

SJR 30 Report

Occupational Disease Presumptions

Submitted to Jerry Keck, Administrator
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By

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Occupational Disease Presumptions

Background

A presumptive occupational disease law is a law that links a particular occupation with a disease or condition that has been shown to be or is considered to be a hazard associated with that occupation. As a result of this linkage, if an individual employed in the occupation covered by the presumption contracts a disease or condition that is specified in the presumptive law, then that disease or condition is presumed to have come from that occupation. In this case, the burden of proof shifts from the employee to the employer to demonstrate that the condition was not in fact associated with the occupation but with another cause.¹ This is considered a “rebuttable presumption” since the employer has the opportunity to rebut the presumption by showing that the condition was caused by other factors, although this is very difficult.

The presumptions vary from state to state in terms of what occupational diseases are covered for each profession according to a study done by the Washington State’s Law Enforcement Officers’ and Fire Fighters’ Plan 2 Retirement Board in 2007. As of the date of their study, most of the states had an explicit occupational disease presumption in statute. At least 38 states (76%) had an explicit occupational disease for fire fighters and 28 states (56%) had an explicit occupational disease presumption for law enforcement. Several states also had included groups such as corrections officers, state police and volunteer fire fighters.²

The Public Policy Debate

In the case of public safety officers, particularly firefighters, the nature of their occupations take them into areas where there may be known and unknown exposures when they are attempting to protect citizens and property. Numerous states have enacted laws to ensure that public safety officers and their families are protected medically and financially from the hazards of their occupations and the risks they take on behalf of the public. Some scientific evidence has demonstrated an increased risk for heart disease, respiratory disease, certain cancers, and infectious diseases in public safety officers. However, the evidence for the linkages between all cancers and firefighting is still very inconclusive. A study published in April of 2009 by the TriData Division of the System Planning Corporation paid for by the National League of Cities concluded after reviewing 71 studies on firefighters and cancer published in 1995 through 2008:

“...there is a lack of substantive scientific evidence currently available to confirm or deny linkages between firefighting and an elevated incidence of cancer. Although several studies found supporting associations between firefighting and bladder, brain, colon, Hodgkin’s lymphoma, kidney, malignant melanoma, multiple myeloma, Non-Hodgkin’s lymphoma, prostate, testicular, thyroid, and

¹ *Presumptive Duty-Related Illnesses for Law Enforcement Officers, Preliminary Report*, September 26, 2007, Washington Law Enforcement Officers’ and Fire Fighters’ Plan 2 Retirement Board, page 2.

² *Ibid.*

ureter cancers, the researchers found that considerable research needs to be undertaken before definitive linkages can be supported or refuted.”³

In many respects, this is a political and emotional issue more than one of scientific evidence. Proponents believe the public owes a special duty to our public safety officers since they regularly put their lives on the line for us. Opponents don't deny we owe a special duty to our public safety officers, but are concerned with who will pay for this additional cost to cities, counties, state and federal entities. In the current economic climate, many cities, counties and states' tax bases are diminishing and raising taxes is not likely an option government officials are likely to pursue. This means any increases in workers' compensation costs for cities; counties and the state would have to be paid for out of their current revenue. So in part, the issue for opponents becomes one of increased taxes and/or what other services do they not provide in order to pay for this additional benefit to our public safety officers.

These opposing forces, make it a very difficult to find a meeting of the minds between those that support these presumptions in workers' compensation laws and those that oppose them.

Two Methods of Enacting Occupational Presumption Laws

The methods used in the various states in enacting these presumption laws are to enact them through workers' compensation statutes or through disability retirement statutes. These laws also vary in the conditions that are presumed to be contracted in the line of duty and in the requirements for eligibility. Table 1 provides a listing of comparator states with occupational disease presumptions; the laws to which they apply; the public servants to whom the laws apply; the conditions covered and the eligibility requirements for coverage.

The states of Alaska, Idaho, New Mexico, North Dakota, and Oregon cover occupational presumptions under their workers' compensation statutes. The states of Montana, South Dakota and Wyoming cover them under disability retirement statutes. The state of Washington provides for benefits under both laws.

Conditions Presumed To Be Contracted In The Line of Duty

The most common conditions assumed to be related to exposures for firefighters are heart attacks or cardiovascular diseases and respiratory or lung diseases. To a lesser extent states include hypertension, certain cancers and strokes. The most common presumed condition for law enforcement officers are also heart attacks, cardiovascular diseases and respiratory or lung diseases and infectious diseases like hepatitis, tuberculosis HIV/AIDS, and meningitis.

For the comparator states that cover occupational presumptions under their workers compensation laws (6 out of 9 states), most have chosen to cover only specific cancers.

³ *Assessing State Firefighter Cancer Presumption Laws and Current Firefighter Cancer Research*, April, 2009, TriData Division, System Planning Corporation, page VII.

The most common being brain cancer, malignant melanoma, leukemia, non-Hodgkin's lymphoma, bladder cancer, ureter cancer and kidney cancer. Other cancers that are covered to a lesser extent are cancers of the throat and mouth, rectal cancer, colon cancer, stomach cancer, breast cancer and prostate cancer (See attached table 1). A survey conducted for SJR30 issues and completed by 34 states was not very helpful for this particular issue since only 16 of the 34 states completed answers to the questions on firefighter presumptions. However, the responses from the 16 states revealed that 6 of those states, or 37.5% of the responding states had no firefighter presumptions in effect as of July 9, 2009. (See Table 2)

Provisions That Attempt To Ensure Significant Exposure Prior To Entitlement

States have tended to outline some criteria under which the presumptions will be in effect, probably to limit the conditions that would be considered "ordinary diseases of life", which are generally not covered under occupational disease statutes, from those that are more likely to be developed in the line of duty. Most of the occupational presumptions only cover full time paid public safety officers and not volunteers (although there may be a few exceptions to this rule). For cancers, these generally take the form of a timeframe for the public officials being on the job before such a condition would be presumed to be occupationally related or a timeframe in which the diagnosis is made after retirement. These timeframes in our comparator states range from 4 years (in Idaho) to fifteen years (for kidney cancer, non-Hodgkin's lymphoma, and multiple myeloma in New Mexico). New Mexico actually has different timeframes for exposure for different cancers (for example, brain cancer will only be presumed to be occupationally related for a firefighter after they have been employed fulltime for ten years, bladder cancer after 12 years, etc.). And most of the conditions will only be presumed as occupationally related if the firefighter has successfully passed a medical examination which fails to reveal any evidence of such a condition previously, or prior to hire.

In addition, for respiratory diseases and cardiovascular events in Alaska and Washington, they are only presumptive if experienced within 72 hours after exposure to smoke, fumes, or toxic substances.

Funding and Financial Impacts

According to the work done by Cummings and Moran in early 2009⁴, when a state enacts occupational presumption laws under its workers compensation programs, the municipality, county or state pays for the workers compensation benefits through its workers compensation insurance policy or directly if they are self insured. If they enact such occupational presumptions through disability retirement provisions, this is often funded through contributions from both the employees and the employer. Additionally the benefits paid will likely be very different. Since there is currently already a presumption in the disability retirement statute for Montana (see attached table 1), the cost for that should already be known. The financial impact for Montana employers of

⁴ Cummings, Laura and Moran, John; *Presumptions For Cancer and Infectious Disease For Firefighters*, February 24, 2009, OLR Research, 2009-R-0110

enacting an additional exemption under the workers compensation statute could probably be estimated under the workers' compensation statute by the National Council of Compensation Insurers (NCCI) once a detailed and specific proposal is known since they previously estimated the impact of SB371.

There are different options used by different states. "California provides a presumption for both cancer and infectious disease but funds them differently. It funds cancer through its workers compensation laws and infectious disease through its retirement funds. According to Jason Dickerson of the Legislative Analyst's Office of the California General Assembly, controversy arose over the cancer presumption. Municipalities fought the law as an unfunded mandate, requiring them to pay higher workers compensation premiums without state assistance. Initially, the presumption was deemed an unfunded mandate and California law at the time required the state to reimburse localities for costs related to the unfunded mandate. During this period of reimbursement, California paid approximately \$4 million a year to municipalities. The policy of reimbursement was reversed in *City of Sacramento et al. v State of California* (785 P. 2d 522 (1990)). As it stands today, municipalities are not reimbursed by the state for increased workers' compensation premiums created by law."⁵

It is difficult to forecast the short term and long term costs of these presumption claims and what experience other states have had produces conflicting information in this regard. However, there is some evidence that these occupational presumptions in workers' compensation are not without challenges. Evidently the number of claims increased significantly after Connecticut passed its heart disease and hypertension for fire fighters and police officers in 1977 according to Ron Thomas, manager for a Connecticut based association of 150 towns and cities. As a result, the state's General Assembly eliminated the presumption for new firefighter and police officers hired after July 1, 1996, as part of its property tax reform initiative.⁶ Connecticut's recent survey verifies that they currently do not have any occupational presumptions for fire fighters.

Other states have found that legislative action to add occupational presumptions to their workers' compensation statute without appropriations problematic as well. Although New Hampshire enacted presumptions for heart and lung diseases and cancer presumptions, the cancer presumptions were found unconstitutional as an unfunded mandate⁷. Maine's presumption law which passed in 2009 also contained a provision that unless the General Fund appropriated at least 90% of the additional costs or a Mandate Preamble was amended to the bill and two thirds of the members of each House voted to exempt the mandate from the funding requirements, municipalities may not be required to implement the changes.

⁵ Cummings, Laura and Moran, John; *Presumptions For Cancer and Infectious Disease For Firefighters*, February 24, 2009, OLR Research, 2009-R-0110

⁶ Roberts, Sally, *More States Passing Firefighter Comp Laws*, Business Insurance. Article found at <http://www.businessinsurance.com/apps/pbcs.dll/article?AID=9999100025059>

⁷ Survey response from Kathryn Barger, Director of Workers' Compensation for the State of New Hampshire.

Recommendations

Montana already covers a number of physical conditions as presumptive under their disability retirement law for firefighters. Although the desire to recognize the significant contribution, dedication and sacrifices firefighters make on behalf of the public, doing so by establishing presumptions of conditions that have not yet conclusively been linked to occupational exposures, may not be the best method to accomplish this; especially at a time when one of the primary objectives of workers compensation reform is to lower costs for employers. Additionally, the most common conditions covered by other states, heart attacks, cardiovascular accidents and respiratory diseases appear to usually be covered as work related if the incidents occur soon after an exposure.⁸ Therefore, it would appear that enacting a set of presumptions at this time in Montana would not be advisable.

However, if the Labor Management Committee and/or the Montana Legislature believe this is necessary, I recommend that it be limited to those conditions that most other states cover as presumptions: heart attacks, respiratory diseases and other cardiovascular conditions when symptoms occur within a reasonable period of time after a specific exposure. If cancers are to be included, they should be limited to those where there is some evidence of a documented connection between firefighter's exposure and a higher prevalence of the disease in firefighters and should require documented evidence from a physical examination at the time of hire that these conditions did not exist at the time of hire and require that firefighters be on the job at least 5 years prior to diagnosis for the condition to be presumptive under the workers' compensation act.

⁸ Presentation by Doug Neil to the Labor Management Advisory Committee on September 29, 2009.