

MUNICIPAL FIRE AND POLICE RETIREMENT
SYSTEM OF IOWA
7155 Lake Drive, Suite 201
West Des Moines, IA 50266

IN THE MATTER OF:

MIGUEL ANDREW HERRERA,

Appellant.

DECISION

Iowa Code § 411.6(3) (2015) and
Iowa Code § 411.6(5) (2015)

STATEMENT OF THE CASE

Miguel “Mike” Herrera (“Herrera”) filed his application for an accidental disability pension on or about October 7, 2015. On December 4, 2015, the Medical Board of the University of Iowa Hospitals and Clinics reported its findings to the System regarding Herrera’s disability. An initial decision was made by the System on January 7, 2016. That decision awarded an accidental disability pension based on Herrera’s shoulder injury, but awarded ordinary disability for his left elbow and hand condition and his post-traumatic stress disorder (“PTSD”). Herrera filed a timely appeal challenging the decision to the extent it awarded ordinary, rather than accidental, disability. A hearing was held before the Disability Appeals Committee of the Board (comprised of Mary Bilden, Kay Cmelik, and June Anne Gaeta, chair) on April 6, 2016 at the offices of the System. Herrera appeared, and was represented by attorney Kent Balduchi. Attorney Carol Moser appeared for the City of Des Moines. Daniel Cassady, Deputy Director, appeared on behalf of the System. Alice Helle was present as counsel to the Committee. Testimony was received from Herrera. Des Moines firefighters Joseph Van Hallen and Rick Thomas testified for Herrera. Matt Porter, a District Chief for the Des Moines Fire Department, testified for the City of Des Moines. Both parties filed post-hearing briefs.

FINDINGS OF FACT

The Committee, having reviewed the evidence of record, finds as follows:

1. Miguel Herrera was born on April 12, 1961 and commenced service as a firefighter for the City of Des Moines on or about June 3, 1985.
2. On December 4, 2015, the System’s Medical Board opined that Herrera is mentally and physically incapacitated from the performance of the functional demands of his duties as a firefighter as a result of his “(i) chronic left upper extremity pain following arthroscopic shoulder surgery and chronic lateral epicondylalgia [“tennis elbow”] and

(ii) post-traumatic stress disorder.” The Medical Board further opined that his incapacity due to those impairments is likely to be permanent. The Medical Board also addressed Herrera’s reported “persistent left hand numbness and weakness.” It stated: “Although these symptoms are incompatible with full firefighting duty, the evaluating physicians were unable to provide a diagnosis that accounts [for] these symptoms. Regardless, in the opinion of the evaluating physicians, Mr. Herrera is not fully able to perform all duties of firefighting due to his left hand numbness and weakness, despite that fact this it cannot be attributed to a diagnosable condition or disorder at this time. It is not possible to state whether this condition will improve sufficiently to warrant revaluation after one year.”

3. Herrera responded to a fire at the Equitable Building in downtown Des Moines on August 30, 2014 (the “Equitable fire”). While inside the building, Herrera became separated from his crew. He testified that he was exhausted and became disoriented, and panicked when he realized he was lost and alone. As he reached to retrieve his flashlight, the regulator on his self-contained breathing apparatus (“SCBA”) separated from the face piece and he breathed in hot smoke and gasses. He was able to reattach the regulator, but at some point during all of this he fell, either down the stairway or over the guardrail to the stairway below. He was found at the foot of the stairs by another firefighter and was transported to the hospital, where he remained for several days.
4. It is undisputed that Herrera’s shoulder injury was caused by the fall and that his PTSD was caused by the Equitable fire incident.
5. As noted by the Medical Board, the etiology of his left hand issues is unclear. His elbow condition was described as “tennis elbow.” Herrera testified that he injured his left elbow in a rescue call sometime prior to 2004. It was treated by injections and didn’t bother him from about 2005 and August 30, 2014. He testified that after his March, 2015 shoulder surgery for the injury he suffered in the Equitable fire, he began having elbow pain and hand numbness “like pre-2005, only worse.
6. It is undisputed that Herrera is incapacitated by his PTSD and his shoulder, hand and elbow problems. It is also undisputed that his shoulder injury and PTSD were caused by the Equitable fire incident.
7. The appeal in this case is for findings of accidental (rather than ordinary) disability for Herrera’s elbow/hand issues and for his PTSD. The legal issues are thus
 - a. Whether Herrera’s hand and elbow problems were caused by an injury incurred in or aggravated by the actual performance of duty at some definite time and place; and
 - b. Whether the Equitable fire incident that caused Herrera’s PTSD constitutes workplace stress of greater magnitude than the day-to-day stresses experienced by other firefighters.

8. Much of the testimony related to the latter issue. Herrera, Van Hallen and Thomas had all responded to the Equitable fire, and testified about its unusual nature. The crews had difficulty locating the “seat” of the fire, which was eventually discovered to be between the second and third floors of the building in a mechanical “chase.”
9. Herrera testified that during the time he was lost and disoriented, he panicked and thought he was going to die.
10. Thomas testified that he had never personally been in a situation at a fire where he thought he was going to die. He agreed, under cross-examination, that there is always going to be some hazard, known or unknown, at a fire scene, regardless of whether the scene is residential or commercial.
11. Van Hallen testified that he soon realized that the fire was understaffed, and commented that “communication was sketchy,” not at all like a typical fire.
12. District Chief Porter, who was the incident commander at the Equitable fire, testified that 29 units were involved in fighting the fire, and that it took approximately 10 hours to extinguish. He testified that, although the incident was unusual, it did not exceed his experience, or the department’s training or equipment.

CONCLUSIONS OF LAW

1. As a preliminary matter, we must consider the City’s standing objection to Member’s Exhibits 1-3, which were offered into evidence subject to the objection.
 - a. Member’s Exhibit 1 consisted of a list of Iowa fire fatalities from the State Fire Marshal Division of the Iowa Department of Public Safety.
 - b. Member’s Exhibit 2 consisted of charts from the National Fire Protection Association illustrating causes of firefighter fatalities in the United States.
 - c. Member’s Exhibit 3 was a list by year of line of duty deaths among firefighters in the United States.

The City objected to the exhibits based on lack of foundation and lack of relevance. We find that the proposed exhibits are not relevant to the issues before the Committee and are therefore inadmissible.

2. Iowa Code § 411.6(3) states:

3. Ordinary disability retirement benefit. Upon application to the system, of a member in good standing or of the chief of the police or fire departments, respectively, any member shall be retired by the system, not less than thirty and not more than ninety days next following the date of filing the application, on an ordinary disability retirement allowance, if the medical board after a medical examination of the member certifies that the member is mentally or physically incapacitated for further performance of

duty, that the incapacity is likely to be permanent, and that the member should be retired. However, if a person's membership in the system first commenced on or after July 1, 1992, the member shall not be eligible for benefits with respect to a disability which would not exist, but for a medical condition that was known to exist on the date that membership commenced. A member who is denied a benefit under this subsection, by reason of a finding by the medical board that the member is not mentally or physically incapacitated for the further performance of duty, shall be entitled to be restored to active service in the same position held immediately prior to the application for disability benefits. The member-in-good-standing requirement of this subsection may be waived for good cause as determined by the board. The burden of establishing good cause is on the member.

3. Iowa Code section 411.6(5) states (in relevant part) as follows:

5. *Accidental disability benefit.*

a. Upon application to the system, of a member in good standing or of the chief of the police or fire departments, respectively, any member in good standing who has become totally and permanently incapacitated for duty as the natural and proximate result of an injury or disease incurred in or aggravated by the actual performance of duty at some definite time and place, or while acting pursuant to order, outside of the city by which the member is regularly employed, shall be retired by the system if the medical board certifies that the member is mentally or physically incapacitated for further performance of duty, that the incapacity is likely to be permanent, and that the member should be retired. However, if a person's membership in the system first commenced on or after July 1, 1992, the member shall not be eligible for benefits with respect to a disability which would not exist, but for a medical condition that was known to exist on the date that membership commenced. A medical condition shall be deemed to have been known to exist on the date that membership commenced if the medical condition is reflected in any record or document completed or obtained in accordance with the system's medical protocols pursuant to section 400.8, or in any other record or document obtained pursuant to an application for disability benefits from the system, if such record or document existed prior to the date membership commenced. A member who is denied a benefit under this subsection, by reason of a finding by the medical board that the member is not mentally or physically incapacitated for the further performance of duty, shall be entitled to be restored to active service in the same position held immediately prior to the application for disability benefits.

4. An accidental disability pension is payable under chapter 411 for a mental injury only if the traumatic incident that caused the injury constitutes workplace stress of greater magnitude than the day-to-day stresses experienced by other police officers (or firefighters). *See Moon v. MFPSI*, 548 N.W.2d 565 (Iowa 1996) and *City of Cedar*

Rapids v. MFPRSI, 572 N.W.2d 919 (Iowa 1998). This is referred to by the courts as the “legal causation” prong of the test for a compensable mental injury.

5. Herrera argues in his brief that “when a claim is based on a manifest happening of a sudden traumatic nature from an unexpected cause or unusual strain, the legal causation test is met irrespective of the absence of similar stress on other employees.” (Citing to a workers’ compensation case, *Brown v. Quik Trip Corp.*, at 641 N.W.2d 725, 729 (Iowa 2002)). That case involved a convenience store employee who witnessed a shooting in the store while alone on duty and who, less than a week later, was the victim of an armed robbery while working alone at night. The defendant employer argued in that case that the plaintiff did not meet the standard because he had failed to produce testimony of similarly situated employees to establish his claim of legal causation. The court disagreed, but at any rate, the *Brown* case is not on point. The appropriate mental injury standard and analysis for cases arising under chapter 411 is set out in the *Moon* and *City of Cedar Rapids* cases cited above.
6. The Equitable fire incident was clearly stressful, and would constitute workplace stress of greater magnitude than the day-to-day stresses experienced by workers in most professions. Being a firefighter is inherently dangerous and stressful, however. The issue is not whether a fire incident such and Herrera’s resulting injuries are rare, but whether the cited incident constitutes workplace stress of greater magnitude than the day-to-day stresses experienced by other firefighters. The Committee finds that the incident in question does not meet that standard.
7. With regard to Herrera’s hand and elbow problems, as noted above, the Medical Board found them disabling, but was unable to establish a clear diagnosis that accounted for his hand symptoms. Herrera failed to establish that his current hand and elbow symptoms were caused by the performance of duty at some definite time and place.

DECISION

Miguel Herrera’s appeal for a finding of accidental disability under chapter 411 for his post-traumatic stress disorder and his hand and elbow problems is hereby denied. He will continue to receive an accidental disability pension for his shoulder injury, with his PTSD and hand and elbow problems classified as ordinary disability.

Dated this 19th day of May, 2016.

 , Chair
Disability Appeals Committee

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at such attorney's address as disclosed by the pleadings of record herein on the 19 day of May, 2016.

By: ☒ U.S. Mail ☐ Facsimile
☐ Hand Delivered ☐ Overnight
Courier
☐ Federal Express ☐ Other

Signature John Haggan