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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 REPLY BRIEF

I. Per the holding set forth in the recent Colorado Court of Appeals case, *Town of Castle Rock v. Zukowski*, 2013 COA 109, the ALJ erred by finding that appellant cannot meet its burden of proof in overcoming the statutory presumption through medical evidence of non-occupational risk factors that were the more likely cause of claimant's condition or impairment

The Colorado Court of Appeals held in *Town of Castle Rock v. Zukowski*, 2013 COA 109 that the statutory presumption under Section 8-41-209, C.R.S. can be overcome by evidence of risks of cancer from other sources that outweigh the risk created by firefighting. This opinion was announced on July 3, 2013, which was after appellant filed its opening brief in this matter but before appellees filed its answer brief. Thus, appellant files this reply brief to address the impact of *Town of Castle Rock v. Zukowski, supra* on the instant matter.

As discussed in *Town of Castle Rock v. Zukowski, supra*, a division of the Court of Appeals in *City of Littleton v. Industrial Claim Appeals Office*, 2012 COA 187 held that Section 8-41-209 required employers to "affirmatively prove, by a preponderance of the evidence, that the firefighter's cancer did not result from, arise out of, or arise in the course of the firefighter's employment." *Id.* at ¶ 34. Thus, under the majority's view in *City of Littleton*, an employer could overcome

the presumption by showing "that [the] claimant's occupational exposures (1) could not have caused [the type of cancer the firefighter contracted] (disproving general causation), or (2) did not cause claimant's particular [cancer] (disproving specific causation)." *Id.* at ¶ 82. However, the majority held that because the City "produced no evidence about [the firefighter's] specific occupational exposures," it had failed to overcome the statutory presumption of compensability. *Id.* At ¶¶ 93-94.

Here, similar to respondents in *Town of Castle Rock,* appellant introduced evidence of claimant's specific exposures and risks for developing prostate cancer that were statistically more significant than the risk of firefighting. Dr. Milliken testified 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. Dr. Augspurger testified that claimant's family history was the predominate risk factor in claimant developing prostate cancer, as compared to his firefighting duties. 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.

Based on this Court's holding in *Town of Castle Rock v. Zukowski, supra,* ALJ Henk erred by concluding that § 8-41-209 prohibited an employer from carrying its burden of proof based upon medical evidence that non-occupational risk factors were the more likely cause of the condition or impairment and thus finding that respondents failed to prove by a preponderance of the evidence that claimant's prostate cancer was not caused by his firefighting duties. 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 "[t]he 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.

In affirming the ALJ, the Panel held that it could not set aside the ALJ's decision because the ALJ properly applied the "preponderance of the evidence"

standard and did not misapply the law. It noted that it was persuaded by Dr. Mayer's testimony that claimant's cancer is likely the result of the synergistic interaction between familial factors and his carcinogen exposures as a firefighter. The Panel upheld the ALJ's conclusion that respondents' medical experts' testimony that claimant had an increased risk of developing prostate cancer due to his familial disposition did not constitute medical evidence demonstrating by a preponderance of the evidence that his prostate cancer did not occur on the job.

Per the standard set forth in *Town of Castle Rock v. Zukowski, supra,* the question here is not whether firefighting played any causative role in claimant's development of prostate cancer, but whether the type of evidence presented by appellant, namely, risk factors rather than definitive causal links, was sufficient to overcome the presumption of compensability. This Court has found that evidence of risk factors can be sufficient and thus the Panel and the ALJ consequently misinterpreted section 8-41- 209(2)(b) by refusing to consider such evidence.

Because the ALJ held appellants to a standard higher than required under the statute, the case should be remanded to the Panel to remand to the ALJ to review the evidence under the standard described above. On remand, the ALJ should review the evidence presented to determine whether City of Golden overcame the

presumption by showing, by a preponderance of the medical evidence, that it was more likely than not that claimant's cancer "did not occur on the job." § 8-41-209(2)(b).

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 other risk factors related to claimant's prostate cancer as compared to his firefighting duties presented by respondents in determining whether respondents overcame the statutory presumption under §8-41-209.

Respectfully submitted this 15th day of August, 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 15th day of August, 2013, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was served as follows:

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