THE HARTWELL
LAW OFFICES, LLP

AUGUST 2016 CASE LAW UPDATE

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Savoy v. Workers' Compensation Appeal Board (Global Associates), ___ A.3d ___, (PA Cmwlth Ct. August 25, 2016).

Issues: Whether a claimant injured while working as electrician on Navy ship was subject to exclusive jurisdiction of Longshore and Harbor Workers' Compensation Act.

Answer: Yes.

Analysis: Claimant was employed by Global Associates (Employer) as an electrician assigned to work on United States Navy vessels at the Philadelphia Navy Yard. Claimant was walking along a passageway on the USS Stephen Groves when he tripped and twisted his right knee. The parties stipulated that Claimant had been receiving benefits for his injury under the Longshore Act. The matter was bifurcated to address whether Claimant was entitled to concurrent compensation under the Workers' Compensation Act, or whether the Longshore Act benefits were exclusive. Claimant acknowledged during testimony that she was injured on the ship that was actually on the water.

The Commonwealth Court provided a history of the case law relevant to the interplay of jurisdiction between WC law and the Longshore Act. Essentially, the Commonwealth Court stated that if the injury occurred while on the navigable waterways then it falls exclusively within the jurisdiction of the Longshore Act. If the claimant is injured on the shore or pier the there may be concurrent jurisdiction.

Conclusion and Practical Advise: This is something that many would not really think of when evaluating a case. However, there are many situations in PA where the claimant may be injured while on the navigable waterways. For example if someone is injured while on one of the three rivers in the Pittsburgh area, or the Delaware River that is a navigable waterway. Every scenario is different but be aware if there are potential defenses that an injury falls within the exclusive jurisdiction of the Longshore Act.

<u>City of Philadelphia Fire Dept. v. W.C.A.B. (Sladek)</u>, __ A.3d __ (Pa. Cmwlth August 12, 2016) 2016 WL 4261903

Issues: Whether the claimant was required to prove that his malignant melanoma was a type of cancer caused by the Group 1 carcinogens to which he was exposed in the workplace, and whether expert testimony was relevant to claim that claimant's malignant melanoma was an occupational disease of firefighters.

Answer: Yes.

Analysis: The City of Philadelphia Fire Department petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) granting compensation benefits to Scott Sladek (Claimant) for his malignant melanoma. The Board affirmed the decision of the Workers' Compensation Judge (WCJ) that Claimant's malignant melanoma was a recognized occupational disease for firefighters by reason of Section 108(r) of the Workers' Compensation Act (Act), concluding that the Board erred in its construction of Section 108(r). The Commonwealth Court vacated the Board's order and remanded for further consideration of the claim petition.

Claimant worked as a firefighter beginning in 1994. In 2006, Claimant developed a skin lesion on the back of his right thigh, which was diagnosed as malignant melanoma and removed surgically. The surgery did not cause Claimant to miss work. In June of 2012, Claimant sought payment of the medical bills associated with his melanoma treatment.

Claimant testified that he was exposed to diesel fuel emissions because the fire trucks are kept running inside the building. Claimant also testified that firefighters are exposed to smoke.

In support of his claim petition, Claimant submitted a report from Virginia M. Weaver, M.D., who found that smoke typically contains IARC Group 1 carcinogens. Dr. Weaver noted diesel engine exhaust is listed as an IARC Group 2A agent, meaning it is a probable agent of cancer in humans. Dr. Weaver did not specify the types of cancer caused by Group 1 or 2A carcinogens. Claimant offered the deposition of Barry L. Singer, M.D. Dr. Singer is an oncologist not an epidemiologist or toxicologist, and does not specialize in the etiology of cancer.

Employer submitted the deposition testimony of Tee L. Guidotti, M.D., M.P.H., D.A.B.T., who is board certified in internal medicine, pulmonary medicine, occupational medicine, and has a degree in toxicology. Dr. Guidotti is also trained in epidemiology, which he described as the "science of the patterns of diseases in populations."

Dr. Guidotti testified that specific carcinogens cause specific cancers. Stated otherwise, the IARC Group 1 carcinogens do not cause all types of cancer in all organs. Dr. Guidotti reviewed a number of Dr. Singer's reports prepared for Claimant's counsel on other firefighters. He also reviewed Dr. Singer's testimony on the methodology he employed to reach his opinion about causation of cancer in a particular firefighter's case. Dr. Guidotti testified that the reports were all alike and did not reveal any methodology. Employer then offered Claimant's medical records. Employer offered an IARC publication entitled World Health Organization

Classification of Tumors. The publication explains that "[i]ntermittent exposure to UVR in white people, especially during childhood, has been postulated to be the main risk factor for the development of melanoma, although exposure in adulthood also plays a part."

The WCJ accepted as credible the testimony of Claimant and Dr. Singer and rejected Dr. Guidotti's testimony.

Employer appealed to the Board arguing the WCJ erred in admitting Dr. Singer's report because it did not satisfy the *Frye* standard (an evidentiary argument challenging the expertise of the physician). Further, the WCJ did not explain whether, or how, she used the statutory presumption to reach her decision. Nor did the the WCJ address whether Employer had rebutted the presumption. The Board affirmed the decision.

On appeal to the Commonwealth Court, Employer argues that the Board erred in affirming the WCJ's grant of the claim petition. First, it contends that the Board erred in holding that Claimant met his burden of proving that malignant melanoma is an occupational disease under Section 108(r) of the Act. Second, it contends that the Board erred in holding that Employer's evidence did not prove that Claimant's malignant melanoma was not caused by exposure to arsenic or soot. Third, it contends that the Board erred in refusing to consider whether Dr. Singer's opinions satisfied the *Frye* standard and, thus, were even admissible.

Act 46 added the presumption where the occupational disease is cancer suffered by a firefighter. In sum, to establish that a firefighter's cancer is an occupational disease, the firefighter must show that he has been diagnosed with a type of cancer "*caused by* exposure to a known carcinogen which is recognized as a Group 1 carcinogen." Once a firefighter establishes that his type of cancer is an occupational disease, then he may take advantage of the statutory presumption in Section 301(e) and (f) of the Act. The presumption relieves the firefighter of the need to prove that his cancer was caused by his workplace exposure and not another cause.

The Board interpreted Section 108(r) of the Act to mean that the legislature has established that there is a causal relationship between a firefighter's exposure to any Group 1 carcinogen and any cancer. Specifically, the Board stated, "Claimant was not required to prove that he was exposed to a particular carcinogen in Group 1 or prove that the Group 1 carcinogens to which he was exposed specifically cause malignant melanoma as part of his initial burden."

Section 108(r) defines occupational disease as a cancer *caused by* Group 1 carcinogens. The Board simply skipped over this important language in the definition of occupational disease. The presumption in Section 301(e) of the Act does not come into play until the claimant has established that he has an occupational disease. In the case of a firefighter claimant, he does this by showing that his cancer is a type caused by Group 1 carcinogens.

Conclusion and Practical Advise: The Commonwealth Court provided its first detailed interpretation of Act 46 in a published opinion and addressed that there are certain facts that need to be addressed by the claimant before they are entitled to the presumption. This is further evidence that these cases need to be handled with detailed expertise by counsel who is accustomed to the intricacies of different carcinogens. Again, do no roll over on these cases simply because of Act 46. The claimant must prove every aspect of their case.