

APPEAL NO. 191065  
FILED AUGUST 6, 2019

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 11, 2019, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the appellant (claimant) did not sustain a compensable injury, in the form of an occupational disease, with a date of injury of (date of injury); and (2) because the claimant did not sustain a compensable injury, the claimant did not have disability. The claimant appealed, disputing the ALJ's determinations of compensability and disability. The respondent (self-insured) responded, urging affirmance of the disputed compensable injury and disability determinations.

DECISION

Reversed and rendered.

The evidence reflected that the claimant had been employed with the self-insured since November of 2001. The claimant first worked as a probationary firefighter and subsequently was employed as a firefighter/paramedic. In evidence is an MRI dated October 26, 2012, which included an impression of a cystic tumor in the tail of the pancreas which is most compatible with a mucinous cystadenoma/cystadenocarcinoma. The claimant was diagnosed with a neuroendocrine tumor of the pancreas. In October of 2017, the claimant obtained the results of a liver biopsy and it was determined that he had a neuroendocrine tumor of the liver.

**COMPENSABILITY**

Government Code Section 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 fire fighting 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)].<sup>1</sup>

Government Code Section 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 Section 607.058. PRESUMPTION REBUTTABLE.

A presumption under Sections 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 ALJ's finding that the claimant met the gateway requirements of Government Code Section 607.052(a)(1), (2), and (3) was not appealed. Additionally, the ALJ's finding that the claimant regularly responded on the scene to calls involving fires or fire fighting; or he regularly responded to an event involving the documented release of radiation or a known or suspected carcinogen while employed as a firefighter was not appealed. The ALJ found that the claimant has been diagnosed with a pancreatic neuroendocrine tumor and metastatic neuroendocrine tumor of the liver (digestive cancers) and that digestive cancer is known to be associated with fire fighting or exposure to heat, smoke, radiation, or a known or suspected carcinogen, as determined by the IARC. The ALJ found that the claimant established the presumption under Government Code Chapter 607, Subchapter B. These findings were not appealed.

However, the ALJ found that the self-insured rebutted the presumption that the claimant developed pancreatic and liver cancers during the course and scope of employment through 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 claimant's pancreatic and liver cancers relying on the testimony and written report of (Dr. K). The ALJ therefore

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<sup>1</sup> We note that Senate Bill 2551 of the 86th Texas Legislature amended Government Code Sections 607.055 and 607.058 but those amendments are not applicable in the instant case.

determined that the claimant did not sustain a compensable injury, in the form of an occupational disease, with a date of injury of (date of injury).

Much of Dr. K's testimony and written report attempted to establish that the presumption set forth in Government Code Section 607.055 did not apply in this case. As noted above, the ALJ found that the claimant established the presumption applied. That finding was not appealed. At issue is whether the presumption was rebutted by the evidence presented at the CCH.

The ALJ stated that Dr. K's testimony was persuasive that the claimant's pancreatic neuroendocrine tumor is related to family history. However, while the claimant testified that his father had kidney cancer, there was no specific evidence that the kidney cancer was a result of a neuroendocrine tumor. Further, it is undisputed that the claimant did not have any genetic testing to determine if he possessed any of the genetic syndromes which have been identified to cause pancreatic neuroendocrine tumors. Although Dr. K's written report dated October 30, 2018, stated that neuroendocrine tumors can occur in the kidney, Dr. K acknowledged that the type of kidney cancer the claimant's father had was not described.

Dr. K testified that the cancers caused from neuroendocrine tumors were not mentioned in the monograph of the IARC. Dr. K contended that the claimant's type of cancer was not associated with the firefighter literature. However, Dr. K testified he could not say what was the cause of the claimant's cancer, other than his contention it was related to family history. Dr. K contended simply that it was not a result of the claimant's duties as a firefighter/paramedic.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

Under the facts of this case, we find the ALJ's finding that the self-insured rebutted the presumption through showing by a preponderance of the evidence that a risk factor, accident, hazard, or other cause not associated with the claimant's service as a firefighter or emergency medical technician caused the individual's disease or illness as required by Government Code Section 607.058 to be so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, we reverse the ALJ's determination that the claimant did not sustain a

compensable injury, in the form of an occupational disease, with a date of injury of (date of injury), and render a new decision that the claimant did sustain a compensable injury, in the form of an occupational disease, with a date of injury of (date of injury).

## **DISABILITY**

The ALJ found that the claimant's pancreatic neuroendocrine tumor and metastatic neuroendocrine tumor of the liver were a producing cause of his inability to obtain and retain employment at wages equivalent to his pre-injury wage from October 28, 2017, through March 27, 2018, and from May 26, 2018, through the date of the CCH but not from March 28, 2018, through May 25, 2018. These findings were not appealed. The ALJ determined that because the claimant did not sustain a compensable injury, the claimant did not have disability. The claimant appealed the ALJ's conclusion on disability. We have reversed the ALJ's determination that the claimant did not sustain a compensable injury, in the form of an occupational disease, with a date of injury of (date of injury), and rendered a new decision that the claimant sustained a compensable injury, in the form of an occupational disease, with a date of injury of (date of injury). Consequently, we reverse the ALJ's determination that because the claimant did not sustain a compensable injury, the claimant did not have disability and render a new decision that the claimant had disability from October 28, 2017, through March 27, 2018, and from May 26, 2018, through the date of the CCH but not from March 28, 2018, through May 25, 2018.

## **SUMMARY**

We reverse the ALJ's determination that the claimant did not sustain a compensable injury, in the form of an occupational disease, with a date of injury of (date of injury), and render a new decision that the claimant did sustain a compensable injury, in the form of an occupational disease, with a date of injury of (date of injury).

We reverse the ALJ's determination that because the claimant did not sustain a compensable injury, the claimant did not have disability and render a new decision that the claimant had disability from October 28, 2017, through March 27, 2018, and from May 26, 2018, through the date of the CCH but not from March 28, 2018, through May 25, 2018.

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

**ANNA RUSSELL - CITY SECRETARY  
900 BAGBY  
HOUSTON, TEXAS 77002.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Cristina Beceiro  
Appeals Judge

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Carisa Space-Beam  
Appeals Judge