Presumptive Diseases and Workers’ Compensation Laws

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POST-TRAUMATIC STRESS DISORDER
85% of first responders have experienced symptoms related to mental health issues

84% say they have experienced a traumatic event on the job

34% have received a formal diagnosis with a mental health disorder

First Responders Face Mental Health Stigma at Work

Of those...

- **55%** say their supervisor will treat them differently if they bring up mental health concerns at work

- **45%** say their co-workers will perceive them as "weak" if they bring up mental health concerns at work

- **34%** say bringing up mental health concerns at work will cause them to be looked over for promotions

Additional Findings

The majority of first responders have been exposed to trauma
• 69% have experienced lack of sleep
• 46% have experienced anxiety
• 27% of first responders have been formally diagnosed with depression

Communicating about mental health issues
• 61% of respondents feel comfortable talking to their supervisor about mental health concerns
• 42% disagree that their supervisor openly discusses the importance of addressing mental health concerns
• 50% of first responders believe their supervisor will treat them differently if they seek mental health help

Texas Labor Code 504.019 – Coverage for PTSD for Firefighters and Peace Officers

- PTSD is defined as a disorder that:
  - Meets the diagnostic criteria for PTSD specified by the American Psychiatric Association in the DSM 5; and
  - Results in an impairment of a person’s functioning in the person’s community, employment, family, school, or social group.

- PTSD suffered by a firefighter or peace officer is a compensable injury only if:
  - The disorder is caused by events occurring in the course and scope of employment; and
  - The preponderance of the evidence indicates that the work was a substantial contributing factor of the disorder.
"First responder" means an individual employed by a political subdivision of this state who is:

- a peace officer under Article 2.12, Code of Criminal Procedure;
- a person licensed under Chapter 773, Health and Safety Code, as an emergency care attendant, emergency medical technician, emergency medical technician-intermediate, emergency medical technician-paramedic, or licensed paramedic; or
- a firefighter subject to certification by the Texas Commission on Fire Protection under Chapter 419, Government Code, whose principal duties are firefighting and aircraft crash and rescue.
Post Traumatic Stress Disorder

"Post-traumatic stress disorder" means a disorder that meets the diagnostic criteria for post-traumatic stress disorder specified by the American Psychiatric Association in the Diagnostic and Statistical Manual of Mental Disorders, fifth edition (DSM-5), or a later edition adopted by the commissioner of workers' compensation. DSM-5 is the handbook used by health care professionals in the United States and much of the world as the authoritative guide to the diagnosis of mental disorders. DSM contains descriptions, symptoms, and other criteria for diagnosing mental disorders.
PTSD & DSM-5

https://www ptsd va gov/professional/PTSD-overview/dsm5_criteria_ptsd asp

**Criterion A (one required):** The person was exposed to: death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence, in the following way(s):

- Direct exposure
- Witnessing the trauma
- Learning that a relative or close friend was exposed to a trauma
- Indirect exposure to aversive details of the trauma, usually in the course of professional duties (e.g., first responders, medics)
PTSD & DSM-5

https://www ptsd va gov professional PTSDoverview dsm5 criteria ptsd asp

Criterion B (one required): The traumatic event is persistently re-experienced, in the following way(s):

• Intrusive thoughts
• Nightmares
• Flashbacks
• Emotional distress after exposure to traumatic reminders
• Physical reactivity after exposure to traumatic reminders
PTSD & DSM-5

https://www.ptsd.va.gov/professional/PTSD-overview/dsm5_criteria_ptsd.asp

**Criterion C (one required):** Avoidance of trauma-related stimuli after the trauma, in the following way(s):
- Trauma-related thoughts or feelings
- Trauma-related reminders

**Criterion D (two required):** Negative thoughts or feelings that began or worsened after the trauma, in the following way(s):
- Inability to recall key features of the trauma
- Overly negative thoughts and assumptions about oneself or the world
- Exaggerated blame of self or others for causing the trauma
- Negative affect
- Decreased interest in activities
- Feeling isolated
- Difficulty experiencing positive affect
PTSD & DSM-5

https://www.ptsd.va.gov/professional/PTSD-overview/dsm5_criteria_ptsd.asp

**Criterion E (two required):** Trauma-related arousal and reactivity that began or worsened after the trauma, in the following way(s):

- Irritability or aggression
- Risky or destructive behavior
- Hypervigilance
- Heightened startle reaction
- Difficulty concentrating
- Difficulty sleeping

**Criterion F (required):** Symptoms last for more than 1 month.

**Criterion G (required):** Symptoms create distress or functional impairment (e.g., social, occupational).

**Criterion H (required):** Symptoms are not due to medication, substance use, or other illness.
PTSD & DSM-5

https://www.ptsd.va.gov/professional/PTSD-overview/dsm5_criteria_ptsd.asp

- **Two specifications:**
  - **Dissociative Specification.** In addition to meeting criteria for diagnosis, an individual experiences high levels of either of the following in reaction to trauma-related stimuli:
    - Depersonalization. Experience of being an outside observer of or detached from oneself (e.g., feeling as if "this is not happening to me" or one were in a dream).
    - Derealization. Experience of unreality, distance, or distortion (e.g., "things are not real").
  - **Delayed Specification.** Full diagnostic criteria are not met until at least six months after the trauma(s), although onset of symptoms may occur immediately.
Symptoms of PTSD

There are different manifestations of PTSD, and not all people who may be living with the disorder will exhibit the same symptoms. Exposure to significant trauma – like the experiences that could happen on any given shift for a first responder – are known to trigger the different types of PTSD. According to the National Institute of Mental Health (NIMH), the three types include:

• **Re-experiencing**: Overwhelming fears, unexpected flashbacks of trauma events that include the same rapid breathing and sweating originally experienced, nightmares, and other intrusive symptoms characterize this type of PTSD.

• **Hyperarousal**: Often feeling on edge, intense anger response, insomnia, and/or being easily startled are all signs of hyperarousal.

• **Avoidance**: Feelings of guilt and depression (or having no feelings of attachment at all), difficulty remembering traumatic events, lack of interest in former hobbies, and avoiding places that trigger memories of trauma are all signs of avoidance.

https://americanaddictioncenters.org/firefighters-first-responders/
First Responders PTSD Assessment

- Re-experiencing symptoms: memories and images of the traumatic events may be a sign of PTSD. Often they are accompanied by emotions such as grief, fear, or anger.
- Nightmares, night terrors
- Sleepwalking, sleep fighting
- Unwanted daytime memories, images, thoughts, daydreams
- Flashbacks, feeling like you’re reliving the traumatic event
- Somatic flashbacks (physical pain/medical condition linked to the feeling or bodily states associated with the traumatic event)
- Fixed on war experience, living in the past
- Spontaneous psychotic episodes
- Panic attacks.
The Firefighter Behavioral Health Alliance notes that 105 firefighters took their own lives in the United States in 2014. Because this number is based on reported suicides, actual numbers may be higher.

The US Firefighters Association (USFA) reports that about 10 percent of firefighters may be abusing illicit substances and that alcohol abuse among this population is more than twice the rates seen in the general public.

Post-traumatic stress disorder, depression, and suicidal thoughts and behaviors among first responders are also common and believed to be triggered or worsened by repeat exposure to trauma, including physical abuse and death among the people they serve, loss of people close to them, and life-threatening situations.

https://americanaddictioncenters.org/firefighters-first-responders/
Transportation Insurance Co. v. Maksyn, 580 S.W.2d 334, 336 (Tex. 1979)

Mental trauma is not compensable unless it is traceable to such an event, which in “other words is the result of an accident.”

Damage or harm caused by repetitive mental trauma cannot constitute an occupational disease.
Mental trauma can produce a compensable injury if it arises in the course and scope of employment and is traceable to a definite time, place, and cause. Texas Workers' Compensation Commission Appeal No. 950011, decided February 15, 1995. However, damage or harm caused by repetitious mental traumatic activity does not constitute an occupational disease for purposes of compensability under the workers' compensation statutes. Appeal No. 950011, supra.
Legislative Intent

• Prior to HB1983, PTSD was only compensable if based on a single event. HB1983 seeks to remedy these issues to make PTSD, as diagnosed according to the American Psychiatric Association, a compensable injury under workers’ compensation. It gives first responders the option to apply for workers’ compensation benefits for PTSD without declaring a mental impairment.
Scenario 1

- Claimant is employed as a firefighter for over 15 years and has battled multiple fires over his career. While driving home one day after a shift, Claimant drives by a house fire. He witnesses several firefighters battling the blaze. Claimant did not help fight the fire and did not sustain any physical injuries himself. Several weeks later he begins to have nightmares about the fire.

- Do you think this is a compensable injury?
- Can he claim PTSD as a result of the fire?
- What evidence does Claimant need to provide to support his case?
Scenario 2

• Claimant is a police officer for Smalltown, Texas. One day during her shift, she responds to a deadly car crash involving multiple vehicles. She helps several of the victims. During the rescue, she hurts her back and files a workers’ compensation claim. Six months later she begins to have flashbacks of the crash.

• Can she claim a mental trauma claim?

• What evidence does she need to support her claim?
Scenario 3

- Claimant works with the Harris County EMS and responds to an emergency at an office building. One of the employees for a local company has a heart attack and is revived.
- The EMS medic does not follow established guidelines in responding to the scene and is reprimanded by management.
- The medic files a workers’ compensation claim for PTSD.
- Is this a compensable injury?
- What questions should the employer/management be asking to determine compensability?
Compensability of Mental Trauma Injury

Sec. 408.006. MENTAL TRAUMA INJURIES.
(a) It is the express intent of the legislature that nothing in this subtitle shall be construed to limit or expand recovery in cases of mental trauma injuries.
(b) Notwithstanding Section 504.019, a mental or emotional injury that arises principally from a legitimate personnel action, including a transfer, promotion, demotion, or termination, is not a compensable injury under this subtitle.
Texas Government Code Chapter 607
Subchapter B – Diseases or Illnesses Suffered by Firefighters and EMTs

Sec. 607.053 – Smallpox Immunization

Sec. 607.054 – Tuberculosis or Other Respiratory Illness

Sec. 607-055 – Tuberculosis or Other Respiratory Illness

Sec. 607.055 – Cancer

Sec. 607.056 – Acute Myocardial Infarction or Stroke
What does the presumption mean? (Sec. 607.057)

- A presumption established under Chapter 607 Subchapter B applies to a determination of whether a firefighter’s or emergency medical technician’s disability or death resulted from a disease or illness contracted in the course and scope of employment.
What is a presumption?

• In the law of evidence, a presumption of a particular fact can be made without the aid of proof in some situations.

• The types of presumption include a rebuttable discretionary presumption, a rebuttable mandatory presumption, and an irrebuttable or conclusive presumption.

• The invocation of a presumption shifts the burden of proof from one party to the opposing party in a court trial.
Rebutting the Presumption – Sec.607.058

- A presumption applying to smallpox, tuberculosis or other respiratory illness, cancer, or acute myocardial infarction/stroke may be rebutted through a showing by a preponderance of the evidence that a risk factor, accident, hazard, or other cause not associated with service as a firefighter or EMT caused the disease or illness.
Rebutting the Presumption – Sec. 607.058

• A rebuttal offered under this section must include a statement by the person offering the rebuttal that describes, in detail, the evidence that the person reviewed before making the determination that a cause not associated with the individual’s service as a firefighter or EMT caused the disease or illness.

• Added by HB 1388 in 2015 and effective immediately.
Cancer Presumption – Sec. 607.055

(a) A firefighter or emergency medical technician who suffers from cancer resulting in death or total or partial disability is presumed to have developed the cancer during the course and scope of employment as a firefighter or emergency medical technician if:

• (1) the firefighter or emergency medical technician:
  • (A) regularly responded on the scene to calls involving fires or fire fighting; or
  • (B) regularly responded to an event involving the documented release of radiation or a known or suspected carcinogen while the person was employed as a firefighter or emergency medical technician; and

• (2) the cancer is known to be associated with fire fighting or exposure to heat, smoke, radiation, or a known or suspected carcinogen, as described by Subsection (b).

(b) This section applies only to a type of cancer that may be caused by exposure to heat, smoke, radiation, or a known or suspected carcinogen as determined by the International Agency for Research on Cancer (IARC).
The IARC categorizes agents, mixtures and exposures into five categories. Note that the classification is based only on the strength of evidence for carcinogenicity, not on the relative increase of cancer risk due to exposure, or on the amount of exposure necessary to cause cancer. For example, a substance that only very slightly increases the likelihood of cancer and only after long-term exposure to large doses, but the evidence for that slight increase is strong, would be placed in Group 1 even though it does not pose a significant risk in normal use.

- **Group 1**: carcinogenic to humans: There is enough evidence to conclude that it can cause cancer in humans.
- **Group 2A**: probably carcinogenic to humans: There is strong evidence that it can cause cancer in humans, but at present it is not conclusive.
- **Group 2B**: possibly carcinogenic to humans: There is some evidence that it can cause cancer in humans but at present it is far from conclusive.
- **Group 3**: not classifiable as to carcinogenicity in humans: There is no evidence at present that it causes cancer in humans.
- **Group 4**: probably not carcinogenic to humans: There is strong evidence that it does not cause cancer in humans. Only one substance – caprolactam – has been both assessed for carcinogenicity by the IARC and placed in this category.
Cancers that “may” be related…

- Esophagus
- Stomach
- Colorectum
- Caecum
- Pancreas
- Lung & bronchus
- Melanoma
- Prostate
- Testis
- Bladder
- Kidney & renal
- Pelvis cancer
- Brain
- Thyroid cancer
- Leukemia
- Non-Hodgkin lymphoma
- Multiple myeloma
Three Types of Cancer showed “significant summary risk” to the IARC

- Testicular cancer
- Prostatic cancer
- Non-Hodgkin lymphoma
The LeMasters Meta-Analysis

- No likely risk for firefighters
  - Esophagus
  - Liver
  - Pancreas
  - Larynx
  - Lung
  - Bladder
  - Kidney
  - Hodgkin’s disease
  - (other) cancers
  - Buccal cavity/pharynx
  - Leukemia

- Probable or possible
  - Stomach
  - Colon
  - Rectum
  - Skin
  - Prostate
  - Testis
  - Brain
  - Non-Hodgkin lymphoma
  - Multiple myeloma
  - Malignant melanoma
Who does the cancer presumption apply to? (Sec. 607.051)

Emergency medical technician is defined as “an individual who is certified as an emergency medical technician by the Department of State Health Services as provided by Chapter 773, Health and Safety Code, and who is employed by a political subdivision.”

A firefighter is “an individual who is defined as fire protection personnel under Sec. 419.021 or an individual who is a volunteer firefighter certified by the Texas Commission on Fire Protection or the State Firemen's and Fire Marshals' Association of Texas.”
Applicability – Sec. 607.052

The presumption only applies to a firefighter or EMT who:

- Received a physical examination that failed to reveal evidence of the illness or disease;
- Has been employed for five or more years as a firefighter or EMT; and
- The disease or illness is discovered during employment as a firefighter or EMT.
This was the very first Appeals Panel case to address Chapter 607.

Claimant was employed as a firefighter for the Self-Insured since August 1994 and was diagnosed with multiple myeloma cancer in April 2013.

Claimant testified that she regularly responded to calls involving fires, including a large explosive fire known as the “Market Street Fire” on June 24, 1995.

The Claimant introduced an expert’s opinion on causation, an affidavit from another firefighter with multiple myeloma, and evidence-based medicine.
The Hearing Officer found against the Claimant stating, “there is no known factor that directly and unequivocally finds that multiple myeloma is directly caused by hear, smoke, radiation, or a known or suspected carcinogen.”

The Appeals Panel reversed, finding that the Hearing Officer misplaced the burden of proof.

The burden should have been placed on the self-insured to rebut the presumption.
The House Research Organization (HRO) Bill Analysis for S.B. 310 states:

[S.B. 310] would improve firefighter and emergency personnel benefit security and shift the burden of proof away from the employee to the local government or risk pool in determining whether an employee’s illness was caused by the performance of duties. Firefighters and emergency personnel often face hazardous situations and sustain injuries, illness, and death in their efforts to save lives and property. To receive medical coverage and workers’ compensation, they must document when and where they sustained injury and illness. Because of the nature of their work, determining the origin of disease exposure or injury can be impossible to prove, yet the burden of proof currently lies with the employee. This bill appropriately would create a presumption in favor of the employee for diseases, such as certain cancers and respiratory illnesses, which typically are associated with the performance of emergency personnel duties. . . . By allowing for the rebuttal of presumption in specific situations, it would not create barriers to receiving benefits in unrelated situations. HRO Bill Analysis, Tex. S.B. 310, 79th Leg. R.S. (2005).
Legislative Intent re: APD 150098-s

• “Current Texas law provides that public safety personnel who contract certain occupational diseases may receive benefits if the person can prove that the disease was caused by an exposure in the line of duty, and if a specific exposure is documented in a timely manner. There is a lack of available benefits to those who do not show the effects of a disease that they contracted in the line of duty until later. S.B. 310 provides a rebuttal presumption for firefighters and emergency medical technicians for certain diseases, including . . . cancer.” State Affairs, SRC Bill Analysis, Tex. S.B. 310, 79th Leg. R.S. (2005).
• Decedent was employed as a firefighter with the Self-Insured for 31 years.

• Decedent was diagnosed with pancreatic cancer while employed as a firefighter and passed away on May 6, 2011.

• The Self-Insured’s expert testified that pancreatic cancer has not been a risk associated with firefighting per IARC.
The Hearing Officer agreed with the expert and found that there was no evidence that pancreatic cancer is caused by firefighting.

The Hearing Officer found that the presumption did not apply and that the Decedent’s beneficiaries’ burden of proof was not met.

The Appeals Panel reversed, finding that the presumption applied because pancreatic cancer may be related to firefighting per the IARC.

The case was remanded back to the Hearing Officer to apply the presumption to the facts.
Defending a Firefighter Cancer Claim

“Regularly responded” has not been defined by the Legislature or Appeals Panel.

- Attempt to obtain documentation of the number and frequency of fires fought by the Claimant.

You must attempt to determine a full medical history and family history of the Claimant.

- Did the Claimant or spouse use tobacco?
- Does the Claimant have underlying risk factors?
Defending a Firefighter Cancer Claim

You must obtain a medical opinion prior to filing your denial.

- The denial must explain why the carrier determined the presumption does not apply and describe the evidence reviewed.

You will want your medical expert to testify at the CCH.

- The expert may testify why a risk factor, accident, hazard, or other cause not associated with the Claimant’s work caused the disease or illness.
- The expert may testify why the cancer is not known to be associated with firefighting or is not linked to firefighting by the IARC.
Scenario 1

Claimant has been employed as a firefighter for 25 years.

He fought fires for the first 10 years of his career but has worked a desk job for the last 15.

Claimant was diagnosed with throat cancer and filed a workers’ compensation claim.

Your investigation revealed that Claimant’s wife is a user of chewing tobacco.

Should you consider a denial of this claim?
Scenario 2

• Claimant has been employed as an EMT for the City for the last 15 years.

• Claimant would frequently respond to fires to provide medical care but was never involved in fighting fires.

• Can the City deny Claimant’s lung cancer claim because he did not regularly fight fires?
Scenario 3

- Claimant has been a firefighter for 20 years and was diagnosed with lung cancer.
- The City obtained a report and testimony from a medical expert which stated that while the cancer may be linked to firefighting by IARC, Claimant had numerous other risk factors including family history.
- Who will have the burden of proof at a Contested Case Hearing?
Scenario 4

- Claimant was employed as a firefighter for 30 years.
- Six months after retiring, Claimant is diagnosed with lung cancer and files a workers’ compensation claim.
- Will the presumption apply?
- If not, what burden of proof will apply?
THANK YOU FOR ATTENDING

HAVE A GREAT DAY

THE LAW OFFICE OF RICKY D. GREEN, PLLC