



House Bill 233

Workers' Compensation – Medical Presumptions

MACo Position: **OPPOSE**

To: Economic Matters Committee

Date: February 26, 2019

From: Leslie Knapp, Jr.

The Maryland Association of Counties (MACo) **OPPOSES** HB 233. The bill would further expand a presumption that is not truly legally rebuttable or based on science.

HB 233 would add bladder and kidney or renal cell cancer to the list of workers' compensation occupation disease presumptions for firefighters under § 9-503 of the Labor and Employment Article. These presumptions follow the employee into retirement, are virtually impossible to rebut, can be very expensive, and can result in enhanced death benefits.

MACo has consistently urged reasonable adjustments to the firefighter presumption law, which is in need of a comprehensive reform.¹ MACo would resist expanding the presumption to include new cancers without broader consideration of the issues raised by the presumption, including the types of conditions covered by the presumption and the lack of rebuttability.

Presumption Not Truly Rebuttable

HB 233 would also exacerbate underlying burden-of-proof inequities found in the existing presumption law. The Maryland Court of Appeals has found that for burden-of-proof issues, the presumptions use a "Morgan-McCormick" approach, which means that a claimant does not need to present any evidence to prevail in a claim for workers' compensation.² In practice, this standard usually makes compensation automatic once the claim is filed. The only other instance in Maryland law where the Morgan-McCormick presumption approach applies is in family law where a husband is presumed to be the father of his wife's children.³ Today, a DNA test easily determines paternity. Unfortunately, there is no analogous test to determine the origin of cancer or other diseases covered under this bill.

¹ See MACo testimony on SB 1099 of 2014, HB 1101/SB 949 of 2012, HB 1280/SB 646 of 2010, HB 1069/SB 491 of 2005 and HB 1070/SB 557 of 2004.

² See *Board of County Commissioners v. Colgan*, 274 Md. 193 (1975) and *Montgomery County Fire Board v. Fisher*, 53 Md. App. 435, aff'd, 298 Md. 245 (1983). In *Fisher*, the Court of Appeals stated that "both the burden of production and the burden of persuasion remain fixed on the employer."

³ See § 5-1027 of the Family Law Article.

A 2001 Maryland Court of Appeals decision further limited the ability of counties to offer rebuttable testimony by holding that an expert witness who does not believe in the presumption cannot testify in a case premised on that presumption.⁴

A 2009 report by the National League of Cities, in its review of other states with firefighter cancer presumptions, classified only Arizona's and Maryland's presumption as not being rebuttable.⁵ The Department of Legislative Services recently catalogued the more equitable rebuttability standards found in most other states with presumptions⁶ and the House has previously acknowledged the lack of a reasonable rebuttability standard for the presumptions when it passed a presumption bill in 2010 that included language designed to strengthen the standard.⁷

The Science

The research showing linkages between cancer and firefighting remains murky. According to the preliminary findings of a recent firefighter cohort study by the National Institute for Occupational Safety and Health, "modest elevations were observed in several solid cancers; however, evidence of excess lymphatic or haematopoietic cancers was lacking."⁸ The completed study confirmed that firefighters in the cohort group (Chicago, Philadelphia, and San Francisco) showed slightly higher rates of certain types of cancer than the general U.S. population but cautioned that "our ability to detect links between firefighting and cancer is still limited" and lacked important information about information on exposures to cancer-causing agents outside of firefighting and lifestyle choices that are linked to cancer.⁹

A literature review of 71 firefighter cancer studies published between 1995 and 2008 found some association between certain cancers and firefighting but concluded there "is a lack of substantive scientific evidence currently available to confirm or deny linkages between firefighting and an elevated incidence of cancer."¹⁰

The Cost

As the bill's fiscal note indicates, local government expenditures may increase, potentially significantly, beginning in FY 2020 to cover increased worker's compensation and related insurance costs.

It is also extremely challenging for counties to manage risk with respect to cancers. Counties cannot realistically regulate the numerous sources or potential exposure to causal agents for the cancers covered in the bill. "Cancer" represents a wide and diverse range of diseases that have a variety of

⁴ *City of Frederick vs. Shankle*, 367 Md. 5 (2001).

⁵ *Assessing State Firefighter Cancer Presumption Laws and Current Firefighter Cancer Research*, National League of Cities, April 2009.

⁶ *Cancer Presumption Statutes in Maryland and Other States*, Department of Legislative Services, December 2012.

⁷ HB 1280 of 2010.

⁸ *Mortality and Cancer Incidence in a Pooled Cohort of US Firefighters from San Francisco, Chicago, and Philadelphia (1950-2009)*, Occupational and Environmental Medicine (October 14, 2013)

⁹ *Findings from a Study of Cancer among U.S. Fire Fighters*, NIOSH (July 2016)

¹⁰ *Assessing State Firefighter Cancer Presumption Laws and Current Firefighter Cancer Research*, National League of Cities, April 2009.

causes. Lifestyle choices, such as alcohol consumption, smoking, poor diet, lack of exercise, and high body weight all have been shown to increase the risk of contracting certain cancers. Sources of ionizing radiation, such as radon gas or a CT scan, can cause cancer. Cancer can also result from certain viruses, including Hepatitis B, and bacterial infections. Finally, cancer can originate through immune system dysfunction or inherited genetic traits.

HB 233 represents an expansion of the firefighter occupational disease presumptions without consideration of the presumptions' problematic underlying issues and would increase the potential liability and costs of affected counties. Accordingly, MACo urges the Committee to give HB 233 an **UNFAVORABLE** report.