

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17th Street Suite 1300, Denver, CO 80202	EFILED Document CO Court of Appeals 12CA1561 Filing Date: Jul 24 2012 3:33PM MDT Transaction ID: 45522789
In the Matter of the Workers' Compensation Claim of: KEVIN MILAN, Claimant, vs. SOUTH METRO FIRE AND RESCUE, CITY OF GOLDEN, CASTLEWOOD FIRE DEPARTMENT, AND PARKER FIRE PROTECTION DISTRICT, Employer, and SELF-INSURED, COLORADO INTERGOVERNMENTAL RISK SHARING AGENCY, AND PINNACOL ASSURANCE, Insurer, Respondents.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> CASE NUMBER: WC 4-783-192
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER	

DATE FILED: July 24, 2012 3:33 PM

Hearings in this matter were held on July 1, 2011 and August 12, 2011 before Barbara S. Henk, Administrative Law Judge.

Claimant was present and represented by Neil D. O'Toole Esq. Respondent South Metro Fire and Rescue, self insured, was represented by Melissa Lohman-Evans, Esq. Respondents City of Golden and Intergovernmental Risk Sharing Agency were represented by Paul Feld, Esq. Respondents Castlewood Fire Department and Pinnacol Assurance were represented by Frank Cavanaugh, Esq. Respondents Parker Fire Protection District and Pinnacol Assurance were represented by Lisa Simons, Esq.

The July 1, 2011 hearing was digitally recorded in Courtroom 3 from 8:30 a.m. to 4:10 p.m. The August 12, 2011 hearing was digitally recorded in Courtroom 3 from 8:30 a.m. to 3:00 p.m. The record was held open until November 9, 2011 for the acceptance of additional evidence and position statements.

In this order, Kevin Milan will be referred to as "Claimant"; City of Golden will be referred to as "Golden"; Parker Fire Protection District will be referred to as "Parker"; South Metro Fire and Rescue will be referred to as "South Metro"; and Castlewood Fire Department will be referred to as "Castlewood."

Also in this order, "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2007); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by U.S. Mail, or by e-mail addressed as follows:

Neil D. O'Toole Esq.
kim@otoole-sbarbaro.com

Lisa A. Simons, Esq.
orders@rs3legal.com

Frank Cavanaugh, Esq.
orders@rs3legal.com

Melissa J. Loman Evans, Esq.
Melissa@dnvrlaw.com

Paul D. Feld, Esq.
pfeld@ritsema-lyon.com

Division of Workers' Compensation
wcoac.Orders@state.co.us

Date: 1/19/12

/s/Charleen Corliss
Court Clerk

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-783-192**

EXHIBITS

The following Exhibits were accepted into evidence: Claimant's Exhibits 1-18, 22-27, Golden's Exhibits A-U, Respondents' Joint Submissions A-S, South Metro's Exhibits AA-ZZ, Exhibit A House Bill 07-1008 legislative testimony, and evidentiary deposition of Dr. Mark Pattridge taken on November 10, 2010 with deposition exhibits 1-8.

ISSUES

1. Compensability under Section 8-41-209, C.R.S. for genitourinary cancer of the prostate.
2. Medical benefits.
3. Average weekly wage.
4. Apportionment.
5. TTD and all other issues reserved.

STIPULATIONS

The parties stipulated to the following facts at hearing:

- a) Claimant worked as a volunteer firefighter for Golden from August 7, 1990 through July 29, 2001.
- b) Claimant worked as a firefighter for Castlewood from March 7, 1998 through July 30, 2001.
- c) Claimant worked as a firefighter for Golden from July 30, 2001 through September 5, 2007.
- d) Claimant worked as a Captain for Parker from September 6, 2007 through December 31, 2008.
- e) Claimant worked as a volunteer firefighter for Golden on February 5, 2008 to present.
- f) Parker merged with South Metro on January 1, 2009 and thus Claimant worked for South Metro from January 1, 2009 to present.

g) Claimant is entitled to maximum average weekly wage on date of onset of disability.

h) The medical treatment Claimant received including surgery for his prostate cancer at John Hopkins University is reasonable and necessary and authorized.

FINDINGS OF FACT

1. Claimant's date of birth is October 26, 1959. He is currently 52 years old.
2. Claimant has been employed as a firefighter since 1990. From August 7, 1990 through July 29, 2001, Claimant worked as a volunteer firefighter for Golden. His primary responsibilities were fire suppression and overhaul. From July 30, 2001 through September 5, 2007, Claimant worked full time for Golden as a training officer. Claimant trained volunteers and recruits and also performed fire suppression and overhauls. Approximately 3 fire suppression calls came into the station each day and Claimant usually responded to at least one of them. Claimant was rehired by Golden as a volunteer firefighter from February 5, 2008 and continuing to the present.
3. Claimant worked as a firefighter for Castlewood from March 7, 1998 through July 30, 2001. Castlewood subsequently became South Metro. During his employment with Castlewood, Claimant's duties included public education, apparatus/equipment maintenance, fire prevention, building and hazard pre-incident planning, inspection and fire suppression and overhaul. Claimant responded to approximately 4-5 calls on a 24 hour shift and completed approximately one hundred and twenty 24-hour shifts per year. Approximately 50% of the fire suppression calls were residential and 50% commercial structure fires.
4. Claimant worked for Parker as a Captain on September 6, 2007 through December 31, 2008. Claimant was a safety officer responding to major fires and going into burning structures to make sure both that operations were running safely and that firefighting equipment was properly used. Claimant was also exposed to numerous live fires during training burns while acting as a lead training instructor.
5. On January 1, 2009, Parker merged with South Metro. Claimant primarily worked as a training and safety officer for South Metro.
6. Collectively, Claimant completed five or more years of employment as a firefighter as required under Section 8-41-209, C.R.S.
7. Claimant's work as a firefighter for over 21 years, involved suppression and overhaul of residential and commercial structural fires. He also contained hazardous materials and spills as well as chemical and car fires. Both Claimant and Chief Bales credibly testified that firefighters suffer regular exposures to multiple chemicals that vary by fire type.

8. Claimant has a family history of prostate cancer, i.e. "familial" predisposition. His father was diagnosed with prostate cancer at age 69/70. Two of his father's brothers were diagnosed with prostate cancer; one at age 69/70 and the other at age 71. He has a maternal uncle who was diagnosed with prostate cancer at age 69/70. Claimant has approximately 17 first cousins who are male and one has prostate cancer diagnosed at age 49. His paternal grandfather did not have cancer. His father's 3rd brother and Claimant's 58 year old brother have not been diagnosed with cancer nor have the other 16 first male cousins.

9. On July 24, 2007, Claimant underwent a physical examination by Dr. John Harris, a physician for Parker. The physical included a digital rectal exam (DRE) and prostate exam, both of which were normal. At this time Claimant's prostate specific antigen (PSA) was 2.5. In 2007, a 2.5 PSA was not high enough to recommend a biopsy.

10. On November 4, 2008 when Claimant was 48 years old, his PSA was 3.6. This PSA was ordered by Dr. Harris. Dr. Harris referred Claimant to his family physician for follow-up. Claimant saw his family physician, Dr. Pattridge who felt that the proportional increase (velocity) of the PSA between 2007 and 2008 warranted a urological consultation and referred Claimant to Dr. Abernathy. Claimant underwent a biopsy on December 18, 2008 that showed he had clinically significant prostate adenocarcinoma. Dr. Abernathy referred Claimant to Johns Hopkins University where he underwent surgery on April 8, 2009.

11. Richard R. Augspurger, M.D., is an expert urologist. He is the medical director for The Urology Center of Colorado and has practiced medicine for over 30 years. Dr. Augspurger has managed prostate cancer patients since 1973.

12. When asked to address the ideology of prostate cancer, Dr. Augspurger opined, "Most of them just occur spontaneously and we don't know the underlying cause. There are family histories of it where it runs through families. And then there are hereditary ones where there's a strong genetic component that runs through families." (8/12/11 hearing transcript (HT) p. 57 l. 25, p. 58 ll. 1-5). He further stated that the textbooks do not identify smoking or exposure to firefighting as a factor. (8/12/11 HT p. 58 ll. 7-9). He indicated that other risk factors for prostate cancer include a high fat diet, race, and vasectomy. (8/12/11 HT p. 60 ll. 17-25, p. 61 ll. 2-8, p. 89 ll. 1-9). When asked to explain the difference between hereditary and familial risk factors, Dr. Augspurger stated:

"Okay. If you look, we're going to take everybody who has prostate cancer and you have this big pool. Then you have another pool here and inside this pool is this. This is the prostate cancer that comes up and we don't know the cause, there's no family history, there's no genetics. And that's 85 percent of the cancers that we see. Then we have the cancers that run in families and that accounts for about 15 percent of all the cancers. And then inside that family, there are what are called the hereditary ones and that number is dependent

on several factors. But if you have two family members who are less than 55 – this accounts for 43 percent of this 15 percent. So if you have two family members. So a diagnosis of familial cancer means that you have more than one person in a family that has prostate cancer.”

(8/12/11 HT p. 58 ll. 17-25, p. 59 ll.1-5)

13. Dr. Augspurger opined that Claimant fell into the category between hereditary and familial. (8/12/11 HT p. 61 ll. 22-25). He further opined that the familial history is the most likely cause of Claimant's cancer within a reasonable degree of medical probability. (8/12/11 HT p. 63 ll. 4-17). Dr. Augspurger does not believe that prostate cancer is firefighting caused or related. (8/12/11 HT p. 88) Dr. Augspurger's opinion on causation is not persuasive enough to overcome the statutory presumption. The cause of Claimant's cancer is unknown. Dr. Augspurger opined that familial predisposition is a risk factor. But Section 8-41-209, C.R.S. provides that Claimant's prostate cancer “shall be presumed to result from a firefighter's employment.” His opinion does not overcome this presumption.

14. Dr. Augspurger persuasively testified that the practice of prostate cancer medicine has evolved since 2007. Dr. Augspurger opined that he “probably” would have ordered the biopsy when Claimant's PSA was 2.5 in 2007. (8/12/11 HT pg. 67 ll. 6-7)

15. Dr. Augspurger credibly explained that back in 1995 when claimant had a 1.3 PSA at age 35 that was considered “normal” because the PSA was below 2.5. Today physicians are suspicious of the existence of prostate cancer when a male who is under 50 years old has a PSA of more than 1.0. Dr. Augspurger persuasively testified that Claimant's 1.3 PSA at age 35 is suggestive that prostate cancer was present at that time. The normal PSA at age 35 should be less than 0.6. (Joint HS G)

16. Dr. Augspurger persuasively opined that it was medically probable that Claimant had prostate cancer in July 2007:

“No, I would say with a pretty good degree of medical probability that he had the cancer in 2007 and he probably had it in 2006. Because cancer is not just overnight you show up with cancer. So you start out with one cancer cell at some point. And depending on how fast it grows, you'll end up with a volume of cancer that's big enough to detect when you do a biopsy.”

(8/12/11 HT, pg. 76 ll. 4-12)

17. Consistent with Dr. Augspurger, William Milliken, M.D., persuasively opined that it is medically probable that Claimant had prostate cancer in July 2007. Dr. Milliken is board certified in occupational medicine and Level II accredited. He has performed evaluations of hundreds of claims for assessment of whether occupational exposure to various materials was causally related to the development of various

cancers. Dr. Milliken was accepted as an expert in occupational environmental medicine.

18. When addressing the increased and high PSA at age 47, Dr. Milliken persuasively testified:

“[W]e do have a hard number in 2007, which was 2.5 or 2.8 depending on how you read it. It wasn’t legible to me. And from that time forward to 15 or so months later you had significant progression. And so I think that with all – with reasonable medical certainty based on those three references that we’re talking about, the risk factors that [Claimant] had at that time, that he – *it’s more likely than not that the cancer was present [in July 2007] when the reading was 2.5 to 2.8. I think that’s – I can make, in my opinion, a reasonable conclusion in all medical probability that that was the case.*”

(8/12/11 HT, pg. 179 ll. 13-23) (Emphasis added)

19. Dr. Milliken testified that the firefighter statute should be limited to certain genitourinary cancers, such as kidney and/or bladder cancer, but not prostate. This is because “the path of destruction” from the chemicals involved in firefighting should not impact the prostate. (8/12/11 HT p. 107 ll. 3-25, p. 108 ll. 1-4). He did acknowledge a “weakly possible” occupational exposure contributing effect. Exhibit K, BS 166. He concluded that Claimant’s carcinogenic exposure was not related to his occupation because he did not believe that carcinogens found in firefighting could impact the prostate.

20. Dr. Milliken disputes the Colorado Legislature’s inclusion of the prostate gland as a covered cancer because the prostate gland is not significantly exposed to an excretory function (urine). Therefore, he believes that the statute’s presumption is not supported by scientific evidence that there is a cellular interaction with prostate cell DNA. Exhibit K, BS 163.

21. Dr. Milliken agreed with Dr. Mayer that in many cases the cause of cancer is unknown.

“A. Yes, I can. I would agree with the doctors that have all I think testified including Dr. Mayor that in many cases we don’t have the precise cause of many cancers. And this is not unusual for a large number of cancers. The determination of most likely cause is based on probability or you know what does the majority of or the overwhelming percentage of the evidence suggest would be the cause.

* * * *

So based on that probability analysis if you will when I look at genetic risk as 2 or 300 to 500 times increase in risk for prostate cancer as compared to someone without the genetic history, that to me in a

very simple manner is clearly the chief risk factor. And while it may not be the sole cause or they (sic) may be other factors involved, I can't identify from that large group of other risk factors which one, if any, was the significant co-conspirator if you will or co-contributor to carcinogenesis or the development of prostate cancer. I don't know that - - I don't know that anybody could."

(8/12/11 HT p. 110 ll. 4-25, p. 111 ll. 1-5)

22. Dr. Milliken concluded, "[I]t was the familial or genetic risk that was the most prominent risk factor for prostate cancer." (8/12/11 HT p. 111 ll. 12-14). Dr. Milliken's opinion disputing the scientific validity of Section 8-41-209, C.R.S. is rejected and the presumption is applicable in this matter. His opinion on causation is not persuasive enough to overcome the statutory presumption. He admits that the cause of Claimant's cancer is unknown. He opines that familial predisposition is the most prominent risk factor. However, Section 8-41-209, C.R.S. provides that Claimant's prostate cancer "shall be presumed to result from a firefighter's employment." His opinion does not overcome this presumption.

23. Dr. Annyce Mayer was accepted as an expert in occupational medicine and public health. Dr. Mayer persuasively testified that Claimant had contracted genitourinary cancer or prostate cancer, had completed more than 5 years of firefighter service, and had undergone physical examinations at the time of becoming a firefighter and thereafter, which failed to reveal substantial evidence of the presence of prostate cancer. Therefore, Claimant has met the statutory threshold requirements set forth in Section 8-41-209, C.R.S.

24. Dr. Mayer persuasively opined that the medical evidence presented by Respondents failed to demonstrate that Claimant's prostate cancer did not occur on his job. She testified that although the exact cause of Claimant's prostate cancer is unknown, Claimant's cancer is likely the result of the synergistic interaction between familial factors and his carcinogen exposures as a firefighter. This opinion is credible and persuasive.

25. Dr. Mayer's opinion relied on published articles establishing that the risk of prostate cancer is influenced by the age of relatives in the first degree who had been diagnosed with cancer. Claimant's father was 69 or 70 when he was diagnosed and his uncles were between the ages of 69-71 when they were diagnosed with prostate cancer. Thus, Claimant's diagnosis at a much younger age is suggestive that, other factors, including occupational exposures, combined with familial risk and unknown genes to create prostate cancer.

26. Dr. Mayer opined that Claimant's younger onset of prostate cancer was not consistent with a familial history of his other first degree relatives. Further, of forty-two relatives in the first and second degree, only seven had some level of prostate cancer. Further, his older brother does not have prostate cancer, and his sister has not suffered from any type of cancer.

27. Dr. Mayer testified that recent epidemiological studies have demonstrated a nexus between exposure to polyhydrocarbons and the early development of cancer in individuals who were predisposed by heredity to the development of cancer. Although these studies have not defined the precise causal relationship, they provide support for the proposition that there is a relationship between an early onset of prostate cancer in individuals who are exposed to carcinogens and who have a hereditary predisposition.

28. Dr. Noel Weiss testified at the August 12, 2011 hearing as a joint witness for all Respondents. He is an epidemiologist and professor at the University of Washington in Seattle. Dr. Weiss has been an epidemiologist, which is one who studies the causes of disease in the human population, for approximately forty years. Dr. Weiss authored several scientific publications regarding the occurrence of cancer among firefighters. Dr. Weiss was accepted as an expert witness in the area of epidemiology. (8/12/11 H.T. p. 13-16).

29. Dr. Weiss opined that the firefighter cancer presumption statute is not supported by scientific evidence.

Q. "Do you agree, and isn't it your position that a presumption of occupational relatedness of prostate cancer for firefighters is not scientifically based?"

* * * *

A. It would be because we don't have scientific knowledge that firefighting can predispose to prostate cancer. And I would agree that it would not make sense to presume any individual who was a firefighter who developed prostate cancer, it would be unreasonable to presume that such an individual's illness was due to his firefighting."

(8/12/11H.T. p. 54 l.19 - p. 55 l. 4)

30. When asked if the cause of prostate cancer for a firefighter is unknown, Dr. Weiss stated, "It was true then and it's true now, that a strong family history predisposes to the incidence of prostate cancer. The specific means by which that operates is not known." (8/12/11 H.T. p. 46 ll. 19-21)

31. Dr. Weiss opined that it is premature to conclude that firefighting could lead to an increased risk in prostate cancer. (8/12/11 H.T. p.25, ll.12-17). Dr. Weiss stated that a person with a family history of prostate cancer is at a sharply increased risk of prostate cancer. (8/12/11 H.T. p. 26, ll. 2-8). He agreed with Dr. Augsburg's report that there was a 500% increase in risk of one having prostate cancer if his father, cousin, who is the father's brother's son, a maternal uncle, and a paternal uncle all have prostate cancer. Dr. Weiss testified that this figure of a fivefold increase would be compatible with his interpretation of a "sharply increased" risk. (8/12/11 H.T. p. 26, ll. 9-19)

32. Based on a fivefold increase in risk associated with a family history of prostate cancer, Dr. Weiss stated the first element of the fivefold increase would be the background risk for prostate cancer that all men have. The remaining four elements, going from one to five, are the size of the increase in risk based on the family history. Dr. Weiss explained that four of the five, or 80%, would be the attributable risk percentages or the likelihood that a given individual with that family history of prostate cancer developed prostate cancer based on this family history. (8/12/11 H.T. p. 27, ll.7-25).

33. Dr. Weiss also provided testimony regarding a document prepared by a "working group" of the International Agency for Research on Cancer. This agency convenes these working groups to make judgments as to the likelihood that a particular occupation or substance is carcinogenic in human beings. Dr. Weiss explained that the International Agency specifically reviewed firefighting several years ago and found that the epidemiologic data on the relationship between cancer and firefighting was "limited" and that it was only "possible" that firefighting is a cause of cancer of any type. Dr. Weiss agreed that there is a possibility that firefighting is a cause of cancer but did not believe it was reasonable to opine beyond that *i.e.* opine based on probability. (8/12/11 H.T. p. 28, ll.19-25-p.29, ll.1-12).

34. Dr. Weiss stated there were studies that looked at the causal relationship between exposures to benzene, formaldehyde, diesel exhaust, and/or carcinogens in forest smoke and incidences of increased prostate cancer. These studies did not find any increased risk. (8/12/11 H.T. p. 29, ll.13-19).

35. Dr. Weiss opined within a reasonable degree of epidemiologic and medical probability that it was medically probable that Claimant would have developed prostate cancer even if he never served as a firefighter. (8/12/11 H.T. p. 29 ll.20-25 to p. 30, ll.1-2).

36. Dr. Weiss stated that when trying to gauge which is the more likely explanation for the cause of Claimant's prostate cancer, one is three times more likely to contract prostate cancer as a result of family history when compared to the 28% increased risk for firefighters to contract prostate cancer indicates that the larger figure would constitute the more likely explanation. Here, Dr. Weiss stated there is a 300% increase that Claimant would contract prostate cancer due to his familial history. (8/12/11H.T. p. 36 ll. 12-25, p.37, ll. 1-22).

37. Dr. Weiss opined that he does not know the cause of Claimant's cancer:

"Unfortunately, any man can develop cancer of the prostate, and almost always the reasons for its development are unknown. Whatever these reasons, they are present in firefighters just as in the rest of us. So if a firefighter does develop prostate cancer it could be the result of on the job exposure (given the tentative assumption made above), or it could be due to the result of a non-occupational exposure or exposures.

...

In summary, though in aggregate the results of epidemiologic studies suggest an approximately 30% increase in the occurrence of prostate cancer among firefighters, it is unclear whether exposures sustained during firefighting actually have the capacity to cause these tumors to develop. Furthermore, even if one were to assume that such a capacity does exist, it is likely that a given firefighter with cancer of the prostate developed it for reasons-unknown to us at present- having nothing to do with his work."

Exhibit N, BS 241 - 242.

38. Dr. Weiss opined within a reasonable degree of epidemiologic and medical probability that Claimant's cancer was not caused by firefighting but was caused by his familial predisposition. (8/12/11 H.T. p. 30, ll.1-13). Dr. Weiss's opinion on causation is not persuasive enough to overcome the statutory presumption. He admits that the cause of Claimant's cancer is unknown. He opines that familial predisposition is one risk factor. But Section 8-41-209, C.R.S. provides that Claimant's prostate cancer "shall be presumed to result from a firefighter's employment." His opinion does not overcome this presumption.

39. According to the persuasive and consistent testimony of Drs. Milliken and Augspurger, given Claimant's PSA between 2.5 and 2.8 at age 47 which increased from the 1.3 PSA Claimant had at age 35, it is medically probable that Claimant had prostate cancer in July 2007, before he went to work for Parker and South Metro.

40. No persuasive medical testimony was presented to contradict the opinions of Drs. Milliken and Augspurger that Claimant likely had prostate cancer in July 2007.

41. Drs. Milliken and Augspurger also agree that Claimant's medical treatment following a biopsy positive for prostate cancer in July 2007, would have been identical to the treatment Claimant underwent after his official diagnosis. (8/12/11 HT p. 68 ll. 16-25, p. 69 ll. 1)

42. Dr. Augspurger persuasively opined that there is no medical literature to suggest that once the prostate cell has undergone malignant transformation, exposure to carcinogens would directly affect the cells or have any influence on the progression of the disease. In other words, once a male has prostate cancer, exposure to carcinogens will not alter, aggravate, or change the course of the prostate cancer. (8/12/11 HT, p. 69 ll. 2-9)

43. Dr. Milliken agreed that once a person has prostate cancer, the cancer has a natural progression and it is unlikely that subsequent firefighting exposures would

have been significant in altering the course of Claimant's prostate cancer that likely existed in July 2007. (8/12/11 HT, pg. 167-168)

44. The ALJ finds the opinions of Dr. Augspurger and Dr. Milliken, that Claimant more likely than not had prostate cancer in July 2007 and the course of the prostate cancer was not aggravated or accelerated by carcinogen exposures or firefighting duties after July 2007, to be credible and persuasive and found as fact.

45. In passing Section 8-41-209, C.R.S., the Legislature had the benefit of the expert opinion of Dr. Virginia Weaver, a specialist in the field of occupational medicine practicing at Johns Hopkins University. Dr. Weaver informed the Legislature that firefighters face an increased risk of cancer due to their occupational exposure and that these risks were frequently underestimated. She also testified that the presumption statute was needed because there is a significant challenge to determining exposure assessment for firefighters, a challenge which is more difficult than in a controlled manufacturing setting. Nevertheless, firefighters are exposed to significant hazards which give rise to the need for increased protection.

46. Claimant met the threshold requirement of Section 8-41-209, C.R.S. Therefore, his prostate cancer is occupationally related.

47. Respondents have failed to establish by a preponderance of the medical evidence that Claimant's prostate cancer did not occur on the job.

48. The persuasive medical evidence supports a finding that Claimant more likely than not had prostate cancer in July 2007 while employed by Golden.

49. The persuasive medical evidence supports a finding that Claimant's cancer was not caused, aggravated, or accelerated by Claimant's employment with Parker which began in September 2007 or with South Metro which began on January 1, 2009. The persuasive medical evidence also does not support a finding that Claimant had cancer during his employment with Castlewood from 1998 to 2001.

50. Claimant became disabled when he began losing time from work after his prostate cancer surgery on April 8, 2009.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. In deciding whether a party to a workers' compensation dispute has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Qlaim Appeals Office*, 53 P3d 1192, 1197 (Colo. App. 2002); *Penasquitos Village, Inc. v. NLRB*, 565

F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and or actions; the motives of a witness; whether the testimony has been contradicted; and bias, prejudice or interest. See *Prudential ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI (2005).

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

4. The Colorado Firefighter Presumption Statute, which became effective on May 17, 2007, provides:

8-41-209 Coverage for occupational diseases contracted by firefighters – repeal.

(1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system hematological system or genitourinary system and resulting from his or her employment as a firefighter, shall be considered an occupational disease.

(2) Any condition or impairment of health described in subsection (1) of this section:

(a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter; and

(b) Shall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job.

5. Preponderance of the evidence means as follows: "Proof by a preponderance of the evidence requires the proponent to establish that the existence of a 'contested fact is more probable than its nonexistence.'" *Jimenez-Chavez v. Cargill*

Meat Solutions and Self-Insured, W.C. No. 4-704-536 (October 2008); see *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

6. In general, “medical probability” or “more likely than not” means more than 51%. That is, the existence of a contested fact is more than 50% likely.

7. Once the firefighter has met the threshold requirements of Section 8-41-209, C.R.S., the burden shifts to Respondents to prove by preponderance that there is “medical evidence” that the firefighter’s cancer did not occur on the job.

8. Testimony from experts in the medical community disputing the presumption’s validity is not medical evidence that the exposure to carcinogens experienced by Claimant did not contribute to his prostate cancer. It is not medical evidence that firefighting risk is excluded as a cause of his cancer. Additionally, the statute is not overcome by expert opinions that the cause of prostate cancer is unknown.

9. The Colorado Industrial Claim Appeals Office (“ICAO”) in *Christ v. Littleton Fire and Rescue*, (W.C. No. 4-745-560) (June 9, 2009) was called upon to evaluate the applicability of the presumption legislatively mandated by Section 8-41-209, C.R.S. The ICAO acknowledged that the purpose of the statute was to remove the initial burden from the firefighter to establish causation, and that causation could not be rebutted by the opinion of medical experts that there is no causal connection between the occupational firefighting in general and the firefighter’s cancer.

10. The ICAO recognized that Colorado Legislature by creating Section 8-41-209, C.R.S., generally intended to confer substantial benefit on firefighters, and the statute’s purpose was to shift the burden the firefighters were required to meet prior to its passage to show that a particular cancer occurred on the job. The presumption was needed because firefighters, in the course of their profession, were routinely exposed to burning toxic chemicals/carcinogens. Unless the Respondents could prove that the firefighter’s cancer was the result of exposures outside of firefighting, they could not overcome the presumption.

11. In *Christ, supra*, The Industrial Claim Appeals Panel stated, “In essence the claimant contends that the respondents did not show by a preponderance of the medical evidence that his brain cancer did not occur on the job by presenting medical opinions that the cause of the claimant’s cancer is unknown. We agree.” ICAP concluded, “In our view the plain and ordinary meaning of the language of the presumption in Section 8-41-209 cannot be rebutted by the opinions of medical experts that there is no causal connection between the occupation *in general* and the disease in question.”

12. In the present matter, Respondents presented the expert testimony from Drs. Weiss, Augspurger, and Milliken that the cause of prostate cancer is unknown. This testimony is not sufficient medical evidence to overcome the statutory presumption.

13. Additionally, Drs. Weiss and Augspurger dispute the scientific validity of the Colorado Legislature's presumption that firefighting could give rise to an occupational disease claim. Dr. Milliken conceded the validity of the Legislature's presumptive language but did not agree that prostate cancer should be included. Despite *LeMasters*, Dr. Milliken disputes the scientific/medical validity of the Colorado Legislature's conclusion that genitourinary problems, particularly prostate cancer, are at a heightened risk due to firefighting exposure. Again, as found by ICAO in *Christ, supra*, this testimony is not sufficient to overcome the presumption.

14. Dr. Mayer persuasively testified that the presence of Claimant's "familial" predisposition did not constitute a preponderance of the medical evidence that his cancer did not occur on the job. Her opinion was that to do so erroneously assume that predisposing factors equal medical causation. The ALJ agrees. The medical experts all agree that familial predisposition is risk factor. The experts testified to several risk factors for prostate cancer. And familial predisposition has a higher risk factor than other risk factors. But predisposition and risk factors do not equate to medical causation. And simply because a person has a familial predisposition to cancer does not mean he or she will get cancer. The medical testimony that Claimant's familial predisposition is a significant risk factor in the development of Claimant's prostate cancer is not sufficient to overcome the statutory presumption. Respondents have not proven that it is more likely than not that Claimant's cancer is not the result of his firefighting occupation. Therefore, Claimant's prostate cancer is occupationally related and compensable under Section 8-41-209, C.R.S.

15. Section 8-41-304(1), C.R.S. governs the determination of liability for an occupational disease. The statute provides that:

"Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease and suffered a substantial, permanent aggravation thereof, and the insurance carrier, if any, on the risk when such employee was last so exposed under such employer shall alone be liable therefore, without right to contribution from any prior employer or insurance carrier."

16. For Section 8-41-304(1), C.R.S. to apply, the Claimant must be exposed to the hazards of the disease during successive employment and there must be a substantial permanent aggravation. Without satisfying both elements, liability does not transfer to the subsequent employer.

17. Determining whether or not the Claimant was last injuriously exposed hinges upon whether the Claimant was exposed to "a concentration of toxic material which would be sufficient to cause the disease in the event of prolonged exposure to the disease." *Union Carbide Corp. v. Industrial Commission*, 581 P.2d 734, 737 (Colo. 1978). Furthermore, liability is "limited to those employers in whose employ there has been exposure to a harmful concentration of the hazard and the effect of such exposure

is a substantial and permanent aggravation of the previous conditions.” *Monfort, Inc. v. Rangel*, 867 P.2d 122, 124-25 (Colo. App. 1993).

18. Claimant did not sustain a last injurious exposure and substantial permanent aggravation of his cancer during his subsequent employment with Parker or South Metro. As found, Claimant more likely than not had prostate cancer in July 2007. Dr. Augspurger persuasively opined that there is no medical literature to suggest that once the prostate cell has undergone malignant transformation, exposure to carcinogens would directly affect the cells or have any influence on the progression of the disease. In other words, once a male has prostate cancer, exposure to carcinogens will not alter, aggravate, or change the course of the prostate cancer. Dr. Milliken agreed that once a person has prostate cancer, the cancer has a natural progression and it is unlikely that subsequent firefighting exposures would have been significant in altering the course of Claimant’s prostate cancer that existed in July 2007. These opinions were found persuasive. Therefore, Golden is solely liable for Claimant’s prostate cancer.

19. The “last injurious exposure” rule does not apply to medical benefits caused by an occupational disease. *University Park Care Center v. The Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). The Court of Appeals held, “The cost of those benefits is, instead, placed upon the carrier ‘on the risk’ at the time such expenses are incurred. *Royal Globe Insurance Co. v. Collins*, 723 P.2d 731, 733 (Colo. 1986).” *University Park Care Center, supra at 640*. The Court further held, “However, even if liability for medical benefits were to be assigned to the carrier ‘on the risk,’ we read that phrase as a reference to the insurer that provided coverage to the employer whose conditions of employment caused the need for treatment. Thus, to impose liability for medical benefits on a particular employer, the evidence must demonstrate that the employment with that employer caused, aggravated, or accelerated the claimant’s injury.” *University Park Care Center, supra at 640*.

20. Claimant developed prostate cancer in July 2007 when he was employed by Golden. The need for medical treatment including surgery was causally related to Claimant’s employment with Golden as a firefighter. Claimant’s firefighting exposures after July 2007 did not aggravate or accelerate his prostate cancer or alter the course of treatment. Golden and its carrier are solely responsible for Claimant’s medical treatment.

21. Onset of disability is defined as the time when Claimant’s occupational disease either impairs his ability to effectively and properly perform his regular employment or renders him incapable of returning to work except in a restricted capacity. See *Ortiz v. Murphy*, 964 P.2d 595 (Colo.App. 1998).

22. It is well established that, although the onset of disability is important for several purposes, it does not determine or establish the existence of a compensable occupational disease claim in the first instance. *Wal-Mart Stores, Inc. v. ICAO*, 989 P.2d 251 (Colo. App. 1990) (holding that, “although the date of disability may be important for certain purposes such as determinations involving award of disability

benefits or other situations in which the date of disability directly effects the Claimant's benefits, a Claimant suffering from an occupational disease is nevertheless entitled to reasonable necessary medical benefits even if the disease has not yet become disabling)". See also *Leming v. ICAO*, 62 P.3d 1015 (Colo. App. 2002); *Vigil v. United Parcel Service*, W.C. No. 4-724-653 (ICAO, 5/19/08); *Thomas v. Target Corporation, Inc.*, W.C. No. 4-683-268 (ICAO, 6/29/07).

23. Claimant's onset of disability is April 8, 2009, when he underwent prostate cancer surgery at John Hopkins University.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable occupational disease, prostate cancer, as a result of his employment with Golden.
2. Golden and its carrier are solely liable for Claimant's medical benefits.
3. Pursuant to stipulation of the parties, Claimant is entitled to maximum average weekly wage on date of onset of disability, April 8, 2009.
4. The claims against Parker, South Metro, and Castlewood are denied and dismissed.
5. Temporary disability benefits are reserved as well as all other issues not determined herein.

DATED: January 18, 2012



Barbara S. Henk
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.