2016 IL App (3d) 150658WC-U

Workers' Compensation
Commission Division
Order Filed September 26, 2016

No. 3-15-0658WC

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

CITY OF PEORIA,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Peoria County
	)	
v.	)	No. 15 MR 46
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*,	)	Honorable
	)	James Mack,
(Bryan Grant, Appellee).	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hudson, Harris, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* We: reversed the judgment of the circuit court which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) awarding the claimant benefits pursuant to the Workers' Occupational Diseases Act (Act) (820 ILCS 310/1 *et seq.* (West 2010)); vacated the Commission's decision; and remanded the matter back to the Commission with instructions to reweigh the evidence without treating a statutory presumption as evidence.

¶ 2 The City of Peoria (City), appeals from a judgment of the circuit court of Peoria County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission), awarding the claimant, Bryan Grant, benefits pursuant to the Workers' Occupational Diseases

Act (Act) (820 ILCS 310/1 *et seq.* (West 2010)). For the reasons which follow, we reverse the judgment of the circuit court, vacate the Commission's decision and remand the matter back to the Commission with directions.

¶ 3 The following factual recitation is taken from the evidence adduced at the arbitration hearing held on September 24, 2013.

¶ 4 The claimant testified that, at the time of his occupational disease at issue, he had worked for the City's fire department for approximately 18 years, beginning in 1990. During that time, he held positions of firefighter and engineer. In those positions, the claimant suppressed a variety of fires, including structural fires, rubbish fires, dumpster fires, car fires, and grass fires. While suppressing fires, the claimant wore a "self-contained breathing apparatus" (SCBA) which weighed approximately 60 pounds and provided breathable air. The claimant testified that his responsibilities included operating fire extinguishers, advancing chemical/water hoses, and using fog nozzles to direct a stream of water on the fire. In addition, he would frequently breach doors, walls, and ceilings to ventilate burning buildings and dissipate smoke. The claimant explained that after the main fire was extinguished, firefighters would perform overhaul and salvage operations which involved checking the fire scene for "hot spots," extinguishing smoldering embers, and removing debris. Although smoke and fumes were present during overhaul and salvage operations, the claimant testified that firefighters would remove the SCBA's because much of the heat and smoke had dissipated and it was easier to communicate and see without it. The claimant testified that he was regularly exposed to various substances, including smoke, toxins, carcinogens, asbestos, and diesel fumes.

¶ 5 The claimant testified that he never smoked tobacco of any kind, has no family history of renal cell carcinoma, and has never been diagnosed with any other form of cancer.

¶ 6 On August 19, 2008, the claimant presented to the emergency department at St. Francis Medical Center with complaints of abdominal pain. On admission, the emergency room physician ordered a CT scan of the claimant's abdomen and pelvis, which revealed (1) "acute appendicitis" and (2) the presence of a "complex cystic mass on the upper pole of the right kidney, suspicious for renal cell carcinoma." The claimant underwent an emergency appendectomy and was referred to Dr. Kelly Bewsey, a urologist, regarding the mass on his right kidney.

¶ 7 On September 2, 2008, the claimant was seen by Dr. Bewsey. According to Dr. Bewsey's notes of that visit, she reviewed the CT scan of August 19, 2008, and confirmed that the claimant had a "5.6 x 4.1 cm complex cystic mass at the superior pole of his right kidney" which is "highly suspicious for a cystic renal cell carcinoma." The doctor discussed her findings with the claimant and recommended surgery to remove his right kidney.

¶ 8 On September 10, 2008, Dr. Bewsey operated on the claimant, performing a "hand assisted laparoscopic nephrectomy" on his right kidney. The surgical pathology report, dated September 15, 2008, confirmed that the cystic mass on the claimant's right kidney was "clear cell (conventional) renal carcinoma." Dr. Bewsey's post-operative medical records state that the claimant recovered well from the surgery and that his blood pressure and metabolic profile have been normal.

¶ 9 On October 7, 2008, the claimant saw Dr. Robert Meister, his primary care physician at Proctor Medical Group. Those records state that the claimant takes Avalide for hypertension, is on a low sodium diet, and his blood pressure is under control.

¶ 10 On October 27, 2008, Dr. Bewsey released the claimant to full-duty work.

¶ 11 On June 16, 2010, the claimant was examined by Dr. Peter Orris, an internal medicine physician, at the request of his attorney. Following his review of the claimant's medical records, employment history, and his physical examination of the claimant, Dr. Orris authored a written report of his findings. Dr. Orris stated that the claimant's relevant past medical history included hypertension, gastroesophageal reflux disease, and being somewhat overweight. The claimant had no history of smoking, and his family history was negative for any form of cancer other than prostate cancer which caused his father's death. Dr. Orris explained that "[i]t is well documented that firefighters are exposed to multiple carcinogenic and toxic chemicals in the line of duty," including polycyclic aromatic hydrocarbons, asbestos, diesel engine exhaust, and cadmium, all of which are risk factors for developing renal cell carcinoma. Dr. Orris noted that the claimant infrequently used respiratory protection during overhaul and salvation operations, which exposed him to "pyrolysis products of burned materials" which "produce substantial concentrations of toxins in the air." Dr. Orris also cited various studies published in medical journals demonstrating that "firefighters are [at] an increased risk for renal cell carcinoma." Based upon this information, Dr. Orris opined that the claimant's exposure to smoke, carcinogens, and toxic chemicals while working as a firefighter was a cause of his renal cell carcinoma. He also observed that, while the claimant has been in a good state of health and returned to full-duty work, he is nevertheless at an "increased risk of damage to his renal function if he suffered a trauma to his remaining kidney."

¶ 12 The City retained Dr. Scott Eggener, a urologic oncologist at the University of Chicago, to perform a records review. In a letter dated June 23, 2010, Dr. Eggener stated that he reviewed the claimant's occupational history and job description, medical records, and the CT scan of September 2008 to determine whether the claimant's kidney cancer was related to his work as a

firefighter. Dr. Eggener explained that, for the overwhelming majority of patients diagnosed with kidney cancer, there is no etiology or explanation as to why the cancer developed. In a very small percentage of patients, there is a familial or genetic abnormality that predisposes them to developing kidney cancer. According to Dr. Eggener, the most established risk factors for developing kidney cancer are cigarette smoking, obesity, hypertension, and dietary habits (caffeine consumption). He stated, however, that more than 100 chemicals have been identified as potential etiologic factors leading to the development of kidney cancer; though, no individual agent has been uniformly and definitively established as a causative agent in human kidney cancer. As to occupational risks, Dr. Eggener noted that workers in the metal, chemical, rubber and printing industries are at a "very modest increased risk" for developing kidney cancer. He cautioned, however, that "the aforementioned risk factors are somewhat controversial and evidence exists both suggesting and refuting an association." As to the claimant's work as a firefighter, Dr. Eggener noted that the evidence is "limited" due to a "lack of good exposure assessment in almost all studies" and the implication is that "there is not, automatically, a 'more likely than not' probability *** that a kidney cancer in a fireman is the result of exposures encountered in his occupation." Dr. Eggener opined that,

> "it is inappropriate and not evidence-based to suggest that being a fireman conclusively leads to an elevated risk of developing kidney cancer. If, indeed, there was a significantly increased risk of developing kidney cancer as a fireman, it undoubtedly would be a strong, consistent and irrefutable finding in virtually all of the previous studies. In fact, the exact opposite is true where there is no consistency, often conflicting results, and no obvious evidence of a link with kidney cancer."

According to Dr. Eggener, the claimant's hypertension, obesity, and caffeine consumption are "well-validated and known risk factors for developing kidney cancer." The doctor concluded his letter by writing that "it is [his] firm opinion there is no definitive association or causation evident for firemen being at an increased risk of developing kidney cancer."

¶ 13 In a letter dated September 28, 2011, Dr. Orris stated that he reviewed Dr. Eggener's report, but his opinion remains unchanged. While he agrees that hypertension and obesity are risk factors that may lead to the development of kidney cancer, he noted that Dr. Eggener provided "no evidence for the exclusion of firefighting as a cause in the development of [kidney] cancer." In support of this assertion, Dr. Orris cited to a study published in Cancer Epidemiology and Prevention by Drs. Schottendeld and Fraumeni which demonstrates that firefighting is a stronger risk factor than hypertension and obesity. Dr. Orris also acknowledged that Dr. Eggener cited an "excellent" medical review conducted by Douglas B. McGregor for the Quebec workers' compensation system (the "McGregor review"). However, according to Dr. Orris, of the 13 medical studies analyzed in the McGregor review, 9 demonstrated that firefighters are at an "elevated" to "high" risk of developing kidney cancer. Dr. Orris found it "unfortunate" that Dr. Eggener selectively quoted the McGregor review "to support his preconceived notion as to the lack of a relationship between firefighting and renal cell cancer." As to the claimant's caffeine consumption, Dr. Orris wrote that there are several review articles documenting a "total lack of any epidemiologic data that supported the idea of coffee or soda being risk factors for renal cancer." In sum, while Dr. Orris agreed that hypertension and obesity are risk factors that "probably" played a role in the development of the claimant's renal cell carcinoma, he believed that the claimant's exposure to smoke, carcinogens, and other toxic

chemicals while working as a firefighter constituted a "stronger causative factor." Dr. Orris rejected the idea that caffeine consumption is a risk factor.

¶ 14 On November 10, 2011, Dr. Orris testified in an evidence deposition that the claimant reported wearing an SCBA during fire suppression, but not during overhaul or salvage operations. Dr. Orris testified that the failure to wear an SCBA during overhaul and salvage operations exposes firefighters to "pyrolyses products" and that firefighters have been urged to wear at least a half-face chemical respirator during overhaul and salvage operations because they are exposed to smoke and other carcinogens.

¶ 15 On cross-examination, Dr. Orris admitted that there is no clear etiology for why renal cell carcinoma develops. He also recognized that obesity and hypertension are risk factors that may have contributed to the claimant's development of renal cell carcinoma. Although Dr. Orris acknowledged that some scientific studies found that firefighters are not at a higher risk for developing renal cell carcinoma, he did not agree with Dr. Eggener's statement that the evidence is "limited" and "not sufficient."

¶ 16 In his evidence deposition, taken November 29, 2011, Dr. Eggener reiterated his opinion that "there's no association between [the claimant] being a fireman and his subsequent development of kidney cancer." He testified that there are three risk factors for developing kidney cancer—smoking, obesity, and hypertension—and the claimant was obese and had hypertension. Regarding occupational risk factors, Dr. Eggener testified that workers in the metal, chemical, rubber, and printing industries, and those exposed to asbestos or cadmium are at an increased risk, but the data is not "particularly convincing." Although Dr. Eggener acknowledged that some studies suggest that exposure to asbestos, cadmium, and gasoline increases the risk for developing kidney cancer, he stated that those studies are "limited by the

lack of specific exposure details as well as a number of other factors." He explained that being a firefighter is not listed among the occupations associated with the development of renal cell carcinoma and that renal cell carcinoma is not generally considered an "occupationally-associated tumor." In short, Dr. Eggener testified that the medical evidence is limited and contradictory and "the implication is that there is not a more likely than not probability that kidney cancer in a fireman is *** a result of exposures from his profession."

¶ 17 On cross-examination, Dr. Eggener was unable to recall when the claimant first became hypertensive or whether it was controlled at the time he was diagnosed with renal cell carcinoma. His field of interest does not include the epidemiological effects of various occupational exposures, and he has never done any studies relating to occupational exposures and resulting cancers. He is not familiar with the chemical composition of smoke emanating from burning insulation, household plastics, carpeting, or draperies.

¶ 18 According to the medical records dated March 22, 2012, from Dr. Robert A. Meister, the claimant's primary care physician, the claimant's mother had coronary artery disease and diabetes and his father had prostate cancer and hypertension. The claimant's siblings have a history of hypertension, obesity, and colon cancer. There is no family history of kidney cancer. The records state that the claimant was never a smoker and does not live with any smokers. According to the social history section of Proctor Medical Group's records, the claimant has "excessive environment exposure" to asbestos, fumes, dust, solvents, noise, air-borne particles, and blood and body fluids. The claimant rarely consumes alcohol, does not take illicit drugs, and consumes caffeinated beverages on a daily basis.

¶ 19 Chief Kent Tomlin testified at the arbitration hearing that firefighters are required to wear SCBAs whenever they are in an atmosphere that is immediately dangerous to their life or health.

He stated that firefighters wear SCBAs while suppressing structural fires, but not during dumpster fires, car fires, or overhaul operations. Chief Tomlin identified the City's exhibit numbers 11 and 13 as compilations of fire statistics dating back to 1990. According to the statistics, the number of fires in a given year, between 1991 and 2002, ranges from 366 to 573. Between 2003 and 2008, there were anywhere between 541 and 1017 fires per year.

¶ 20 On cross-examination, Chief Tomlin testified that dumpster fires and car fires produce toxins and bad air. And, although smoke is present during overhaul operations, he explained that firefighters do not wear SCBAs during the overhaul operations because, by that time, they are hot and want to get the extra 60 pounds off their back. Chief Tomlin testified that the City's fire department is "very much aware of asbestos" and he acknowledged that firefighters encounter it while fighting fires.

¶ 21 The claimant testified that he made a good recovery following the surgical removal of his right kidney and his kidney function is essentially normal. In October 2012, he was promoted to the rank of Captain.

¶ 22 Following a hearing, the arbitrator issued a decision finding that the claimant failed to prove that he sustained an accident that arose out of and in the course of his employment with the City on August 19, 2008, and failed to prove that his condition of ill-being was causally related to his alleged work-related accident. Consequently, the arbitrator denied the claimant benefits pursuant to the Act.

¶ 23 The claimant sought review of the arbitrator's decision before the Commission. On December 26, 2014, the Commission issued a unanimous decision reversing the arbitrator, finding that the claimant's renal cell carcinoma arose out of and in the course of his employment as a firefighter with the City. The Commission explained that the claimant suffered from kidney

cancer and that he is entitled to the benefit of the presumption set forth in section 1(d) of the Act (820 ILCS 310/1(d) (West 2010)) by reason of his 19 years of work as a firefighter. Although the Commission noted that the presumption is rebuttable, it did not explicitly state whether the City presented sufficient evidence to rebut the presumption. Instead, the Commission weighed all of the evidence in the case and ultimately concluded that the claimant "proved both accident and causal connection by a preponderance of the evidence." The Commission awarded the claimant 6 5/7 weeks of temporary total disability (TTD) benefits, and it ordered the City to pay the claimant's reasonable and necessary medical expenses. In addition, the Commission awarded the claimant benefits of $664.72 per week for 100 weeks because his renal cell carcinoma and removal of his right kidney constituted a permanent and partial disability (PPD) to 20% of the person as a whole.

¶ 24 The City filed a petition for judicial review of the Commission's decision in the circuit court of Peoria County. On August 24, 2015, the circuit court entered an order confirming the Commission's decision, and this appeal followed.

¶ 25 The City first contends that the Commission erred, as a matter of law, in its interpretation and application of the rebuttable presumption in section 1(d) of the Act. Because our resolution of this issue requires us to interpret and apply section 1(d) of the Act, we employ the *de novo* standard of review. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 317 Ill. App. 3d 497, 503 (2000).

¶ 26 Section 1(d) of the Act provides, in pertinent part, as follows:

> "Any condition or impairment of health of an employee employed as a firefighter *** which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition,

> hypertension, tuberculosis, or cancer resulting in any disability (temporary, permanent, total, or partial) to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting *** employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment. *** However, this presumption shall not apply to any employee who has been employed as a firefighter *** for less than 5 years at the time he or she files an Application for Adjustment of Claim concerning this condition or impairment with the Illinois Workers' Compensation Commission." 820 ILCS 310/1(d) (West 2010).

¶ 27 In this case, the City does not dispute that the claimant suffered from kidney cancer and that he is entitled to the benefit of the presumption set forth in section 1(d) of the Act by reason of his 19 years of work as a firefighter. The City argues, however, that the presumption is rebuttable and that the Commission erred by applying the wrong legal approach to the City's burden of rebutting the presumption. The City urges this court to apply the burden-shifting approach set forth in *Diederich v. Walters*, 65 Ill. 2d 95 (1976).

¶ 28 In *Diederich*, our supreme court explained that rebuttable presumptions create "a [p]rima facie case as to the particular issue in question and thus has the practical effect of requiring the party against whom it operates to come forward with evidence to meet the presumption." *Id.* at 100. If evidence is introduced which is contrary to the presumption, the presumption will cease to operate, and the issue will be determined on the basis of the evidence adduced at trial as if no presumption had ever existed. *Id.* at 100-01. The burden of proof does not shift but remains with the party who initially had the benefit of the presumption. *Id.* at 101. The only effect of the rebuttable presumption is to create the necessity of evidence to meet the *prima facie* case created

thereby, and which, if no proof to the contrary is offered, will prevail. *Id*. at 102. The court further stated:

> " 'A presumption is not evidence, and cannot be treated as evidence. It cannot be weighed in the scale against evidence. Presumptions are never indulged in against established facts. They are indulged in only to supply the place of facts. As soon as evidence is produced which is contrary to the presumption which arose before the contrary proof was offered, the presumption vanishes entirely.' [Citations]." *Id*. at 102.

¶ 29 Although *Diederich* involved a wrongful death action, this court has previously recognized that the policies of presumptions found in civil and criminal law are helpful in analyzing presumptions in workers' compensation cases. See *Chidichimo v. Industrial Comm'n*, 278 Ill. App. 3d 369, 376 (1996) (applying *Diederich*'s approach to an evidentiary presumption that arises from the destruction of evidence). Indeed, courts in other jurisdictions have applied a similar framework when analyzing presumptions in the context of workers' compensation claims. See, *e.g.*, *American Grain Trimmers, Inc. v. Office of Workers' Compensation Programs*, 181 F. 3d 810 (7th Cir. 1999). We agree with the City that the framework set forth in *Diederich* governs our analysis where the presumption in section 1(d) of the Act is invoked.

¶ 30 With this framework in mind, we now turn to the City's claim that the Commission misapplied *Diederich*'s analytical framework. In support of its argument, the City directs this court's attention to the following passage in the Commission's decision:

> "The Commission finds that, pursuant to [s]ection 1(d) of the Occupational Disease[s] Act, [the claimant] presented a prima facie case for both accident and

> causal connection. The issue becomes then whether [the City] succeeded in rebutting the statutory presumption.
>
> Both parties offered extremely persuasive expert testimony."

¶ 31 According to the City, the Commission correctly noted that the claimant presented a *prima facie* case and that the City was required to come forward with some evidence to rebut the presumption. The City points out, however, that the Commission (1) failed to explicitly state whether it presented sufficient evidence to rebut the presumption, and (2) improperly "considered and weighed the evidence presented by both parties in determining whether [it] rebutted the statutory presumption." We disagree.

¶ 32 The City's contentions are flawed in two respects. First, it is presumed that the Commission considers competent and proper evidence in reaching its decision. *National Biscuit Inc. v. Industrial Comm'n*, 129 Ill. App. 3d 118, 120 (1984). The failure of the Commission to explicitly state whether the City successfully rebutted the presumption, by itself, should not serve to rebut the presumption that the Commission considered proper and competent evidence. Second based upon our review of the Commission's decision, we believe the Commission implicitly found that the City satisfied its burden of production by presenting "extremely persuasive expert testimony"—the causation opinion of Dr. Eggener (the City's independent medical examiner)—to rebut the statutory presumption. Although its decision could have been clearer, the Commission immediately proceeded to the third and final step by weighing all of the evidence in the case to determine whether the claimant met his burden of proof. Thus, the City's assertion that the Commission improperly "considered and weighed the evidence presented by both parties" is incorrect. By proceeding to the third step, the Commission implicitly found that the City rebutted the presumption in section 1(d) of the Act. And, because the Commission

reached the third step, any error in its analysis of whether the City rebutted the presumption, is harmless.

¶ 33 Having found that the City rebutted the section 1(d) presumption, we next address the City's contention that the Commission erred by treating the section 1(d) presumption as evidence and misplacing the burden of proof. According to the City, once it offered evidence to contradict the presumption, the presumption is "destroyed" and may not be considered as evidence. The City maintains that the burden of proof remained with the claimant, and the issue of accident and causation had to be determined on the basis of the evidence presented at the arbitration hearing, as if the presumption had never existed. The City asks this court to remand this matter back to the Commission so it can reweigh the evidence without considering the presumption.

¶ 34 The claimant responds by arguing that the Commission did not give any weight to the presumption. The claimant argues the Commission did not rely upon the presumption in finding that he met his burden of proof; rather, it was simply addressing the arbitrator's decision which relied upon the claimant's failure to wear a SCBA during overhauls. The claimant asserts that the Commission was rejecting the notion that his contributory negligence prevented him from recovering under the Act.

¶ 35 In support of their respective arguments, the parties direct this court's attention to the following passage in the Commission's decision:

> "The Commission finds that [the claimant] may have been exposed to 'bad air' during the occasions he did not use the SCBA and that, *pursuant to the presumption contained in *** [s]ection 1(d) of the Occupational Diseases Act*, and the medical causation opinions presented by Dr. Orris and medical literature, [the claimant] has proved both accident and causal connection by a preponderance

> of the evidence. * * * Therefore, the Commission reverses the Decision of the Arbitrator, and finds [the claimant] proved he sustained a compensable accident under the Act and that the accident was a cause of his condition of ill-being." (Emphasis added.)

¶ 36 Based upon the above quoted language, we agree with the City that the Commission misapprehended the role of the statutory presumption by considering it as evidence. As our supreme court stated in *Diedrich*: a presumption is not evidence, cannot be treated as evidence, and "cannot be weighed in the scale against evidence." *Diederich*, 65 Ill. 2d at 102; see also *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 461 (1983). In this case, as soon as the City produced evidence that was contrary to the presumption in section 1(d) of the Act—*i.e.*, the causation opinion of Dr. Eggener that the claimant's kidney cancer was not causally connected to the exposures of his employment as a firefighter—the presumption vanished entirely and the issue should have been determined as if the presumption never existed. Because the Commission treated the presumption as evidence, we question whether it erroneously placed the burden of proof on the City to prove that the claimant's kidney cancer did not arise out of and in the course of his employment with the City. Although the Commission does not need to be reminded that the claimant has the burden of proving that his kidney cancer arose out of and in the course of his employment with the City, we must be assured on appeal that the Commission did not improperly shift the burden to the City by treating the presumption in section 1(d) as evidence. Consequently, we believe a limited remand is appropriate in the present case to ensure that the Commission has applied the correct principles of law. We wish to be clear that we are not instructing the Commission as to the conclusion it should reach on remand, only that it

should decide the issue without giving evidentiary weight to the presumption in section 1(d) of the Act.

¶ 37 In light of our decision, we need not reach the City's second argument, namely, that the Commission's decision that the claimant is permanently and partially disabled to the extent of 20% of the person as a whole is against the manifest weight of the evidence.

¶ 38 For the foregoing reasons, we reverse the judgment of the circuit court which confirmed the Commission's decision; vacate the Commission's decision; and remand this matter back to the Commission with directions to reweigh the evidence without considering the presumption in section 1(d) of the Act as evidence.

¶ 39 Circuit court reversed; Commission's decision vacated; and cause remanded with directions.