APPEAL NO. 92337

On June 29, 1992, a contested case hearing was held. The hearing officer determined that the claimant, appellant herein, did not sustain an injury and/or an occupational disease in the course and scope of her employment on _____, and denied her benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant contends that the hearing officer misapplied the facts, the law, and the argument presented at the hearing, and requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent, a self-insured political subdivision, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Appellant has worked as a telephone operator for the (employer) for about 11 years. On _____, the date appellant claims to have sustained a compensable injury, she was 61 years old and had several years' history of high blood pressure (220/110 in December 1990), neck and back pain, insulin dependent diabetes, hypertension, and hyperlipidemia. Appellant was also overweight. In addition, she was a patient in a study of an experimental drug to control eye disease from diabetes. The risks associated with the drug included among other things, dizziness, rash, muscle pain, headache, and fatigue. Patients and their doctors were not told whether the patient was receiving the experimental drug or a placebo. Three days prior to _____, appellant was diagnosed as having herpes zoster (shingles), a disease characterized by the formation of small water blisters on the skin and which causes inflammation of nerves to the skin. Appellant said that the herpes zoster caused her excruciating pain in her nerve endings. Notations in medical records indicate that appellant was under a great deal of stress before _____, with her physical therapist referring to it as "occupational stress" in a 1990 report.

Appellant testified that while she was working on _____ she started feeling very weak, her head hurt, her eyes became crossed, and her heart started beating very fast. She thought she was having a heart attack and was taken by emergency medical services to a hospital where she was found to have a blood pressure of 230/118. Dr. C, M.D., took her off work until February 18, 1992. Appellant does not claim to have suffered a heart attack or stroke, nor is there any medical record indicating a heart attack or stroke. Dr. C opined that appellant's elevated blood pressure was a result of the job stress she experienced, and that after the event on _____, appellant became more concerned about the consequences of job stress on her health which likely led to an exacerbation of her underlying conditions of herpes zoster and musco-skeletal pains. Dr. C also stated that, to a degree of reasonable medical probability, the rotating shift appellant was required to work also served as a contributing factor since it was more

difficult for her blood sugar to be kept stable. Dr. C concluded that, to a degree of reasonable medical probability, had appellant not been at work on _____, the physical problems which caused her to be unable to work from that day until February 18, 1992, would not have occurred when they did.

Appellant described her work area as being noisy, loud, and insufferable with people using gutter language and screaming at each other across the room. She said the police telephone operators have to catch all the calls from angry and frustrated citizens who are unable to reach municipal court by telephone. She described the calls she receives as being "definitely not friendly" and added that she has been called everything that a person can be called. The month prior to _____, the city had an "amnesty program" which allowed people to pay certain overdue fines without arrest on outstanding warrants. This program resulted in additional telephone calls, some of which were still being received on _____. Except for the fact that _____ was the _____ holiday, appellant did not distinguish her work activities on that day from her work activities on other days. When asked if anything that happened that day was different from what had been going on for the past month at work, including bad language, appellant responded that "[i]t's happened before." She said that what was going on at work on _____, "with the cursing" was too much. Appellant testified that what was different on _____ was that she had never before felt pain like she felt at work that day and had never been medically evacuated from work before. She said that before that day she had never experienced such intense pain that she was unable to work. She added that she had taken sick time off work before, but it was not due to the physical therapy she had been receiving for her neck problem.

Appellant's position at the hearing was that work-related stress she experienced on _____ caused her blood pressure to go up very high which then interacted with her herpes zosters to change it to a debilitating injury.

Under the 1989 Act, a "compensable injury" means an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act. Article 8308-1.03(10). An "injury" means damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm, and it includes occupational diseases. Article 8308-1.03(16). The term "occupational disease" means a disease arising out of and in the course and scope of employment that causes damage or harm to the physical structure of the body. The term includes other diseases or infections that naturally result from the work-related disease, but does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease. The term includes a repetitive trauma injury which means damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment. Article 8308-1.03(36) and (39).

A claimant has the burden of proving that she was injured in the course and scope

of her employment. Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377, 378 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e). There must be evidence establishing a causal connection between the injury or disease and the employment. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1990). In the present case, the hearing officer found that the claimant's physical problems represent ordinary diseases of life to which the general public is exposed outside of employment, and that there was no causal connection between the claimant's employment and her physical problems. He concluded that the claimant did not sustain an injury and/or an occupational disease in the course and scope of her employment on _____.

Appellant principally relies on Aetna Insurance Company v. Hart, 315 S.W.2d 169 (Tex. Civ. App.-Houston 1958, writ ref'd n.r.e.) in support of her contention that she sustained a compensable injury. In that case, the court held that an employee of a laundry who had hypertension and who suffered a stroke as a result of being berated by a customer was entitled to recover workers' compensation benefits. There was evidence that the customer's conduct toward the employee scared her, and that the incident could have caused a rise in the employee's blood pressure which could cause a cerebral hemorrhage resulting in the stroke she suffered. The court found that the berating incident was an undesigned, untoward event traceable to a definite time and place involving a risk of the employment, and that a doctor had testified that it was reasonably probable that the emotional stimulus caused the stroke. In Olson v. Hartford Accident and Indemnity Company, 477 S.W.2d 859 (Tex. 1972), the Supreme Court of Texas held that a claimant who suffered a heart attack while on the job did not suffer a compensable accidental injury where no attempt was made to connect any of the three or four irritating or frustrating experiences that had occurred on the job over a 19 day period to the heart attack. The court reiterated that for there to be an accidental injury, there must be an undesigned, untoward event traceable to a definite time, place, and cause. The court noted that the Hart case and numerous other cases allowing recovery for heart attacks, strokes, and traumatic neuroses, were distinguishable from the case before it in that Hart and the other cited cases all involved particular events. The present case is also distinguishable from Hart as there was no showing of any particular event arising out of and in the course and scope of appellant's employment which precipitated appellant's rise in blood pressure on _____. Thus, we conclude that Hart does not support appellant's claim.

In view of the fact that appellant is unable to connect her claimed injury to any particular event occurring in the course and scope of her employment, and in light of her testimony and argument at the hearing, we cannot but conclude that her claim is based on the repeated stress she experienced in her employment. The evidence simply does not support a claim of an accidental injury from a particular work-related event traceable to a definite time, place, and cause. In Transportation Insurance Company v. Maksyn, 580 S.W.2d 334 (Tex. 1979), the Supreme Court of Texas held that damage or harm caused by repetitious mental traumatic activity, as distinguished from physical activity, does not constitute an "occupational disease" for purposes of the workers' compensation statute. We note that Article 8308-4.02(a) of the 1989 Act provides that "[i]t is the express

intent of the legislature that nothing in this Act shall be construed to limit or expand recovery in cases of mental trauma injuries." In Maksyn, the claimant was a long-time employee of a publishing company who had succumbed to the pressure, mental strain, overwork, and exhaustion from his duties which culminated in hypertension, nervousness, vertigo, anxiety depression, and disability to perform his work. There was an abundance of evidence that mental stimuli produced the claimant's condition, but no evidence, as in the instant case, that any physical traumatic activity produced it. The question before the court was whether mental stimuli alone were enough to bring the claimant within the definition of an occupational disease. The court concluded that mental trauma can produce an accidental injury so long as there is proof of a definite time, place, and cause, but that mental traumatic activity does not constitute an occupational disease. The court stated that the Texas Legislature drew its line for compensability for occupational diseases by limiting coverage to those cases in which physical activities cause harm or injury and by denying coverage when mental activities cause the harm or injury, and that the legislature very well reasoned that physical activities are identifiable and traceable whereas such factors as worry, anxiety, tension, pressure, and overwork are not.

We also find the case of Aetna Casualty & Surety Company v. Burris, 600 S.W.2d 402 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.) to be germane. In that case, a truck driver claimed that as a result of certain conditions of his employment, including the stress and strain he was subjected to, he sustained occupational diseases consisting of headaches, hypoglycemia, vision problems, hypertension, gastritis, chest pains, and depressive reaction. On appeal, the court reversed the judgment for the claimant which was based on the jury's finding that the claimant had an occupational disease as a result of repetitious, physically traumatic activities extending over a period of time at work. The court concluded that there was no evidence that any of the occupational diseases complained of was the result of repetitious, physically traumatic activities arising out of the course of the claimant's employment as a truck driver. The court stated that the proof relied on by the claimant rested on repetitious mental traumatic activities rather than repetitious physical activities. The court also concluded that the diseases or infirmities complained of were ordinary diseases of life to which the general public is exposed and were not indigenous to the work of a truck driver, and, thus, were not compensable occupational diseases.

In a more recent occupational disease case, Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ), the court observed that absent evidence of a causal link between the disease and the employment, the disease is not compensable and is an "ordinary disease of life." The court also noted that the fact that symptoms occur during a period of employment does not mandate the conclusion that the employment was the cause of the ailments.

We conclude that there is no evidence that appellant's claimed injury was the result of an accidental injury that arose out of and in the course and scope of her employment which is traceable to a definite time, place, and cause. We further conclude that there is no evidence that appellant's claimed injury was the result of repetitious,

physically traumatic activities that occurred over time and arose out of and in the course and scope of her employment. In essence, appellant's claim is for damage or harm caused by repetitious mental traumatic activities and does not constitute an occupational disease under the workers' compensation law of this state. *See* Article 8308-4.02(a); Maksyn, *supra*; Burris, *supra*. Under the evidence presented in this case, we conclude that the hearing officer was correct in finding that appellant's physical problems are ordinary diseases of life, and in concluding that appellant did not sustain an injury or occupational disease in the course and scope of her employment on _____. If there is a causal connection between appellant's employment and her physical problems, that connection is based on repetitious mental traumatic activity which does not constitute an occupational disease.

The decision of the hearing officer is affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge