

Presumptions in workers' compensation – a double-edged sword

10 September 2015

Agenda

- ▶ Introductions and opening remarks
- ▶ Workers' compensation (WC) presumptions: definitions and background
- ▶ Impact of WC presumptions
- ▶ Impact on carriers
- ▶ Actuarial takeaways
- ▶ Questions and answers

Panelist introductions

- ▶ Jay Votta – EY
- ▶ Jim Kremer – EY
- ▶ Mike Parish – Accident Fund Holdings, Inc.

WC presumptions

Definitions and background

Historical basis for presumptions in WC

- ▶ The doctrine of WC itself as a statutory and exclusive remedy for injured workers
- ▶ The overall US WC system operates very similarly to a presumption, favoring the injured worker if certain criteria are met.
- ▶ Most state WC acts (via statutes or case law) are remedially constructed and resolve doubts in favor of the employee.
- ▶ Some jurisdictions go beyond and follow the “Rule of Liberality”: if there is a causal relationship between an injury and employment, an employer must show **substantial evidence** in order to overcome the assumption that the injury is work related. For carriers and employers, this means:
 - ▶ Benefit of doubt given to injured workers: assumption by the system and its arbiters is that the injury is work related.
 - ▶ Burden of proof rests on the employer to prove injury is not work related.
 - ▶ These states provide a core “presumption of compensability.”

WC presumptions

Definitions and background

Why is there a need for these presumptions?

- ▶ Anecdotal evidence and some isolated scientific studies support claims that prolonged exposure to the everyday conditions of their work cause, or are at least associated with, various maladies: respiratory disease, coronary conditions and some cancers.
- ▶ Many existing state WC acts, absent special provisions, would disqualify the majority of claims associated with these conditions under relevant definitions of occupational disease since most of them are “ordinary diseases of life to which the general public are exposed.”
- ▶ In many jurisdictions, this has led to a steady adoption of new or revised presumptions, usually rebuttable, granting special WC coverage to firefighters, police officers and sometimes to other first responders for cancer, respiratory and heart diseases and posttraumatic stress disorder (PTSD) connected with the exertions of their employment.

WC presumptions

Definitions and background

Common WC presumptions

- ▶ Presumptions favoring the employee
 - ▶ Firefighter presumptions (respiratory, cancer, heart, vascular)
 - ▶ First responder presumptions (communicable diseases, PTSD)
- ▶ Presumptions favoring the employer
 - ▶ Drug-free workplace laws
- ▶ Public entities vs. private employers
 - ▶ Exposure impact tilted heavily toward state, county and municipal entities

WC presumptions

Definitions and background

What is driving new presumptions?

- ▶ Increasing frequency: 35 states now have some type of disability presumption relating to WC
- ▶ Often created in response to larger societal events
 - ▶ Post-9/11 first responder vulnerability
 - ▶ Increased prevalence of media coverage for:
 - ▶ Mass shooting/casualty events
 - ▶ Natural disasters
- ▶ Changing state political environments
 - ▶ Lobbying entities on behalf of employers, industries or unionized labor
 - ▶ Polarizing case law decisions

WC presumptions

Definitions and background

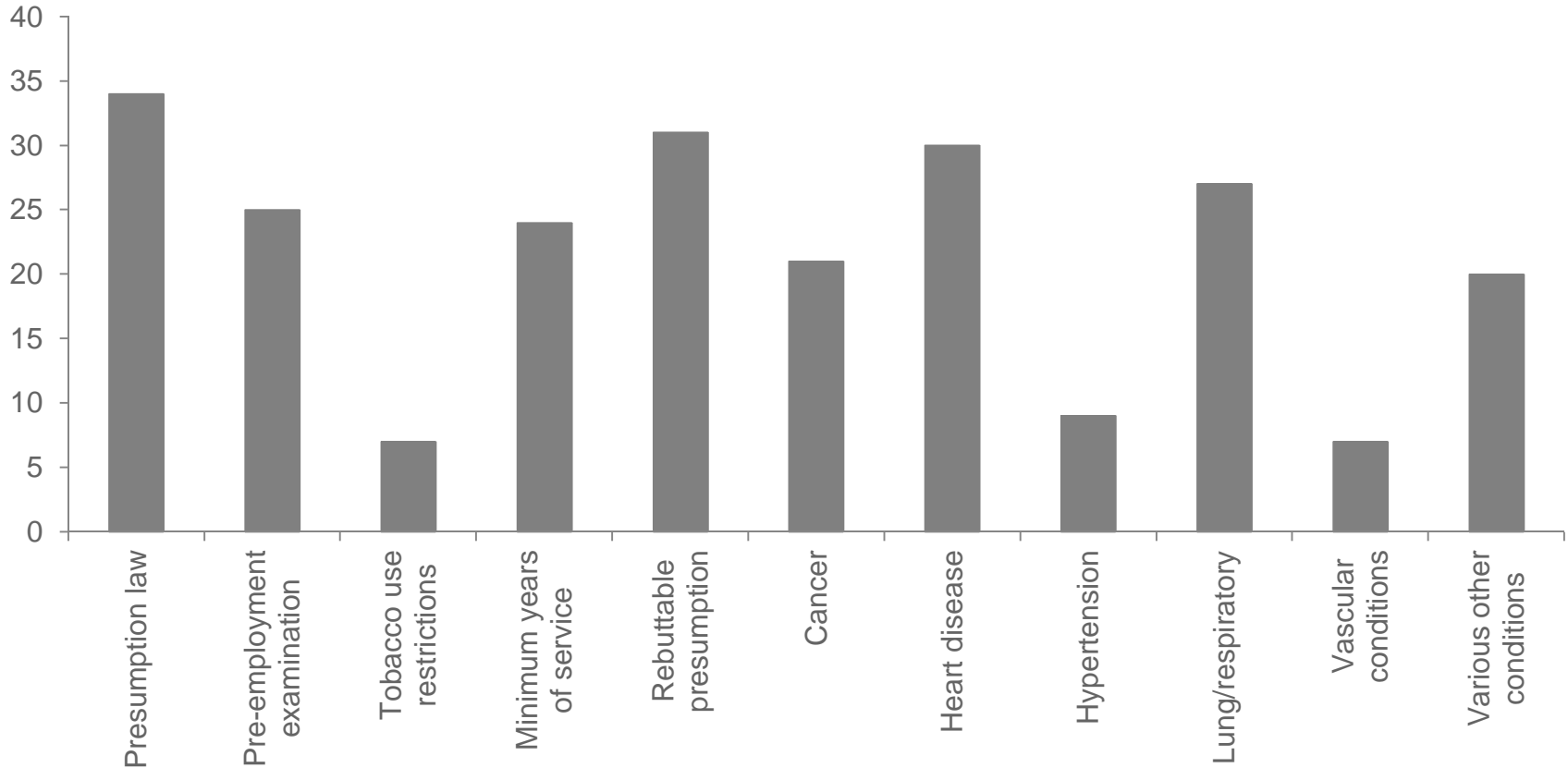
WC presumptions – key questions

- ▶ What are the eligibility criteria triggering the presumption?
 - ▶ How broadly are eligible employees (volunteers) defined?
 - ▶ What are the eligibility service requirements?
 - ▶ Are there time limitations between employment and claim reporting?
 - ▶ Are there specified age restrictions?
- ▶ Is the presumption “rebuttable”
 - ▶ **Non-rebuttable:** employer **cannot defend** against compensability.
 - ▶ **Rebuttable:** employer **can defend** against compensability.
- ▶ Is there an increase in WC benefits available compared to the normal reimbursement scheme?
- ▶ Is the presumption retroactive?
- ▶ Is subrogation by other carriers allowed?

WC presumptions

Definitions and background

States with presumption laws, qualifying provisions and covered conditions



Task force on public employee disability presumptions

WC presumptions

Definitions and background

What has the claim severity impact been?

- ▶ The National Council on Compensation Insurance (NCCI) forecasts that presumptions have and will increase costs, but due to significant data limitations and conflicting medical research, the extent of the increases is difficult to estimate.
- ▶ Latency of conditions covered under the presumptions often delay understanding of the true impact.
- ▶ Relatively low frequency of potential claims compared with overall WC exposure for most public entities.
- ▶ Plaintiff firms working with unions to actively recruit WC claimants to file claims.
- ▶ In general, WC presumption claims are more expensive than the incurred average cost per WC claim.

WC presumptions

Definitions and background

What about the market and actuarial impact?

- ▶ Challenging forecasting environment: need to examine the potential frequency **and** severity impact
- ▶ There is an inherent uncertainty when these presumptions are created or expanded.
- ▶ Judicial interpretation at the administrative, commission and circuit court (and beyond) levels are often unpredictable and change over time.
- ▶ Impact depends on public entity exposure (past/present)
- ▶ Consider impact on WC markets and coverage availability
 - ▶ Policyholders
 - ▶ Carriers
 - ▶ Residual markets

Impact of WC presumptions favorable to injured workers

Cancer presumptions in Pennsylvania: Act 46

- ▶ Enacted in 2011 after decades of debate and negotiation
- ▶ Municipalities must cover all costs to **any cancer** diagnosed in ex-firefighters for more than 11 years after their last day on the job, if they can establish exposure to certain carcinogens during their careers, regardless of when the cancer was diagnosed or treated
- ▶ Costs include current, future and retroactive indemnity, medical, legal, death and survivor benefits
- ▶ Rebuttable by substantial, competent evidence for the first 300 weeks; no presumption exists from 300–600 weeks
- ▶ Subrogation is allowed.

Impact of WC presumptions favorable to injured workers

Pennsylvania cancer presumption: market impact

- ▶ 2012 PA Department of Community and Economic Development survey of all classes of municipalities
- ▶ It revealed that 21% of the respondents reported having their firefighters workers' compensation coverage cancelled as a result of Act 46. Additionally, 43% reported an increase in workers' compensation costs as a result of the legislation.
- ▶ Premiums were never collected for this additional (300 weeks), retroactive exposure, as well as inability to accurately price exposures going forward.
- ▶ Driving increase in settlement activity vs. litigation and the risk of potentially adverse judicial precedents
- ▶ Potential impact on self-insured employer WC funding balances

Impact of WC presumptions favorable to injured workers

Connecticut PTSD presumptions

- ▶ 2015 proposal would expand benefits for first responders' claims of PTSD for using or being subject to deadly force or witnessing a death or the "aftermath" of a death
- ▶ Developed in response to Sandy Hook and Aurora, Colorado, mass shooting events
- ▶ Would grant benefits beyond first responders to cover all municipal employees diagnosed with PTSD after witnessing a violent event or its aftermath
- ▶ Prospective only, not retroactive
- ▶ Real need vs. potential for abuse by employees
- ▶ Likely dead for this year

Impact of WC presumptions favorable to employers

2013 Tennessee WC reforms

- ▶ Revised basic construction of WC
- ▶ WC law shall not be remedially or liberally construed but shall be construed “fairly, impartially, and in accordance with basic principles of statutory construction” and in a manner favoring neither the employee nor the employer.
- ▶ Why? Business-friendly reform to help attract new and provide relief to existing employers
- ▶ Results?
 - ▶ NCCI: loss costs decreasing – 21% over two years
 - ▶ Too early for impact on premiums due to long tail of WC

Impact of WC presumptions favorable to employers

Florida Drug Free Workplace Act of 2010 (DFWA)

- ▶ Two-tiered approach to issue of intoxication and benefits
 - ▶ If there is reason to believe at the time of injury it was “occasioned primarily by” alcohol or drugs, the employer can require a test
 - ▶ If the employer has complied with the DFWA, and there is a positive result, it is **presumed** that the injury was “occasioned primarily by” the employee’s intoxication
 - ▶ Burden of proof goes to the employee to prove otherwise
- ▶ Thus, a positive test actually precludes benefits
- ▶ Implementing the program also makes the employer eligible for a 5% WC premium credit
- ▶ Impact on overall safety for employer and all workers
- ▶ Part of large overall group of WC reforms in Florida

WC presumptions

Carrier impact

Carrier analysis of new WC presumptions

- ▶ At the state level, this is never a surprise
- ▶ Extensive lobbying and discussion phase
- ▶ What drives the discussion in any given state?
 - ▶ Overall political climate
 - ▶ Strength of lobbying interests involved: public sector unions, private sector unions, business lobbies, state/county/municipal governments, state insurance funds
 - ▶ High-profile events or individuals
 - ▶ State of the economy
 - ▶ Availability of funding sources
- ▶ During legislative phase, language of bill likely in flux as to extent of firefighters and types of cancer covered

WC presumptions

Carrier impact

Carrier analysis – firefighter cancer presumption

- ▶ Identify whether this will impact claims on a go-forward basis or if it will impact historical exposures as well.
- ▶ Determine who is covered: full time only? Or, are part-time and volunteer firefighters also included?
- ▶ What kinds of cancer are covered under the presumption?
- ▶ What other qualifying provisions are included?
 - ▶ Eligibility/years of service requirements
 - ▶ Reporting time frames
 - ▶ Baseline examinations
 - ▶ Tobacco use restrictions

WC presumptions

Carrier impact

Carrier analysis – firefighter cancer presumption

- ▶ Run several scenarios based on different combinations of expanded coverage
- ▶ Utilize statistics based on general populations and then run scenarios where these estimates varied
- ▶ Derive a wide range of potential outcomes for different combinations of expanded coverage
- ▶ Even under the most restrictive of coverage (full-time firefighters covering only lung cancer), a rate increase may likely be needed as this kind of law represents expanded coverage

WC presumptions

Carrier impact

Claim cost estimates – firefighter cancer

- ▶ Calculate each scenario, assuming different firefighter types, incidence rates, annual costs, estimated life expectancies and types of cancer covered
- ▶ Lung and seven types of cancer – rate for entire populations multiplied by number of full-time, volunteer and part-time/on-call firefighters in carrier's book of business
- ▶ Doubled, then tripled incidence rates, medical and indemnity costs for different types of firefighters to allow for comparison
- ▶ Life expectancy considerations – medical and indemnity costs based on average age of covered employees within the book of business

WC presumptions

Carrier impact

Evaluating impacts – firefighter cancer

- ▶ If only full-time firefighters, and lung cancer is the only covered condition
 - ▶ 1X (most optimistic) annual cost
- ▶ If all firefighters and seven types of cancer are covered
 - ▶ 13X (most pessimistic) annual cost
- ▶ At 1X – still likely a rate increase, but tolerable
- ▶ Higher than that – decision needed on whether to continue to underwrite that business

WC presumptions

Carrier impact

Market impact – firefighter cancer presumption

- ▶ Already an expensive class of business to write
- ▶ Ongoing discussion/debate through the years as details were agreed to
- ▶ As legislation became more likely, carriers in this state estimated the total cost of the new presumptions
- ▶ For many carriers in the open market, this accelerated their exit from risks with firefighter exposure
- ▶ No ongoing new business and non-renewing existing risks
- ▶ Significant impact on residual markets

WC presumptions

Carrier impact

Actuarial impact – firefighter cancer presumption

- ▶ Communication with claims, legal and government affairs resources within the carrier is critical
- ▶ Retroactive provisions can have the biggest impact as these risks were never adequately priced for.
- ▶ For future risks, typically there is time to evaluate the potential exposure from new presumption laws to assist in pricing and reserving
- ▶ Based on analysis of the potential impact and the level of exposure within a carrier's book of business and considering the long latency periods for many of the conditions typically covered, there would be a significant impact on actuarial reserving methodologies

WC presumptions

Key takeaways

- ▶ Any new WC rules and regulations are highly dependent on how they are ultimately interpreted at the judicial level in each state.
- ▶ Political dynamics influence the creation and modification of the various presumption statutes across the US.
- ▶ This is not going away: during the 2013 legislative session, 28 states attempted to introduce or revise occupational disease laws regarding firefighters alone.
- ▶ Carriers and state funds must understand the depth of their exposure to public entities that are most profoundly impacted by these presumptions.
- ▶ Seek out and work with policyholders who take advantage of favorable presumption laws to their fullest extent.

Questions and answers



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