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SB 802 -1

Brief summary

Specifies a presumption for essential, subject workers as to compensability for occupational disease or occupational injury that resulted in a secondary effect resulting from a previous infection by SARS-CoV-2 or previous development of a COVID-19 condition. Declares emergency, effective on passage.

Analysis

What the law currently does

Workers' compensation claims are either an injury or occupational disease. An injury arises from an identifiable event or has an onset traceable to a discrete period of time. An occupational disease generally occurs more gradually, but in specified circumstances, may include sudden conditions.

If a claim is categorized as an occupational disease, the worker usually has to show that work was the major cause of the condition. But, the law contains a "presumption" for certain types of claims. A presumption does not mean a claim is automatically accepted. Instead, it shifts the burden of proof. Without the presumption, *the worker* must establish that work was the major cause of the condition. With the presumption, *the employer/insurer* has a specified burden of proof to establish the condition was *not* caused by work. This specified burden varies depending on the presumption being applied.

Currently there are three presumptions in the workers' compensation law. All three are under the occupational disease statute: heart and lung presumption, a cancer presumption, and an acute stress disorder and PTSD presumption. The method in which the presumption works is dictated by the language in the statute. The current presumptions work in the following way:

- The workers that the presumption applies to are described in statute (ORS 656.802(4) - (6)).
- If the worker qualifies, and if the worker is diagnosed with one of the qualifying diseases, it's presumed to be from the worker's employment.
- The employer can overcome this presumption with certain clear and convincing evidence.

If the worker does not qualify for the presumption, the worker can pursue the claim without the benefit of the presumption. Without the presumption the worker has the burden of proof and must prove both legal and medical causation by a preponderance of the evidence.

What will change if the bill is enacted

A subject worker who meets the bill's definition of an "essential worker" during an emergency period declared by the Governor and who files a workers' compensation claim for a secondary effect as a result of a previous infection by SARS-CoV-2 or previous development of a COVID-19 condition within 30 years of the expiration of an emergency period, would be eligible for a presumption. The claim would be presumed to be compensable unless the employer can prove the condition was not caused by work.

The bill sets the following criteria:

- A subject worker must be an essential worker that is working at their regular work site or a temporarily assigned work site at their employer's direction.
- The period of time and the location of the worksite must be covered under the Governor's state of emergency.
- An essential worker is defined as:
 - public safety personnel
 - peace officer
 - medical services provider, including emergency medical technician, physician, nurse, physician assistant, nursing assistant, employee of a hospital or medical clinic, pharmacy technician or employee of a home health care or long term care facility
 - employee of a retail store, including a grocery store
 - employee of a public, private or charter school
 - employee of a child care facility who cares for the dependent of another essential worker
 - agricultural worker
 - janitorial worker who provides services in locations, buildings or facilities that operate in compliance with the provisions of a declaration of emergency by the Governor
 - employee of a public body, as defined in ORS 174.109, or an employee of an agent of a public body who, while in direct contact with members of the public, provided transient housing, temporary shelter or health and wellness services.
- 'Secondary effect' means 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.

In addition, the subject worker's development of a secondary effect within 30 years after the end of the emergency period is presumed to be compensable as an occupational disease or occupational injury even if the subject worker had not previously filed a claim for an occupational disease or occupational injury that is directly related to exposure to SARS-CoV-2 or development of a COVID-19 condition. These situations allow the presumption if the worker:

- Was exposed at work to a known or suspected source of SARS-CoV-2 or COVID-19 and the employer, a medical provider or a federal, state or local public health authority required the subject worker to remain away from the subject worker's work site;

- Was exposed at work to a known or suspected source of SARS-CoV-2 or COVID-19 and became symptomatic for COVID-19;
- Became symptomatic for COVID-19 and received a diagnosis of COVID-19 from a medical provider or a federal, state or local public health authority;
- Received a laboratory-confirmed diagnosis of COVID-19 or infection by SARS-CoV-2; or
- Received a presumptive positive test result for COVID-19 or infection by SARS-CoV-2.

An insurer or self-insured employer may rebut the presumption, or may deny a claim filed, only with clear and convincing evidence. A lack of an express confirmation of previous exposure to SARS-CoV-2 or previous development of a COVID-19 condition is not sufficient alone to rebut the presumption.

The bill expands the definition of occupational disease to include “exposure to or infection by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).”

The bill applies to claims for occupational disease or occupational injury that are submitted on or after the effective date of the Act and to claims for occupational disease or occupational injury that were submitted and were pending but for which compensability was not yet determined before the effective date of the Act. The bill declares an emergency so it will be effective upon passage.

Likely impacts, results, or consequences if the bill is enacted

The number of compensable claims for secondary effects for exposure to SARS-CoV-2 or COVID-19 is difficult to quantify. The department receives reports of all disabling claims and denied non-disabling workers’ compensation claims related to COVID-19, but does not have any data specific to “secondary effects”. Currently there is little information about what constitutes a “secondary effect” from COVID-19, and it is likely it will evolve over time. In any case, there will likely be claims filed under the provisions of this bill, but it is not possible to quantify at this time.

Questions/relevant information for the bill sponsor or primary proponent

1. In the criteria for essential worker, the term “may work” could be interpreted to mean that they are allowed to work at a regular or temporarily assigned work site, not that they actually did work there. As a result, workers who are allowed to work at a work site, but who chose to work from home, may be covered by the presumption. Is this the intent?
2. The presumption does not require any diagnosis for COVID-19. Also, it covers exposure to suspected sources of SARS-CoV-2 and COVID-19, but it does not say *who* suspects the exposure took place.
3. The burden on the employer for rebuttal is clear and convincing evidence, which might be difficult to obtain. In addition to the 30 year time frame for a worker to file a claim for a secondary effect, the insurer/self-insured employer cannot obtain the medical records of people

other than the worker and public health laws may not allow sharing of information about workplace outbreaks. However, it is possible the worker will be made aware of a known or confirmed source of SARS-CoV-2 or COVID-19 and disclose that to the insurer/self-insured employer.

4. In the proposal, the bill refers to an “occupational injury” as a compensable injury that results from exposure to SARS-CoV-2 or COVID-19 arising out of and in the course of employment. “Occupational injury” is a new term as the law currently uses “injury” or “occupational disease”. If the definition of occupational disease is expanded, why is there a need for a reference to an occupational “injury”?
5. The bill applies to “pending” claims. It is unclear if the intent is to include denied claims that were appealed.

Legislative history

Has this bill been introduced in a prior session?

No Yes Years Bill numbers

Does this bill amend current state or federal law or programs?

No Yes Specify ORS 656

Is this bill related to a legal decision?

No Yes Case citation, AG opinion, date, etc.

Should another DCBS division review this measure?

No Yes Divisions

Other impacts

Does this bill have a fiscal impact to DCBS?

No Yes Unknown Explain The fiscal impact to DCBS would be minimal to none. There could be a slight increase in medical or vocational disputes that come before the director, but it is not anticipated to be enough to have a fiscal impact.

Does this bill have an economic impact to stakeholders?

No Yes Unknown Explain This bill would result in an increased number of compensable workers’ compensation claims and it may increase the overall costs of claims which fall under the presumption. The cost would be reflected in the insurance rates paid by employers for the categories of workers covered by the bill.

Sponsors

Senator Gorsek

Possible interested stakeholders

Insurers, employers, self-insured employers, labor organizations, attorneys

Public policy topics

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| <input type="checkbox"/> Agency operations | <input type="checkbox"/> Other lines of insurance |
| <input type="checkbox"/> Building codes | <input type="checkbox"/> Prescription drugs |
| <input type="checkbox"/> Financial institutions and lending | <input type="checkbox"/> Property and casualty insurance |
| <input type="checkbox"/> Health insurance | <input type="checkbox"/> Public records/public meetings law |
| <input type="checkbox"/> Involvement with other agencies | <input type="checkbox"/> Rulemaking |
| <input type="checkbox"/> Licensure | <input type="checkbox"/> Securities |
| <input type="checkbox"/> Manufactured structures | <input type="checkbox"/> Task force/reports |
| <input checked="" type="checkbox"/> MLAC legislative review | <input type="checkbox"/> Worker safety |
| <input type="checkbox"/> New program | <input checked="" type="checkbox"/> Workers' compensation system |
| <input type="checkbox"/> Nondepository programs | <input type="checkbox"/> Other |