

Alaska Workers' Compensation Appeals Commission

Municipality of Anchorage and
NovaPro Risk Solutions,
Appellants,

vs.

John E. Adamson,
Appellee.

Final Decision

Decision No. 173 December 19, 2012

AWCAC Appeal No. 11-017
AWCB Decision No. 11-0141
AWCB Case No. 200815548

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 11-0141, issued at Anchorage on September 16, 2011, by southcentral panel members Linda M. Cerro, Chair, Patricia Vollendorf, Member for Labor, and a dissent by Linda Hutchings, Member for Industry.

Appearances: Trena L. Heikes, Office of the Municipal Attorney, for appellants, Municipality of Anchorage and NovaPro Risk Solutions; Eric C. Croft, The Crofts Law Office, for appellee, John E. Adamson.

Commission proceedings: Appeal filed September 26, 2011, with motion for stay, memorandum and attached Exhibits A-R; opposition to motion for stay filed October 19, 2011; hearing on motion for stay held October 28, 2011; order on motion for stay issued January 25, 2012; briefing completed April 9, 2012; oral argument held on September 26, 2012.

Commissioners: David W. Richards, S. T. Hagedorn, Laurence Keyes, Chair.

By: S. T. Hagedorn, Commissioner.

1. Introduction.

Appellee, John E. Adamson (Adamson), had worked as a firefighter for appellant, the Municipality of Anchorage (Municipality or MOA), for over thirty years when he

retired from the Anchorage Fire Department (AFD) in May 2011.¹ Adamson maintained that his work as a firefighter exposed him to a known carcinogen, which resulted in him developing prostate cancer. He filed a workers' compensation claim (claim) on July 14, 2010, and an amended claim on January 5, 2011,² seeking a finding that his prostate cancer is presumed to have resulted from his employment as a firefighter, pursuant to AS 23.30.121,³ medical costs, temporary total disability (TTD) benefits, penalties,

¹ See *John E. Adamson v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 11-0141, 6 (September 16, 2011).

² See *Adamson*, Bd. Dec. No. 11-0141 at 14, 15.

³ The statute provides in relevant part:

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:

.....

(C) the following cancers:

.....

(viii) prostate cancer;

.....

(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

(footnote continued)

(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.

. . . .

(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[.]

On February 20, 2011, a regulation pertaining to the type and extent of the medical examinations needed pursuant to the authority granted in AS 23.30.121(e) went into effect. It reads:

8 AAC 45.093. Qualifying medical examinations for certain firefighters. (a) A qualifying medical examination under AS 23.30.121(b)(3)(A) must occur no later than 30 days after an individual's employment as a firefighter.

(b) A medical examination under AS 23.30.121(b)(3)(A) or (B) must consist of

(1) a medical history, on a form prescribed by the department, completed by the firefighter, and reviewed by the examining physician;

(2) measurement of the levels of the nicotine by-product cotinine in the blood of the firefighter being examined, and documentation of the measurement on a form prescribed by the department and completed by the examining physician;

(3) a lung examination, documented on a form prescribed by the department and completed by the examining physician; the lung examination must include

(A) pulmonary auscultation;

(B) a baseline chest x-ray and, if indicated, subsequent annual x-rays; and

(C) pulmonary function testing; and

(4) a cardiac examination, documented on a form prescribed by the department and completed by the examining physician; the cardiac examination must include

(A) cardiac auscultation;

(B) an electrocardiogram; and

(footnote continued)

interest, and attorney fees and costs.⁴ Following a hearing on June 30, 2011, a majority of a panel of the Alaska Workers' Compensation Board (board) held that, under AS 23.30.121(a), Adamson had triggered the presumption and the Municipality had not rebutted the presumption by a preponderance of the evidence. In accordance with these holdings, the board awarded Adamson the relief he sought, other than the penalties.⁵ MOA appealed the decision, on procedural, substantive, and constitutional grounds, to the Workers' Compensation Appeals Commission (commission). A majority of the commission agrees with the board majority and affirms that Adamson attached the presumption; however, we unanimously disagree and reverse the board majority's ruling that excluded certain evidence MOA offered to rebut the presumption, and remand the matter to the board.

2. Factual and procedural background.

Since at least 1975, MOA had medical examinations of its firefighter applicants performed.⁶ On April 14, 1980, Adamson had a medical examination immediately prior

(C) if the firefighter being examined is 40 years of age or older, or the examining physician considers it appropriate for a firefighter under 40 years of age, a stress electrocardiogram.

(c) In addition to meeting the requirements of (b) of this section, a qualifying medical examination under AS 23.30.121(b)(3)(A) must include an initial screening for the cancers listed in AS 23.30.121(b)(1)(C). The screening must include a comprehensive history, complete physical and neurological examinations, blood chemistries, complete blood counts, urinalysis, and other diagnostic tests as indicated to screen for these cancers, each documented on a form prescribed by the department and completed by the examining physician.

⁴ Adamson chose not to avail himself of the general presumption of compensability set forth in AS 23.30.120. *See Adamson*, Bd. Dec. No. 11-0141 at 2.

⁵ *See Adamson*, Bd. Dec. No. 11-0141 at 65.

⁶ *See Mahlberg v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 10-0181, 5 (November 5, 2010).

to and as a condition of hire as a firefighter.⁷ The examination included a health and family history, a comprehensive physical evaluation of all systems, including height and weight, pulse, blood pressure, eyes and ears, nose and throat, chest, heart, abdomen, skin, metabolic, neuro-muscular, genito-urinary, rectum, skeletal, including neck, back and extremities, and an orthopedic evaluation. The examination also included a digital rectal examination (DRE),⁸ audiogram, chest x-ray, pulmonary function test, eye examination, electrocardiogram, urinalysis, complete blood count, and blood chemistry. No abnormalities were detected, and no evidence of prostate cancer was found.⁹ However, no screening was performed for the various cancers set forth in AS 23.30.121(b)(1)(C), as required by a subsection of the board's regulation, 8 AAC 45.093(c).¹⁰

⁷ The identity of the individual at Medical Park Family Group who performed this medical examination is disputed by MOA. *See* Appellants' Br. 21 n.6. The majority, in its decision, identified the individual as R. M. White, M.D. *See Adamson*, Bd. Dec. No. 11-0141 at 4-5. One page of the form used to record the findings for the examination bears the signature of an individual that could be R. M. White, with "M.D." following the signature, although the legibility of the signature leaves much to be desired. R. 632; Appellee's Exc. 266. On the invoice for the examination, R. M. White is also identified as one of the physicians practicing at Medical Park Family Group. R. 633; Appellee's Exc. 267. The names of the other five physicians identified on the invoice do not match the signature on the form particularly well. *See also Adamson* Dep. 53:21-54:12, Dec. 13, 2010.

⁸ According to the board majority, in April 1980, a DRE was the only screening test for prostate cancer. It was not until the early 1990s that prostate specific antigen (PSA) testing was approved by the U.S. Food and Drug Administration for prostate cancer diagnosis. A DRE, during which the prostate is examined, and blood testing for PSA level, are now commonly utilized screening tools for prostate cancer. *See Adamson*, Bd. Dec. No. 11-0141 at 5.

⁹ Appellee's Exc. 263-67.

¹⁰ *See Adamson*, Bd. Dec. No. 11-0141 at 70 (L. Hutchings, dissenting opinion).

On May 5, 1980, the Municipality hired Adamson as a firefighter. He worked his way up through the ranks, as Firefighter I, II, and III, Engineer, Fire Captain, Senior Captain, and Battalion Chief.¹¹

MOA did not conduct annual medical examinations of its firefighters until 1993, but has been having them performed since that time.¹² MOA contracted with Primary Care Associates (PCA) to perform the annual medical examinations of its firefighters.¹³ At each of Adamson's annual examinations, a DRE was performed,¹⁴ however, written records of his annual examinations in the 1990s, specifically, 1993,¹⁵ 1995, 1996, and 1997, were limited, and included a one-page "Annual Physical Fitness Written Opinion," noting the examining physician's conclusion that he could perform the duties of a firefighter.¹⁶

In 1998, Adamson's annual examination was conducted by Ed Hall, a physician's assistant (PA-C) at PCA.¹⁷ Blood testing included a PSA test. No abnormalities were detected on the DRE, and no evidence of prostate cancer was found.¹⁸ On April 8, 1998, PA-C Hall wrote to Adamson, notifying him that the results of all testing were normal, and reporting his PSA screening for prostate cancer measured 1.14, with normal being less than 4, "so you are well within normal limits."¹⁹

Apparently, no annual examination was given Adamson in 1999. The 2000 annual examination was again conducted by PA-C Hall. The examination was similar to

¹¹ Hr'g Tr. 51:2–57:7, June 30, 2011; *Adamson*, Bd. Dec. No. 11-0141 at 5-6.

¹² *Adamson* Dep. 53:21–55:17, 124:17-21, Dec. 13, 2010.

¹³ *See Mahlberg*, Bd. Dec. No. 10-0181 at 5.

¹⁴ *Adamson* Dep. 57:24–58:3, 124:5-7, Dec. 13, 2010.

¹⁵ We assume no annual examination of Adamson was performed in 1994.

¹⁶ Appellee's Exc. 268-70, 272-75.

¹⁷ Appellee's Exc. 276.

¹⁸ R. 1392-413, 1415-16, 1419-23.

¹⁹ R. 1414.

the earlier ones, and included pulmonary function testing, blood testing, chest and spine x-rays, an electrocardiogram, and a DRE. No evidence of prostate cancer was found, however there is no record that a PSA test was performed.²⁰ The 2000 annual examination included a respirator use questionnaire completed by the firefighter. One question read: "At work or at home, have you ever been exposed to hazardous solvents, hazardous airborne chemicals (e.g., gases, fumes, or dust), or have you come into skin contact with hazardous chemicals[?]" Adamson responded: "Yes . . . 20 years of firefighting have obviously exposed me to a variety of hazardous chemicals."²¹

The 2001 annual examination was also conducted by PA-C Hall. This examination was similar to prior examinations, and included an electrocardiogram, x-rays, pulmonary function testing, and a DRE.²² Adamson requested a PSA test paid for by his private insurance. His PSA test registered 1.95, with normal being between zero and 4.0. PA-C Hall reported Adamson's PSA was "well within normal limits." There was no evidence of prostate cancer found.²³ On the 2001 respirator use questionnaire, Adamson responded affirmatively to the question whether he had ever been exposed to hazardous solvents, hazardous airborne chemicals (e.g., gases, fumes, or dust), or had ever come into skin contact with hazardous chemicals. When asked to identify those chemicals if he could, Adamson answered: "numerous toxic chemicals and Fire by products (Smoke)."²⁴ He noted high exposure to benzene, 10 minutes per shift; high exposure to poly-carbons, 30 minutes per shift; high exposure to carbon monoxide, 20 minutes per shift; and "the usual toxic fire gases associated with fire fighting in a hazardous atmospher[e]."²⁵

²⁰ R. 1363-66, 1368-69, 1375-76.

²¹ R. 1370-74.

²² R. 1341-60.

²³ R. 1340.

²⁴ R. 1344.

²⁵ R. 1345.

Subsequent annual examinations in 2002,²⁶ 2003,²⁷ 2004,²⁸ 2005,²⁹ 2006,³⁰ and 2007,³¹ were administered by various medical personnel at PCA, some of which included a respirator use questionnaire. All except one of these examinations included PSA tests, and all the levels were within normal limits.³² In 2008, the examination was again performed by PA-C Hall.³³ The comprehensive examination was similar to earlier examinations, and included pulmonary function testing, electrocardiogram, and blood draw. PSA testing reflected a PSA level of 1.4, within normal limits. Performing the DRE, however, PA-C Hall detected a hardened ridge on the lower portion of Adamson's prostate.³⁴ He recommended that Adamson follow up with a urologist, Lawrence R. Strawbridge, M.D.³⁵

On June 19, 2008, Adamson saw Dr. Strawbridge, who, on performing a DRE, noted a normal size prostate "but clearly firmer and abnormal on the left compared to the right."³⁶ On August 6, 2008, Dr. Strawbridge performed a needle biopsy.³⁷ The surgical pathology report revealed moderately-differentiated adenocarcinoma, with no

²⁶ R. 1316, R. 1319-30, 1332-38.

²⁷ R. 1273-84, 1286-93.

²⁸ R. 1241, 1243, 1245-59.

²⁹ R. 1093-94, 1217-24, 1226, 1228-31.

³⁰ R. 1087-88, 1199-1211.

³¹ R. 953-55, 1179-93.

³² R. 1338 (2002 PSA test); R. 1275 (no PSA test in 2003); R. 1245 (in 2004, PSA was 1.65); R. 1093 (in 2005, PSA was 1.70); R. 1087 (in 2006, PSA was 1.5); R. 954 (in 2007, PSA was 1.6).

³³ R. 1162-65.

³⁴ R. 1163.

³⁵ R. 1164.

³⁶ R. 1076.

³⁷ R. 1072-73.

evidence of angiolymphatic invasion or perineural invasion.³⁸ On August 8, 2008, Adamson spoke with Dr. Strawbridge about the biopsy results. Bone and CT scans were ordered and conducted.³⁹ No evidence that Adamson's prostate cancer had metastasized was found.⁴⁰ On August 13, 2008, Adamson met with Dr. Strawbridge to discuss therapeutic options for his prostate cancer including surgery, radiation therapy, hormone therapy, and observation.⁴¹ On August 19, 2008, Adamson met with Greg O. Lund, M.D., for a second opinion on options for prostate cancer treatment.⁴² On September 4, 2008, he met with Richard T. Chung, M.D., of Anchorage Radiation Therapy Center, on referral from Dr. Strawbridge, to discuss the possibility of radiation therapy for his prostate cancer.⁴³ After conferring with these three physicians concerning the various therapies available, Adamson decided to have Dr. Lund perform a prostatectomy.⁴⁴ After revealing to co-workers he would be having prostate surgery, Adamson learned of the recent enactment of AS 23.30.121, and the possible connection between his prostate cancer and employment as a firefighter.⁴⁵ On October 16, 2008, Dr. Lund performed a radical retropubic prostatectomy and bilateral pelvic lymph node dissection.⁴⁶ On October 31, 2008, Dr. Lund released Adamson to return to work without limitation after December 4, 2008.⁴⁷

³⁸ R. 1072.

³⁹ R. 1068.

⁴⁰ R. 1062.

⁴¹ R. 1060-61.

⁴² R. 1058. Coincidentally, on August 19, 2008, AS 23.30.121 became effective. (Section 2, ch. 26, SLA 2008).

⁴³ R. 1054-57.

⁴⁴ Hr'g Tr. 93:18-94:6, June 30, 2011.

⁴⁵ Hr'g Tr. 94:7-95:2, June 30, 2011.

⁴⁶ R. 1043-46.

⁴⁷ R. 1040.

Dr. Lund wrote two letters concerning the work-relatedness of Adamson's prostate cancer. On December 12, 2008, he wrote "I do not have evidence nor believe at this time that prostate cancer is in fact work related. . . . I understand there are numerous complexities to this case including legislative action but at this point in time as a physician I can certainly not consider prostate cancer nor its treatment in any way work related."⁴⁸ On December 18, 2008, the Municipality filed its first controversion notice, relying in part on Dr. Lund's letter, and stating: "We have not received any medical or other evidence to support that a cancerous condition arose out of an exposure in the course & scope of employment to a carcinogen as described in AS 23.30.121(b)(3)(C)."⁴⁹

On July 14, 2010, Adamson, through counsel, filed a claim, seeking a board finding that he satisfied the elements necessary for application of the presumption of compensability under the new "firefighter presumption" in AS 23.30.121. If successful, Adamson requested an award of TTD benefits, medical costs, and attorney fees and costs.⁵⁰ A few days later, on July 26, 2010, after Adamson had retained counsel, Dr. Lund wrote in his second letter: "I am unable to make any determination regarding the origin or cause of his prostate cancer. . . . I cannot state whether or not his prostate cancer was or was not a direct result of job-related working conditions or exposure."⁵¹ This letter notwithstanding, on August 4, 2010, MOA filed a second controversion notice denying all benefits and reiterating that it had not received medical or other evidence to support that a cancerous condition arose out of an exposure to a known carcinogen in the course of employment, as described in AS 23.30.121(b)(3)(C).⁵²

⁴⁸ R. 1036.

⁴⁹ R. 0003.

⁵⁰ R. 0038-39.

⁵¹ R. 1461.

⁵² R. 0006.

On August 18, 2010, Adamson filed an affidavit which addressed the criteria for application of the presumption in AS 23.30.121.⁵³ It indicated he had been employed as a firefighter with the AFD since 1980, and that 1) at all times while employed by AFD he held a certificate as a Firefighter I or greater; 2) he served more than seven years as a firefighter; 3) his pre-hire medical examination showed no evidence of cancer; 4) after the initial medical examination, AFD did not require or conduct medical examinations of its firefighters for a period of years; 5) in the first seven years AFD required annual medical examinations, none of his examinations showed any evidence of cancer; 6) in the course of his employment as a firefighter with AFD, he was exposed to known carcinogens at multiple fires, specifically soot and diesel exhaust containing benzene; 7) the first indication he had cancer was from a medical examination conducted on May 22, 2008; and 8) thereafter, he was diagnosed with prostate cancer.⁵⁴

On January 18, 2011, and February 25, 2011, the Municipality filed two identical controversion notices, again denying all benefits. The controversions asserted that 1) the firefighter presumption had not been established because the phrase "qualifying medical examination" referenced in the statute had not yet been defined by the Department of Labor and Workforce Development; 2) no qualifying or annual medical examinations were undertaken which did not show evidence of the disease, as required by the statute; 3) AS 23.30.121 is not mandatory; 4) MOA did not opt to provide either the qualifying or annual medical examinations necessary to activate the firefighter presumption; and 5) according to MOA's expert, Thomas S. Allems, M.D., Adamson's prostate cancer was unrelated to his employment with MOA.⁵⁵ On February 11, 2011, before the filing of the February 25, 2011, controversion notice, the board adopted 8 AAC 45.093,⁵⁶ setting forth the type and extent of both the qualifying and annual medical examinations needed for the presumption to apply.

⁵³ R. 0055-57.

⁵⁴ R. 0055-57.

⁵⁵ R. 0012-13.

⁵⁶ *See* n.3, *supra*.

On June 20, 2011, Adamson filed an updated Medical Summary containing 33 pages obtained from MOA during discovery. The records consisted of AFD Physical Fitness Opinion Forms for 1993, 1995-2006, and 2009-2010, a 2003 International Prostate Symptom Score (I-PSS) questionnaire completed by Adamson in March 2003, August 11, 2008, bone scan results showing his prostate cancer had not metastasized, a January 25, 2010, letter from PA-C Tamara A. Brothers-McNeil to Adamson reporting the results of the 2010 annual medical examination, and Dr. Lund's July 26, 2010, letter.⁵⁷

On June 20, 2011, the Municipality filed a Request for Cross-Examination of the author of the April 14, 1980, pre-hire medical examination report. The request failed to specifically identify by name the witness it sought to examine.⁵⁸ That same day, MOA also filed a Petition to Strike Adamson's June 17, 2011, Medical Summary and attached documents. The basis for the petition was that MOA had received the summary only eleven days prior to the hearing scheduled for June 30, 2011, and the summary was not in the board's possession 20 or more days prior to the hearing.⁵⁹

The majority found that the records of the 2003 I-PSS and the 2008 bone scan results that were provided in connection with Adamson's June 17, 2011, Medical Summary, had been previously submitted on an MOA Medical Summary filed July 20, 2010.⁶⁰ It also found that the records pertaining to the 1997, 1998, and 2000-2006 annual medical examinations had been previously submitted on an MOA Medical Summary filed August 12, 2010.⁶¹ Furthermore, the majority found that the July 26, 2010, letter from Dr. Lund that was in Adamson's June 17, 2011, Medical Summary had

⁵⁷ The majority determined that these medical records were originally produced from MOA's records on the basis of the Bates stamping of the records. *See Adamson*, Bd. Dec. No. 11-0141 at 16; R. 1607-41.

⁵⁸ R. 0622.

⁵⁹ R. 0623-25. *See n.87, infra*.

⁶⁰ *See Adamson*, Bd. Dec. No. 11-0141 at 17-18; R. 1030-31.

⁶¹ *See id.*; R. 1113-15.

been previously submitted on both Adamson's Medical Summary filed August 18, 2010, and the Municipality's Medical Summary filed August 23, 2010.⁶² Similarly, the majority found that the records pertaining to the 2009 and 2010 annual medical examinations had been previously submitted on the Municipality's Medical Summary filed September 10, 2010.⁶³

Among the evidence presented at the hearing were AFD records pertaining to fires for which Adamson was called out,⁶⁴ and his testimony regarding certain fires he fought over his career as an Anchorage firefighter.⁶⁵ The majority found that in the course of that career, Adamson was exposed to soot, arsenic, cadmium, and benzene,⁶⁶ all of which are known human carcinogens and, to one degree or another, associated with prostate cancer.⁶⁷

Furthermore, the majority noted the report of Dr. Allems, MOA's expert, where he acknowledged that firefighters are exposed to carcinogens.⁶⁸ Dr. Allems also

⁶² See *Adamson*, Bd. Dec. No. 11-0141 at 17; R. 1455, 1457-58.

⁶³ See *id.* at 18; R. 1494.

⁶⁴ See, e.g., Appellee's Exc. 296-309.

⁶⁵ Hr'g Tr. 65:11-81:18, June 30, 2011.

⁶⁶ See *Adamson*, Bd. Dec. No. 11-0141 at 58-59.

⁶⁷ Appellee's Exc. 310-22 and R. 2246-59. See *Adamson*, Bd. Dec. No. 11-0141 at 20-25.

⁶⁸ See *Adamson*, Bd. Dec. No. 11-0141 at 21 n.9; R. 1597. The report states:

The fact that firefighters are exposed to carcinogens in smoke and post-fire gasses is indisputable. It is accepted that firefighters, in the usual course of their firefighting duties, are exposed to numerous toxins and recognized human carcinogens that are unavoidably present in the general products of combustion - smoke, particulates, vapors and fumes. Depending on the specific compound being consumed by fire (e.g. plastic, preserved wood, stored chemicals, asbestos containing building materials, etc.), carcinogens may be elaborated that are more specific to that particular material. Recognized and suspected human carcinogens that can be present in products of combustion include asbestos, polyaromatic

(footnote continued)

acknowledged that firefighters are further exposed to exhausts from their vehicles and, even though diesel exhaust is not a prostate carcinogen, he referenced a German study that found a strong relationship between prostate cancer and diesel exhaust, and a Montreal case-control study that found prostate cancer to be associated with liquid fuel combustion products, as well as the polycyclic aromatic hydrocarbons from coal and diesel exhaust.⁶⁹ Having reviewed Adamson's medical records dating back to 1995, Dr. Allems concluded that "[t]here is no alternative basis for causation - lifestyle, heredity, etc." for Adamson's prostate cancer.⁷⁰

To bring Adamson within the purview of AS 23.30.121, the majority found that 1) he had developed prostate cancer; 2) prostate cancer is one of the enumerated cancers in the statute; 3) the disease manifested itself after he served in the state for at least seven years; 4) he was given a "qualifying medical examination" upon becoming a firefighter that showed no evidence of prostate cancer; 5) during each of the seven years MOA maintained records of the annual medical examinations it required of its firefighters, Adamson showed no evidence of prostate cancer; 6) he showed no evidence of prostate cancer from the time of his qualifying medical examination in 1980, until May, 2008, when an abnormal prostate was detected during a DRE; and 7) other than occupational exposure to carcinogens as a firefighter, there was no known alternative basis for causation of Adamson's prostate cancer.⁷¹

hydrocarbons, benzo(a)pyrene, benzene, formaldehyde, arsenic, dioxins, polychlorinated biphenyls and vinyl chloride...[s]ome inhalation of airborne carcinogens, and skin contact with soots containing carcinogens obviously is unavoidable in the firefighting profession. *See Adamson*, Bd. Dec. No. 11-0141 at 21 n.9 (citing Dr. Allems' Report, December 22, 2010, at 11 (footnotes omitted); R. 1597.

⁶⁹ R. 1597-98.

⁷⁰ R. 1588-94, 1601.

⁷¹ *See Adamson*, Bd. Dec. No. 11-0141 at 25-26, 54-58, and 62.

3. *Standard of review.*

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.⁷² The board's weight findings are conclusive.⁷³ We exercise our independent judgment when reviewing questions of law and procedure.⁷⁴ However, for legal questions involving board expertise or fundamental policy questions, the commission applies the reasonable basis standard and defers to the board if its interpretations are reasonable.⁷⁵ We review the board's application of its regulation to the facts to determine whether the board's decision was arbitrary, unreasonable, or an abuse of discretion.⁷⁶ The board's exercise of its discretion is reviewed for abuse; an abuse of discretion occurs if we are left with a "definite and firm conviction" that the decision reviewed was a mistake.⁷⁷

4. *Discussion.*

a. The commission does not have jurisdiction to decide constitutional issues.

MOA has argued to the commission that AS 23.30.121 violates the equal protection clause of the Alaska Constitution.⁷⁸ As we noted in a previous decision:

The Alaska Supreme Court has held that the commission is a quasi-judicial administrative agency with adjudicative power, but not judicial power. Its "jurisdiction is limited to 'hearing and determination of all questions of law and fact' arising under the Alaska Workers' Compensation Act in matters that have been appealed to the Appeals Commission."

⁷² Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁷³ *See* AS 23.30.122.

⁷⁴ *See* AS 23.30.128(b).

⁷⁵ *See, e.g., Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 858 (Alaska 2010) (footnote and citation omitted).

⁷⁶ *See Hodges v. Alaska Constructors, Inc.*, 957 P.2d 957, 960 (Alaska 1998).

⁷⁷ *See Municipality of Anchorage v. Devon*, 124 P.3d 424, 429 (Alaska 2005).

⁷⁸ Appellants' Br. 39-44.

However, as an administrative agency, the commission “do[es] not have jurisdiction to decide issues of constitutional law.”⁷⁹

In accordance with this authority, the constitutionality of AS 23.30.121 is an issue that the commission has no jurisdiction to decide, and we therefore do not address it in this decision.

b. The appropriate standard for compliance with AS 23.30.121 is substantial compliance.

The majority’s Finding of Fact 87 states that Adamson’s pre-hire and annual examinations “were substantially compliant with those now required for both qualifying and annual medical examinations[.]”⁸⁰ MOA argues that the majority is mistaken and maintains that AS 23.30.121 is a type of procedural statute that requires strict compliance.⁸¹ However, in a recent decision in which the Alaska Supreme Court (supreme court) reviewed the commission’s application of a procedural statute, AS 23.30.110(c), it held: “A party must strictly comply with a procedural statute only if its provisions are mandatory; if they are directory, then ‘substantial compliance is acceptable absent significant prejudice to the other party.’”⁸² The court went on to explain that “[a] statute is considered directory if (1) its wording is affirmative rather than prohibitive; (2) the legislative intent was to create ‘guidelines for the orderly conduct of public business’; and (3) ‘serious, practical consequences would result if it were considered mandatory.’”⁸³

⁷⁹ See *Linda S. Rockstad v. Chugach Eareckson Support Services, et al.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 140, 27 (November 5, 2010) (citing *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 35-36 (Alaska 2007) (quoting AS 23.30.008(a))).

⁸⁰ *Adamson*, Bd. Dec. No. 11-0141 at 19.

⁸¹ Appellants’ Br. 24-26 (citing *Pan Alaska Trucking, Inc. v. Crouch*, 773 P.2d 947, 949 (Alaska 1989)).

⁸² *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 196 (Alaska 2008) (footnote omitted).

⁸³ *Kim*, 197 P.3d at 197 (footnote omitted).

Based on these criteria, we conclude that AS 23.30.121 is directory, requiring substantial compliance.⁸⁴ In relevant part, the statute provides:

(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. . . .

(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[.]

First, the language of the statute is affirmative, reflecting not only the presumption of coverage, but also the showing that is necessary to rebut it. Second, the statute's legislative purpose was the creation of guidelines for the orderly conduct of certain types of claims, namely those between a firefighter and his or her employer, involving specific enumerated diseases, the work-relatedness of which would be problematic to demonstrate without the presumption.⁸⁵ Lastly, serious practical consequences would result if the statute was considered mandatory, requiring strict compliance. In *Kim*, the result would have been denial of Kim's claim for benefits.⁸⁶ Similarly, here, strict compliance with AS 23.30.121 would have resulted in Adamson's claim for benefits having been denied by the board because he did not have the requisite medical examinations.

c. Adamson's 1980 pre-hire examination report is admissible.

As a preliminary matter, the Municipality argues that Adamson's pre-hire examination report is not admissible because it was not filed 20 days before hearing

⁸⁴ See *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 196-97 (Alaska 2008).

⁸⁵ See *Adamson*, Bd. Dec. No. 11-0141 at 28-30.

⁸⁶ See *Kim*, 197 P.3d at 197.

under 8 AAC 45.120(f)⁸⁷ and the Municipality was denied its right to cross-examine the author of the report.⁸⁸ Adamson submitted the pre-hire examination report as part of an updated medical summary 13 days before hearing.⁸⁹ However, a different regulation than the one cited by the MOA addresses the filing and admission of medical summaries and their included reports. 8 AAC 45.052(c)(4) provides that:

If an updated medical summary is filed and served less than 20 days before a hearing, the board will rely upon a medical report listed in the updated medical summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the updated summary is admissible under a hearsay exception of the Alaska Rules of Evidence.

In accordance with this regulation, we conclude the pre-hire examination report is admissible under Alaska Rules of Evidence 801(d)(2)(C). This rule provides:

(d) **Statements Which Are Not Hearsay.** A statement is not hearsay if . . . (2) *Admission by Party-Opponent.* The statement is offered against a party and is . . . (C) a statement by a person authorized by the party to make a statement concerning the subject,

⁸⁷ 8 AAC 45.120(f) provides:

Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.

⁸⁸ Appellants' Br. 17-22.

⁸⁹ Appellants' Exc. 92-93. The hearing was held June 30, 2011. Hr'g Tr. 3:7-8.

When an employer requires a worker to submit to an examination by physicians of the employer's choice, the report is an opinion by an authorized person and is therefore admissible against a party-opponent.⁹⁰ Adamson offered the 1980 pre-hire medical examination report that was required by the Municipality at that time as evidence that he had a qualifying examination to attach the firefighter presumption. In addition, the Municipality authorized the doctor to prepare the report concerning the pre-hire examination because it required Adamson to be examined by the medical practice of its choosing before Adamson was hired.⁹¹ The supreme court has observed that, in such circumstances, "the party that authorized the report has in effect vouched for the competence and credibility of the report's author; his need to impeach the credibility and competence of the author through cross-examination is therefore less urgent."⁹²

Therefore, we conclude that the board properly admitted the 1980 pre-hire medical examination report as non-hearsay under Rule 801(d)(2)(C).

d. Adamson substantially complied with the criteria to attach the presumption.

To attach the presumption, Adamson had to satisfy the criteria in AS 23.30.121(b)(3)(A)–(C).

(b) For a firefighter covered under AS 23.30.243,

.....

(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;

⁹⁰ *Frazier v. H.C. Price/CIRI Constr., JV*, 794 P.2d 103, 105 (Alaska 1990) (concluding worker was not obligated to bear costs of employer's cross-examination of doctors who wrote medical report because report was admissible as non-hearsay under 801(d)(2)(C). The doctors were authorized to issue the report because Price/CIRI requested that the employee submit to examination by clinic physicians of its choice).

⁹¹ Hr'g Tr. 40:12-17, 41:11-12, 42:2-16, June 30, 2011.

⁹² *Frazier*, 794 P.2d at 105.

(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.

The primary purpose of the medical examinations provided for in the statute is to demonstrate that Adamson, an active firefighter, was free of prostate cancer before he was hired and during the first seven years of employment, which would tend to support inferences that the cancer was not preexisting and that it was linked to his firefighting job.⁹³ Adamson had a thorough pre-hire examination in 1980, including a DRE.⁹⁴ PSA testing did not exist in 1980. With the exceptions of 1994 and 1999, Adamson had annual medical examinations, including a DRE, from 1993 to 2007.⁹⁵ Seven of these examinations included a PSA test, which in each instance was within normal limits.⁹⁶ Adamson's annual examination in 2008 led to his prostate cancer diagnosis; although his PSA was within normal limits, the DRE detected a hardened ridge.⁹⁷

Thus, materially, Adamson fulfilled the purpose of the medical examinations requirements. His pre-hire medical examination was sufficient to demonstrate that he did not have preexisting prostate cancer given his credible testimony that a DRE was performed and the doctor described no abnormalities. Moreover, Adamson's further examinations substantially complied with the requirement that medical examinations demonstrate that he was free of prostate cancer for the first seven years of

⁹³ We note that AS 23.30.121(b)(3)(A) and (B) require that the examinations not show evidence of "the disease," which we understand to mean the disease that is the firefighter's diagnosis for which he is seeking benefits. The statute does not require that the examinations show no evidence of any of the enumerated covered diseases.

⁹⁴ Hr'g Tr. 39:2–41:10, June 30, 2011; Appellee's Exc. 263-67.

⁹⁵ Adamson Dep. 57:24–58:3, 124:5-7, Dec. 13, 2010.

⁹⁶ PSA testing was done in 1998, 2001, 2002, and 2004 through 2007. R. 953-54, 1087, 1093, 1245, 1338, 1340, 1414.

⁹⁷ R. 1162-65.

employment. Although he did not have annual examinations during his first seven years of employment, he had at least seven annual examinations that detected no prostate abnormalities. Thus, one could reasonably presume he did not have prostate cancer during the first seven years of his employment because no abnormalities were detected in his prostate during his 12 annual examinations conducted from 1993 to 2007. Therefore, we conclude that the 12 annual examinations, which found no abnormalities in his prostate during a DRE and seven of which found normal PSA limits, constitute substantial compliance with the medical examination requirements in AS 23.30.121(b)(3).

The Municipality points out that the legislature specified that the board “shall, by regulation, define (1) . . . the type and extent of the medical examination that is needed to eliminate evidence of the disease”⁹⁸ Consequently, the Municipality contends that Adamson’s examinations must comply with 8 AAC 45.093, which requires in part the use of board-prescribed examination forms, and diagnostic tests to screen for all the listed cancers and to measure the level of a nicotine byproduct, cotinine, in the firefighter’s blood.⁹⁹ This regulation became effective February 20, 2011. Strictly applying the board’s regulation to firefighters who had their examinations before the regulation’s effective date, would, in essence, deny firefighters who were hired before the regulation’s effective date the benefit of the presumption, because no firefighter could have completed a pre-hire examination or an annual examination on a board-prescribed form that did not exist. We conclude that this result was not the legislature’s intent because the session law provided that the presumption “applies to claims made on or after August 19, 2008, even if the exposure leading to the occupational disease occurred before August 19, 2008.”¹⁰⁰

⁹⁸ AS 23.30.121(e)(1).

⁹⁹ Appellants’ Br. 9.

¹⁰⁰ Section 2, ch. 26, SLA 2008 (stating the firefighter presumption “applies to claims made on or after August 19, 2008, even if the exposure leading to the occupational disease occurred before August 19, 2008.”).

The regulation requires medical examinations to include a medical history, measurements of the levels of cotinine in the firefighter's blood, a lung examination, and a cardiac examination, all on board-prescribed forms.¹⁰¹ In addition, the initial cancer screening is to include "a comprehensive history, complete physical and neurological examinations, blood chemistries, complete blood counts, urinalysis and other diagnostic tests as indicated to screen for these cancers, each documented on a form prescribed by the department and completed by the examining physician."¹⁰² We conclude that Adamson substantially complied with these requirements. Although he was not screened for all the listed cancers and the cotinine levels in his blood were never measured, we conclude these tests were not required in his case because he had the diagnostic tests necessary to screen for the particular type of cancer for which he is seeking benefits. His examinations were not on board-prescribed forms because those forms did not exist when he had his examinations. We conclude substantial evidence supports that the majority, if not all of his 13 examinations, included the lung and cardiac examinations required under the regulation. Thus, we conclude that Adamson substantially complied with the statutory and regulatory medical examination requirements.

The last step to attach the presumption requires Adamson to show that he was "exposed to a known carcinogen" during the course of his job and "the carcinogen is associated with a disabling cancer."¹⁰³ Because the statute is intended to require a link between a firefighter's cancer diagnosis and his work, we view it as similar to the preliminary link needed to attach the general presumption of compensability under

¹⁰¹ 8 AAC 45.093. The regulation specifies the lung examination should include pulmonary auscultation; a baseline chest x-ray and, if indicated, subsequent annual x-rays; and pulmonary function testing. 8 AAC 45.093(b)(3). The cardiac examination should include cardiac auscultation; an electrocardiogram; and, if the firefighter is 40 or older or the doctor considers it appropriate for a younger firefighter, a stress electrocardiogram. 8 AAC 45.093(b)(4).

¹⁰² 8 AAC 45.093(c).

¹⁰³ AS 23.30.121(b)(3)(C).

AS 23.30.120(a).¹⁰⁴ To attach the subsection .120(a) presumption, a worker must produce “some evidence,” a “minimal showing,” that the claim arose out of the worker’s employment.¹⁰⁵ Only evidence that tends to establish the connection is evaluated at this stage, and credibility is not considered.¹⁰⁶ We conclude the same showing is required to attach the firefighter presumption. The statutory language supports this interpretation because it speaks of a carcinogen being “associated with” a cancer, rather than the substantial cause¹⁰⁷ of a cancer, or other language that would imply a stronger link between the known carcinogen and a cancer. Moreover, once attached, the firefighter presumption shifts the burden of proof to the employer; requiring more than “some evidence” to attach the presumption would undermine shifting the burden of proof.

Before we consider whether Adamson presented “some evidence” to attach the presumption, we must address a question of statutory interpretation. Interpretation of a statute is a question of law¹⁰⁸ to which we apply our independent judgment.¹⁰⁹ AS 23.30.121(b)(3)(A)–(C) state the criteria that must be satisfied for the presumption to attach. Paragraph .121(b)(3) indicates that the presumption “applies only to an active or former firefighter who has *a* disease described in [paragraph] (1) . . . that develops or manifests *itself* after the firefighter has served in the state for at least

¹⁰⁴ AS 23.30.120(a) provides: “In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that (1) the claim comes within the provisions of this chapter[.]”

¹⁰⁵ *E.g., Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999).

¹⁰⁶ *Id.*

¹⁰⁷ *See* AS 23.30.010(a) (requiring the board to evaluate “relative contribution of different causes” in deciding whether the employment is the substantial cause of the disability or death or need for medical treatment, after the compensability presumption drops out).

¹⁰⁸ *See, e.g., Anderson v. Alyeska Pipeline Service Co.*, 234 P.3d 1282, 1286 (Alaska 2010).

¹⁰⁹ *See* AS 23.30.128(b).

seven years[.]”¹¹⁰ Subparagraphs .121(b)(3)(A) and (B) set forth the requirements for the qualifying and annual medical examinations for firefighters. They must “not show evidence of *the disease*[.]”¹¹¹ Finally, subparagraph .121(b)(3)(C) provides that, “with regard to the [cancers listed in subparagraph (1)(C) of the statute,]” the firefighter must demonstrate “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*.”¹¹²

The question then arises: Is a firefighter’s exposure to a carcinogen associated with *any* of the cancers listed in AS 23.30.121(b)(1)(C), not necessarily *the cancer* with which he is diagnosed, sufficient to attach the presumption? In terms of this issue, we find that the statute is ambiguous. If a statute is ambiguous, “we apply a sliding scale of interpretation, where ‘the plainer the language, the more convincing contrary legislative history must be.’”¹¹³ Fortunately, there is legislative history which, rather than being contrary to the language of the statute, explains away the ambiguity we have identified. Senator Hollis French, the sponsor of SB 117, the senate’s version of the firefighter presumption legislation that was ultimately enacted, stated: “[T]he fire fighter must demonstrate that during the course of employment they were [sic] exposed to a known carcinogen related to *the disabling cancer*.”¹¹⁴ In view of this legislative history, the commission construes AS 23.30.121 as requiring the employee, when attaching the presumption, and the employer, when attempting to rebut the presumption, to provide evidence that, while in the course of employment, the

¹¹⁰ AS 23.30.121(b)(3) (italics added).

¹¹¹ AS 23.30.121(b)(3)(A) and (B) (italics added).

¹¹² AS 23.30.121(b)(3)(C) (italics added).

¹¹³ *Tesoro Petroleum Corp. v. State*, 42 P.3d 531, 537 (Alaska 2002) (quoting *Konecky v. Camco Wireline, Inc.*, 920 P.2d 277, 281 (Alaska 1996)).

¹¹⁴ Senate Health, Education & Social Services Committee Hearing, February 18, 2008 (italics added). Appellants’ Exc. 210.

firefighter was or was not exposed to a known carcinogen associated with *the* disabling cancer with which the firefighter was diagnosed. Interpreting the statute in this manner makes it consistent with all parts of AS 23.30.121(b)(3) as well, which reference “the” disease, not “a” disease.

In Adamson’s case, we conclude that he has produced minimal sufficient evidence that he was exposed to a known carcinogen associated with prostate cancer. First, Adamson produced evidence that in connection with his work as a firefighter, he was exposed to known carcinogens, including soots and benzene, as defined by the National Toxicology Program (NTP).¹¹⁵ He testified about his on-the-job exposures as well as providing lists of the types of fires that he responded to during his more than 20 years as a firefighter before his prostate cancer diagnosis.¹¹⁶ Moreover, the Municipality’s expert, Dr. Allems, acknowledged that Adamson was exposed to known carcinogens as a firefighter.¹¹⁷ Finally, Adamson introduced into evidence a medical analysis of studies that linked firefighting to the development of prostate cancer.¹¹⁸ Without considering the weight or credibility of this evidence, we conclude that it is sufficient for Adamson to attach the presumption.

Therefore, we conclude Adamson substantially complied with the medical examination requirements and established a preliminary link between his prostate cancer and his work, with evidence that he was exposed to known carcinogens that are associated with prostate cancer. Thus, he attached the firefighter presumption to his claim for benefits.

¹¹⁵ See Substance Profiles “Soots,” “Arsenic,” “Cadmium,” and “Benzene,” Report on Carcinogens, Twelfth Edition (2011), U.S. Department of Health and Human Services, Public Health Service, National Toxicology Program. Appellee’s Exc. 310-22.

¹¹⁶ See, e.g., Appellee’s Exc. 296-309, Hr’g Tr. 65:11–81:10, June 30, 2011.

¹¹⁷ Hr’g Tr. 171:7-9, 176:9-14, June 30, 2011.

¹¹⁸ LeMasters, Grace K., *et al.*, *Cancer Risk Among Firefighters: A Review and Meta-analysis of 32 Studies*, Journal of the American College of Occupational and Environmental Medicine, Volume 48, Number 11, November, 2006 at 1200. Appellee’s Exc. 324-37.

e. MOA rebutted the presumption of compensability.

Having decided that Adamson attached the presumption of compensability, we now consider whether MOA rebutted it by a preponderance of the evidence. The board held it did not.¹¹⁹ Central to the board's conclusion that the Municipality did not rebut the presumption is its holding that, in the process of enacting AS 23.30.121, the legislature had made the determination "that exposure to certain carcinogens . . . causes prostate cancer[.]"¹²⁰ Hence, in the board majority's view, "Dr. Allems' opinion there are no known prostate carcinogens [is] of no probative value here given the Alaska legislature's determination that occupational exposure to carcinogens during firefighting causes prostate cancer[.]"¹²¹ As a consequence, the board majority ruled out the presentation and admissibility of evidence by the Municipality that Adamson's prostate cancer was not work-related because he was not exposed to a known carcinogen associated with prostate cancer.¹²²

In order to decide whether, pursuant to AS 23.30.121, the board majority correctly excluded Dr. Allems' evidence, the commission must again interpret AS 23.30.121. "When construing statutes, we consider three factors: the language of the statute, the legislative history, and the legislative purpose behind the statute. . . .

¹¹⁹ See *Adamson*, Bd. Dec. No. 11-0141 at 61-62.

¹²⁰ *Adamson*, Bd. Dec. No. 11-0141 at 2.

¹²¹ *Adamson*, Bd. Dec. No. 11-0141 at 23. As authority for this proposition, the board majority cited one of its prior decisions, *Mahlberg*, Bd. Dec. No. 10-0181. The majority also cited cases from other jurisdictions construing presumption statutes for certain occupations for certain diseases. See *Adamson*, Bd. Dec. No. 11-0141 at 32-33. We do not find these cases persuasive in terms of the rebuttal evidence permitted by AS 23.30.121, as discussed *infra*.

¹²² See *Adamson*, Bd. Dec. No. 11-0141 at 61-62.

[T]he plainer the language of the statute, the more convincing any contrary legislative history must be ... to overcome the statute's plain meaning."¹²³

AS 23.30.121(a) states in relevant part: "Th[e] 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." We note, at the outset, that the language of the statute not only expressly provides for rebuttal of the presumption, it does not limit the evidence the employer may present to rebut the presumption. The "may include" language in the statute permits no other construction.

Furthermore, we do not believe that the principle of statutory construction, *expressio unius est exclusio alterius*,¹²⁴ applies to the list in AS 23.30.121(a). This principle "establishes the inference that, where certain things are designated in a statute, all omissions should be understood as exclusions."¹²⁵ However, where, as here, the statute does not designate an exclusive list, but instead, expressly provides that the list is *not* exclusive, namely, the "may include" language, the principle is not applicable.¹²⁶

Turning to the legislative history and purpose of AS 23.30.121, the board majority cited and quoted the legislative hearing testimony of Paul Lisankie, the former director of the division of workers' compensation.

The crunch is cancer...the problem...[with] workers' compensation is that typically [the injured worker must] be able to make a case that

¹²³ *Oels v. Anchorage Police Dep't Employees Ass'n*, 279 P.3d 589, 595 (Alaska 2012) (footnotes and internal quotation marks omitted). See also *City of Seward v. Hansen*, Alaska Workers' Comp. App. Comm'n Dec. No. 146, 10 (January 21, 2011) (quoting *Ranney v. Whitewater Engineering*, 122 P.3d 214, 217 (Alaska 2005)).

¹²⁴ See *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066 (Alaska 1991).

¹²⁵ *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066 (Alaska 1991) (citation and internal quotation marks omitted).

¹²⁶ See *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1258 (Alaska 2007).

what is disabling [him] is caused by [his] work...where the crunch is...is...*medical science is not nearly as certain about what causes cancer*...and so the workers' compensation system that we have today, because...the injured worker has to make their case, has to prove, they have a difficult time proving that their cancer was work related. By the same token, if they are given a presumption of this sort, then it will be, *the difficulty will shift to the employer*, the employer will have a very difficult time proving that it is not work related because I don't think that they are going to be able to find too many experts that are going to give them a definitive answer that you cannot possibly get this cancer from exposure to some type of chemical.¹²⁷

This testimony addressed the difficulty *claimants*, in particular, had in demonstrating that their employment caused cancer. Mr. Lisankie expressed his concern that, at least in his opinion, medical science could not determine, with certainty, what caused cancer, urging the adoption of legislation that would eliminate the burden on claimants to prove that their cancer was work-related. Ultimately, the legislature enacted AS 23.30.121 and its presumption that firefighting caused certain cancers. The statute effectively shifted the burden to employers of proving that firefighting did not cause the cancer in question.

Mr. Lisankie's testimony is best characterized as recognizing the obstacles both claimants and employers faced in finding experts who could provide evidence in terms of causation of the particular cancer at issue. In any event, his remarks could not be interpreted as endorsing exclusion of expert rebuttal evidence on causation. On the contrary, he appears to anticipate it when he states that employers will have problems finding experts who can definitively state that exposure to certain chemicals could not cause cancer.

The board majority's opinion also referenced the remarks of three other individuals who testified before various committees of the legislature.¹²⁸ The gist of their testimony was that it was problematic for firefighters to demonstrate causation for

¹²⁷ *Adamson*, Bd. Dec. No. 11-0141 at 28 (quoting House Labor & Commerce Committee Hearing, April 27, 2007 (italics in board decision)).

¹²⁸ *See Adamson*, Bd. Dec. No. 11-0141 at 29-30.

cancer. According to the board majority, the purpose of the presumption was “so the employer or insurer is required to prove the cancer is not related to the job, instead of the employee having to prove it is job related.”¹²⁹ Furthermore, it stated the legislation “would place fire fighters . . . into a preferred category where they would not be subject to the same proof requirements for occupational injuries or illnesses as other workers[.]” Instead, the statute “would require ... [employers] to prove a negative; that the fire fighter[’s] cancer, for example, was not caused by the job.”¹³⁰

The language, legislative history, and purpose of AS 23.30.121 unquestionably point to one conclusion: the statute was intended to relieve firefighters of the burden of proving their cancer was work-related. However, there is nothing from any of these sources to support the board majority’s conclusion that the presumption cannot be rebutted through expert opinion that firefighting could not cause the particular cancer at issue. The statute expressly provides that employers can rebut the presumption and does not limit the evidence that can be introduced for that purpose. Consequently, we construe the statute as not precluding the presentation or admissibility of evidence by an employer that the listed diseases were not caused by employment as a firefighter.

Thus, in the context of this case, the Municipality would have to come forward with a preponderance of any type of evidence tending to show that Adamson was not exposed to a known carcinogen associated with prostate cancer. At the hearing in this matter, and over objections by Adamson’s counsel, MOA’s expert, Dr. Allems, testified that neither the International Association for Research on Cancer (IARC) nor the NTP, the two entities specifically referenced in AS 23.30.121(b)(3)(C) as having the expertise and authority to define known carcinogens for the purposes of the statute, have

¹²⁹ *Adamson*, Bd. Dec. No. 11-0141 at 29, paraphrasing the remarks of Mark Drygas, President of the Alaska Professional Fire Fighters Association.

¹³⁰ *Adamson*, Bd. Dec. No. 11-0141 at 30 (quoting Kevin Smith, Executive Director of the Alaska Municipal League Joint Insurance Association, Inc. (italics omitted)).

identified any known carcinogen for prostate cancer.¹³¹ Moreover, he stated that with respect to specific known carcinogens, soot, diesel exhaust, arsenic, cadmium, and benzene, there was no causal connection with prostate cancer.¹³²

Again, AS 23.30.121 sets forth specific criteria for triggering the presumption, and in the process, relieving Adamson of the burden of demonstrating causation. We believe the statute functions similarly in setting forth the criteria for rebutting the presumption. First, the statute does not limit the evidence the Municipality can introduce in this respect. Second, it mandates, as one of its criteria, that Adamson had to have been exposed to a known carcinogen, as defined by the IARC or the NTP. There is no dispute here that he was exposed to known carcinogens, soot, diesel exhaust, arsenic, cadmium, and benzene. Third, the statute requires that these known carcinogens must be associated with prostate cancer. Dr. Allems testified that the IARC and NTP do not associate these carcinogens with prostate cancer. Thus, Dr. Allems' evidence addressed the very narrow issue whether there was a causal link between certain carcinogens and Adamson's prostate cancer, as required by AS 23.30.121. He unequivocally testified there was no such link.

In the commission's view, when the board majority pronounced that "Dr. Allems' opinion there are no known prostate carcinogens [is] of no probative value here given the Alaska legislature's determination that occupational exposure to carcinogens during firefighting causes prostate cancer,"¹³³ it overstated the substance of the legislative determination. The legislature only went so far; it established criteria for application of the presumption. It did not go so far as to preclude evidence relative to those criteria. If the Municipality could demonstrate, by a preponderance of the evidence, that the criteria were not met, Adamson's claim would fail. Here, Dr. Allems showed there was

¹³¹ Hr'g Tr. 133:14-24, 134:19-135:1, June 30, 2011.

¹³² Hr'g Tr. 139:15-21, 142:10-13, 144:5-10, 148:7-12, 150:9-13, 150:19-25, and 152:8-12. In contrast, the board majority found all of these carcinogens to be associated with prostate cancer. *See Adamson*, Bd. Dec. No. 11-0141 at 20-25.

¹³³ *Adamson*, Bd. Dec. No. 11-0141 at 23.

no causal link between certain carcinogens and Adamson's prostate cancer. Neither the statute, nor any legislative determination in connection with that statute, prevented him from presenting, and the board from admitting, that evidence.

The board excluded Dr. Allems' evidence. As a consequence, it did not have the opportunity that admitting it would have provided to weigh that evidence against Adamson's, as to whether there is a casual link between soot, diesel exhaust, arsenic, cadmium, and benzene, and his prostate cancer. The commission concludes that a remand to the board for this purpose is required.

5. Conclusion.

A majority of the commission AFFIRMS the board majority's decision that Adamson attached the presumption of compensability under AS 23.30.121; the commission REVERSES the board majority's decision to exclude MOA's evidence as to whether there is a casual link between certain carcinogens and Adamson's prostate cancer. We REMAND this matter to the board for that purpose, and to ultimately decide whether the Municipality rebutted the presumption by a preponderance of the evidence, as provided in AS 23.30.121(a).

Date: 19 December 2012 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

S. T. Hagedorn, Appeals Commissioner

Signed

David W. Richards, Appeals Commissioner

Laurence Keyes, Chair, dissenting in part and concurring in part.

I respectfully dissent with respect to the majority's holding that Adamson attached the presumption of compensability for firefighters.

This appeal is an object lesson in the difficulties that the retroactive application of a statute can present. In August 2008, when AS 23.30.121 went into effect and

Adamson was diagnosed with prostate cancer, Adamson was an "active" firefighter.¹³⁴ If he was otherwise able to satisfy its requirements, he could avail himself of the presumption the statute provides. However, to satisfy the requirements relating to medical examinations, his past examinations would have to substantially comply with the criteria that were subsequently set forth in the statute, and later the regulation.

At least initially, the primary purposes of the pre-hire and the annual medical examinations of its firefighters that MOA conducted before passage of AS 23.30.121 and the effective date of 8 AAC 45.093 were: 1) to identify any health issues that might affect firefighters' performance of their duties, and 2) to inform the firefighters whether any medical condition was found requiring further evaluation or treatment. I infer this from the wording of the one-page Annual Physical Fitness Written Opinion[s] documenting Adamson's 1993, 1995-1998, and 2000-2002 annual medical examinations, which make inquiries of the examiner in these two respects.¹³⁵ It does not appear to me that the pre-statute medical examinations were ever intended or performed to satisfy the detailed requirements of the statute or regulation. Nor was fulfilling those requirements within the contemplation of Adamson or the Municipality at the time the examinations were performed.

Moreover, as pointed out in the board's dissenting opinion, the legislative history of AS 23.30.121, and the sequence of events leading to the board's promulgation of 8 AAC 45.093, do not support the board majority's argument that Adamson's pre-hire and annual medical examinations substantially complied with the criteria of the statute

¹³⁴ AS 23.30.121(b)(3).

¹³⁵ Appellee's Exc. 268, 270, 273, 275, 276, 278, 280, and 282. Notably, the latter inquiry whether the firefighter was told about any medical conditions requiring further treatment is omitted on the form pertaining to Adamson's annual examinations conducted from 2004 through 2007, Appellee's Exc. 284-87, before the effective date of AS 23.30.121, August 19, 2008. *See* n.42, *supra*.

and regulation.¹³⁶ As for the pre-hire examination, the dissenter, Board Member Linda Hutchings, states:

The regulation details the initial and subsequent medical examinations a firefighter must undergo before the AS 23.30.121 presumption will attach. [Adamson] did not meet AS 23.30.121's requirements. While [Adamson] underwent an initial medical evaluation with [MOA], that examination did not meet 8 AAC 45.09[3]'s requirements. Specifically, under 8 AAC 45.093(c), a qualifying medical examination, which entails an initial screening for cancer, must include "a comprehensive history, complete physical and neurological examinations, blood chemistries, complete blood counts, urinalysis, and other diagnostic tests as indicated to screen for these cancers, each documented on a form prescribed by the department and completed by the examining physician." The April 1980 physical examination does not comply with the law[.]¹³⁷

The dissenting opinion goes on to point out:

[Adamson's] examination upon hire in 1980, referred to in the findings of facts as a "qualifying medical examination," was not documented on the prescribed form required under 8 AAC 45.093. Further, and *in my opinion more importantly*, it did not include an initial screening for the cancers listed in AS 23.30.121(b)(C) and specifically, did not involve a blood chemistry test measuring the prostate specific antigen (PSA) level in [Adamson's] blood, which is a marker for prostate cancer. Thus, [Adamson's] examination upon hire did not include the type of prostate cancer screening required by 8 AAC 45.093(c).¹³⁸

In terms of the annual examinations, Ms. Hutchings concludes:

[Adamson] is still not entitled to the AS 23.30.121 presumption because an annual medical exam was not conducted during each of the first seven years of [Adamson's] employment as a firefighter. An annual medical exam "during each of the first seven years of employment" is a statutory requirement. AS 23.30.121(b)(3)(B). The statute clearly states, the presumption only applies to a firefighter who was given the qualifying medical examination upon becoming a firefighter and was given an annual medical exam during each of the first seven years of employment. As for

¹³⁶ See *Adamson*, Bd. Dec. No. 11-0141 at 67-70 (L. Hutchings, dissenting opinion).

¹³⁷ *Adamson*, Bd. Dec. No. 11-0141 at 69-70 (L. Hutchings, dissenting opinion).

¹³⁸ *Id.* at 70 (italics added).

[Adamson's] first seven years of employment, Finding of Fact 15 states, "Whether [MOA] conducted annual medical examinations of its incumbent firefighters . . . before 1993, is unknown." After the exam in April 1980, there is no record of further examinations until 1993, and no blood chemistries taken until 1995.¹³⁹

Finding it "result oriented and legally flawed[.]" Ms. Hutchings takes issue with the board majority's conclusion that Adamson's pre-hire and annual examinations substantially complied with those now required under the statute and regulation.¹⁴⁰ In her view, because substantial compliance with the statute and regulation was lacking, there were no grounds for applying the AS 23.30.121 presumption. This conclusion is supported by the holdings in three supreme court cases.¹⁴¹ *Bockness*, *Grove*, and *Burke* all involved similar issues, namely application of a statute, AS 23.30.095(c), and a board regulation, 8 AAC 45.082, which pertain to medical treatment requiring continuing and multiple treatments of a similar nature. In *Burke*, the specific issue was whether the provider, a California chiropractor, had furnished a written treatment plan that satisfied the statute, that is, one that stated the objectives, modalities, frequency of treatments, and reasons for the frequency of treatments.¹⁴² The employee, Burke, argued that the chiropractor "filed a treatment plan that substantially complied with the requirements of AS 23.30.095(c)[.]"¹⁴³ The supreme court implicitly rejected that argument when it upheld the board's decision that "it did not have the authority to award medical benefits in excess of the regulatory standards[.]"¹⁴⁴

¹³⁹ *Adamson*, Bd. Dec. No. 11-0141 at 70-71 (L. Hutchings, dissenting opinion).

¹⁴⁰ *See Adamson*, Bd. Dec. No. 11-0141 at 71, 73 (L. Hutchings, dissenting opinion).

¹⁴¹ *See Bockness v. Brown Jug, Inc.*, 980 P.2d 462 (Alaska 1999); *Grove v. Alaska Constr. and Erectors*, 948 P.2d 454 (Alaska 1997); and *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851 (Alaska 2010).

¹⁴² *See* AS 23.30.095(c).

¹⁴³ *Burke*, 222 P.3d at 859.

¹⁴⁴ *Id.*, 222 P.3d at 856.

The argument made by Burke is the same argument Adamson, the board majority, and the commission majority are making here, in analogous circumstances, that is, that Adamson's medical examinations substantially complied with the statute and regulation.¹⁴⁵ However, the pre-hire examination did not include an initial screening for the cancers listed in AS 23.30.121(b)(1)(C) and specifically, did not involve a blood chemistry test measuring the PSA level in Adamson's blood, which is the appropriate test for prostate cancer, *the particular disease with respect to which Adamson is claiming benefits*. Furthermore, there were no annual examinations during the first seven years of Adamson's employment as a firefighter, as required by AS 23.30.121(b)(3)(B). Adamson's annual examinations beginning thirteen years after he was hired might seem to be a satisfactory substitute, as it did to the board and the commission majorities. In my opinion, they are not. The statutory language is clear. Adamson was *not* "given an annual medical exam during each of *the first seven years of employment* that did not show evidence of *the disease*["¹⁴⁶ in his case, prostate cancer. Given the straightforward requirements of the statute and the supreme court's literal application in *Burke* of a similar statute, AS 23.30.095, in similar circumstances,¹⁴⁷ I disagree with the conclusions of the board and commission majorities that Adamson's physical examinations substantially complied with the statute and regulation.

Had the required physical examinations been administered to Adamson, he might have otherwise been able to prevail on his claim. However, through no fault of his, they were not. Consequently, in my view, the presumption provided for in AS 23.30.121 did not attach, which would render moot the issue whether the presumption was rebutted.

¹⁴⁵ See *Adamson*, Bd. Dec. No. 11-0141 at 19.

¹⁴⁶ AS 23.30.121(b)(3)(B) (italics added).

¹⁴⁷ See *Burke*, 222 P.3d at 856.

The foregoing notwithstanding, I concur with the commission majority's decision in all other respects, in particular its conclusion that the Municipality could rebut the presumption by presenting expert evidence that there was no causal link between certain carcinogens and Adamson's prostate cancer.

Date: 19 December 2012



Signed

Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal as to the appeals commission's affirmation of the board's decision in part and reversal of the board's decision in part. This is a non-final decision as to the appeals commission's remand of the matter in part to the board. The final decision portion of this decision becomes effective when distributed (mailed) unless proceedings to 1) reconsider the final decision portion are instituted (started), pursuant to AS 23.30.128(f) and 8 AAC 57.230, or 2) unless proceedings to appeal the final decision portion to the Alaska Supreme Court, pursuant to AS 23.30.129(a) are instituted. See Reconsideration and Appeal Procedures sections below.

The non-final portion of this decision becomes effective when distributed (mailed) unless proceedings to petition for review to the Alaska Supreme Court, pursuant to AS 23.30.129(a) and Rules of Appellate Procedure 401-403 are instituted. See Petition for Review section below.

To see the date of distribution look at the box below.

RECONSIDERATION

A party may request the commission to reconsider this decision as to the final decision portion by filing a motion for reconsideration. AS 23.30.128(e) and 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed (mailed) to the parties. If a request for reconsideration of a final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

APPEAL PROCEDURES

Appeal

The commission's final decision portion becomes effective when distributed unless proceedings to appeal to the Alaska Supreme Court are instituted (started). Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed¹⁴⁸ and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. See AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

More information is available on the Alaska Court System's website:

<http://www.courts.alaska.gov/>

Petition for Review

A party may petition the Alaska Supreme Court for review of that portion of the commission's decision that is non-final. AS 23.30.129(a) and Rules of Appellate Procedure 401-403. The petition for review must be filed with the Alaska Supreme Court no later than 10 days after the date this decision is distributed.¹⁴⁹

¹⁴⁸ A party has 30 days after the distribution of a final decision of the commission to file an appeal with the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

Additional Time After Service or Distribution by Mail.

Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

¹⁴⁹ A party has 10 days after the distribution of a non-final decision of the commission to file a petition for review with the Alaska Supreme Court. If the
(footnote continued)

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition the Alaska Supreme Court for review, you should contact the Alaska Appellate Courts *immediately*:

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Telephone: 907-264-0612

More information is available on the Alaska Court System's website:
<http://www.courts.alaska.gov/>

I certify that, with the exception of corrections of typographical and grammatical errors, this is a full and correct copy of the Final Decision No. 173 issued in the matter of *Municipality of Anchorage and NovaPro Risk Solutions v. John E. Adamson*, AWCAC Appeal No. 11-017, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on December 19, 2012.

Date: December 26, 2012



Signed

K. Morrison, Deputy Commission Clerk

commission's decision was distributed by mail only to a party, then three days are added to the 10 days, pursuant to Rule of Appellate Procedure 502(c). See n.148 for Rule of Appellate Procedure 502(c).