

Presumptive Diseases and Workers' Compensation Laws

Presented by:

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Texas Government Code Chapter 607 Subchapter B – Diseases or Illnesses Suffered by Firefighters and EMTs

Sec. 607.053 – Smallpox Immunization

Sec. 607.054 – Tuberculosis or Other Respiratory Illness

Sec. 607-055 – Tuberculosis or Other Respiratory Illness

Sec. 607.055 – Cancer

Sec. 607.056 – Acute Myocardial Infarction or Stroke

What does the presumption mean? (Sec. 607.057)

- A presumption established under Chapter 607 Subchapter B applies to a determination of whether a firefighter's or emergency medical technician's disability or death resulted from a disease or illness contracted in the course and scope of employment.

What is a presumption?

- In the law of evidence, a presumption of a particular fact can be made without the aid of proof in some situations.
- The types of presumption include a rebuttable discretionary presumption, a rebuttable mandatory presumption, and an irrebuttable or conclusive presumption.
- The invocation of a presumption shifts the burden of proof from one party to the opposing party in a court trial.

Rebutting the Presumption – Sec.607.058

- A presumption applying to smallpox, tuberculosis or other respiratory illness, cancer, or acute myocardial infarction/stroke may be rebutted through a showing by a preponderance of the evidence that a risk factor, accident, hazard, or other cause not associated with service as a firefighter or EMT caused the disease or illness.

Rebutting the Presumption – Sec. 607.058

- A rebuttal offered under this section must include a statement by the person offering the rebuttal that describes, in detail, the evidence that the person reviewed before making the determination that a cause not associated with the individual's service as a firefighter or EMT caused the disease or illness.
- Added by HB 1388 in 2015 and effective immediately.

Cancer Presumption – Sec. 607.055

(a) A firefighter or emergency medical technician who suffers from cancer resulting in death or total or partial disability is **presumed** to have developed the cancer during the course and scope of employment as a firefighter or emergency medical technician if:

- (1) the firefighter or emergency medical technician:
 - (A) **regularly responded** on the scene to calls involving fires or fire fighting; or
 - (B) regularly responded to an event involving the documented release of radiation or a known or suspected carcinogen while the person was employed as a firefighter or emergency medical technician; and
- (2) the cancer is **known to be associated** with fire fighting or exposure to heat, smoke, radiation, or a known or suspected carcinogen, as described by Subsection (b).

(b) This section applies only to a type of cancer that **may be** caused by exposure to heat, smoke, radiation, or a known or suspected carcinogen as determined by the **International Agency for Research on Cancer (IARC)**.

Legislative Intent

- It is clear that the legislative intent was to shift the burden of proof from the claimant to the employer by creating a presumption of causation in favor of the firefighter or emergency medical technician. See Gen. Motors Corp. v. Saenz, 873 S.W.2d 353, 359 (Tex. 1993).

International Agency for Research on Cancer (IARC)

<http://www.iarc.fr/>

- IARC's Mission: Cancer research for cancer prevention. The International Agency for Research on Cancer (IARC) is the specialized cancer agency of the World Health Organization. The objective of the IARC is to promote international collaboration in cancer research. The Agency is inter-disciplinary, bringing together skills in epidemiology, laboratory sciences and biostatistics to identify the causes of cancer so that preventive measures may be adopted and the burden of disease and associated suffering reduced. A significant feature of the IARC is its expertise in coordinating research across countries and organizations; its independent role as an international organization facilitates this activity. The Agency has a particular interest in conducting research in low and middle-income countries through partnerships and collaborations with researchers in these regions.

International Agency for Research on Cancer (IARC)

- Emphasis is placed on elucidating the role of environmental and lifestyle risk factors and studying their interplay with genetic background in population-based studies and appropriate experimental models. This emphasis reflects the understanding that most cancers are, directly or indirectly, linked to environmental factors and thus are preventable. The IARC Monographs Programme is a core element of the Agency's portfolio of activities, with international expert working groups evaluating the evidence of the carcinogenicity of specific exposures. The Agency is also committed to studying approaches for the early detection of cancer and in evaluating prevention strategies.
- Its main offices are in Lyon, France. Its role is to conduct and coordinate research into the causes of cancer. It also collects and publishes surveillance data regarding the occurrence of cancer worldwide. It maintains a series of monographs on the carcinogenic risks to humans posed by a variety of agents, mixtures and exposures.

IARC Categories

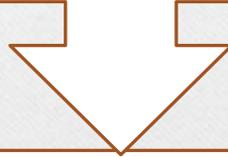
- The IARC categorizes agents, mixtures and exposures into five categories. Note that the classification is based only on the strength of evidence for carcinogenicity, not on the relative increase of cancer risk due to exposure, or on the amount of exposure necessary to cause cancer. For example, a substance that only very slightly increases the likelihood of cancer and only after long-term exposure to large doses, but the evidence for that slight increase is strong, would be placed in Group 1 even though it does not pose a significant risk in normal use.
- Group 1: carcinogenic to humans: There is enough evidence to conclude that it can cause cancer in humans.
- Group 2A: probably carcinogenic to humans: There is strong evidence that it can cause cancer in humans, but at present it is not conclusive.
- Group 2B: possibly carcinogenic to humans: There is some evidence that it can cause cancer in humans but at present it is far from conclusive.
- Group 3: not classifiable as to carcinogenicity in humans: There is no evidence at present that it causes cancer in humans.
- Group 4: probably not carcinogenic to humans: There is strong evidence that it does not cause cancer in humans. Only one substance – caprolactam – has been both assessed for carcinogenicity by the IARC and placed in this category.

Cancers that “may” be related...

- Esophagus
- Stomach
- Colorectum
- Caecum
- Pancreas
- Lung & bronchus
- Melanoma
- Prostate
- Testis
- Bladder
- Kidney & renal
- Pelvis cancer
- Brain
- Thyroid cancer
- Leukemia
- Non-Hodgkin lymphoma
- Multiple myeloma

Who does the cancer presumption apply to? (Sec. 607.051)

Emergency medical technician is defined as “an individual who is certified as an emergency medical technician by the Department of State Health Services as provided by Chapter 773, Health and Safety Code, and who is employed by a political subdivision.”



A firefighter is “an individual who is defined as fire protection personnel under Sec. 419.021 or an individual who is a volunteer firefighter certified by the Texas Commission on Fire Protection or the State Firemen's and Fire Marshals' Association of Texas.”

Applicability – Sec. 607.052

The presumption only applies to a firefighter or EMT who:

- Received a physical examination that failed to reveal evidence of the illness or disease;
- Has been employed for five or more years as a firefighter or EMT; and
- The disease or illness is discovered during employment as a firefighter or EMT.

Applicability – Sec. 607.052

The presumption does not apply to:

- Survivor's benefits under Chapter 615;
- A cause of action in state or federal court except for judicial review;
- A determination under a life or disability insurance policy; or
- A disease or illness known to be caused by the use of tobacco and the firefighter/EMT used tobacco or the spouse smoked during marriage.

APD 150098-s

- This was the very first Appeals Panel case to address Chapter 607.
- Claimant was employed as a firefighter for the Self-Insured since August 1994 and was diagnosed with multiple myeloma cancer in April 2013.
- Claimant testified that she regularly responded to calls involving fires, including a large explosive fire known as the “Market Street Fire” on June 24, 1995.
- The Claimant introduced an expert’s opinion on causation, an affidavit from another firefighter with multiple myeloma, and evidence-based medicine.

APD 150098-s Continued

- The Hearing Officer found against the Claimant stating, “there is no known factor that directly and unequivocally finds that multiple myeloma is directly caused by heat, smoke, radiation, or a known or suspected carcinogen.”
- The Appeals Panel reversed, finding that the Hearing Officer misplaced the burden of proof.
- The burden should have been placed on the self-insured to rebut the presumption.

Legislative Intent re: APD 150098-s

- The House Research Organization (HRO) Bill Analysis for S.B. 310 states:

[S.B. 310] would improve firefighter and emergency personnel benefit security and shift the burden of proof away from the employee to the local government or risk pool in determining whether an employee's illness was caused by the performance of duties. Firefighters and emergency personnel often face hazardous situations and sustain injuries, illness, and death in their efforts to save lives and property. To receive medical coverage and workers' compensation, they must document when and where they sustained injury and illness. Because of the nature of their work, determining the origin of disease exposure or injury can be impossible to prove, yet the burden of proof currently lies with the employee. This bill appropriately would create a presumption in favor of the employee for diseases, such as certain cancers and respiratory illnesses, which typically are associated with the performance of emergency personnel duties. . . . By allowing for the rebuttal of presumption in specific situations, it would not create barriers to receiving benefits in unrelated situations. HRO Bill Analysis, Tex. S.B. 310, 79th Leg. R.S. (2005).

Legislative Intent re: APD 150098-s

- “Current Texas law provides that public safety personnel who contract certain occupational diseases may receive benefits if the person can prove that the disease was caused by an exposure in the line of duty, and if a specific exposure is documented in a timely manner. There is a lack of available benefits to those who do not show the effects of a disease that they contracted in the line of duty until later. S.B. 310 provides a rebuttal presumption for firefighters and emergency medical technicians for certain diseases, including . . . cancer.” State Affairs, SRC Bill Analysis, Tex. S.B. 310, 79th Leg. R.S. (2005).

APD 151156

- Decedent was employed as a firefighter with the Self-Insured for 31 years.
- Decedent was diagnosed with pancreatic cancer while employed as a firefighter and passed away on May 6, 2011.
- The Self-Insured's expert testified that pancreatic cancer has not been a risk associated with firefighting per IARC.

APD 151156 Continued

- The Hearing Officer agreed with the expert and found that there was no evidence that pancreatic cancer is caused by firefighting.
- The Hearing Officer found that the presumption did not apply and that the Decedent's beneficiaries' burden of proof was not met.
- The Appeals Panel reversed, finding that the presumption applied because pancreatic cancer **may be** related to firefighting per the IARC.
- The case was remanded back to the Hearing Officer to apply the presumption to the facts.

Case Law in the Future

- These first two Appeals Panel cases only came out in 2015 and are currently the controlling opinions.
- The political subdivisions may choose to seek judicial review in District Court.
- Those cases may be appealed to the Texas courts of appeals and eventually the Texas Supreme Court.
- Once the cases go up on appeal, the courts will review and write case law interpreting the presumption.
- Those opinions will be several years down the road.

Defending a Firefighter Cancer Claim

“Regularly responded” has not been defined by the Legislature or Appeals Panel.

- Attempt to obtain documentation of the number and frequency of fires fought by the Claimant.

You must attempt to determine a full medical history and family history of the Claimant.

- Did the Claimant or spouse use tobacco?
- Does the Claimant have underlying risk factors?

Defending a Firefighter Cancer Claim

You must obtain a medical opinion prior to filing your denial.

- The denial must explain why the carrier determined the presumption does not apply and describe the evidence reviewed.

You will want your medical expert to testify at the CCH.

- The expert may testify why a risk factor, accident, hazard, or other cause not associated with the Claimant's work caused the disease or illness.
- The expert may testify why the cancer is not known to be associated with fire fighting or is not linked to firefighting by the IARC.

Scenario 1

Claimant has been employed as a firefighter for 25 years.

He fought fires for the first 10 years of his career but has worked a desk job for the last 15.

Claimant was diagnosed with throat cancer and filed a workers' compensation claim.

Your investigation revealed that Claimant's wife is a user of chewing tobacco.

Should you consider a denial of this claim?

Scenario 2

- Claimant has been employed as an EMT for the City for the last 15 years.
- Claimant would frequently respond to fires to provide medical care but was never involved in fighting fires.
- Can the City deny Claimant's lung cancer claim because he did not regularly fight fires?

Scenario 3

- Claimant has been a firefighter for 20 years and was diagnosed with lung cancer.
- The City obtained a report and testimony from a medical expert which stated that while the cancer may be linked to firefighting by IARC, Claimant had numerous other risk factors including family history.
- Who will have the burden of proof at a Contested Case Hearing?

Scenario 4

- Claimant was employed as a firefighter for 30 years.
- Six months after retiring, Claimant is diagnosed with lung cancer and files a workers' compensation claim.
- Will the presumption apply?
- If not, what burden of proof will apply?



RDG

THANK YOU FOR ATTENDING
HAVE A GREAT DAY

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