BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD NELSON, Claimant, v. CITY OF POCATELLO, Self-Insured Employer, Defendant.	**IC 2018-033423** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** FILED AUG 13 2021 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Sonnet Robinson. In lieu of hearing, the parties submitted stipulated facts. Claimant, Richard Nelson, was represented by Rachel Miller of Pocatello. Defendant was represented by Michael McPeek of Boise. The parties presented documentary evidence, and a post-hearing deposition was taken. The matter came under advisement on June 8, 2021, and is ready for decision.

ISSUES

The issues to be decided are:

1. Whether Claimant contracted an occupational disease; and
2. Whether Defendant has adduced sufficient evidence within the meaning of Idaho Code § 72-438(14)(c) to rebut the presumption under Idaho Code § 72-438(14)(b).

CONTENTIONS OF THE PARTIES

Claimant contends he contracted chronic lymphocytic leukemia because of his employment as a firefighter. Claimant argues the presumption at Idaho Code § 72-438(14) applies, and that Defendant has not met its burden to show substantial evidence to the contrary.

Defendant agrees that the presumption at Idaho Code § 72-438(14) applies, however, Defendant contends it produced substantial evidence via their expert that rebuts the presumption that Claimant's cancer was caused by his employment. Further, Claimant produced no evidence of causation and therefore cannot prevail once the presumption has been rebutted.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Stipulated facts;
3. Attached Exhibits 1-7;
4. The post-hearing depositions of Robert E. Burdick, M.D. (Exhibit 8).

The undersigned Commissioners have reviewed the proposed decision of Referee Robinson and agree with her ultimate conclusion but believe that slightly different treatment is warranted on the nature of the statutory presumption at issue. Accordingly, the Commission declines to adopt the proposed decision and issues these findings of fact, conclusions of law and order.

STIPULATED FACTS

1. Claimant, Richard Nelson, is a male who is currently 69 years old (DOB: April 11, 1952) and who resides in Pocatello, Idaho at 2092 Cassia, where he has lived since approximately

2009.

2. Claimant was a firefighter as defined in Idaho Code § 72-438(14)(a) for the City of Pocatello Fire Department from 1993 to 2014. He retired from the City effective April 30, 2014.

3. Claimant began his career with the City of Pocatello Fire Department in 1993 as a Probationary Firefighter. He became a 2nd Class Firefighter in 1994. He was promoted to First Class Firefighter in 1995. He continued in that position until he was promoted to Driver/Operator in 2005. He continued as a Driver/Operator until 2011 when he was promoted to Captain in the Fire Prevention and Public Education Division. He remained in the latter position throughout the remainder of his employment with the Fire Department.

4. As a firefighter for the City of Pocatello, Claimant was actively involved in extinguishing or investigating fires from 1993 until 2011 when he was promoted to Captain in the Fire Prevention and Public Education Division.

5. On November 27, 2018, Claimant was seen by Michael Francisco, M.D., an oncologist and hematologist at the Portneuf Medical Center Cancer Center Clinic in Pocatello. Dr. Francisco diagnosed Claimant as having early-stage chronic lymphocytic leukemia, stage O in the Rai classification. Claimant had been referred to Dr. Francisco following the detection of an elevated white count on lab work performed at a Bingham Memorial Hospital clinic on August 22, 2018.

6. Claimant has been treated for his chronic lymphocytic leukemia by Dr. Francisco and by Harsh Shah, D.O., Huntsman Cancer Center, University of Utah Health, since Dr. Francisco's diagnosis of November 27, 2018.

7. Claimant timely filed a claim for workers' compensation benefits for his lymphocytic leukemia.

8. Lymphocytic leukemia was not revealed during any initial employment medical screening examination with the City of Pocatello.

9. Claimant's diagnosis of lymphocytic leukemia was not made more than ten (10) years following the last date on which Claimant actually worked as a firefighter as defined in Idaho Code § 72-438(14(a), regardless of whether such "last date" occurred in 2011 when he was promoted from Driver/Operator to Captain in the Fire Prevention and Public Education Division, or whether it occurred as of the effective date of his retirement from the City on April 30, 2014.

10. Neither Claimant nor Claimant's cohabitant(s) in his household regularly and habitually used tobacco products for ten (10) or more year years prior to Claimant's diagnosis of lymphocytic leukemia by Dr. Francisco on November 27, 2018.

11. Claimant's lymphocytic leukemia and his length of service as a fire fighter for the City of Pocatello fall within the meaning of "Leukemia after five (5) years" for purposes of Idaho Code § 72-438(14)(b)(vi).

12. Claimant's lymphocytic leukemia qualifies for the presumption of Idaho Code § 72-438(14)(b) that his disease was "proximately caused by" his "employment as a firefighter."

13. Defendant contends that it has evidence sufficient for purposes of Idaho Code § 72-438(14)(c) to overcome the presumption of causation created by Idaho Code § 72-438(14)(b).

14. Defendant relies on the June 26, 2020 report of Robert E. Burdick, M.D., to overcome the presumption. Defendant currently intends to also take and submit the post-hearing deposition testimony of Dr. Burdick.

15. Claimant contends that evidence from Dr. Burdick is legally insufficient under Idaho Code § 72-438(14)(c) to overcome the presumption of causation created by Idaho Code § 72-438(14)(b).

16. The foregoing stipulated facts are accepted and adopted by the Commission.

FURTHER FINDINGS OF FACT

17. Stipulated exhibits one through three are Claimant's medical records for prostate cancer, skin care, and other health concerns not in controversy. Stipulated exhibits four and five are Claimant's records regarding diagnosis and treatment for his claimed occupational disease, chronic lymphocytic leukemia (CLL). Claimant has not required any treatment for his cancer according to these records. See Ex. 4:79, 82; Ex. 5:95. Claimant's second opinion physician, Harsh Shah, DO, wrote: "[w]e talked about the evolution of CLL at length and [I] told him that we are [n]ot sure of any outside triggers that could have caused this CLL." Ex 5:95.

18. Robert Burdick, MD, authored a report on June 26, 2020. Ex 6:96. Dr. Burdick has practiced medicine since 1964 with a focus on hematology and oncology and has conducted medical-legal assessments since 1974; he is qualified to testify as an expert in this matter. Ex. 7.

19. Dr. Burdick began by summarizing Claimant's prior medical history and noted Claimant lived in a part of Idaho with high radon. Ex. 6:97. Dr. Burdick detailed his literature review, its limitations, and noted his review was focused on six meta-analyses. *Id.* at 98. Dr. Burdick then compared the concepts of statistical significance in science and law, noting that in science a 95% confidence level was the "standard of excellence," however, in the law, the standard was defined as a "more probable than not basis" meaning that to meet that standard "something is more than 50% probable." *Id.* at 99.

20. Dr. Burdick then reviewed six meta-analyses and opined that the medical literature did not support a medically probable link between firefighting and chronic lymphocytic leukemia. *Id.* at 100. Dr. Burdick then speculated that Claimant's cancer could be related to high levels of radon in the Pocatello area, but the association had not been "firmly established" in the medical literature and Claimant's home would need to be tested for this gas. *Id.* Dr. Burdick concluded with his opinion that Claimant's cancer was due to "random error" in cell division, the process by which "almost all" cancers start. *Id.* at 101.

21. Dr. Burdick was deposed on March 8, 2021. Dr. Burdick explained that Claimant's chronic lymphocytic leukemia was in the lowest Rai classification, meaning it had just been discovered and did not need treatment. Burdick Depo. 10:20-11:8. Dr. Burdick described CLL as an overgrowth of lymphocytes within the bone marrow. *Id.* at 11:17-12:14. Dr. Burdick reiterated the conclusions in his report, including that there was no connection in the literature between CLL and firefighting. *Id.* at 20:17-25.

22. On cross-examination, Dr. Burdick explained there were no known causes of CLL, only associations, such as radiation and radon. *Id.* at 25:9-23. Dr. Burdick confirmed he had no evidence that radon was present in Claimant's home. *Id.* at 27:5-8. Dr. Burdick agreed it was fair to say no one could say what caused Claimant's CLL. *Id.* at 29:1-3. Dr. Burdick also agreed that one of the meta-analyses he relied on showed that firefighters had a 40% increased rate of cancer but emphasized that his understanding of the legal standard required there to be a 50% increase for it to be found related to employment. *Id.* at 31:13-32:11.

DISCUSSION

23. Idaho Code § 72-438(14)(b) specifies that for qualifying cancers, "the disease shall be presumed to be proximately caused by the firefighter's employment as a firefighter." Here it is

conceded that Claimant's cancer is one which qualifies for the presumption. The parties' dispute arises regarding subsection (c) which reads as follows:

> The presumption created in this subsection may be overcome by substantial evidence to the contrary. If the presumption is overcome by substantial evidence, then the firefighter or the beneficiaries must prove that the firefighter's disease was caused by his or her duties of employment.

Idaho Code § 72-438(14)(c). More specifically, the parties' dispute centers around what "substantial evidence to the contrary" means in the context of the presumption that Claimant's cancer is proximately caused by his work as a firefighter.

24. The firefighter presumption statute was enacted in 2016 and has not yet been interpreted by the Industrial Commission or the Idaho Supreme Court. 2016 Sess. Laws, Ch. 276 § 2, p. 764-765. In Idaho, statutory interpretation can be summarized as follows:

> The object of statutory interpretation is to derive legislative intent. Interpretation of a statute begins with the statute's literal words. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. The Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, courts must give effect to the legislature's clearly expressed intent without engaging in statutory construction.
>
> However, if the statute is ambiguous, this Court must engage in statutory construction to ascertain legislative intent and give effect to that intent. To ascertain the legislature's intent, this Court examines the literal words of the statute, the context of those words, the public policy behind the statute, and the statute's legislative history. Courts must construe a statute under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed.

Saint Alphonsus Reg'l Med. Ctr. v. Gooding Cty., 159 Idaho 84, 86–87, 356 P.3d 377, 379–80 (2015) (internal citations omitted).

The Firefighter Presumption is Unambiguous

25. The firefighter presumption statute is not ambiguous. It requires the Commission to presume, unless there is "substantial evidence to the contrary", that a claimant's disease was

proximately caused by his employment as a firefighter. "Substantial evidence to the contrary" can be given its "plain, usual, and ordinary" meaning as a well-known legal term of art.

26. In *State v. Schulz*, 151 Idaho 863, 264 P.3d 970 (2011), the Idaho Supreme Court analyzed the term "cohabiting" as a legal term of art within Idaho Code § 18-918(1)(a), the definition of household member. The Court found that the statute was unambiguous, but disagreed with the State's offered definition of cohabiting:

> [t]he term "cohabiting" is a long-recognized term of art plainly denoting an intimate relationship. See *State v. Oar*, 129 Idaho 337, 340, 924 P.2d 599, 602 (1996) (quoting *Lorillard v. Pons*, 434 U.S. 575, 583, 98 S.Ct. 866, 871, 55 L.Ed.2d 40, 47 (1978) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law ... they are presumed to have been used in that sense unless the context compels to the contrary.")).

Id. at 867, 974 (emphasis added). The Court went on to explain that the term had an accepted meaning within Idaho case law and there was nothing within the statute that compelled a different reading of the term; in other words, "cohabiting" was a legal term of art which could be given its unambiguous, plain, usual, ordinary meaning.

27. Like *Schulz*, in this case the term "substantial evidence to the contrary" is a term that appears, or has previously appeared, elsewhere in the workers' compensation laws of the State and has received treatment in a number of past cases.

28. In *Hatley v. Lewiston Grain Growers, Inc*, 97 Idaho 719, 552 P.2d 482 (1976), the version of Idaho Code § 72-208 then in effect specified, inter alia, that, "if an injury is the proximate result of an employee's intoxication, all income benefits shall be reduced by fifty percent (50%) ...." *Id.* at 721-22, 484-85. The version of Idaho Code § 72-228 then in effect specified that "in any claim for compensation, where the employee has been killed, ... it shall be presumed, in the absence of substantial evidence to the contrary, ... that the injury or death was not occasioned by the employee's intoxication...." *Id.* at 722, 485. In *Hatley*, a truck driver was

killed when he failed to negotiate a curve while in the course of his work. He was also found to have a blood alcohol level in excess of the legal limit. The Court observed that in light of the applicable statutes, it was the burden of an employer relying on the intoxication defense to come forth with substantial affirmative evidence showing that the employee was intoxicated at the time of death and also that the intoxication proximately resulted in the injury. In discussing what "substantial evidence to the contrary" meant, the Court explained:

> In light of the presumption imposed by I.C. § 72-228, it is incumbent upon an employer relying on the intoxication defense to come forth with substantial affirmative evidence showing that the employee was intoxicated at the time of death and also that the intoxication proximately resulted in the injury. It is not sufficient that the defendant present negative evidence, e. g., tending to rule out other possible causes of the injury such as mechanical difficulties, bad weather or another vehicle on the road.

Hatley, 97 Idaho at 722, 552 P.2d at 485 (internal citations omitted, emphasis supplied). In other words, to defeat the presumption, defendants had to produce affirmative evidence that the claimant was intoxicated and that the intoxication proximately caused the accident.

29. In *Evans v. Hara*, 123 Idaho 473, 849 P.2d 934 (1993), the Court discussed the current version of Idaho Code § 72-228(1), which provides:

> 72-228. PRESUMPTION FAVORING CERTAIN CLAIMS. (1) In any claim for compensation, where the employee has been killed, or is physically or mentally unable to testify, and where there is unrebutted prima facie evidence that indicates that the injury arose in the course of employment, it shall be presumed, in the absence of substantial evidence to the contrary, that the injury arose out of the employment and that sufficient notice of the accident causing the injury has been given.

(emphasis added). In *Evans*, the claimant suffered an unwitnessed fall at work which rendered him unable to testify. It was conceded that his accident occurred in the course of his employment. It was argued, however, that the accident did not arise out of employment. At issue was the extent of the presumption enjoyed by the claimant, and the type of evidence necessary to rebut it. The

Commission accepted as credible, evidence tending to indicate that the claimant's unwitnessed fall was precipitated by an alcohol withdrawal seizure, a cause unconnected to his employment. It found that this constituted substantial evidence that the claimant's fall did not arise out of his employment and that employer had therefore successfully rebutted the Idaho Code § 72-228 presumption. With the presumption rebutted, the Commission then found that the claimant had failed to prove that his injury arose out of employment. On appeal, the claimant argued that the Commission erred in applying the provisions of statute and that properly construed, Idaho Code § 72-228 placed both the burden of production and persuasion on employer. Therefore, per the claimant, under the facts of the case, employer had the burden to prove that the claimant's injuries were not occasioned by an employment created risk.

30. The Court rejected the claimant's preferred construction, noting that had that been the legislature's intention, it would have been a simple matter to specify that in those cases where a claimant is injured in the course of his employment, but is unable to testify about what happened, employer has the burden of disproving the claim. The Court then stated:

> Instead the legislature chose the "substantial evidence to the contrary" language suggesting that a portion of the burden would shift, but not the entire burden of both production and persuasion. Thus we conclude that once the employer has come forward with substantial affirmative evidence to indicate that the accident did not arise out of the employment, the burden shifts back to the employee to persuade the Commission that it did indeed arise out of the employment.

Evans, 123 Idaho at 478, 849 P.2d at 939.

31. Citing *Hatley*, the Court then ruled that to meet its burden, an employer is obligated to adduce substantial affirmative evidence that the claimant's injuries arose from a cause unconnected to his employment. Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance. Negative evidence alone will not suffice, but may be considered by the Commission in connection

with substantial affirmative evidence of a non-work-related cause. Therefore, the medical evidence adduced by employer that the claimant's fall was induced by an alcohol withdrawal seizure was substantial affirmative evidence of a non-work-related cause of the claimant's fall. It was buttressed by negative evidence tending to denigrate the proposition that the claimant's injuries were precipitated by an employment created risk. This negative evidence consisted of proof that there was nothing for the claimant to trip over at his workstation, that he was not working at any height and that there was no dangerous machinery in the vicinity of his work which might have struck him. Considering the totality of the evidence, the Court concluded that employer met its burden of rebutting the presumption. The presumption having been rebutted; the burden shifted to the claimant to prove that his injuries arose out of an employment created risk. This he failed to do. Essentially, rebutting the presumption had the effect of making the claimant's case like any other worker's compensation case; claimant bears the burden of proving that his injuries are the result of an accident arising out of and in the course of his employment.

32. In *Politte v. Idaho Department of Transportation*, 126 Idaho 270, 882 P.2d 437 (1994), the claimant suffered a stroke at the end of a routine day of work. His condition left him unable to communicate. His claim was denied by employer. The Commission determined that the claimant was unable to testify within the meaning of Idaho Code § 72-228, and that his stroke arose in the course of his employment. Therefore, the claimant was entitled to the benefit of the Idaho Code § 72-228 presumption. The Commission then considered whether employer had adduced sufficient evidence to rebut the presumption that the claimant's injury arose from an employment created risk. The Commission considered the testimony of two of the claimant's supervisors who offered testimony to the effect that there was nothing unusually stressful about the job that the claimant was performing on the day of his injury. The employer also offered the

report of a cardiovascular surgeon who opined that there was no causal relationship demonstrated between the claimant's job and his cerebrovascular injury, and that the claimant had other risk factors for such an injury, including hypertension, hypercholesterolemia, hypertriglyceridemia, and elevated blood glucose.

33. Although the testimony of the supervisors was deemed credible, the Commission found it insufficient to rebut the Idaho Code § 72-228 presumption, ruling that substantial medical evidence is required to rebut the presumption of medical causation. (The supervisors' testimony also seems to constitute merely negative evidence.) As to the report of the employer's expert, the Commission recognized that the opinion that the claimant's stroke could well be related to risk factors not connected to his employment was potentially significant. However, the expert did not adequately explain the foundation of his opinion; the record was unclear as to what medical records he consulted in formulating his opinion. Therefore, his opinion did not constitute substantial evidence. It was not evidence which a reasonable mind would accept to support a conclusion.

34. On appeal, the Court affirmed the Commission's statement of the rule for determining whether evidence is substantial. The Court, too, concluded that based on the lack of foundation for the expert's opinion, a reasonable mind would not accept that opinion as sufficient to overcome the presumption that the claimant's injuries were causally related to his employment. Further, the Commission did not err in disregarding the testimony of the claimant's supervisors since the evidence that can be considered in rebutting the presumption must be medical evidence.

35. *Evans* and *Politte* treat the phrase "substantial evidence to the contrary" in the context of a presumption that is different from the presumption at issue. Idaho Code § 72-228(1) specifies that when certain conditions are met, it shall be presumed that an injury arises out of employment, i.e., that it occurs as a result of an employment created risk. The presumption of

causation can be overcome by more than a scintilla of affirmative medical proof that a reasonable mind would accept in support of a non-work-related cause. However, under Idaho Code § 72-438(14)(b), a qualifying cancer "shall be presumed to be proximately caused by the firefighter's employment as a firefighter." The presumption of proximate cause, too, can be overcome by substantial evidence to the contrary. The question is whether the construction given to "substantial evidence to the contrary" in connection with Idaho Code § 72-228 applies to a statute which sets up a slightly different type of presumption. Idaho Code § 72-438(14)(c) specifies that the presumption of cancer proximately caused by employment may be rebutted by substantial evidence to the contrary. This necessarily anticipates that a firefighter's cancer may have several possible causes. Idaho Pattern Civil Jury Instruction ("IDJI") 2.30.2 addresses what is required to prove proximate cause where several possible causes are at issue:

> When I use the expression "proximate cause," I mean a cause that, in natural or probable sequence, produced the injury, the loss or the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

36. Therefore, it might be said that, for a qualifying cancer, Idaho Code § 72-438(14)(b) creates a presumption that a firefighter's work as a firefighter is a substantial factor in causing the cancer. Per Idaho Code § 72-438(14)(c), the presumption that work as a firefighter is a substantial factor in causing the cancer may be rebutted by substantial evidence to the contrary, i.e., more than a scintilla of affirmative medical evidence that a reasonable mind would accept in support of the conclusion that there is a non-work-related cause that is a substantial factor in causing the cancer. As applied to the instant matter there is little practical difference in the type of proof necessary to rebut the Idaho Code § 72-228 and the § 72-438 presumptions. In both cases, an employer must put on a minimum of affirmative medical proof supporting a non-work-related cause.

37. Claimant argues that Defendant's evidence is neither relevant, nor affirmative, and that Dr. Burdick's opinion merely attacks the underlying presumption on which the statute is based. Defendant responds that it has presented relevant evidence, more than a scintilla, which a reasonable mind might accept to rebut the presumption that Claimant's injury arose out of his employment.

38. Claimant is correct that Defendant has failed to produce substantial affirmative evidence. Specifically, Defendant has failed to produce affirmative medical evidence that Claimant's cancer was caused by something other than his employment. Defendant has only produced "negative" evidence, i.e., evidence which tends to show that Claimant's disease could not have arisen from his employment, not that his disease arose from something other than his employment. The various meta-analyses relied upon by Dr. Burdick to challenge a causal connection between firefighting and leukemia is the equivalent of the negative evidence offered in *Evans*, *supra*; that there was no extant condition at the claimant's workstation that could have caused his head injury. Such negative evidence, standing alone, is insufficient to overcome the presumption established by statute.

39. In *Evans*, the evidence that did overcome the presumption was affirmative medical evidence that the claimant's injury was due to a cause unrelated to his employment, in that case, an alcohol withdrawal seizure. In *Politte*, the evidence that the claimant's stroke resulted from risks personal to claimant, such as hypercholesterolemia, might also have constituted substantial affirmative medical evidence sufficient to overcome the presumption had the expert's opinion been supported by an adequate foundation.

40. The closest Dr. Burdick came to addressing affirmative medical evidence that might rebut the presumption was when he asserted that Claimant's cancer could be related to radon

exposure. The Commission finds that this is insufficient as proof of a non-work-related cause because in the same breath Dr. Burdick acknowledged that the association is not firmly established and he has no evidence that radon was present in Claimant's home. Defendant is required to put on affirmative evidence that Claimant's CLL is related to some non-work-related cause, but we conclude that this testimony is not evidence which a reasonable mind would accept to support that conclusion. Like the opinion of the cardiovascular surgeon in *Politte*, *supra*, Dr. Burdick's opinion about radon lacks a foundational element of proof, i.e., that Claimant was actually exposed to the gas.

41. It might also be argued that Dr. Burdick's statement that leukemia occurs when a single cell division "goes haywire" constitutes affirmative medical evidence tending to show Claimant's cancer arose from a non-occupational cause. However, absent some proof of a non-industrial cause of this first cell division error, this statement does nothing to denigrate the presumption that the cancer is proximately caused by Claimant's employment. From his testimony, it is clear that Dr. Burdick does not know what causes the initial cell division error:

> Q. [by Ms. Miller] I believe you say that a physician cannot conclude with medical probability that Mr. Nelson's CLL is causally related on a more probable basis than not to toxins that he may have been exposed to during his employment with the City of Pocatello as a firefighter. Is it fair to say that no one can say what caused Mr. Nelson's CLL?
>
> A. That's accurate.
>
> Q. All right. So you cannot say with a reasonable degree of medical certainty what is the cause of Richard's CLL; is that accurate?
>
> A. That's accurate. I might add that in most cases of leukemia of all types, what happens is that there is a single cell division that goes haywire. And that that single cell division leads then to a multiplication of cells that continue to divide in which we call cancer. And then some of those take the form of CLL; some of them take the form of chronic myelocytic leukemia, or acute leukemia.

Q. All right. And I appreciate that, but you haven't been given any specific data regarding Richard that would allow you to be able to determine on a more probable basis than not what it is that caused Richard's, in particular, his CLL; is that correct?

A. You're absolutely right, on a more probable than not basis, I cannot say.

Burdick Depo. 28:21 – 29:22.

42. Of course, to overcome the presumption of Idaho Code § 72-438(14) it is not necessary for Defendant to prove another cause to a reasonable degree of medical probability, much less a reasonable degree of medical certainty. All Defendant needs to do is adduce substantial affirmative medical proof of another cause, i.e., more than a scintilla of medical evidence that a reasonable mind would accept to support the conclusion that Claimant's leukemia is proximately caused by something unrelated to his employment. However, even at this lower threshold, Dr. Burdick's testimony is insufficient to overcome the presumption since he could not offer proof of another cause that was anything more than a guess.

43. Upon review of the record, Defendant has not presented "substantial evidence to the contrary" sufficient to overcome the statutory presumption that Claimant's cancer was proximately caused by his employment as a firefighter.

44. Although Claimant contends that Idaho Code § 72-438 is unambiguous, Claimant cites to legislative history to buttress his position if the Commission were to find that the statute is not unambiguous. Claimant's Opening Brief pp. 15-18. However, under the plain language of the statute and the analyses of *Evans*, *Hatley*, and *Politte* discussed above, the Commission finds that the phrase "substantial evidence to the contrary" as used in Idaho Code § 72-438(14)(c) is unambiguous, or if ambiguous, has previously been construed by the Court. Furthermore, Defendant does not argue that the statute is ambiguous. Therefore, there is no need to address Claimant's arguments raised in his briefing regarding potential ambiguity.

45. Claimant has met all the requirements to qualify for the presumption under Idaho Code § 72-438(14)(b). Defendants have failed to rebut the presumption with substantial affirmative evidence tending to show that Claimant's cancer was not proximately caused by his employment.

CONCLUSIONS OF LAW AND ORDER

1. Claimant qualifies for the presumption under Idaho Code § 72-438(14) that his chronic lymphocytic leukemia was proximately caused by his employment as a firefighter;

2. Defendant has failed to rebut the presumption that Claimant's chronic lymphocytic leukemia was proximately caused by his employment;

3. All other issues are reserved.

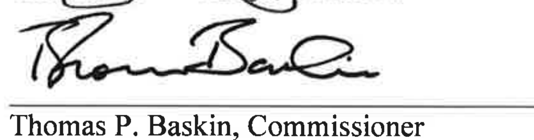
4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 12th day of August, 2021.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner



Thomas P. Baskin, Commissioner

ATTEST:

Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, 2021, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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