Case: *Municipality of Anchorage and NovaPro Risk Solutions vs. John E. Adamson*, Alaska Workers' Comp. App. Comm'n Dec. No. 173 (December 19, 2012)

Facts: John Adamson (Adamson) worked as a firefighter for the Municipality of Anchorage (Municipality) for more than 30 years. He filed a claim that his work as a firefighter exposed him to a known carcinogen, resulting in him developing prostate cancer. He filed a workers' compensation claim, seeking a finding that his prostate cancer is presumed to have resulted from his employment as a firefighter, pursuant to AS 23.30.121.

Before Adamson was hired in April 1980, a medical evaluation was performed. The exam included a digital rectal examination (DRE); no abnormalities were detected and no evidence of prostate cancer was found. No prostate specific antigen (PSA) test was done because it was not an option in 1980. Moreover, 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). Adamson did not have annual exams during the first seven years of his employment, but Adamson had annual medical examinations, including a DRE, from 1993 to 2007, with the exceptions of 1994 and 1999. Seven of these examinations included a PSA test, which in each instance was within normal limits. Adamson's annual examination in May 2008 led to his prostate cancer diagnosis; although his PSA was within normal limits, the DRE detected a hardened ridge. (The board's regulation was not enacted until February 11, 2011, well after the time Adamson had his exams.)

Adamson testified that in the course of his employment as a firefighter with the Anchorage Fire Department, he was exposed to known carcinogens at multiple fires; specifically soot and diesel exhaust containing benzene.

The Municipality controverted benefits, arguing that his examinations did not comply with the statute and regulations and that the Municipality had not opted to provide the examinations necessary to activate the firefighter presumption. In addition, the Municipality asserted that its expert, Thomas S. Allems, M.D., concluded that Adamson's prostate cancer was unrelated to his employment with the Municipality because there were no known prostate carcinogens to which he could have been exposed.

After a hearing in June 2011, a majority of a panel of the 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. The board concluded that the Municipality had not rebutted the presumption because the legislature, in enacting AS 23.30.121, made the determination "that exposure to certain carcinogens . . . causes prostate cancer[.]" Thus, 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[.]" Since the Municipality failed to rebut the presumption, Adamson's claim was compensable. The Municipality appeals.

Applicable law: AS 23.30.121 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. 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,
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> (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:
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> . . . .
>
> (C) the following cancers:
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> . . . .
>
> (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
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> (A) was given a qualifying medical examination upon becoming a firefighter that did not show evidence of the disease;
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> (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
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> (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.

8 AAC 45.093 provides more specific details on what must be included in qualifying medical examinations for firefighters. "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.'" The Alaska Supreme Court (supreme 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.'" *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 196-97 (Alaska 2008).

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.

Alaska Rule 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,
> . . . .

Issues: Does AS 23.30.121 violate equal protection? Was Adamson required to strictly comply with AS 23.30.121? Was the 1980 pre-hire medical examination admissible even though it was not submitted 20 days before hearing? Did Adamson substantially comply with the medical exam requirements to attach the presumption? 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? What showing is required to demonstrate exposure to a known carcinogen? Did Adamson produce sufficient evidence to demonstrate his exposure? Did the board err in excluding Dr. Allems' opinion because it was not the type of evidence that could be used to rebut the presumption?

Holding/analysis: The commission did not address the equal protection argument because it lacks jurisdiction to address constitutional questions.

The commission concluded that the appropriate standard for compliance with AS 23.30.121 is substantial, rather than strict, compliance.

> 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. Lastly, serious practical consequences would result . . . 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. Dec. No. 173 at 17.

The commission concluded that the board properly admitted the 1980 pre-hire medical examination report as non-hearsay under Rule 801(d)(2)(C). "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." *Id.* at 19.

Adamson substantially complied with medical examination requirements. The commission stated:

> [Adamson's] 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 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. *Id.* at 20-21.

The commission concluded that the board's regulation did not strictly apply to firefighters who had their examinations before the regulation's effective date, because it would deny these firefighters the benefit of the presumption, contrary to legislative intent. "We conclude that . . . 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.'" *Id.* at 21.

The commission concluded that Adamson substantially complied with the regulation.

> 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. *Id.* at 22.

The commission concluded that a firefighter must attach the presumption with evidence that he was exposed to a known carcinogen associated with the same cancer with which he was diagnosed. The commission reached this result because it made the statute consistent with all parts of AS 23.30.121(b)(3) that reference "the" disease, not "a" disease; and because the senator sponsoring the legislation explained that "[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*." *Id.* at 23-24. The commission also decided that the requirement to show exposure to a known carcinogen is similar to the requirements to attach the presumption of compensability. Thus, without assessing credibility, Adamson had to produce "some evidence," a "minimal showing," that during his work he was exposed to a known carcinogen related to his prostate cancer. *Id.* at 23.

The commission concluded Adamson produced minimal sufficient evidence that his job exposed him to a known carcinogen associated with prostate cancer, with his testimony about his on-the-job exposures, lists of the types of fires he responded to and a medical analysis of studies that linked firefighting to the development of prostate cancer. *Id*. at 25.

The commission concluded that the Municipality's evidence could be used to rebut the presumption. The commission concluded that the statute with its language of "may include" did not limit the types of evidence that could be used to rebut the presumption. Moreover, the commission disagreed with the board's take on the legislative history. Although the statute was intended to relieve firefighters of the burden of proving their cancer was work-related, nothing in the language, legislative history or purpose supported "the board majority's conclusion that the presumption cannot be rebutted through expert opinion that firefighting could not cause the particular cancer at issue." *Id.* at 29. The commission remanded to the board to decide whether the Municipality rebutted the presumption.

Note: This decision is on appeal to the Alaska Supreme Court. The supreme court issued an opinion in a separate petition for review in this case, addressing the requirements necessary to stay medical benefits, Op. No. 6780 (May 3, 2013).