Testimony Before the
Management Labor Advisory Committee on SB 802 -1
March 25, 2021

TO: Management Labor Advisory Committee
FROM: Hasina Wittenberg, SDAO & Andy Graham, Cummins Goodman
RE: Opposition to SB 802 -1

The Special Districts Association of Oregon urges MLAC to reject SB 802 -1. For the reasons discussed below, SB 802-1 is an unusual and unnecessary bill that would unquestionably shift responsibility for a wide range of nonoccupational conditions to the workers' compensation system. SB 802 -1 would create an "anything goes" presumption that is not based in science and would extend that presumption out 30 years. The presumption created in SB 802 -1 would be functionally irrebuttable in all but the most extraordinary of cases. Furthermore, the presumption would not require work exposure, nor would it even require proof of actual underlying COVID-19 or actual exposure to SARS-CoV-2. Rather than being tailored to a solve an identified problem, SB 802 -1 would open the floodgates for a certain subset of Oregon workers to likely successfully pursue a variety of claims bearing no relationship to workplace exposures.

SB 802 -1 would create an "anything goes" presumption unlike any other provision of the Oregon Workers' Compensation Law.

SB 802 -1 is totally divorced from any science. It has to be. Because SARS-CoV-2 remains a relatively new pathogen and because COVID-19 remains such a new disease, science does not yet know what the long-term effects or "secondary effects" of the virus or the associated disease may be. As such, rather than identify what precise conditions *science* may support for presumptive compensability, SB 802-1 would turn traditional workers' compensation presumption law on its ear by empowering doctors and other medical professionals to dictate what conditions are presumptively compensable in any given case. This comes directly from the proposal's definition of "secondary effect": "a debilitating medical condition *that a medical professional has determined* by a preponderance of the evidence was a likely result of a previous infection by SARS-CoV-2 or a previous development of a COVID-19 condition."[1]

In other words, what SB 802 -1 creates is an "anything goes" presumption. If *any medical professional* says that condition "X" is likely the result of a worker's prior actual or presumed

[1] SB 802-1, Section 2, subsection (1)(e) (*italics added*).

COVID-19 infection or actual or suspected SARS-CoV-2 exposure, that condition then becomes presumptively compensable as a matter of law.

It cannot be stressed enough how unusual it would be to allow doctors or other medical professionals to dictate what conditions are or are not presumptively compensable. In every one of the other presumption provisions in the Oregon Workers' Compensation Law, it is the legislature, not a doctor or other medical professional, that dictates what conditions are presumed to be compensable:

- ORS 656.802(4) makes "any disease of the lungs or respiratory tract, hypertension or cardiovascular-renal disease" presumptively compensable.
- ORS 656.802(5) makes "brain cancer, colon cancer, stomach cancer, testicular cancer, prostate cancer, multiple myeloma, non-Hodgkin's lymphoma, cancer of the throat or mouth, rectal cancer, breast cancer or leukemia" presumptively compensable.
- ORS 656.802(7)(b) makes post-traumatic stress disorder and acute stress disorder presumptively compensable.

For each of those presumptions, the legislature relied on some then-existing medical, epidemiologic, or other scientific evidence to support making the specified conditions compensable. This is not the case with SB 802 -1. As noted above, the science simply does not yet exist. We just don't yet know what the "secondary effects" of COVID-19 or SARS-CoV-2 exposure may be.

Lacking any scientific basis for identifying specific conditions that have been proven to result from COVID-19 or SARS-CoV-2, it may make sense to study this issue, as the original version of SB 802 proposed. But it does not make sense to open the floodgates by granting presumptive compensability to any condition any medical professional says resulted from a worker's known or suspected COVID-19 case or SARS-CoV-2 exposure.

Again, without any scientific basis, the bill would extend the presumption to conditions that arise up to 30 years after the COVID-19 pandemic ends.

SB 802 -1 would grant presumptive compensability to conditions that may arise up to 30 years after the Governor's declaration of emergency relative to the COVID-19 pandemic expires. ***30 years!*** There is simply no rational scientific basis for granting a presumption 30 years into the future. As noted above, it is unknown what the long-term effects of COVID-19 or SARS-CoV-2 exposure may be. It is even more unknown what the *ultra-long-term* effects may be 15, 20, 30 years down the road.

Here is what is not unknown: It is predictable that many workers in their 20s, 30s, 40s, 50s, etc., today will develop heart disease, atherosclerotic cardiovascular disease, COPD, emphysema, idiopathic pulmonary fibrosis, chronic kidney failure, or any of another hundred chronic conditions sometime within the next 30 years. This is the case both for people who have never had COVID-19 or been exposed to SARS-CoV-2 and for people who have.

SB 802 -1 would effectively grant presumptive compensability for all of those sorts of chronic conditions for the class of workers covered by the presumption. All those workers would need to do is have a medical professional—*any medical professional*—say that the condition was "a likely result" of known *or suspected* COVID-19 or SARS-CoV-2 exposure, and the condition would then be presumptively compensable. Nowhere else in the workers' compensation system can one find such a broad grant of special benefits to a specific class of workers.

SB 802 -1 would create a presumption that is actually or at least arguably functionally irrebuttable.

Although SB 802 -1 is billed as being a "rebuttable" presumption, it is at best questionable whether an employer would be able to rebut any but the most far-fetched of presumed "secondary effects" cases. The bill purports to grant employers the opportunity to rebut the presumption with "clear and convincing evidence." Clear and convincing evidence *of what*? The answer to this question is far less clear.

On its face, the bill notes that an employer could not simply show "lack of an express confirmation of previous exposure to SARS-CoV-2 or previous development of a COVID-19 condition" to rebut the presumption. So, from a functional standpoint, an employer cannot realistically rebut the presumption by attempting to prove that the worker did not in fact have COVID-19 or that the worker was not in fact exposed to SARS-CoV-2.

One may be able to attempt to prove that the worker's COVID-19 or SARS-CoV-2 exposure was not in fact a work-related exposure. But in the absence of unambiguous evidence as to where the worker contracted COVID-19 or where the worker was exposed to SARS-CoV-2 away from the workplace, that is again virtually impossible to establish. And as we approach the *30-year tail* this bill would create, the likelihood of proving that the COVID-19 or SARS-CoV-2 exposure was not work related becomes vanishingly small.

In short, rebuttal either by proof that the worker did not have COVID-19 and was not exposed to SARS-CoV-2 or by proof of a non–work related cause of the underlying COVID-19/SARS-CoV-2 exposure is, for practical purposes, virtually impossible.

That leaves rebuttal by establishing that the presumptively compensable condition—*i.e.*, whatever the one doctor or other medical professional has said likely resulted from prior COVID-19/ SARS-CoV-2 exposure—was not in fact "a likely result"[2] of such prior disease or exposure. Lacking from the proposed bill is any compensability standard here. That is, it is unclear whether "*a likely result*" implies material causation, major causation, or some other unspecified standard. If "a likely result" is held to imply a low bar, such as material causation, proving through clear and convincing evidence that COVID-19 or SARS-CoV-2 exposure was not a material factor in the development of the secondary effect when there is at least one doctor

[2] SB 802-1, Section 2, subsection (1)(e).

who claims otherwise is a tall order. The reality is that employers are unlikely to be able to meet this burden for any but the most outrageous attempts at linking a claimed "secondary effect" to COVID-19 or SARS-CoV-2.

The presumption SB 802 -1 would create is not necessarily linked to work exposure.

There is no requirement in SB 802 -1 that there be any proof that a worker's actual or *suspected* COVID-19 or SARS-CoV-2 exposure be work-related. There are five ways for "essential workers" to establish applicability of the presumption.[3] While two of them are linked to a known or suspected work exposure,[4] the remaining three bear no relationship to work whatsoever: Provided one is an "essential worker" during the period the Governor's declaration of emergency is in effect, it is enough that the worker "[b]ecame symptomatic for COVID-19 and received a diagnosis of COVID-19 from a medical provider or a federal, state or local public health authority"[5]; "[r]eceived a laboratory-confirmed diagnosis of COVID-19 or infection by SARS-CoV-2"[6]; or "[r]eceived a presumptive positive test result for COVID-19 or infection by SARS-CoV-2."[7] None of those three avenues for establishing applicability of the presumption depends in any way on actual or even suspected *work exposure*. In other words, it is without question that SB 802 -1 would bring non-occupational cases into the workers' compensation system.

One may counter that an employer could attempt to rebut the presumption by proving that the underlying known or suspected COVID-19 disease or known or suspected SARS-CoV-2 exposure occurred outside of work. But as discussed above, in the presence of a requirement that evidence be "clear and convincing" to rebut the presumption, an employer would likely need unambiguous evidence as to where the worker contracted COVID-19 or where the worker was exposed to SARS-CoV-2 away from the workplace. Given that the worker has near exclusive access to such information, it is a quite a stretch to believe that an employer might be able to produce such unambiguous evidence in any but the most unusual of cases.[8]

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[3] *See* SB 802-1, Section 2, subsection (2)(b)(A)–(E).
[4] *See* SB 802-1, Section 2, subsection (2)(b)(A) & (B).
[5] SB 802-1, Section 2, subsection (2)(b)(C).
[6] SB 802-1, Section 2, subsection (2)(b)(D).
[7] SB 802-1, Section 2, subsection (2)(b)(E).
[8] On the flip side, though there may be concern that workers cannot establish exposure at work, that is not really accurate. First, for many occupations, a worker may be able to establish exposure through an increased risk analysis. *Cf., e.g.*, *Seeley v. Sisters of Providence*, 179 Or. App. 723 (2002) (holding that a worker may rely in part on statistical evidence of increased risk to establish work-relatedness of a condition). Second, current Oregon OSHA rules require that employers have a "COVID-19 infection notification process" whereby the employer must notify employees of their exposure to another employee confirmed to have COVID-19. OAR 437-001-0744(3)(j). In other words, employers are mandated to inform employees of any work-related exposures to other employees who have COVID-19.

The presumption does not even require proof of actual exposure; a prior suspected exposure to SARS-CoV-2 can be enough to trigger application of the presumption.

The bar for application of the presumption is unusually low. Under subsections (1)(b)(A) and (B), even workers who experienced only exposure to a "suspected source" of SARS-CoV-2 can gain the benefit of the presumption. Subsection (1)(b)(B) requires that the worker also "became symptomatic for COVID-19." But it is unclear what that means. It may very well mean that the worker must simply endorse having had COVID-like symptoms without ever having necessarily consulted with a medical professional or received a diagnosis. On the other hand, it is perhaps more restrictive and may require at least a medical professional's opinion that the worker's symptoms were in fact due to COVID-19. We will not know unless and until there is litigation on this issue. But what we do know is that subsection (1)(b)(A) does not even require the worker to have had the disease or actual exposure *at all*. Under subsection (1)(b)(A), a worker can gain the benefit of the presumption if the worker was exposed at work to a suspected source and the employer, a medical provider, or a governmental authority simply required the worker to stay away from the worksite. That is, it is entirely possible for a worker to have the benefit of the presumption *even if the worker never had COVID-19 and was never actually exposed to SARS-CoV-2*.

It is again instructive to compare the applicability of the proposed SB 802-1 presumption with other presumptions that currently exist. Those other three presumptions generally require years of relevant work-related exposure before the presumption even kicks in:

- ORS 656.802(4), the so-called "heart/lung" presumption, grants firefighters the presumption for lung diseases, hypertension, and cardiovascular-renal disease only after five or more years' employment as a firefighter.
- ORS 656.802(5), the firefighter's cancer presumption, grants firefighters the presumption for listed cancers only after five or more years' employment as a firefighter.
- ORS 656.802(7), the acute stress disorder/PTSD presumption, grants firefighters, police officers, emergency responders, and others the presumption only after the worker experiences a qualifying single traumatic event or has been employed in a qualifying profession for at least five years.

In contrast, SB 802 -1 would grant the presumption even where workers have never had COVID-19 and have not ever actually been exposed to SARS-CoV-2, on or off the job.

It is undeniable that SB 802 -1 would bring non-occupational cases into the workers' compensation system. Employers would wind up bearing the financial burden of non-occupational cases involving all manner of chronic diseases and sundry other conditions that some medical provider might link to a prior known *or suspected* COVID-19 case or SARS-CoV-2 exposure.

Special Districts Association of Oregon asks MLAC to reject SB 802 -1.