COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203-2115	
Appellant: *City of Golden and Colorado Intergovermental Risk Sharing Agency* v. Appellees: *Industrial Claim Appeals Office and Kevin Milan*	▲Court Use Only▲
Workers' Compensation No.: 4-783-192	
Attorney for Appellee: Neil D. O'Toole, Esq. Law Office of O'Toole and Sbarbaro, P.C. 226 W. 12th Avenue Denver, CO 80204 Phone Number: 303.595.4777 Atty. Reg. #: 9887-01 Fax Number: 303.825.6759 E-mail address: kim@otoole-sbarbaro.com	Case Number: Division Courtroom: **2012 CA 1561**

FIREFIGHTER MILAN'S ANSWER BRIEF

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, 31 and 32 C.A.R., including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

Choose one:

☒ It contains 8,727 words.

☐ It does not exceed 30 pages.

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 (R. ____, 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 opponents' statements concerning the standard of review and preservation for appeal, and if not, why not.

Dated this ____ day of _____, _____.

Respectfully submitted,

LAW OFFICE OF O'TOOLE & SBARBARO, P.C.

_____

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I. STATEMENT OF ISSUES PRESENTED ON APPEAL BY APPELLANTS

- Whether the Administrative Law Judge ("ALJ") correctly applied the law set forth in § 8-41-209, C.R.S., by finding that Appellant City of Golden ("Golden") failed to meet its burden of proof by overcoming the statutory presumption of Firefighter Milan's prostate cancer causation by arguing that non-occupational "risk" or "precursor" factors could overcome § 8-41-209's causation presumption?
- Whether the ALJ correctly applied the law set forth in § 8-41-209, C.R.S, by requiring Golden to overcome the presumed causal connection between Firefighter Milan's firefighting and prostate cancer under § 8-41-209, C.R.S., by a preponderance of medical evidence?
- Whether the ALJ correctly applied the presumption set forth in § 8-41-209, C.R.S, by rejecting evidence submitted by Appellant Golden challenging both the causal connection and scientific validity of the legislative presumption found at § 8-41-209, C.R.S, causally connecting firefighting with prostate cancer?

II. STATEMENT OF THE CASE

The Claimant incorporates by reference the Statement of Case found on page 2 of Golden's Opening Brief.

A. STATUTE

This case involves the application of § 8-41-209, C.R.S., which provides:

> (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.

(ROA, pp. 752 – 743)

B. UNDERLYING PURPOSE OF § 8-41-209, C.R.S.

The purpose of § 8-41-209, C.R.S., was declared by its Colorado House of Representative sponsor Representative Mike Cerbo to be as follows:

> Members, here's what this bill's all about. House bill 1008 amends our workers' compensation statute that a new section, the Part 2 of Article 8, Section 41. This new section basically shifts the presumption of an on-the-job injury relating to cancer from the near impossible standard that we now have.
> It shifts this burden from the injured firefighter to prove that he or she contracted the cancer on the job to the insurance (audible) to prove that the firefighter didn't contract cancer on the job. It's about shifting that burden, plain and simple.
>
> Now, some of the stories that have been out in the press have really mischaracterized this bill into something it really isn't. And I just wanted to lay that out that it's a simple matter of burden shifting in a workers' comp claim on certain cancers for certain job classifications. It's about covering firefighters. It's about helping our heroes in their effort to get the medical attention and financial protection they should rightfully be afforded under our workers' compensation system.

Legislative History of Bill No.HB07-1008, Transcript of Colorado House Committee on Business Affairs and Labor, 02/01/2007, p. 3 line 17 though p. 4, line 12. (ROA, pp. 2614 – 2916).

Its social policy purpose of § 8-41-209, C.R.S., was also unambiguously detailed by Representative Cerbo:

> Firefighters, their business locations, where they work every day, is unlike anybody else's business location. Firefighters'' business locations are basically uncontrolled environments, the kind of environments you can't go in and test before they enter these environments, the kind of environments that are difficult to test after they leave, and to follow-up.
>
> Firefighters go into burning buildings. They save lives. They save property. They don't have time when they're entering their workplace to measure carcinogens and what's going on in that building. And it's not their job to worry about or even think about. It's their job to get in those buildings and get their job done, unlike any other workplace that

> I know of. Maybe there's some others. We could think about them here for a while, but I can't think of any right now. They work in uncontrolled conditions - - uncontrolled hazardous conditions of employment unlike any other job, so this is not a slippery slope we're going down. This is about contracting cancer in the workplace and making people whole who do contract cancer.

Id., p. 5, lines 3 through 23 (ROA, pp. 2619 – 2620).

Finally, with regard to the burden of proof, the intent of the Legislature was to initiate a **profound** shift in the burden of proof for firefighter cancers and was specific to the needs of firefighters. Thus, Representative Cerbo stated:

> Yes, Representative Stephens I just wanted to clarify. I don't think I said small shift of burden. It's a large shift of burden for a small group of workers. That's what I meant.

Id., p. 10, lines 16 through 19 (ROA, p. 2624.)

C. CASE AT ISSUE

Golden challenges the decision of the Industrial Claim Appeals Office ("ICAO") dated July 12, 2012, upholding the ruling of the Administrative Law Judge ("ALJ") of January 18, 2012, by arguing that the ALJ failed to thoroughly weigh the evidence and by misconstruing the application of § 8-41-209, C.R.S. ("Firefighter Cancer Presumption Statute").

As is evident from her Findings of Fact, Conclusions of Law and Order, the ALJ's well-reasoned decision was supported by substantial evidence in the record and the proper application of § 8-41-209, C.R.S.:

> 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 so 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 presumptions.
>
> 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."

Findings of Fact, Conclusions of Law and Order ("FFCLO"), January 18, 2012, ¶ 9 - 11. (ROA, p. 2944).

The ICAO, in upholding the ALJ, stated that the parties had introduced conflicting evidence, (ROA, p. 3081), but not that the ALJ's Order placed a

Sisyphean burden of proof on Golden beyond that required by § 8-41-209, C.R.S. (ROA, p. 3084).

As it argued below, Golden asserts that the ALJ erred in not accepting the testimony of its experts by rejecting alleged "medical evidence" which Golden presented concerning the extent of Firefighter Milan's pre-existing "risk" or "precursor" factors as evidence of causation. The ALJ also rejected Golden's challenge to the scientific validity of the Legislature's establishment a causal connection between firefighting and prostate cancer.

The ICAO below found that the ALJ had considered "risk" factors as evidence of causation and rejected them in favor of the application of the presumption found at § 8-41-209, C.R.S. (ROA pp. 3085 – 3086). In rejecting Golden's argument, the ICAO stated that the presumption found at § 8-41-209, C.R.S., cannot be rebutted "by the opinions of medical experts that there is no causal connection between firefighting and the disease in question." (ROA, p. 3087). The ICAO correctly declared:

> Here, we agree with the Panel's Order in *Christ* that the presumption in § 8-41-209, C.R.S. cannot be rebutted by the opinions of medical experts that there is no causal connection between firefighting and the disease in question. A showing of an absence of medical evidence linking firefighting with a particular type of caner merely represents a void of information, and cannot be considered evidence sufficient to overcome the presumption enumerated in § 8-41-209, C.R.S. As stated by the Panel in *Christ*, the General Assembly has decided that

> work common to firefighting contributes causally to certain cancers, such as cancer of the genitourinary system, when the firefighter has completed five or more years of employment and at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such cancer that preexisted his or her employment as a firefighter, Under such circumstances, therefore, legal causation is established. Consequently, we conclude that the ALJ did not incorrectly apply the presumption set forth in § 8-41-209, C.R.S.

(ROA, p. 3087).

In sum, both the ALJ and the ICAO rejected Golden's argument only after extensive consideration and analysis of all evidence.

III. STATEMENT OF THE FACTS

A. INTRODUCTION

Firefighter Milan agrees with Golden's statement describing his twenty year employment as a firefighter.

In 2007 Firefighter Milan underwent a digital rectal examination. No clinical evidence of prostate cancer was found at that examination. Thereafter, he underwent a check for prostate specific antigen ("PSA") and was eventually referred to Dr. Brett Abernathy who diagnosed a 49 years old Firefighter Milan of suffering from clinically significant prostate adenocarcinoma on December 18, 2008.

Eventually Firefighter Milan was referred to Johns Hopkins University and underwent extensive prostate surgery on April 8, 2009.

At hearing it was uncontested that Firefighter Milan had been diagnosed with prostate cancer, that he has completed five or more years of employment as a firefighter, and that at the time of becoming a firefighter his physical examination had failed to reveal substantial evidence of prostate cancer. Firefighter Milan therefore met the threshold requirements for the application of § 8-41-209, C.R.S. The burden than shifted to Golden to present a "preponderance of medical evidence" that Firefighter Milan's prostate cancer did not occur on the job. § 8-41-209(2)(b), C.R.S.

All parties introduced medical expert testimony. Golden's argued that predisposing "risk" or "precursor" factors established **medical evidence** of causation. Thus, Firefighter Milan's cancer "did not occur on the job". Although the other defense experts differed somewhat over the general scientific validity of the presumption, each opined that science did not support Firefighter Milan's prostate cancer claim under § 8-41-209, C.R.S. The ALJ properly rejected Golden's arguments.

Firefighter Milan relied on the testimony of Dr. Annyce Mayer. Respondents relied on the testimony of Drs. Noel Weiss, Richard R. Augspurger, and William Milliken.

After receiving all of the evidence, the ALJ concluded:

> 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 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.

(ROA, pp. 2944 – 2946).

These conclusions were amply supported by substantial evidence in the record. §8-43-301(6), C.R.S.

B. CONFLICTING TESTIMONY OF EXPERTS

1. Respondents' Experts

Dr. Weiss

Dr. Weiss testified for Respondent Parker Fire Protection District. He had earlier testified against a firefighter cancer presumption statute in Oregon because, in his opinion, the cause of cancers of the prostate were unknown.

Dr. Weiss candidly testified that "[i]t was true then and it is true now that strong family history predisposes the incidence of prostate cancer. The specific means by which that operates **is not known**." Electronic Transcript ("TR") August 12, 2011, p. 46, lines 19 - 21 (emphasis)(ROA, p. 2328).

Dr. Weiss also acknowledged that the large majority of men age forty-nine, Firefighter Milan's age, have never been diagnosed with prostate cancer. *Id.*, p. 51, lines 17 – 19 (ROA, p. 2333). He could not answer why Firefighter Milan's brother, who is older than the Firefighter Milan, had not contracted prostate cancer,

even though he may have had the same familial predisposition as Firefighter Milan. Further, Firefighter Milan has a cousin who has prostate cancer, but whose paternal uncle does not. Dr. Weiss candidly admitted he does not know why this would be the case. *Id*., p. 52, lines 9 – 21 (ROA, p. 2334). He stated: "We don't know in most incidences why they get it [prostate cancer] and we therefore, we don't know why you don't get it. It's just the opposite side of the same coin." *Id*., p. 53, lines 15 – 18 (ROA, p. 2335).

Dr. Weiss believes that the presumption of an occupational relatedness of prostate cancer to firefighting, as set forth in § 8-41-209, is not scientifically supportable. *Id*., p. 54, lines 19 – p. 55, line 4 (ROA, pp. 2335 – 2336). In his report he stated:

> In summary, though in aggregate the results of epidemiological 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 work.

Exhibit N, BS 241 – 242 (ROA, pp. 1157 - 1158).

In light of § 8-41-209's legislative presumption of firefighting prostate cancer causation, Dr. Weiss's opinion that the presumption of cancer causation in §

8-41-209, is not scientifically supportable "medical evidence" that Firefighter Milan's prostate cancer did not occur on the job.

Dr. Augspurger

Respondent Parker Fire Protection District and Pinnacol Assurance also relied on the expert testimony of Dr. Richard B Augspurger, a urologist. Golden argues that Dr. Augspurger's testimony proved by a preponderance of **medical evidence** that Firefighter Milan's family history, not his firefighting, was sufficient to overcome § 8-41-209's presumption.

At hearing Dr. Auspurger stated:

> Q. Now, a heightened PSA, you've told us as an expert in the field of urology, does not mean that there is a cancer which should be surgically approached, correct?
>
> **A. That's correct.**
>
> Q. Okay. You would agree up to the date of the biopsy there was no medical evidence in the records of a diagnostic – diagnosis of prostate cancer?
>
> **A. Yes.**

TR, p. 81, lines 17 – 24 (ROA, p. 2363).

He opined that simply because one has a gene which may suggest a predisposition the prostate cancer does not mean that prostate cancer will be manifest. *Id.*, P. 83, lines 3 – 8 (ROA, p. 2365).

In response to the question of whether a statute should presume an occupational relationship between prostate cancer and exposure to carcinogens in firefighting in light of scientific knowledge, Dr. Augspurger stated: "I would just say – and I surveyed my partners as well—that none of them have said that they would make somebody change an occupation based on the presence of cancer." *Id*., P. 88, lines 4 – 12 (ROA, p. 2370). He also stated that he was unaware of what, if any, interaction there was between carcinogens in firefighting and familial cancer. *Id*., p. 82, line 25 through p. 83, line 2 (ROA, pp. 2363 – 2364). Dr. Augspurger also agreed there was no way to determine what percentage of the population has familial factors predisposing them to prostate cancer. *Id.*, p. 90 lines 3 – 6 (ROA, p. 2372).

Regarding the etiology of prostate cancer, Dr. Augspurger had testified in an earlier case as follows:

> In most cases, we don't know the reason why people get prostate cancer.
>
> ****
>
> Most cases, 85 percent of the cases of prostate cancer, we do not know the etiology. It happens sporadically. So, it can happen in every man.
>
> ****

> [A]most all the people who come to our office have sporadic prostate cancer. And then, there's a group of people which count for 15 percent, and that's the familial, the ones that run in families. So, the one's that go in families is about 15 percent. And then there's a little smaller group here, which are the hereditary ones.
>
> ****
>
> And hereditary means there's some genes associated with it, and there's at least seven genes, and probably more today, that have been identified as a link to prostate cancer.

Dreckman v. Poudre Valley, Findings of Fact, Exhibit 23, ¶ 8 (ROA, p. 833).

Dr. Augspurger's opinion at hearings below on July 1 and August 12, 2011, was consistent with his opinion in *Dreckman.*

Dr. Augspurger opined that there is statistical support of the increased relative risk of developing prostate cancer if an individual has a father and a brother with prostate cancer, i.e. a "familial" predisposition.

According to Dr. Augspurger, Firefighter Milan has "familial" predisposition, an opinion shared by Firefighter Milan's medical expert, Dr. Mayer. However, Dr. Augspurger testified that for each individual treated for prostate cancer a specific causative factor is **unknown**. Yet, by relying on percentages only, he felt the most likely relationship for Firefighter Milan's cancer would be his family history. In essence, he equated "risk" with **cause** while acknowledging that **he did not know** the the **cause** of Firefighter Milan's prostate

cancer. He admitted that familial association is most useful when advising a patient to undergo prophylactic testing, **not for determining the medically probable cause of prostate cancer**. Thus, he opined that there was no evidence that the Claimant suffered disability from an elevated PSA prior to his surgery on April 8, 2009. Further, he begrudgingly agreed that the diagnosis of prostate cancer could not have been be made without benefit of the biopsy performed on December 18, 2008.

Ultimately, Dr. Augspurger opined that the **cause**, or etiology, of Firefighter Milan's prostate cancer is beyond the reach of current medical science, although Firefighter Milan's family history establishes a heightened risk of his developing prostate cancer. He opined that once a prostate cell has undergone malignant transformation "it is unclear if exposure to carcinogens has a direct effect on the cells. . . or has any influence on the progression of the disease." Exhibit G, p. 2 (ROA, p. 957).

Although Dr. Augspurger speculated that Firefighter Milan's prostate cancer may have been present prior to December 2008 biopsy, he could not state when Firefighter Milan's prostate cancer had developed, or even if Firefighter Milan likely had some cancer cells because of his age. The clear impact of this evidence

is that prior to December 2008 Firefighter Milan **had not been diagnosed** with clinically significant prostate cancer, or any cancer, for that matter.

When Dr. Augsburger was asked whether he could establish the percentage of individuals who had never been diagnosed with prostate cancer but had "familial" predisposition, he could not. Nor could Dr. Augspurger state why these similarly situated individuals had not contracted prostate cancer. Dr. Augspurger opined that the increase PSA velocity from 2.5 in 2007 to 3.6 in 2008, in Firefighter Milan was a red-flag suggesting the need for further testing. The fact that Firefighter Milan's primary care physician, Dr. Pattridge, did not suggest further testing after his digital rectal examination of Firefighter Milan in 2007 did not either suggest a lack of diligence by Dr. Pattridge or the presence of clinically significant prostate cancer.

Dr. Augspurger discussed the presence of various genes which **may** predispose an individual to prostate cancer and that the number of known genes is increasing. However, he acknowledged that there is no evidence that Firefighter Milan underwent genetic testing to identify the presence of predisposing genes. TR, p. 84, lines 11 – 20 (ROA, p. 2366).

As the ALJ found, Dr. Augspurger's testimony did not amount to medical evidence overcoming the presumption found at § 8-41-209, C.R.S.; and he failed to

establish a non-speculative **cause** that Firefighter Milan's prostate cancer did not occur on the job.

Dr. Milliken

Dr. Michael Milliken testified as an expert on behalf of South Metro Fire Rescue Authority. Dr. Milliken stated the purpose of his evaluation "was to determine whether the presumption is supported by medical evidence or not." Exhibit K, BS 162 (ROA, p. 1075).

Dr. Milliken did not fully share Dr. Weiss' negative view concerning the scientific validity of § 8-41-209, C.R.S.'s, presumption; and, testified that the statute may be warranted for certain types of cancers. Nevertheless, he opined that § 8-41-209's application should be limited to certain genitourinary cancers, such as kidney and/or bladder cancer, but not prostate cancer. This is because, in his opinion, the path of destruction from the chemicals involved in firefighting should not impact the prostate. Exhibit K, BS 156, 165 (ROA, pp. 1069, 1078). **Thus, in his opinion, the presumption is not scientifically supportable of causation for prostate cancer.**

Dr. Milliken disputes § 8-41-209, C.R.S.'s, coverage of prostate cancer absent specific a firefighters carcinogen exposure. Exhibit K, BS 166 (ROA, p. 1079). Thus, he opined that the scientific evidence to support a possible cause and

effect for toxin induced cancer, specifically prostate cancer, is absent. *Id.* In effect, he criticized the Colorado Legislature's inclusion of the genitourinary system as a covered cancer because this included the prostate gland, he asserted, which is not significantly exposed to an excretory function (urine). Thus, since the prostate gland is not significantly exposed, the statute's presumption for prostate cancer is not scientifically supportable due to a lack of cellular interaction with prostate cell DNA. *Id*. BS 163 (ROA, p. 1076). Further, he disagreed with Dr. Mayer that Firefighter Milan's exposure to carcinogens synergistically impacted Firefighter Milan's development of prostate cancer.

Dr. Milliken, as an occupational medicine doctor, agreed that Firefighter Milan had not suffered an industrial disability until he underwent surgery and experienced subsequent absences from work in 2009. Yet, he speculated that Firefighter Milan likely had cancer genes coursing through his body even though he was not suffering its disabling effects. Like Dr. Augspurger, Dr. Milliken acknowledged that no gene testing had been performed to demonstrate the Claimant had acquired prostate cancer specific genes.

Dr. Milliken's opinion was that prostate cancer should be excluded from § 8-41-209's purview, although he did acknowledge a "weakly possible" occupational exposure contributing effect. Exhibit K, BS 166 (ROA, p. 1079). He concluded

that Firefighter Milan's carcinogenic exposure was not related to his occupation because he did not believe that carcinogens found in firefighting could impact the prostate. In other words, in the absence of a positive dose-response analysis, Dr. Milliken does not believe that Firefighter Milan should be able to demonstrate that his prostate cancer is related to his occupation. However, this is not Firefighter Milan's obligation, since the presumption favors him and places the burden of overcoming causation on the fire district.

Dr. Milliken was also unaware of studies referenced by Dr. Mayer making a connection between familial factors and the exposure to carcinogens giving rise to risk of a development of prostate cancer.

Like Dr. Augspurger, Dr. Milliken agreed that there were individuals who had not been diagnosed with prostate cancer but who had a "familial" predisposition. He could not explain why individuals similarity situated to Firefighter Milan had not contracted cancer while Firefighter Milan had. For example, Firefighter Milan's older brother, who had the identical familial risk, has not contracted prostate cancer while Firefighter Milan has this disease.

Dr. Milliken's dispute with the scientific validity of § 8-41-209's coverage of prostate cancer was correctly rejected by ALJ Henk.

2. Firefighter Milan's expert

Dr. Mayer

Dr. Annyce Mayer testified as an expert for Firefighter Milan and was found credible by the ALJ.

Dr. Mayer opined that the medical evidence presented by Golden failed to demonstrate that Firefighter Milan's prostate cancer "did not occur on the job". § 8-41-209(2)(b), C.R.S. Exhibit 15, BS 341 (ROA, p. 750). Although Dr. Mayer testified that the precise cause of the Claimant's prostate cancer is unknown, she opined the preponderance medical evidence failed to show his cancer and did not occur on the job. Exhibit 15, BS 341 (ROA, p. 750).

On cross-examination Dr. Mayer was asked whether she could establish the cause of Firefighter Milan's prostate cancer. Dr. Mayer candidly stated that there was no medical evidence which would support a medical opinion on his prostate cancer's cause. When asked to speculate when Firefighter Milan had first contracted prostate cancer, Dr. Mayer testified that the medical evidence showed that this occurred when he underwent a biopsy on December 18, 2008, establishing its clinical presence. Further, she stated that the absence of earlier clinical findings could not permit speculation that his cancer had existed prior to the biopsy of December 18, 2008.

On rebuttal Dr. Mayer testified that Firefighter Milan's "familial" predisposition likely combined with his occupation to create synergistic interaction with other contributing factors. Due to this synergistic interaction, Respondent could **not** establish, **by a preponderance of the medical evidence**, that Firefighter Milan's prostate cancer was "caused" by his familial predisposition. TR, p. 195 line 18 to p. 196, line 1 (ROA, pp. 2477, 2478); p. 188, line 11 through p. 189, line 3 (ROA, pp. 2469 – 2470).

Firefighter Milan's father was seventy when he was diagnosed with prostate cancer, his uncle was approximately seventy when he was diagnosed and his grandfathers had been diagnosed when they were approximately sixty-nine or seventy. His younger (age 49) onset of prostate cancer was inconsistent with a familial history of his other first degree relatives. Additionally, of forty-two relatives in the first and second degree to Firefighter Milan only seven had some level of prostate cancer; while his older brother does not have prostate cancer, and his sister has not suffered from any type of cancer. TR., p. 195, line 18 to p. 196, line 1 (ROA, pp. 2477, 2478). Thus, according to Dr. Mayer, Firefighter Milan'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.

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. TR., p. 187, line 2 and page 188, line 7 (ROA, pp. 2468 – 2469). Although these studies have not defined a causal relationship, they provide support for the proposition that there is a "risk" relationship between an early onset of prostate cancer in individuals who are exposed to carcinogens and have a hereditary predisposition.

Dr. Mayer addressed demographic statistics concerning the morbidity for prostate cancer among individuals at about the age at which Firefighter Milan developed prostate cancer. According to the Colorado Health Information Data Set and the Colorado Central Cancer Registry, the incidence of prostate cancer for individuals who have reached age forty-nine is approximately 75 per 100,000. TR., p. 183, lines 5 – 11 (ROA, p. 2465). Thus, approximately 99,925 males in the age category have **not** been diagnosed with prostate cancer. It is statistically likely that this group contains numerous individuals who have familial factors but do not have cancer.

Dr. Mayer's ultimate was:

> The development of cancer is a complex multistage process involving initiation, promotion, and tumor progression with failure of host repair

> mechanisms. Progression to clinically evident disease occurred after he had been working as a firefighter. The Colorado Division of Workers' Compensation considers a condition to be work related if the work exposure causes or accelerates the expected natural history of an underlying condition. In my opinion, on a more likely than not basis, there is no way to state with any certainty that the natural history of Mr. Milan's prostate cancer would have been in the absence of his exposures as a firefighter. It is possible he would have developed clinically evident prostate cancer at the same age. But it is also possible that just like his 56 year old brother and approximately 19 other male cousins, he might still have no clinical evidence of prostate cancer at this time.
>
> In my opinion, although Mr. Milan had decidedly increased risk of prostate cancer due to his family history, there is no preponderance of the medical evidence that shows that the clinical presentation of his prostate cancer at age 49 that required the above surgical intervention was completely unaffected by his years of exposures to carcinogens as a firefighter, an occupation associated with a 28% increased risk of prostate cancer.

Exhibit 15, BS 341 (ROA, p. 750).

The ALJ's conclusion was that the testimony of Dr. Mayer was credible and amply supported by the record. Thus, affirmance by the ICAO was appropriate.

A. <u>Standard of Review</u>

Firefighter Milan disagrees with Golden's assertion that the issues here relate solely to the application of law. Rather, Firefighter Milan asserts that the both legal and factual questions have been presented. Thus, the ALJ's Findings of Fact were sufficient; the evidence upon which the ALJ relied is supported by the record; and, the ICAO's decision was supported by applicable law. See § 8-43-

308, C.R.S. Since the ALJ's Findings of Fact were supported by substantial evidence the Final Order of ICAO should not be disturbed. *Id.*

IV. ARGUMENT

A. CLAIMANT MET THE THRESHOLD TO TRIGGER COLORADO'S FIREFIGHTER CANCER PRESUMPTION STATUTE

Section 8-41-209, C.R.S., provides that the presumption that a firefighter's prostate cancer arose as an occupational disease as a firefighter is triggered only when the firefighter can show that he has "completed five or more years of employment as a firefighter" and that "the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that pre-existed his or her employment as a firefighter. . . ." Golden agrees that Firefighter Milan met § 8-41-209's threshold requirement.

B. CITY OF LITTLETON V. ICAO, 12CA1494 (11/01/2012)

A division of this Court in *City of Littleton v. ICAO,* 10 CA 1494 (11/01/2012), declared that § 8-41-209, C.R.S., provided substantial benefit to firefighters from the risk of carcinogen exposure during their work activity in two important ways:

> First, it contemplates a wide range of potential exposures. The statute presumes that the pertinent type of cancer (here, GBM) can be caused by an exposure to some unspecified substance or intangible agent (such as radiation). It presumes that the claimant was exposed to such

> substances or agents while working as a firefighter. And it presumes that those exposures caused the firefighter's particular cancer.
>
> Second, it contemplates that the unspecified exposure caused the firefighter's cancer directly, or in combination with other genetic or environmental factors. It presumes that the exposure either caused a disease that would not otherwise have occurred, or hastened the onset of a disease that the firefighter would have developed later.

Id., p. 11 and 12, ¶s 28, 29.

The Court also stated:

> The statute places a formidable burden on the firefighter's employer. The difficulty lies not in the degree of proof required (which, as noted, is merely a preponderance of the evidence), but in the breadth of the presumption, the nature of the facts presumed, and its practical effect under traditional toxic tort principles.

Id., p. 12, ¶ 30.

Although Golden agreed that Firefighter Milan met the threshold requirements of § 8-41-209, it views the statute as applied, as placing it an unfair burden of overcoming the presumption of cancer **causation** created by § 8-41-209, C.R.S. What Golden refuses to acknowledge, or appreciate, is that § 8-41-209, C.R.S., is constructed to ensure that claims arising are significantly circumscribed by its mandatory threshold requirements.

First, not all firefighters are protected, only those with over five years of firefighting service. Those with less firefighting experience do not enjoy its

substantial benefit, since their carcinogen exposure is presumed to be less, regardless of the intensity of their exposure to carcinogens during their brief tenure.

Next, not all cancers are covered. Only those cancers involving the brain, skin, digestive, hematological or genitourinary systems fall under its purview. Those firefighters with cancers attacking other body parts or systems, such as the respiratory system, the central nervous system (except the brain), the muscular system, the skeletal system, the cardio system, the endocrine system, or the breast, do not receive its substantial benefit.

Finally, coverage only arises when a firefighter, at the time of becoming a firefighter, has undergone a physical examination which failed to detect substantial evidence that his cancer pre-existed his employment. Thus, a firefighter who had been diagnosed with cancer to any of § 8-41-209's enumerated systems, but had been treated and cured, is potentially excluded from its coverage for a newly diagnosed cancer of the same system, assuming the new cancer can be traced by "medical evidence" to the pre-existing cancer.

C. GOLDEN FAILED TO OVERCOME THE STATUTORY PRESUMPTION BY PRESENTING EVIDENCE THAT SCIENCE DID NOT SUPPORT THE PREMISE OF THE PRESUMPTION; OR THAT FIREFIGHER MILAN HAD A FAMILIAL PRE-DISPOSITION TO PROSTATE CANCER

Section 8-41-209, C.R.S., reverses the burden of proof for the occupational disease of prostate cancer in favor of firefighters**.** Golden was required to show that the condition or impairment arising from cancer of the genitourinary (prostate) system **did not arise** from firefighting by preponderance of **medical evidence**. *Id*. This burden is not satisfied by opinion from members of the scientific community disputing the significance of the risk of prostate cancer for combat firefighters, i.e., disputing the premise of the presumption set forth in § 8-41-209, C.R.S. Next, the presumption is not overcome by expert opinion which *unequivocally acknowledged* that the cause of Firefighter Milan's prostate cancer ***is unknown***. Finally, it is not overcome by speculation that a familial pre-disposition is sufficient to establish that Firefighter Milan's prostate cancer did not occur on the job.

Golden asserted that the ALJ improperly rejected its alleged "medical evidence" challenging both the causal nexus between cancer and firefighting and its reliance on "risk" or "precursor" factor analysis as medical evidence. See Respondent City of Golden's Opening Brief, p. 13. In fact, the ALJ specifically

recognized Golden's statutory burden by declaring: "Unless the Respondents could prove that the firefighter's cancer was the result of exposures outside of firefighting they could not overcome the presumption." FFCLO, p. 13, ¶10 (ROA, p. 2953). Golden failed to do so.

Whether § 8-41-209's presumption should have been adopted by the State Legislature is not a matter for consideration by either the Courts, or by experts, holding an opposing view. Such testimony is not **"medical evidence"** that the exposure to carcinogens experienced by combat firefighter did not cause Firefighter Milan's prostate cancer. Further, it does not constitute **"medical evidence"** that cancer did not occur on the job. See Section E, below.

D. ESTABLISHING "RISK" OR 'PRECURSORS 'DOES NOT ESTABLISH CAUSE

Golden has argued that evidence of the "risk" or "precursor" factors, including familial predisposition, which are higher numerically than that found for firefighting trumps the presumption established by §8-41-209, C.R.S. At its core, Golden's argument is that it overcame the presumption because the presence of another prostate cancer "risks" or "precursors" established by epidemiological studies which may be numerically higher than the firefighting risk to which Firefighter Milan sufficed to overcome § 8-41-209's causation presumption.

Golden, through its experts, argues that since Firefighter Milan's familial

risk is 2.0, and this constitutes a higher risk factor than 1.30 arising from the firefighter's exposure to carcinogens Firefighter Milan's prostate cancer did not occur on the job. However, "risk" or "precursors" do not equal "cause".

Although Golden cloaks its argument in "risk" or "precursors" analysis, uncloaked its argument is that imposing liability for prostate cancer based on the firefighter presumption lacks scientific validity because Firefighter Milan has "risk" or "precursors" factors greater than that of firefighting. However, in passing § 8-41-209, the Colorado Legislature never countenanced a mechanical balancing of "risk" or "precursors" factors. In fact, the legislative history contains no such concept. Rather, the Legislature concluded that firefighting has sufficient risk to support occupational disease **causation**. Further, the Legislature never defined a preponderance of "medical evidence" as equating to a quantum of "risk"

Black's Law Dictionary defines cause as: "to effect as an agent; to bring about; to bring into existence; to make." *Black's Law Dictionary* 4th Edition (1968) p. 278. The *Random House Webster's Unabridged Dictionary* defines "cause" as a thing "that acts, happens, or exists in such a way that some specific thing happens as a result; the producer of an effect." *Random House Webster's Unabridged Dictionary* 2nd Edition. "Risk" is defined by *Black's Law Dictionary* as "the degree of hazard" or the "hazard of loss" of a property or things. The

Random House Webster's Unabridged Dictionary, 2nd Edition defines "risk" as "exposure to the chance of injury or loss; a hazard or dangerous chance".

"Risk" does not equal "cause". There was agreement among the experts that despite the risk from predisposing factors there is no reasonable way to determine the actual cause of a specific cancer.

As artfully stated by Dr. Mukherjee in his Pulitzer Prize winning book, *The Emperor of All Maladies*: *A biography of Cancer* (2010): "Statistical methods to identify risk factors for cancers are, by their very nature, descriptive rather than mechanistic: they describe correlation not causes." *Id.,* p. 276.

Taking Golden's argument to its logical conclusion one might assume that identifying risk factors and avoiding them will establish a cancer prevention lifestyle. Not so:

> Finding a cancer prevention lifestyle has turned out to be much more difficult that anyone initially imagined. There are some general principles. We should avoid the known toxins-radon, cadmium, asbestos. The number of people who have high exposure to these is small, but the exposure should cease. We should avoid exposure to tobacco and avoid or reduce our exposure to alcohol. We could eat low-meat, fiber-rich diets, we could avoid exposure to UV and to ionizing radiation. But these are rather obvious insights. I have yet to find a "cancer prevention lifestyle" that has been clinically tested in large-scale population studies.

Id., (Interview with Dr. Siddhartha Mukherjee).

In yet another discussion concerning cancer "risk or "precursors" and cancer causation experts Rohan, Henson, Franco and Albores-Saavedra stated:

> An indicated earlier, the term "cancer precursor" refers to specific morphologic changes that precede the development of cancer. The term does not imply that cancer is inevitable; rather, it refers to histologic changes associated with an increased probability or risk for cancer. These histological changes are designated by morphologic terms that convey a mixture of diagnostic, prognostic, and etiologic significance. Such terms have included "atypical hyperplasia," "mild, moderate, or severe dysplasia," epithelial atypia," "high grade or low grade intraepithelial lesion," "in situ carcinoma," "intramucosal carcinoma," "borderline tumor," "grade one-half carcinoma," "intraepithelial neoplasia," and "minimal cancer." Terms such as "actinic keratosis" and "arsenical keratosis" reflect the etiology of these cutaneous in situ carcinomas (Salasche, 2000).

Cancer Epidemiology and Prevention (Third Edition), Schottenfield, M.D., and Fraumeni, Jr., M.D., p. 22, Oxford University Press, 2006.

Here it is unsuprising that no expert could state why there are over approximately Colorado 99,925 males age 49 who have not contracted prostate cancer, although many of this population universe have a familial predisposition.

The Colorado Legislature intended to confer a substantial benefit on firefighters who place themselves at risk for the benefit of society. In doing so, it had access to the *LeMasters,* et al, Cancer Risk Among Firefighters: A Review and Meta-analysis of 32 Studies, *JOEM* * Volume 48, Number 11, (Nov. 2006) which recognized the cancer "risk" of firefighting. ROA, pp. 780 – 794. The Legislature unassailably **never declared** that there was scientific agreement that firefighting

caused cancer. Rather, it presumed that the firefighting "risk" of exposure to carcinogens was sufficient to presume its caused a firefighter's occupational disease.

As the ALJ found, the "medical evidence" failed to establish that Firefighter Milan's familial predisposition "caused" his prostate cancer. Thus, the comparing of mathematically concurrent risks did not constitute medical evidence to overcome the presumption that Firefighter Milan's prostate cancer occurred on the job.

E. GOLDEN'S CHALLENGE TO THE SCIENTIFIC VALIDITY OF THE PRESUMPTION IS NOT MEDICAL EVIDENCE.

Firefighter/law enforcement presumptions for stress or heart attacks in effect in other states have an evolved appellate history which sheds light on the proper analysis of scientific invalidity challenges to this type of occupational disease presumptions. The shared conclusion is that it is not for the Courts to disregard the validity of a legislatively enacted premise or presumption.

The North Dakota Supreme Court explained in *Robertson v. North Dakota, Workers' Compensation Bureau*, 616 N.W. 2d. 844 (N.D. 2000), that the firefighter/policeman heart attack "presumption shifts the burden of going forward with evidence and the burden of persuasion from the Claimant to the Bureau". *Id.*, at 853.

Relying on caselaw from other jurisdictions, the North Dakota Supreme Court declared:

> [E]xpert medical opinion rejecting the premise of the presumption is **insufficient** to rebut the presumption. . . .We agree the **effect of the presumption would be defeated if it could be rebutted by expert medical opinion generally denying the validity of the legislatively premise. . . .**
>
> **. . .**
>
> **We conclude that expert medical opinion that denied the underlying premise of a causal relationship** between a law enforcement officer's work stress, including the Claimant's **predisposition to risk factors**, and heart disease **is insufficient to rebut the presumption the heart disease suffered in the line of duty**.

Id., (emphasis).

The North Dakota Supreme Court again wrestled with this issue when addressing a firefighter lung disease presumption in *Wanstrom v. North Dakota Workers' Compensation Bureau,* 621 N.W. 2d 864 (N.D. 2001). Rejecting a lower Court ruling, the N.D. Supreme Court explained that "**the presumption's purpose is to relieve firefighters of the nearly impossible burden of proving firefighting actually caused their disease."** *Id.* 867(emphasis); see also *Sperbeck v. Dept. of Industry, Labor and Human Relations*, 174 N.W. 2d 546, 549 (Wisc. 1970).

The Minnesota Supreme Court in *Swanson v. City of St. Paul*, 526 N.W. 2d. 366 (Minn. 1995):

> Certainly, causation in heart cases is difficult enough to determine by applying medical theory to observable facts, but the difficulty is compounded by the persisting split in medical theory itself on the relation of stress and heart disease. That, however, is not a matter for the courts to consider where the legislature has decided that work common to certain occupations contributes causally to named diseases when the pre-employment physical examination evinces the absence of the disease at the time. Consequently, when there is evidence that a claimant performed the work common to the occupation named in the statute or when the nature of the work done **undisputed legal causation** is established.
>
> As we observed in *Egeland* [v. City of Minneapolis, 344 N.W .2d 597(Minn. 1984)], stress in the workplace does not incapacitate the majority of workers in occupations named in the statute and, like Egeland, Swanson was "probably constitutionally predisposed" to his heart disease. *Egeland*, 344 N.W .2d at 604. **But a predisposition to disease does not disqualify a claimant from the coverage provided by the Workers Compensation Act.**
>
> The compensation act was designed for the protection of all laborers coming within its purview. That is, it does not apply to those only who are strong in body. Neither is it limited to those only who are normal. Those who are below normal, have a weakness or carry perchance a disease, are also within its protection. Compensation is not dependent upon any implied assumption of perfect health. It does not exclude the weak or physically unfortunate.

Id. at *368* (emphasis); see also, *Linnell v. City of St. Louis Park*, 305 N.W. 2d 599 (Minn. 1981).

Each of the employer's experts below testified to the lack of scientifically valid support for the causal nexus between combat firefighter's exposure to carcinogens and prostate cancer. They opined that there either should be no statutory presumption of prostate cancer causation, since science does not support

a causal connection between combat firefighting and the development of prostate cancer. Unfortunately for those of their ilk, and fortunately for Firefighter Milan, this ship has sailed.

Any scientific dispute over the occupational causation for cancer for combat firefighters suffering prostate cancer, was resolved by the Legislature by the passage of § 8-41-209, C.R.S. This constituted a unequivocal declaration by the Legislature that the public policy of ensuring equitable protection for firefighters who place their lives and well-being at risk by exposing themselves to carcinogens for society's benefit is a paramount concern.

Because both Drs. Weiss and Milliken testified that Firefighter Milan's prostate cancer is not likely related to his risk exposure as a combat firefighter, their opinions constituted a rejection of § 8-41-209 presumption's premise. Further, their opinions are speculative, at best, since no other causative agent of Firefighter Milan's prostate cancer was identified: i.e., **these experts could not, or would not, state what actually** caused Firefighter Milan's prostate cancer. Rather, their opinions were that the job risks confronted by Firefighter Milan's were insufficiently established scientifically to support § 8-41-209's legislative causation presumption.

Dr. Milliken opined that it is unlikely that prostate cancer could arise from carcinogen exposure from firefighting because the excretory process did not involve the prostate. Again, this is a direct challenge to the statute's scientific validity. As such, it is not medical evidence that Firefighter Milan's prostate cancer did not occur on the job.

Respondent expert witness Dr. Augspurger could not state what constituted Firefighter Milan's firefighting risk; and he did not attempt to estimate what role Firefighter Milan's combat firefighting carcinogen exposure risk would, or could, have had in contributing to Firefighter Milan's prostate cancer. He speculated that Firefighter Milan's cancer was "highly suspicious' when Firefighter Milan's prostate had a 1.3 PSA at age thirty-five. Exhibit G (ROA, p. 957). What this suggests is anyone's guess, since he also testified that Firefighter Milan did not have clinical significant prostate cancer until the 2008 biopsy.

Given an arguable scientific dispute over such issues as combat firefighter carcinogen dose levels, the impact of duration of carcinogen exposure, the variability of fire suppression venues, the impact of the healthy worker effect, or the small size of firefighter sampling, etc., it would have been difficult, or perhaps "nearly impossible", for Firefighter Milan to have mounted convincing support for his occupational disease claim in the absence of the presumption.

As the Colorado Legislature recognized, had there been no presumptive legislation Firefighter Milan would have shouldered the burden of proving prostate cancer causation. Perhaps, based on any one of Respondents' expert's opinion, Firefighter Milan's cause may have failed since he may have been unable to prove causation by preponderance of the evidence. However, as stated by the North Dakota Supreme Court in *Wanstrom v. Workers' Compensation Bureau*, supra,, the purpose of the causation presumption "is to relieve firefighters of the nearly impossible burden of proving firefighting actually caused their disease." *Wanstrom*, supra p. 867. The Colorado Legislature agreed, and relieved Firefighter Milan from this burden in recognition of the essential societal function combat firefighters serve.

Implicitly, Golden suggests that the ALJ imposed a profoundly difficult burden of proof upon it. It is wrong.

First, Respondent's burden is imposed by the Colorado Legislature to serve a social policy purpose. Second, the presumption limits the employer from meeting its burden by relying on a scientific disagreement as to whether the Colorado Legislature should have passed the presumption in the first place. Thus, § 8-41-209 deprives Golden from relying on "speculation" as "proof" of cause. Third, the presumption ensures that a firefighter will not be deprived of its

statutory protection because a Respondent has retained experts to identify multiple "risks" of cancer without establishing that these "risks" equals cause.

As Dr. Weaver pointed out in her legislative testimony, (Exhibit 17) (ROA, pp. 759 – 760), the limitations of scientific explanation are precisely why the presumption is needed. The legislature recognized as much by adopting § 8-41-209, C.R.S. Under this statutory scheme, Respondent failed to meet its burden of overcoming the presumption that Firefighter Milan's prostate cancer is compensable as an occupational disease by a preponderance of medical evidence.

Although Golden may view the statutory scheme of § 8-41-209, C.R.S., unfair, as applied by the ALJ, Colorado Legislature has opted to protect the societally critical combat firefighter from the risk of cancer presumed to arise from firefighters exposure to carcinogens. The ALJ proceeded accordingly.

F. GOLDEN FAILED TO PRESENT A PREPONDERANCE OF MEDICAL EVIDENCE THAT FIREFIGHTER MILAN'S PROSTATE CANCER DID NOT OCCUR "ON THE JOB".

Golden has argued that ALJ Henk erred in concluding that it had not provided sufficient evidence to overcome the presumption found at § 8-41-209, C.R.S.

As evidenced from her Findings of Fact, ALJ Henk expressly considered and rejected the Respondent's argument that Firefighter Milan's cancer did not

occur on the job. Her opinion was amply supported by the medical evidence and was consistent with the presumption.

Golden's argument rests on the proposition that a familial predisposition is a sufficient "risk" to overcome the presumption that Firefighter Milan's prostate cancer occurred on the job. Its argument expands the opinions of its own experts beyond those presented at hearing

Golden's medical experts either opined that the cause of cancer was unknown, or that a familial predisposition did not establish that an individual would suffer from prostate cancer. Further, Golden's experts agreed that how, if at all, familial risk predisposition impacts the development of prostate cancer remains unknown. Thus, there is no explanation for the fact that out of a 100,000 males only 75 had prostate cancer at age 49 while there is a statistical probability that some portion of the remaining 99,925 individuals contains a family predisposition. Nor, could they explain why Firefighter Milan's brother, an individual in the first degree of familial relationship, does not have prostate cancer, while Firefighter Milan does.

As is evident from the record, the ALJ's opinion below was supported by substantial evidence, i.e. the quantum of probative evidence which a rational fact finder would accept as adequate. See *Durocher v. Industrial Claim Appeals Office*,

905 P. 2d 4 (Colo. App. 1995). Even assuming that Golden presented evidence which would permit a contrary result, this evidence was not credited. Therefore, it provides for no relief on appeal. *Cordova v. Industrial Claim Appeal Office*, 55 P. 3d 186 (Colo. App. 2002).

V. CONCLUSION

Wherefore, Firefighter Milan requests that the Appeal by Golden be denied and the decision of the ICAO affirmed.

Dated this ____ day of _____, _____.

Respectfully submitted,

LAW OFFICE OF O'TOOLE & SBARBARO, P.C.

_____

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, _____, a true and correct copy of the foregoing **FIGHERFIGHTER MILAN'S ANSWER BRIEF** was deposited in the United States mail, postage pre-paid, to the following:

Original Hand Delivered to:

Colorado Court of Appeals
Colorado State Judicial Building
2 East 14th Avenue, 3rd Floor
Denver, CO 80203-2115

Copies Hand Delivered to:

Industrial Claim Appeals Office
633 17th Street, 6th Floor
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