[J-56-2017] [MO:Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CITY OF PHILADELPHIA FIRE DEPARTMENT	:	No. 13 EAP 2017
	:	
	:	Appeal from the Order of
	:	Commonwealth Court entered on
v.	:	08/12/2016 at No. 579 CD 2015
	:	vacating and remanding the Order
	:	entered on 03/13/2015 by the
WORKERS' COMPENSATION APPEAL BOARD (SLADEK)	:	Workers' Compensation Appeal Board
	:	at Nos. A13-1317 and WCAIS Claim
	:	No: 4037688.
	:	
APPEAL OF: SCOTT SLADEK	:	ARGUED: September 12, 2017

CONCURRING AND DISSENTING OPINION

JUSTICE MUNDY **DECIDED: October 17, 2018**

It is incongruent with the intent of the Workers' Compensation Act and the language of its relevant provisions to place a burden of causation on a firefighter when the Act itself provides for the presumption of causation. The statutory scheme contemplated by the Legislature did not intend to place any initial burden on a claimant to show that his or her cancer is capable of being caused by exposure to IARC Group 1 carcinogens. Thus, I respectively dissent as to the Majority's resolution of the first issue.

Sladek argues the Commonwealth Court decision requiring him '"to prove that his malignant melanoma is a type of cancer caused by Group I carcinogens to which he was exposed in the workplace to establish an occupational disease"' before the presumptions afforded under the Act may be invoked places "an additional and unreasonable burden of proof for a firefighter diagnosed with cancer." Sladek's Brief at 18 (citing *City of Phila. Fire Dept. v. W.C.A.B.*, 144 A.3d 1011, 1021-22 (Pa. Cmwlth. 2016) (en banc)). At the

outset, it bears noting that this Court has stated that the Workers' Compensation Act is remedial in nature, and the aim of its enactment was to benefit the worker. *Phoenixville Hosp. v. W.C.A.B. (Shoap)*, 81 A.3d 830, 838 (Pa. 2013). Accordingly, we must liberally construe the Act in accordance with its humanitarian aims, recognizing that borderline interpretations should be resolved in favor of the worker. *Id.*

Reading the relevant provisions of the Act as a whole, in order to be entitled to compensation benefits for cancer, a firefighter claimant must show: 1) the presence of an occupational disease under Section 108(r); 2) four or more years of service in continuous firefighting duties; 3) direct exposure to a Group 1 carcinogen; and 4) that he or she underwent a physical examination that did not reveal the existence of cancer prior to asserting the claim or engaging in firefighting (provided the City does not successfully rebut the presumption). 77 P.S. § 27.1; 77 P.S. § 414; 77 P.S. § 413. However, the question before this Court concerns what if any evidentiary burden imposed on a claimant in order to first meet the definition of an occupational disease under Section 108(r).

The Majority concludes that a firefighter-claimant "must produce evidence that it is possible that the carcinogen in question caused the type of cancer with which the claimant is afflicted." Majority Op. at 17 (emphasis omitted). Notwithstanding the Majority's characterization that this does not constitute "a heavy burden" upon a claimant, it is a burden nonetheless. The Legislature did not intend any such burden to be placed on a claimant before he or she is entitled to the evidentiary presumption at Section 301(e). *See id.* at 18. By its enactment, Section 301(e) created "a procedural or evidentiary advantage to a claimant who has established that he has contracted an occupational disease and the disease was a hazard in his occupation or industry." *City of Wilkes-Barre v. W.C.A.B. (Zuczek)*, 664 A.2d 90, 92 (Pa. 1990). The evidentiary presumption afforded by Section 301(e) would be negated by requiring a causal showing by a claimant at the

outset of the litigation. By listing cancer as an occupational disease and creating a rebuttable presumption of causation, the Legislature has acknowledged that firefighters are exposed to a number of IARC Group 1 carcinogens in the course of the dangerous work they perform. Indeed, in affirming the award of compensation benefits to Sladek in the instant case, the Workers' Compensation Appeal Board turned to the legislative history underlying Section 108(r) and observed the following:

> We also note that in remarks made in the Pennsylvania House of Representatives regarding House Bill 797, which was enacted as Act 46 of 2011, reference was also made to prior House Bill 1231, which was described as similar legislation that had been passed in the previous year's session by the House and the Senate but was vetoed on November 27, 2010. It was specifically noted that House Bill 797 represented a compromise that improved upon House Bill 1231. (Pa. Legis. Journal - House, June 21, 2011, at 1337-1339). The text of House Bill 1231 reveals that a prior version of Section 108(r) provided for cancer caused by exposure to "a known carcinogen which is recognized by the International Agency for Research on Cancer which is reasonably linked to the cancer." However, the phrase "which is reasonably linked to the cancer" was subsequently removed and did not appear in the final text of that bill as passed by the House and Senate. *See* H.B. 1231, 193rd Leg., 2009-2010 Reg. Sess., Printer Number 4393. Had the General Assembly wished to require claimants to prove a specific causal link between a particular carcinogen and a particular cancer as part of their initial burden, it could have retained language to that effect in House Bill 1231 or added such language back to House Bill 797, which ultimately became Act 46 of 2011, but that did not occur.

Board Op. at 13-14, n. 11.

I agree with the Board's review of the statutory language and legislative history and its conclusion based thereon that the omission of the "reasonably linked to the cancer" language from Section 108(r) was a purposeful choice by the General Assembly not to require a causal link as an initial burden on a claimant. In sum, review of Sections 108(f), 301(f), and 301(e) demonstrate that once a firefighter establishes contraction of a

cancer and exposure to Group 1 carcinogens and has also established four or more years in continuous firefighting duties and a history of being cancer-free prior to service, he or she is entitled to the rebuttable presumption that the cancer was caused by workplace activities.[1] *See* 77 P.S. §§ 27.1(r), 414, 413. This construction is consistent with both the text of Section 108(r) and the remedial nature of the Workers' Compensation Act. *See* 1 Pa.C.S. § 1921(b); *Phoenixville Hosp.*, 81 A.3d at 838. The presumption, however, does not afford the firefighter an *entitlement* to benefits, but an evidentiary advantage which relieves the firefighter of proving causation. The legislative history supports the conclusion that the General Assembly intended to ease the burden on firefighter-claimants, not enhance it. Accordingly, I dissent with respect to the Majority's resolution of the first issue and would conclude that Claimant has met the definition of occupational disease under Section 108(r) and was thus entitled to the presumption that his occupational disease, malignant melanoma, arose in the course of his employment per Section 301(e).

Conversely, I concur with the Majority's conclusion that testimony on the general causation of cancer, based on epidemiological evidence, is not relevant or sufficient evidence to overcome the presumption of causation afforded under Section 301(e). *See* Majority Op. at 19-21. Section 301(e) evinces the Legislature's intent to afford firefighter-claimants an evidentiary advantage. *See Marcks v. W.C.A.B.,* 547 A.2d 460, 463 (Pa. Cmwlth. 1988) ("[i]t is the legislature's express intent that firemen seeking recovery for occupational diseases resulting from the hazards of their trade be given an evidentiary advantage."). Section 301(f), references a presumption, and states, "[t]he presumption

[1] It is undisputed that Sladek was diagnosed with cancer and established he was a firefighter for four or more continuous years preceding his cancer diagnosis, he was directly exposed to IARC Group 1 carcinogens, and he had passed a physical examination prior to asserting his claim.

of this subsection may be rebutted by substantial competent evidence that shows that the firefighter's cancer was not caused by the occupation of firefighting." 77 P.S. § 414.

"[T]he firefighter's cancer" as used in Section 301(f) plainly refers to the individual's case of cancer. *See id*. Thus, at this stage of litigation, it is the employer's burden to show that the particular firefighter-claimant did not develop his or her cancer as a result of exposure to carcinogens in the course of the occupation of firefighting. *See id.* Specifically, the employer may only rebut the presumption by "substantial competent evidence that shows that the firefighter's cancer was not caused by the occupation of firefighting." *Id.* Section 301(f) is silent as to what constitutes "substantial competent evidence." However, the Commonwealth Court has stated, "[s]ubstantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion." *Waldamerr Park, Inc. v. W.C.A.B. (Morrison)*, 819 A.2d 164, 168 (Pa. Cmwlth. 2003); *Rising Sun Entertainment, Inc. v. Com*., 829 A.2d 1214, 1219 (Pa. Cmwlth. 2003). By the plain text of Section 301(f), City was required to proffer substantial competent evidence specific to Sladek's cancer that demonstrates the *non-employment related cause of his or her* cancer. *See Jeanette District Memorial Hospital*, 668 A.2d at 252 ("Employer's evidence was insufficient to rebut the presumption that [the c]laimant's disease was work-related" because the medical testimony presented "could not establish within a reasonable degree of medical certainty what had caused [the c]laimant's" occupational disease). It failed to do so.

As Dr. Guidotti explained in the instant case, epidemiology evidence assesses patterns of disease in populations, and epidemiology is "good at" assessing general causation. *See* N.T., 1/21/13, at 12, 23. He further explained that general causation "basically tells us something can cause an outcome." *Id.* at 22. In other words, "general causation is essentially a statement of what might happen." *Id.* at 23. It differs from

specific causation evidence in that specific causation involves assessing "the facts of a particular case." *Id.* Although epidemiological evidence may provide insight as to whether a particular agent may cause a particular ailment in certain populations, it is not substantial competent evidence that a particular causative agent indeed caused the ailment because its focus is on general inferences in populations, and not a particularized assessment of any one case. *See Blum ex rel. Blum v. Merrel Dow Pharmaceuticals, Inc.* 764 A.2d 1, 14 n. 9 (Castille, J., dissenting) (explaining, "[e]pidemiological studies consider whether causation may be inferred by comparing the incidence of a disease in a group of humans who have been exposed to the substance in question with the incidence in a group who have not been exposed"); *see also* N.T., 1/21/13, at 23 (Dr. Guidotti noting that specific causation departs from general causation "to the extent that the individual may be different from the group that was studied before"). Such generalized and non-specific evidence, which effectively nullifies the presumption at Section 301(e), cannot be deemed adequate or competent to support a conclusion that an employer has rebutted a statutorily endowed presumption of causation with substantial and competent evidence. *See Waldamerr Park, Inc. v.* 819 A.2d at 168; *Marcks*, 547 A.2d at 464.

Based on the foregoing, I would hold: 1) Sladek met his burden of establishing an occupational disease under 108(r), and was thus entitled to the presumption of Section 301(e) that his malignant melanoma was caused by his employment as a firefighter; and 2) the general causation evidence in the nature of expert testimony on epidemiology offered by the City was insufficient to rebut the presumption of benefits to Sladek. Accordingly, I dissent from Part 1 of the Majority, and concur in the result of Part 2.

Justice Dougherty joins this concurring and dissenting opinion.