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## New Safety Officer PTSD Presumption

Article by attorneys Nicole Demakis and Alex Clark

The California Legislature has approved Senate Bill Number 542 (hereinafter "SB 542"), which adds a new presumptive injury to the cadre of other presumptions in the Labor Code for sworn safety officers who work for a qualifying public employer in the State of California. This Bill permits the filing of presumptive post-traumatic stress injuries for police and firefighters. Governor Gavin Newsom approved the bill on October 1, 2019 which will apply to injuries occurring on or after January 1, 2020 and will sunset on January 1, 2025.

As justification for the bill, the Legislature recognizes that police and firefighters are two of the most stressful occupations as employees who work in these occupations are required to make life and death, split-second decisions. In so doing, they are exposed to a variety of risks, both emotional and physical, that are unique to their occupations. These risks include being bitten, spit at, assaulted by an under-the influence suspect, gruesome arson or accident scenes.

Recognizing the stigma that is associated with mental disorders such as PTSD, we believe the Legislature in enacting this statute, is validating the general reluctance of the safety officer occupations (police and fire) to file stress claims due to events and experiences they witness on the job. Over the course of hundreds of safety officer depositions, it is clear from testimony that from very early on in the Academy a "machismo culture" is prevalent and pervasive affecting both men and women in their respective occupations, with a tendency to downplay the



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effects of these emotional stressors on one's psyche because they are a sign of weakness.

Acknowledging this reluctance to make such a claim because of various factors that have been reinforced over years of habit and custom, the Legislature has now afforded safety officers a legitimate avenue to pursue a claim of PTSD by enacting this presumption. This will in turn hopefully encourage police and firefighters to promptly receive care without the perceived stigma.

SB 542 adds section 3212.15 to the Labor Code. Once its applicability is established, Labor Code section 3212.15 will allow for full hospital, surgical, medical treatment, disability indemnity, and death benefits.

Labor Code § 3212.15 applies to:

- (I) Active firefighters for
  - A city, county, city and county, district, or other public or municipal corporation or political subdivision fire department;
  - A University of California or California State University fire department;
  - The Department of Forestry and Fire Protection;
  - A firefighter for a county forestry or firefighting department or unit;
- (II) Active firefighting members of a fire department that serves a United States Department of Defense installation and who are certified by the Department of Defense as meeting its standards for firefighters;
- (III) Active firefighting members of a fire department that serves a National Aeronautics and Space Administration installation and who adhere to training standards established in accordance with Article 4 (commencing with Section 13155) of Chapter 1 of Part 2 of Division 12 of the Health and Safety Code;
- (IV) Peace officers, as defined in Section 830.1, subdivisions (a), (b), and (c) of Section 830.2, Section 830.32, subdivisions (a) and (b) of Section 830.37, and Sections 830.5 and 830.55 of the Penal Code, who are primarily engaged in active law enforcement activities; and
- (V) Fire and rescue services coordinators who work for the Office of Emergency Services.

Labor Code § 3212.15 will create a rebuttable presumption of injury for post-traumatic stress claims diagnosed according to the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders. Ensuring that the diagnosis of PTSD is in accordance with the current model of the DSM is a clear avenue for contesting the application of the Labor Code § 3212.15 presumption. The DSM-V currently requires the following for a PTSD diagnosis:

(A) The person was exposed to death, threatened death, actual or threatened serious injury or actual or threatened sexual violence through one of the following:

- Direct exposure;
- Witnessing the trauma;
- Learning that a relative or close friend was exposed to a trauma; or
- Indirect exposure to aversive details of the trauma, usually in the course of professional duties;

(B) The traumatic event is persistently re-experienced through one of the following:

- Unwanted upsetting memories
- Nightmares;
- Flashbacks;
- Emotional distress after exposure to traumatic reminders; or
- Physical reactivity after exposure to traumatic reminders;

(C) Avoidance of trauma-related stimuli after the trauma, in at least one of the following way(s):

- Trauma-related thoughts or feelings
- Trauma-related external reminders;

(D) Negative thoughts or feelings that began or worsened after the trauma, in at least two of the following way(s):

- Inability to recall key features of the trauma

- Overly negative thoughts and assumptions about oneself or the world
- Exaggerated blame of self or others for causing the trauma
- Negative affect
- Decreased interest in activities
- Feeling isolated
- Difficulty experiencing positive affect

(E) The symptoms last more than one month;

(F) Symptoms create distress or functional impairment; and

(G) The symptoms are not due to medication, substance use, or other illness.

This presumption extends to a member following termination of active service for a period of three calendar months for each full year of the requisite service not to exceed 60 months (maximum of 5 years after end of active service). The presumption does contain a threshold making it applicable only to safety officers who have been employed for at least six months with a qualifying employer. The six months need not be consecutive; rather they are calculated in the aggregate. An exception exists for injuries that occur within the first six months of active service that are the result of "sudden and extraordinary" employment conditions. Based upon prior case law using the same language "sudden and extraordinary", we believe this exception likely applies to the mechanism of injury rather than the injury itself.

We believe the Legislature has either intentionally or inadvertently failed to address the anti-attribution components of Labor Code section 4663(e) vis a vis SB 542. As the safety officer practitioner knows, Labor Code § 4663(e) lists the presumptive injuries to which apportionment does not apply. We believe that until the Legislature specifies whether they intend to allow apportionment of any disability related to a presumptive PTSD claim to a "pre-existing mental disorder", that discovery on this issue will be fair game.

There are still a few months left to the legislative year and it is believed that failure to account for inclusion of Labor Code Section 3212.15 in Labor Code section 4663 was an oversight and will be corrected. Until such time it would appear that

apportionment is at least an avenue to mitigate exposure for the impairment, but not as to causation of the injury itself.

Accompanying this new PTSD presumption will most likely be a host of new pre-employment psychological testing public employers may need to consider adding to their repertoire. This is almost certain to trigger more potential privacy and discrimination issues than desired. What the future holds in this regard for employers is as of yet, uncertain; but for us workers' compensation lawyers, it is a certainty that we will be busy.

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