APPEAL NO. 931149

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On November 8, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues determined at the contested case hearing were whether the claimant, TA, who is the appellant, sustained a compensable occupational disease on (date of injury)), in the course and scope of her employment as a reservations clerk with (employer), and whether she had disability therefrom. It was stipulated at the hearing that claimant had reached maximum medical improvement (MMI) from her alleged injury on March 17, 1993.

The hearing officer determined, based upon her finding that the Appeals Panel has determined that losing one's voice is an ordinary disease of life, that claimant did not sustain a compensable occupational disease.

The claimant has appealed, pointing out that she developed vocal cord nodules from her employment, with resultant voice loss, and that this is supported by medical evidence in the file. Claimant also complains that the hearing officer erred by refusing to allow her to present evidence related to a coworker who experienced the same problem. Claimant has attached to her appeal some company policies which were not part of the record of the hearing. The carrier has not filed a response.

DECISION

We reverse the hearing officer's decision and remand the decision for further evidence and consideration in accordance with this decision.

At the outset, we note that claimant has attached to her appeal several items that were not put into the record at the hearing. However, as we have stated before, the Appeals Panel does not take new evidence but must review only the record created below; new evidence submitted on appeal will not be considered by us. *See* Section 410.203(a); Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992. (However, we note that this does not preclude the claimant from offering such evidence in the hearing on remand, subject to requirements relating to exchange of documents.)

The claimant stated that she had been employed by employer as a reservation agent for nearly six years at the time of her injury. She said that on (date of injury), with no forewarning, her voice "just left" at around 4:00 in the afternoon. Claimant stated that this was the first hoarseness she had had. Claimant went to see (Dr. K) on January 27th. He prescribed voice rest and antibiotics. She stated that her condition improved slightly and she returned to work February 2, 1993, but was able to work only 30 minutes before her voice went out again. She stated that it was explained to her, when she was later diagnosed with vocal cord nodes, that rest had caused her nodes to go down but that work on this day caused them to swell again.

Claimant described her job duties as taking incoming calls, informing callers about various fares, and arranging for reservations and automobile rentals. She stated that agents were required to maintain a certain voice level, which, while not yelling, had to be audible, even-toned, and cheerful. She stated that telephone calls were taped and that every two or three months employees listened to their tapes and were graded on how the calls were handled. She stated that if an agent's voice was not as cheerful or at a level that it should be, that would be mentioned. (Claimant's personal calendar indicated that she had a tape review on (date)). She said that she worked 10-12 hours a day, which she characterized as "overtime," and that calls lasted on the average 15 minutes. The only breaks allowed were fifteen minutes in the morning, fifteen in the afternoon, and half an hour for lunch. She said that another 20 minutes of the employer's time would be allowed throughout the day, but that it was generally reserved for paperwork. There is no direct evidence developed as to the number of days worked, and claimant's testimony indicated that she may not have worked as much overtime in January before her voice went out.

Claimant returned to Dr. K on February 9th; he told her that her voice should have cleared up by then because of his treatment and speculated that she had polyps. Dr. K told her that polyps developed from excessive talking. He made an appointment for her that day with (Dr. R), an ear, nose and throat specialist, and upon physical examination with a scope that passed through her nostrils, Dr. R confirmed the existence of vocal cord nodules. Dr. R initially treated the nodules with an injection to dissolve them and with antibiotics. Claimant's voice had still not returned by February 24th, and she was scheduled for outpatient surgery called microlaryngoscopy, which she had March 2nd.

Dr. R's notes and letters on the subject begin February 10th, when he recorded that claimant had persistent hoarseness associated with cough and bronchitis for the past six weeks, with hoarseness becoming worse two weeks before. His assessment was "[c]hronic laryngitis as well as bilateral vocal cord nodules associated with moderate vocal cord abuse."

On February 24th, he noted that she was no better in spite of voice rest and found persistent voice cord nodules with moderate edema of the vocal cords. This assessment is repeated in a February 28th letter to Dr. K. On March 17th, he stated "[b]ecause of the fact that she works significantly greater than 40 hours per week continually using her voice, I suggest a period of voice rest." A letter dated March 18th says: "It is my opinion that these nodules are definitely due to excessive vocal use in her job as a reservation agent at [employer]."

The claimant testified that she lived alone, had no pets, and directed her telephone calls during the week to her telephone answering machine. She said that when she got home, she didn't want to talk on the telephone. She did not smoke.

WHETHER THE HEARING OFFICER ERRED IN FINDING THAT CLAIMANT'S VOCAL CORD NODULES DID NOT CONSTITUTE A COMPENSABLE INJURY

It is clear that the hearing officer simply read Texas Workers' Compensation Commission Appeal No. 92525, decided November 19, 1992, as a blanket prohibition on compensability of voice-related problems as occupational diseases.[1] We do not believe that to be the holding of the case. First of all, we note that Appeal No. 92525 involved a diagnosis which ruled out the presence of vocal cord nodes, and indicated that a virus may have caused hoarseness. The claimant in that hearing also asserted hoarseness as her injury related to extended periods of talking in a normal voice.

The lead opinion in Appeals No. 92525, *supra*, noted that an ordinary disease of life incident to a compensable injury or disease would still be compensable, and pointed out that the case at hand did not involve that. That opinion further opined the necessity for proving "external forces converging on the body in the work place." The concurring opinion in that appeal made clear that each determination was to be made case-by-case, and, notwithstanding strong dicta in the lead opinion concerning Hernandez v. Texas Employers' Insurance Association, 783 S.W.2d 250 (Tex. App.- Corpus Christi 1989, no writ), reconciled the Hernandez case with other authority and focused on whether the talking in normal tone of voice that was asserted in that hearing was something to which the general public was exposed outside of employment, and concluded that it was.

To the extent that Appeal No. 92525, (which consists of three opinions, including a dissent) may be taken as precedent, it cannot be interpreted to depart from the basic proposition, articulated in Davis v. Employers Insurance of Wausau, 694 S.W.2d 105, 109 (Tex. App.- Houston [14th Dist.] 1985, writ ref'd n.r.e.) that each claim for occupational disease must be judged on a case-by-case basis. Whether or not a compensable injury has occurred is a matter for a finder of fact to determine; although in some cases the strength of the evidence connecting the injury to work could be so weak that "as a matter of law" a disease is not compensable, this does not necessarily equate to a conclusion a disease is inherently not compensable. The Act itself does not flatly prohibit the compensability of a condition that is arguably an ordinary disease of life, if it arises as a natural result of a compensable injury or is incident to compensable occupational diseases or injuries that are compensable. We would observe also that "ordinary" diseases to which even the general public is unquestionably exposed in some measure could be compensable in one context, although not in another. This is commented upon by Professor Larson, who notes, in Larson's Workers' Compensation Law, § 41.33(b):

> However, the conditions of employment which distinguish occupational diseases from ordinary diseases of life need not be unusual chemicals, fumes, and the like. They may be distinctive because familiar harmful elements are present in an unusual degree. Exposure to change in temperature is common to all

[1]Section 401.011(34) defines occupational disease as "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. The term includes a disease or infection that naturally results 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."

> life and employment. A moderate amount of it, resulting in splotches on the legs of a theatre ticket seller, has therefore been held not to render that condition an occupational disease. But in the same state the contraction of rheumatoid arthritis has been held occupational when it resulted from continual handling of ice and iced vegetables by a worker in a wholesale market . . . . Just as chills and temperature changes are features of everyday life, so are bumps, jars, jolts, and strains-within limits.

Likewise, it must be noted that in other cases where the Appeals Panel has indicated that an injury grew out of a condition to which the general public was exposed, that evidence did not point to any unusual and special prevalence of disease-causing circumstances on the job. *See* Texas Workers' Compensation Commission Appeal Decision No. 92713, decided February 8, 1993 (standing and walking); Texas Workers' Compensation Commission Appeal No. 92272, decided August 7, 1992 (sitting). Likewise, the lack of causal evidence is a basis in court cases for rejecting certain diseases as occupational diseases, rather than a theory of inherent noncompensability. *See* Reyes v. Liberty Mutual Fire Insurance Co., 749 S.W.2d 234 (Tex. App.- San Antonio 1988, no writ) (arthritis). Further, where it is shown that a disease is indigenous or present in an increased degree in an employment, an occupational disease can be found to be compensable. INA of Texas v. Adams, 793 S.W.2d 265 (Tex. App.- Beaumont 1990, no writ).

The case of Bewley v. Texas Employers Insurance Ass'n, 568 S.W.2d 208 (Tex. Civ. App.-Waco 1978, writ ref'd n.r.e.), contrasts an occupational disease with an ordinary disease of life. In denying compensability for Bewley's cold and pneumonia contracted on the job, the court noted that an occupational disease "has been construed by the courts to mean a disease which is contracted gradually in the course of an employment and as a commonly recognized incident of it, whose time and place of development are not susceptible of definite ascertainment." Id at 211. In determining Bewley's illness was not within this definition, the court noted that colds and the like are caused by bacteria which are in the very atmosphere, and not particular to any work place.

The case here presents different and arguably distinguishable facts from Appeal No. 92525, as well as Bewley. Claimant is not asserting that her injury was hoarseness. She has shown, through medical evidence, that she developed vocal cord nodes attributed to excessive use of her voice at work, and not to any underlying virus or bacteria. At work, she was required to maintain a certain tone of voice for a period of 10-12 hours a day, with only 60-80 minutes of not talking broken up throughout the day. We believe that the evidence indicates in this case that more than a "normal" voice was required. Employees would be periodically critiqued through recordings as to the cheerful quality of their voice. Such things are evidence of external forces converging upon the body at claimant's work place.

Further, claimant's surgeon stated that the cause of the nodes was excessive use of her voice (and not just greater use). The vocal nodules and edema in turn caused not just hoarseness, but a complete and sudden loss of voice. Surgery was required to resolve the condition. Claimant testified that she lived alone and rarely spoke off the job, and there is

no evidence that talking anywhere but at work was excessive.

Against this was carrier's argument, but no evidence, that claimant's condition was an ordinary disease of life. Although the lead opinion in Appeal No. 92525 relies upon common experience as to the use of voice and hoarseness, we have no similar common experience to lead us to believe that development of vocal cord nodules are either an ordinary disease of life or a hazard to which the general public is exposed. If there is common experience to be taken note of in this case, it is that members of the general public are customarily not called upon to speak 10-12 hours a day while maintaining a cheerful quality in the voice, which is taped and evaluated. We do not believe that the facts here present the situation described in dicta in the lead opinion in Appeal No. 92525: ". . . 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."

The decision of the hearing officer indicated that she based her decision solely upon a reading of Appeal No. 92525 as a blanket prohibition upon compensability for <u>any</u> loss of voice. This constitutes, in our opinion, a misinterpretation of that decision. The facts presented here establish the connection of the vocal cord nodules to the circumstances of employment. The hearing officer should have applied applicable case law and Appeals Panel Decisions to the particular facts of this case. It is clear that the hearing officer's sole reason for deciding against the claimant in this case was her interpretation of an earlier Appeals Panel decision to effectively prohibit her from considering the facts of this case.

WHETHER THE HEARING OFFICER ERRED BY EXCLUDING EVIDENCE RELATING TO A SIMILARLY AFFECTED COWORKER

During the claimant's direct testimony, she was asked the following question: ". . . to your knowledge, has anybody else at the company ever had a history of vocal cord problems?" When the claimant began to answer, the carrier objected. The claimant's assistant explained that they understood another person had a problem but at this point, the hearing officer stated that this was not relevant and sustained the objection.

We believe it was error for the hearing officer to exclude the answer to this question concerning any affected coworkers. We would agree that how a carrier or employer did, or did not, handle a similar case is not relevant to whether an injury occurred. But that was not the question asked, nor the information that claimant attempted to submit, at the time the objection was made and sustained. For an occupational disease case, most especially one in which the carrier defends on the basis that the claimant has an ordinary disease of life, we believe that evidence concerning the existence of similar injuries in the work place is always relevant. Otherwise, a claimant would be hard pressed to meet the challenge arguably imposed by Appeal No. 92525 and case law to show that he or she has encountered hazards at the work place beyond those encountered by the general public, or that the disease was "indigenous" to her particular employment.

We cannot dismiss this as harmless error. Accordingly, we remand the case to allow

development of further evidence regarding conditions at claimant's work place, including the erroneously excluded evidence.

Depending upon the hearing officer's determination based upon additional facts on the issue of injury, the decision on disability (currently based on a finding of no compensable injury) may need to be reconsidered as well.

We reverse the determination of the hearing officer and remand the case to allow development and consideration of the evidence in accordance with this decision.

A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to § 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

CONCURRING OPINION:

Because I do not agree with all the statements made in the majority opinion, I do not join therein but concur in the result.

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Philip F. O'Neill
Appeals Judge