NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

FIREFIGHTER CANCER PRESUMPTION STATUTES IN WORKERS' COMPENSATION AND RELATED LAWS: AN INTRODUCTION AND A STATUTORY/REGULATORY/CASE LAW TABLE

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I. *Introduction*

In the typical tort case, and in the majority (but by no means all) state workers' compensation schemes, the employee seeking to show work causation of an alleged injury bears the burden of proof. Legislatures, however, can alter this arrangement by shifting or reversing the burden of proof, so that the responding employer bears the burden of showing *lack* of causation. The typical method of achieving this goal is by erecting a "presumption" of causation. The injured worker, though bearing some burden to show that he is injured or diseased, and disabled, enters the courtroom with the law *presuming* the fact that the malady complained of arose in the court of employment and is medically related thereto.

Presumptions in workers' compensation laws are not new. Instead, they are of ancient heritage. According to Yale Law Professor Walter F. Dodd, writing in 1936, occupational disease presumptions were first adopted in the U.S. in New York and Minnesota. These states copied the English workers' compensation law virtually verbatim. According to Dodd, the English statute, from the late nineteenth century, provided, "If the employee, at or immediately before the date of disablement, was employed in any process mentioned in the second column of diseases … the disease presumptively shall be deemed to have been due to the nature of the employment."[2]

The purpose of this note, and the accompanying table, is to summarize generally, and then identify specifically, an increasingly popular type of occupational disease presumption – that which provides to firefighters, and kindred public safety employees, a presumption that his or *cancer* has its genesis in work exposures.

This type of undertaking has been undertaken before. In 2009, the National League of Cities (NLC) issued a report that thoroughly examined firefighter cancer presumptions and their adoption by an increasing number of states.[3] One of the chapters of that study categorized the various state laws that include presumptions. The study is mandatory reading for all who are

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[2] WALTER F. DODD, ADMINISTRATION OF WORKERS' COMPENSATION, p.768 (1936).

[3] ASSESSING STATE FIREFIGHTER CANCER PRESUMPTION LAWS AND CURRENT FIREFIGHTER CANCER RESEARCH (National League of Cities, April 2009), available at http://www.colofirechiefs.org/docs/PresumptionReport2009.pdf.

involved in analysis of cancer presumptions. This is so given its impressive breadth, touching on all areas of the subject – particularly those surrounding the *scientific studies* that have been undertaken regarding cancer prevalence in firefighters. It is notable, however, that the report, in this latter aspect, has been subject to criticism by organized firefighter interests.[4]

Plainly the NLC was on to something when it identified the phenomenon of increasing popularity of these statutes. In this regard, since the 2009 publication of the report, five states, Iowa, Maine, Oregon, New Mexico, and Pennsylvania, have all adopted precisely these types of laws. By this writer's count, thirty-two states now have a workers' compensation, or public employee pension/retirement statute, that feature the firefighters' presumption. (See below for a table of states that maintain the presumption, with corresponding date of enactment. Many of these provisions are in fact amendments to well-known, established laws that provide a presumption of causation for *heart and lung* ailments.)

In the course of 2013, notably, the firefighter cancer presumption was considered for enactment in Michigan and New Jersey. Florida is another state where the presumption has been considered over the last few years, but efforts at enacting the same do not seem to have unfolded successfully.

The NAWCJ here supplements the NLC study to provide the lawyer and judge quick reference to the pertinent statutory and regulatory citations. This paper and the accompanying table also identify key precedents from most states to enable the reader better to evaluate how courts have interpreted firefighter cancer presumption laws.

Like the NLC and other analyses, this effort will identify the characteristics, or statutory features, of cancer presumption laws. A focus of this summary is on three of the five jurisdictions that enacted cancer presumptions since 2009.

A key question on this topic is whether a state's firefighter cancer presumption law is merely procedural or is, instead, *evidentiary* in nature. This dichotomy has, notably, been treated by the Larson treatise for many years.[5] Conclusions on this issue can only be achieved by a study of the cases – no state statute, to the writer's knowledge, actually announces whether the cancer presumption is substantive or procedural. The predominant holding, as it turns out, is that the formidable firefighter cancer presumption does indeed rise to the level of evidence.

II. *Policy Supporting the Presumption; Collision with Evidence-Based Medicine?*

Legislatures have enacted cancer presumption statutes in their compensation laws to make it easier for a cancer-afflicted firefighter to succeed with his or her case. "The presumption," one thoughtful court has stated, was "enacted to relieve claimants from the nearly

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[4] REVIEW AND ASSESSMENT OF THE NATIONAL LEAGUE OF CITIES' ASSESSING STATE FIREFIGHTER CANCER PRESUMPTION LAWS AND CURRENT FIREFIGHTER CANCER RESEARCH (IAFC 2009), available at http://www.iafc.org/files/safety_ReviewFindingsNLCreportOnCancerRiskInFirefighters.pdf.

[5] ARTHUR LARSON, WORKERS' COMPENSATION, § 3-52.07(2)(A)(ii), (iii), (iv), (v).

impossible burden of proving firefighting actually caused their disease …."[6] The presumption is thought appropriate as legislatures have been persuaded that an increased risk of cancer accompanies the occupation of firefighter. The Rhode Island cancer presumption statute sets forth explicitly this conviction; the statute "acknowledges the unfortunate fact that in the performance of their duties, firefighters develop cancer at a disproportionate rate …."[7]

In explaining the purpose of the presumption, a Colorado appeals court characterized the claimant's difficulty in ever proving a case under the *traditional* model of litigation:

> Consider now a firefighter who believes that his disease was caused by an exposure to a toxic substance that he encountered while battling fires. How will he fare under the traditional model?
>
> The answer is "badly." And it is easy to see why. First, the firefighter may have no way of identifying the substances to which he was actually exposed. (Rarely is monitoring equipment installed at a fire scene before the firefighters arrive.) Consequently, he may be unable to locate the relevant epidemiological studies, if indeed those exist. … Second, even if the firefighter can show that he was exposed to a substance that is known to cause his type of disease, he may lack the kind of information needed to prove specific causation…. [I]n 2007, the legislature made it easier for firefighters to recover benefits. It enacted a statute that reverses the usual burden of proof in a narrow class of cases[.][8]

Many have objected that, considered overall, scientific studies do not so impressively support an increased rate of cancer in firefighters that the presumption is merited. Addressing a similar complaint about the presumption for *cardiac ailments* in firefighters, one court stated, "The legislature was aware that the exact causation of cardiac diseases is unknown and the medical community disagrees as to the role of one's occupation in the development of these diseases. The legislature decided, nevertheless, that a sufficiently positive relationship exists between heart disease and the environmental and stressful aspects of firefighting to warrant the creation of the statute."[9]

Is this legitimate law-making? Though counterintuitive to some, a legislature *can enact* a law presumptively establishing that occupational exposures have induced cancer in a particular category of workers, even in the face of limited evidence. The only limitation is, or should be, that a legislature cannot be irrational or capricious in its enactments.[10] In other words, the law

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[6] *Wanstrom v. North Dakota Workers' Compensation Bureau*, 621 N.W.2d 864 (North Dakota 2001).

[7] *City of East Providence v. International Association of Firefighters Local 850*, 982 A.2d 1281 (Rhode Island 2009).

[8] *City of Littleton v. Indus. Claim Appeals Office (Christ)*, 2012 Colo. App. LEXIS 1793 (Colorado Ct. Appeals 2012).

[9] *City of East Providence v. International Association of Firefighters Local 850*, 982 A.2d 1281 (Rhode Island 2009). *See also City of Littleton v. Indus. Claim Appeals Office (Christ)*, 2012 Colo. App. LEXIS 1793 (Colorado Ct. Appeals 2012).

must have a rational basis. Also, a presumption statute in this realm must be *rebuttable*. An *irrebuttable* presumption would surely be unconstitutional under most state constitutions, as denying due process to the responding municipality.

Cancer presumptions are, in any event, likely offensive to those who advocate for evidence-based medicine (EBM) in the courtroom. The theory of EBM is that opinions with regard to causal connection, and treatment protocols, must comport with the results of scientific studies – opinions and protocols, that is, must be based on *evidence*. But, of course, presumptions create facts (potentially rebuttable) based on no evidence whatsoever. A Virginia court has explained, "The purpose of the statutory presumption is to establish by law, *in the absence of evidence*, a causal connection between certain occupations and death or disability resulting from specified diseases."[11] A Maryland court, meanwhile, affirming a cardiac injury presumption award stated, ironically, "While it may be true that the stress of being a firefighter/paramedic neither causes or leads to coronary artery disease or heart disease, the legislature has determined otherwise."[12]

III. *Expanding Nature of Firefighter Cancer Presumption Laws*

As noted above, more and more states have enacted firefighter cancer presumption laws. The following table illustrates this expansion:

State	**Year** + (major amendment)
California	1982 (2010)
Rhode Island	1986
Nevada	1987 (2003), (2009)
Oklahoma	1987
New Hampshire	1988
Minnesota	1988
Alabama	1990
Massachusetts	1990
Maryland	1991 (2012)
South Dakota	1991
Tennessee	1991
Virginia	1994 (2000)
Louisiana	1995 (2004)
Nebraska	1996
New York	1997 (2002)
North Dakota	1997
Wisconsin	1997

[10] *Cf. City of Frederick v. Shankle*, 785 A.2d 749, n.4 (Maryland Ct. Appeals 2001) (defending cardiac presumption, court states, "We are not dealing here with a legislative declaration that is utterly without any factual or scientific support whatever and therefore is wholly capricious….").

[11] *Henrico County Division of Fire v. Estate of Woody*, 572 S.E.2d 526 (Virginia Ct. of Appeals 2002).

[12] *Montgomery County v. Pirrone*, 674 A.2d 98 (Maryland Ct. Special Appeals 1996).

Arizona	2001
Washington	2002 (2007)
Kansas	2003
Texas	2005
Indiana	2006
Colorado	2007
Illinois	2007
Missouri	2007
Vermont	2007
Alaska	2008
Iowa	2009
Maine	2009
Oregon	2009
Connecticut[13]	2010
New Mexico	2010
Pennsylvania	2011

IV. *Statutory Features*

Firefighter cancer presumption statutes possess a number of features besides a statement of the presumption itself. These are criteria the firefighter must establish before he or she is *qualified* for the presumption. The laws in this realm can be fairly complex and must be read carefully. It is notable, in this regard, that the state of Washington, seeming to recognize that it had enacted a complex law, also promulgated an easy-reference-type regulation that shows how the presumption operates.[14]

Some preliminary characteristics of these laws should be noted. First, some statutes declare that the presumption applies only when the incurrence of cancer is accompanied by *disability*. Louisiana is a state where this is the rule.[15] Second, the presumption applies to *causation* of cancer, and not *disability* (that is, the need to be off of work) from the same.[16] Also, if the firefighter for some reason does not meet the necessary criteria, he or she can usually *still proceed* with a cancer claim, but in such instance the employee bears the burden of proof.[17]

[13] The 2010 law, codified at Conn. Gen. Stat. Ann. § 31-294j, provides that firefighters may make a claim for occupational cancers. However, this new law does not seem to include any causal presumption. According to a treatise, "The intent of this statute is unclear. Presumably firemen and policemen, like all other employees, were already eligible for benefits related to these and all other diseases if they are able to show that the disease arose out of and in the course of employment. This statute may, however, increase coverage for volunteer firemen." 19 CONN. PRAC., WORKERS' COMPENSATION, § 4:5.

[14] *See* WASHINGTON ADMINISTRATIVE CODE § 296-14-330.

[15] *See Landreneau v. St. Landry Fire Dist*., 815 So.2d 936 (Louisiana Ct. Appeal 2002).

[16] *See City of Sioux City, Iowa v. Bd. of Trustees of Fire Ret. Sys. of City of Sioux City*, 348 N.W.2d 643 (Iowa Ct. App. 1984); *Hebden v. WCAB (Bethenergy Mines, Inc.)*, 597 A.2d 182 (Pa. Commw. 1991) (*rev. on other grounds*).

Six qualifying criteria are noted here. I will use Virginia as an example of how the criterion is or is not applied.

(1) The necessity that the firefighter suffer from the type of cancer listed. Some statutes have no restrictions, whereas others specify the cancers covered. (Note: It's likely that in those states where the rule of liberal construction prevails, thyroid and esophageal cancer (for example) would be covered if "throat cancer" only is listed in the statute.) *Under the Virginia statute, leukemia and six specific cancers are listed. These are pancreatic, prostate, rectal, throat, ovarian and breast cancer.*

(2) The precise occupation of the public safety employee who has contracted cancer. Firefighters are universally covered, but some legislatures have added EMTs and other similar employees. *Under the Virginia statute, both salaried and volunteer firefighters are covered, as are many other public safety employees.*

(3) The firefighter's pre-claim physical exam which failed to reveal pre-existing cancer. Most cancer presumption statutes have such a requirement, but all are differently worded. *Under the Virginia statute, the firefighter must have undergone an adequate preemployment physical which found him or her free of the cancer.*

(4) The firefighter's current work status. Is he or she still working, laboring somewhere else, or even retired? Most statutes address this issue, often setting forth restrictions. *Virginia statute seems silent*.

(5) Time of manifestation of the disease. Most cancer presumption statutes will require that, before the presumption is available, the employee have labored in his or her position for a certain period of time, and/or that the disease have manifested itself within a certain period of time. *Under the Virginia statute, the firefighter or other covered employee must have completed twelve years of continuous service.*

(6) Time of incurrence of the cancer. Does the statute make reference to retroactivity? If a legislature declared that the new presumption is retroactive, employer claims that the statute should only apply to post-enactment claims would be frivolous. *Virginia statute seems silent.*

[17] *See City of Las Vegas v. Evans*, 301 P.3d 844 (Nevada 2013).

Here are these (and certain other) features as reflected in three recently amended workers' compensation laws:

State, Date of Enactment, Employees Covered	Cancers Covered	Physical Exam	Manifestation	Disability Noted?	Presumption and the Retired
Maine (2009). Paid and volunteer, and must have been employed as firefighter for five years and regularly responded to firefighting or emergency calls.	Non-Hodgkin's lymphoma, leukemia, Multiple myeloma, kidney, colon, brain, bladder, prostate, testicular, and breast cancers.	Yes.[18] Also governed by regulation.	Applies to firefighter diagnosed with cancer within 10 years of firefighter's last active employment as firefighter or prior to attaining 70 years of age, whichever occurs first.	No, only "contract[ion] of cancer."	No bar on retired: applies to firefighter diagnosed with cancer within 10 years of firefighter's last active employment as firefighter or prior to attaining 70 years of age, whichever occurs first.
Oregon (2009). Non-volunteers only; must have been employed by political division/ subdivision, who has completed five or more years of employment.	Leukemia, multiple myeloma, non-Hodgkin's lymphoma, brain, colon, stomach, testicular, prostate (post-55 years old), cancer, cancer of throat or mouth, rectal and breast cancer.	Yes.[19]	Must be first diagnosed by a physician after July 1, 2009; Presumption not applicable to claims filed more than 84 months following the termination of the nonvolunteer firefighter's employment as such firefighter.	Yes, but presumption applies also for "impairment of health."	No bar on retired.
Pennsylvania (2011). Career and volunteer firefighters who have served four or more years in	No restrictions.	Yes. [20]	300 weeks of last exposure (presumption applicable); 600 weeks after last date of	Disability from cancer seemingly required before presumption applies. *See*	No bar in statute.

[18] ***Maine***: "In order to be entitled to the presumption … during the time of employment as a firefighter, the firefighter must have undergone a standard, medically acceptable test for evidence of the cancer for which the presumption is sought or evidence of the medical conditions derived from the disease, which test failed to indicate the presence or condition of cancer."

[19] ***Oregon***: "Any such firefighter must have taken a physical examination upon becoming a firefighter, or subsequently thereto, which failed to reveal any evidence of such condition or impairment of health which preexisted employment."

[20] ***Pennsylvania:*** He or she must "[h]ave successfully passed a physical examination prior to asserting a claim under this subsection or prior to engaging in firefighting duties and the examination failed to reveal any evidence of the condition of cancer."

continuous firefighting duties; volunteers must establish direct exposure to a carcinogen through special documentary evidence.			employment (no presumption).	Section 301(e) of the Act, 77 P.S. § 413.	

Of note is that some states specifically target a firefighter's tobacco use as negating or limiting the presumption. The Arizona statute, for example, states that the presumption "does not apply to cancers of the respiratory tract if the firefighter or peace officer has smoked tobacco products."[21] The Indiana presumption does not apply, meanwhile, if the public safety employee has "use[d] tobacco products in any form in the last five … years."[22]

V. *How the Presumption Has Been Applied in Court*

A. *In general*

The firefighter who proceeds under the typical cancer presumption statute will bear an initial burden, presumably easy, to show that he has a listed, or otherwise applicable, cancer; and that he or she has been exposed to a carcinogenic agent as identified by the International Agency for Research on Cancer (IARC). (This is an organization whose findings are ubiquitously incorporated by reference into the statutes.[23])

Thereafter, assuming that the qualifying criteria (see above) are met, the firefighter is entitled a presumed fact that the cancer arose in the court of employment and is medically related thereto. (Note that in most cases, counsel for firefighters will not rely only on the presumption, but will also advance expert medical evidence to corroborate the presumption and render a specific opinion on the cause of cancer in the individual case.[24])

The employer thus has the job of presenting evidence that the *cancer was not work-related.* The specific formulations of the rebuttal task differ among the statutes. Some state that the municipality merely advance "competent" evidence, others "substantial evidence," still others a "preponderance" of the evidence. Some statutes actually *set forth* the needed rebuttal proofs. The recent New Mexico enactment, for example, states that the presumption "may be rebutted by a preponderance of evidence … showing that the firefighter engaged in conduct or

[21] A.R.S. § 23-901.01.

[22] INDIANA CODE § 5-10-15-1.

[23] *See* http://www.iarc.fr/.

[24] *See, e.g., City of Littleton v. Indus. Claim Appeals Office (Christ)*, 2012 Colo. App. LEXIS 1793 (Ct. Appeals Colo. 2012) (claimant presented two experts who vouched for causation).

activities outside of employment that posed a significant risk of contracting or developing a described disease."[25]

In all states, importantly, medical opinions to the effect that "*no one* can render opinions with regard to the cause of cancer in this patient or in other firefighters," or that "it is impossible scientifically to render opinions as to the cause of cancer in this case," are *not* unequivocal opinions sufficient to rebut the presumption.[26]

Perhaps more importantly, a medical opinion that "rejects" or "attacks" the presumption is legally incompetent, and will not be sufficient to rebut the presumption.[27] This is likely so even if such expert opinion is the only one presented in the case, because the claimant *does* dare to rely only on the presumption.

Two theories of presumptions exist. The first treats the presumption as merely procedural, as likely is the case under the Pennsylvania[28] and Minnesota statutes.[29] When a presumption is treated this way, as soon as the responding employer develops an expert medical opinion to the effect that the cancer is not work-related, the presumption "drops out" of the case,[30] and the firefighter once again has the burden of proof, as in any other workers' compensation claim. This theory of presumptions has been called the "Wigmore-Thayer" view.[31]

The second treats the presumption as a substantive rule of law. When the responding employer presents its rebuttal, the presumption does not "drop out." To the contrary, the presumption "remains in the case," and the fact-finder is still to consider the import of the presumption as he or she assesses the proofs, that is, the credibility of the conflicting expert

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[25] N.M. Stat. Ann. § 52-3-32.1.

[26] *See, e.g., Jeanette Dist. Mem. Hosp. v. WCAB (Mesich),* 668 A.2d 249 (Pa. Commw. 1995) (where employer's expert could not state unequivocally where claimant, a nurse, acquired her hepatitis, employer had not rebutted presumption).

[27] *City of Frederick v. Shankle*, 785 A.2d 749 (Md. 2001); *City of Littleton v. Indus. Claim Appeals Office (Christ),* 2012 Colo. App. LEXIS 1793 (Ct. Appeals Colo. 2012).

[28] A Missouri court has read a Pennsylvania *cardiac ailment* presumption case, from the Supreme Court, as implying that Pennsylvania treats the presumption as procedural and not substantive. *See Byous v. Mo. Local Gov't Employees Retirement System*, 157 S.W.3d 740 (Missouri Ct. Appeals 2005) ("Pennsylvania has stated that the statutory presumption is a [mere] procedural or evidentiary advantage to a claimant…. We choose not to follow this view of the presumption because Pennsylvania's statute has a lower standard of proof and because of the compelling social policy in our statute.") (citing *City of Wilkes-Barre v. WCAB*, 664 A.2d 90 (Pennsylvania 1995)).

[29] *See Jerabek v. Teleprompter Corp*., 255 N.W .2d 377 (Minnesota 1977) ("The statutory presumption … [of] Minn. Stat. § 176.011, subd. 15, regarding myocarditis in employees of municipal fire and police departments, is not evidence. It is, rather, a rule of law dictating decision on unopposed facts. Where substantial evidence to rebut the presumption is introduced, the presumption should disappear…").

[30] *Kroptavich v. Pennsylvania Power & Light Co*., 795 A.2d 1048 (Pa. Super. 2002) (quoting, among others, *St. Mary's Honor Ctr. v. Hicks,* 113 S. Ct. 2742 (U.S. 1993)).

[31] *See Montgomery County Fire Bd. v. Fisher*, 468 A.2d 625 (Maryland Ct. Appeals 1983).

medical opinions. This concept, called the "Morgan approach,"[32] holds that a firefighter cancer presumption statute shifts the burden of both *production* (moving forward to get around the presumption, by developing a legally sufficient expert medical opinion of non-causation); and *persuasion*, that is, trying to persuade the fact-finder that the opinion as to non-causation is the most credible.

Most states seem to treat the firefighter cancer presumption under the Morgan approach. This is certainly the case in Virginia, Maryland, Oregon, Maryland, North Dakota, Missouri,[33] and Colorado.[34] In these states, the employer has a heavy burden of rebuttal. Yet, states applying the Morgan approach insist that the presumption is still rebuttable.[35]

B. *Illustrations: Specific Cases Where the Presumption has, and has not, been Rebutted*

Many reported precedents exist that illustrate the operation of the presumption. Most involve the appeal of a municipality which has been ordered to pay benefits to a firefighter who has prevailed in his case in whole or in part by relying on the presumption.

It is important to remember that most presumption statutes have different wording, and the language of the specific state law at issue will be interpreted and parsed differently by courts. Still, the following cases are examples of how states have applied the firefighter cancer presumptions. (Some here interpret the well-established and similar presumption for *heart and lung* ailments.)

Two Colorado cases. In a 2012 Colorado case, a career firefighter with twenty years on the job developed glioblastoma, a type of brain cancer.[36] The claim was disputed, and an ALJ at first ruled that the municipality had rebutted the presumption that the cancer "did not occur on the job." After a remand, the ALJ, Appeals Office, and court all held that the employer had not rebutted the presumption, and the firefighter was awarded benefits.

The court held that the municipality's experts had in essence *rejected* the presumption. For example, one expert opined that "none of the chemicals described as associated with firefighting are causally associated with brain cancer." Two of the experts, meanwhile, characterized as unpersuasive a study that showed increased incidence of brain cancer in firefighters. As noted above, however, an "attack" on the presumption is not permissible as a rebuttal proof. In the court's words, an "employer gains nothing by challenging the wisdom or the evidentiary foundation of the legislature's decision." The court also held that, even had the municipality's experts not rejected the presumption, their testimony, even considered believable, was not sufficient to prove that claimant's work exposures were not a cause of the cancer. In the

[32] *Id.*

[33] *Byous v. Mo. Local Gov't Employees Retirement System*, 157 S.W.3d 740 (Missouri Ct. Appeals 2005).

[34] *City of Littleton v. Indus. Claim Appeals Office (Christ)*, 2012 Colo. App. LEXIS 1793 (Ct. Appeals Colo. 2012).

[35] *See, e.g., City of Frederick v. Shankle*, 785 A.2d 749 (Md. 2001).

[36] *City of Littleton v. Indus. Claim Appeals Office (Christ)*, 2012 Colo. App. LEXIS 1793 (Ct. Appeals Colo. 2012).

court's view, the experts were shown not to have sufficient information about claimant's actual work exposures to render opinions on this point.

The second Colorado case, from 2013, acknowledges the "formidable" nature of the Colorado presumption, but reminds the reader that the presumption is rebuttable. The case also sets forth how a municipality may rebut the presumption.[37] There, a career firefighter/paramedic had worked for his municipal employer for eleven years. He had, however, also spent much time in the sun and had an unusual number of large moles on his lower extremities. He developed, in any event, a malignant melanoma on his right outer calf. The municipality's expert testified in rebuttal that claimant's UV radiation exposures and pre-existing moles were much more likely than work exposures to have caused the melanoma.

The ALJ and Appeals Office rejected this testimony as insufficient to rebut the presumption, but the court reversed and remanded. According to the court, "specific risk evidence," if found credible, "demonstrating that a particular firefighter's cancer was probably caused by a source outside of work," is sufficient to overcome the presumption. The employer was not, in contrast, "require[d] … to unequivocally establish that the cause of the firefighter's cancer arose outside work." The court in this case, having clarified the law, returned the case to the ALJ for reconsideration.

Three Virginia cases. In a 2002 Virginia case, the court clarified how the presumption in that state operates.[38] There, a long-time volunteer/career firefighter contracted lung cancer and died. He had, however, also been a heavy cigarette smoker, and in the proceedings experts on both sides opined that cigarette smoking was involved in claimant's disease. Under Virginia law, claimant was entitled to the presumption, and to overcome the same the responding municipality was obliged to show "both that 1) the claimant's disease was not caused by his employment, and 2) there was a non-work-related cause of the disease." The court noted that the municipality had presented proofs that smoking was a non-work-related cause of the cancer (prong #1), and could hence prove (prong #2) that the disease was "not caused by his employment." In this latter regard, the court, correcting the Commission, held that mere exposure to fumes and other respiratory hazards does *not* create an *irrebuttable* presumption of causation.

In a 2003 case, the Virginia court, considering the kindred *cardiac ailment* presumption, held that the employer had not rebutted the presumption of causation.[39] There, a firefighter trainer/fire inspector developed coronary artery disease (CAD), and became entitled to the presumption. In the proceedings that followed, the employer presented expert medical proofs which the court characterized as reflecting the familiar *rejection* of the presumption (here, that the stress and exposures of firefighting could cause coronary artery disease.) One expert, for example, opined that "Any attempt to make this association [between Lusby's CAD and his employment at MWAA] is contrary to our current scientific understanding as to the genesis of this process."

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[37] *Town of Castle Rock v. Indus. Claim Appeals Off. (Zukowski)*, 2013 Colo. App. LEXIS 1093) (July 3, 2013).

[38] *Henrico Co. Div. of Fire v. Estate of Woody*, 572 S.E.2d 526 (Va. Ct. Appeals 2002).

[39] *Metro. Washington Airports Auth. v. Lusby*, 585 S.E.2d 318 (Va. Ct. Appeals 2003).

In a 2011 Virginia Commission case, the municipal employer failed to submit *any* rebuttal medical proofs and became, perhaps inevitably, liable for claimant's compensation.[40] There, the worker had labored as a firefighter for almost twenty years. She developed breast cancer and sought workers' compensation benefits, maintaining that exposure to benzene, a substance recognized (as required) by IARC as a carcinogen, caused the cancer. The municipal employer, rather than developing an expert rebuttal medical opinion, advanced the legal argument that benzene must not only be listed by IARC "as a known or suspected carcinogen," but one which "causes or is suspected *to cause breast cancer*." The Commission rejected this reading of the statute.

Along the way to doing so, the Commission held that claimant was entitled to the presumption, as she had proven that she had one of the listed cancers, that she had contact with a toxic substance in the line of duty, and that the toxic substance to which she was exposed was one listed by IARC. And, because the employer developed no medical evidence of any kind, it necessarily had not rebutted the presumption. (Claimant, notably, also pursued her case with the testimony of an expert, her Board-certified treating oncologist.)

A North Dakota case. In a model North Dakota case, the insurer of the municipal employer was held to have rebutted the presumption.[41] There, the claimant was a longtime police officer who developed lung cancer and died. While he and his widow were entitled to the presumption of causation, the deceased was also a 40-year smoker, and the insurer (the Bureau), defended on the grounds that the cancer was caused by smoking. Towards this end, it submitted the expert opinions of two physicians. (The widow, meanwhile, also submitted the opinion of an expert in concert with invoking the presumption.)

The ALJ concluded that the insurer had met the burden of both production and persuasion. The court reproduced her specific reasoning which included the statement, "at the roots of this decision finding the Bureau to have rebutted the presumption, is an analysis of the probabilities that claimant's small cell lung carcinoma was caused by his smoking. Statistically, claimant was 50 times more likely than a non-smoker to develop lung cancer …."

An Oregon case. In a 2012 Oregon Board case, the claimant was a firefighter who developed testicular cancer.[42] He pursued his compensation case relying on the presumption, as corroborated by his expert. The Board noted that the carrier's task in rebuttal was as follows: "the truth of the facts it asserts must make it highly probable that claimant's employment was not a 'fact of consequence' in causing or contributing to his testicular cancer."

The carrier, in unsuccessfully undertaking this task, presented the opinions of three experts, none of which were found legally sufficient. A Dr. Pierce testified that "there was no medical agreement that firefighting or any occupation increase[s] the risk of testes cancer." A

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[40] *Beahm v. City of Norfolk,* No. VA199677 (Va. WC Commission, Oct. 5, 2011).

[41] *Burrows v. No. Dakota Workers' Compensation Bureau*, 510 N.W.2d 617 (North Dakota 1994).

[42] *In the Matter of the Compensation of Leonard C. Damian, II*, Oregon WCB Case No. 11-01172 (Oregon WC Board, filed Oct. 26, 2012).

Dr. Bernstein, meanwhile, rejected the import of studies that suggested an increased risk of testicular cancer in firefighters. A Dr. Burton, finally, insisted that there is "no relationship between firefighting activities, in this case or in general, and the development of testicular cancer."

APPENDIX

FIREFIGHTER CANCER PRESUMPTION STATUTES IN WORKERS' COMPENSATION AND RELATED LAWS: STATUTES, REGULATION(S), ILLUSTRATIVE CASES

~ Torrey/Yskamp/Monroe (09-13)
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State	Statute	In WC Act or in other law?	Regs?	What cancers covered?	Year Cancer Added	Illustrative/ Relevant Case/Comment
Alabama	Code of Alabama § 11-43-144(a)(3)(d) *et al.*; Code of Alabama § 25-5-110 *et seq.*; § 25-5-120.	Yes, but also at Title 11, Counties/ Municorps	No.	Not restricted in Title 11.	1990	*City of Hoover v. Phillips*, 895 So. 2d 992 (Ala. Ct. Civ. App. 2004) (cardiac case). Rebuttal burden by preponderance.
Alaska	Alaska Stat. § 23.30.121 (noting, *inter alia*, that law is to be refined by regulation).	Yes.	8 Alaska Admin. Code § 45.093; *id.*, § 45.094 (detailing physical exam).	Cancers enumerated.	2008	*Municipality of Anchorage v. Adams*, 2012 WL 6727541 (Alaska WC App. Com., Dec. 19, 2012). Rebuttal burden is by preponderance. Presumption "drops out" once rebuttal burden met.
Arizona	A.R.S. § 23-901.01. **Note**: presumption "does not apply to cancers of the respiratory tract if the firefighter or peace officer has smoked tobacco products."	Yes.	No.	Cancers enumerated.	2001	*Hahn v. Indus. Comm'n*, 252 P.3d 1036 (Ariz. Ct. App. 2011). Rebuttal burden not stated.
California	Cal. Lab. Code § 3212.1.[43]	Yes.	No.	Not restricted.	1982 (2010)	*City of Long Beach v. WCAB (Garcia)*, 23 Cal. Rptr. 3d 782 (Cal. Ct. App. 2005).
Colorado	C.R.S. § 8-41-209.	Yes.	No.	Cancers enumerated.	2007	*City of Littleton v. Ind. Claim Appeals Office*, 2012 Colo.

[43] **California**: For a website listing all firefighter ("public safety") presumption statutes in the state, with citations, see http://www.cpf.org/go/cpf/health-and-safety/firefighter-presumptions/.

						App. LEXIS 1793 (Colo. Ct. App. 2012); *Town of Castle Rock v. Indus. Claim Appeals Office*, 2013 WL 3424172 (Colo. Ct. App. 2013).
Illinois	40 ILCS 5, Art. 4, § 4-110.1 (pension). 820 ILCS 305/6(f) (WC Act).	Illinois Pension Code. WC Act.	No.	Caused by exposure to known carcinogen. For WC Act: Not restricted.	Cancer in the statute as far back as 1995. WC Act: 2007	*Lindemuller v. Bd. of Trustees, Naperville Firefighters Pension Fund et al*., 946 N.E.2d 940 (Ill. Ct. App. 2011). Rebuttal burden in WC Act not stated.
Indiana	Indiana Statutes § 5-10-15-1 *et seq.*	No, Public Employees Code.	*See* Ind. Code Ann. § 5-14-1.5-6.1(b)(1).	Not restricted.	2006	None on point. Rebuttal burden: "by competent evidence."
Iowa	Iowa Code § 411.1 Definitions § 411.6 Benefits *See also* Iowa Code § 411.5(8) (pertaining to medical board).	No, Retirement System.	No.	Cancers enumerated.	2009 (cancer added)	*City of Sioux City, Iowa v. Bd. of Trustees of Fire Ret. Sys. of City of Sioux City*, 348 N.W.2d 643 (Iowa Ct. App. 1984). Rebuttal burden not stated.
Kansas	Kansas Statutes § 74-4952.	No, Public Employees Retirement Systems.	No	Not restricted.	1993	*Miller v. Bd. of Trustees of Kansas Pub. Employees Ret. Sys.*, 21 Kan. App. 2d 315 (1995).
Louisiana	Lo. Stat. Ann. § 33:2011.	No, Public Safety Code, Title 33.	No.	Cancers enumerated.	1995 (2004)	*Landreneau v. St. Landry Fire Dist*., 815 So.2d 936 (Lo. Ct. Appeal 2002) "[P]resumption shall be rebuttable by evidence meeting judicial standards."
Maine	Me. Rev. Stat. tit. 39-A, § 328-B.	Yes.	Maine Code, Rule 90-351, Ch. 1, § 10, (eff. 6-13?) (exam guidance)	Cancers enumerated.	2009	None on point. Rebuttal burden not stated.

Maryland	Md. Labor & Employment Code Ann. § 9-503.	Yes.	No.	Cancers enumerated.	1991 (2012)	*Montgomery County Fire Bd. v. Fisher*, 468 A.2d 625 (Md. 1983); *Montgomery County v. Pirrone*, 674 A.2d 98 (Maryland Ct. Sp. Appeals 1996); *City of Frederick v. Shankle*, 785 A.2d 749 (Md. 2001).
Massachusetts	ALM GL ch. 32, § 94B.	No, Public Employees Code.	840 Mass. Code Regs. 10.04(3), (4) "Standard for Decision Findings of Fact": references rebuttal standard.	Cancers enumerated, but overall reading suggests no restrictions.	1990	None on point. Presumption rebuttable: "Preponderance of the evidence that non service connected risk factors or non-service connected accidents or hazards undergone, or any combination thereof, caused such incapacity."
Minnesota	Minn. Stat. § 176.011(15)(c).	Yes.	No.	Not restricted.	1988	*Moes v. City of St. Paul*, 402 N.W.2d 520 (Minn. 1987) "Presumption may be rebutted by substantial factors brought by the employer or insurer."
Missouri	Missouri Revised Statutes § 87.006.	No, Ret. Systems Code.	No.	Cancers enumerated.	2007	*Byous v. Mo. Local Gov't Employees Retirement System*, 157 S.W.3d 740 (Missouri Ct. Appeals 2005).
Nebraska	R.R.S. Neb. § 35-1001.	No, Under Chapter 35: Fire Cos. and Firefightrs Code.	No.	Not restricted.	1996	None on point.
Nevada	N.R.S. § 617.453.	Yes.	No.	Not restricted.	1987 (2003) (2009)	*City of Las Vegas v. Evans*, 301 P.3d 844 (Nevada 2013).
New Hampshire	RSA § 281-A:17.	Yes.	No.	Not restricted.	1988	*City of Manchester Fire Dept. v. Galinas*, 649 A.2d 50 (N.H. 1994) To rebut, "It shall be the duty of the employer of call or volunteer firefighters

						to provide the required reasonable medical evidence."
New Mexico	N.M. Stat. Ann. § 52-3-32.1.	Yes.	N.M. Stat. Ann. § 50-9-1 through 50-9-25: Medical Screening provisos, as noted via cross-reference in statute.	Cancers enumerated.	2010	None. As to rebuttal, "presumptions … may be rebutted by a preponderance of evidence … showing that the firefighter engaged in conduct or activities outside of employment that posed a significant risk of contracting or developing a described disease."
New York [*ed.*: status unclear.]	(A) NY CLS Retire & SS § 363-d. (B) NY CLS Gen Mun § 207-kk.	Retirement and Social Security Law. General Municipal Law.	No.	(A), (B), Cancers enumerated.	(A) 1997 (2002) (B) 1994 (2003)	*Albano v. Bd. of Trustees of New York City Fire Dep't*, 98 N.Y.2d 548 (2002) (As to both (A) and (B), presumption applies "unless the contrary be proven by competent evidence.").
North Dakota	North Dakota Century Code §§ 65-01-15; 65-01-15.1.	Yes.	No.	Not restricted.	1997	*Burrows v. ND WC Bureau*, 510 N.W.2d 617 (ND 1994); *Elter v. ND WC Bureau*, 599 N.W.2d 315 (ND 1999); *Wanstrom v. ND WC Bureau*, 621 N.W.2d 864 (ND 2001).
Oklahoma	11 Okla. St. §49-110.	No, City/ Towns/ Municipal Code.	No.	Not restricted.	1987	*Sheets v. Ada Fire Dep't,* 83 P.3d 905 (Okla. Ct. Civ. App. 2003).
Oregon	O.R.S. § 656.802.	Yes.	No.	Cancers enumerated.	2009	*In the Matter of the Comp. of Leonard C. Damian, II, Claimant,* 64 Van Natta 2082 (2012) (Or. Work. Comp. Bd. 2012).
Pennsylvania	Act 46 of 2011. This law enhanced the current presumption for firefighters who suffer from cancer. *Amended*: Section	Yes.	No.	Not restricted.	2011	*City of Wilkes-Barre v. WCAB*, 664 A.2d 90 (Pa. 1995). "The presumption [in favor of the firefighter] of this subsection may be

	301(c)(1) and Section 301(c)(2), 77 P.S. §§ 411(1), (2); a*dded*: Sections 108(r), 77 P.S. § 27.1(r), and 301(f), 77 P.S. § 414. Presumption itself is at Section 301(e), 77 P.S. § 413.					rebutted by substantial competent evidence that shows that the firefighter's cancer was not caused by the occupation of firefighting."
Rhode Island	R.I. Gen. Laws § 45-19-16 (presumption); § 45-19.1-3 (reference to cancer, and includes a retroactivity proviso).	No, Chapter 45, Towns and Cities.	No.	Not restricted.	1986	*City of East Providence v. IAF No. 850*, 982 A.2d 1281 (R.I. 2009). As to presumption, same applies "unless the contrary is shown by competent evidence."
South Dakota	S.D. Codified Laws § 9-16-3.3.	No, Municipal Code (Pension law).	No.	Not restricted.	1991	Found none.
Tennessee	Tenn. Code Ann. § 7-51-205.	No, Under Title 7, Chapter 51, Misc. Gov't Functions.	No.	Not restricted.	1991	Found none. As to rebuttal of presumption, latter applies, "unless the contrary is shown by competent medical evidence."
Texas	Tex. Gov't Code § 607.055 (addressing cancer); Tex. Gov't Code § 607.057 (addressing effect of presumption); Tex. Gov't Code § 607.058 (explaining that that presumption is rebuttable).	No, Gov't Code, Title 6.	No.	Not restricted.	2005	None on point. Presumption "may be rebutted through a showing by a preponderance of the evidence that a risk factor, accident, hazard, or other cause not associated with the individual's service as a firefighter or emergency medical technician caused the individual's disease or illness."
Vermont	21 V.S.A. § 601(11)(E) *et seq*.	Yes.	No.	Cancers enumerated.	2007	*Estate of George v. Vermont League of Cities & Towns*, 993 A.2d 367 (Vermont 2010).
Virginia	Va. Code § 65.2-402.	Yes.	No.	Cancers enumerated.	1994 (2000)	*Henrico Co. Div. of Fire v. Estate of Woody*, 572 S.E.2d

						526 (Va. Ct. App. 2002); *Metro. Washington Airports Auth. v. Lusby*, 585 S.E.2d 318 (Va. Ct. App. 2003); *Beahm v. City of Norfolk*, No. VA199677 (VA WC Comm'n, Oct. 5, 2011).
Washington	Wash. Rev. Code § 51.32.185.	Yes.	Wash. Admin. Code § 296-14-310 *et seq*.[44]	Cancers enumerated.	2002 (2007)	*The City of Bellevue v. Raum*, 286 P.3d 695 (Wash. Ct. Appeals 2012); *McKeown v. City of Mountlake Terrace*, 2012 Wash. App. LEXIS 1850 (Wash. Ct. Appeals 2012). "Presumption of occupational disease may be rebutted by a preponderance of the evidence…. "
Wisconsin	Wis. Stat. § 891.455.	No, Retirement Bd., Duty Disability Benefit Program. Codified in procedural section.	Wis. Admin. Code ETF § 52.06(7)(c) (deter-minations made by the Dept. of Employee Trust Funds).	Cancers enumerated.	1997	Found none. *Regulation* states that presumption is rebuttable.

[44] **Washington**: Extensive regulations refine and explain the law, in Q&A fashion. These are found at WAC § 296-14-310 through 296-14-330, including a remarkable table of how presumptions work at § 296-14-330.