



## Senate Bill 646

### *Workers' Compensation – Medical Presumptions for Disease and Cancer - Eligibility*

MACo Position: **OPPOSE**

To: Finance Committee

Date: February 19, 2019

From: Leslie Knapp, Jr.

The Maryland Association of Counties (MACo) **OPPOSES** SB 646. The bill would expand eligibility under the firefighter workers' compensation occupational disease presumption without addressing longstanding concerns with the application of the presumption.

SB 646 would modify when a covered firefighter or rescue squad member can qualify for a workers' compensation occupational disease presumption. The bill would alter a 10-year service requirement with one jurisdiction to a cumulative 10-year service requirement with any jurisdiction. The bill also removes a requirement that an individual be unable to perform the normal duties of a firefighter or rescue squad member due to the cancer or leukemia disability.

MACo has consistently urged reasonable adjustments to the firefighter presumption law, which needs a comprehensive reform.<sup>1</sup> MACo would resist expanding the eligibility of the presumption without broader consideration of the issues raised by the presumption, particularly the lack of rebuttability.

### **Presumption Not Truly Rebuttable**

SB 646 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.<sup>2</sup> 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.<sup>3</sup> Today, a DNA test easily determines paternity.

<sup>1</sup> 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.

<sup>2</sup> 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."

<sup>3</sup> See § 5-1027 of the Family Law Article.

Unfortunately, there is no analogous test to determine the origin of cancer or other diseases covered under this bill.

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.<sup>4</sup>

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.<sup>5</sup> Maryland's Department of Legislative Services (DLS) recently catalogued the more equitable rebuttability standards found in most other states with presumptions<sup>6</sup> 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.<sup>7</sup>

### **Required Study Did Not Happen**

Seeking to address MACo's longstanding concerns, the Chairs of the Senate Finance Committee, House Economic Matters Committee, and Workers' Compensation Benefit and Insurance Oversight Committee jointly called for DLS to undertake a comprehensive review of the presumption in 2012. The study was to include the evidentiary standards of rebuttability for workers' compensation presumptions in Maryland and other states and the cancers included in other states' presumptions.

Despite DLS working to bring stakeholders to the table, in 2013 the Professional Firefighters of Maryland released a letter criticizing the study. Essentially the study was never completed due to lack of firefighter participation.

### **Conclusion**

MACo is not averse to having a presumption for firefighters or changing its eligibility standards as appropriate. However, the underlying problems of the presumption must first be addressed to bring the presumption more into line with that of other states or, at a minimum, finish the study that was requested in 2012. Without such actions, MACo requests the Committee issue an **UNFAVORABLE** report on SB 646.

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<sup>4</sup> *City of Frederick vs. Shankle*, 367 Md. 5 (2001).

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

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

<sup>7</sup> HB 1280 of 2010.