APPEAL NO. 150098-s
FILED MARCH 9, 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 (CCH) was held on September 9, 2014, and November 18, 2014, in Houston, Texas, with [hearing officer] presiding as hearing officer. The hearing officer 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 there is no compensable injury, there can be no disability "from August 28, 2013, and continuing through January 2, 2014, and at no other times." The claimant appealed the hearing officer's determinations stating that the hearing officer improperly placed the burden of proof on the claimant and applied the wrong legal standard. Also, the claimant contends that the hearing officer's decision is clearly wrong, manifestly unjust and goes against the great weight of the evidence. The respondent (self-insured) responded, urging affirmance of the disputed determinations.

DECISION

Reversed and remanded.

It is undisputed that the claimant has been employed as a firefighter with the self-insured since August 1994, and that the claimant was diagnosed with a cancer, multiple myeloma[1], in April 2013. We note that this case involves an amendment to Chapter 607 of the Government Code, by adding 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).

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

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;

[1] The evidence describes multiple myeloma as a cancer formed by malignant plasma cells.

(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.

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.

At the CCH, the claimant testified that she developed multiple myeloma during the course and scope of her employment as a firefighter. The claimant testified she

regularly responded to calls involving fire and firefighting and because of the nature of her work as a firefighter she developed a cancer known to be associated with firefighting or exposure to heat, smoke, radiation, or a known or suspected carcinogen. The claimant testified that as a firefighter she responded to a particular huge explosive fire known as the "Market Street Fire" on June 24, 1995, where she was exposed to numerous chemicals and carcinogens.

Also, the claimant contends that even though a statutory presumption has been established in her favor, she additionally introduced expert medical evidence to corroborate that statutory presumption. In evidence is a medical report dated April 18, 2013, that lists the claimant's diagnosis as multiple myeloma and subsequent reports that show the claimant has undergone treatment for her cancer. A medical report from (Dr. C) dated September 23, 2013, states the claimant's occupational exposure and years of service as a firefighter to be the major factor in the claimant acquiring multiple myeloma. In evidence is an affidavit dated March 14, 2014, from a fellow firefighter stating that he was a firefighter for 25 years with the Houston Fire Department and has also been diagnosed with multiple myeloma. The claimant's exhibits include evidence-based medicine regarding multiple myeloma.

The claimant testified that she has met the requirements of Government Code § 607.052 (Applicability), and a causation presumption has been established in her favor under Government Code § 607.055 (Cancer). *See* also Government Code § 607.057 (Effect of Presumption). The claimant contends the burden of proof shifted to the self-insured to rebut the presumption. *See* Government Code § 607.058 (Presumption Rebuttable).

In this case there is no dispute that the claimant has met the requirements of Government Code § 607.052 which is the applicability of Subchapter B. The claimant testified that she passed a physical exam prior to being hired as a firefighter, she has been employed as a firefighter for more than 5 years, and she is seeking workers' compensation benefits for a disease she developed during her employment as a firefighter.

At issue in this case is the interpretation of Government Code § 607.055 (Cancer), regarding firefighters that develop cancer during the course and scope of their employment. 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. In this case, there is no dispute that the claimant met the first portion of Government Code § 607.055(a)(1)(A). The claimant testified that she regularly responded on the scene to calls involving fires or firefighting.

The key dispute in this case is whether the claimant met the second requirement under Government Code § 607.055(a)(2) which provides that "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)." Subsection (b) states that "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." Both parties dispute as to how the presumption is established and which party has the burden of proof as provided in Government Code § 607.055.

The claimant argued that the presumption under Government Code § 607.055(a)(2) is established by showing that she was diagnosed with multiple myeloma during the course and scope of her employment as a firefighter, and therefore the burden of proof is then shifted to the self-insured to rebut that presumption. The self-insured argued that the presumption under Government Code § 607.055(a)(2) is established if the claimant presents evidence of causation that multiple myeloma is shown to be associated with firefighting or exposure to heat, smoke, radiation, or a known or suspected carcinogen as determined by the International Agency for Research on Cancer. In effect, the self-insured argued that the claimant has the burden of proof to establish that the International Agency for Research on Cancer has determined that multiple myeloma may be caused by heat, smoke, radiation, or a known or suspected carcinogen.

The hearing officer states that the claimant met the threshold presumption, however the hearing officer also states that "there is no known factor that directly and unequivocally finds that multiple myeloma is directly caused by heat, smoke, radiation or a known or suspected carcinogen of which [the] [c]laimant was exposed during the course and scope of her employment." The claimant states that the hearing officer improperly placed the burden of proof on the claimant and applied the wrong legal standard.

In this case we look to the legislative intent regarding S.B. 310 that added the firefighter cancer presumption to the Government Code. As previously mentioned, S.B. 310 amended Chapter 607 of the Government Code by adding Subchapter B, Disease or Illnesses Suffered by Firefighters and Emergency Medical Technicians, which includes cancer as a disease or illness suffered by firefighters during the course and scope of employment. The House Research Organization (HRO) Bill Analysis for S.B. 310 states that the subject of the bill was to create a presumption about certain illnesses among emergency workers and that the medical conditions covered by the bill would include cancer and "presumption could be rebutted by showing through a preponderance of the evidence that the medical condition resulted from some factor not

related to an individual's service as a firefighter or emergency medical technician." HRO Bill Analysis, Tex. S.B. 310, 79th Leg. R.S. (2005). Furthermore, the HRO Bill Analysis states that supporters of S.B. 310 emphasize that:

[S.B. 310] would improve firefighter and emergency personnel benefit security and shift the burden of proof away from the employee to the local government or risk pool in determining whether an employee's illness was caused by the performance of duties. Firefighters and emergency personnel often face hazardous situations and sustain injuries, illness, and death in their efforts to save lives and property. To receive medical coverage and workers' compensation, they must document when and where they sustained injury and illness. Because of the nature of their work, determining the origin of disease exposure or injury can be impossible to prove, yet the burden of proof currently lies with the employee. This bill appropriately would create a presumption in favor of the employee for diseases, such as certain cancers and respiratory illnesses, which typically are associated with the performance of emergency personnel duties. . . . By allowing for the rebuttal of presumption in specific situations, it would not create barriers to receiving benefits in unrelated situations. HRO Bill Analysis, Tex. S.B. 310, 79th Leg. R.S. (2005).

Additionally, the Senate Research Center (SRC) Bill Analysis for S.B. 310 states the author's/sponsor's statement of intent was to explain that:

Current Texas law provides that public safety personnel who contract certain occupational diseases may receive benefits if the person can prove that the disease was caused by an exposure in the line of duty, and if a specific exposure is documented in a timely manner. There is a lack of available benefits to those who do not show the effects of a disease that they contracted in the line of duty until later. S.B. 310 provides a rebuttal presumption for firefighters and emergency medical technicians for certain diseases, including . . . cancer. State Affairs, SRC Bill Analysis, Tex. S.B. 310, 79th Leg. R.S. (2005).

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. We note that the Texas Supreme Court has 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).

The claimant states that she has met the criteria under Subchapter B, Government Code § 607.055 and that the hearing officer also agreed that she met the threshold presumption as stated in her discussion. Based on the plain language of the statute, the legislative intent, and the hearing officer's discussion, the evidence supports

that the claimant met the threshold presumption as provided in Government Code § 607.055(a)(1) and (2); that is, the claimant is presumed to have developed multiple myeloma during the course and scope of her employment as a firefighter. *See* also Government Code § 607.057 (Effect of Presumption).

However, the claimant argues that the hearing officer misplaced the burden of proof on the claimant to show causation of a "known factor that directly and unequivocally shows that multiple myeloma is directly caused by heat, smoke, radiation or a known or suspected carcinogen of which [the] [c]laimant was exposed during the course and scope of her employment," even though the hearing officer correctly states that she met the threshold presumption. The claimant contends that once the presumption was established, the self-insured had the burden to rebut that presumption. We agree. The hearing officer has failed to properly apply the statutory presumption to facts of this case by requiring direct and unequivocal evidence that multiple myeloma is 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. As discussed above, the legislative intent was to create a presumption in favor of the employee and to allow for the employer to rebut that presumption by a preponderance of the evidence. Government Code § 607.058 provides that a presumption under Section 607.055 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. Once the presumption is established, the burden of proof is shifted to the self-insured to rebut that presumption.

The hearing officer misplaced the burden of proof on the claimant to show causation once the statutory presumption was established, and by doing so applied the wrong legal standard to determine whether the claimant sustained a compensable injury in the form of an occupational disease with a date of injury of [Date of Injury].

Accordingly, we reverse the hearing officer'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 we remand the compensable injury issue to the hearing officer to apply the correct legal standard. Since we have reversed and remanded the compensable injury determination for the hearing officer to apply the correct legal standard, we also reverse the hearing officer's determination that because there is no compensable injury, there can be no disability from August 28, 2013, and continuing through January 2, 2014, and at no other times, and we remand the disability issue to the hearing officer for a decision consistent with the hearing officer's determination of compensable injury on remand.

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 compensable injury. The hearing officer is to make a finding of facts, conclusion of laws, and a decision that is consistent with this decision. The hearing officer shall make a determination on the compensable injury and disability issues, consistent with this decision. The hearing officer is not to consider additional evidence on remand.

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* Appeals Panel Decision 060721, decided June 12, 2006.

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.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge