



Senate Bill 1099

Workers' Compensation – Occupational Disease Presumptions – Paid Emergency Medical Services Providers

MACo Position: **OPPOSE**

To: Finance Committee

Date: March 20, 2014

From: Leslie Knapp, Jr.

The Maryland Association of Counties (MACo) **OPPOSES** Senate Bill 1099. The bill would expand the number of people covered by the workers' compensation firefighter occupational disease presumptions without addressing ongoing concerns raised by the presumptions and it would increase liability and costs for affected counties.

SB 1099 extends to paid emergency medical services (EMS) providers the workers' compensation firefighter occupational disease presumptions under § 9-503 of the Labor and Employment Article for heart disease, hypertension, lung disease, and various types of cancers. 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 a new class of person without broader consideration of the issues raised by the presumption, including the types of conditions covered by the presumption and the lack of rebuttability.

The research purporting to show linkages between cancer and firefighting is tenuous. 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

¹ See MACo testimony on 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.

firefighting and an elevated incidence of cancer.”² According to the preliminary findings of a recent firefighter cohort study by the National Institute for Occupational Safety and Health (NIOSH), “modest elevations were observed in several solid cancers; however, evidence of excess lymphatic or haematopoietic cancers was lacking.”³

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 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.

SB 1099 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.⁴ 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.⁵ 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.

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.⁶

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

² *Assessing State Firefighter Cancer Presumption Laws and Current Firefighter Cancer Research*, National League of Cities, April 2009.

³ *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)

⁴ 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.”

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

⁶ *City of Frederick vs. Shankle*, 367 Md. 5 (2001).

rebuttable.⁷ The Department of Legislative Services recently catalogued the more equitable rebuttability standards found in most other states with presumptions⁸ 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.⁹

SB 1099 would also increase costs for those counties with paid EMS providers not covered by the presumption. Montgomery County alone reports that it has 1,167 paid EMS providers. Using a set of assumptions, the bill's fiscal note estimates a cost of nearly \$6 million spread across self-insured counties, Chesapeake Employers' Insurance Company, and the Maryland Aviation Administration.

Ultimately, MACo believes the decision whether to include paid EMS providers under the presumption should be the decision of each county, as it is the county that will bear the increased liability and costs. SB 1099 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 SB 1099 an **UNFAVORABLE** report.

⁷ *Assessing State Firefighter Cancer Presumption Laws and Current Firefighter Cancer Research*, National League of Cities, April 2009.

⁸ *Cancer Presumption Statutes in Maryland and Other States*, Department of Legislative Services, December 2012.

⁹ HB 1280 of 2010.