

APPEAL NO. 92525

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). A contested case hearing was held on August 8, 1992, in (city), Texas, with (hearing officer) presiding. The single issue was whether the claimant was injured in the course and scope of her employment. After taking testimony and hearing argument, the hearing officer recessed the hearing, upon agreement of the parties, to allow the claimant to be examined by a medical examination order (MEO) doctor appointed by the Commission. The report of the MEO doctor was received into the record on August 21st, and the record of the hearing was closed September 1, 1992, upon receipt of the carrier's position on the report. In his decision and order, the hearing officer held that claimant suffered a compensable occupational disease, hoarseness and inability to speak at a normal volume, in the course and scope of her employment as a telephone operator, and ordered that benefits be paid under the 1989 Act.

The appellant, who is the employer's workers' compensation insurance carrier (hereinafter "carrier") contested the hearing officer's decision, claiming that there was not sufficient medical evidence to support the finding that the claimant's problems were caused by her employment, and that claimant's condition is an ordinary disease of life and thus not compensable. No response to the carrier's request for review was filed.

DECISION

We reverse the decision and order of the hearing officer and render a new decision and order.

The claimant testified that she had worked for (hereinafter "employer") as a telephone operator for 18 1/2 years. Her job required her to talk on the telephone "all the time," except during lunch and two 15-minute breaks. She said that during 1991 she began developing hoarseness. She was treated for laryngitis which she said her doctors attributed to some type of viral infection. She said she continued to have this problem, and lost time from work, off and on until (date of injury). She said that on (date of injury), she lost her voice entirely and has not been back to work since. She stated that she has continued to have trouble speaking since that time.

The claimant was referred by her doctor to an otolaryngologist, (Dr. H). The record shows claimant first saw Dr. H on April 29, 1991, and that she had a series of appointments with Dr. H beginning in January 1992. Dr. H diagnosed hoarseness and dysphonia (defined in Dorland's Medical Dictionary, 27th Ed., as "any impairment of voice; a difficulty in speaking"), prescribed voice rest, and advised that claimant be kept off work. The day before the hearing claimant was seen by Dr. H, who examined her throat with a scope and ruled out the presence of polyps or a tumor. The claimant said Dr. H told her he could not help her further because he is a surgeon, and she had no condition which required surgery. Because he stated that the normal elasticity of her vocal cords was now lost, he strongly

recommended speech therapy to train claimant to use her voice in a different way. He also recommended a test with a stereoscope, which claimant explained involved putting this equipment into her throat and testing the force of the vibrations of the vocal cords and the voice box.

The claimant's medical records showed she was also seen by (Dr. T), a neurologist. Dr. T performed tests and ruled out myasthenia. He also prescribed medication, recommended periodic breaks to allow the claimant's vocal cords to rest, and discussed stress reduction techniques.

An August 18, 1992 report of (Dr. L), the MEO doctor, was admitted into the record. Dr. L examined the claimant and found the oropharynx, hypopharynx, and larynx to be normal, the latter with no masses or lesions and the vocal cords moving well bilaterally and equally. He said the character of the vocal cords "is not quite normal in that the normal glistening white surface of the vocal cords is not present. In addition both vocal cords appear slightly thickened and I would agree with [Dr. H's] evaluation that the 'elasticity' of the vocal cords is lost. By this I mean that the normal fluid wave on which the epithelial surface of the vocal cord functions is no longer present. This is due to probably fibrosis of the submucosal layers and therefore the patient's quality of the voice is not crystal clear."

Dr. L's report concluded, "I believe this patient does have a primary problem with her vocal cords which is causing her to have an abnormal hoarseness. There may be some overlying problem of over compensation and strain and the patient does tend to talk in a 'stage whisper' type of voice . . . In answer to your question whether her condition is a result of overuse of her vocal cords I would say definitely yes. Is this related to activities at work, I would say also yes. I believe that the strain of talking eight hours continuously every day for that many years may have taken a toll on her voice and this is evidenced as the current problem . . ."

Carrier's response to Dr. L's report, also made part of the record, was that the claimant's condition was an ordinary disease of life, and that Dr. L did not address why the claimant's condition did not improve after she ceased work.

We reverse the decision of the hearing officer because we do not find the facts of the case, as a matter of law, take this situation outside the exception in the statute that ordinary diseases of life are not compensable. Under the facts of this case, the "occupational disease" in question (hoarseness and inability to speak at a normal level) is concerned with what can be inferred from the evidence to be the claimant's talking at a normal voice level in duties as a telephone information operator. (The carrier offered no evidence and did not conduct any meaningful cross-examination). The definition of occupational disease as set forth in Article 8308-1.03(36), when applied to the facts of the case, in our opinion, preclude recovery of benefits. Occupational disease means:

a disease arising out of and in the course 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. The term 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 repetitive trauma injuries.

As stated, if an ordinary disease is an incident to a compensable injury or disease, it may be a basis for recovery. That is not the situation here since there is no other compensable injury that any "ordinary disease" would be incidental to. In this regard, Black's Law Dictionary, Sixth Edition, 1990, defines "incident" to mean "[s]omething dependent upon, appertaining or subordinate to, or accompanying something else of greater or principal importance, something arising or resulting from something else of greater or principal importance." The "occupational disease" found by the hearing officer was not, therefore, incident to a compensable injury or occupational disease.

Is hoarseness and inability to speak at a normal level because of talking on duty anything more than an ordinary disease of life to which the general public is exposed outside of employment under workers' compensation law? We find persuasive authority that it is not.

Initially, we are unaware of any Texas case involving a similar set of circumstances or dealing with talking as the basis of an "occupational disease." However, several decisions have discussed ordinary diseases of life. Bewley v. Texas Employers Insurance Association, 568 S.W.2d 208 (Tex. Civ. App.-Waco 1978, writ ref'd n.r.e.), is persuasive. There the claimed illness or disease included a cold, sore throat, and pneumonia resulting from employment-related exposure to water and inclement weather. The court, in holding that the illness or disease involved was an ordinary disease of life to which the general public is exposed and not compensable, stated:

It has been the uniform holding of the courts of our State that illnesses like cold, sore throat, and pneumonia resulting solely from exposure to rain, wind, wetting, and cold weather in the course of employment are not "personal injuries" or "diseases or infections as naturally result therefrom" within the meaning of the workmen's compensation statute, although the evidence in the cases showed that by reason of the employment the employee's exposure to the elements causing his illness was traceable to a definite time, place, and event, and was greater than the exposure of the public generally. (emphasis mine)

See also Aetna Casualty & Surety Co. v. Burris, 600 S.W.2d 402 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.), where headaches, vision problems, gastritis, etc., were

determined to be ordinary diseases of life to which the general public is exposed outside the employment of a truck driver.

It seems to us that there are those things that are so common and ordinary that they are not and were never intended to be covered by workers' compensation coverage as opposed to other programs such as disability or health insurance. Talking in a normal level, which we infer from the evidence and common experience, at work, even if the talking may be to some greater degree, and even if it can possibly be connected to some hoarseness and lower voice volume, is to us such a matter that is so common and ordinary as to not be compensable as a matter of law.

The dissenting opinion cites Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. Civ. App.-Corpus Christi 1989, no writ) in opining the decision in this case should be upheld. That case ultimately determined that expert medical evidence was required (there was none) in order to establish a causal connection between the employment and asthma. The court, in its analysis of "ordinary disease of life," stated that it was a term of art having a meaning distinct from the common usage. The court, after indicating that all diseases outside the course and scope of employment are "ordinary diseases," went on to state that the test for compensability of a disease was one of causal connection, either direct or indirect, between the disease and the employment. Under this reading, if there is some causal connection, a disease could never be an ordinary disease of life to which the general public is exposed outside of employment. Hernandez does not, in our opinion, square with either the plain language of Article 8308-1.03(36) or other cases on "ordinary disease of life." Indeed, "ordinary disease of life" would seem to take on a meaningless concept.

Readily distinguishable are those cases where compensability is sustained which deal with external forces converging on the body in the work place. Such cases, for example, involve noise in the work place resulting in permanent hearing loss (INA of Texas v. Adams, 793 S.W.2d 265 (Civ. App.-Beaumont 1990, no writ)) and inhalation of noxious fumes, metal filings, dust, etc. Charter Oak Fire Insurance Co. v. Hollis, 511 S.W.2d 583 (Tex. Civ. App.-Houston [14th Dist] 1974, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal 91002, decided August 7, 1991. In the case before us, there are no employment-related converging forces: only the talking in a normal voice level on duty. This is, to us, common or ordinary; something to which the general public is exposed outside of any employment environment. Accordingly, we reverse the decision of the hearing officer and render a new decision that this case involves an ordinary disease of life to which the general public is exposed outside of employment and that benefits are not payable.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCURRING OPINION

I concur with Chief Appeals Judge (S) that the hearing officer's decision should be reversed and rendered. I wish, however, to make the following comments.

Under the provisions of Article 8308-1.03(36), an occupational disease is a disease that arises out of and in the course and scope of employment that causes damage or harm to the physical structure of the body. However, the term 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. In this case there is both lay testimony and expert medical opinion establishing that the claimant's hoarseness and inability to speak at a normal volume arose out of and in the course and scope of her employment. The question to be answered on appeal is whether, given the fact that the damage or harm to the claimant's vocal cords was caused by talking and nothing else, the uncontroverted evidence establishing a causal connection between the injury and the employment is sufficient to make the injury compensable under the workers' compensation law.

In his discussion of occupational disease, Professor Larson states that: "A number of statutes contain detailed definitions of the term "occupational disease," and these statutory definitions give the clue to the distinction which is controlling for present purposes. The common element running through all is that of the distinctive relation of the particular disease to the nature of the employment, as contrasted with diseases which might just as readily be contracted in other occupations or in everyday life apart from employment." In Hernandez, *supra*, the court stated that the test of whether a disease is compensable under workers' compensation is if there exists a causal connection, either direct or indirect, between the disease and the employment. There can be no doubt that under the uncontroverted evidence in the present case, the claimant has met the test set forth in Hernandez for compensability of a disease. However, in Bewley, *supra*, the court found as a matter of law that the employee's pneumonia was an ordinary disease of life, notwithstanding the fact that under the record it was undisputed that the employee contracted pneumonia in the course of her employment while she was working in her employer's tent and was exposed to water and inclement weather. In attempting to reconcile the test set forth in Hernandez, the holding in Bewley, and the definition of occupational disease, I have come to conclude that for some diseases, a causal connection between the employment and the disease is not enough to establish a compensable disease, because as a matter of law those diseases are ordinary diseases of life to which the general public is exposed outside of employment. I believe that hoarseness resulting from talking at a normal level of voice at work is one such disease. Talking in a normal level of voice for extended periods of time is simply something which many people do, both while at work and away from work. While the claimant has connected her talking and resulting hoarseness to her employment, in my opinion, that connection does not take her illness out of the concept of an ordinary

disease of life to which the general public is exposed. In reaching my conclusion, I do not mean to imply that the test set forth in Hernandez for the determination of whether a disease is compensable is incorrect for I am of the opinion that that test should be applied; however, in applying the test, due regard must be given to the statutory mandate that ordinary diseases of life are not compensable unless incident to a compensable injury or occupational disease. What is or is not an ordinary disease of life must be determined from the facts of each case.

Robert W. Potts
Appeals Judge

DISSENTING OPINION

I respectfully dissent. The claimant in this case clearly is contending that she suffered an occupational disease. The 1989 Act defines "injury" to include occupational disease, Article 8308-1.03(27), which itself is defined to exclude "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." Article 8308-1.03(36).

In Hernandez, *supra*, the court discussed the relationship between an occupational disease and an ordinary disease of life. The insurance carrier made two arguments to justify the rendition of an instructed verdict in its favor: that there was no evidence of causation, and that the maladies involved were ordinary diseases of life. The court said, "[w]e view both contentions to be the same--that of causation . . . As such, it is not useful for a witness to opine that an affliction is an 'ordinary disease of life.' The test of whether a disease is compensable under workers' compensation is if there exists a causal connection, either direct or indirect, between the disease and the employment."

To establish an occupational disease, there must be probative evidence of a causal connection between a claimant's employment and the disease, i.e. the disease is indigenous thereto or present in an increased degree. Home Insurance Co. v. Davis, 642 S.W.2d 268 (Civ. App.-Texarkana 1982, no writ). Expert testimony may be required to establish causation where a claimant alleges that employment caused or aggravated a disease and the fact finder lacks ability, from common knowledge, to find a causal connection. Hernandez, *supra*. Such expert medical testimony must establish a reasonable probability of a causal connection between the employment and the injury; an opinion based upon mere possibility, speculation, and surmise is not sufficient. Insurance Company of North American v. Myers, 411 S.W.2d 710 (Tex. 1966).

This case confronts this panel with a claimant whose work, it is uncontroverted, has

required her to use her voice virtually "all the time," every working day for 18 years. One can certainly take cognizance of the fact that talking is an activity performed by the general populace as a whole routinely and on a daily basis. Whether claimant's physical condition is one incident to an occupational disease (i.e., one arising out of the course and scope of her employment) is a question of causation.

Reviewing the limited evidence in the record, it is questionable whether the medical opinions of Drs. H and T provided that critical nexus to establish causation by a reasonable probability. Claimant's own testimony primarily addressed her work and her treatment; she was asked no questions on cross-examination other than the names of her doctors and whether she had a previous workers' compensation claim. However, the letter from the MEO doctor relates the claimant's conditions to "overuse of her vocal cords" and "the strain of talking eight hours continuously every day for that many years," and answered affirmatively the question of whether her condition was related to her work. The MEO doctor's report was the sole evidence of causation; there was no attempt, for example by an affidavit or letter from carrier's doctor to elicit an opinion that claimant's condition could have been caused by her everyday activities, or by some other source.

Under these circumstances, I believe that Dr. L's opinion on causation was sufficient evidence for the hearing officer to have based his determination.

Lynda H. Neseholtz
Appeals Judge