

HOUSE BILL REPORT

HB 1833

As Reported by House Committee On:
Commerce & Labor

Title: An act relating to occupational diseases affecting firefighters.

Brief Description: Expanding the presumption of occupational disease for firefighters.

Sponsors: Representatives Conway, Pettigrew, Seaquist, Upthegrove, Morrell, Kessler, P. Sullivan, Williams, Kenney, Haler, Ericksen, Moeller, Sells, Dunn, Rolfes, Lantz, McCoy, Lovick, Jarrett, Strow, Hurst, Springer, Campbell, Goodman, Simpson, Pearson, Curtis, Rodne, Schual-Berke, McDermott, Ormsby and Chase.

Brief History:

Committee Activity:

Commerce & Labor: 2/15/07, 2/26/07 [DPS].

Brief Summary of Substitute Bill

- Modifies the industrial insurance presumption of occupational disease for firefighters to include certain heart injuries and certain cancers.
- Changes the standard for rebutting a presumption of occupational disease for firefighters.
- Allows a firefighter to recover litigation fees and costs in certain cases involving the presumption of occupational disease for firefighters.

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Conway, Chair; Wood, Vice Chair; Green, Moeller and Williams.

Minority Report: Do not pass. Signed by 2 members: Representatives Condotta, Ranking Minority Member and Chandler, Assistant Ranking Minority Member.

Staff: Sarah Beznoska (786-7109).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

A worker who, in the course of employment, is injured or suffers disability from an occupational disease may be entitled to benefits under the Industrial Insurance Act (Act). To prove an occupational disease, the injured worker must show that the disease arose "naturally and proximately" out of employment.

Members of the Law Enforcement Officers' and Fire Fighters' retirement system plan are covered for workplace injuries and occupational diseases under the Act. In 1987, the Legislature created a rebuttable presumption that respiratory diseases in firefighters are occupationally related. In 2002, the Legislature extended this presumption. For these firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector fire department with more than 50 firefighters, the Act provides a presumption the following diseases are occupational diseases:

- respiratory disease;
- heart problems that are experienced within 72 hours of exposure to smoke, fumes, or toxic substances;
- primary brain cancer, malignant melanoma, leukemia, non-Hodgkin's lymphoma, bladder cancer, ureter cancer, and kidney cancer; and
- infectious diseases, including Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome, hepatitis, meningococcal meningitis, or mycobacterium tuberculosis.

With respect to the cancers presumed to be an occupational disease, an active or former firefighter must have cancer that developed or manifested itself after at least 10 years of service and must have had a qualifying medical examination at the time of becoming a firefighter that showed no evidence of cancer.

The presumption of occupational disease may be rebutted by a preponderance of evidence, including, but not limited to: use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or non-employment activities.

Since July 1, 2003, the presumption of occupational disease has not applied to a firefighter who develops a heart or lung condition and who is a regular user of tobacco products or who has a history of tobacco use.

Summary of Substitute Bill:

Legislative Findings

Legislative findings are made related to the following:

- firefighters' exposures, in the course of employment, to uncontrolled environments, hazardous substances, multiple carcinogens, and strenuous physical conditions;

- firefighters exposing co-workers, families, and members of the public to infectious diseases;
- the slow development of harmful effects caused by these exposures;
- firefighting exacerbating cardiovascular disease; and
- firefighters who experience heart injuries during firefighting being assumed to meet unusual exertion standards.

Presumption of Occupational Disease

The presumption of occupational disease for heart problems that are experienced within 72 hours of exposure to smoke, fumes, or toxic substances is modified. A presumption of occupational disease is created for any heart condition or heart impairment resulting in total or partial disability experienced within 72 hours of exposure to smoke, fumes, toxic substances, or strenuous physical exertion, or injury to the heart causing death within 72 hours of exposure to smoke, fumes, toxic substances, or strenuous physical exertion.

Certain cancers are added to the list of cancers presumed to be occupational diseases. The added cancers are: stomach cancer, intestinal cancer, multiple myeloma, testicular cancer, and prostate cancer.

Rebutting a Presumption of Occupational Disease

The standard for rebutting a presumption of occupational disease is changed. The presumption may be rebutted by clear, cogent, and convincing evidence.

Litigation Costs and Fees

In any Board of Industrial Appeals case or court case where the presumption of occupational disease is upheld, the employee must be awarded full benefits, attorney fees, expert witness costs, and all other costs from the date of the employee's initial application for benefits.

Substitute Bill Compared to Original Bill:

The substitute narrows the language related to heart injuries and creates a presumption of occupational disease for any heart condition or heart impairment resulting in total or partial disability experienced within 72 hours of exposure to smoke, fumes, toxic substances, or strenuous physical exertion, or injury to the heart causing death within 72 hours of exposure to smoke, fumes, toxic substances, or strenuous physical exertion.

Appropriation: None.

Fiscal Note: Available on original bill.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) Studies show that firefighters tend to be healthier than the general population. Studies also show that there are risks from exposures to different chemicals. The risk to firefighters for certain cancers is greater than the general public. Sufficient evidence is available that shows that firefighters are at risk from cancer and heart disease based on firefighting exposures.

There are 30 states with legislation in effect. The presumption has been in existence in Washington since 1987 and updated in 2002. The fiscal note in 2002 assumed a little more than 100 claims per year. That has not been the case; there have only been 14 claims related to cancers in the past five years. There have also been four claims that have been denied.

With respect to heart disease, there are standards that are difficult to meet. There is a court definition of unusual physical exertion that does not make sense because each event that a firefighter participates in at a fire scene is an unusual event. This bill attempts to address that issue.

The interpretation of the original language of the bill was that any injury would be included and not just an injury to the heart. The substitute addresses that issue.

There is an example of a firefighter who contracted non-Hodgkins lymphoma. The Department of Labor and Industries (Department) found that the presumption applied, but this was appealed. The Department affirmed, but additional appeals and protests were filed. There are other examples of difficulties with administration of these claims. There is a need for a presumptive of occupational disease law that works for these situations.

(With concerns) The fiscal note is based on the underlying bill which includes a broader presumption. Revised substitute language will impact the fiscal note. There are concerns about reimbursement for the costs of attorney and witness fees because, as drafted, the Department would be subject to cost even in situations when the Department is aligned with the worker. This area needs to be clarified. Lastly, the clear, cogent, and convincing standard is generally reserved for fraud cases.

(Opposed) The standard of proof to rebut a presumption of occupational disease combined with the cost recovery provisions of this bill could result in a situation where, instead of establishing a presumption of occupational disease, the bill would essentially deem certain diseases to be occupational diseases.

Originally, a firefighter was required to show that, more likely than not, the disease was firefighting related. Recognizing hazards that firefighters face, the presumption was switched. It is up to the employer to show that the disease was caused by non-firefighting activities. The clear, cogent, and convincing standard would require proof that it is highly probable that the disease is caused by non-firefighting activity. Clear, cogent, and convincing is used in fraud cases and in statutes that have an effect on basic, constitutional rights, such as termination of parental rights. This standard for rebutting a presumption would make it impossible to prove that something was non-job related.

The attorney fee provision is drafted without indicating who will pay the fees. There is a concern that the employer would be required to pay fees, and that could have a chilling effect on a decision to challenge the presumption. The attorney fee provision does not specify when it applies. Instead, it states that anytime the worker prevails, the attorney fees are awarded.

There are statements in the bill that are broad. For example, strenuous physical exertion within 72 hours is broad. There is also not medical evidence about all of the cancers that are included.

Persons Testifying: (In support) Kelly Fox and Denni Lawson, Washington State Council of Firefighters.

(With concerns) Vickie Kennedy, Department of Labor and Industries.

(Opposed) Ryan Spiller and Brian Snure, Washington Fire Commissioners; Jim Justin, Association of Washington Cities; and Kathleen Collins, Washington Self Insurers Association.

Persons Signed In To Testify But Not Testifying: None.