APPEAL NO. 980098

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (City 1), on December 3, 1997, with hearing officer. She determined that the appellant's (claimant) amoebic dysentery was not the result of any occupational exposure which occurred while performing his duties for the employer on _____; that his amoebic dysentery was experienced by him as an ordinary disease of life; that the claimant did not sustain a compensable injury in the form of an occupational disease on _____; that he was unable to obtain and retain wages equivalent to his preinjury wage from _____ to May 31, 1997; and that since the claimant did not sustain a compensable injury, he did not have disability. The claimant appealed, urging that the amoebic dysentery he had was a compensable injury because it resulted from a risk created by the necessity of eating or sleeping away from home, contending that the risk to which he was exposed was greater than those to which the general public is exposed, and requesting that the Appeals Panel reverse the decision of the hearing officer. The respondent (carrier) replied, urging that the hearing officer correctly concluded that the claimant's food poisoning was an ordinary disease of life to which the general public was exposed, contending that the Appeals Panel had previously rejected the argument of the claimant, and requesting that the decision of the hearing officer be affirmed.

DECISION

We reverse and remand.

The claimant, a flight attendant for a major airline, testified that once every four months he is a reserve flight attendant and does not have a regular flight schedule; that he was a reserve flight attendant during the month of May 1997; that on May 16, 1997, he worked on a seven-hour flight to (City 2); that that was his first flight to City 2; that he was given per diem for meals; that he had a 24-hour on-duty rest break before the return flight; that after the flight he went to the hotel and slept; that the next morning he walked around; that he and another flight attendant had lunch at a restaurant; that the other flight attendant had been to City 2 before and said that the restaurant was a decent place to eat; that he returned to the hotel to take a nap; that he started feeling stomach cramps; that the cramps persisted on the flight home; that for about five days he was unable to keep food down; and that about 30 minutes after he ate he had to go to the bathroom. The claimant said that he went to (Dr. CH); that the doctor diagnosed amoebic dysentery; that Dr. CH said that it sounded exactly like what he got in (City 3), a few years ago; that the doctor told him he could get it from eating food that had been washed in contaminated water; and that Dr. CH prescribed medication. He testified that he was unable to work the remainder of May and that he returned to the doctor's office about two months later because symptoms reoccurred. He stated that he had had food poisoning from eating in a restaurant in City 1, but that this was different from what he got in City 2.

In a letter dated August 4, 1997, Dr. CH states that he treated the claimant for a bowel infection on May 21, 1997; that the claimant apparently contracted amoebic dysentery; that such infections are relatively uncommon in the United States; that it appears the infection was contracted during a layover in City 2; and that such infections may be caused by drinking contaminated water or eating food that had been washed in contaminated water. A report from (Dr. AH) said that he reviewed the letter of Dr. CH, provided background on amoebic dysentery, stated that amoebic dysentery appears in Texas, and stated that in his opinion the claimant's illness was likely an ordinary disease of life and not specifically related to travel or employment.

In this case, the hearing officer and the parties considered whether there was a compensable injury in the form of an occupational disease. However, as more fully explained below, the facts, as developed by the parties, show that the injury, if any, was in the nature of a specific injury.

Prior to 1971, the Texas legislation on workers' compensation law at TEX. REV. CIV. STAT. ANN. art. 8306 § 20 provided:

> Wherever the terms "injury" or "personal injury" are used in the Workmen's Compensation Law of this state, such terms shall be construed to mean damage or harm to the physical structure of the body and such diseases or infection as naturally result therefrom. Unless from the context the meaning is clearly to the contrary, such terms shall also be construed to mean and include occupational diseases, as hereinafter defined. The following diseases only shall be deemed to be occupational diseases:
>
> [A long list, that had been amended but did not include dysentery, followed.]

In 1971 Section 20 was amended to state:

> "Injury" or "Personal Injury," and "Occupational Disease" defined; ordinary diseases. Wherever the terms "Injury" or "Personal Injury" are used in the Workmen's Compensation Laws of this State, such terms shall be construed to mean damage or harm to the physical structure of the body and such diseases or infections as naturally result therefrom. The terms "Injury" and "Personal Injury" shall also be construed to mean and include "Occupational Diseases," as hereinafter defined. Whenever the term "Occupational Disease" is used in the Workmen's Compensation Laws of this State, such term shall be construed to mean any disease arising out of and in the course of employment which causes damage or harm to the physical structure of the body and such other diseases or infections as naturally result therefrom. An "Occupational Disease" shall also include damage or harm to the physical structure of the body occurring as the result of repetitious physical traumatic activities extending over a period of time and arising in the course of

> employment; provided, that the date of the cumulative injury shall be the date disability was caused thereby. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where such diseases follow as an incident to an "Occupational Disease" or "Injury" as defined in this section.

In the 1989 Act, Section 401.011(26), defines injury as:

> damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease.

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.

Section 401.011(36) defines repetitive trauma injury as:

> 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.

In Transportation Insurance Company v. Maksyn, 580 S.W.2d 334 (Tex. 1979), the Supreme Court discussed the 1971 amendment to Article 8306, Section 20. It said that the first sentence had not been changed and that "an injury is defined and understood as one that is an undesigned, untoward event that is traceable to a definite time, place, and cause." The Court said that the first sentence extends coverage to and includes damage or harm to the physical structure of the body and that:

> The term "physical structure of the body" was construed in Bailey v. American General Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955), to include coverage for an iron worker who suffered neurosis after seeing his co-worker fall from a scaffold to his death. . . . The event produced in Bailey such a disabling neurosis, an anxiety reaction, that he was incapable of pursuing his trade. Bailey recovered compensation on the basis of an accidental injury–not an occupational disease.

The Court said that there was a slight change in the second sentence, and that:

> Both before and after the 1971 change, the sentence recognized that the term "Occupational Disease," was something different from and in addition to the ordinary meaning of "Injury" and "Personal Injury," and the sentence announces that "Occupational Diseases" will next be defined which the rest of the statute does. It is apparent, therefore, that the legislature recognized that workers still had the protection for both accidental and occupational injuries after 1971, but that the definition of an occupational disease was being changed.

The fourth sentence in the amended Section 20 states:

> An "Occupational Disease" shall also include damage or harm to the physical structure of the body occurring as the result of repetitious physical traumatic activities extending over a period of time and arising in the course of employment; provided, that the date of the cumulative injury shall be the date disability was caused thereby.

Concerning the fourth and fifth sentences, the court wrote:

> The sentence says and means that an occupational disease exists when "repetitious physical traumatic activities" cause damage or harm to the physical structure of the body. The fifth and final sentence states that ordinary diseases of life to which the general public is exposed outside of the employment are not compensable.

In Olson v. Hartford Accident and Indemnity Company, 477 S.W.2d 859 (Tex. 1972) the Supreme Court stated that except in occupational diseases designated by the legislature (the case was tried when occupational diseases were listed in Article 8306, Section 20), the court adhered to the requirement that there be an accidental injury traceable to a definite time, place, and cause.

In Bewley v. Texas Employers' Ins. Ass'n, 568 S.W.2d 208 (Tex. Civ. App.–Waco 1978, writ ref'd n.r.e.), the court wrote:

> The term "occupational disease" in our workmen's compensation statutes 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 to it, whose time and place of development are not susceptible of definite ascertainment. Texas Employers' Ins. Ass'n v. McKay, 146 Tex. 569, 210 S.W.2d147, 150 (1948); Soloman v. Massachusetts Bonding and Insurance Company, 347 S.W.2d 17, 19 Tex.Civ.App.–San Antonio 1961, writ ref'd).

There is no indication that the legislature intended for specific injuries and occupational diseases to be treated differently when the 1989 Act became effective. *Also see* "Accidental" Infectious Diseases, ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 40.00 (1990) for a discussion of accidental infectious diseases. At page 7-471 the following appears:

> The "accidental" character of the infection has usually been attributed simply to the unexpected appearance of the germs in the water or food. For example, the act of drinking contaminated water, in ignorance of its dangerous condition, is itself an accidental event. The "injury" is the harmful work promptly undertaken by the bacilli, although some time may be required to bring it to its conclusion.

One of the issues reported as unresolved at the benefit review conference was did the claimant sustain a compensable injury, in the form of an occupational disease, on _____. The hearing officer resolved the disputed issue as reported. The issue should have been did the claimant sustain an injury in the course and scope of his employment on _____. We reverse the decision of the hearing officer and remand for her to decide that issue. Since the issue does not involve an occupational disease, the hearing officer need not make determinations concerning ordinary diseases of life.

The claimant referred to Appeals Panel decisions concerning risks created by the necessity of sleeping or eating away from home. Texas Workers' Compensation Commission Appeal No. 950973, decided July 31, 1995, contains citations to and discussions of several court cases. *Also see* Texas Workers' Compensation Commission Appeal No. 94868, decided August 18, 1994. Texas Workers' Compensation Commission Appeal No. 972046, decided November 24, 1997, is an unpublished case; however, it also involves an airline employee and contains several citations to and discussions of court cases. The evidence was developed at the hearing. The parties should be given the opportunity to present argument.

Pending resolution of the remand, 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 Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge