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Division of Workers' Compensation

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May 14, 2021

To: House Labor and Commerce Committee
Chair Zack Fields
Chair Ivy Spohnholz

RE: House Bill 204

To the Committee,

A question was posed about the possible defense of a workers' compensation claim under 23.30.121.

After a search of the history of claims involving 23.30.121, (Presumption of coverage for disability from diseases for certain firefighters), the Division was able to find only one claim that specifically dealt with the issue of heredity. The following is from our case file and is public record.

> **AS 23.30.121. Presumption of coverage for disability from diseases for certain firefighters.** (a) There is a presumption that a claim for compensation for disability as a result of the diseases described in (b) of this section for the occupations listed under (b) of this section is within the provisions of this chapter. This presumption of coverage may be rebutted by a preponderance of the evidence. The evidence may include the use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.
>
> (b) For a firefighter covered under AS 23.30.243,
>
> (1) there is a presumption that a claim for compensation for disability as a result of the following diseases is within the provisions of this chapter:
>
> (A) respiratory disease;
> (B) cardiovascular events that are experienced within 72 hours after exposure to smoke, fumes, or toxic substances; and
> (C) the following cancers:
>
> (i) primary brain cancer;
> (ii) malignant melanoma;
> (iii) leukemia;
> (iv) non-Hodgkin's lymphoma;

(v) bladder cancer;
(vi) ureter cancer;
(vii) kidney cancer; and
(viii) prostate cancer;

(2) notwithstanding AS 23.30.100(a), following termination of service, the presumption established in (1) of this subsection extends to the firefighter for a period of three calendar months for each year of requisite service but may not extend more than 60 calendar months following the last date of employment;

(3) the presumption established in (1) of this subsection applies only to an active or former firefighter who has a disease described in (1) of this subsection that develops or manifests itself after the firefighter has served in the state for at least seven years and who

(A) was given a qualifying medical examination upon becoming a firefighter that did not show evidence of the disease;
(B) was given an annual medical exam during each of the first seven years of employment that did not show evidence of the disease; and
(C) with regard to diseases described in (1)(C) of this subsection, demonstrates that, while in the course of employment as a firefighter, the firefighter was exposed to a known carcinogen, as defined by the International Agency for Research on Cancer or the National Toxicology Program, and the carcinogen is associated with a disabling cancer.

(c) The presumption set out in this section applies only to a firefighter who, at a minimum, holds a certificate as a Firefighter I by the Department of Public Safety under firefighter testing and certification standards established by the department under authority of AS 18.70.350(1) or other applicable statutory authority.

(d) The provisions of (b)(1)(A) and (B) of this section do not apply to a firefighter who develops a cardiovascular or lung condition and who has a history of tobacco product use as established under (e)(2) of this section.

(e) The department shall, by regulation, define

(1) for purposes of (b)(1)-(3) of this section, the type and extent of the medical examination that is needed to eliminate evidence of the disease in an active or former firefighter; and

(2) for purposes of (d) of this section, the nature and quantity of a person's tobacco product use; the standards adopted under this paragraph shall use or be based on existing medical research.

(f) In this section, "firefighter" has the meaning given in AS 09.65.295.

Issue: Do defendants in firefighter presumption cases use heredity as a defense?

In *Adamson v. Municipality of Anchorage*, 333 P.3d 5 (Alaska 2014), the court held a firefighter trying to take advantage of the firefighter presumption statute AS 23.30.121 is not required to present expert testimony to raise the presumption and cause it to attach to his or her claim. However, the employer had to use a defense that was "personal" to that particular firefighter to rebut the raised presumption, and could not offer not "evidence attempting to undermine the legislature's determination that the enumerated diseases are occupational diseases of firefighters." (*Id*. at 20). In other words, an employer cannot rebut the §121 presumption by providing testimony from a medical expert who generically states that there is no evidence linking the firefighter's type of cancer to his employment as a firefighter, because the legislature has already found there is such evidence; such evidence from the employer is not even admissible, and any expert evidence offered to rebut the raised presumption must demonstrate that something personal to that particular firefighter is the cause of the injury he or she claims is work-related. Stated another way, the legislature has already determined through factual findings in committee hearings that firefighters' occupational exposures to carcinogens are significant enough that they are accorded a presumption that certain cancers are occupational diseases, without regard to presenting expert testimony to raise that presumption. The court does not allow litigants to attack legislative findings; in fact, such evidence is not even admissible at hearing. (*Id*. at 21).

However, the §121 presumption is not irrebuttable. The statute in §121(a) expressly lists "hereditary factors" as one basis particular to a specific firefighter's claim that could be used to rebut the raised presumption. In *Adamson*, the employer's expert physician agreed there was no evidence that the claimant had issues with use of tobacco products, physical fitness, weight, lifestyle, hereditary factors, or exposure from other employment or nonemployment activities.

One could infer from this expert's opinion that if there was, for example, evidence that all male members of Mr. Adamson's family tree had developed prostate cancer and none of them were firefighters, the employer would have and could have used that evidence to successfully rebut the presumption. The problem the employer in *Adamson* had was that they provided no such evidence and were only challenging the legislature's basic findings giving rise to the firefighter presumption in the first place. But to answer the question presented, the employer in *Adamson* was looking for a defense including heredity but simply could find none.

There are several other board decisions that addressed §121 but a review of those decisions (*Mahlberg*, *Jones*, and *Mullen*) does not reveal that the parties ever got to the point where evidence was offered to rebut the raised presumption. These cases primarily addressed the legal implications of the firefighters' presumption and the burdens of proof on each party. One case, *Mahlberg*, stated employers were not limited to the listed §121(b) bases to controvert or rebut the raised presumption and reiterated that "hereditary factors" remained one way to overcome the presumption.

The Division has no knowledge of possible claims that may have been settled without a controversion that may have been affected by hereditary factor. A possibility exists that a claim may have been accepted by the employer without contesting the causal link due to a work injury due to the burden of rebuttal by the presumptive language.

Charles Collins
Director, Division of Workers' Compensation

Presumptive Defenses
HB 204
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