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

CITY OF PHILADELPHIA FIRE DEPARTMENT	:	No. 13 EAP 2017
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	:	Appeal from the Order of the Commonwealth Court entered on
v.	:	8/12/16 at No. 579 CD 2015 vacating and remanding the order entered on
	:	3/13/15 by the Workers' Compensation
WORKERS' COMPENSATION APPEAL BOARD (SLADEK)	:	Appeal Board at Nos. A13-1317 and WCAIS Claim No: 4037688
	:	
	:	
APPEAL OF: SCOTT SLADEK	:	ARGUED: September 12, 2017

CONCURRING AND DISSENTING OPINION

CHIEF JUSTICE SAYLOR **DECIDED: October 17, 2018**

As concerns the first issue on which allocatur was granted, Claimant's argument is premised substantially on the notion that the Commonwealth Court imposed an unduly elevated burden on firefighters seeking to pursue workers' compensation benefits on account of cancer as an occupational disease. In this regard, Claimant pervasively asserts that the intermediate court determined that the cancer-related definition of "occupational disease," delineated in Section 108(r) of the Workers' Compensation Act, requires a firefighter-claimant to "prove that *his cancer* is caused by specific carcinogens 'to which he was exposed in the workplace[.]'" Brief for Appellant at 24 (quoting *City of Phila. Fire Dep't v. WCAB (Sladek)*, 144 A.3d 1011, 1022 (Pa. Cmwlth. 2016)) (emphasis added); *see also id.* at 13-14, 16, 19-22.

In point of fact, however, the Commonwealth Court's material holding was to the effect that Claimant was required to "prove that his malignant melanoma is *a type of cancer* caused by the Group 1 carcinogens *to which he was exposed in the workplace* to establish an occupational disease." *Sladek*, 144 A.3d at 1021-22 (emphasis adjusted). Contrary to Claimant's position, this formulation contains no requirement of specific causation.[1]

Significantly, moreover, for purposes of Section 108(r), Claimant accepts the burden to prove both of the pivotal requirements embodied in the Commonwealth Court's actual holding, as stated above. Specifically, he indicates that "to pursue benefits pursuant to Section 108(r) . . .[Claimant] must show [(1)] that his cancer is a type caused by exposure to IARC Group 1 carcinogens and [(2)] that he had direct exposure to those carcinogens at work." Brief for Appellant at 20. Therefore -- and once the mistaken premise (*i.e.*, that the Commonwealth Court imposed some greater causation requirement) is removed -- I fail to discern how Claimant's argument, as concerns the first issue, differs from the City's main substantive position. *See, e.g.*, Brief for Appellee at 25 ("If a claimant can prove that he or she was directly exposed to an IARC Group 1 carcinogen while working as a firefighter and has a type of cancer that is causally related to that IARC Group 1 carcinogen, then a claimant has established that he or she suffers from an occupational disease.").[2]

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[1] Indeed, the intermediate court specifically explained that a claimant is *not* required to prove that *his cancer* was caused by his workplace exposure, and not another cause, to pursue the relevant avenue of benefits recovery under the Workers' Compensation Act. *See Sladek*, 144 A.3d at 1020.

[2] I acknowledge that the City's argument is at times internally inconsistent, as on the one hand the City transiently asserts that a claimant must prove that his cancer "was 'caused by' direct exposure to an IARC Group 1 carcinogen," Brief for Appellee at 24, but then the City proceeds to equate this statement with the lesser burden of (continued…)

The majority adopts the first prong of this standard but appears to simply disregard the second. For my own part, however, in light of substantive consensus among the litigants, I would affirm the Commonwealth Court's holding -- concerning both prongs of the two-part standard -- on a case-specific basis, without foreclosing the possibility that Section 108(r) might be construed differently in future cases in which other arguments might be presented.[3] Alternatively, the first issue could be dismissed as having been improvidently granted.

In terms of the second issue presented, I respectfully differ with the majority's position that Section 301(f) limits an employer's rebuttal evidence to production of "a medical opinion regarding the specific, non-firefighting related cause of claimant's cancer." Majority Opinion, *slip op.* at 20. In point of fact, nothing on the face of Section

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(…continued)
establishing that the claimant suffers from *a type of cancer* that is causally related to a Group 1 carcinogen to which there was work-related exposure. *See id.* at 25. Such admixture reflects the same misunderstanding embedded in Claimant's misstatement of the Commonwealth Court's holding, as discussed above. In any event, the latter line of argument (*i.e.*, the type-of-cancer overlay) represents the main thrust of the City's presentation, which urges that the Commonwealth Court's opinion should be affirmed.

[3] In the broader plane, and left to my own devices, I might question the underlying premise that the definitional aspects of occupational disease must be fully satisfied before any ensuing presumptions regarding work-relatedness could be implemented. *See Sladek*, 144 A.3d at 1021 ("Once a firefighter establishes that his type of cancer *is an occupational disease*, then he may take advantage of the statutory presumption[.]" (emphasis added)). In this respect, it would seem that an *in pari materia* construction -- allowing the presumption to operate within the definitions of occupational diseases unless otherwise proscribed -- would remove the conceptual tension created by the premise and would remediate the pervasive confusion surrounding the occupational disease regime. *See, e.g.*, *supra* note 2. Again, however, Claimant's affirmative statement of the burden borne by firefighter-claimants is not to this effect, but rather, substantively aligns with the Commonwealth Court's *entire* actual holding on the first issue presented.

301(f) would foreclose an employer from proving that "the firefighter' cancer was not caused by the occupation of firefighting," 77 P.S. §414, by demonstrating that substances to which the claimant was exposed while serving as a firefighter do not cause the relevant type of cancer in the general population.

In this regard, to cause cancer in an individual, a substance must be capable of causing cancer in the general population (of which any individual is a member). *See generally Knight v. Kirby Inland Marine Inc., 482 F.3d 347, 351 (5th Cir. 2007); accord* 63 AM. JUR. 2D PRODUCTS LIABILITY § 71.[4] As a logical matter, therefore, a party who proves that a substance is not capable of causing cancer in the general population advances highly persuasive (if not dispositive) evidence that the substance did not cause a particular individual's cancer. *Accord City of Littleton v. Indus. Claim Appeals Office*, 370 P.3d 157, 169 n.9 (Colo. 2016) ("Logically, the absence of general causation forecloses the possibility of specific causation." (citation omitted)).

Thus, I fail to see how an employer offering admissible, competent evidence that substances to which a firefighter-claimant was exposed do not cause the type of cancer suffered by such claimant in the general population has not presented "substantial competent evidence that shows that the firefighter's cancer was not caused by the occupation of firefighting." 77 P.S. §414. Indeed, the Colorado Supreme Court recently had little difficulty reaching the same conclusion in the context of a similar statute entitling an employer to rebut a presumption of work relatedness benefitting firefighters.

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[4] Significantly, general causation is expressed in terms of "whether a substance is capable of causing a particular injury or condition in the general population"; whereas "specific causation is whether a substance caused a particular individual's injury." *Knight,* 482 F.3d at 351 (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997)); *accord* 63 AM. JUR. 2D PRODUCTS LIABILITY § 71 (2017). Both of these elements of causation generally must be satisfied in toxic disease cases. Indeed, many jurisdictions require plaintiffs in such cases to proceed by a two-step process, proceeding with proof of general causation first. *See*, *e.g., Knight*, 482 F.3d at 351.

See City of Littleton, 370 P.3d at 169 (explaining that "nothing in [the statute] prohibits the employer from seeking . . . to establish the lack of general causation by showing . . . that the firefighter's work exposures are not capable of causing the firefighter's condition or health impairment").

The majority appears to suggest that its holding is ameliorated by the imposition, under Section 108(r), of a requirement for the claimant to prove general causation. *See* Majority Opinion, *slip op.* at 20-21. Such requirement, however, as articulated by the majority, is causation in the abstract. In this regard, the majority requires only that a claimant demonstrate a link between the type of cancer from which he suffers and *any* Group 1 carcinogen, apparently regardless of whether it is one to which the firefighter might have been exposed at work. *See* Majority Opinion, *slip op.* at 17.[5] For my part, I fail to see how such a limited requirement of proof can be relied upon to restrict an employer's ability to present evidence that the substances to which a firefighter-claimant was exposed at work simply do not cause the relevant type of cancer, particularly when such defense resides squarely within the statutory authorization for rebuttal provided by the General Assembly. *Accord City of Littleton*, 370 P.3d at 169.[6]

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[5] There are over 120 agents classified as IARC Group 1 carcinogens, many of which are identified by a categorical nexus. *See* International Agency for Research on Cancer, Agents Classified by the IARC Monographs, Volumes 1-122, available at https://monographs.iarc.fr/agents-classified-by-the-iarc/.

[6] Of course, the issues as presented here do not touch on the requirements imposed by Section 301(f) for a claimant to gain the benefit of a presumption that the cancer arose out of and in the course of the employment. *See* Majority Opinion, *slip op.* at 16-17 (alluding to the requirements under Section 301(f)). Accordingly, even short of the *in pari materia* construction that I have suggested, *see supra* note 3, it may be that something in the Section 301(f) requirements, as interpreted in a future case, could bear on whether or to what degree general causation is to be determined prior to the rebuttal stage. Absent a determinative ruling on this score, however, I do not believe that (continued…)

In all events, on the arguments presently before the Court, I would not dilute the Commonwealth Court's holding requiring some showing, by a firefighter-claimant, that the type of cancer could have been caused by Group 1 carcinogens *to which the claimant was exposed at work*, while at the same time foreclosing employers from demonstrating that this type of cancer is incapable of having been caused by relevant workplace exposure.

For all of the above reasons, I respectfully dissent as to the substantive treatment of the two discrete issues presented in this appeal. I agree with the majority, however, that the case should be remanded relative to the treatment of Claimant's expert evidence.

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employers should be deprived of the ability to address general causation at the rebuttal stage.