DATE FILED: June 20, 2013 3:32 PM

COURT OF APPEALS, STATE OF COLORADO Court Address: 101 W. Colfax Ave., Ste. 800 Denver, Colorado 80202	
Agency Information: Agency: Industrial Claim Appeals Office W.C. No.: 4-783-192	
Appellant: City of Golden and CIRSA v. **Appellees:** Industrial Claim Appeals Office and Kevin Milan	**▲COURT USE ONLY▲**
Attorneys for Appellant: Paul Krueger, #34592 Alana S. McKenna, #41780 Ritsema & Lyon, P.C. 999 18th Street, Suite 3100 Denver, CO 80202 Telephone: 303-293-3100 Facsimile: 303-297-2337 E-mail: paul.krueger@ritsema-lyon.com alana.mckenna@ritsema-lyon.com	**Case No. 2012 CA 1561**

APPELLANT'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

- ✓ It contains 5377 words.
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The brief complies with C.A.R. 28(k).

- ✓ For the party raising the issue:
  It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (CD.___, p.___), not to an entire document, where the issue was raised and ruled on.

- ☐ For the party responding to the issue:
  It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

s/ Alana S. McKenna
Paul Krueger, Esq.
Alana S. McKenna, Esq.

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STATEMENT OF THE ISSUES PRESENTED ON APPEAL

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2. Did the Administrative Law Judge (ALJ) incorrectly apply the law set forth in § 8-41-209, C.R.S. by applying a heightened burden of proof in requiring employer to prove the actual cause of claimant's cancer in order to sufficiently rebut the statutory presumption of compensability of claimant's prostate cancer?

3. Did the Administrative Law Judge (ALJ) incorrectly apply the presumption set forth in §8-41-209, C.R.S. by refusing to consider medical evidence submitted by respondents challenging the causal connection between firefighting and prostate cancer?

STATEMENT OF THE CASE

A. The Nature of the Case, Course of the Proceedings, and Disposition in the Court Below

On July 1, 2011 and August 12, 2011, the parties proceeded to hearing before ALJ Barbara S. Henk on the issues of compensability under §8-41-209, C.R.S. for genitourinary cancer of the prostate, medical benefits, average weekly wage, and apportionment. (*Transcript of Hearing, CD, pp.1927-2090, 2102-2202, 2283-2499).*

On January 18, 2012, ALJ Henk issued an order that awarded claimant workers' compensation benefits for prostate cancer. *(ALJ's Specific Findings of Fact, Conclusions of Law, and Order, CD, pp. 2941-2958).* The ALJ found that claimant sustained a compensable occupational disease, prostate cancer, as a result of his employment with City of Golden. The ALJ further found that respondents failed to prove by a preponderance of the medical evidence that claimant's prostate cancer did not occur on the job and awarded claimant medical benefits. *(ALJ's Specific Findings of Fact, Conclusions of Law, and Order, CD, pp.2951, 2954-2956).* On July 6, 2012, the Industrial Claim Appeals Office upheld the Order of ALJ Henk. *(ICAO's Final Order, CD, pp. 3080-3092).*

B. Statement of the Facts

Claimant has either volunteered or been employed as a firefighter for over twenty years. As stipulated by the parties at the time of hearing:

Claimant volunteered as a firefighter for City of Golden (Golden) from August 7, 1990 through July 29, 2001. For all time periods, CIRSA insured Golden. Claimant worked as a firefighter for Castlewood Fire Protection Department (Castlewood) from May 7, 1998 through July 30, 2001. Pinnacol Assurance insured Castlewood during this period. Claimant worked as a firefighter for Golden from July 30, 2001 through September 5, 2007. Claimant worked as a Fire Captain for Parker Fire Protection District (Parker) from September 6, 2007 through December 31, 2008. Pinnacol Assurance insured Parker during this period. Claimant volunteered as a firefighter for Golden from February 5, 2008 through present. Parker merged into South Metro Fire and Rescue on January 1, 2009. According, from January 1, 2009 through present, claimant is employed as a firefighter with South Metro. South Metro is self-insured. (*Transcript of Hearing, CD, pp. 2942-2943)*:

In July 2007, claimant underwent a physical examination performed by Dr. John Harris, a physician for Parker. (*Report of Dr. Harris, CD, pp.143-165).* The digital rectal examination (DRE) and prostate examination returned normal. At the

time, claimant's prostate specific antigen (PSA) was 2.5. By November 2008, claimant's PSA had risen to 3.6. (*Report of Dr. Abernathy dated November 17, 2008, CD, p.168).* Dr. Harris referred claimant to his personal physician Dr. Mark Pattridge, who in turn referred claimant to a urologist, Dr. Brett Abernathy. On December 19, 2008, a biopsy revealed clinically significant prostate adenocarcinom (prostate cancer). *(The Urology Center of Colorado, pathology report, CD, pp.170-173.* On April 8, 2009, claimant underwent surgery for the prostate. *(Dr. Walsh's operative report, CD, pp.1142-1143).*

Claimant filed a claim for workers' compensation benefits, eventually joining Golden, Castlewood, Parker, and South Metro as co-respondents. After claimant withdrew the issue of temporary disability benefits, the matter proceeded to hearing based on the issues of compensability, medical benefits, and, if compensable, assignment of liability for the medical benefits. (*Transcript of Hearing, CD, pp.1931-1935).*

At hearing, claimant presented uncontested evidence that (1) he suffered from prostate cancer, (2) he completed five or more years of employment as a firefighter, and (3) at the time of becoming a firefighter, a physical examination did not reveal substantial evidence of cancer. (*Transcript of Hearing,*

CD, pp.1967-1984). In response, employers presented medical evidence in the form of expert reports and testimony from Drs. Richard Augspurger, William Milliken and Noel Weiss.

Dr. Augspurger testified to a reasonable degree of medical probability that claimant's family history was the predominate risk factor in claimant developing prostate cancer, as compared to his firefighting duties. Claimant's father was diagnosed with prostate cancer at age 69/70, his father's brothers were diagnosed with prostate cancer at ages 69/70 and 71, a maternal uncle was diagnosed with prostate cancer at age 69/70, and a male cousin was diagnosed with prostate cancer at age 49. (*Transcript of Hearing, CD, pp.2337-2345).*

Dr. Milliken testified that to a reasonable degree of medical probability claimant's prostate cancer was not causally related to his firefighting duties because the carcinogens found in firefighting would not impact the prostate gland. (*Transcript of Hearing, CD, pp.2389-2390).* Dr. Milliken testified to a reasonable degree of medical probability that that claimant's family history of prostate cancer - which showed a 300 to 500 times increased risk for prostate cancer - was the most likely cause of claimant's condition and impairment.

(*Transcript of Hearing, CD, pp.2392-2393; Dr. Milliken's report, CD, pp. 1068-1069, 1078-1079).*

Dr. Weiss testified that to a reasonable degree of medical probability firefighting does not predispose an individual to prostate cancer. *Transcript of Hearing, CD, pp.2300-2307).* Like Drs. Augspurger and Milliken, Dr. Weiss testified that claimant's family history, which showed a 300-500% increase in the risk that claimant would contract prostate cancer, was the most likely cause of claimant's condition and impairment. (*Transcript of Hearing, CD, pp.2307-2310, 2312).*

ALJ Henk concluded that § 8-41-209 prohibited an employer from carrying its burden of proof based upon medical evidence (1) that the conditions of employment did not cause the condition or impairment and (2) that non-occupational risk factors were the more likely cause of the condition or impairment. Accordingly, the ALJ found that respondents failed to prove by a preponderance of the evidence that claimant's prostate cancer was not caused by his firefighting duties. *(ALJ's Specific Findings of Fact, Conclusions of Law, and Order, CD, pp. 2941-2958).*

Please note that City of Golden and CIRSA have dismissed all appeals as to "apportionment" and as to co-liability of all other employers in this matter. (*Please see Court of Appeals Order dated June 17, 2013 granting Petitioners' Motion for Partial Dismissal).*

SUMMARY OF THE ARGUMENT

The ALJ incorrectly interpreted the legal standard in §8-41-209, C.R.S. as preventing the consideration of medical evidence disputing the causal connection between firefighting and claimant's prostate cancer. In her Conclusions of Law, the ALJ explained that this evidence is legally insufficient to overcome the statutory presumption and cited the *Christ v. Littleton Fire Rescue* case, W.C. 40745-560 (ICAO November 3, 2009), which was upheld by this Court. Respondents respectfully argue that the Court of Appeal's holding in the *Christ* case was wrong and the standard set forth in the dissenting opinion is the correct standard. Because § 8-41-209(2)(b) does not limit the medical evidence an employer may present to prove that a claimant's condition or impairment did not occur on the job, the ALJ erred.

As discussed in the legislative history, § 8-41-209 simply shifts the burden of proof onto employers, thus relieving the claimant of the initial burden of

proving a causal connection. The statute does not conclusively presume that firefighting causes cancer. It places the burden on employers to prove by a preponderance of the evidence that, for example, an employee's prostate cancer did not result from his or her employment activities. Neither the plain language of the statute nor the legislative history limits, prohibits, or otherwise addresses what evidence would be sufficient to satisfy subsection (2)(b).

The ALJ also incorrectly interpreted the legal standard in § 8-41-209, C.R.S. as prohibiting the consideration of medical evidence identifying risk factors which would lead the trier of fact to find the more probable cause of claimant's prostate cancer was claimant's genetic or familial predisposition. The ALJ burdened employers with establishing the exact cause of claimant's condition in order to show that claimant's prostate cancer did not occur on the job and failed to accept the evidence of risk factors as evidence of causative factors, a burden not set forth in § 8-41-209, C.R.S.

As there is no exact, precise scientific evidence of what causes a given cancer, and if the courts are unable to ever consider any analysis of various risk factors for cancer as evidence of causation, an employer would never be able to present a "sufficient" preponderance of the medical evidence of any kind that

would effectively rebut the statutory presumption under §8-41-209. The exclusion of consideration of risk factors in determining whether employers overcame the statutory presumption under §8-41-209 results in a strict liability statute. The legislative history clearly shows that the General Assembly's intent in enacting §8-41-209 and creating the rebuttable presumption was not to enact a strict liability statute.

Had consideration of the evidence of the significant risk factors present outside of claimant's job as a firefighter been included in the ALJ's analysis, respondents have shown by a preponderance of the evidence that claimant's prostate cancer was more likely than not caused by claimant's genetic or familial predisposition and not on the job as a firefighter, and that claimant's personal risk factors were greater than the risk factors he faced as a firefighter.

The ALJ erred and the matter must be remanded for further findings or reversed as a matter of law.

ARGUMENT

I. The ALJ Erred by Requiring a Heightened Burden of Proof for Employer to Overcome the Rebuttable Presumption under §8-41-209(2)(b).

A. Standard of Review

The issues in this case involve statutory interpretation, and therefore constitute matters of law. *Fogg v. Macaluso*, 892 P.2d 271, 273 (Colo. 1995). The standard of review involving matters of law is *de novo*. *Colantuno v. A. Tenenbaum & Co., Inc.*, 23 P.3d 708, 711 (Colo. 2001). (*Respondents' Joint Position Statement, CD, pp. 2595-2600; ALJ's Specific Findings of Fact, Conclusions of Law, and Order, CD, pp. 2954).*

B. Misapplication of §8-41-209(2)(b), C.R.S.

At hearing, Golden, along with the joined employers, presented medical evidence disputing the causal connection between firefighting and claimant's prostate cancer. In her Conclusions of Law, the ALJ explained that this evidence is legally insufficient to overcome the statutory presumption. The ALJ also prohibited the consideration of medical evidence identifying risk factors which would lead the trier of fact to find the more probable cause of claimant's prostate cancer was claimant's genetic or familial predisposition. The ALJ burdened the employer with establishing the exact cause of claimant's condition in order to show that claimant's prostate cancer did not occur on the job and failed to accept the evidence of risk factors as evidence of causative factors, a burden not set forth in § 8-41-209, C.R.S. Because §8-41-209(2)(b) does not limit the medical

evidence an employer may present to prove that a claimant's condition or impairment did not occur on the job, the ALJ erred.

Section 8-41-209 provides as follows:

> (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.

The effect of the statute is to shift the burden of proof. If the facts in subsections (1) and (2)(a) are established, an additional fact is presumed; claimant's cancer is causally related to his employment. The claimant is relieved from presenting evidence establishing the causal connection. In other words, the causal connection is a presumed fact.

"It is well established that the legislature has the power to declare that the existence of one fact shall be presumptive or prima facie evidence of another." *Bishop v. Salida Hospital District*, 406 P.2d 329, 330 (Colo. 1965). In general, "presumptions" are rules of convenience based upon experience or public policy. *The Denver Publishing Company v. City of Aurora*, 896 P.2d 306, 319 (Colo. 1995). The effect of such a presumption creates a prima facie case, upon which judgment may be rendered in absence of contrary evidence. *Murray v. Montgomery Ward Life Ins.*, 584 P.2d 78, 81 (Colo. 1978).

Colorado recognizes two types of presumptions: rebuttable and irrebuttable (or conclusive). A rebuttable presumption lends weight to particular inferences from a stated set of facts, but can be overcome by the party against whom the presumption applies. *Board of Assessment Appeals v. Sampson*, 105 P.3d 198, 204-05 (Colo. 2005). An irrebuttable or conclusive presumption does not permit evidence to the contrary. However, the legislature cannot constitutionally make one fact "conclusive" evidence of another. *Bishop*, 406 P.2d at 330 C*iting 20 Am. Jur. 39*. Section 8-41-209 is a rebuttable presumption, as subsection (2)(b) permits the employer to present medical evidence that a claimant's condition or impairment did not occur on the job.

A rebuttable presumption does not relieve a party of nor impose on a party the ultimate burden of proof. *City & County of Denver v. DeLong*, 545 P.2d 154, 157 (Colo. 1976) (presumption does not eliminate the need to establish a prima facia case). Further,

> [S]tatus and strength of a rebuttable presumption varies according to the force of the policies which motivate a court or a legislature to create it and … there are no universal rules as to the amount of evidence necessary to overcome a rebuttable presumption.

Denver Publishing Company, 896 P.3d at 319, *citing Tafoya v. Sears Roebuck*, 884 F.2d 1330, 1336 (10th Cir. 1989) overruled on other grounds, *Wagner v. Case Corp.*, 33. F.3d 1253 (10th Cir 1994). Here, the General Assembly established that the presumed causal connection between employment as a firefighter and the listed cancers may be overcome by a preponderance of the medical evidence. Accordingly, Section 8-41-209 shifts the burden of proof. Employer must prove a negative that a preponderance of the evidence the claimant's employment is not causally connected to the condition or impairment.

Once the burden of proof is shifted, however, the presumption no longer applies as the employer is free to rebut it. As explained by Representative Cerbo in the legislative history:

> Simply [the statute] changes the burden of proof. That's what this bill does. That's the heart of this bill. It changes the burden of proof for a firefighter to have a workers' comp claim proceed when one of them contracts job-related cancer.
>
> This bill shifts the burden. And because of the unique nature of this public safety job will presume that certain cancers that are contracted on the job are related to the job. This bill will also

> give the insurance companies the latitude to rebut that presumption by a preponderance of evidence…

(*Legislative Testimony for House Bill 07-1008, CD, p.2756).*

Thus, to the extent an ambiguity exists, legislative history reveals that the intent was to permit employers to rebut the presumption; the presumption being a causal relationship between firefighting and certain cancers.

Importantly, subsection (2)(b) does not limit or otherwise define what evidence is sufficient to overcome the presumption aside from designating "medical evidence" as a minimum standard. An employer may present "medical evidence that such condition or impairment did not occur on the job." Here, the ALJ refused to consider medical evidence in the form of expert opinion disputing, in general, a causal connection between prostate cancer and firefighting. The ALJ explained that an employer may not challenge the legislatively determined presumption that a causal connection exists between firefighting and certain cancers. The ALJ misapplied the law.

As explained above by the sponsoring legislator, § 8-41-209 was simply intended to shift the burden of proof onto employers, thus relieving the claimant of the initial burden of proving a causal connection. The statute does not

conclusively presume that firefighting causes cancer. It places the burden on employers to prove by a preponderance of the evidence that, for example, an employee's prostate cancer did not result from his or her employment activities. Neither the plain language of the statute nor the legislative history limits, prohibits, or otherwise addresses what evidence would be sufficient to satisfy subsection (2)(b).

As authority, the ALJ relied upon *Christ v. Littleton Fire Rescue*, W.C. 40745-560 (ICAO November 3, 2009). In *Christ*, the ICAO concluded that evidence challenging the causal relationship between firefighting and cancer is not legally sufficient to overcome the presumption. The ICAO concluded that §8-41-209 represented a "legislatively adopted premise that the occupational exposure of firefighters causes cancer." The ICAO's holding was affirmed by this Court in *Christ v. Littleton Fire Rescue*, 2012 COA 187 (Colo. App. 2012), The *Christ* opinion was a 2/1 opinion, with Judge Carparelli dissenting. Respectfully, respondents assert that the standard set forth in the majority decision in *Christ* by this Court is incorrect and the dissenting opinion sets forth the correct legal standard as to how an employer may overcome the statutory presumption.

"To overcome [C.R.S. § 8-41-209], an employer must prove that it is *more likely* that the firefighter's employment was *not capable of causing* the firefighter's specific cancer, *or* if the ALJ finds that the employment was capable of causing the cancer, that the firefighter's employment *did not cause* that cancer." *City of Littleton v. Christ* at 43-44, dissenting opinion.

This burden, according to Judge Carparelli, can be overcome with epidemiologic evidence of general causation. "…[E]pidemiology is highly probative because it considers human physiology and the likelihood that a potential environmental factor is capable of entering the body, traveling to a particular organ, and interacting with that organ in a way that can cause a particular cancer." *Id.* at 51, dissenting opinion.

"ALJs should not apply [the decision in *Christ*] to disallow or give less weight to scientific evidence that tends to prove that a particular firefighter's employment was not capable of causing his or her cancer or that, even if it was capable of doing so, it did not do so." *Id.* at 54, dissenting opinion.

Here, the ALJ erred in finding that employer's burden of proof required it to produce evidence of causative factors rather than risk factors of claimant's prostate cancer to effectively rebut the firefighter presumption and further that the risk

factors of familial predisposition and hereditary factors did not constitute adequate causative factors. The ALJ also erred in preventing the consideration of medical evidence disputing the causal connection between firefighting and claimant's prostate cancer, such as Dr. Milliken's testimony that carcinogens found in firefighting would not impact the prostate gland.

Respondents submit that per the dissenting opinion in *Christ*, the ALJ must consider epidemiologic evidence of general causation in determining whether the statutory presumption can be overcome. In this matter, the ALJ clearly disallowed consideration of or, at the very least, gave less weight to the epidemiologic evidence regarding claimant's genetic risk factors and familial predispositions for prostate cancer simply due to the categorization of these factors as 'risk' factors rather than a delineation of them as 'causative' factors. As discussed above, risk factors are often considered by ALJs when making causation determinations. Thus, the ALJ erred as a matter of law in refusing to consider such evidence or giving less weight to the pertinent evidence.

The ALJ further erred by concluding that evidence of risk factors outside claimant's employment could not be considered evidence of medical causation. The ALJ wrote that "The medical experts all agree that familial predisposition is a

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 ALJ misapplied the law by requiring the employers to prove the actual cause of claimant's cancer rather than conduct an analysis of applicable risk factors.

The ALJ's acceptance of Dr. Mayer's testimony that claimant's cancer is likely the result of the synergistic interaction with familial factors and his carcinogen exposures as a firefighter utilizes an incorrect standard in determining whether overcame the statutory presumption. If a claimant meets the statutory presumption, then his or her exposures to carcinogens as a firefighter will always be combined with whatever other risk factors, if applicable, are present for claimant, based on the nature of the presumption itself. Thus, the correct analysis here is what is the more likely cause of claimant's prostate cancer after evaluating all potential risk factors, rather than an analysis of whether firefighting played absolutely no causative role in claimant's cancer, which does not constitute a preponderance of the evidence burden of proof.

Proof of a fact "by a preponderance of the evidence" means "proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its nonexistence." *Page v. Clark*, 592 P.2d 792, 800 (Colo. 1979) *citing McCormick, The Law of Evidence*, 2d Edition, West 1972 (§ 339). The standard set forth in subsection (2)(b) is plain; an employer must present proof that it is more probable that claimant's condition or impairment did not occur on the job. By refusing to consider predisposition and risk factors in relation to causation, the ALJ effectively raised the standard of proof beyond a preponderance of the evidence.

Even a brief review of the legislative history reveals that the underlying medical basis of § 8-41-209 is not that firefighting causes cancer but that certain medical studies showed that firefighting led to an increased risk for certain cancers. (*Legislative Testimony for House Bill 07-1008, CD, p. 2869-2883).* In other words, the evidence presented to the General Assembly was not that firefighting affirmatively causes cancer but that studies showed that firefighting is a statistically significant risk factor to developing certain cancers. Similarly, the evidence disregarded by the ALJ, predisposition and familial history, are known risk factors as well. It is incongruous to disregard such evidence when the same

evidence, epidemiologic studies, formed the basis of the presumption relied upon by the ALJ.

The Colorado Division of Workers' Compensation instructs physicians to utilize risk factors when determining medical causation. Division of Workers' Compensation Level I Accreditation Curriculum, pp.15-41.[1] Additionally, the Division set forth a specific medical causation algorithm for physicians to utilize. *See* WCRP 17, Exhibit 5, pp.13-30, Colorado Medical Treatment Guideline – Cumulative Trauma Conditions. This section of the Medical Treatment Guidelines contains a table detailing occupational and non-occupational risk factors for physicians to utilize when determining medical causation. Administrative Law Judges and ICAO routinely rely upon risk factors, including genetic risk factors, when determining medical causation. *See Flores v. Safeway Stores*, W.C. No. 4-799-270 (ICAO November 2, 2011) ("The ALJ specifically credited 'the medical opinion of Dr. Watson and Dr. Hughes in finding claimant has inherent genetic risk factors and disease factors that predispose her to develop CTS, irrespective of any

[1] Respondents request that judicial notice be taken of Division of Workers' Compensation Level I Accreditation Curriculum pursuant to CRCP 201. The curriculum is available to the public on the Colorado Division of Workers' Compensation website: http://www.colorado.gov/cs/Satellite/CDLE-WorkComp/CDLE/1240336932511

physical activity factor.' These findings support the conclusion that the claimant failed to show it more probably true than not that her work activities intensified or reasonably aggravated her CTS").

Section 8-41-209 does not define "medical causation." It follows that the statute does not, as the ALJ concluded, eliminate the consideration of risk factors when determining medical causation. By its plain language, subsection (2)(b) is expansive and unlimiting. An employer may utilize "medical evidence" to carry its burden of proof.

The ALJ incorrectly interpreted the legal standard in § 8-41-209 as prohibiting the consideration of medical evidence (1) challenging, in general, the causal connection between claimant's employment and the condition and (2) identifying risk factors which would lead the trier of fact to find the non-existence of a causal connection between claimant's employment and condition more probable than its existence. The ALJ burdened employers with establishing the exact cause of claimant's condition, a burden not set forth in § 8-41-209. The ALJ erred and the matter must be remanded for further findings.

C. <u>The General Assembly did not Intend for §8-41-209 to Be Applied as a Strict Liability Statute</u>

The primary objective in construing a statute is to effectuate the intent of the General Assembly. *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004). If the statutory language is clear, the statute will be interpreted according to its plain and ordinary meaning. *Id*. If the statute is reasonably susceptible to multiple interpretations, the court may look to other aids in construction. *Williams v. Kunau*, 147 P.3d 33, 36 (Colo. 2006). In addition, a statute will not be construed in a manner that assumes the General Assembly made an omission; rather, the General Assembly's failure to include particular language is a statement of legislative intent. *Romer v. Bd. of County Comm'rs*, 956 P.2d 566, 576 (Colo. 1998).

Here, the General Assembly established that the presumed causal connection between employment as a firefighter and the listed cancers may be overcome by a preponderance of the medical evidence. Accordingly, § 8-41-209 shifts the burden of proof. Employer must prove a negative: that by a preponderance of the medical evidence, the claimant's condition did not occur on the job. As discussed above, once the burden of proof is shifted to employer, the presumption no longer applies as the employer is free to rebut it. Thus, to the extent an ambiguity exists, legislative history reveals that the intent was to permit employers to rebut the

presumption: the presumption being a causal relationship between firefighting and certain cancers.

As there is no exact, precise scientific evidence of what causes a given cancer, and if the courts are unable to consider any analysis of various risk factors for cancer as noted by the Panel, employer would never be able to present a "sufficient" preponderance of the medical evidence of any kind that would effectively rebut the statutory presumption under §8-41-209. The legislative history clearly shows that the General Assembly's intent in enacting §8-41-209 was not to enact a strict liability statute.

A review of the legislative history reveals that the underlying medical basis of § 8-41-209 is not that firefighting causes cancer but that certain medical studies showed that firefighting led to an increased risk for certain cancers. In other words, the evidence presented to the General Assembly was not that firefighting affirmatively causes cancer but that studies showed that firefighting is a statistically significant risk factor to developing certain cancers. Similarly, the evidence regarded by this ALJ, familial predisposition and genetics, are known risk factors as well. It would be inconsistent to disregard such evidence when the same evidence relied upon in the epidemiologic studies formed the basis of the

presumption relied upon today. Applying the Act in such a way that frustrates this purpose is contrary to the intent of the General Assembly.

CONCLUSION

The ICAO's Final Order dated July 6, 2012, should be reversed and remanded back to the ALJ for consideration of the medical evidence of risk factors and/or the evidence regarding causation of claimant's prostate cancer as it relates to his firefighting duties presented by respondents in determining whether respondents overcame the statutory presumption under §8-41-209.

Respectfully submitted this 20th day of June, 2013.

This document was served via ICCES electronic filing system. The signed original is on file at the offices of Ritsema & Lyon, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2013, a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** was served as follows:

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