

**Testimony Before the  
Management Labor Advisory Subcommittee on SB 507/HB 2148  
March 29, 2019**

TO: MLAC PTSD Subcommittee  
 FROM: Andy Graham, Cummins Goodman for SDAO  
 RE: Compensability Standards for Rebutting Presumption/  
 Comparison of SB 507 -3 and SB 507 -4

During the last MLAC Subcommittee meeting members requested an alternate proposal relating to the causation standard be provided. The following is provided for your consideration. The table listed below outlines the differences between the most recent version of the SB 507 -3 marked up proposal and SDAO’s SB 507 -4 proposal with respect to the standard for rebutting the presumption of compensability.

	<b>SB507 -3 (marked up)</b>	<b>SB507 -4 (SDAO proposal)</b>
What is the burden of proof to rebut coverage?	<p>The employer would have to prove that the employee’s covered employment (as a firefighter or public safety officer) did not cause or contribute “in material part” to the claimed condition (PTSD, acute stress disorder, adjustment disorder, or major depressive disorder) or associated death, disability or impairment of health.</p> <p>The Board has held that something that is “at most, an ‘extremely minor contributor’” satisfies the “material part” threshold. <i>Robert B. Ritchey, Jr.</i>, 69 Van Natta 325 (2017). So, to rebut the presumption of compensability under existing Board case law, an employer would have to prove that employment factors were not even an “extremely minor contributor” to the</p>	<p>The employer would have to prove that one or more non-covered factors, taken alone or in combination, is the major contributing cause (51% or more) of the PTSD or Acute Stress Disorder.</p> <p>Non-covered factors listed in the proposal include:</p> <ul style="list-style-type: none"> <li>• Employment conditions that do not exist in a real and objective sense;</li> <li>• Employment conditions that do not arise out of performing duties as a covered employee (i.e., employment conditions from other jobs);</li> <li>• Employment conditions that are generally inherent in every working situation or are reasonable disciplinary, corrective or job</li> </ul>

	<p>development of the mental health condition or associated death, disability, or impairment of health.</p>	<p>performance evaluation actions by the employer;</p> <ul style="list-style-type: none"> <li>• Employment decisions, including a decision to cease employment, that are attendant upon ordinary business or financial cycles; or</li> <li>• Factors other than exposure to employment conditions.</li> </ul> <p>Functionally, this is a reversal of ORS 656.802(3), the existing mental stress statute, employing essentially the same concepts as are in the existing statute but flipping the burden of proof onto the employer to disprove work-relatedness.</p>
<p>What is the standard for the level of proof required?</p>	<p>Clear and convincing evidence</p>	<p>Clear and convincing evidence</p>
<p>How does the burden work?</p>	<p>Any contribution from work, however small, would be enough to prevent the employer from rebutting the presumption.</p> <p>Functionally, it would be impossible for an employer to establish that work exposures were not even “at most, an ‘extremely minor contributor’” to the claimed condition or associated death, disability, or impairment of health. This is especially true given the clear and convincing evidence requirement.</p> <p>Why would this be functionally impossible? Mental health conditions are subjectively driven and multifactorial. Without any real question, firefighters and public safety officers experience traumas that <u>can</u> cause PTSD or acute stress disorder or <u>can</u> be a “stressor” required for an adjustment disorder diagnosis. The fact that a claim has been filed implies that the firefighter or public safety officer perceives that work exposures</p>	<p>This proposal effectively flips the way the existing statute for mental stress claims works and make the <u>employer</u> have to disprove, based on the standards that mirror those in the existing law, what the <u>employee</u> would otherwise have to prove.</p> <p>The existing statute, ORS 656.802(3), requires that an employee prove, by clear and convincing evidence, that (a) “[t]he employment conditions producing the mental disorder exist in a real and objective sense”; (b) “[t]he employment conditions producing the mental disorder are conditions other than [those] generally inherent in every working situation or reasonable disciplinary, corrective or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business and financial cycles”; (c) “[t]here is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or</p>

	<p>are part of what is giving him or her problems. In all but perhaps the most unusual of cases, that perception is not something that could reasonably be challenged. As such, experts are not realistically going to rule out those exposures from being “an ‘extremely minor contributor.’” And yet that is what would be required under the existing Board case law.</p>	<p>psychological community”; and (d) “[t]here is clear and convincing evidence that the mental disorder arose out of and in the course of employment” on a major contributing cause basis (i.e., that non-excluded factors were 51% or more of the cause of the condition).</p> <p>The -4 proposal would essentially turn that around. The condition would be presumed compensable, and the employer would have to prove, through clear and convincing evidence, that covered factors were <u>not</u> the major contributing cause. (The way this is phrased is that the employer would have to prove that listed non-covered factors, taken alone or together, were the major contributing cause.) Whereas in a claim under the existing law the employee has to prove that the conditions producing the disorder exist in a real and objective sense, under the -4 proposal any conditions that don’t exist in a real and objective sense would be weighed as non-covered factors. Similarly, in contrast to a claim under the existing law where the employee has to prove that it was conditions other than those generally inherent in all employment, conditions other than reasonable disciplinary factors, etc., and conditions other than those tied to ordinary business and financial cycles that were the major cause, under the -4 proposal the employer would weigh all of those excluded factors as part of the non-covered factors category. Again, paralleling the existing mental stress statute, whereas an employee now must prove that work-related factors caused the condition, under the -4 proposal an employer would be able to weigh non-work related factors (including factors not tied to the covered employment) on the non-</p>
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		<p>covered factors side.</p> <p>Just like occurs for mental stress claims today, there would be a weighing of non-excluded factors against excluded factors (i.e., covered factors against non-covered factors). The change is that under the -4 proposal it's the <u>employer's</u> burden to prove that non-covered factors are the major cause of the claimed condition. And the <u>employer</u> would be required to prove this by clear and convincing evidence (similar to the evidentiary standard placed on employees under the existing statute).</p> <p>In short, the -4 proposal would use existing, familiar criteria and <u>flip the burden</u> onto employers to disprove compensability by clear and convincing evidence.</p> <p>This proposal would give firefighters and public safety officers the presumption of compensability. By virtue of the clear and convincing evidence requirement, the burden of rebutting the presumption would be difficult for employers to meet. But because the weighing of factors would be done on a major contributing cause basis versus being tied to an unrealistic "in material part" standard, it would not be an impossible one for employers to meet.</p>
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SB 507-4  
(LC 2181)  
3/14/19 (TSB/ps)

Requested by Senator KNOPP

**PROPOSED AMENDMENTS TO  
SENATE BILL 507**

1 On page 3 of the printed bill, delete lines 15 through 45 and delete page  
2 4 and insert:

3 “(7)(a) As used in this subsection:

4 “(A) ‘Acute stress disorder’ has the meaning given that term in the fifth  
5 edition of the Diagnostic and Statistical Manual of Mental Disorders pub-  
6 lished by the American Psychiatric Association.

7 “(B) ‘Covered employee’ means an individual who, on the date a claim is  
8 filed under this chapter:

9 “(i) Was employed for at least five years in any of these occupations:

10 “(I) A full-time paid firefighter;

11 “(II) A full-time paid emergency medical services provider;

12 “(III) A police officer;

13 “(IV) A corrections officer or youth corrections officer; or

14 “(V) A parole and probation officer; and

15 “(ii) Remains employed in an occupation listed in sub-subparagraph (i) of  
16 this subparagraph or separated from employment in the occupation not more  
17 than seven years previously.

18 “(C) ‘Post-traumatic stress disorder’ has the meaning given that term in  
19 the fifth edition of the Diagnostic and Statistical Manual of Mental Disor-  
20 ders published by the American Psychiatric Association.

21 “(D) ‘Psychiatrist’ means a psychiatrist whom the Oregon Medical Board

1 has licensed and certified as eligible to perform the diagnoses described in  
2 this subsection.

3 “(E) ‘Psychologist’ means a licensed psychologist, as defined in 675.010,  
4 whom the Oregon Board of Psychology has certified as eligible to perform  
5 the diagnoses described in this subsection.

6 “(b) Notwithstanding ~~subsection (2) of this section and~~ the provisions in  
7 subsection (3) of this section that require certain demonstrations for a men-  
8 tal disorder to be compensable, death, disability or impairment of health of  
9 a covered employee is compensable as an occupational disease if a psychol-  
10 ogist or psychiatrist has determined that post-traumatic stress disorder or  
11 acute stress disorder caused the death, disability or impairment of health  
12 unless an insurer or self-insured employer establishes through clear and  
13 convincing expert evidence that one or more of the following conditions,  
14 decisions or other factors is the major contributing cause of the post-  
15 traumatic stress disorder or acute stress disorder:

16 “(A) Employment conditions that do not exist in a real and objective  
17 sense or that do not arise out of performing duties as a covered employee;

18 “(B) Employment conditions that are generally inherent in every working  
19 situation or are reasonable disciplinary, corrective or job performance eval-  
20 uation actions by the employer;

21 “(C) Employment decisions, including a decision to cease employment,  
22 that are attendant upon ordinary business or financial cycles; or

23 “(D) Factors other than exposure to employment conditions.

24 “(c) Notwithstanding ORS 656.027 (6), a city that provides a disability or  
25 retirement system for firefighters and police officers by ordinance or charter  
26 that is not subject to this chapter, when accepting and processing claims for  
27 death, disability or impairment of health from firefighters and police officers  
28 covered by the disability or retirement system, shall apply:

29 “(A) The provisions of this subsection; and

30 “(B) The time limitations for filing claims that are set forth in ORS

1 656.807.

2 **“SECTION 2. The amendments to ORS 656.802 by section 1 of this**  
3 **2019 Act apply to all claims for benefits that are filed on or after the**  
4 **effective date of this 2019 Act.”.**

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