IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-11147

TEDDY GUTIERREZ, ET AL.,

Plaintiffs,

MARTHA RUIZ,

Plaintiff-Appellant,

versus

EXCEL CORPORATION, ET AL.,

Defendants,

EXCEL CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for
the Northern District of Texas
(5:93-CV-176-C)

January 23, 1996

Before REAVLEY, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:[*]

Ruiz and nine other plaintiffs sued their employer, Excel, and Whizard knife manufacturer, Bettcher Industries, for negligence. The plaintiffs alleged they suffered from cumulative trauma disorder in their hands due to their use of the electric

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[*] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Whizard knife at the Excel meat-packing plant in Plainview, Texas. Excel's liability was premised upon the company's failure to put in place proper safety measures. Bettcher Industries settled, and the other plaintiffs' cases against Excel were severed. Only the Ruiz claim against Excel is here.

A jury awarded Ruiz damages for Excel's negligence. On Excel's motion, the district court granted a motion for judgment as a matter of law on two grounds. First, the district court determined that the employee welfare benefit plan under ERISA preempted the state law cause of action. Second, the district court found the evidence insufficient to establish any act or omission on the part of Excel that was a cause in fact of any injury sustained by Ruiz. We conclude that the district court erred, and we reverse. Judgment is to be entered on the verdict.

I.

When the district court determined the preemption issue, the court did not have the benefit of our decision in Hook v. Morrison Milling Co., 38 F.3d 776 (5th Cir. 1994). In Hook, as in the instant case, the employer was a nonsubscriber to the Texas worker's compensation system and was, therefore, subject to common-law claims of action. Tex. Labor Code § 406.033.[1] We

[1]The Texas workers compensation statutes have been recently codified in the Labor Code. Tex. Labor Code § 401.001 et. seq. (effective September 1, 1993) (formerly Tex.Rev.Stat. art. 8306 et. seq.). Texas remains an "opt-out" state under the current scheme, that is, an employer may chose to not provide workers compensation. However, such an election subjects the employer to common-law negligence actions by an employee. Tex. Labor Code §406.033 (formerly Tex.Rev.Civ.Stat.Ann. art. 8308-3.23(a) (Vernon Supp. 1993)).

held that an employee's negligence claim against his nonsubscribing employer based on that employer's independent duty to maintain a safe workplace was not preempted by ERISA. Hook, 38 F.3d at 781-83. We are bound by the holding of a previous panel of our circuit. Capps v. N.L. Baroid-NL Indus., Inc., 784 F.2d 615, 619 (5th Cir.), cert. denied, 479 U.S. 838 (1986).

II.

The district court also granted the motion for judgment as a matter of law based upon lack of proof of causation. In reviewing the court's decision, we use the same standard of review that guided the trial court in its ruling for judgment as a matter of law. Crosthwait Equipment Co. v. John Deere Co., 992 F.2d 525, 528 (5th Cir.), cert. denied, 114 S.Ct. 549 (1993). "A motion for judgment as a matter of law should be granted by the trial court if, after considering all the evidence in the light and with all reasonable inferences most favorable to the party opposed to the motion, the facts and inferences point so strongly and overwhelmingly in favor of one party that the court concludes that reasonable people could not arrive at a contrary verdict." Texas Farm Bureau v. United States, 53 F.3d 120, 123 (5th Cir. 1995).

Ruiz was employed at Excel's meat-packing plant in Plainview, Texas. She was hired to work at the Whizard table, aptly named for the knife used by employees at the table. The Whizard table was one of the final steps in the slaughter and processing of beef. The employees at the table were responsible

for trimming meat and fat from neck bones which arrived via a conveyor belt. They would then remove the bones from the belt and trim them using the Whizard knife. The trim was placed into a drum through a hole in the table, and the now "clean" bone was placed back onto the conveyor belt.

The handle of the Whizard knife was cylindrical in shape similar to a flashlight handle. A blade rotated at one end of the cylinder, and the power cord attached to the other end. Ruiz alleged that constant holding of this knife caused cumulative trauma disorder in her hand. This disorder resulted in her middle and ring fingers locking in a bent position, referred to by the workers as "trigger finger." (The reference is a slight misnomer; there is no "trigger" on the handle, rather the knife blade rotates at all times.) Ruiz alleged that Excel failed to provide proper safety procedures for the operation of the electric knife. She asserts Excel did not provide for a work/rest cycle so that workers could relax their hands; Excel did not inform its employees about cumulative trauma disorder; and Excel's expectations concerning worker productivity precluded rest of their hands.

Ruiz worked the 3:00 p.m. to 12:00 a.m. shift at Excel. She had a 15 minute break at 6:00, and a 30 minute break at 8:30. After a Whizard knife worker successfully completed a 45-day probationary period, the worker was required to trim an average of 40 pounds of meat per day over a two-week period. The employees were also required to "pull count," that is, if there

were 20 employees at the table Ruiz would be required to take every 20th neck bone that came down the conveyer belt.

In 1990, Ruiz reported having problems with her hand as a result of the use of the knife and was treated by the company nurses. After unsuccessful treatment by the nursing staff, her fingers continued to lock, and she was referred by the company doctor to another doctor. Ruiz was given injection therapy and eventually underwent surgery on her hand in April of 1991. The day after the surgery she returned to work. In June of 1991 she was again working at the Whizard table.

Ruiz developed hand problems again in September of 1992. This time she was referred to Dr. Lewis by the company doctor. The following represents his synopsis of her history of occupational illness:

> Patient has a history of pain in the right hand. She had status post trigger finger release in 1991, and did relatively well after that. She was off work due to pregnancy, but when she returned to work, with the knife, her symptoms recurred. She has an old mallet finger injury from basketball.

Dr. Lewis's assessment, in part, was that he

> believe[d] that this constitute[d] a tendinitis of the flexor canal of the middle and ring fingers and [he] believe[d] that it [was] work related. [He thought] that she [had] symptoms related to this caused by her job and [he] believe[d] that for the present time conservative management [was] indicated.

(Emphasis added). In February, Ruiz underwent a second surgery.

Ruiz returned again to work the day after her surgery. At some point she was required to climb a ladder and wash a belt in the hamburger room with her bandaged hand. When Dr. Lewis

learned of the activity, he restricted it. Eventually the pain was too much. The doctor permitted her to work with additional restrictions. Based on the significant restrictions, she was placed on a medical layoff, the equivalent of a termination, in the summer of 1994.

Under Texas law, negligence consists of four essential elements: (1) a legal duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) actual injury to the plaintiff; and (4) a showing that the breach was a proximate cause of the injury. Skipper v. United States, 1 F.3d 349, 352 (5th Cir. 1993), cert. denied, 114 S.Ct. 1220 (1994). Excel asserts both that they owed no duty to Ruiz, and that there was no evidence that the use of the knife was the cause-in-fact of her injuries. We address each in turn.

Texas has long recognized an employer's duty to use ordinary care in providing a safe work place for its employees. Werner v. Colwell, 909 S.W.2d 866, 869 (Tex. 1995). Excel argues that its duty must be considered with reference to the character of the business in which the company is engaged. Further, the employer argues that in this regard it acted as a prudent meat-packing plant operator with regard to the Whizard table and its employees.[2] In fact, they insist the company was a leader in the

[2]The district court notes and Excel argues that the Whizard knife was the best tool for trimming neck bones available in the industry. However, such a contention misses the point of Ruiz's allegations of Excel's negligence. She does not complain that she was required to use the Whizard knife. Rather, her allegations concern proper safety procedures which should have been followed to properly protect her from the known danger of

safety of its employees. The evidence, however, is less convincing.

Excel points to their general policy concerning employee safety. While this is commendable, it is only minimally relevant to the inquiry of the company's policies regarding cumulative trauma disorder at the Whizard table. The evidence indicates there was a significantly higher injury rate for employees at the Whizard table than in any other areas of the plant. These figures may have been even higher if there had not been such a tremendous turnover rate for Whizard employees. Excel's management basically argued that the Whizard employees could rest their hands between individual bone trimming, and the employees who had developed hand problems had done so because they had a "death grip" on the electric knife. The evidence indicates that the work and poundage requirement for employees may have precluded any "down-time" for employees to rest their hands. The employees were also never informed of the potential for cumulative trauma disorder and the various ways to prevent such injuries. However, even assuming there was sufficient rest time, the employees were still precluded from turning off the knife and stretching their hands except during the two breaks provided them during the day. In fact, they were discouraged from such acts. One employee witnessed a supervisor warn an employee that such an act constituted misuse of company time. A nurse testified that one

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cumulative trauma disorder to Whizard knife workers at Excel's plant.

supervisor of the Whizard line violated doctor's restrictions on employees who were injured because he "didn't feel they were productive employees. If they were injured, if he had to put them on restriction, it cost him time and it cost money." When Dr. Lewis discovered the work Excel was requiring Ruiz to do, he further specifically restricted those jobs.

Excel argues further that it had a full time ergonomics coordinator and a committee to examine ergonomics issues, and that it had hired an independent ergonomics consultant for advise. Excel asserts that it implemented all of the consultant's recommendations. Our review of the record, with the appropriate deference, indicates the contrary. The expert recommended a work/rest cycle, but the employees were not permitted to turn off their machines periodically except for the two break periods during the day. The expert also recommended that the table employees be rotated with other employees whose jobs did not require the same use of their hands. This also was not done. The company did not follow the Occupational Safety and Health Administration's (OSHA) guidelines either. The evidence indicates that OSHA's guidelines for the meat packing industry recommended increasing the number of workers to decrease the work load and designing jobs to allow sufficient rest time. Neither of these was done by Excel.

Finally, there is also some evidence that Excel's work requirements for Ruiz after her second surgery may have contributed to her injury. She was required to clean a

production belt in the hamburger room and to climb a ladder to paint, both of which required her to use her still bandaged hand.

A jury could have reasonably determined that the company knew of the dangers associated with her work, knew of means to prevent such dangers, and failed to implement those means.

The evidence also indicates that Excel's negligence outlined above was the proximate cause of her injuries. In Texas proximate cause consists of cause in fact and foreseeability. Skipper, 1 F.3d at 352. Both of these elements must be present, and both may be established by direct or circumstantial evidence. McClure v. Allied Stores of Texas, Inc., 608 S.W.2d 901, 903 (Tex. 1980). Excel assails the causation prong of proximate cause. To establish causation, Ruiz must prove that the conduct of Excel caused an event and that event caused Ruiz to suffer compensable injuries. Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995). Excel must establish that the facts and inferences point so strongly and overwhelmingly in their favor that no reasonable person could arrive at a verdict in favor of Ruiz.

Dr. Lewis's records are quite telling of the causation. His records indicate that he believed her injury was work-related. Excel asserts Dr. Lewis's medical records were speculative and were not based upon reasonable medical probability. See Burroughs, 907 S.W.2d at 500 ("[T]o constitute evidence of causation, an expert opinion must rest in reasonable medical probability.") In Texas, "[r]easonable probability is determined

by the substance and context of the opinion, and does not turn on semantics or on the use of a particular term or phrase." Id. Unlike in Burroughs, Dr. Lewis states a positive belief in his records that the injuries were work-related, based upon his examination of her hand and her treatment. Dr. Lewis's conclusion is unlike that disavowed in Burroughs. There the notation contained in the medical records appears to be based not upon the physician's own diagnosis of the patient, but rather upon the statements of others. Burroughs, 907 S.W.2d at 500.

We also note that causation may be inferred from the evidence and circumstances surrounding Ruiz's injury. See Insurance Co. of North America v. Kneten, 440 S.W.2d 52, 54 (Tex. 1969) (A jury can infer proximate cause from the facts and circumstances surrounding the injury). Ruiz underwent a physical prior to beginning work at Excel. Her hand injury began and recurred after her use of the Whizard knife. "Trigger finger" or cumulative trauma disorders were disproportionately common among Whizard knife employees. The company medical staff treated the injury as it treated other "trigger finger" injuries at the plant. Despite the frequency of cumulative trauma disorder injuries, Excel failed to follow OSHA or its own expert's recommendations to reduce those injuries at the Whizard table.

Based on the circumstances of Ruiz's injuries and Dr. Lewis's conclusions, a reasonable jury could have concluded the use of the Whizard knife was the cause in fact of her injuries. The evidence was sufficient to support the jury's verdict.

III.

For these reasons, we REVERSE the court's order granting judgment as a matter of law and REMAND the case with instructions to enter judgment on the jury's verdict.