

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia, :  
Petitioner :  
 :  
v. : No. 2032 C.D. 2009  
 :  
Workers' Compensation Appeal : Submitted: July 23, 2010  
Board (Kilgus, Dec'd), :  
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH

FILED: October 19, 2010

The City of Philadelphia (Employer) petitions for review of the September 29, 2009, order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of a workers' compensation judge (WCJ) granting the fatal claim petitions of Patricia Kilgus (Claimant). We affirm.

Charles Kilgus (Decedent) worked as a firefighter for Employer for thirty years, having joined the Philadelphia Fire Department in 1973. (WCJ's Finding of Fact No. 3(a).) Over the course of his career, Decedent worked for five different ladder companies in the City. (WCJ's Finding of Fact No. 3(d).) Decedent also periodically worked various second jobs, including delivering flowers and servicing fire extinguishers. (WCJ's Finding of Fact No. 3(f).) Claimant and Decedent married in 1987 and had known each other for several

years prior to the marriage. (WCJ's Findings of Fact Nos. 3(b), (c).) Decedent smoked on and off the entire time, usually one to two packs a day. Id.

In the fall of 2003, Decedent was diagnosed with acute myelogenous leukemia (AML), for which he immediately underwent chemotherapy and, later, a bone marrow transplant. (WCJ's Finding of Fact No. 3(h).) The treatments were unsuccessful, and Decedent died on July 1, 2004. Id. At the time of his death, Decedent resided with Claimant and Claimant's grandson, over whom he and Claimant had primary physical and legal custody.<sup>1</sup> (WCJ's Finding of Fact No. 3(j).)

On December 27, 2006, Claimant filed a fatal claim petition pursuant to section 108(n) of the Workers' Compensation Act (Act)<sup>2</sup> on behalf of herself and her grandson alleging that Decedent died as a result of an occupational disease, AML. (R.R. at 3a.) Claimant further alleged that Decedent's leukemia resulted from his exposure to excessive amounts of benzene during his firefighting career and that the incidence of leukemia is substantially greater in firefighters than in the general population. (R.R. at 4a.) Employer filed an answer denying the allegations of Claimant's petition. (R.R. at 11a.) On July 2, 2007, Claimant filed a second fatal claim petition alleging that Decedent died of an injury, AML. (R.R. at 15a.) Employer again filed an answer denying the allegations of Claimant's petition. (R.R. at 18a.) The petitions were consolidated for hearings before the WCJ.

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<sup>1</sup> Claimant and Decedent were granted primary physical and legal custody of the child pursuant to an order of the Court of Common Pleas of Philadelphia County dated March 28, 2001. (WCJ's Finding of Fact No. 3(i).) The WCJ's finding references an improper date of March 24, 2001.

<sup>2</sup> Act of June 2, 1915, P.L. 736, added by the Act of October 17, 1972, P.L. 930, as amended, 77 P.S. §27.1(n).

During her testimony, Claimant described Decedent's condition after a fire, stating that he would be coughing up a blackish gray mucous for days, blowing a black discharge from his nose, and smelling of smoke for two to three days despite repeated showers. (R.R. at 79a.)

Claimant also presented the deposition testimony of Henry McDevitt, a firefighter for thirty-four years who had worked with Decedent. McDevitt indicated that a firefighter's gear in the 1970's and 1980's consisted of rubber boots, canvas coats, a yellow helmet, and one breathing apparatus for every four men. (R.R. at 168a-69a.) McDevitt noted that each firefighter was later assigned his own mask but that most firefighters working the exterior of a fire did not wear the mask. (R.R. at 170a-71a.)

McDevitt testified that he worked with Decedent at one of the busiest firehouses in the City, responding to river fires, house fires, and industrial fires. (R.R. at 173a.) McDevitt explained that Decedent was assigned to a ladder truck, whose responsibility is to ventilate a building and perform rescues, if necessary. (R.R. at 174a.) McDevitt described Decedent's appearance after a fire as being covered in black from the smoke with black mucous running from his nose. (R.R. at 175a-76a.)

Claimant also presented the deposition testimony of Barry Fife, a lieutenant with Employer and a supervisor of Decedent beginning in 2000. (R.R. at 131a.) Fife's testimony corroborated McDevitt's testimony as to the early gear worn by a firefighter, the assignments of individual breathing apparatus, the rarity of a firefighter to use such apparatus when working on the exterior of a building, the duties of a firefighter assigned to a ladder company, the different types of fires, and the post-fire appearance of the firefighters. (R.R. at 122a-36a.)

Finally, Claimant presented the deposition testimony of Arthur L. Frank, M.D., PhD, who is Board-certified in internal and occupational medicine. Dr. Frank reviewed Decedent's medical records, the testimony of Claimant, and the deposition testimony of McDevitt and Fife, and he prepared a report dated April 12, 2006. (R.R. at 207a.) Dr. Frank indicated that Decedent died as a result of AML. (R.R. at 209a.) In addition, Dr. Frank identified benzene exposure as a risk factor for leukemia, especially AML, and he cited literature showing that firefighters have more exposure to benzene than the general public. (R.R. at 212a-13a, 227a.)

Dr. Frank specifically referenced a study entitled "Cohort Mortality Study of Philadelphia Firefighters," which identifies benzene as a carcinogen and states that high levels of benzene exist in the occupational setting of firefighters. (R.R. at 220a.) Further, this study found a statistically significant increased mortality rate among firefighters, as compared to the general population, especially among firefighters who work in ladder companies. Id.

While acknowledging that benzene is commonly found in cigarettes, Dr. Frank opined that Decedent's death was caused by AML, which resulted from his exposure to benzene while working as a firefighter. (R.R. at 213a, 227a-28a.) Dr. Frank explained that benzene is released in the course of a fire and that excess amounts of benzene have been found in firefighters after a fire. (R.R. at 228a-29a.) On cross-examination, Dr. Frank indicated that the percentage of cigarette smokers who develop leukemia is very small. (R.R. at 235a.)

Employer presented the deposition testimony of David Topolsky, M.D., who is Board-certified in internal medicine and medical oncology. Dr. Topolsky conducted his own review of Decedent's medical records and

concluded that Decedent died of acute biphenotypic leukemia, rather than AML. (R.R. at 334a.) Dr. Topolsky agreed that firefighters are exposed to benzene in the course of fighting fires, which can play a part in the development of certain kinds of leukemia. (R.R. at 335a.) However, Dr. Topolsky indicated that it was impossible to say with certainty whether benzene exposure played a role in Decedent's leukemia, because Decedent's biphenotypic leukemia does not generally result from such exposure. (R.R. at 336a.)

On cross-examination, Dr. Topolsky acknowledged that Decedent had been diagnosed with AML during a hospitalization in October 2003, and that this diagnosis was confirmed by subsequent bone marrow studies. (R.R. at 351a-53a.) Dr. Topolsky also admitted that he lacked knowledge regarding Decedent's employment history and his exposures while working for Employer. (R.R. at 348a-50a, 357a-60a.) Further, Dr. Topolsky indicated that he had not read the studies referenced by Dr. Frank regarding firefighters and benzene exposure, but noted that he was aware of the presence of benzene in fire environments. (R.R. at 356a, 362a-63a, 366a.)

The WCJ accepted the testimony of Claimant, McDevitt, Fife and Dr. Frank as credible and persuasive. (WCJ's Findings of Fact Nos. 8-10.) The WCJ explained that Dr. Frank's opinions are supported and substantiated by his education and experience in occupational medicine, as well as by peer-reviewed scientific literature which confirms that firefighters are exposed to excessive benzene on the fire grounds and that firefighters working in ladder companies suffer a statistically significant increased mortality rate. (WCJ's Finding of Fact No. 10.) The WCJ noted that Employer's expert, Dr. Topolsky, agreed that firefighters are exposed to benzene and that AML is commonly linked to such exposure. Id. The WCJ further noted that Decedent only worked in ladder

companies and that his medical records consistently reflected an AML diagnosis.  
Id.

Based upon these credibility determinations, the WCJ concluded that Claimant established that Decedent suffered from an occupational disease under section 108(n) of the Act, that Claimant was entitled to the rebuttable presumption provided by section 301(e) of the Act<sup>3</sup> that Decedent's disease arose out of and in the course of his employment, and that Employer failed to present sufficient evidence to rebut this presumption. (WCJ's Conclusion of Law No. 2.) The WCJ further concluded that Claimant met her burden of showing that Decedent's condition upon his death was caused by his exposure to benzene over the course and scope of his employment as a firefighter. Hence, the WCJ granted Claimant's fatal claim petitions.<sup>4</sup> Employer appealed to the Board, which affirmed the WCJ's decision and order.

On appeal to this Court,<sup>5</sup> Employer argues that the WCJ erred as a matter of law in concluding that Claimant met her burden of establishing that Decedent suffered from an occupational disease under section 108(n) of the Act. We disagree.

In a claim petition proceeding, the claimant bears the burden of establishing the right to compensation and all necessary elements to support an award. Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa.

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<sup>3</sup> 77 P.S. §413.

<sup>4</sup> The WCJ awarded benefits to both Claimant and her grandson, whom the WCJ found to be a dependent of Decedent.

<sup>5</sup> Our scope of review is limited to determining whether findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Meadow Lakes Apartments v. Workers' Compensation Appeal Board (Spencer), 894 A.2d 214 (Pa. Cmwlth. 2006).

135, 634 A.2d 592 (1993). A compensable injury includes an occupational disease as defined in section 108 of the Act.<sup>6</sup> Section 108 of the Act sets forth sixteen specific categories of compensable occupational diseases and includes a “catchall” provision in section 108(n).

A claimant who seeks benefits for a non-enumerated occupational disease pursuant to section 108(n) must establish each of the following elements: 1) that he was exposed to the disease by reason of his employment; 2) that the disease is causally related to his employment; and 3) that the incidence of the disease is substantially greater in his particular industry or occupation than in the general population. 77 P.S. §27.1(n); Kozlowski v. Workers’ Compensation Appeal Board (McKeesport Hospital), 764 A.2d 676 (Pa. Cmwlth. 2000); Conroy v. Workers’ Compensation Appeal Board (Perrier Group), 750 A.2d 932 (Pa. Cmwlth. 2000).

The question of whether a claimant was exposed to a hazard in the workplace is a question of fact to be resolved by the WCJ. Mauger and Company

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<sup>6</sup> Section 301(c)(2) of the Act provides, in pertinent part, as follows:

The terms “injury,” “personal injury,” and “injury arising in the course of his employment,” as used in this act, shall include, unless the context clearly requires otherwise, occupational disease as defined in section 108 of this act: Provided, That whenever occupational disease is the basis for compensation, for disability or death under this act, it shall apply only to disability or death resulting from such disease and occurring within three hundred weeks after the last date of employment in an occupation or industry to which he was exposed to hazards of such disease: And provided further, That if the employe’s compensable disability has occurred within such period, his subsequent death as a result of the disease shall likewise be compensable.

77 P.S. §411(2).

v. Workmen's Compensation Appeal Board (Waltz), 598 A.2d 1035 (Pa. Cmwlth. 1991). Since a claimant's exposure is a factual question, a claimant need not present scientific evidence or expert testimony to prove the existence of a hazard in the workplace. Id. Instead, the WCJ may rely solely on the testimony of the claimant or other witnesses to prove the existence of and exposure to the hazard. Id.

Once a claimant establishes that he is suffering from and is disabled by an occupational disease, section 301(e) of the Act, 77 P.S. §413, affords the claimant a presumption that the occupational disease arose out of and in the course of his employment.<sup>7</sup> Buchanan v. Workmen's Compensation Appeal Board (City of Philadelphia), 659 A.2d 54 (Pa. Cmwlth.), appeal denied, 542 Pa. 675, 668 A.2d 1137 (1995). The presumption, however, is not conclusive and may be rebutted by substantial, competent evidence. Buchanan; Marcks v. Workmen's Compensation Appeal Board (City of Allentown), 547 A.2d 460 (Pa. Cmwlth. 1988).

In the present case, Claimant testified about Decedent's thirty-year work history as a firefighter assigned to various ladder companies of Employer. McDevitt and Fife explained that firefighters working the exterior of a building, such as Decedent, rarely wore masks or any other breathing apparatus. Dr. Frank identified benzene exposure as a risk factor for leukemia, especially AML, and noted that studies have found that firefighters have more exposure to benzene.

Dr. Frank explained that benzene is released in the course of a fire and that studies have found excess amounts of benzene in firefighters after a fire.

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<sup>7</sup> Section 301(e) provides that "[i]f it be shown that the employe, at or immediately before the date of disability, was employed in any occupation or industry in which the occupational disease is a hazard, it shall be presumed that the employe's occupational disease arose out of and in the course of his employment, but this presumption shall not be conclusive." 77 P.S. §413.



Employer's medical expert even agreed that firefighters are exposed to benzene in the course of fighting fires and that benzene contributes to the development of certain kinds of leukemia. Dr. Frank also referenced a study which found high levels of benzene in the occupational setting of firefighters and a statistically significant increased mortality rate among firefighters, as compared to the general population, especially among firefighters who work in ladder companies. This testimony constitutes substantial, competent evidence in support of the WCJ's conclusion that Claimant met her burden of establishing that Decedent suffered from an occupational disease under section 108(n) of the Act.

Employer also raises an issue concerning the WCJ's failure to apply the standard regarding scientific evidence first enunciated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), to the testimony of Dr. Frank.<sup>8</sup> However, as the Board aptly noted, Employer did not object to Dr. Frank's testimony under Frye at the time of his deposition, nor did it object in a subsequent writing. Hence, Employer waived this argument. Section 131.66(b) of the Special Rules of Administrative Practice and Procedure Before Workers' Compensation Judges, 34 Pa. Code §131.66(b);<sup>9</sup> Stech v. Workmen's Compensation Appeal Board (MJS Equipment Company), 678 A.2d 1243 (Pa. Cmwlth. 1996), appeal denied, 548 Pa. 663, 698 A.2d 69 (1997).

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<sup>8</sup> The Court in Frye held that a party wishing to introduce expert testimony involving novel scientific evidence must demonstrate that the relevant scientific community has reached general acceptance of the principles and methodology employed by the expert witness before the expert witness may testify regarding his or her conclusions. The Frye standard was later adopted in Pennsylvania in Commonwealth v. Topa, 471 Pa. 223, 369 A.2d 1277 (1977).

<sup>9</sup> Section 131.66(b) provides that objections shall be made and the basis stated at the time of the deposition and that only objections which are identified in a separate writing, introduced prior to the close of the record and stating the specific nature of the objection and the page where it appears in the deposition will be preserved for ruling. Objections not so preserved are waived.

Accordingly, the order of the Board is affirmed.

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PATRICIA A. McCULLOUGH, Judge

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Board (Kilgus, Dec'd),	:	
Respondent	:	

***ORDER***

AND NOW, this 19th day of October, 2010, the September 29, 2009, order of the Workers' Compensation Appeal Board is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge