Circuit Court for Washington County
Case No.: C-21-CV-20-000463

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 976

September Term, 2022

IN THE MATTER OF
CHARLES E. SHINDLE

Friedman,
Ripken,
Eyler, Deborah S.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Eyler, Deborah, S., J.

Filed: August 2, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Before the Workers' Compensation Commission ("the Commission"), Charles Shindle, the appellee, filed a claim for benefits based on an occupational disease. He alleged that as a result of working as a firefighter for the appellant, Washington County Volunteer Fire and Rescue Association ("the Association"), a position from which he had retired, he contracted throat cancer. Following a hearing, the Commission disallowed the claim. Mr. Shindle filed a petition for judicial review in the Circuit Court for Washington County. The matter was tried before a jury, which found in Mr. Shindle's favor.

The Association noted this appeal, posing three questions, which we have rephrased slightly:

I. Did the trial court err by denying the Association's motion to exclude the testimony of Mr. Shindle's expert witness?

II. Was the evidence legally sufficient to support the jury's finding that Mr. Shindle sustained an occupational disease arising out of and in the course of his employment?

III. Did the trial court err by not giving the requested pattern jury instruction on idiopathic conditions?

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

For roughly 30 years, between 1953 and sometime in the 1980s, Mr. Shindle worked as a volunteer firefighter for the Maugansville Volunteer Fire Department, a division of the Association. In June 2017, at age 82, he was diagnosed with squamous cell carcinoma of his right tonsil, a type of throat cancer. He underwent a tonsillectomy followed by chemotherapy and radiation. Two years later, he filed an occupational

disease claim with the Commission, alleging that his throat cancer was caused by his work as a volunteer firefighter and that on June 20, 2017, he became temporarily disabled due to that disease. The Commission held a hearing at which Mr. Shindle testified. Both parties submitted written reports prepared by their medical experts.

The Commission issued an order deciding two issues. First, it ruled that the statutory presumption that firefighters, including volunteer firefighters, who develop certain cancers, including throat cancer, suffer from a compensable occupational disease did not apply because as of his date of disablement Mr. Shindle no longer was working as a volunteer firefighter.[1] Second, it ruled that Mr. Shindle "did not sustain an occupational

[1] The statute appears at Md. Code, § 9-503(c) of the Labor and Employment Article ("LE"). As of Mr. Shindle's date of disablement, it stated, in pertinent part:

> (c) A . . . volunteer firefighter . . . who is a covered employee under § 9-234 of this title is presumed to be suffering from an occupational disease that was suffered in the line of duty and is compensable under this title if the individual:
>
> > (1) has . . . throat . . . cancer that is caused by contact with a toxic substance that the individual has encountered in the line of duty;
> >
> > (2) has completed at least 10 years of service as a firefighter . . . in the department where the individual currently is employed or serves;
> >
> > (3) is unable to perform the normal duties of a firefighter . . . in the department **where the individual currently is employed or serves** because of the cancer . . . ; and
> >
> > (4) in the case of a volunteer firefighter . . . has met a suitable standard of physical examination before becoming a firefighter[.]

(continued…)

disease of throat cancer arising out [of] and in the course of employment[.]" As a consequence of its rulings, the Commission disallowed Mr. Shindle's claim. A petition for rehearing was denied.

Mr. Shindle filed a complaint for an essentially *de novo* review of the Commission's decision and prayed a jury trial.[2] The Association moved *in limine* to preclude the testimony of Jonathan Gitter, M.D., Mr. Shindle's medical expert, on the ground that he lacked a "legally sufficient factual basis" to support his opinions that Mr. Shindle's throat cancer was causally related to his employment and was inherent in the nature of the occupation of a volunteer firefighter. It attached to its motion a transcript of Dr. Gitter's *de bene esse* deposition. Simultaneously, the Association moved for summary judgment on the ground that, without Dr. Gitter's testimony, Mr. Shindle could

LE § 9-503(c) (1999, 2016 Repl. Vol.) (emphasis added). In 2019, the statute was amended to remove the requirement that the firefighter still be employed or be serving for the presumption to apply. 2019 Maryland Laws ch. 215.

[2] Because by statute a "decision [of the Commission] is presumed '*prima facie* correct' and the party challenging the decision has the burden of proof[,]" *Baltimore Cnty. v. Quinlan*, 466 Md. 1, 10 (2019) (citing LE § 9-745(b)(1)-(2)), our appellate decisions describe the process as "essentially *de novo*[.]" *Baltimore Cnty. v. Kelly*, 391 Md. 64, 74-75 (2006). Where, as here, "the employer prevails before the Commission and the claimant elects to appeal employing an essentially *de novo* trial method, 'the provision, as a practical matter, is largely meaningless' because the parties retain their initial burdens of proof and persuasion.'" *Id*. at 75 (quoting *S.B. Thomas, Inc. v. Thompson*, 114 Md. App. 357, 366 (1997)).

not satisfy his burden to produce evidence that his throat cancer arose from his employment and was inherent in the nature of his occupation.[3]

The court took up both motions on the morning of trial, June 7, 2022. After hearing argument, the court reserved ruling until it had an opportunity to hear Dr. Gitter's video deposition testimony.

Mr. Shindle testified that he began working as a volunteer firefighter with the Maugansville Volunteer Fire Department in 1953, when he was 16 years old. Beginning in 1966, he also worked as an electrician. As a firefighter, he rose through the ranks to become chief of the department. He responded to his last emergency call in the 1980s but could not recall the exact date or year. In the 1950s and 1960s, Mr. Shindle responded to approximately 100 calls per year. By the 1980s, he routinely was responding to 250 calls per year.

In his early years with the department, Mr. Shindle and the other volunteer firefighters shared a "canister type of breathing . . . apparatus[.]" There were not enough canisters for all the firefighters. Mr. Shindle used them when they were available. The face masks attached to the apparatuses were not fitted to individual firefighters. In the late 1970s, the department switched to self-contained breathing apparatuses with oxygen tanks. The firefighters continued to share the apparatuses, however, and the face masks

[3] Mr. Shindle moved for partial summary judgment, arguing that he was entitled to the statutory presumption of compensability for his throat cancer. The circuit court denied the motion, concluding, as had the Commission, that based upon the version of LE § 9-503(c) in effect when Mr. Shindle became disabled, the presumption was inapplicable. The applicability of the statutory presumption is not before us in this appeal.

remained unfitted. Mr. Shindle recalled that he could "smell smoke through the face piece[.]" He explained that a firefighter would wear the apparatus when fighting an active fire, but routinely would remove it during the "overhaul processes," which included extinguishing remaining hot spots and the preliminary investigation into the cause of the fire.

As noted, Mr. Shindle was diagnosed with throat cancer in 2017. He did not have a family history of cancer. He had smoked cigarettes for four years while serving in the army in the 1950s and for a few years thereafter. He had not smoked since then.

Dr. Gitter, a board-certified internist, was accepted without objection as an expert in the field of internal medicine. On September 12, 2019, he performed an "independent medical examination" of Mr. Shindle. He reviewed Mr. Shindle's medical records from his primary care physician, the report of a biopsy, and a PET scan report. He explained that Mr. Shindle had been diagnosed with squamous cell carcinoma of the right tonsil that was P16 positive, which means that he previously had contracted the human papillomavirus ("HPV").

Dr. Gitter testified that cancer itself is an "abnormal growth of . . . cells." The development of any cancer is always "multifactorial," meaning that different processes cause "the DNA . . . to deteriorate and the cells, at some point, [to] start growing out of control." Dr. Gitter opined that Mr. Shindle's throat cancer was "causally related to his employment as a volunteer firefighter[.]" Specifically, "the exposures" Mr. Shindle experienced while working at fire scenes "were contributors to his . . . development . . .

of that cancer" because they "increased the chance that he would develop . . . that cancer." In Dr. Gitter's opinion, working as a firefighter is a risk factor for developing throat cancer, generally, and was a risk factor for Mr. Shindle, specifically.

Mr. Shindle's exposure to HPV also was a risk factor for developing throat cancer (and other cancers). According to Dr. Gitter, although individuals exposed to HPV are more likely to develop throat cancer than those not exposed to it, not every person with an HPV exposure will develop throat cancer. Likewise, Mr. Shindle's exposure to carcinogens during his work as a volunteer firefighter increased his risk of developing throat cancer and "more likely than not" was a "contributing factor" in his eventual development of that disease. Moreover, "if someone has more than . . . one risk factor for a disease," they are "more likely" to develop that disease.

On cross-examination, Dr. Gitter was asked about his knowledge of Mr. Shindle's duties as a volunteer firefighter. Dr. Gitter could not recount the number of calls Mr. Shindle responded to each year but was aware that Mr. Shindle was "very active" and "did . . . all of the normal firefighting duties." He recalled that Mr. Shindle informed him that in the "earlier years . . . they weren't really using the respirators on a . . . very regular basis[.]" Dr. Gitter knew that Mr. Shindle "attended a lot of . . . fires" for "many years[.]" When asked, hypothetically, whether, had Mr. Shindle told him that he only worked a limited schedule as a volunteer firefighter, he would have qualified his opinion, Dr. Gitter declined to accept the hypothetical because Mr. Shindle in fact had "worked frequently throughout the week[.]"

Dr. Gitter did not know when Mr. Shindle stopped responding to calls or how much time had passed between his "last call and his diagnosis . . . with cancer." He opined that it was common for "many years" to pass after exposure to a carcinogen and before a diagnosis of cancer. Dr. Gitter estimated a "ballpark" range of between 15 and 30 years. Consequently, if he knew that Mr. Shindle had not responded to fires for many years, that "wouldn't change [his] opinion that the exposures played a role."

When asked if a "risk factor is different than a cause[,]" Dr. Gitter replied:

> [T]o some extent it's a matter of semantics. Because there are many conditions . . . where the causation is multifactorial. So, the more risk factors you have the more likely you are to develop that . . . condition. High blood pressure[']s another one. . . that's . . . [a] similar thing. There can be a family history, there can be, you know, there can be stresses[,] there can be . . . other things in somebody's life that could . . . contribute to it. But so, there's multiple risk factors and a lot of times people have one or two of the risk factors and they never get it and other times, you know, . . . they have three or four risk factors, and they are more likely to get it.

Dr. Gitter added that there was a "strong association" between HPV and throat cancer, between smoking tobacco products and throat cancer, and between the "exposure of a firefighter" and throat cancer, noting that exposure to smoke from firefighting is "probably worse in some ways" than smoking tobacco products. Mr. Shindle had all three risk factors. In Dr. Gitter's view, "they all contributed" to his development of throat cancer. Dr. Gitter stated that he was familiar with studies that "show an increase[d] risk

amongst firefighters and amongst other occupations with exposures" to developing throat cancer, although he did not cite any specific study in his report.[4]

At the conclusion of Dr. Gitter's videotaped testimony, the Association moved to strike and for judgment. It argued that Dr. Gitter's opinions were not supported by an adequate factual basis, and without his testimony, Mr. Shindle could not sustain his claim. It further argued that even if admissible, Dr. Gitter's testimony was legally insufficient to establish a causal link between the occupation of a volunteer firefighter and squamous cell carcinoma of the tonsil.

The court denied the motions. It found that although Dr. Gitter could not recall every detail about Mr. Shindle's job history, he knew and testified that Mr. Shindle was "exposed to smoke in fires[,]" which was the only "pertinent" activity he engaged in as a firefighter. The court reasoned that Dr. Gitter's testimony that firefighting is a risk factor for developing throat cancer, coupled with his testimony that Mr. Shindle's activities exposed him to that risk, amounted to a factual basis for his ultimate opinion that Mr. Shindle's work as a firefighter was a contributing cause of his throat cancer.

In its case, the Association introduced the *de bene esse* deposition of Kenneth Miller, M.D., a board-certified oncologist/hematologist who was accepted as an expert in those fields. Dr. Miller evaluated Mr. Shindle in February 2020. He opined that Mr. Shindle's squamous cell cancer of the right tonsil was not causally related to his work as a firefighter. In his view, it was caused by Mr. Shindle's exposure to HPV.

[4] Dr. Gitter's report was not moved into evidence.

Dr. Miller explained that HPV is "able to insert its own genetic material into normal cells[,]" leading to mutations that can cause cancer. This process "inactivates a good gene[,]" called P16, that is a "tumor suppressive." Between 70 to 85 percent of cancers of the tonsil are caused by HPV because the viral particles tend to accumulate in the tonsils and the base of the tongue.

Upon his initial evaluation of Mr. Shindle, Dr. Miller did not know whether the "tumor . . . stained positively for the P16 antigen[.]" He concluded that if the tumor were P16 positive, the cancer was "consistent with . . . being secondary to the HPV" and if it were not P16 positive, it was "more likely than not, related to smoke exposure." Dr. Miller ruled out alcohol use and cigarette smoking as risk factors contributing to the cancer because Mr. Shindle reported that he did not drink alcohol and had not smoked cigarettes for over 50 years. According to Dr. Miller, the passage of time since Mr. Shindle was an active firefighter also made it unlikely that his cancer was caused by smoke exposure. Because HPV is "known . . . to cause tonsillar cancer" and Mr. Shindle had HPV, Dr. Miller opined that that was the cause of his cancer. He concluded that the cancer was not "causally related to Mr. Shindle's work as a volunteer firefighter[.]"

On cross-examination, Dr. Miller testified that if Mr. Shindle's cancer had not been P16 positive, his opinion would have been that the cancer was related to an exposure from firefighting. He acknowledged that firefighters have an "increased relative risk" of developing certain cancers "compared to non-firefighters."

At the conclusion of all the evidence, the Association renewed its motion for judgment, which was denied. The case was sent to the jury on a single issue: "Did the Claimant sustain the condition of squamous cell carcinoma of the tonsil arising out of and in the course of his employment with [the Association]?" The jury answered, "Yes," to that question. The Association moved for judgment notwithstanding the verdict and for a new trial, raising the same arguments it had raised in its pretrial motions and motion for judgment. After the post-judgment motions were denied, the Association noted this timely appeal.

DISCUSSION

The Workers' Compensation Act, codified at Title 9 of the Labor and Employment Article, defines an "occupational disease" as "a disease contracted by a covered employee: (1) as the result of and in the course of employment; and (2) that causes the covered employee to become temporarily or permanently, partially or totally incapacitated." LE § 9-101(g). An employer will be liable for an occupational disease claim if: (1) the disease "is due to the nature of an employment in which hazards of the occupational disease exist" or "has manifestations that are consistent with those known to result from exposure to a biological, chemical, or physical agent that is attributable to the type of employment in which the covered employee was employed"; *and* (2) "on the weight of the evidence, it reasonably may be concluded that the occupational disease was incurred as a result of the employment[.]" LE § 9-502(d). In short, "for an illness to be compensable as an occupational disease, a claimant must (1) qualify the particular illness

as an occupational disease under § 9-101(g); and (2) satisfy the compensability test of § 9-502(d)." *King v. Bd. of Educ. of Prince George's Cnty.*, 354 Md. 369, 376-77 (1999).

I.

Admissibility of Dr. Gitter's Testimony

The Association contends the trial court's ruling allowing Dr. Gitter's testimony was an error of law because it ran contrary to Rule 5-702.

Admissibility of expert testimony under Rule 5-702 involves three inquiries: "(1) whether the expert, based on her skills, knowledge, experience, and training, is qualified; (2) whether her methods are reliable; and (3) whether there is a sufficient factual basis to support her testimony and assist the trier of fact." *Parkway Neuroscience and Spine Inst., LLC v. Katz, Abosch, Windesheim, Gershman & Freedman, P.A.*, 255 Md. App. 596, 621 (2022) (citing Md. Rule 5-702), *cert. granted*, 482 Md. 534 (2023). It is well-established that we review a trial court's ruling on the admissibility of expert testimony under Rule 5-702 with deference and only will reverse for an abuse of discretion. *Rochkind v. Stevenson*, 471 Md. 1, 10-11 (2020). Thus, contrary to the Association's assertion, we do not review a court's decision that expert testimony satisfies the requirements of Rule 5-702 for legal error, but for abuse of discretion.

A decision that is an abuse of discretion is '"well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable."' *Nash v. State*, 439 Md. 53, 67 (2014) (quoting *Gray v. State*, 388 Md. 366, 383 (2005)) (further quotation marks and citation omitted). Because the abuse

of discretion standard of review is highly deferential, a court's "action in admitting or excluding such testimony will seldom constitute a ground for reversal." *Bryant v. State*, 393 Md. 196, 203 (2006) (quotation marks and citations omitted).

This appeal only concerns the third inquiry under Rule 5-702: whether there was a sufficient factual basis to support Dr. Gitter's testimony. "The sufficiency of the factual basis 'include[s] two subfactors: an adequate supply of data and a reliable methodology.'" *Walter v. State*, 239 Md. App. 168, 196-97 (2018) (quoting *Rochkind v. Stevenson*, 454 Md. 277, 286 (2017)). Subfactor one, an adequate supply of data, '"may arise from a number of sources, such as facts obtained from the expert's first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions."' *Rochkind*, 454 Md. at 286 (quoting *Sippio v. State*, 350 Md. 633, 653 (1998)). Subfactor two, a reliable methodology, is a methodology evidencing "a sound reasoning process for inducing its conclusion from the factual data and . . . an adequate theory or rational explanation of how the factual data led to the expert's conclusion." *Id*. at 287 (quotation marks and citation omitted).

The Association argues that Dr. Gitter's opinion lacked an adequate supply of data, for two reasons. First, he "did not identify any evidence to support the conclusion that volunteer firefighters have an increased risk of squamous cell carcinoma of the tonsil." And second, he "failed to identify any evidence linking [Mr. Shindle]'s work as a volunteer firefighter to his development of cancer." "[M]ost significantly," the Association maintains, Dr. Gitter testified that he did not know which, if any, of Mr.

Shindle's risk factors for throat cancer, including firefighting, was the "actual cause" of his throat cancer. The Association relies largely upon this Court's decision in *Giant Food, Inc. v. Booker*, 152 Md. App. 166 (2003), for the proposition that Dr. Gitter's testimony amounted to an inadmissible "'because I say so' opinion[.]"

In *Booker*, an employee of Giant Food experienced a single exposure to Freon gas while at work. Fourteen months later, he was diagnosed with adult-onset asthma. The Commission denied his claim for permanent partial disability on two bases, including that there was no causal connection between the Freon gas exposure and the employee's disability. On judicial review in the circuit court, however, a jury found such a causal connection.

This Court reversed on appeal, concluding that the testimony of the employee's medical expert, a specialist in pulmonary medicine, did "not rise above the level of mere speculation or conjecture" and therefore should not have been admitted in evidence. *Id.* at 185. Because expert medical testimony was necessary to establish a causal connection between Freon gas exposure and adult-onset asthma, without an admissible expert opinion there was no legally sufficient evidence upon which a reasonable juror could find that the employee's occupational disease was causally related to his occupation. The expert was unclear about what exactly had happened, whether Freon was involved, and what other chemicals may have been involved. He "could not point to any medical or scientific study demonstrating a causal connection between Freon inhalation and asthma[,]" and testified that the textbooks he reviewed did not support any such

association. *Id*. at 185-86. We reasoned that the expert "was not clear about what happened, not clear about what chemicals were involved" and his opinion amounted to an inappropriate *res ipsa loquitur* theory of causation. *Id*. at 187.

Dr. Gitter's expert testimony in this case differed markedly from the expert's testimony in *Booker*. Dr. Gitter had evaluated Mr. Shindle, read his medical records, taken his medical history, and reviewed the test results related to his tonsillar cancer. Dr. Gitter testified that Mr. Shindle was "active" as a firefighter for many years; that he performed all the normal responsibilities of firefighters, including being present "within the buildings" at fire scenes and overhaul duties; and that Mr. Shindle did not use respirators regularly for long stretches of his career. Dr. Gitter also had general knowledge of the risks and exposures faced by firefighters acquired from his own experience evaluating and treating them.

Dr. Gitter explained the mechanism by which firefighting exposures can cause squamous cell cancer of the tonsil. Smoke and other "carcinogens" pass through the nasal and mouth passages in the body used for breathing because "in order for the air to get into your lungs, it goes through your nasal passages and through your oral passages and . . . over your tonsils." Thus, the tonsils repeatedly are exposed to smoke and other carcinogens. He added that he had "read studies in the past . . . that show an increase[d] risk amongst

firefighters and amongst other occupations with exposures[,]" although he acknowledged that he had not cited those studies in his report.[5]

As mentioned, Dr. Gitter opined that causation for all cancers, including squamous cell cancer of the tonsil, is multifactorial. Mr. Shindle had three risk factors for throat cancer: HPV, firefighting, and a history of cigarette smoking, albeit remote. Dr. Gitter testified that the addition of each risk factor increases the likelihood that an individual will develop the disease. He opined that although it is impossible to say with absolute certainty that one risk factor contributed to Mr. Shindle's cancer, to a reasonable degree of medical certainty, more likely than not Mr. Shindle's firefighting exposures contributed to his development of cancer.[6]

In contrast to the expert testimony in *Booker*, Dr. Gitter articulated a logical explanation for his conclusions based on Mr. Shindle's medical history, his evaluation of Mr. Shindle, and his professional experience. The trial court did not abuse its discretion by denying the motion *in limine* and admitting Dr. Gitter's expert testimony.

[5] As we shall discuss further, the existence of this causal link was not disputed by the defense expert, Dr. Miller, who testified that when he first evaluated Mr. Shindle, his differential diagnosis was that Mr. Shindle's throat cancer was caused *either* by HPV or by smoke exposure. His opinion diverged from Dr. Gitter's opinion based upon whether both risk factors could have contributed to Mr. Shindle's throat cancer, or whether his throat cancer was caused solely by HPV.

[6] In its brief, the Association mischaracterizes this testimony, asserting that Dr. Gitter said he did not know what caused Mr. Shindle's cancer. When read in context, it is clear that Dr. Gitter was explaining that he thought each of the "risk factors" identified by defense counsel – HPV, smoke inhalation from firefighting, and, to some extent, cigarette smoking – contributed to the development of the disease and, consequently, it was impossible to distinguish between them as causes because each played a role.

II.

Sufficiency of the Evidence

The Association contends the evidence at trial was legally insufficient to prove that the risk of developing squamous cell carcinoma of the tonsil is inherent in the nature of the occupation of a firefighter and that that type of cancer was causally related to Mr. Shindle's employment. Thus, it maintains, the circuit court erred by denying its motion for judgment and its subsequent motion for judgment notwithstanding the verdict ("JNOV").

We review a trial court's denial of a motion for judgment or JNOV for legal correctness. *Anne Arundel Cnty. v. Reeves*, 474 Md. 46, 72 (2021). In assessing the propriety of the ruling, we, like the trial court, view "'the evidence and the reasonable inferences to be drawn from it in the light most favorable to the non-moving party, and determin[e] whether the facts and circumstances only permit one inference with regard to the issue presented.'" *Adcor Indus., Inc. v. Beretta U.S.A. Corp.*, 250 Md. App. 135, 147-48 (2021) (quoting *Stracke v. Est. of Butler*, 465 Md. 407, 420 (2019) (cleaned up)). We will affirm the ruling "if there is 'any evidence, no matter how slight, that is legally sufficient to generate a jury question.'" *Jones v. State*, 425 Md. 1, 31 (2012) (citation omitted). And, significantly, our "assessment of evidentiary sufficiency assumes that all of the evidence actually in the case is competent." *CSX Transp., Inc. v. Miller*, 159 Md. App. 123, 179 (2004).

An occupational disease is "'one which arises from causes incident to the profession or labor of the party's occupation or calling. It has its origin in the inherent nature or mode of work of the profession or industry, and it is the usual result or concomitant.'" *Johnson v. Mayor & City Council of Baltimore*, 203 Md. App. 673, 685 (2012) (quoting *Polomski v. Mayor & City Council of Baltimore*, 344 Md. 70, 78 n.8 (1996)), *aff'd*, 430 Md. 368 (2013). In assessing whether an occupational disease is compensable under LE § 9-502(d), we follow two steps:

> First, the court must identify the professional tasks of the specific employee, remembering that function outweighs form. [Second], the court determines whether: (a) the "nature" of the employment includes the hazards of the ailment the employee suffers from to a greater degree than that present in general employment; and (b) whether the employee's job functions expose the employee to those hazards.

Baltimore Cnty. v. Quinlan, 466 Md. 1, 19 (2019) (cleaned up). "[A] hazard is a risk factor. To be compensable, it is the risk factors, not the disease, that must inhere in the nature of the employment." *Black & Decker Corp. v. Humbert*, 189 Md. App. 171, 187 (2009).

Thus, our task is to determine whether Mr. Shindle adduced any evidence from which a reasonable juror could find that firefighting includes hazards of throat cancer that are greater than those present in general employment and that Mr. Shindle's actual work as a volunteer firefighter exposed him to those hazards. Because we conclude that he satisfied his burden of production on both fronts, we hold that the motions for judgment and JNOV properly were denied. We explain.

First, viewed in a light most favorable to Mr. Shindle, the evidence established that he worked for more than 30 years fighting fires and engaging in overhaul duties in the aftermath of fires. He performed those tasks actively on a weekly basis, responding to hundreds of calls each year.

Second, Dr. Gitter testified that a history of firefighting is a risk factor for developing squamous cell throat cancers, which would include tonsillar cancer. He testified that this is so because the carcinogens present at fire scenes are inhaled by firefighters and pass over and through their nasal passages and throat, including the tonsils, before entering the lungs. *See also Montgomery Cnty. Fire Bd. v. Fisher*, 298 Md. 245, 256 (1983) (noting that the LE § 9-503 presumption of compensability for firefighters reflects "the general public knowledge that fire fighters in the course of their daily activities are exposed to inhalation of smoke or noxious fumes"). Likewise, it was implicit in Dr. Miller's testimony that he initially concluded that "smoke exposure" was a likely cause of Mr. Shindle's cancer, and that smoke inhalation, both through tobacco smoking and firefighting, is a widely recognized risk factor for this type of cancer.

Third, the evidence showed that Mr. Shindle was exposed to the hazard of smoke inhalation during his career. Although his department provided breathing apparatuses to firefighters, the face masks were not fitted and there were not enough apparatuses to go around. Mr. Shindle also did not wear the equipment when he remained on the fire scene after the active fire was extinguished. Even when he was wearing the apparatuses, he

remembered that he could smell smoke through the equipment. The above evidence satisfied Mr. Shindle's burden of production.

The cases the Association relies upon are inapposite. For example, in *King*, 354 Md. at 371-72, a transportation assistant for the school district filed an occupational disease claim with the Commission, alleging that she suffered a nervous breakdown because of the demands of her employment. After the Commission denied her claim, the circuit court granted the school district's motion for summary judgment and this Court and the Supreme Court of Maryland, then known as the Court of Appeals, affirmed. The Supreme Court reasoned that although the evidence showed that Ms. King was overworked and mismanaged in her position, causing her extreme mental stress, those were hazards of her "specific job," not hazards inherent in her employment as a transportation assistant. *Id*. at 381. *See also Davis v. Dyncorp*, 336 Md. 226, 236-39 (1994) (A computer operator who was harassed on the job and developed post-traumatic stress disorder did not suffer a compensable occupational disease because there was "nothing peculiar to Davis's duties as a computer operator that made him more susceptible to harassment than in any other kind of employment."). In those cases, the hazards that were alleged to have caused the claimants' occupational disease (stress and harassment) could be present in any job. Here, exposure to smoke and other toxic fumes plainly is present in the occupation of a firefighter to a much greater extent than in general employment.

In related contentions, the Association maintains that Mr. Shindle failed to adduce expert medical testimony linking the exposures he faced as a firefighter to the condition of squamous cell cancer of the tonsil and showing that smoke inhalation can cause that cancer. It maintains that Dr. Gitter "provided no explanation as to how [Mr. Shindle]'s alleged risk factors as a firefighter relate to contracting throat cancer." As already explained, however, Dr. Gitter's testimony that smoke inhalation during firefighting can cause throat cancers, including squamous cell cancer of the tonsil, was supported by an adequate factual basis. He explained the basic mechanism for how carcinogens present in smoke travel through the throat and over the tonsils. He also opined that cancer in general, including throat cancer, does not have a single cause, but is "multifactorial."

This Court's decision in *Humbert*, 189 Md. App. 171, is instructive. We affirmed a jury verdict in favor of an electrician who filed an occupational disease claim for shoulder impingement syndrome. Humbert's medical expert testified that he had a bone spur on the underside of his shoulder bone, likely a congenital condition, and that the bone spur coupled with the repetitive overhead reaching inherent in Humbert's occupation as an electrician caused inflammation, resulting in the impingement syndrome. We reasoned that the cases holding that '"mere aggravation of a disease not occupational in character"' did not amount to an occupational disease were inapposite because in *Humbert*, the disease was not a bone spur, but the impingement syndrome. *Id.* at 179 (quoting *Blake v. Bethlehem Steel Co.*, 225 Md. 196, 200 (1961)). Because Humbert's medical expert testified that that syndrome "resulted, in part, from the

repetitive overhead activities[,]" the testimony was legally sufficient to make compensability a jury question, even if the disease would not have developed absent Humbert's bone spur. *Id*. at 184.

Here, Dr. Gitter and Dr. Miller agreed that HPV and smoke inhalation both are risk factors for tonsillar cancer. They disagreed about whether those two risk factors operated synergistically to cause Mr. Shindle to develop cancer, as Dr. Gitter opined, or whether HPV, standing alone, caused the cancer regardless of the other risk factors, as Dr. Miller opined. As in *Humbert*, Dr. Gitter's opinion that Mr. Shindle's throat cancer resulted, in part, from his exposure to smoke as a volunteer firefighter was legally sufficient to create a jury question, even if Mr. Shindle would not have developed the cancer absent his HPV exposure. The court did not err by denying the Association's motions for judgment and for JNOV.

III.

Jury Instruction

The Association asked the court to give Maryland Civil Pattern Jury Instruction ("MPJI-Cv") 30:13, entitled "Idiopathic Condition," which states:

> If an Employee is injured because of a risk or medical condition that is personal to the Employee, then the injury does not arise out of the employment.
>
> However, if the conditions of the employment increase the risk of injury to the Employee or aggravate the effects of the medical condition, the Employee is entitled to workers' compensation.

The Association's counsel argued that the instruction was generated by the evidence because HPV was a "condition personal to" Mr. Shindle. Mr. Shindle's attorney responded that in his view the instruction usually applies when there is a "prior injury," which is not the case here, but he would not object to the court giving the instruction.

The court concluded that the instruction did not apply to the facts of this case because there was no evidence that Mr. Shindle was "injured" because of a risk or medical condition that was personal to him. Counsel for the Association responded that although the instruction uses the term "injured," it also could apply to an occupational disease, and that Dr. Miller's testimony was that Mr. Shindle developed cancer as a result of HPV, a medical condition personal to him. Mr. Shindle's attorney rejoined that the only question for the jury was whether Mr. Shindle's throat cancer was "causally related or [a]rises out of his occupation[,]" making the instruction unnecessary. The trial court agreed, ruling:

> I feel like I'm getting confused reading this instruction because – because it . . . seems to lead to certain conclusions. Your experts have differing opinions about the causation and would be arguing that to the jury, but I wouldn't want to present an instruction that . . . confuses them. So, I'm going to disallow idiopathic condition.

The court instructed the jurors, in pertinent part:

> An occupational disease may be found in either of two ways. One, the disease was due to the nature of the employment, in which the hazard of the disease actually exists. Or two, the symptoms of the disease are consistent with those known to result from exposure to a physical, biological, or chemical agent attributable to the type of employment. To be compensable the alleged occupational disease must be due to the nature of the employment, in general, rather than merely the specific job in which the employee was working.

> The focus in an occupational disease claim for workers' compensation benefits, is on whether the resulting condition is due, in part, to the occupation.

The first paragraph is part of the pattern occupational disease instruction, MPJI-Cv 30:9, and the second paragraph is a special instruction, drawn from the *Humbert* decision, that Mr. Shindle requested and the Association does not challenge on appeal.

"This Court reviews a trial court's grant or denial of a requested jury instruction for abuse of discretion." *Steamfitters Loc. Union No. 602 v. Erie Ins. Exch.*, 469 Md. 704, 739 (2020). "When applying the abuse of discretion standard in this context, we look to the following factors: (1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Id*. (quotation marks and citation omitted). There is no dispute here that MPJI-Cv 30:13 is a correct statement of the law.

The Association argues that the concept of an idiopathic condition – HPV – causing Mr. Shindle's cancer was "fundamental" to its theory of the case and that it was error for the court not to give the instruction, which was not otherwise covered. Mr. Shindle responds that there are no appellate cases in Maryland applying the idiopathic condition rule in the context of an occupational disease and that the court properly instructed the jurors on the standards application to occupational diseases.

The cases applying the principle of the law set out in the instruction at issue uniformly involve accidental injuries and, more precisely, falls.[7] The only issue for the jury in this case was whether Mr. Shindle's squamous cell cancer of the tonsil arose from and in the course of his occupation as a volunteer firefighter. The court properly instructed the jurors that for the cancer to qualify as an occupational disease, it must be "due to the nature of the employment in which the hazard of the disease actually exist," but that it was sufficient for the disease to be "due in part to the occupation." These instructions were a correct statement of the law governing occupational disease claims and the idiopathic condition instruction was inapplicable here. Accordingly, the court did not abuse its discretion in declining to give the requested instruction.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.

[7] *See, e.g., Baltimore Dry Docks & Ship Bldg. Co. v. Webster*, 139 Md. 616 (1922) (carpenter fell from the upper deck of a ship while working, possibly due to vertigo); *Watson v. Grimm*, 200 Md. 461 (1952) (garbage collector fell from the running board of a garbage truck during a dizzy spell); *Franquet v. Imperial Mgmt. Corp*., 27 Md. App. 653 (1975) (property manager for apartment complex fell into drainage ditch during a petit mal epileptic seizure); *CAM Constr. Co., Inc. v. Beccio*, 92 Md. App. 452 (1992) (superintendent for construction project tripped and fell in a hallway, possibly due in part to a muscle relaxant prescribed to treat a toe walking condition); *Youngblud v. Fallston Supply Co., Inc.*, 180 Md. App. 389 (2008) (office worker fell down staircase during a hypoglycemic episode brought on by Type I diabetes). In these cases, the central issue was whether "'some factor peculiar to the employment' contributed to the [worker's] injury" even if an idiopathic condition was the "sole origin" of the injury. *Beccio*, 92 Md. App. at 463. Where a condition of employment placed the employee in a precarious or hazardous place, aggravating the effects of an idiopathic fall, the accidental injury was held compensable, whereas a fall caused solely by an idiopathic condition where no "peculiarities of employment" contributed to the injury was held not to be compensable. *Youngblud*, 180 Md. App. at 407.