

APPEAL NO. 151156
FILED AUGUST 6, 2015

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 6, 2015, with the record closing on May 20, 2015, in Dallas, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (decendent) did not sustain a compensable injury in the form of an occupational disease, on (date of injury), resulting in his death. The appellant (claimant beneficiaries) appealed the hearing officer's determination that the decedent did not sustain a compensable injury in the form of an occupational disease, on (date of injury), resulting in his death. The claimant beneficiaries filed a timely amended appeal, stating that the hearing officer improperly placed the burden of proof on the claimant beneficiaries, and incorrectly determined that the decedent's pancreatic cancer was not caused by his job as a firefighter. The respondent (self-insured) responded, urging affirmance of the disputed determinations. The self-insured responds that the claimant beneficiaries did not meet the criteria to establish that the decedent's cancer was related to the decedent's activities as a firefighter.

DECISION

Reversed and remanded.

It is undisputed that the decedent had been employed as a firefighter with the self-insured for 31 years. The decedent was diagnosed with pancreatic cancer on (date of injury), while employed as a firefighter. The decedent passed away on May 6, 2011. In evidence is a certificate of death listing the decedent's immediate cause of death as "metastatic pancreatic undifferentiated carcinoma."

This case involves the application of Chapter 607 of the Government Code, Subchapter B, Disease or Illnesses Suffered by Firefighters and Emergency Medical Technicians, effective September 1, 2005. See Senate Bill (S.B.) 310 of the 79th Leg., R.S. (2005). Also, we note House Bill (H.B.) 1388 of the 84th Leg., R.S. (2015), amended Government Code § 607.058, Presumption Rebuttal which was signed by the Governor on May 29, 2015.¹

Under the facts of this case, the relevant statutes under the Government Code are as follows:

¹ We note that the change in law made by H.B. 1388 to Government Code § 607.058 applies to a claim for benefits or compensation brought on or after the effective date, May 29, 2015.

Government Code § 607.052. APPLICABILITY.

(a) Notwithstanding any other law, this subchapter applies only to a firefighter or emergency medical technician who:

- (1) on becoming employed or during employment as a firefighter or emergency medical technician, received a physical examination that failed to reveal evidence of the illness or disease for which benefits or compensation are sought using a presumption established by this subchapter;
- (2) is employed for 5 or more years as a firefighter or emergency medical technician; and
- (3) seeks benefits or compensation for a disease or illness covered by this subchapter that is discovered during employment as a firefighter or emergency medical technician.

Government Code § 607.055. CANCER.

(a) A firefighter or emergency medical technician who suffers from cancer resulting in death or total or partial disability is presumed to have developed the cancer during the course and scope of employment as a firefighter or emergency medical technician if:

- (1) the firefighter or emergency medical technician:
 - (A) regularly responded on the scene to calls involving fires or fire fighting; or
 - (B) regularly responded to an event involving the documented release of radiation or a known or suspected carcinogen while the person was employed as a firefighter or emergency medical technician; and
- (2) the cancer is known to be associated with firefighting or exposure to heat, smoke, radiation, or a known or suspected carcinogen, as described by Subsection (b).

(b) This section applies only to a type of cancer that may be caused by exposure to heat, smoke, radiation, or a known or suspected carcinogen as determined by the International Agency for Research on Cancer [(IARC)].

Government Code § 607.057. EFFECT OF PRESUMPTION.

Except as provided by Section 607.052(b), a presumption established under this subchapter applies to a determination of whether a firefighter's or emergency medical technician's disability or death resulted from a disease or illness contracted in the

course and scope of employment for purposes of benefits or compensation provided under another employee benefit, law, or plan, including a pension plan.
Sec. 3, eff. September 1, 2005.

Government Code § 607.058. PRESUMPTION REBUTTABLE.

A presumption under Section 607.053, 607.054, 607.055, or 607.056 may be rebutted through a showing by a preponderance of the evidence that a risk factor, accident, hazard, or other cause not associated with the individual's service as a firefighter or emergency medical technician caused the individual's disease or illness.

The hearing officer states in the Discussion section of the decision that “[a] plain reading of [Government Code] § 607.055 indicates that both portions of Government Code § 607.055(a) (1) and (2) must be satisfied in order for a presumption to be established that the firefighter developed cancer during the course and scope of employment.” The hearing officer discusses in the decision that the decedent met the requirements of Government Code § 607.055(a) (1), however the decedent did not meet the requirements of Government Code § 607.055(a) (2) and (b) based on the written opinion and testimony of (Dr. K).

The hearing officer discusses that Dr. K opined that: cancer of the pancreas has not been a risk associated with firefighting in the IARC document, as incorporated by the Government Code, and that pancreatic cancer is not known to be associated with firefighting or exposure to heat, smoke, radiation, or a known or suspected carcinogen. The hearing officer states that given the depth and detail of Dr. K’s testimony and written opinion, that opinion was found to be persuasive, and based on the evidence presented, “pancreatic cancer is not known to be associated with firefighting or exposure to heat, smoke, radiation, or a known or suspected carcinogen, as determined by the IARC. Consequently, the firefighter’s presumption was not found to apply to the cancer suffered by [the] [d]ecedent.” Furthermore, the hearing officer states that “[a]bsent the firefighter’s presumption, [the] [c]laimant [b]eneficiaries did not meet their burden of proof. While there was some evidence as to the nature of the chemicals that [the] [d]ecedent may have been exposed to as a firefighter, there was no persuasive evidence regarding the duration or frequency of that exposure or the damage done by them to the physical structure of his body.”

In Appeals Panel Decision (APD) 150098-s, decided March 9, 2015, the Appeals Panel held that the hearing officer failed to properly apply the statutory presumption to the facts of the case because the hearing officer required direct and unequivocal evidence that the injured worker’s multiple myeloma was caused by heat, smoke, radiation or a known or suspected carcinogen of which the claimant was exposed during the course and scope of her employment as a firefighter. In that case, the Appeals

Panel determined that the hearing officer applied the wrong legal standard and reversed and remanded the case back to the hearing officer to apply the proper legal standard. The Appeals Panel discussed the statutory presumption found in Government Code § 607.055(a) (2) and the legislative intent to create a presumption for firefighters that would include cancer. The Appeals Panel stated that it is clear that the legislative intent was to shift the burden of proof from the claimant to the employer by creating a presumption of causation in favor of the firefighter or emergency medical technician. The Appeals Panel noted that the Texas Supreme Court explained that a presumption's "effect is to shift the burden of producing evidence to the party against whom it operates." See *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993).

In this case, in evidence is a publication by the IARC, entitled "IARC Monographs on the Evaluation of Carcinogenic Risks to Humans, Volume 98, Painting, Firefighting, and Shiftwork," (2010). That publication contains a section on Firefighting, pages 397-525, that discusses exposure of carcinogens found in smoke at fires under the title of Exposure Data. Also, that publication references evidence-based medicine on firefighters developing types of cancer, including pancreatic cancer, under the title of "Studies of Cancer in Humans."

Government Code § 607.055(b) states that the presumption found in section 607.055 applies "only to a type of cancer that **may be** caused by exposure to heat, smoke, radiation, or a known or suspected carcinogen as determined by the [IARC]." (Emphasis added). In this case, the evidence is sufficient to establish that the decedent met the statutory presumption that the decedent's cancer is known to be associated with firefighting or exposure to heat, smoke, radiation, or a known or suspected carcinogen, and that pancreatic cancer is a type that may be caused by exposure to heat, smoke, radiation, or a known or suspected carcinogen as determined by the IARC.

The hearing officer erred in finding that pancreatic cancer is not known to be associated with firefighting or exposure to heat, smoke, radiation, or a known or suspected carcinogen, as determined by the IARC, because the hearing officer failed to properly apply the statutory presumption to the facts and evidence. Furthermore, the hearing officer misplaced the burden of proof on the claimant beneficiaries to show causation, and by doing so applied the wrong legal standard to determine whether the decedent sustained a compensable injury in the form of an occupational disease with a date of injury of (date of injury), resulting in his death.

Based on the plain language of the statute, the legislative intent, and the evidence, the decedent met the threshold presumption as provided in Government

Code § 607.055(a) (1) and (2); that is, the decedent is presumed to have developed pancreatic cancer during the course and scope of his employment as a firefighter.

Accordingly, we reverse the hearing officer's determination that the decedent did not sustain a compensable injury in the form of an occupational disease with a date of injury of (date of injury), resulting in his death and we remand the compensable injury issue to the hearing officer to apply the correct legal standard.

REMAND INSTRUCTIONS

On remand, the hearing officer is to apply the correct legal standard as provided in Government Code §§ 607.055, 607.057, and 607.058 as it pertains to the issue of a compensable injury. The hearing officer is to make finding of facts, conclusion of laws, and a determination that is consistent with this decision. The hearing officer shall make a determination on whether the decedent sustained a compensable injury in the form of an occupational disease with a date of injury of (date of injury), resulting in his death consistent with this decision.

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 Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **CITY OF DALLAS (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**DEBORAH WATKINS
1500 MARILLA, 5D SOUTH
DALLAS, TEXAS 75201.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge