APPEALS PANEL DECISION SUMMARIES

(151156 – 151407)

<http://www.tdi.texas.gov/appeals/2015cases>

*Don’t rely on the summaries for your arguments. Make sure the decision applies to your case. My summaries focus on why the decision was overturned. I don’t go into great depth so any decision may say more than what I write/cut/paste from the AP decision. About 90% of what is here is just cut and paste from the decisions. I try to hit the highlights, even if there are other reasons the hearing officer’s decision was overturned. I also do not write about typographical errors that may have been made that resulted in a reversal. Ken Wrobel*

151156 – Cancer in firefighters and presumption - The decedent was diagnosed with pancreatic cancer 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.

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;

(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.

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).

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.

151157 – Disability - Disability means the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury. Section 401.011(16). The claimant need not prove that the compensable injury was the sole cause of his disability only that it was a producing cause. The claimant testified that he was terminated by the employer on February 27, 2013. The Appeals Panel has held that even a claimant’s termination for cause does not, in itself, foreclose the existence of disability. *See* APD 990655, decided May 13, 1999. Also, the payroll records show that the claimant worked up until February 27, 2013. In evidence are Work Status Reports (DWC-73) dated after February 27, 2013, that show the claimant was released to work with restrictions due to his compensable injury. There is no evidence that the claimant earned less than his pre-injury wages prior to February 27, 2013.

151158-s –Impairment rating/Distal clavicle resection - A written decision is being issued in this case to clarify the use of Table 27, Impairment of the Upper Extremity (UE) After Arthroplasty of Specific Bones or Joints, of the AMA Guides in assessing impairment for a distal clavicle resection arthroplasty received as treatment for the compensable injury.

It is undisputed by the parties that the claimant underwent a distal clavicle resection arthroplasty for the compensable injury. Dr. E explained in his narrative report that he assigned 4% impairment based on loss of range of motion (ROM) of the claimant’s left shoulder. Dr. E also explained in his report that he did not assign an impairment under Table 27 of the AMA Guides for the claimant’s distal clavicle resection arthroplasty because:

[c]urrent guidance from the [Texas Department of Insurance, Division of Workers’ Compensation (Division)] on this from impairment from Table 27, though, is to consider the final result of the injured worker and if they have a relatively good result, then the examiner would probably not be advised to assign impairment for the distal clavicle arthroplasty since the procedure was not intended to impair them and a good result means that they were not impaired, subverting any reasonable application of that impairment from that table. But if the final result of such surgery was relatively adverse, such as instability or other factors, then it would be reasonable to assign that 10% [UE] impairment. In this case, the examinee has a relatively normal examination except for minor loss in [ROM], which is accounted for by the [ROM] impairment. As such, assignment for the distal clavicle arthroplasty is not seen as reasonable here.

The hearing officer noted in his discussion that Table 27 of the AMA Guides does not give the guidance as stated by Dr. E; rather, Table 27 “simply gives an [IR] value for different levels of arthroplasty, with 10% being given for a distal clavicle arthroplasty.” The hearing officer then stated in part that because Dr. E did not give a rating for the distal clavicle resection arthroplasty, the claimant was sent to a new designated doctor to address the claimant’s IR.

The question in this case is whether a distal clavicle resection arthroplasty received as treatment for the compensable injury results in a 10% UE impairment under Table 27 of the AMA Guides.

The AMA Guides provide on page 3/58 the following:

It is emphasized that impairments from the disorders considered in this section [3.1m Impairment Due to Other Disorders of the UE] are usually estimated by using other criteria. The criteria described in this section should be used only when the other criteria have not adequately encompassed the extent of the impairments.

Table 27, Impairment of the UE After Arthroplasty of Specific Bones or Joints, falls under Section 3.1m. When considering the language on page 3/58 in isolation it would appear that a distal clavicle resection arthroplasty would receive a 10% UE rating under Table 27 only if the other criteria provided in the AMA Guides have not adequately rated the impairment.

However, the AMA Guides also provide on page 3/62 the following specifically regarding arthroplasty of a joint:

In the presence of decreased motion, motion impairments are derived separately (Sections 3.1f through 3.1j) and *combined* with arthroplasty impairments using the Combined Values Chart (p. 322).

The language on page 3/62 clearly provides that impairment for arthroplasty procedures is to be derived by combining loss of ROM, if any, with arthroplasty impairment under Table 27. The language contained on page 3/58 is ambiguous, whereas the language on page 3/62 provides more clear instruction regarding the rating of arthroplasty procedures. Therefore, we hold that impairment for a distal clavicle resection arthroplasty that was received as treatment for the compensable injury results in 10% UE impairment under Table 27, which is then combined with ROM impairment, if any, as provided by the AMA Guides. We note that the manner of assessing loss of ROM, including but not limited to whether or not loss of ROM should be invalidated or the comparison of ROM of a contralateral joint, remains within the discretion of the certifying doctor.

151161 – Extent of injury, the specific conditions in dispute must be explained - In evidence is Dr. M’s causation letter, which describes the mechanism of injury and references an MRI of the right shoulder. Dr. M states “[t]he weight of the tire and the angle in which the patient was loading the tire caused the pain along with the need for surgical intervention. The MRI performed on 10/2/2013 showed distal supraspinatus tendonitis and mild bursitis. With the information provided and the physical examinations I have been able to obtain, it is my professional opinion the incident of (date of injury) is a plausible cause to the pain and disorder of the patient’s right shoulder.” In evidence is an operative report dated October 10, 2014, from Dr. M, that states the claimant underwent a right shoulder “arthroscopy, subacromial decompression, bursectomy, and debridement of labrum.” Although the diagnostic studies reference the extent-of-injury conditions in dispute, the medical records do not contain any explanation of how the compensable injury of (date of injury), caused a labral tear, partial intrasubstance tear, partial articular surface tear, and tendinosis of the infraspinatus tendon of the right shoulder.

151207 – Extent of injury/ sprain/strains do not need expert causation - The hearing officer found that the compensable injury of (date of injury), does not extend to Grade I strain/tear of the infraspinatus muscle. Where the subject is one where the fact finder has the ability from common knowledge to find a causal connection, expert evidence is not required to establish causation. In APD 130808, decided May 20, 2013, the Appeals Panel held that Grade II cervical sprain/strain and Grade II lumbar sprain/strain do not require expert medical evidence. *See* APD 130915, decided May 20, 2013. *See also* APD 120383, decided April 20, 2012, where the Appeals Panel rejected the contention that a cervical strain requires expert medical evidence; APD 992946, decided February 14, 2000, where the Appeals Panel declined to hold expert medical evidence was required to prove a shoulder strain; and APD 952129, decided January 31, 1996, where the Appeals Panel declined to hold expert medical evidence was required to prove a back strain. Although the hearing officer could accept or reject in whole or in part the claimant’s testimony or other evidence, the hearing officer is requiring a higher standard than is required under the law, as cited in this decision, to establish causation.

151219 – Impairment rating – How to rate a total knee replacement.

151371 – Claimant was a no show, 10-day letter sent - The claimant did not attend the June 4, 2015, CCH, or respond to the 10-day letter that was sent to the claimant by the hearing officer after the CCH to the claimant’s address of record. The hearing officer closed the record on June 29, 2015. The hearing officer determined that the claimant did not have good cause for his failure to appear for the CCH of June 4, 2015. On appeal the claimant contends that he did not recall receiving documentation that was mailed to his address of record. The claimant states that he did not know that a CCH was set for June 4, 2015. The hearing officer’s 10-day letter in the appeal file was sent to the claimant’s correct address. The claimant does not provide any additional information regarding a reason he may not have received the 10-day letter. The hearing officer’s determination that the claimant did not have good cause for his failure to appear for the CCH of June 4, 2015, is supported by sufficient evidence.

151382 – Claimant’s attorney fees in SIBs case - The Texas Department of Insurance, Division of Workers’ Compensation (Division) Order for Sequence No. 77, dated May 14, 2015, grants attorney’s fees to the claimant’s attorney for travel time and attendance at a BRC held on September 10, 2013. The standard for review in an attorney’s fees case is abuse of discretion. Division records indicate that a BRC was held in Corpus Christi, Texas, on September 9, 2013, and lasted 45 minutes. Division records do not indicate that a BRC was held in this case on September 10, 2013. Additionally, the carrier attached to its appeal, a Order for Sequence No. 60 dated December 11, 2014, which reflects that the same attorney previously requested time for travel time to and attendance at a BRC on September 10, 2013, which was approved by a hearing officer. Given the discrepancy between the date of the BRC reflected in Division records and the date of service requested for attendance and travel to the BRC by the claimant’s attorney and the duplication of requested fees as reflected in the Order for Sequence No. 60, we remand the Order to the hearing officer for a hearing regarding these requested fees.

151390 – Claimant’s attorney fees in SIBs case - The carrier contends that the fees submitted included 5.0 hours for travel time, which is the amount consistently billed by this office for round trip travel from San Antonio to Corpus Christi, Texas. The carrier contends that 5.0 hours does not reflect the actual travel time by the attorney to the contested case hearing. Additionally, the carrier contends that the claimant’s attorney submitted a different amount of time for attending the BRC than the attorney who represented the carrier at the same BRC. Neither the respondent 1 (claimant) nor the respondent 2 (atty) responded. Division records indicate that a BRC was held on November 10, 2014, and was continued after 20 minutes. The amount of time requested by the claimant’s attorney was 45 minutes. Given the discrepancy between the actual time of the BRC reflected in Division records and the amount of time requested for attendance by the claimant’s attorney at the same proceeding, we remand the Order to the hearing officer for a hearing regarding these requested fees.

151401 – Claimant’s attorney fees in SIBs case - Division records indicate that a CCH was held on July 23, 2012, and was concluded on the same date, lasting 100 minutes. The amount of time requested by the claimant’s attorney was 105 minutes. Given the discrepancy between the actual time of the CCH reflected in Division records and the amount of time requested for attendance by the claimant’s attorney at the same proceeding, we remand the Order to the hearing officer for a hearing regarding these requested fees.

151407 – Headaches do not require expert causation - The hearing officer determined that the (date of injury), compensable injury does not extend to post-traumatic headaches. The carrier accepted a forehead laceration as part of the compensable injury and it was undisputed that the claimant fell striking his head causing the laceration. The medical records in evidence document that the claimant had a 5 cm laceration on the right side of his forehead and complained about his head. Numerous medical records in evidence document the claimant’s headaches. Under the facts of this case as discussed above, the hearing officer’s determination that the compensable injury does not extend to post-traumatic headaches is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.