SDAO Special Districts Association of Oregon

Testimony Before the
Management Labor Advisory Committee
In Opposition to SB 507 – 3 amendment

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Members of the committee, my name is Hasina Wittenberg and I appear before you today to present testimony in opposition to the -3 amendment to SB 507 on behalf of the Special Districts Association of Oregon (SDAO) and the Special Districts Insurance Services (SDIS). SDIS was formed in the mid-1980s in response to an extremely adverse public liability insurance market. Currently, SDAO has approximately 956 members statewide and approximately 60% of those districts obtain workers' compensation coverage from the SDIS insurance pool; nearly 200 rural fire protection districts participate in our workers compensation plan. Rural fire protection districts are the largest type of special district that belongs to our association (approximately 253 of the 956 special districts). SDIS's pool includes but is not limited to the following types of special districts: rural fire protection districts; park and recreation districts; water districts; sanitary districts and; port districts.

Clarification regarding SDIS claims history. Of the 25 claims filed from 2014 – 2018, fourteen claims were approved, seven were settled and four were denied. The seven claims that were settled were settled under a disputed claims settlement process for amounts ranging from $2,000 to $50,000.

SDAO Firefighter Stress Related Claims – 5 Year History

Year	2014	2015	2016	2017	2018	Total
Approved	0	9	1	2	2	14
Denied	0	1	0	5	5	11
Total	0	10	1	7	7	25

SDAO and SDIS opposes the -3 amendment to SB 507 for the following reasons:

The presumption proposed under SB 507-3 remains functionally irrebuttable.

SB 507-3 changes the originally proposed standard for rebutting the presumption from an employer's having to prove that the condition is "unrelated" to employment to instead having to prove that the condition was not "caused or contributed to in material part" by employment. In the context of mental disorder conditions, these two standards are virtually identical. An employer's having to prove, through clear and convincing evidence, that a subjectively-driven

mental disorder was not "caused or contributed to in material part" by an employee's work exposures is essentially impossible.

The standard "in material part" appears elsewhere in the workers' compensation law. It is not an unfamiliar standard. In 2006, the Court of Appeals looked to the Oregon courts' go-to dictionary for a definition of this phrase. In *Mize v. Comcast Corp.*, the court found the dictionary definition to mean that "a 'material part' must be 'of real importance or great consequence: SUBSTANTIAL…'"[1] In then applying that definition, the court inexplicably dropped the qualifier "great," and proceeded to treat "in material part" as implying any "fact of consequence."[2] While the omission of the qualifier "great" did not matter in the context of the court's analysis of the facts in *Mize*, that omission has since been given real importance by the Workers' Compensation Board in its application of the "in material part" standard.

The "in material part" standard appears in the cancer presumption, as well. There, the Board has interpreted the phrase to require, effectively, that the employer prove that employment conditions were not a cause of the cancer <u>at all</u>. This extreme application of the "in material part" standard is perhaps most evident in a 2017 Board case, *Robert B. Ritchey, Jr.*[3] There, the expert evidence was that firefighting was "at most, an 'extremely minor contributor to the overall number of [testicular cancer] cases,'" and that "'scientifically it is <u>extraordinarily unlikely</u> that [claimant's] occupation contributed to the development of testicular cancer.'"[4] The Board found the expert's acknowledgement that work was "at most, an 'extremely minor contributor'" to constitute evidence that work caused the condition "in material part."[5] So the expert's opinion that it was "extraordinarily unlikely" that work contributed to development of the cancer was not enough to rebut the cancer presumption.[6]

In other words, as the Board sees it, <u>any contribution</u>, however minor or minimal, constitutes a "material part." This means that to establish that a condition was not caused or contributed to "in material part" by work exposures, an employer effectively must prove that work played no role in bringing about the condition.

That standard remains at least *arguably* workable in the context of cancer cases where there is robust scientific evidence that firefighting exposures are not recognized causes of some of the enumerated cancers. But such a standard would not be workable in the context of mental disorders. The reason is that mental disorders are inherently subjective. Because of that subjectivity, it is effectively impossible for an expert to entirely rule out work exposures playing any role — however minor or minimal — in development of the condition. In short, proof that a worker's mental disorder was not caused or contributed to "in material part" by work exposures — as the Board currently understands that phrase — would be an impossible burden for employers to meet.

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[1] *Mize v. Comcast Corp.—AT&T Broadband*, 208 Or. App. 563, 569 (2006).
[2] *Id.*
[3] 69 Van Natta 325 (2017).
[4] *Id.* at 328 (emphasis added).
[5] *Id.*
[6] *Id.*

On the other hand, if the mental disorder presumption were to specifically *define* "in material part" in the way the Court of Appeals first defined it in *Mize*—that a "'material part' must be 'of real importance or great consequence: SUBSTANTIAL,'"[7] the standard understood that way *could* be workable. But without statutory clarification on the meaning of "in material part," the proposed presumption is functionally irrebuttable.

SB 507-3 remains unreasonably overbroad in its identification of conditions subject to the presumption.

SB 507-3 now explicitly links the presumptively compensable conditions to those listed in the DSM-V as being "Trauma- or Stressor-Related Disorders." While SB 507-3's language used to identify conditions subject to the presumption is more understandable than the original proposal to include any "mental or emotional trauma or a stress-related disorder," the fact remains that SB 507-3 casts far too wide a net.

On its face, the list of conditions covered is absurd. The bill specifically includes, among the presumptively compensable conditions, "reactive attachment disorder" and "disinhibited social engagement disorder." If one looks at the DSM-V, it is readily apparent that these two diagnoses apply only to children. There is zero reason why these two conditions should be listed in the bill.

More concerning is that the proposed bill includes adjustment disorder among those that would be presumptively compensable. Adjustment disorder includes multiple subtypes, with most adjustment disorder diagnosed in the general population characterized by elements of anxiety and depressed mood. DSM-V describes adjustment disorder as being "common."

Importantly, the types of stressors that can lead to adjustment disorder are not limited to those that firefighters and public safety personnel experience more frequently than people in the general population. A comparison between PTSD, acute stress disorder, and adjustment disorder is telling. PTSD requires exposure to "actual or threatened death, serious injury, or sexual violence." Similarly, acute stress disorder requires exposure to "actual or threatened death, serious injury, or sexual violation." For either, the exposure giving rise to the condition can include directly experiencing it, witnessing it in person, learning that it occurred to a close family member or friend, or "experiencing repeated or extreme exposure to aversive details of the traumatic event(s)." DSM-V even points to first responders and police officers as examples of people who may be repeatedly exposed in a way that would be diagnostically significant. In contrast, adjustment disorder requires no such unusual or uncommon stressors. Rather, it requires merely that a person experience the development of emotional or behavioral symptoms in response to any identifiable stressor—common or uncommon. Why should a presumption be afforded to firefighters and public safety personnel for conditions that are common in the general population and that are triggered by common—not unusual—stressors?

[7] 208 Or. App. At 569 (underlining added).

Finally, although not explicitly listed, the conditions for which the presumption would apply also include "other specified" and "other unspecified" trauma- and stressor-related disorders. According to the DSM-V, these categories are used when an individual "does not meet the full criteria for any of the disorders in the trauma- and stressor-related disorders diagnostic class." In other words, here, anything goes, and whatever limits one may think exist on what falls under the presumption dissolve.

SB 507-3 would cover not only career employees, but also volunteers and others whose actual time working in one of the covered employments would be considerably less than "full time."

The class of people for whom the presumption would apply is not limited to career firefighters and public safety personnel. It is arguably not even limited to *paid* firefighters and public safety personnel. Rather, the proposed bill would apply to *all* firefighters and public safety personnel, whether full time or part time, and, at least arguably, whether paid or not.

There are different levels of exposure between full-time career firefighters and public safety personnel and those who are in such positions on a part time or even volunteer basis. Part time workers are exposed to fewer potentially traumatic events while working in covered employment than are full time career professionals. And because they spend more of their time away from the covered employment, part time workers also have more opportunity to experience other non-covered stressors in their day-to-day lives away from the covered employment. Because of this disparity in the time part time and volunteer workers spend in the covered employment relative to the full time professionals, it makes little sense to extend the same presumption to a class of workers having fewer exposures.

The proponents of SB 507-3 have said before that one of the primary goals of the presumption legislation is to make it more likely that the people who deserve benefits get them. But with that necessarily comes the risk that people who should not get the benefits wrongly get them. To employers, that risk represents real costs. And that risk and the associated costs increase when more people with fewer exposures are afforded the presumption. To the extent a presumption is "needed" at all, it should be limited to full time, paid professionals.

SB 507-3 has no exception for workers with pre-existing mental health conditions; their "death, disability, and impairment of health" is presumed compensable too.

Once again, the proposed bill does not exclude pre-existing mental health conditions. Presumably, the theory for why excluding pre-existing conditions is not needed is the illusion that employers can somehow rebut the presumption in cases involving pre-existing conditions. But this theory assumes the false premise that the presumption, as written, would be functionally rebuttable. As discussed above, it is not. Based on the manner in which the courts and, more particularly, the Board have interpreted the phrase "in material part," essentially any contribution from work, however small, would be enough to defeat an employer's attempt to rebut the presumption.

Consider, as an example, a worker with long-standing adjustment disorder that, over time, has been tied to whatever work the person was doing at the time. Once the worker becomes employed as a firefighter or in other covered public safety employment, it is predictable that the worker would continue to experience job stress. That has been the pattern all along. After two years, that person's adjustment disorder would become presumptively compensable. And because the worker or his or her mental health provider could likely identify some firefighting or public safety stress as being at least a minimal factor in the ongoing adjustment disorder, the employer would not likely be able to rebut the presumptive compensability.

Without an exclusion for pre-existing problems, and because the ability to "rebut" the presumption is little more than an illusion, it is predictable that long-standing mental health problems such as this will become presumptively compensable essentially as soon as workers reach the two-year employment milestone. The "solution" to the "problem" of firefighters and public safety personnel not getting benefits they should get under the current system should not require a wholesale giveaway of benefits. Rather, the "solution" should be more narrowly tailored to fairly compensate those who should be compensated without imposing unnecessary costs on employers.

Any presumption MLAC approves to move forward should apply only to claims filed after the effective date of the Act, not also to claims that are "pending" as of the effective date.

In Section 2, SB 507-3 would make the presumption applicable not only to future claims but to "pending" claims as well. Though "pending" is not defined, this arguably means any claims for which a denial is not yet final. That would include claims currently in various stages of litigation. In some of those cases, the evidentiary record is now closed, and so to the extent an employer would want to try to rebut the presumption, it would be foreclosed from developing the necessary evidence to do so. Cases on review by the Workers' Compensation Board or the Court of Appeals would be decided based on law that was not in existence at the time the evidence was being prepared. Neither MLAC nor the legislature should endorse a fundamentally unfair process whereby cases would be decided without the parties being afforded a chance to address the applicable law.

SDAO does not believe there is any reason to make statutory changes to the workers compensation system at this time as it relates to a PTSD presumption. While we appreciate many of the changes made to SB 507 via the -3 amendment the bill is still completely unworkable for employers and for that reason we request that MLAC reject the bill and create a workgroup to study the issue further.

Thank you for the opportunity to express our opposition to this legislation.