

**Testimony Before the
Management Labor Advisory Subcommittee on SB 507/HB 2148
April 19, 2019**

TO: MLAC PTSD Subcommittee
FROM: Hasina Wittenberg, SDAO & Andy Graham, Cummins Goodman
RE: Proposed Draft Compromise (attached)

During the last MLAC Subcommittee meeting members requested an alternate proposal to the -4 amendments that SDAO presented. The latest proposal reflects a compromise position that SDAO believes fairly allows specific classes of career public safety employees a worker's compensation presumption for certain specific mental health conditions that focus on the unusual traumas experienced by public safety employees.

The following is a summary of what the proposal contains:

Who is covered?

The proposal covers Oregon public sector full-time paid (career-type) firefighters, emergency medical services providers, police officers, corrections and youth corrections officers, emergency dispatchers, 911 operators, and parole and probation officers.

What conditions are presumptively compensable?

The presumption of compensability only applies to Post-Traumatic Stress Disorder (PTSD) and Acute Stress Disorder. These are the only diagnoses in the DSM V for which exposure to life threatening/life changing trauma is necessary for the condition to occur.

How and when does the presumption apply?

Where cumulative traumas exist, the proposal provides for a presumption only if the employee has worked in one of the listed Oregon public safety fields for a minimum of five years. There is also a fixed endpoint beyond which the presumption is no longer applies; the claim must be filed while the employee remains in public safety employment or within seven years of leaving such employment. If an employee has been exposed to a significant single traumatic event that the DSM-V recognizes as sufficient to trigger PTSD or Acute Stress Disorder, the five-years of employment minimum does not apply. In that case, the presumption is available to employees

who have experienced such a significant single event regardless of how long the employee has been employee in a covered public safety category.

Are there any pre-conditions to availability of the presumption?

Yes. The proposal makes clear that it is the employee’s burden to establish that it is medically probable that he or she has PTSD or Acute Stress Disorder per the DSM V before the presumption is available. To satisfy that burden, the employee must come forth with expert medical evidence from a psychiatrist or psychologist saying that the employee meets the DSM V diagnostic criteria for PTSD or Acute Stress Disorder. The employer may then choose to seek independent expert input on whether the diagnosis of PTSD or Acute Stress Disorder is correct. The intent of the bill is that the Workers’ Compensation Board and its judges are to then consider and weigh opinions of experts saying that the employee has PTSD or Acute Stress Disorder against any opinions of experts saying that the employee does not have such a condition. Through an evaluation of which opinions are the most well-reasoned, and therefore most persuasive, the Board and its judges will then rule on whether the employee likely has met his/her burden of proving that the PTSD and Acute Stress Disorder diagnoses are valid. Only if the Board or its judges decide that the persuasive evidence establishes that the employee has PTSD or Acute Stress Disorder will the presumption of compensability then apply.

Who can diagnose PTSD and Acute Stress Disorder?

For the presumption to apply, the diagnosis must come from a licensed psychiatrist or psychologist. The opinions of other medical professionals do not trigger the presumption.

Is the presumption rebuttable?

Yes. Once the employee establishes that he or she has PTSD or Acute Stress Disorder such that the condition is presumptively compensable, an employer may rebut that presumption by proving through clear and convincing evidence (i.e., by proving it highly likely) that the employee’s duties in the covered public safety fields were not of real importance or great consequence in causing the diagnosed condition. Essentially, if the employer shows that work duties were not a substantial or significant factor in causing the condition, the presumption is rebutted.

Can employers issue a current condition denial after a claim for PTSD or Acute Stress Disorder is accepted?

Yes. The proposal allows for issuance of current condition or “ceases”-type denials. It is the employer’s burden to support such a denial with clear and convincing evidence that the employee’s duties working in covered employment are no longer of real importance or great consequence in causing the disability and need for treatment of the diagnosed condition.

Will the presumption apply to claims filed by City of Portland police, fire, and other public safety employees?

Yes.

If this bill passes, will claims already filed be affected?

No. Under the proposal the new law will apply only to new claims filed on or after the effective date of the law. As drafted, the effective date would be 60 days after the Governor signs the bill.

(7) (a) As used in this subsection:

(A) “Acute Stress Disorder” has the meaning given that term in the DSM-V.

(B) “Covered Employee” means an individual who, on the date a claim is filed under this section:

(1) Had been employed for at least 5 years in any of the following occupations by the state, any political subdivision of this state, a special government body as defined in ORS 174.117, or a public agency, or has experienced a single traumatic event which satisfies Criterion A of the Post-Traumatic Stress Disorder diagnostic criteria found in the DSM-V while employed in any of the following occupations by the state, any political subdivision of this state, a special government body as defined in ORS 174.117, or a public agency:

(i) A full-time paid firefighter;

(ii) A full-time paid emergency medical services provider;

(iii) A full time paid police officer;

(iv) A full time paid corrections officer or youth corrections officer;

(v) A full time paid Emergency Dispatcher or a 911 Emergency Operator, or

(vi) A full time paid parole and probation officer; and

(2) Either remains so employed at the time the claim is filed, or has been separated from such employment at the time the claim is filed for no more than 7 years.

(C) “DSM-V” means the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association.

(D) “Post-Traumatic Stress Disorder” has the meaning given that term in the DSM-V.

(E) "Psychiatrist" means a psychiatrist whom the Oregon Medical Board has licensed and certified as eligible to diagnose the conditions described in this subsection.

(F) "Psychologist" means a licensed psychologist, as defined in 675.010, whom the Oregon Board of Psychology has certified as eligible to diagnose the conditions described in this subsection.

(b) Notwithstanding subsections (2) and (3) of this section, where a covered employee establishes through a preponderance of the persuasive medical evidence from a psychiatrist or psychologist that it is more likely than not that the covered employee has satisfied the DSM V diagnostic criteria for Post-Traumatic Stress Disorder or Acute Stress Disorder, any resulting death, disability or impairment of health of a covered employee shall be presumed to be compensable as an occupational disease. This presumption may be rebutted only by an insurer or self-insured employer establishing through clear and convincing medical evidence that duties as a covered employee were not of real importance or great consequence in causing the diagnosed condition.

(c) An insurer's or self-insured employer's acceptance of a claim under this subsection, whether voluntary or as a result of a judgment or order, shall not preclude the insurer or self-insured employer from later denying the current compensability of the claim if:

(A) For claims accepted for Acute Stress Disorder or Post-Traumatic Stress Disorder, exposures as a covered employee to trauma meeting the diagnostic criteria A for PTSD in DSM V cease being of real importance or great consequence in causing the disability and need for treatment of the diagnosed condition.

(B) Any denial issued under this paragraph (c) of this subsection must be based on clear and convincing medical evidence.

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

(A) The provisions of this subsection; and

(B) The time limitations set forth in ORS 656.807(1) and (2) shall apply to the filing of claims under this subsection.

SECTION 2. The amendments to ORS 656.802 by section 1 of this 2019 Act apply only to claims for benefits filed on or after the effective date of this 2019 Act. This 2019 Act shall become effective 60 days after being signed into law.