

# HOUSE BILL REPORT

## ESHB 1833

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**As Passed House:**

March 13, 2007

**Title:** An act relating to occupational diseases affecting firefighters.

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

**Sponsors:** By House Committee on Commerce & Labor (originally sponsored by 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].

**Floor Activity:**

Passed House: 3/13/07, 83-12.

**Brief Summary of Engrossed Substitute Bill**

- Modifies the industrial insurance presumption of occupational disease for firefighters to include certain heart injuries and certain cancers.
- Allows a firefighter to recover litigation fees and costs in certain cases involving the presumption of occupational disease for firefighters.
- Requires payment during appeals of decisions involving the presumption of occupational disease when the firefighter's doctor has determined the firefighter to be terminally ill

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**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.

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*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.*

**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).

**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.

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**Summary of Engrossed Substitute Bill:**

Legislative Findings

Legislative findings are made related to the following:

- firefighters' exposures, by reason of their employment, to smoke, fumes, infection diseases, and toxic and hazardous substances;
- firefighters' entering uncontrolled environments to save lives, provide emergency services, and reduce property damage without being aware of the potential toxic and carcinogenic substances and infectious diseases;
- the slow development of harmful effect caused by these exposures;
- firefighters' frequently and at unpredictable intervals performing job duties under strenuous physical conditions unique to their employment; and
- firefighting exacerbating cardiovascular disease.

#### Presumption of Occupational Disease

A presumption of occupational disease is added for heart problems that are experienced within 24 hours of strenuous physical exertion due to firefighting activities. "Firefighting activities" means fire suppression, fire prevention, emergency medical services, rescue operations, hazardous materials response, aircraft rescue, and training and other assigned duties related to emergency response.

Certain cancers are added to the list of cancers presumed to be occupational diseases. The added cancers are: prostate cancer diagnosed prior to the age of 50, colorectal cancer, multiple myeloma, and testicular 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

When a determination involving the presumption of occupational disease for firefighters is appealed to the Board or Industrial Insurance Appeals or to any court and the final decision allows the claim for benefits, the Board of Industrial Insurance Appeals or the court must order that all reasonable costs of the appeal be paid to the firefighter or his or her beneficiary.

#### Payment on Appeal

When an employer requests reconsideration or appeal a Department order allowing benefits based on the presumption of occupational disease for firefighters and the firefighter's medical provider has made a determination that the firefighter is terminally ill, temporary total disability benefits (time loss) and medical aid benefits granted under the order must continue during the appeal, subject to recoupment.

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**Appropriation:** None.

**Fiscal Note:** Available on original bill.

**Effective Date:** 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.