

APPEAL NO. 211026-s
FILED AUGUST 20, 2021

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 January 25, 2021, and May 24, 2021, 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 decedent, (decedent), did sustain a compensable injury, in the form of an occupational disease, with a date of injury of (date of injury), resulting in his death; (2) the respondent (claimant beneficiary) is a proper legal beneficiary of the decedent, thus the claimant beneficiary is entitled to death benefits; and (3) the claimant beneficiary is entitled to reimbursement for burial benefits in the amount of \$1,922.86. The appellant (self-insured) appealed, disputing the ALJ's determinations. The claimant beneficiary responded, urging affirmance of the disputed determinations.

DECISION

Reversed and remanded.

The evidence reflected that the decedent had been employed with the self-insured for 27 years and worked as a deputy sheriff detention officer in the (building) of the (county) County Jail. The claimant beneficiary testified that the decedent began to have a dry cough and was tested for coronavirus 2019 (COVID-19) on (date of injury). The decedent's condition rapidly deteriorated and he passed away at his house on the morning of (two days after the date of injury). The COVID-19 test yielded a positive result. Additionally, an autopsy report in evidence dated (on the date of the decedent's death), concluded that the decedent died as a result of complications of COVID-19, with hypertension and cardiomegaly contributing.

At issue was 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. The ALJ reconvened the hearing on May 24, 2021, in order to take evidence and testimony regarding the applicability of Section 607.054 of the Texas Government Code. The self-insured argued in its appeal that the admission of new evidence and testimony at the May 24, 2021, CCH was improper. Rulings on evidentiary matters are reviewed under an abuse-of-discretion standard and the Appeals Panel will not disturb the ALJ's ruling on a continuance absent an abuse of discretion. *Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.—San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the ALJ acted without reference to any guiding rules or principles. *Morrow*

v. H.E.B., Inc., 714 S.W.2d 297 (Tex.1986). Considering the facts of this case, we find no abuse of discretion in the ALJ's reconvening the hearing and admission of evidence.

COMPENSABILITY

Section 401.011(34) provides that "occupational disease" means 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. Expert medical testimony is necessary to establish the cause of the disease. See generally *Houston General Insurance Company v. Pegues*, 514 S.W.2d 492 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.), *Schaefer v. Texas Employers' Insurance Association*, 612 S.W.2d 199 (Tex. 1980). The question in this case is whether there is a causal connection between COVID-19 and the decedent's employment as established by medical evidence.

Section 607.054 of the Government Code provides, in part, that a firefighter, peace officer, or emergency medical technician who suffers from tuberculosis, or any other disease or illness of the lungs or respiratory tract that has a statistically positive correlation with service as a firefighter, peace officer, or emergency medical technician, that results in death or total or partial disability is presumed to have contracted the disease or illness during the course and scope of employment as a firefighter, peace officer, or emergency medical technician. In her discussion of the evidence the ALJ stated that the claimant beneficiary satisfactorily met the requirements of Section 607.054 of the Government Code by proving that COVID-19 is a disease or illness of the lungs or respiratory tract and proving that there is a statistically positive correlation between COVID-19 and the decedent's employment. We disagree. Although the articles in evidence discuss a prevalence of COVID-19 in police officers, the evidence in the record is insufficient to prove a statistically positive correlation between the decedent's COVID-19 infection and his service as a detention officer. In addition, Senate Bill (S.B.) 22 of the 87th Leg., R.S. (2021) added a subsection (b) to Section 607.054 of the Government Code which provides this section does not apply to a claim that a firefighter, peace officer, or emergency medical technician suffers from severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) or COVID-19.

S.B. 22 provided an additional section to specifically cover SARS-CoV-2 and COVID-19 for detention officers, custodial officers, firefighters, peace officers, and emergency medical technicians. Section 607.0545(a) of the Government Code provides, in pertinent part, that a detention officer who suffers from COVID-19 that

results in death or total or partial disability is presumed to have contracted the virus or disease during the course and scope of employment as a detention officer if the detention officer is: (1) employed in the area designated in a disaster declaration by the governor under Section 418.014 of the Government Code or another law and the disaster is related to COVID-19; and (2) contracts the disease during the disaster declared by the governor described above. On March 13, 2020, the governor declared a state of disaster in Texas due to COVID-19.

Section 607.0545(b) of the Government Code provides, in pertinent part, the presumption only applies to specified persons including a detention officer employed on a full-time basis who is diagnosed with COVID-19 using a test authorized, approved, or licensed by the United States Food and Drug Administration. See Section 607.0545(b)(1) and (2)(A) of the Government Code. Section 607.0545(b)(2)(B) of the Government Code reflects that the presumption would apply to a deceased person who is diagnosed by a test authorized, approved, or licensed by the United States Food and Drug Administration (Section 607.0545(b)(2)(A) of the Government Code) or by another means, including by a physician. Section 607.0545(b)(3)(B)(iv) of the Government Code further provides, in pertinent part, that the presumption only applies to a detention officer who was last on duty not more than 15 days before the person died if COVID-19 was a contributing factor in the person's death.

Section 607.058(a) of the Government Code provides, in part, that the presumption established in Section 607.0545 of the Government Code is rebuttable. Section 607.058(b) of the Government Code provides, in pertinent part, that any rebuttal offered must include a statement by the person offering the rebuttal that describes, in detail, the evidence that the person reviewed before making the determination that a cause not associated with the individual's service as a detention officer was a substantial factor in bringing about the individual's disease or illness without which the disease or illness would not have occurred.

Section 607.058(c) of the Government Code provides, in pertinent part, that an ALJ in addressing an argument based on a rebuttal shall make findings of fact and conclusions of law that consider whether a qualified expert, relying on evidence-based medicine, stated the opinion that, based on reasonable medical probability, an identified risk factor, accident, hazard, or other cause not associated with the individual's service as a detention officer was a substantial factor in bringing about the individual's disease or illness, without which the disease or illness would not have occurred. Section 607.058(d) of the Government Code provides, in pertinent part, that a rebuttal to a presumption under Section 607.0545 of the Government Code may not be based solely on evidence relating to the risk of exposure to COVID-19 of a person with whom a detention officer resides.

S.B. 22 provides that a person subject to Section 607.0545 of the Government Code who on or after the date the governor declared a disaster under Chapter 418 of the Government Code relating to COVID-19 but before the effective date of S.B. 22, contracted COVID-19, may file a claim for benefits related to COVID-19 on or after the effective date of S.B. 22 regardless of whether the claim is otherwise considered untimely and the changes in law made by S.B. 22 apply to that claim.

The ALJ in this case incorrectly determined that the presumption set forth in Section 607.054 of the Government Code applied to this claim. However, S.B. 22 makes clear that the presumption set forth in Section 607.0545 of the Government Code applies to claims, like the one in the instant case, that were pending at the time the law went into effect. S.B. 22 became effective on June 14, 2021, a date after the CCH was held and a decision was issued in this case. Because this claim was pending at the time S.B. 22 went into effect, we reverse the ALJ's determination that the decedent did 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 this issue back to the ALJ for further action consistent with this decision.

On remand, the ALJ is to apply the provisions set forth in Sections 607.0545 and 607.058 of the Government Code and make a determination of 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.

PROPER LEGAL BENEFICIARY AND DEATH BENEFITS

As we have reversed and remanded the compensability issue in this case, we also reverse the ALJ's determination that the claimant beneficiary is a proper legal beneficiary of the decedent, thus entitling her to death benefits, and we remand this issue back to the ALJ for further action consistent with this decision.

BURIAL BENEFITS

As we have reversed and remanded the compensability issue in this case, we also reverse the ALJ's determination that the claimant beneficiary is entitled to reimbursement for burial benefits in the amount of \$1,922.86, and we remand the issue of burial benefits back to the ALJ for further action consistent with this decision.

SUMMARY

We reverse the ALJ's determination that the decedent did 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 this issue back to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant beneficiary is a proper legal beneficiary of the decedent, thus entitling her to death benefits, and we remand this issue back to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant beneficiary is entitled to reimbursement for burial benefits in the amount of \$1,922.86, and we remand the issue of burial benefits back to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the ALJ is to apply the provisions set forth in Sections 607.0545 and 607.058 of the Government Code and make a determination of 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. The ALJ is then to make determinations regarding the issues of whether the claimant beneficiary is a proper legal beneficiary entitling her to death benefits and whether the claimant beneficiary is entitled to reimbursement for burial benefits.

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 ALJ, 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 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 **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**NAME
ADDRESS
CITY, TEXAS ZIP CODE.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge