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# CALIFORNIA WORKERS' COMPENSATION

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## For Fire Department Leadership



# Today's presenter: Tom Richard, Sr. Counsel RTGR Law LLP



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- Police and Firefighter claims.
- 4850 benefits and leaves of absence management.
- IDRs – both CalPERS and CERL.
- Risk pools and Excess Insurance issues.
- Disability accommodations and the interactive process.
- COVID-19 workplace rules.
- 132a and S&W Claim Defenses.
- “Carve-Outs” and ADR programs.





# Questions, PDF of this PowerPoint...

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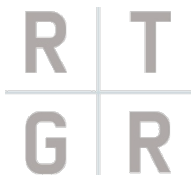
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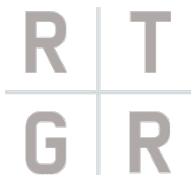
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# What is Workers' Compensation?



- Workers' Compensation is a system of workplace injury laws that originated in Germany in the 19<sup>th</sup> Century and came to the US in 1911.
- These laws provide medical care and compensation to injured workers on a *no-fault* basis. Regardless of how safe an employer may try to make its workplace, on-the-job accidents and job-related illnesses occur.
- There are also separate Workers' Compensation programs covering federal employees, longshoremen, merchant seamen, railroad employees and coal miners.



# The Purpose of Workers' Compensation



- The purpose of Workers' Compensation laws is to provide:
  - Coverage of **medical expenses** for treatment of injuries or occupational illness.
  - **Income protection** for employees who must be absent from work because of occupational illness or injury.
  - **Limited compensation** for any serious permanent injury such as loss of limb or loss of life.
- These laws also contain anti-retaliation provisions, which prohibit employers from retaliating against any employee because he or she has filed a claim or received benefits.



## Three Methods of Securing Workers' Compensation



Employers have three methods of securing Workers' Compensation liability insurance:

- ❑ Through an approved private compensation insurance carrier.
- ❑ Through self-insurance. This is only an option for employers that have the financial resources to provide Workers' Compensation benefits in good times and bad. There must be a guarantee that the injured employee will not lose his or her benefits in the event of bankruptcy of the employer.
- ❑ Through state-funded insurance. This is provided in about one third of the states.



# Advantages of Workers' Compensation



## Advantages for employers:

- ❑ Employees cannot seek damages through a separate lawsuit against the employer for on-the-job injuries.
- ❑ Employees are limited in the benefits they may recover.

## Advantages for employees:

- ❑ Coverage is provided without direct cost to employees.
- ❑ Employees receive prompt payment of claims following an injury.
- ❑ Medical expenses are compensated.
- ❑ Payments are based on an employee's current earnings and are generally excluded from gross income for tax purposes.
- ❑ Payments are made to an employee's spouse or dependent children in the event of death.





## Disadvantages of Workers' Compensation

### Disadvantages for employers:

- ❑ Premiums may be high because of the nature of an employer's business; costs are based on an employer's accident record.
- ❑ An employer's paperwork burden is increased because of requirements to report accidents to Cal/OSHA and other authorities.
- ❑ Employers may spend time defending fraudulent or spurious claims.

### Disadvantages for employees:

- ❑ Employees are denied an opportunity to seek damages against the employer beyond Workers' Compensation, such as for pain and suffering, or punitive damages.
- ❑ In some states, but not in California, Workers' Compensation benefits may be offset by Social Security disability benefits.



## Exclusive Remedy



- Workers' compensation benefits are the exclusive remedy for those injured or killed on the job.
- Generally, employees cannot sue their employers for damages in civil court for these work-related injuries. (Cal. Lab. Code § 3602(a).)

## Exclusive Remedy



- However, this exclusivity is waived, and the employee can sue in court for damages in certain circumstances, including:
  - If the injury results from certain types of intentional or egregious conduct.
  - When the employer does not have workers' compensation coverage or permissible self-insurance.

# Managing Claims





# Initial Action Plan for Employers

- Step 1: Acknowledge the claim
- Step 2: Direct employee to medical treatment
- Step 3: Take care of paperwork
- Step 4: Consider subrogation

# Acknowledge the Claim



- Labor Code Section 5402:
- “Knowledge of an injury, obtained from any source, on the part of an employer, his or her managing agent, superintendent, foreman, or other person in authority, or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts, is equivalent to service [of a written notice of injury]”



## Direct Medical Treatment

- If it is an emergency, call 911 or direct the employee to nearest Emergency Room;
- For non-emergency injuries, promptly provide first aid if needed, and direct the employee to the designated medical provider(s) specified through your Workers' Compensation program or insurance provider.



## Taking Care of Paperwork

- Immediately provide claim form to employee (DWC-1)
- Report claim to your JPA, TPA or insurance carrier.
- Complete the Employer's Report of Occupational Injury or Illness.
- Immediately report to Cal/OSHA any serious injury or illness, or death.



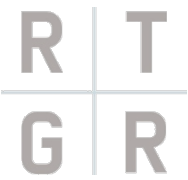


## Consider Subrogation

- Was injury “someone else’s fault?”
- A third party (not employer or coworker) may be liable.
- Workers’ Comp still pays, but employer may get reimbursement from the third party.
- Notify your TPA or insurance right away.
- Save any evidence.
  - ▣ Contact info of all witnesses.
  - ▣ Preserve any physical object involved (e.g. broken equipment, motor vehicles, etc.)

# Investigating the Workers' Comp Claim





# AOE/COE & Claim Defenses



- 1: AOE/COE
- 2: Going & Coming Rule
- 3: Other Defenses
- 4: Presumptions of Injury



# “Arising out of and in the Course of Employment”

- ❑ Workers' Compensation laws contain a coverage formula stating that, to be compensable, an injury must “arise out of and in the course of employment.”
- ❑ “Arising out of employment” refers to the activity or cause/origin of the injury.
- ❑ “In the course of employment” refers to the time, place and circumstances of the injury.
- ❑ Generally, the burden of proof is on the employee to prove injury with some medical evidence.



# The Going & Coming Rule

- ❑ Going to and from work: The general rule is that an employee is not covered during their normal commute to & from a fixed place of work.
- ❑ However, exceptions exist, including when an employee is on the employer's premises (such as in the employer's parking lot), but has not yet started or has left for the day, or is running a special errand for the employer.



## Other Defenses to Consider

- Employment/Independent Contractor
- Voluntary Intoxication
- Self-Inflicted Injuries/Suicide
- Initial Physical Aggressor
- Off-Duty Recreational Activity
- Post Termination Cases
- Psyche Claim Defenses

# Presumptions



- Any claimed injury is presumed by law to be compensable if the employer fails to timely deny the claim in writing, within 30 days to 90 days, depending on the type of injury.
- Certain Safety Officer and healthcare worker claims are also presumed compensable, if they involve:
  - Cancer,
  - Heart trouble,
  - Hernia,
  - Pneumonia,
  - COVID-19 (but only until 12/31/2023),
  - Others...



# Safety Officer Claims





# Overview of California Workers' Compensation Benefits

- Medical Care
- Temporary Disability/4850 pay
- Permanent Disability
- Supplemental Job Displacement Benefit
- Disability Retirements

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## Medical Care



- Treatment provided subject to Utilization Review (UR) and Independent Medical Review (IMR).
- Includes reimbursement for reasonable travel costs.
- Includes provision of interpreter if needed.

# Utilization Review



- UR applies to every WC case.
  - Treatment requests and prescriptions must be submitted by the physician to the Claims Administrator using an RFA form.
  - The Claims Administrator then can approve the treatment, or immediately submit it to a UR physician.
  - The prescribing physician or employee can appeal a UR non-certification, but if upheld, the denial decision is final for 1 year.



# Temporary Disability

- Doctor provides work status.
  - ▣ off work or with restrictions.
- If placed off work or employer can't provide modified duty, temporary total disability (TTD) is paid.
- TTD is  $\frac{2}{3}$  of average weekly earnings (tax free.)
  - ▣ subject to maximum rate.
- Temporary disability cap: 104 weeks.
- Temporary partial disability (TPD/wage loss.)
- In lieu of TD, certain public safety officers receive full salary for up to 52 weeks (Labor Code sec. 4850), followed by up to 52 weeks of TD.

# Labor Code § 4850 pay

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- Provides special disability compensation for police officers, firefighters, sheriffs, inspectors and district attorney investigators, among others.
- Provides for up to one year of salary continuation, tax free, in lieu of temporary disability benefits during time off for an industrial injury.

# Eligibility for § 4850 Benefits

- Generally, only applies to persons involved in active law enforcement or firefighting and prevention.
  - § 4850(c)(1) – (4) specifically excludes police and fire department personnel whose functions do not clearly come within the scope of active law enforcement or fire prevention, e.g. clerks, stenographers and mechanics.
- Courts have excluded city jailers, firefighters still in training and officers who have yet to complete a police academy.

## Eligibility for § 4850 Benefits



- Person must be employed on a regular, full-time basis.
  - Excludes reserve police officers, sheriff's reserve volunteers and volunteer firefighters.
  - § 4855 specifically excludes reserve public safety employees who have been deemed employees of a county or city for workers' compensation purposes under § 3362.
- Each separate industrial injury can result in a full year of § 4850 benefits.

# Calculation of § 4850 Benefits

- Benefits are full salary, tax free.
  - There are differing opinions on whether “full salary” includes incentive pay or differential pay.
  - Excludes holiday pay (*Mannetter* case).
  - Probably excludes overtime and uniform pay.
  - Probably excludes step or pay increases for anticipated promotions, unless the injured worker can demonstrate a binding past practice to automatically grant such increases.





# Calculation of § 4850 Benefits

- A “leave of absence” is a foundational prerequisite to the application of § 4850’s no-loss-of-salary guarantee (*Lade* case).
  - ▣ An injured worker who has returned to work, even on modified duty, is not on a leave of absence.
  - ▣ Each week of wage loss § 4850 benefits counts as a full week of § 4850 pay and counts towards the 52-week cap, even when on part-time modified duty.
- No statutory entitlement to § 4850 for attendance at medical appointments when the injured worker is working full time.
  - ▣ However, many agencies have provisions in their MOUs granting benefits in these situations.

## Disability Continuing Beyond One Year

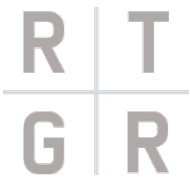


- § 4853 states that whenever disability continues for a period beyond one year, the injured worker is entitled to disability indemnity under the provisions of the Labor Code other than § 4850 for the remainder of the disability period or until his or her effective date of retirement under CalPERS.
  - Injured worker is entitled to ordinary workers' compensation benefits (TD) during this period.



## § 4850 Benefits Subject to Cap on Temporary Disability

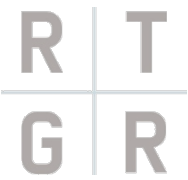
- The Court of Appeal held the 104-week cap on temporary disability pursuant to § 4656 is also applicable to § 4850 time (*Knittel* case).
  - Injured safety officers are entitled to up to one year of § 4850 time followed by up to one year of temporary disability (104 weeks total).
- All 4850 (and TD) ends 5 years after the date of injury (*Pike* case).



## Termination of § 4850 Benefits



- Benefits continue for the period of disability, not to exceed one year, or until the date the injured worker is retired on a permanent disability pension and is actually receiving disability pension payments or advanced disability pension payments (ADPP).
- Advice: After § 4850 ends and as soon as TD starts, immediately start to run FMLA/CFRA.



## Termination of § 4850 Benefits



- Benefits continue even if worker becomes MMI, so long as they remain off work because of the injury and are not retired on a permanent disability pension.
  - Temporary disability benefits can still be terminated when MMI.
- There is legal support for termination of § 4850 benefits following a voluntary or involuntary resignation (*Warren* case) and after a service-connected retirement because a “leave of absence” is a foundational prerequisite to the application of § 4850’s no-loss-of-salary guarantee (*Lade* case).



## Strategies for Mitigating 4850 Costs



- The best way to mitigate § 4850 exposure is having a robust Light Duty program.
  - Need a medical opinion stating the injured worker is released to some modified duty.
  - Offer light duty in writing. If declined, § 4850 pay may not be owed.
  - Part-time light duty is an option.
  - Can be on a different schedule from the firefighter's usual full-duty schedule/shift and primary work location.

## Strategies for Mitigating 4850 Costs



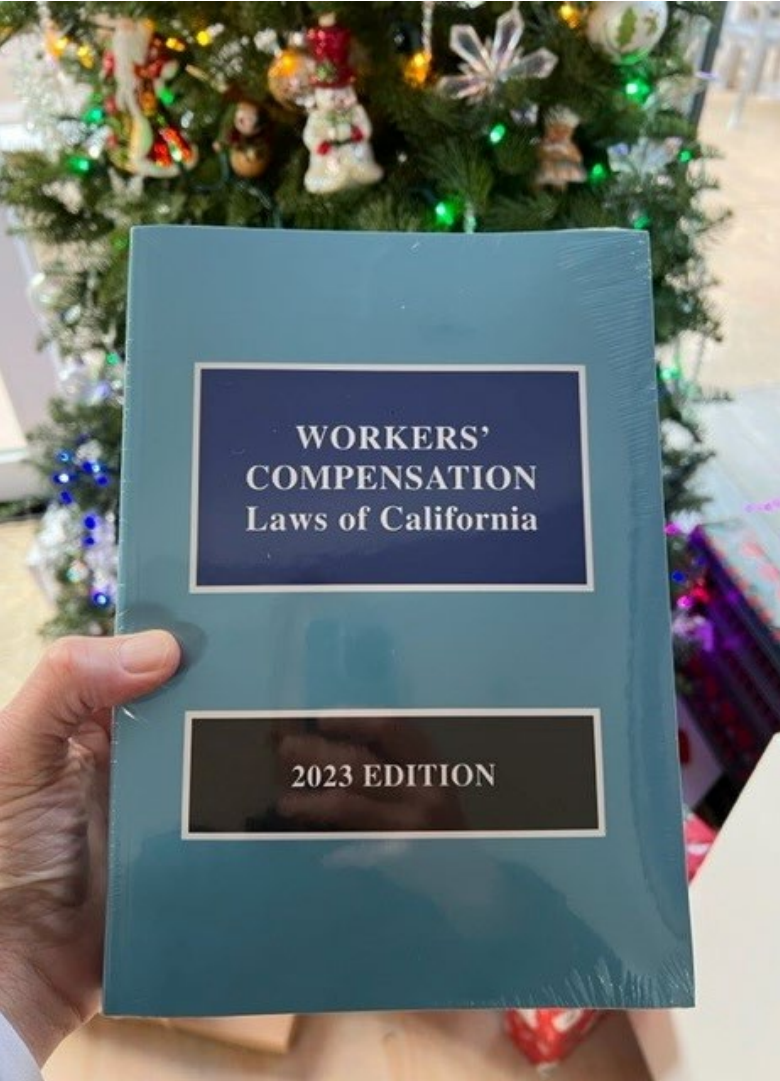
- The employer can file an application for industrial disability retirement (IDR) as part of the Interactive Process.
  - Need a medical opinion stating the injured worker is permanently substantially incapacitated from his or her usual and customary position.
  - Generally, the employer cannot proceed while the employee is still receiving § 4850 benefits.
  - Employee *can* file for an IDR before exhausting § 4850 benefits.

## Strategies for Mitigating 4850 Costs



- Negotiated buy-outs of remaining § 4850 time in exchange for the injured worker's filing of an application for industrial disability retirement is an option.
  - ▣ Can be used in situations where all parties agree the injured worker is substantially incapacitated and will not be returning to work.
- Another option is a Service Retirement with IDR Pending. That retirement can be approved in a very short time (usually a few weeks).





## Other WC Benefits and the WCAB

## Permanent Disability



- Once maximum medical improvement (MMI) is reached or TD benefits end, statutory PD benefits may start.
- Dollar value is based on level of the person's permanent impairment.
- Evaluating doctor provides rating per AMA Guides (5th Edition).
- PD mostly based on objective findings.
- Employees may be able to return to full duty and still receive a PD award.



## Supplemental Job Displacement Benefit (SJDB)

- If there is PD, employee is entitled to a \$6,000 voucher for vocational training expenses unless the employer offers to return them to work.
- Specific forms must be used for a valid return to work offer.
  - ▣ Location/duration/wage requirements.
- Consider accommodations and the interactive process.



# Workers' Comp Court System

- Workers' Compensation Appeals Board (WCAB)
- Administrative Law Judges.
- No Jury.
- All settlements must be approved by a Judge.
- Case initiated by filing Application or settlement.
- Case must be filed before compelling discovery.
- Claims are not necessarily filed as cases at WCAB unless litigated or settled.



## Carve-Outs

- **History:** Workers' compensation alternative dispute resolution (ADR) carve-out programs began to take shape in California in the late 1990s.
- These carve-out programs allowed employers and unions to establish their own ADR programs.
- The goal was to expedite the resolution of workplace injury claims, provide a more streamlined and efficient process for injured workers, and for employers to save time and money on rising WC costs.



## Carve-Outs vs. State WC Process

- **Medical Legal exams:** Carve-outs may contract with IME's who have superior exam availability and report turnaround times, especially if employers agree to pay more for their services than the set rates for AMEs and QMEs under the state's fee schedule.
  
- **Litigation duplication:** Attorneys representing WC claimants sometimes file in both the ADR and state systems, which creates redundancy, sows confusion and drives-up employer costs.

## Carve-Outs vs. State WC Process



- **Costs:** Workers' compensation carve-outs in California usually require that employers pay for Ombudsperson services to help resolve claims and the costs of an Arbitrator to adjudicate claims.
- ▣ Settlement and trial judges at the WCAB, on the other hand, are provided at no charge to the parties.
- ▣ Consultant fees to set up, administer and wind-down the ADR may be incurred, as well as specialized third-party claims administration costs to handle ADR claims.



# Do Carve-Outs still make sense?

- In the 20 years since the carve-out law, significant WC reform laws have been adopted, flattening or even driving down state WC claim costs.
- “Historically, California's workers' comp system has been full of conflict, abuse, wasted effort and misspent dollars. The past decade has seen vast improvements for system stability, while accelerating benefits for workers.”
  - California Workers' Comp. Coalition report, 9/13/2022.
- WC claim rates fell from \$3.24 per \$100 of payroll in 2014 to \$1.81 for 2021.
  - Dan Walters, *CalMatters*, 9/26/2022.



# Preventing Injuries & Reducing Claims





## Ways to Reduce Workers' Compensation Injuries *Before they happen*

- ❑ Develop a robust employee safety culture.
- ❑ Advocate for employee health injury-prevention resources as well as EAP and Workplace Wellness programs.
- ❑ Educate workplace leaders about the cost and impact of workers' compensation injuries on other work issues such as overtime requirements.
- ❑ Establish and empower a safety committee that is actively engaged in your injury and accident prevention programs.



## Ways to Reduce Workers' Compensation Claim costs



- ❑ Immediately report workers' compensation injuries.
- ❑ Consider appropriate steps to prevent similar injuries next time.
- ❑ Have a robust light-duty/return-to-work program.
- ❑ Maintain frequent contact with the injured employee and the workers' compensation claims administrator throughout.

# Disability Retirements

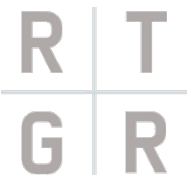




# Industrial Disability Retirement

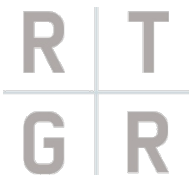


- Public safety officers who are substantially incapacitated from performing the essential functions of the job due to an industrial injury are generally entitled to an Industrial Disability Retirement (IDR) under CalPERS or else a Service-Connected Disability Retirement under the County Act of 1937.
- Receipt of disability retirement benefits from the employer or CalPERS terminates liability for § 4850 benefits and temporary disability (§ 4853).



# Disability Retirement Requirements

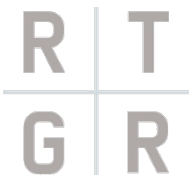
- Injured worker bears burden of showing they are substantially incapacitated from performing the essential functions of their job.
- Must be based on competent medical evidence.
- Incapacity is a determination to be made by the employer, but CalPERS has exacting IDR processing requirements.



# Advanced Disability Pension Payments



- Labor Code §§ 4850.3 and 4850.4 require certain employers to make advanced disability pension payments to eligible workers who have applied for industrial disability retirement.
- Applies to any city, county, special district or harbor district that is a member of PERS, the County Act of 1937 or the Los Angeles City Employee's Retirement System.

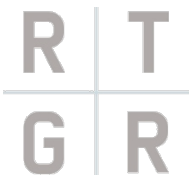


## Advanced Disability Pension Payments



- Advanced disability pension payments shall commence no later than 30 days from:
  - ▣ The worker's last regular payment of wages or salary;
  - ▣ The worker's last payment of benefits under § 4850; or
  - ▣ The worker's last payment of sick leave.

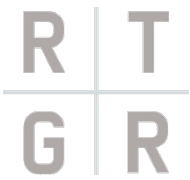




# Advanced Disability Pension Payments



- The injured worker must file an application for disability retirement at least 60 days prior to the payment of benefits and must fully cooperate by providing medical information and attending all required medical examinations.
  - The retirement systems are required to reimburse the employer for ADP payments.
  - Injured worker is required to reimburse the employer in the event the disability retirement is not approved.



# Advanced Disability Pension Payments



- ADP payments are not required if any of the following apply:
  - ▣ After examination, a doctor determines there is no discernable injury or illness.
  - ▣ The employee was incontrovertibly outside the course of employment when the injury occurred.
  - ▣ There is proof of fraud associated with the claim.

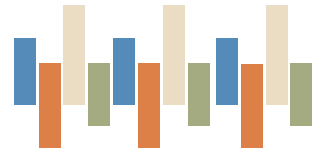
# Disability Retirement Benefits



- Generally, for qualified workers under age 50, the pension is 50% of the highest year of salary, tax free and payable by the retirement system.
- For qualified workers over age 50, the pension is calculated at either 50% or the percentage they would be entitled to due to a service retirement, whichever is greater, of which the first 50% of base is tax free.

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# Presumptions Of Work Injury



# Who Qualifies for Presumptions?



- Certain police officers, firefighters and medical personnel are entitled to a presumption of work injury for conditions such as COVID-19, cancer, heart trouble, hernia, PTSD, blood-borne infectious disease and other conditions.
  - ▣ The COVID-19 presumptions end on 12/31/2023.
- These presumptions generally, but not always, apply to those engaged in active law enforcement or active firefighting and prevention.



## Effect of a Presumptive Work Injury

- Many presumption statutes have anti-attribution clauses regarding AOE/COE: they cannot be attributed to pre-existing, non-industrial causes.
  - For example, a firefighter's lung cancer cannot be attributed to his years of smoking cigarettes.
- Apportionment to causation of permanent disability under Labor Code § 4663 is also prohibited in most presumptive injury cases by § 4663(e).

A microscopic view of numerous spherical cells. Most are a reddish-brown color with a textured surface, while several are a vibrant blue with a more crystalline or porous appearance. The cells are scattered across the frame, with some in sharp focus and others blurred in the background.

# Cancer Presumption



# Cancer Presumption Overview

- § 3212.1 cancer presumption applies to active firefighters (including volunteers) and peace officers who are primarily engaged in active law enforcement activities.
- Presumption will apply if worker establishes exposure to any known carcinogen, as defined by the IARC, and manifestation or development of the cancer within the statutory timeframe.





# AB 1400: Extends the Cancer Presumption

- Effective 01/01/2020, the law extends the cancer presumptions to all fire department personnel “exposed” to fires and the hazards directly resulting from firefighting operations, not just active firefighters.
- This could include on-scene dispatchers, EMTs, fire marshals & inspectors, mechanics and those who clear & maintain equipment and apparatuses where toxic chemicals are deposited.

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# Rebuttal of Cancer Presumption



- Cancer presumption is rebuttable if defendant can: (1) establish the primary site of the cancer, and (2) affirmatively establish there is no reasonable link between the carcinogen and the cancer.
- Often, defendant must produce a specific study that states a specific carcinogen is not reasonably linked to a specific cancer.

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## Rebuttal of Cancer Presumption

- The fact that no existing medical studies show a positive link between the cancer and the exposure does not rebut the presumption (*Garcia*).
- An employee's genetic predisposition to cancer is not sufficient to rebut the presumption (*Castro*).



## Latency Defense

- Defendants can rebut the cancer presumption by establishing that the latency period excludes the subject employment.
- For example, medical studies suggest many solid tumors have a 10-year latency period between exposure to the carcinogen and manifestation of cancer.



## Latency Period

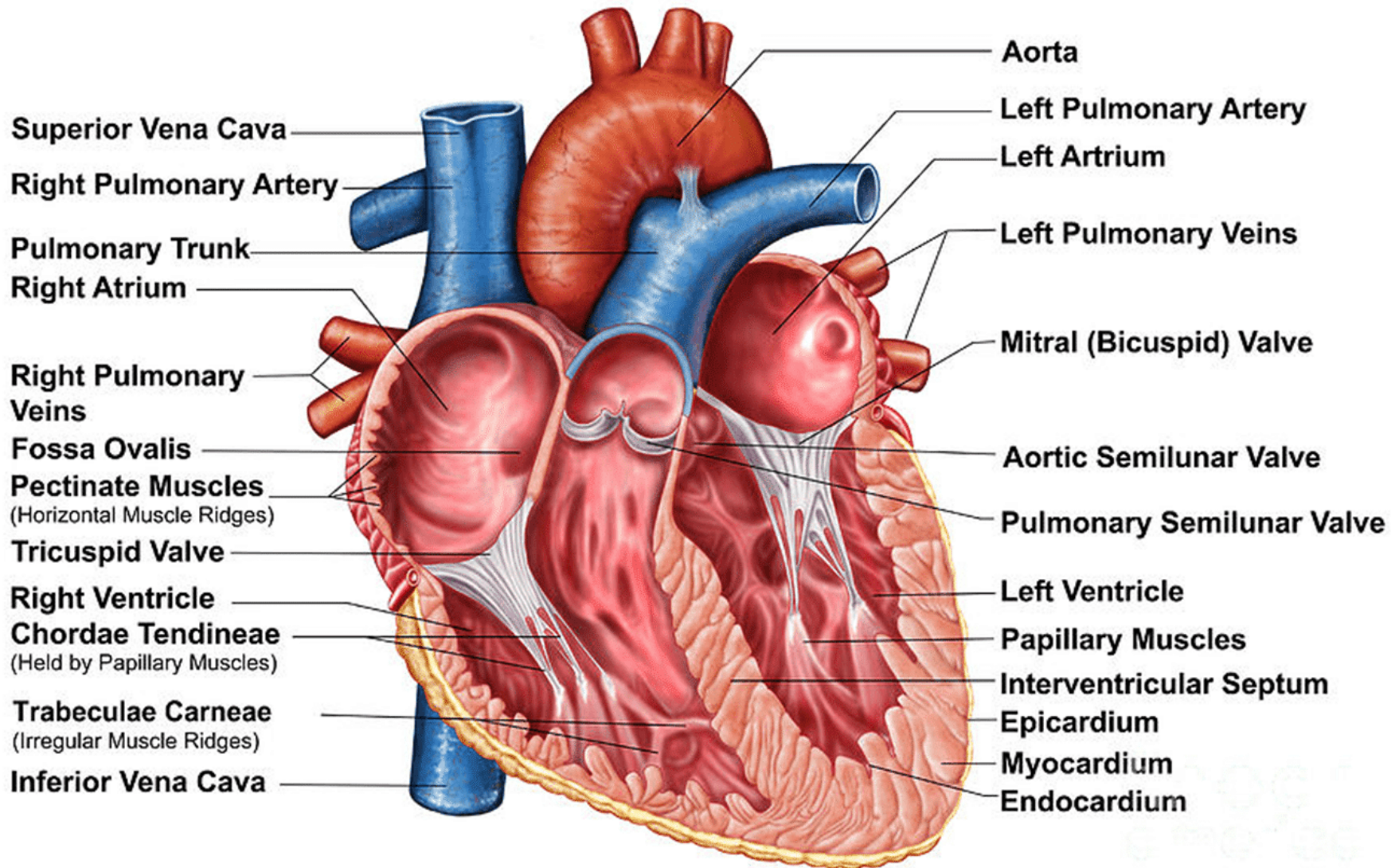
- AMEs and Panel QMEs will offer a wide range of latency periods or opine they are unable to accurately address the latency period, which can make rebuttal of the presumption far more difficult.
- The WCAB has suggested defendants need to establish a specific latency period for the specific cancer through medical studies (*Bigelow*).



# Cancer Presumption After Retirement

- The cancer presumption extends three months for every full year of service up to a total of 120 months (10 years) after the worker's last date of active service.
- Statute of Limitations is based on last day actually worked, not last day paid or day actually retired.

# Heart Trouble Presumption



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## What is “Heart Trouble”?

- No strict legislative or judicial definition of “heart trouble.”
- Atrial fibrillation has been considered heart trouble (*Surrena*).
- A heart tumor falls within the presumption (*Herfurth*).
- Aortic valve disease constitutes heart trouble (*Miller*).
- Left ventricular hypertrophy (LVH) is heart trouble (*Richardson*).



## What is NOT “Heart Trouble”?

- Hypertension alone is not heart trouble for purposes of the presumption (*Hamilton*).
- No heart trouble with two isolated incidents of tachycardia where there was no recurrence and the worker’s chest pain was non-cardiac (*Andrews*).
- A cerebral stroke has been held to not be heart trouble (*Coyne*).
- Arteriosclerosis is not heart trouble, absent a connection to a cardiovascular problem (*Bennett*).





# Rebutting Heart Trouble Presumption

- The courts have held injury AOE/COE for heart trouble can be rebutted by establishing some contemporaneous, non-work-related event, such as strenuous recreational exercise like deep-sea diving, if it was the sole cause of the heart trouble.
- Medical evidence that alcohol consumption contributed to heart trouble was insufficient to rebut the presumption where a doctor indicated alcoholism was not the sole cause of the heart trouble (*Estrada*).



# Rebutting Heart Trouble Presumption

- The courts have found the following conditions to properly rebut the heart trouble presumption:
  - Post-partum cardiomyopathy (*Palmer*);
  - Non-industrial pancreatic cancer which caused blood clots leading to a stroke and heart attack (*Hootman*);
  - Strenuous jogging off-work leading directly to a heart attack (*Robinson*).



## Heart Trouble Presumption After Retirement

- Presumption is extended 3 months for each full year of service, up to 60 months (5 years), based on last date of active service.
- Time runs from last day actually worked, not from a subsequent, official retirement date.

Posttraumatic  
Nightmares  
Acute  
Violence  
Assault  
Flashbacks  
Stress  
Depression  
Mental  
Therapy  
Recurring  
Disorder  
Vets  
Treat  
Veterans  
Avoidance  
Illness  
Diagnosis  
Memories  
Stress  
Events  
PTSD  
Fear  
Assistance  
Warfare  
Phobia  
Trauma

## The P.T.S.D. Presumption

## SB 542: the PTSD Presumption

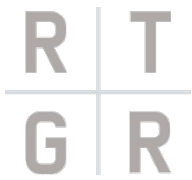


- PTSD presumption creates a “rebuttable” presumption of psyche injury for active firefighters and most sworn peace officers for injuries on or after 01/01/2020.
- This means once PTSD is claimed and diagnosed by a treater or medical-legal evaluator, the burden of proof shifts to the employer to prove there was no injury, an already difficult task given the subjective nature of psyche injuries.



## Defenses to the PTSD Presumption

- The PTSD must be diagnosed according to the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association.
- It must develop or manifest itself during a period of service in the department or unit, or else following termination of service for a period of 3 calendar months for each full year of the requisite service, but not to exceed 60 months (5 years), commencing with the last date worked.



# Defenses to the PTSD Presumption



- The PTSD presumption does not apply unless the safety officer has performed services for the department or unit for at least six months.
  - The six months of employment need not be continuous.
  - There is an exception to this rule if the injury is caused by a sudden and extraordinary employment condition.



# Other Presumptions





# COVID-19 Presumption

- COVID-19 is a statutorily-presumed injury for public safety officers and some health care workers. It is set to expire on 12/31/2023.
- The employer only has 30-days to deny the COVID claim otherwise it is presumed compensable.
- The presumption is rebuttable and may be refuted by showing that the direct cause of the COVID-19 infection was not work-related, such as a contemporaneous non-work exposure at home or unsafe off-work activities, compared to safety protocols in place at work.



## Other Presumptions

- § 3212 extends a **hernia** presumption to firefighters and safety officers.
  - Extends up to 60 months post-retirement.
- §§ 3212 and 3212.5 extends a **pneumonia** presumption to firefighters and certain safety officers.
- § 3212.8 extends a presumption for **blood-borne infectious disease** or **MRSA** to firefighters and certain safety officers.
- These presumptions contain anti-attribution clauses.



## Benefits in Presumptive Cases

- § 4458.5 states for certain presumptive injuries that occur after retirement or termination of service, the worker is entitled to maximum rates for temporary disability and permanent disability.
- Worker may be entitled to TTD at maximum rates even if he took a service retirement and has not worked or earned any income since retirement.



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THANK YOU.

## Workers' Compensation

### ***Glossary of Terms***

**ADA** – Americans with Disability Act of 1990: A federal law that prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities.

**ADAAA** - The ADA Amendments Act of 2008 was enacted on September 25, 2008, and became effective on January 1, 2009. The law made a number of significant changes to the definition of “disability” under the Americans with Disabilities Act (ADA). The Act emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA. It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA.

**A.D.** - Administrative Director: Is the Administrative Director of the Division of Workers' Compensation. The A.D. is charged with adopting, amending or repealing rules and regulations to implement, carry out, and clarify many laws in the Labor Code. The A.D. also has many other responsibilities that are specifically outlined in the Labor Code.

**AME** - Agreed Medical Evaluator: Labor Code § 4062.2 allows represented parties to use an agreed doctor to resolve disputes arising out of an injury or claimed injury.

**“Carve Out” Programs:** Labor Code section 3201.5 allows for collective bargaining agreements between employers and labor unions that establish alternative dispute resolution (ADR) programs that replace parts of the typical workers compensation system program.

**CFRA** - California Family Rights Act (Gov. Code, § 12945.2) contains family care and medical leave provisions for California employees. Secures leave rights, for example, for the birth of a child for purposes of bonding, placement of a child in the employee's family for adoption or foster care, for the serious health condition of the employee's child, parent or spouse, and for the employee's own serious health condition, among other circumstances.

**Civil Rights Department** – See *DFEH below*.

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**CMS** - Centers for Medicare & Medicaid Services: The federal agency that administers the Medicare program. In addition, CMS works with the States to run the Medicaid program and the State Children's Health Insurance Program (SCHIP).

**DFEC** - Diminished Future Earning Capacity: Labor Code § 4660(a) provides that for injuries occurring before January 1, 2013, "in determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.

**DFEH** - Department of Fair Employment and Housing: The former state agency charged with enforcing California's civil rights laws, recently renamed/organized as the Civil Rights Department. The mission of the department is to protect the people of California from unlawful discrimination in employment, housing, and public accommodations and from hate violence. Claims of unlawful disability discrimination flowing from a workplace injury originate here.

**DWC** - Division of Workers Compensation: A division within the state Department of Industrial Relations (DIR). The DWC administers workers' compensation laws, resolves disputes over workers' compensation benefits and provides information and assistance to injured workers and others about the workers' compensation system.

**IME** - Independent Medical Examiner: A forensic evaluator other than an AME or QME used in certain WC situations. IMR's are also used in "carve out" ADR programs.

**IMR** - Independent Medical Review: Labor Code § 4616.4 provides for IMR in cases of MPN disputes. Labor Code § 139.5 provides that the Administrative Director shall contract with one or more medical review organizations to conduct reviews. All appeals from utilization review determinations under Labor Code § 4610 will either be subject to a second UR review or directed to the Independent Medical Review process.

**LABOR CODE SECTION 132a**: Makes it a misdemeanor for an employer to discriminate, including discharge or threat of discharge, against an employee who has filed a workers' compensation claim or an employee who has received a workers' compensation award. This is coupled with a financial remedy to include reinstatement and back pay which is not insurable. The remedy is thought to be exclusive to the WCAB.

**MMI** - Maximal Medical Improvement: The point at which an injured worker's condition is well stabilized and unlikely to change substantially in the next year, with or without medical treatment. See P&S.

**FEHA** - Fair Employment and Housing Act: The California Fair Employment and Housing Act (FEHA) is the primary law that provides employees with protection from discrimination, retaliation and harassment in employment, including disability discrimination and retaliation. All employment provisions of the FEHA anti-discrimination provisions apply to all employers with five or more full-time or part-time employees.

**FMLA** - Family and Medical Leave Act of 1993: A Federal law that provides certain employees with serious health problems or who need to care for a child or other family member with up to 12 weeks of unpaid, job-protected leave per year. It also requires that group health benefits be maintained during the leave.

**IBR** - Independent Bill Review: Labor Code § 139.5 provides that the Administrative Director shall contract with one or more independent bill review organizations to conduct reviews. IBR was added pursuant to SB 863 to provide an unbiased method to resolve medical billing dispute resolution and reduce costs.

**MPN** - Medical Provider Network: An entity or group of health care providers set up by an insurer or self-insured employer and approved by DWC's administrative director to treat workers injured on the job.

**MSA** - Medicare Set-Aside: An MSA is an allocation created from the settlement of a workers compensation case. It is established from a portion of the settlement to be used to pay for future medical care that is related to the work injury and that would otherwise be covered by Medicare.

**PD** - Permanent Disability: Any lasting disability that results in a reduced earning capacity after maximum medical improvement is reached. Also commonly referred to the benefits an injured worker may receive as a result of his/her permanent disability.

**PPD** - Permanent Partial Disability: Per Labor Code § 4452.5 (b), "Permanent partial disability" means a permanent disability with a rating of less than 100 percent permanent disability.

**PTD** - Permanent Total Disability: Per Labor Code § 4452.5 (a), "Permanent total disability" means a permanent disability with a rating of 100 percent permanent disability only.

**PTP** - Primary Treating Physician: The doctor having overall responsibility for treatment of an injured worker's work injury or illness. The responsibility of the PTP is set out in California Code of Regulation Title 8, § 9785.

**P&S** - Permanent and Stationary: "Permanent and stationary status" is the point when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment. See MMI.

**QME** - Qualified Medical Evaluator: Labor Code § 4060 et. seq. allows for the assignment of an independent physician certified by the DWC Medical Unit to perform medical evaluations.

**RTW Fund**: created by Labor Code Section 139.48. It is funded by an assessment on employers. It is administered through the State. At present, any injured worker who does not return to work with their employer at the time of injury and receives the SJDV benefit of

Labor Code Section 4658.7 may apply. The current benefit is \$5,000. (applies to injuries on and after 1/1/13.)

**SJDB** - Supplemental Job Displacement Benefit: For injuries occurring on or after January 1, 2004, and before January 1, 2013, Except as provided in § 4658.6, if the injury causes permanent partial disability and the injured employee does not return to work for the employer within 60 days of the termination of temporary disability, the injured employee shall be eligible for a supplemental job displacement benefit in the form of a nontransferable voucher for education-related retraining or skill enhancement, or both, at state-approved or accredited schools. Also referred to as a voucher.

**SJDV** - Supplemental Job Displacement Voucher. The Voucher benefit applies to injuries occurring on and after 1/1/13. Captured within Labor Code Section 4658.7, this benefit cannot be settled, except in limited situations per panel decision on the *Beltran* case. It must be provided to any injured worker who sustains permanent disability and their employer cannot or does not offer regular, modified or alternate work by the 60<sup>th</sup> day following receipt of the MMI report or RTW and Voucher report.

**TPD** - Temporary Partial Disability: Payments you get if you can do some work while recovering, but you earn less than before the injury. Per Labor Code § 4654, if the injury causes TPD, the disability payment is two-thirds of the weekly loss in wages during the period of such disability.

**TTD** - Temporary Total Disability: Benefits that are paid to an injured worker who is temporarily medically disabled from returning to work as a result of his or her industrial accident. These benefits are payable at two-thirds of the injured employee's wages, with a maximum amount set forth by the Labor Code.

**UR** - Utilization Review: Labor Code § 4610 provides the process used by employers or claims administrators to review treatment requests to determine if they are medically necessary.

**WCAB** - Workers' Compensation Appeals Board: Consists of 24 local offices throughout the state where disagreements over workers' compensation benefits are initially heard by workers' compensation judges. The WCAB Reconsideration Unit in San Francisco is a seven-member, judicial body appointed by the governor and confirmed by the Senate that hears appeals of decisions issued by local workers' compensation judges.

Questions? Please contact:

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