

4-20-2015

# Estate of Aikele v. City of Blackfoot Appellant's Brief Dckt. 42742

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Estate of Aikele v. City of Blackfoot Appellant's Brief Dckt. 42742" (2015). *Idaho Supreme Court Records & Briefs*. 5664.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/5664](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/5664)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

The Estate of,	)	
KURT AIKELE, (Deceased)	)	
	)	
Claimant/Appellant,	)	Supreme Court No. 42742
v.	)	
	)	APPELLANT'S
CITY OF BLACKFOOT, Employer, and	)	OPENING BRIEF
IDAHO STATE INSURANCE FUND, Surety	)	
	)	
Defendants/Respondents.	)	
_____	)	

\*\*\*\*\*

APPELLANT'S OPENING BRIEF

\*\*\*\*\*

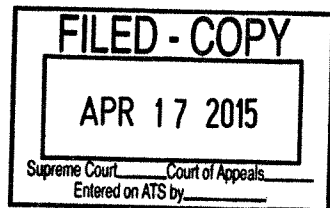
APPEAL FROM THE INDUSTRIAL COMMISSION  
OF THE STATE OF IDAHO  
Chairman Thomas E. Limbaugh, Presiding

Andrew Adams, Esq.  
CURTIS & PORTER, PA  
598 N. Capital Avenue  
Idaho Falls, ID 83402

Attorney for Appellant

Mr. Steven R. Fuller  
FULLER & FULLER, PLLC  
P.O. Box 191  
Preston, ID 83263

Attorney for Respondents.



BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

The Estate of,	)	
KURT AIKELE, (Deceased)	)	
	)	
Claimant/Appellant,	)	Supreme Court No. 42742
v.	)	
	)	APPELLANT’S
CITY OF BLACKFOOT, Employer, and	)	OPENING BRIEF
IDAHO STATE INSURANCE FUND, Surety	)	
	)	
Defendants/Respondents.	)	
_____	)	

\*\*\*\*\*

APPELLANT’S OPENING BRIEF

\*\*\*\*\*

APPEAL FROM THE INDUSTRIAL COMMISSION  
OF THE STATE OF IDAHO  
Chairman Thomas E. Limbaugh, Presiding

Andrew Adams, Esq.  
CURTIS & PORTER, PA  
598 N. Capital Avenue  
Idaho Falls, ID 83402

Mr. Steven R. Fuller  
FULLER & FULLER, PLLC  
P.O. Box 191  
Preston, ID 83263

Attorney for Appellant

Attorney for Respondents

## TABLE OF CONTENTS

	PAGE
Table of Cases and Authorities .....	i
Statement of the Case .....	1
1. Nature of the Case .....	1
2. Course of Proceedings and Disposition .....	1
3. Statement of Facts .....	2-6
Issue Presented on Appeal .....	6
Attorney's Fees .....	6
Legal Summary .....	6-8
Argument .....	9 - 24
A. The Commission's Findings are Inaccurate and Erroneous .....	8-15
B. The Commissioner's Decision is Not Supported by .....	15-21
Substantial and Competent Evidence.	
i. The Meta-Analysis Only Addresses Risk of Firefighter.....	16-19
as Compared to The General Public,	
It does not Address Causation of an Individual Cancer.	
ii. Dr.. Dickson's Testimony Addresses Causation of.....	19-21
Mr. Aikele's Cancer.	
C. The Commission's Decision is Erroneous as a Matter of Law....	21-24
Conclusion .....	24 - 25

**TABLE OF CASES AND AUTHORITIES**

<b>CASES</b>	<b>PAGE</b>
<u>Boise Orthopedic Clinic V. Idaho State Ins. Fund</u> .....	7,15
128 Idaho 161, 911 P.2d 754 (1996)	
<u>Deav v. Dravo Corporation</u> .....	8
95 Idaho 558, 560-61, 511 P.2d 1334, 1336-1337 (1973).	
<u>Dinius v. Loving Care and More, Inc.</u> , .....	8
133 Idaho 572, 990 P.2d 738	
<u>Excell Constr. Inc. v. State, Dep't of Labor</u> .....	7,8
141 Idaho 688, 116 P.3d 18 (2005)	
<u>Hagler v. Micron Tech., Inc.</u> , .....	7, 22
118 Idaho 596, 798 P.2d 55 (1990).	
<u>Jones v. Emmett Manor</u> .....	8
134 Idaho 688, 692, 116 P.3d 18, 22 (2005).	
<u>Langely v. State Idus. Special Indem. Fund</u> .....	7, 22
126 Idaho 781, 890 P.2d 732 (1995).	
<u>Stewart v. Sun Valley Co., Idaho</u> .....	7
140 Idaho 381, 384, 94 P.3d 686, 689 (2004)	
 <b>STATUTES</b>	
Idaho Code § 72-102(22) .....	7, 21
Idaho Code § 72-102(22)(b) .....	7, 21
Idaho Code §72-313 .....	6
Idaho Code §72-438 (12) .....	7, 22, 23, 24
Idaho Code § 72-439 .....	7, 439
Idaho Code §72-732 .....	7

## STATEMENT OF THE CASE

### 1. Nature of the Case:

This is an Appeal of an Order, issued by the Idaho Industrial Commission denying death benefits and compensation to the widow of Claimant, Kurt Aikele, a firefighter for the City of Blackfoot, Idaho, for twenty-six (26) years. The Commission denied Mrs. Denise Aikele's claim on the grounds that she allegedly failed to establish that Mr. Aikele's lung cancer, which caused his death, was an occupational disease caused, more likely than not, by his work environment.

### 2. Course of Proceedings and Disposition:

A bifurcated hearing was held on August 22, 2012. (Hearing Tr. August 22, 2012). Claimant, Mr. Aikele, was still alive at that time, and the purpose of this bifurcated hearing was to determine whether or not payment by the surety to Dr. Norman Zuckerman, an I.M.E. physician hired by the surety, was "compensation" for the purposes of extending the statute of limitations as per I.C. § 72-706(1). (Id. at 5: 7-11). The only testimony on that day was the testimony of Mr. Aikele (Id.). Dr. Zuckerman's first deposition was taken on October 24, 2011. (Zuckerman Dep., October 24, 2011). A briefing schedule was assigned by the Referee on November 9, 2012. (Order Establishing Briefing Schedule). On December 8, 2012, Mr. Aikele passed away from "adenocarcinoma lung." (Joint Exhibits (JE), Volume III, 20:1) On March 11, 2013, a claim for death benefits was filed for Mrs. Denise Aikele, the widow of Mr. Aikele. (Death Benefits Complaint). A subsequent hearing was held on December 4, 2013, to decide the issues of whether Mr. Aikele's condition was caused by Mr. Aikele's occupation and if Mrs. Aikele was entitled to death benefits and compensation. (Hearing Tr., December 4, 2013 at 1).

Testimony was heard from the Claimant's widow, Denise Aikele, and City of Blackfoot Fire Chief, Kevin Grey (Hearing Tr, December 4, 2013).

The deposition of Dr. Dane Dickson, Mr. Aikele's treating physician, was taken on February 11, 2014. (Dickson Dep., Feb. 11, 2014). A second deposition of Dr. Zuckerman relating to the causation issue was taken on March 11, 2014. (Zuckerman Dep, Mar. 11, 2014).

The matter was briefed, and the Commission denied Mrs. Aikele's claim for widow's benefits on the basis that she failed to prove her husband's cancer was caused by exposure to hazardous material as a result of his employment as a firefighter for the City of Blackfoot. (Findings of Facts and Conclusions of Law (FFCL), October 22, 2014).

3. Statement of Facts:

Except as to Claimant's arguments beginning on page 8, the Claimant does not substantially dispute the Commissioner's Findings of Facts and Conclusions of Law paragraphs 1-13.

“1. Claimant worked for the Employer as a firefighter. Through the years he has assisted at a multitude of fires at various locations and of various causes.

2. At various times, medical records show Claimant reported a family history of prostate cancer involving his father and/or both of his grandfathers.

3. A January 7, 2005 visit to Bret J. Rodgers, M.D., involved removal of basal cell carcinoma from the left side of his face. Physicians have not opined that this impacts any analysis of causation about his lung cancer.

4. In December 2008, Claimant was seen for possible pneumonia. Subsequent testing and a biopsy revealed lung cancer.

5. On December 29, 2008, Dane Dickson, M.D., examined Claimant. He opined that since Claimant worked as firefighter he had been exposed to smoke during

clean-up operations and to diesel fuel fumes; therefore, these were “most likely the reason” for having developed non-small-cell lung cancer. He noted an absence of conditions likely to expose Claimant to radon gas and that Claimant never smoked.

6. Thereafter, Dr. Dickson provided significant treatment of Claimant’s condition.

7. On June 8, 2009, Dr. Dickson wrote to rebut Dr. Pfoertner’s opinion and an article describing scientific studies involving firefighter (See below). He provided other more recent studies including one relied upon by Dr. Girardi (see below). Dr. Dickson opined, “I feel the review I have done, which is limited and I recognize this, is enough to say there can be a presumptive risk of cancer although it may not be enough to establish a definitive relationship.” He suggested a possible relationship to lung cancer where a study linked laryngeal cancer to firefighters.

8. On August 21, 2011, Dr. Dickson reiterated his opinions while noting the impossibility of determining a cause. He compared Claimant’s situation to veterans who had been exposed to Agent Orange who eventually grouped in a presumptive category by the Veteran’s Administration to obtain compensable medical care. Dr. Dickson went on to state, “I readily admit that I am not an expert in this field, but feel strongly.”

9. Kirt Mckinlay, M.D., treated Claimant. He recorded that initially, Claimant’s lung cancer was “nodular in nature.” After chemotherapy and a remission, it returned, but this time as an infiltrate.

10. On July 4, 2010, Christopher Shields, M.D., described Claimant’s condition as “non-tobacco related adenocarcinoma of the lung.”

11. In December 2011, Claimant underwent a lung cancer mutation screening. The equivocal legibility of this report precludes Commission’s evaluation of it, except to say that it does not appear to demonstrate a significant genetic predisposition toward cancer.

12. On November 20, 2012, urologist Timothy Taylor, M.D., diagnosed cancer, adenocarcinoma of the prostate. It is unclear whether this was an error and Dr. Taylor meant to say “lung” regardless, prostate cancer did not kill Claimant, lung cancer did.



13. Except as described above, the significant volume of medical records does not significantly contribute to establishing a cause for Claimant's cancer." (FFCL Pgs. 3-4).

Claimant does not either substantially dispute the synopsis of the physicians paragraphs

14-18.

#### Non-Treating Medical Opinions

"14. On March 13, 2009, George Pfoertner, M.D., evaluated Claimant's records and reviewed scientific literature at Surety's request. He opined: "Thus, on a more probable than not basis, I do not feel that Mr. Aikele's diagnosis of Adenocarcinoma of the Lung is related to his employment as a Firefighter/EMT, in the city of Blackfoot."

15. On December 8, 2009, oncologist Norman Zuckerman, M.D., evaluated Claimant at Surety's request for an independent medical evaluation ("IME"). He reviewed records and examined Claimant. He noted that the Claimant had never smoked. He recommended additional treatment. He did not provide this treatment.

16. On January 21, 2010, Dr. Zuckerman reported to Surety and opined Claimant's adenocarcinoma of the lung was "unlikely to be related to his occupation as a firefighter." Dr. Zuckerman provided a copy of a meta-analysis of scientific studies which Dr. Zuckerman opined was the "best and most thorough" available. He noted this meta-analysis concluded that firefighters have been shown to face an increased risk of non-Hodgkin's lymphoma, multiple myeloma, and malignant myeloma but no statistically significant increased risk of lung cancer.

17. On December 24, 2009, Richard Oehlschlager, M.D. wrote Claimant's prior attorney Richard Owen. Dr. Oehlschlager opined about the likelihood of prevailing on a claim before a jury rather than about whether Claimant's work likely caused his cancer. Inadequate foundation fails to establish the documentation which Dr. Oehlschlager reviewed. This opinion does not significantly contribute to our analysis here.

18. On February 16, 2010, Alyce Girardi, M.D., on letterhead identifying the International Association of Fire Fighters, described and criticized scientific literature relating to cancer risk among firefighters. She further relied upon an

attached article summarizing and criticizing studies which indicate firefighters experience lung cancer at an equal rate as the general population, but smoke at a lower rate. The article's author proposes some presumptions and performs an "indirect . . . mathematical derivation" which suggests to that author and Dr. Girardi that non-smoking firefighters experience cancer more than the general populations. The major opinion of that author was that worker's compensation jurisdictions should enact a legislative or regulatory presumption of a causal link between lung cancer and work for non-smoking firefighters. The article concludes:

Such assessments for medicolegal and adjudicatory purposes are not intended to replace the standards of scientific certainty that are the foundation of etiologic investigation. They are social constructs required to resolve disputes in the absence of scientific certainty.

Despite the fact that most studies indicate firefighters have an increased risk for certain types of cancer—but not lung cancer—Dr. Girardi opined "work-related exposures are likely contributors to lung cancer in non-smoking fire fighters." The record does not show whether Dr. Girardi reviewed medical records specifically related to the Claimant." (*Id.* at 4-6).

Claimant will address paragraphs 20-27, in her "Argument" section as specifics of these findings are clearly erroneous findings of facts.

Additional facts include:

- Mary Denise Hjelm married Kurt H. Aikele in Idaho Falls, Idaho, on June 29, 1976.  
(Joint Exhibits, Volume III, at 20).
- In total Kurt Aikele was a firefighter for the City of Blackfoot for twenty-six (26) years.  
(Hearing Transcript 12:14-16, Dec. 4, 2013).
- His duties included: fire control, EMS operations, emergency response, direct response for any type of wild-land, urban interface, structure fire, and medical emergency.  
(Hearing Tr. 7:8-11, Aug. 22, 2012).

- As a firefighter, Mr. Aikele participated in a process called “mop up.” (Hearing Tr. 30: 3-10, Aug. 22, 2012). “Mop up” is the process by which a firefighter works through a fire, after the fire is out, continuing to look for hotspots. (Id). “Mop-up” includes, but is not limited to, cleaning debris by looking underneath clothes or anything that is smoldering. (Id). Mr. Aikele performed the “mop-up” process without having protective equipment. (Dickson Depo. 23:1-5).
- From 1999 to 2011, Mr. Aikele participated in over 500 calls. (Joint Exhibits Volume III, 21:1-4).
- Mr. Aikele also spent a substantial amount of time at the fire station in Blackfoot, Idaho. (Dickson Dep. 23:7). For eighteen (18) of the twenty-six (26) years that Mr. Aikele was employed by the City of Blackfoot, the Fire department did not have a ventilation system for their equipment. Mr. Aikele would have exposed to diesel fumes during that time. (Hearing Tr. 29: 4-16, Dec. 4, 2013). Diesel fumes have been found to increase development of lung cancer. (Dickson Dep. 30: 8-11).

#### **ISSUE PRESENTED ON APPEAL**

1. Appellant/Claimant contends that the Industrial Commission’s Order is erroneous as a matter of law and that it is not supported by substantial and competent evidence. Furthermore, the Commission erred in finding that the Appellant/Claimant did not prove, more likely than not, that Mr. Aikele’s cancer, which was the proximate cause of his death, was caused by his work environment, and the Commission’s decision to the contrary is not supported by substantial and competent evidence.

## ATTORNEY FEES ON APPEAL

Attorney's fees are requested per I.C. 72-313.

## LEGAL SUMMARY

When reviewing a decision by the Industrial Commission, the Court exercises free review over the Commission's conclusions of law, but will not disturb the Commission's factual findings if they are supported by substantial and competent evidence. I.C. §72-732; *Stewart v. Sun Valley Co.*, 140 Idaho 381, 384, 94 P.3d 686, 689 (2004).

The Commission's conclusion's regarding the credibility and weight of evidence will not be disturbed unless they are clearly erroneous. *Excell Constr. Inc. v. State, Dep't of Labor*, 141 Idaho 688, 692, 116 P.3d 18, 22 (2005).

Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Boise Orthopedic Clinic v. Idaho State Ins. Fund*, 128 Idaho 161, 164, 911 P.2d 754, 757 (1996).

An occupational disease is one that is "due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process for employment . . ." See Idaho Code § 72-102(22). The terms "contracted" and "incurred," when referring to an occupational disease, are deemed to be the equivalent of "arising out of and in the course of employment." See Idaho Code § 72-102(22)(b). Under Idaho Code § 72-439, an employer cannot be held liable for an occupational disease unless such disease is actually "incurred" in that employment. Therefore, as in an accident/injury case, one who claims benefits for an occupational disease must show that he developed a disease while

performing the work he was employed to perform, and that there is a causal connection between the conditions under which the work was performed and the resulting disease. *Langelly v. State Indus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995); *Hagler v. Micron Tech., Inc.*, 118 Idaho 596, 798 P.2d 55 (1990).

Idaho Code § 72-438 enumerates a number of specific occupational diseases including respiratory diseases incurred by firefighters:

“Compensation shall be payable for disability or death of an employee resulting from the following occupational diseases:

Cardiovascular or pulmonary or respiratory diseases of a paid fireman, employed by a municipality, village or fire district as a regular member of a lawfully established fire department, caused by overexertion in times of stress or danger or by proximate exposure or by cumulative exposure over a period of four (4) years or more to heat, smoke, chemical fumes or other toxic gases arising directly out of, and in the course of his employment.”

A respiratory disease of a fireman which is caused by cumulative exposure to harmful substances over a period of least four years is a compensable occupational disease. Pursuant to the general and specific tenets of occupational disease law referenced above, Claimant bears the burden of proving that the lung cancer from which he suffered was causally related to the claimed occupational exposure. To prove causation, Claimant must put on medical proof establishing that it is more probable than not that his condition is work related. *Deav v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973), overruled on other grounds by *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

## ARGUMENT

### **A) The Commission’s Findings are Inaccurate and Erroneous.**

The Commission's conclusion's regarding the credibility and weight of evidence will not be disturbed unless they are clearly erroneous. *Excell Constr. Inc. v. State, Dep't of Labor*, 141 Idaho 688, 692, 116 P.3d 18, 22 (2005).

Claimant disputes certain factual findings by the Commission as being clearly erroneous:

1) Paragraph 20 states: "The Meta-analysis concluded that although firefighters have a statistically significant incidence of certain cancers compared to the general population, studies and data show no statistically significant incidence of lung cancer in firefighters." (FFCL P. 6, ¶ 20).

The meta-analysis is a measure of risk and does not address causation. It only demonstrates that firefighters may not have a significant risk of cancer when compared to the general public or other labor groups.

2) The Finding of Facts and Conclusions of Law Page 7, paragraph 21, states: "Physicians who opined Claimant's lung cancer was caused by his work quibbled and questioned the source data and methodology of the meta-analysis, but did not show that Claimant's work differed from the firefighters studied in any material way."

Both Doctors stated that statistical studies can be misleading. (Zuckerman Dep. 49:8-13, March 11, 2014; Dickson Dep. 47:11-15) Dr. Dickson explained he didn't know if the firefighters in the study performed the "mop-up" phase the same way that Mr. Aikele had performed "mop-up." (Dickson Dep. 60:6-20). Dr. Zuckerman also did not know how or if Mr. Aikele's exposure was represented in the statistical meta-analysis. (Zuckerman Dep. 62:5-9, March 11, 2014). Mr. Aikele had explained the "mop-up" phase of a fire to Dr. Dickson as the

process of cleaning up after a fire where smoldering fumes and chemicals are being released into the air. (Dickson Dep. 23:1-5). Dr. Dickson didn't know if the meta-analysis specifically covered Mr. Aikele. Therefore, in forming his opinions he relied more on the science of cancer and how it is formed. (Dickson Dep. 64:22). His opinion is based on the formation of cancer cells: repeated exposure to hazardous debris causing mutations in the multiplications of cells, thereby causing cancer with Mr. Aikele. (Id. at 58:15-19).

3) "However, Dr. Dickson did not possess knowledge of specifics of Claimant's exposures either." (FFCL, Pg. 8, ¶ 26).

This is totally false and clearly erroneous. Dr. Dickson treated Mr. Aikele for many years prior to his death and spent many hours with Mr. Aikele. Dr. Dickson had multiple conversations with Mr. Aikele regarding Mr. Aikele's tasks and responsibilities as a firefighter. As explained earlier, it was during these visits that Mr. Aikele and Dr. Dickson discussed the "mop-up" phase. (Dickson Dep. 23:1-9). He also described the impact of the repeated diesel fumes exposure on Mr. Aikele. (Dickson Dep. 30:8-20).

4) "First, although the record logs fires that Claimant worked in, it is silent about specific dates and times, and about specific carcinogenic compounds and levels, of exposure to potentially causative compound. We are forced to make assumptions favorable to Claimant if we are to fill these gaps and find for compensability." (FFCL Pg. 8, ¶ 26).

Claimant's exhibits clearly demonstrate the time, date, and type of fire calls in which Mr. Aikele participated. (JE, Volume III, 21:2-14) While there is no measurement for the

carcinogens in the over 500 calls that Mr. Aikele worked, the meta-analysis clearly explained the following carcinogenic elements that firefighters are exposed to in their occupation:

“At the fire scene, fire-fighters are potentially exposed to various mixtures of particulates, gases, musts, fumes of organic and/inorganic nature, and the resultant pyrolysis products. Specific exposures include metals such as lead, antimony, cadmium uranium, chemical substances, including acrolein, benzene, methylene chloride, polyaromatic hydrocarbons, perchlorethylene, toluene, trichlorethylene, trichlorophenel, exlene, formaldehydes, minerals such as asbestos, crystalline, and noncrystalline silica, silicates, and various gases that may have acute, toxic effects.” (*Joint Exhibits, Volume I*, at 83).

Since the Commission is relying on the assumptions in the meta-analysis, then they must also assume that, like the meta-analysis suggests, firefighters are exposed to an array of carcinogenic compounds.

Furthermore, in his deposition, Dr. Dickson testified that Mr. Aikele was exposed to carcinogenic toxins:

“We did mention that in the mop-up procedures, there were many things that were still smoldering, not only wood products but also electrical equipment, and so other potential toxins and exposures and many things we could not even probably identify because of everything that would be involved in a fire.” (Dickson Dep. 29:6-12).

This testimony is consistent with the exposures described in the meta-analysis, above.

5). “Second, Claimant’s general testimony about ventilation as the presence of diesel fumes in the living quarters at the firehouse was contradicted by Chief Gray.” (FFCL Page 8, ¶ 26).

This statement is false and misleading. Chief Grey testified that the diesel fumes were currently not present in the firehouse at the date of the hearing on December 4, 2013. His



testimony is clear that the ventilation of diesel fumes was not present until nine years ago. Before that the only means of ventilation was by opening the doors. ( Hearing Tr. 29-4-16, Dec. 4, 2013). Mr. Aikele actually worked for the City of Blackfoot in a non-ventilated building for 18 years.

6). “Claimant initially reported to physicians that he “always” used personal protective equipment.” (FFCL P. 8, ¶ 26).

Dr. Dickson’s record on December 29, 2008, the first visit with Dr. Dickson states, “Although he has been religious in wearing his protective equipment during fires, he is required to walk through post-fire scenes in clean-up and also has extensive diesel fumes as he’s worked in the fire station while working on equipment and have needed to, in spite of open bay doors, still have poor ventilation in the back of the bay.” (JE, Volume 1, 2). This completely in unison with Dr. Dickson’s entire testimony. (Dickson, February 11, 2014).

Mr. Aikele was clear to all physicians, that he was faithful in using the protective equipment during the fire. Dr. Pfoertner’s record indicates, “The claimant admitted that over the past 18 years he has worn a fully contained breathing apparatus, whenever he performed interior firefighting work. (JE. Volume I, 2:75). There is no definition of “interior firefighting work.” Due to the unfortunate death of Dr. Pfoertner, the Claimant was unable to depose the doctor, to determine if “interior firefighting work” included all of Mr. Aikele’s activities as a firefighter, like “mop-up.” As Dr. Pfoertner and Mr. Aikele cannot define “interior firefighting work,” it is incorrect to assume that Mr. Aikele initially told physicians he “always” wore his protective equipment. The record is clear that there is no inconsistency in Mr. Aikele’s reporting to

physicians, as in his first report to a physician he declared he wore his protective equipment during the fire, but not during “mop-up.”

6). “Upon cross-examination in post-hearing deposition, Dr. Dickson acknowledged he did not have sufficient historical data to determine the cause of Claimant’s lung cancer.” (FFCL Pg. 9, ¶ 26).

This is also clearly erroneous. Upon cross-examination, Dr. Dickson specifically testified:

“Q: (By Mr. Fuller) I believe in one of your letters, this was June 8<sup>th</sup> letter of 2009, you had indicated that you didn’t have enough information to say for 100 percent certainty that there is no associated risk between what we’ve been talking about here. Is that still your opinion?

A: A hundred percent certainty in oncology is near impossible to have, and so you’ve to come back say, what do I think percentages are?

And if you ask me the questions today, what do I think the chances are that it was environmental versus bad luck? I would say 70/30, 60/40, but a much higher likelihood of environmental exposure than it is to bad luck.

But I couldn’t be a hundred percent certain with either of those.” (Dickson Dep. 67:18-68:8).

In his depositions, Dr. Dickson discussed his conversations with Mr. Aikele regarding Mr. Aikele’s potential exposures and the etiology of Mr. Aikele’s cancer:

“We talked. Kurt wondered, even from that very first visit, was his job as working as firefighter, did it lead to the cancer?”

And I remember talking to him a great deal, particularly that first visit even though it’s been years ago, about what he did in his occupation.

And what he described to me was after a fire was over, you know, he would wear his protective equipment during the time he was –during the active fire, when the

fire was over, and it was still smoldering, and they were walking through the scene, that he would spend oftentimes hours walking through scenes without having protective equipment being used at that point.” (Dickson Dep. 22:17-23:5).

In their conversations regarding the etiology of the causation of his cancer, Dr. Dickson stated:

“We did mention that in the mop-up procedures, there were many things that were still smoldering, not only wood products but also electrical equipment, and so other potential toxins and exposures and many things we could not even probably identify because of everything that would be involved in a fire.” (Dickson Dep. at 29:6-12).

7). “Dr. Dickson is a qualified oncologist whose opinion has been given serious attention. However, in the end, his criticism of the meta-analysis is unpersuasive; it evinces Dr. Dickson’s willingness to abandon science in favor of his emotional wish on Claimant’s behalf.” (FFCL Pg. 9, ¶ 27).

This statement is clearly erroneous and without foundation. While Dr. Dickson is a qualified oncologist, there is no testimony to conclude that he abandoned science or has “an emotional wish on behalf on the Claimant”. Dr. Dickson stated the exact opposite:

“But I’m arguing for one individual patient to say -- once again, if I look at one individual patient, I have got to say from *everything I know about the development of lung cancer* that it just makes sense to me that he had a toxic exposure that created him at a place where he could develop this.” (Dickson Dep. 62:16-21).

“I believe that his environmental exposures were substantial and *were more likely than not to have led him to a muta-genesis in his lungs* that created lung cancer much higher anything else I can think of.” (Id.at 58:15-19). (emphasis added).

Even more evidence that Dr. Dickson didn’t abandon science:

“Now, once again, I have been asked the questions: What do I believe? And I believe with Mr. Kurt Aikele, he had a substantial environmental exposure. And I believe that substantial environmental exposure is something that I would not have wanted to put myself through. And I believe with everything I know about the path of physiology of development of lung cancer and knowing in other groups where there has been associations, including things such as pollution studies and including things such as other hydrocarbon studies, that even though the meta-analysis showed that on average a firefighter may not have a higher risk, in this one patient, I still am left with this idea that either it was bad luck, which is very uncommon, versus an environmental exposure, which is common.” (Dickson Dep. 64:7-22).

Dr. Dickson’s causation opinion was based on medical evidence, scientific findings, and a medical, more probable than not, standard. There is absolutely no evidence in Dr. Dickson’s testimony to suggest he abandoned science for an “emotional wish on Claimant’s behalf.”

From testimony and the evidence in the records it is clear that the commission made multiple errors in determining the facts of this case.

**B). The Commissioner’s Decision Is Not Supported By Substantial And Competent Evidence.**

Substantial and competent evidence is “relevant evidence which a reasonable mind might accept to support a conclusion.” *Boise Orthopedic Clinic v. Idaho State Ins. Fund*, 128 Idaho 161, 164, 911 P.2d 754, 757 (1996).

Ultimately, this is a case of questions, what caused Mr. Aikele’s cancer? Were his cancer and death the result of his work environment or bad luck? Was Mr. Aikele’s cancer and his subsequent death caused by his occupation? Dr. Dickson and Dr. Zuckerman were both tasked with finding this answer. The Commission’s findings were as follows:

“Claimant was a non-smoker. Thus, having eliminated the cause of the overwhelming majority of lung cancer cases—tobacco smoke—we are left to compare the likelihood of various minority causes. *The physicians agree that the most significant among the potential remaining causes are occupational exposure and bad luck*; there are potentially a multitude of other minor causes, a few of which have been ruled out by testifying physicians.” (FFCL Pg. 9, ¶ 28) (*emphasis added*).

“Based on the evidence of record, we cannot say that Claimant has met his burden of proving that it is more probable than not that his lung cancer is occupationally related. In this regard, we find the meta-analysis, as explained by Dr. Zuckerman and Dr. Pfortner to be persuasive.” (FFCL Pg. 11, ¶ 32).

These findings, together, are not based on substantial and competent evidence. A reasonable mind cannot accept one conclusion without discrediting the other. First, they said, “The physicians agree that the most significant among the potential remaining causes are occupational exposure.” This finding is well founded in the record, as Dr. Zuckerman opined that Mr. Aikele’s cancer was 85% environmental. (Zuckerman Dep. 57:2-9, March 11, 2014). Additionally, Dr. Dickson testified, “I believe that his exposure into his occupation was substantially greater than any other risk factors, known or unknown.” (Dickson Dep. 54:12-15). Despite both physician’s opinions that there was an extremely high probability that Mr. Aikele’s cancer was related to his employment, the Commissioners erroneously determined that the meta-analysis (which addressed risk, not causation), as explained by Dr. Zuckerman was more persuasive as to causation.

**i) The Meta Analysis Only Addresses Risk Of Firefighters As Compared To The General Public, It Does Not Address Causation of an Individual Cancer**

The meta-analysis does not address causation: The meta-analysis as explained by the Commission in its Findings of Facts and Conclusions of Law, Defendant's Response Brief, the Meta-Analysis itself, and Dr. Zuckerman, only addresses the likelihood of a fireman contracting lung cancer when compared to the cancer rates in the general public and other worker groups. It does not address the causation of Mr. Aikele's cancer at all. It is a red herring. It only demonstrates that lung cancer for a never-smoker is unlikely for a member of the general public as well as the firefighter.

In its Findings of Facts and Conclusions of Law, the Commission admits that the meta-analysis was only comparing the risk of firefighters contracting lung cancer to that of the general population. (FFCL P. 6, ¶ 20).

The Defendant's described the meta-analysis as follows:

"Dr. Norman Zuckerman is a well-respected, widely published onocologist who has participated in clinical research of various types of cancer (Zuckerman Depo. 3/11/14, Ex. 1). In his report Dr. Zuckerman relied heavily upon a 2006 Meta-Analysis which is directly on point. It is entitled "Cancer Risk Among Firefighters: a Review and meta-Analysis of Thirty-Two Studies". (R. Vol. 1. Pp. 83-96) The Meta-Analysis is found in the "Journal of Occupations and Environmental Medicine", a renowned journal with an excellent reputation. (Zuckerman Depo 03/11/14, p 40, LL. 11-25). Because the Meta-Analysis involved thirty-two separate trials and was designed with appropriate statistical criteria with the results being peer-reviewed, Dr. Zuckerman called it a "powerful statement". (Zuckerman Dep 03/11/14 p. 43, LL. 17-22)

With regard to the risk of lung cancer for firefighters across the thirty-two studies, the meta-Analysis concluded, "There was agreement that cancer was unlikely between the criteria assessment and the not significant risk assessment for esophagus, liver, pancreas, larynx, lung, bladder, kidney, and Hodgkins Disease and all cancers, (emphasis added) R. Vol. 1 p. 86. In Table 5 assessing the likelihood cancer risk by criteria, lung cancer was found to be unlikely or

statistically insignificant. (R. Vol. 1, p. 94).” (Defendant’s Responsive Brief-Page 7).

The meta-analysis explained this “significant risk” in its summary:

“As noted in Table 1, approximately half of the studies used local regional, or national general population rates as the comparison group. These general population groups raise concern that the actual risk of cancer may be underestimated due to the healthy worker effect related to the strict physical entry requirements, maintenance of better physical fitness, and good health benefits. The healthy worker bias may be less pronounced, however, for such cancer than for conditions such as coronary heart disease. Furthermore, tobacco is unlikely a contributing factor because cancers known to be associated with smoking such as lung, bladder, and larynx were designated as unlikely and corresponding summary risk estimates were not statistically significant.” (DE 3:95).

The meta-analysis as explained by Dr. Zuckerman is as follows:

“Q: (By Mr. Fuller): Let’s go over to the third column on page 1192 of this study. As you go down the beginning paragraph starts, “a final check.” There’s a paragraph that reads as follows:

“There was agreement that cancer was unlikely between the criteria assessment and the not significant summary risk estimates for esophagus, liver, pancreas, larynx, lung, bladder, kidney and Hodgkin’s disease and all cancers.”

Mr. Aikele, in this particular case, suffered from a lung cancer. As you read the results of their study here, what does that mean to you, that it was not statistically significant?

A. (By Dr. Zuckerman) Well, based on the criteria they established and they concluded, at least on a statistical level, they used the term unlikely. What does that mean? *I don’t know. It’s a statistical analysis which is very difficult to apply to an individual patient.*

But on a statistical level, I think it’s a well-done article. I think they attempted to resolve what are the risks for firefighters? Which cancers are at increased risk?

I have not reviewed the current literature in this area. But at least back when I had seen the patient, I think this was probably the best article I could find that attempted to look at that issue. (Zuckerman Dep. 46:25-48:1, March 11, 2014).

\*\*\*

Q: Now, this is the study that you used in making your determination as to whether or not Mr. Aikele was likely to have obtained cancer from his occupation as a firefighter; is that correct?

A: From what I remember, I reviewed a lot - - I thought this article was a good one, so I annotated it in the letter.

Q: Based upon your experience, your knowledge of cancer, this article and all the other articles you've read, do you have an opinion as to whether or not Mr. Aikele's cancer, his lung cancer, was caused by his occupation as a firefighter?

A: I'll repeat what they said. It's unlikely.

Q: That is your opinion today on a more probable than not - -

A: Based on my review back then. I haven't updated myself on the literature.

Q: We use this criteria, doctor. Based on a more-probable-than-not basis; is that correct? Is it more probable than not that it was not created or caused by his occupation as a firefighter?

A: I agree with that." (Id. 49:1-22).

Additionally, Dr. Pfoertner, did not rely on the meta-analysis for his opinion, but he relied on the statistical risk analysis for his opinions, "For the reasons stated above, there is no evidence that cancer of the lung, of any cell type, was increased in firefighters, above that the general population." (JE, Volume I, 76). Again, this is a risk analysis.

The way the meta-analysis has been explained by the meta-analysis itself, Dr. Zuckerman, the Defense Brief, and the Commission, as it only addresses risk as compared to other groups: it does not address causation. Dr. Zuckerman, Dr. Pfoertner and the Commission erred when determining that risk equaled causation, as the meta-analysis does not address the



cause of Mr. Aikele's cancer, it only addresses the risk a firefighter might have in contracting lung cancer as opposed to a member of the general public. They compared apples to oranges. No matter what the risk of being diagnosed with lung cancer as a firefighter, Mr. Aikele was diagnosed with lung cancer, which caused his death. To find the answer of what caused Mr. Aikele's cancer, relying wholly upon risk is an incomplete analysis. This is especially true when comparing Dr. Zuckerman's testimony that there was an 85% chance that Mr. Aikele's cancer was caused by his environment. (Zuckerman Dep. 57:5-9, March 11, 2014). If both physicians agree that Mr. Aikele died from cancer caused by his environment, then an analysis of causation should have included Mr. Aikele's environment.

**ii) Dr. Dickson's Testimony Addresses Causation Of Mr. Aikele's Cancer**

Dr. Dickson's reasoning takes all the evidence and follows it to its natural end. Dr. Dickson applies the meta-analysis to Mr. Aikele as follows:

Steve, and, once again, in my opinion, I think I've got to be clear on this, I know the meta-analysis, I've reviewed the literature, I understand the pathophysiology of the development of lung cancer. I understand the pros and cons of making a diagnosis.

I believe that his environmental exposures were substantial and were more likely than not to have led him to the mutagenesis in his lungs that created lung cancer much higher than anything else I can think of. (Dickson Dep. 58:9-19).

Dr. Dickson's logical breakdown was correct, and a proper analysis of causation based on the findings given by the commission, should have looked like this:

1. Mr. Aikele was a firefighter for the City of Blackfoot.

2. Firefighters don't have a higher likelihood of contracting lung cancer than the general public.
3. Mr. Aikele is a member of the general public.
4. Members of the general public have a 85% chance of contracting lung cancer from environmental exposure.
5. Most significant among the potential remaining causes is occupational exposure.
6. The only physician who looked at Mr. Aikele as a member of the general public was Dr. Dickson.
7. Dr. Dickson opined that, based on all the information available, Mr. Aikele's cancer was more likely than not caused by his employment.

Instead Dr. Zuckerman and the Commissioners cut their opinions short and stopped their investigation as to causation after step number 2 of 7, and rely wholly upon a meta-analysis, which they refer to as a "preponderance of the evidence," (FFCL P. 11, ¶ 35) which was defined in terms of risk and not causation.

Imagine if all worker's compensation claims were decided on the same logic that the Commission has used, by relying wholly upon the statistical analysis. Sureties could use a meta-analysis to determine causation of any issue. For example, a meta-analysis (like Dr. Zuckerman opined could be made to say anything) that paralegal's don't suffer herniations of the spine at a greater likelihood than the general public. Then a paralegal hereniates a disc in her lower back picking up a worker's compensation file. Under the logic used by the commission in their decision, that paralegal would have no recourse, in that her chances of herniating a disc wasn't

statistically significant compared to the general public. The commission would then discredit a treating physician who listened to the injured paralegal about how her injury occurred.

The facts are clear. Dr. Dickson performed the necessary steps to answer the ultimate questions of the etiology of Mr Aikele's cancer. He used all the scientific and medical evidence that was made available and didn't abandon his intuition for statistics. (Dickson Dep. 58:9-19). Once he determined that Mr. Aikele was a member of the general public by use of the meta-analysis, he then continued by looking at Mr. Aikele's environments. (Dr. Dickson 64:7-22). He discussed smoking, where the Claimant grew up, radon exposure, and pollution in Blackfoot, he had the proper historical information to make his opinion. Dr. Dickson then determined that the Claimant's chances of his cancer being related to his occupation, were more likely than not, related to his occupation as a firefighter. (Dickson Dep. 23:10-14).

**C). The Commission's Decision is Erroneous as a Matter of Law**

An occupational disease is one that is "due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process for employment . . ." See Idaho Code § 72-102(22). The terms "contracted" and "incurred," when referring to an occupational disease, are deemed to be the equivalent of "arising out of and in the course of employment." See Idaho Code § 72-102(22)(b). Under Idaho Code § 72-439, an employer cannot be held liable for an occupational disease unless such disease is actually "incurred" in that employment. Therefore, as in an accident/injury case, one who claims benefits for an occupational disease must show that he developed a disease while performing the work he was employed to perform, and that there is a causal connection between

the conditions under which the work was performed and the resulting disease. *Langely v. State Idus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995); *Hagler v. Micron Tech., Inc.*, 118 Idaho 596, 798 P.2d 55 (1990).

Idaho Code § 72-438 (12) enumerates a number of specific occupational diseases including respiratory diseases incurred by firefighters:

“Compensation shall be payable for disability or death of an employee resulting from the following occupational diseases:

Cardiovascular or pulmonary or respiratory diseases of a paid fireman, employed by a municipality, village or fire district as a regular member of a lawfully established fire department, caused by overexertion in times of stress or danger or by proximate exposure or by cumulative exposure over a period of four (4) years or more to heat, smoke, chemical fumes or other toxic gases arising directly out of, and in the course of his employment.”

The respiratory disease of a fireman which is caused by cumulative exposure to harmful substances over a period of at least four years is a compensable occupational disease. Pursuant to the general and specific tenets of occupational disease law referenced above, Claimant bears the burden of proving that the lung cancer from which he suffered was causally related to the claimed occupational exposure. To prove causation Claimant must put on medical proof establishing that it is more probable than not that his condition is work related. *Deav v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973), overruled on other grounds by *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

The Commission ignored the statutes on pulmonary disease being associated with firefighters. According to paragraph 34 of the Commissioners Findings of Facts and Conclusions of Law: “The record does not show whether or how much exposure Claimant

experienced. It does not indicate that any other Blackfoot firefighter has contracted lung cancer. These two factors cut against Dr. Dickson's opinion and favor those of Drs. Pfoertner and Zuckerman."

The Claimant disputes this finding because the evidence and testimony demonstrated that Mr. Aikele was exposed to hundreds of carcinogenic fires over the course of his twenty-six (26) year career as a firefighter, and he was exposed to 18 years of diesel fumes inside an unventilated firehouse. (Joint Exhibits, Volume III, 21:1-14; Hearing Tr. 29:4-16, December 4, 2013). According to I.C. § 72-438 (12) firemen are at risk for pulmonary diseases, like lung cancer. The Commission ignored I.C. § 72-438, which specifically states that firemen contract pulmonary diseases. As a matter of law, the Commissioners have asked the Claimant to carry an even heavier burden than required by I.C. §72-438(12).

Both doctors opined there is no way of proving exactly when and where a firefighter's cancer originated. Specifically, Dr. Zuckerman opined, "No, again, my concern is that there's no way to prove or disprove in an individual case. And this is what I tell my patients, is your exposure to this particular toxin or event caused or not caused the cancer." (Zuckerman Dep. 61:13-17, March 11, 2014). This is exactly why the above statutes exist: to protect firemen and their survivors in case the worst-case scenario occurs. They exist so that the dependants are not asked to determine the impossible in an effort to prove the more probable. Here, the Commissioners ignored the statutes which state that firefighters risk pulmonary disease. The Commissioners were looking for evidence, which by expert testimony is impossible to ascertain. As the Claimant could not provide the impossible, the Commissioners determined that

firefighters do not get pulmonary diseases, like lung cancer. They relied on evidence which was contrary to the statutes. The Commission's Findings of Facts and Conclusions of Law clearly demonstrate the Commissioners did not rely on I.C. § 72-438 (12) when they determined that the Claimant had not suffered an occupational disease. The decision, if left to stand, renders I.C. §72-438 (12) partially moot, as the decision establishes firefighters cannot get occupationally related lung cancer.

If not overturned, the Commission's decision gives precedent to sureties to deny every fireman bringing a lung cancer claim in perpetuity. The decision is clear that the Commissioners asked the Claimant to prove elements of his case, not required by the statutes, and then used those missing impossible elements against the Claimant.

### **Conclusion**

This claim has always been about one question: causation. The Commission has answered the wrong the question. Their decision answers the question, of whether firefighters are at risk for lung cancer. That is not the question they were asked to decide, that question was answered by the statutes that say firemen, due to the nature of the their employment, are at risk for pulmonary diseases. That question had already been answered by I.C. § 72-438(12), and that answer is supposed to protect firemen and their dependents. However, the question they were asked to decide was, on a more likely than not, standard: Did Mr. Aikele's occupation as a firefighter for the City of Blackfoot cause his lung cancer, which ultimately took his life. As both physicians discussed, Mr. Aikele's lung cancer had a high probability of being environmental. Therefore, an environmental analysis is needed to determine causation. Dr.

Zuckerman had an opportunity to ask Mr. Aikele regarding his environment, failed to do so, and he abandoned his intuition for statistics. Dr. Dickson, reviewed the meta-analysis, researched documents, and discussed Mr. Aikele's environment over the course of the treatment. Based on this analysis, Dr. Dickson was unequivocally clear that Mr. Aikele's cancer and therefore his death was more likely than not, related to his employment.

As the Commission's decision is not supported by substantial and competent evidence, the Claimant asks that the Court reverse the Commission's Findings of Facts and Conclusions of Law.

Dated: 4-14-15

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. Adams', written over a horizontal line.

Andrew Adams, Claimant's Attorney