SUPREME COURT OF ARIZONA

BENCHMARK INSURANCE c/o BENCHMARK ADMINISTRATORS, Petitioner Insurance Carrier, SUPERSTITION FIRE & MEDICAL, Petitioner Employer, vs. ROBERT VANDEKROL, Respondent Employee, INDUSTRIAL COMMISSION OF ARIZONA, Respondent.	No. CV-23-0211-PR Arizona Court of Appeals 1 CA - I C: 22-0046 Industrial Commission of Arizona Claim No.: 20210280125 Carrier Claim No.: 7138292

SUPPLEMENTAL BRIEF OF RESPONDENT EMPLOYEE

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WHETHER THE COURT OF APPEALS ERRED IN FINDING THAT AMENDMENTS TO A.R.S. §23-901.01 APPLIED RETROACTIVELY TO THE CLAIM FOR BENEFITS IN THIS CASE

STATEMENT OF THE CASE AND BACKGROUND

In the Worker's Report of Injury, Vande Krol (hereinafter "Respondent") indicated that his 18 plus years of firefighting activities and exposure to carcinogens lead to the development of his brain cancer. (Claims File 00001, hereinafter "CF").

The claim for benefits was denied by Notice of Claim Status dated February 18, 2021, issued by Benchmark Administrators LLC for Benchmark Insurance Company (hereinafter "Petitioners") (CF00100), and a Request for Hearing was filed on May 4, 2021, by Vande Krol and his attorney. (Hearing File 00002, hereinafter "HF"). Hearings were held and the original Decision Upon Hearing and Findings And Award For Non-Compensable Claim was issued April 22, 2022. (HF00238-244). A Request for Review was filed and the Decision Upon Review Affirming And Supplementing Prior Decision Upon Hearing And Denying Request to Reopen Record was issued September 23, 2022. (HF00420-22).

Vande Krol filed a Petition for Special Action with the Court of Appeals on October 19, 2022. That court issued their Opinion on July 11, 2023. The Motion for Reconsideration was filed by the Petitioners on July 25, 2023, and was denied

on July 28, 2023. The Petitioners then filed with the Supreme Court on August 14, 2023, and this Court granted the Petition to Review on December 5, 2023. This Court has jurisdiction pursuant to A.R.C.A.P. Rule 23.

This is a case about Robert Vande Krol, a firefighter who developed brain cancer. Respondent submits that this was caused by his exposure to carcinogens while performing his occupation as a firefighter.

The issue for this Court to decide is whether the Court of Appeals erred regarding application of the 2021 cancer statute, A.R.S. §23-901.01, and the setting aside of the Decision and Decision Upon Review of the ALJ.

The workers' compensation laws at issue here were passed because the citizens, through the Legislature, have chosen to recognize the increased incidence of cancers among firefighters. This has been recognized because of their occupational exposures to carcinogens. Here, and across the country, changes are being made to reflect this recognition. At this time, almost every state has laws which support presumptions for firefighters who are diagnosed with cancer, and thus they are eligible for workers' compensation benefits.

Firefighters are still fighting outdated interpretations of the law in cancer cases for workers' compensation benefits. The employers and insurers argue time and again that the scientific knowledge is not enough to say for sure whether one

carcinogen caused a specific type of cancer. In 2022, the IARC declared the occupation of firefighter to be a known cause of cancer. (HF00410-412).

The evidence presented in these cases where firefighters are pursuing workers' compensation benefits are defended on the rigors of scientific method and should be analyzed based on the goal to be achieved by the legislation and the science presented to the legislature. These cases are the basis for creating presumptions in workers' compensation cancer claims by firefighters.

STANDARD OF REVIEW

In *Grammatico*, the Arizona Supreme Court stated:

> ¶ 1 Article 18, Section 8 of the Arizona Constitution mandates that an employee receive workers' compensation if the employee is injured in "any accident arising out of and in the course of . . . employment," and the injury "is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer or its agents or employee or employees to exercise due care."
> *Grammatico v. Industrial Comm'n*, 211 Ariz. 67, 68, 117 P.3d 786, 787 (2005).

In reviewing Decisions from the Industrial Commission of Arizona (hereinafter "ICA"), this Court has stated: "Although deference is owed to the ALJ's factual findings on appeal, … questions requiring the interpretation of a statute are issues of law, which we review *de novo*." *Carbajal v. Industrial Comm'n*, 218 Ariz. 578, ¶12, 190 P.3d 737 (App. 2008) (*citing Schwarz v. City of Glendale*, 190 Ariz. 508, 510, 950 P.2d 167, 169 (App. 1997)) (citation omitted).

Arizona courts have discussed interpreting the statutes:

> We review questions of statutory interpretation *de novo*. *Salt River Project v. Industrial Comm'n*, 179 Ariz. 280, 282, 877 P.2d 1336, 1338 (App. 1994). The goal of statutory interpretation is to give effect to the legislature's intent; the language used by the legislature is primary evidence of that intent. See *id*.
> *Universal Roofers v. Industrial Comm'n*, 187 Ariz. 620, 622, 931 P.2d 1130, 1132 (App. 1996); see generally *Holsum Bakery v. Industrial Comm'n*, 191 Ariz. 255, 955 P.2d 11 (App 1997) (the Court of Appeals considering public policy of Workers' Compensation system in Arizona); see also *Industrial Comm'n v. Orizaba Mining Co.*, 61 Ariz. 152, 145 P.2d 850 (1944) (Arizona Supreme Court examining the public policy underlying the Workmen's Compensation Act).

Vande Krol requests this Court review this matter in light of this mandate, to effectuate the purpose of workers' compensation laws and the clear legislative intent to protect firefighters from the perils of their occupational exposure to carcinogens, leading to Vande Krol's development of brain cancer. The Courts' interpretations of that law should be liberal in order to effectuate that purpose. *Anton v. Industrial Comm'n*, 141 Ariz. 566, 688 P.2d 192 (App. 1984).

ARGUMENT

The ALJ found that A.R.S. §1-244 was controlling, and therefore, Vande Krol was not entitled to the presumption under A.R.S. §23-901.01 *et seq.* (2021).

Petitioners here argue that pursuant to A.R.S. §1-244 "(n)o statute is retroactive unless expressly declared therein." Therefore, they argue, application

of the 2021 cancer statute is precluded. Their reasoning is that the 2021 statute has no language which states it applies retroactively.

There is much deeper analysis into the retroactive application questions in Arizona case law as discussed by the Court of Appeals. Arizona has established and perpetuated an exception to the general rule requiring specificity in the legislation for a law to be applied retroactively. "Under the exception a statute does have retroactive effect if it is merely procedural and does not affect an earlier established substantive right." *St. Joseph's Hospital & Medical Center v. Superior Court*, 164 Ariz. 454, 457, 793 P.2d 1121, 1124 (1990) (*citing Bouldin v. Turek*, 125 Ariz. 77, 78, 607 P.2d 954, 955 (1979)).

This Supreme Court has examined these questions in *Clear Channel*:

> ¶ 11 "No statute is retroactive unless expressly declared therein." A.R.S. § 1-244 (2002). However,
> [t]his court has previously created an exception to the general rule requiring express language of retroactivity. Enactments that are procedural only, and do not alter or affect earlier established substantive rights may be applied retroactively. Even if a statute does not expressly provide for retroactivity, it may still be applied if merely procedural because litigants have no vested right in a given mode of procedure.
> *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 547-48 ¶ 11, 105 P.3d 1163, 1166-67 (2005) (*citing Aranda v. Industrial Comm'n*, 198 Ariz. 467, 470 ¶ 11, 11 P.3d 1006, 1009 (2000)).

Arizona has passed the statutes to create a cancer presumption, and presumptions in the law exist for several reasons. Crane McClellen in his volume ARIZONA COURTROOM EVIDENCE MANUAL states:

> Under Arizona law, there are two types of presumptions as determined by their basis: (1) those presumptions that have a factual basis; and (2) those presumptions that exist independent of any factual basis. Examples of the first are that a person absent for 5 years is presumed dead, and property acquired during a marriage is presumed to be community property; examples of the second are that everyone is presumed to have exercised due care, and everyone is presumed to know the law. Further, there are three types of presumptions as determined by their effect: (1) conclusive or irrebuttable presumptions; (2) presumptions affecting the burden of production of evidence; and (3) presumptions affecting the burden of proof.… **Presumptions therefore are not so much rules of evidence as they are rules of procedure that control the disposition of cases in the absence of evidence to rebut the presumption.**
> Crane McClennen, ARIZONA COURTROOM EVIDENCE MANUAL, Art. 3 (3rd ed. 1997 & Supp. 1999) (emphasis added).

Thus, presumptions are procedural. Furthermore, the Supreme Court in *Flores* adopted the reasoning of the South Dakota Supreme Court regarding presumptions:

> A presumption is not evidence of anything, and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue.
> *Flores v. Tucson Gas, Electric Light & Power Co.*, 54 Ariz. 460, 466, 97 P.2d 206, 208 (1939) (*citing Peters v. Lohr*, 24 S.D. 605, 605, 124 N.W. 853, 855 (1910)).

Again, presumptions are procedural, and procedural changes may be applied retroactively.

> The Arizona Supreme Court continued in *Clear Channel*:
>
> Thus, 'statutory changes in procedures or remedies may be applied to proceedings already pending except where the statute effects or impairs vested rights.'

> *Clear Channel*, 209 Ariz. at 548 ¶ 11, 105 P.3d at 1167 (*citing Wilco Aviation v. Garfield*, 123 Ariz. 360, 362, 599 P.2d 813, 815 (App. 1979)).

The Court of Appeals in *Allen* also discussed vesting of rights:

> Litigants do not have a vested right in any given mode of procedure, *Denver and Rio Grande Western Railroad Company v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 87 S.Ct. 1746, 18 L.Ed.2d 954 (1967), and a **statute relating solely to procedural law such as burden of proof and rules of evidence can be applied retroactively**. *United Securities Corporation v. Bruton*, 213 A.2d 892 (D.C. App. 1965) [emphasis added].
> *Allen v. Fisher*, 118 Ariz. 93, 94, 574 P.2d 1314, 1315 (App. 1977).

Arizona Courts have stated that there is no vesting of a right in any given mode of procedure, and thus Respondent submits that the procedural changes of the 2021 statute can be considered here, as it merely prescribes the method of enforcing such rights or obtaining redress. *Allen* is cited again much more recently in *Rio Rico*:

> Legislation which defines, creates, or regulates rights is substantive. Legislation which prescribes the manner by which rights are implemented or enforced is procedural. *Allen v. Fisher*, 118 Ariz. 93, 96, 574 P.2d 1314, 1315 (App. 1977). A single legislative act or statute can be composed of elements that are both substantive and procedural. *Rio Rico Properties, Inc. v. Santa Cruz County*, 172 Ariz. 80, 89, 834 P.2d 166, 175 (Ariz. Tax 1992).

This Court should consider the 2021 statute as a procedural change as it alters the burden of proof and prescribes the manner by which rights are enforced. Thus, procedural changes that do not affect substantive rights can be retroactive.

The Supreme Court has explained the distinction between procedural law and substantive law:

> In general, procedural law relates to the manner and means by which a right to recover is enforced or provides no more than the method by which to proceed. *See State ex rel. Miller v. Beardsley Indus. Property,* 173 Ariz. 19, 24, 839 P.2d 439, 444 (App. 1992). Substantive law 'creates, defines and regulates rights' while a procedural law establishes only 'the method of enforcing such rights or obtaining redress.' *State Compensation Fund v. Fink*, 224 Ariz. 611, 614 ¶14, 233 P.3d 1190, 1193 (App. 2010) (*citing Aranda*, 198 Ariz. at 470, ¶12, 11 P.3d at 1009 (*quoting Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 138, 717 P.2d 434, 442 (1986) *superseded by statute on other grounds as recognized by Dykeman v. Engelbrecht,* 166 Ariz. 398, 400-01, 803 P.2d 119, 121-22 (App.1990))).

Also, as shown in Arizona case law, if the changes are procedural, exceptions are recognized by the Arizona courts:

> "As in other jurisdictions, Arizona courts have engrafted an exception onto [the] general rule [set forth in §1-244]. Under [this] exception, a statute does not have an [impermissible] retroactive effect if it is merely procedural and does not affect an earlier established substantive right." *In re Shane B.*, 198 Ariz. 85, 87 (2000) (alterations in original) (*quoting Bouldin v. Turek*, 125 Ariz. 77, 78 (1979).

The amendments to A.R.S §23-901.01 since the beginning have been to establish a presumption that firefighters are exposed to cancer causing agents which have led to illness and death. As a result, they are entitled to coverage under the provisions of the amended occupational disease statute. The methods of establishing the evidence to allow the presumption is what has changed, not the substantive rights

to the claim of benefits. In *State v. Birmingham*, the Supreme Court again discussed the distinction of procedural and substantive law:

> the substantive law is that part of the law which creates, defines and regulates rights; whereas the adjective, remedial or procedural law is that which prescribes the method of enforcing the right or obtaining redress for its invasion. It is often said the adjective law pertains to and prescribes the practice, method, procedure or legal machinery by which the substantive law is enforced or made effective.
> *State v. Birmingham*, 96 Ariz. 109, 110 (1964).

The Supreme Court provided a very reflective and in-depth analysis of these issues in *Hall*. The case arose from the change in the enacted statue with respect to comparative negligence and contributory negligence defenses in Arizona. Respondent submits that significant portions of the Courts' analyses apply here.

"Any inquiry into the effect of a statute on antecedent events must have as its touchstone a consideration of A.R.S. § 1-244." *Hall*, 149 Ariz. at 138-39, 717 P.2d at 442-43 (*citing Bouldin v. Turek*, 125 Ariz. at 78, 607 P.2d at 955).

Continuing, the *Hall* Court stated:

> 'Substantive' is merely a label we apply to certain legal rights. The conclusion that a particular legal right is substantive, in contrast to procedural, does not mean that it can never be modified or abolished by the legislature. 'The rule is that any right conferred by statute may be taken away by statute before it has become vested.'
> *Hall*, 149 Ariz. at 138, 717 P.2d at 442 (*citing In re Dos Cabezas Power District*, 17 Ariz. App. 414, 418, 498 P.2d 488, 492 (1972)).

Additionally, the Court stated:

> When the defendant asserts that substantive legal rights cannot be retroactively impaired, he **cannot mean that substantive rights may never be altered**. Such a contention would sweep far too broadly, since substantive rights, whether statutory or common law, may be abrogated before vesting. *In re Dos Cabezas Power District, supra*. If the rule were otherwise, our continually changing landscape of ideas and laws would instead resemble a petrified forest populated by the outmoded concepts of the past.
> *Hall*, 149 Ariz. at 139, 717 P.2d at 443 (emphasis added).

To further evaluate these issues of retroactive application, the Court in *Hall* stated:

> The critical inquiry in retroactivity analysis is not whether a statute affects a substantive right but whether a statute affects a vested right. Thus the implicit meaning of the statement 'substantive rights may not be retroactively impaired' is 'substantive rights may not be impaired once vested.'
> *Hall*, 149 Ariz. at 139-40, 717 P.2d at 443-44.

> The distinction between substantive and vested rights, while implied by the decisions of this Court and the Court of Appeals, has rarely, if ever, been explicitly delineated. Even those cases which have employed vested rights terminology usually fail to consider what constitutes a vested right and when it accrues. See, e.g., *Wilco Aviation v. Garfield*, 123 Ariz. 360, 362, 599 P.2d 813, 815 (1979) ('statutory changes in procedures or remedies may be applied to proceedings already pending except when the statute effects or impairs vested rights'), *State v. Sanchez*, 119 Ariz. 64, 66, 579 P.2d 568, 570 (1978) ('a statute can not [sic] be applied retroactively to impair a vested right.')
> *Hall*, 149 Ariz. at 140, 717 P.2d at 444.

The Court of Appeals also continued this analysis in *State v. Estes Corp.*:

> "[t]he critical inquiry in retroactivity analysis is not whether a statute affects a substantive right but whether a statute affects a vested right.

> Thus, the implicit meaning of the statement 'substantive rights may not be retroactively impaired' is 'substantive rights may not be impaired *once vested*." *Hall v. A.N.R. Freight Sys., Inc*., 140 Ariz. 130, 139-40 (1986) (emphasis original). "**A vested right is one which is absolute, complete, and unconditional to the exercise of which no obstacle exists, and which is immediate and perfect in itself "not dependent upon a contingency**.*"*
> *State v. Estes Corp*., 27 Ariz. App. 686, 688 (1976) (emphasis added) (*quoting Hutton v. Autoridad Sobre Hogares de la Capital*, 78 F.Supp. 988 (D.C. Puerto Rico 1948)).

A firefighter seeking recovery pursuant to A.R.S. §23-901.01 both in the beginning, and now with further amendments, must establish the elements of the statute to obtain the right to the presumption. The presentation of the evidence is the requirement to obtain the right, and this is the contingency to acquiring the **vested right**. If the law is to be applied retroactively it is the procedural change which is affected and only thereafter do the rights to benefits become vested.

The right to workers' compensation benefits in this matter is not absolute, complete, or unconditional, until the presentation of the evidence satisfies the statutory requirements, therefore, the statute may be applied retroactively. *See State v. Estes Corp*., 27 Ariz. App. 686.

Application of the statute as amended does not take away the rights of the Petitioners here. The Petitioners have the right to establish by "clear and convincing evidence that there is a specific cause of the cancer other than an occupational

exposure to a carcinogen." A.R.S. §23-901.09(E). If this is accomplished, they have the ability to rebut the presumption.

Furthermore, this Court is allowed to consider the presumption statute in its current form as there has been no final judicial decision. In *Bush* the courts were analyzing a change in A.R.S. §23-1043.01, the determination of coverage for heart attacks. *Bush v. Industrial Comm'n*, 136 Ariz. 525, 667 P.2d 225 (App. 1983). The Court describes its analysis of whether changes in the legislation can be considered only for prospective application. Seemingly, the parties agreed that the changed statute could only have prospective application. However, the Court stated:

> The parties here have tacitly conceded that A.R.S. § 23-1043.01 is not controlling in the resolution of this case and can only have prospective application.
>
> We agree that purely as a matter of law, aside from the retroactivity of statutes, A.R.S. § 23-1043.01 can only be applied prospectively. See, Bouldin v. Turek, 125 Ariz. 77, 607 P.2d 954 (1979) [sic]. However, it would be autocratic in the extreme for the judiciary to ignore such a clear legislative expression of public policy, especially when the policy decision is so rightfully within the province of the legislature to make.
>
> …
>
> We further hold in keeping with general principles of retroactivity of judicial decisions which make a change in the law, that our holding here is prospective in nature only, in the sense that it cannot be applied to invalidate awards or judgments which have become final. *Bush*, 136 Ariz. at 228.

The Court of Appeals stated that in general, principles of retroactivity of judicial decisions which make changes in the law would be prospective; however,

they also state they cannot be applied to invalidate awards or judgments which have become **final**.

The clear reasoning here is that there are still exceptions if a statute is affecting procedural rights. The Court in *Clear Channel* also stated: "[e]very right or remedy created solely by a modified statute disappears or falls with the modified statute unless carried to final judgment before the repeal or modification." *Clear Channel*, 209 Ariz. at 547 ¶ 9, 105 P.3d at 1166 (*citing City of Tucson v. Whiteco Metrocom, Inc.*, 194 Ariz. 390, 394 ¶¶ 9, 12, 983 P.2d 759, 763 (App. 1999)). The Court here indicated again that a "final judgment" is necessary, or the "repeal or modification" can be considered. Here, for Vande Krol there is no "final judgment."

The Arizona Courts often discussed consideration of the intent of a statute in statutory construction and modification:

> The general rule is that the court may look to prior and contemporaneous statutes in construing the meaning of a statute which is uncertain and on its face susceptible to more than one interpretation. If reasonably practical, a statute should be explained in conjunction with other statutes to the end that they may be harmonious and consistent. If the statutes relate to the same subject or have the same general purpose--that is, statutes which are in *pari materia*--they should be read in connection with, or should be construed together with other related statutes, as though they constituted one law. As they must be construed as one system governed by one spirit and policy, the legislative intent therefor [sic] must be ascertained not alone from the literal meaning of the wording of the statutes but also from the view of the whole system of related statutes. **This rule of construction applies even where the statutes were enacted at different times**, and contain

> no reference one to the other, and it is immaterial that they are found in different chapters of the revised statutes. **In construing the statute, endeavors should be made to trace the history and legislation on the subject in order to ascertain the consistent purpose of the legislation**.
> *State ex rel, Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970) (emphasis added).

Also, in *State ex rel, Larson*, this Court has clearly set forth this rule: "We have repeatedly held that the cardinal rule of statutory construction is that we must, if possible, ascertain the intent of the legislature." *State ex rel, Larson,* 106 Ariz. at 122, 471 P.2d at 734 (*citing Estate of Stark*, 52 Ariz. 416, 82 P.2d 894 (1938)). In *Rio Rico,* again Arizona has recognized:

> There is a substantial body of law upon which a court may draw in order to assist it to discern just what was the legislative intent. The Court may look to the legislative history which led to the passage of the act. It may also consider subsequent legislation on the same subject if no other clues more compelling exist… .
> *Rio Rico*, 172 Ariz. at 89, 834 P.2d at 175 (*citing Federal Express Corp. v. Skelton*, 265 Ark. 187, 578 S.W.2d 1, 7-8 (1979)).

Vande Krol submits that Petitioners' complete reliance upon A.R.S. §1-244 is not supported by the law and facts in this case. The premise that a statute must expressly state that there is retroactivity is incomplete and incorrect. Our courts also look to legislative intent:

> This court reviews legal questions, including statutory interpretation, de novo, "without deference to any previous determination that may have been made on the question by the agency." []. **This court interprets statutes to give effect to the legislature's or voters' intent**,

> looking first to the statutory language itself. *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 383 ¶ 8 (2013). When construing the workers' compensation statutes, **courts should favor interpretations that favor making the worker whole and that promotes a worker's possibility for redress**. *See Carbajal v. Indus. Comm'n of Ariz.*, 223 Ariz. 1, 3 ¶ 10 (2009) [emphasis added].
> *Innovative Work Comp Solutions, LLC v. Industrial Comm'n*, No. 1 CA-IC 21-0038 ¶ 6 (June 14, 2022) (Memorandum Decision) (*citing Baker* and *Carbajal* which are Arizona Supreme Court Decisions).

Respondent argues that the legislative history, and intent of the legislature, is to grant statutory benefits under the workers' compensation system to firefighters who are diagnosed with cancer. This is applicable here in determining whether to apply the 2021 statute. Vande Krol asserts that by the passage and signing of the cancer presumption statutes culminating in the 2021 statute, the public policy intent is to protect firefighters. Recognizing this intent, this Court should find that application of the current statute is allowed.

There was yet another analysis about vested rights performed by the *Hall* Court. Ultimately, the Court held:

> We believe that a right vests only when it is actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be **manifestly unjust**.
> …
> When a lawsuit is commenced the defendant gains 'an immediate fixed right' to assert any substantive defense, which may not thereafter be prejudiced by the state.
> *Hall*, 149 Ariz. at 140, 717 P.2d at 444 (emphasis added) (*citing In re Dos Cabezas*, 17 Ariz. App. at 418, 498 P.2d at 492).

In part then, the issues to be considered here are whether application of the current statute is "manifestly unjust" to the interests of Petitioners.

We now need to determine what the true value of their vested right or interest means. In *Red Rover*, the Supreme Court held that equity is to be considered in industrial injury cases: "We hold, therefore, that the [Industrial] commission in making an award necessarily has the right to consider and make the proper application of the rules of equity…" *Red Rover Copper Co. v. Industrial Comm'n*, 58 Ariz. 203, 208, 118 P.2d 1102, 1107 (1941).

There are a plethora of insurance laws, rules, and regulations. Specifically, this includes laws related to assessing payment of benefits for injured workers. The Petitioners in this case clearly believe retroactivity will impact their obligation to pay benefits to Vande Krol, when their insurance premium determinations were evaluated using statutes which existed in 2017. These premium assessments would have been aligned with their projected costs based upon the 2017 statute. However, certainly there should have been an appropriate premium assessment based upon potential cancer cases which would accrue, considering the increasing number of firefighters who were facing the diagnosis of cancer as an occupational injury.

The question arises, whether the reliance upon retroactive application of the current statue would be "manifestly unjust."

In 2021, when A.R.S. §23-901.09 was passed, the Legislature also passed A.R.S. §23-1701 *et seq*. Contained in this legislation, themed "firefighter cancer reimbursement for municipal payors," are provisions which allow insurance carriers to make claims with the Industrial Commission of Arizona for payments made pursuant to A.R.S. §23-901.09(A), as defined in the current cancer statutes. The requirements in A.R.S. §23-1701 *et seq*. are satisfied in the instant case.

Additionally, A.R.S. §20-359 allows for deviation from other worker compensation premium rates for coverage of firefighters and fire investigators to address the anticipated increase in losses and expenses for claims that are compensable pursuant to A.R.S. §23-901.09.

It would be manifestly unjust for Petitioners to deny the payment of this claim when they can seek reimbursement from the Industrial Commission of Arizona under the statutory construction. Vande Krol's claim should be compensable.

CONCLUSION

For the foregoing reasons Respondent Vande Krol submits that this Court should hold that the 2021 statute should apply, either because:

A. It is not applied retroactively as Vande Krol has met the two prongs of the required burden of proof as stated by the Court of Appeals;

B. Or, it is proper to apply it retroactively as opposing counsel knew from the outset of the litigation that Vande Krol would be arguing the newest statute applied, and they did not mount such a defense:

   a. And it is permissible to be applied retroactively as it is procedural;

   b. Or it is permissible to apply retroactively as it is not affecting substantive vested rights, as there is no vested right to a given mode of procedure;

   c. Or, if it is found to be affecting a vested substantive right, it is not manifestly unjust.

Pursuant to *Kennecott*, Vande Krol requests the Supreme Court set aside the Decision and Decision Upon Review of the ALJ, and return the matter to the ICA to conduct *de novo* proceedings, at which time the Petitioners here could present any defense they deem relevant. *Krol v. Industrial Comm'n*, 1 CA-IC 22-0046 (App. 2023) (*citing Kennecott Copper Corp. v. Industrial Comm'n*, 62 Ariz. 516, 521-22, 528 (1945)).

RESPECTFULLY SUBMITTED January 2, 2023.

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