

CHANGES MADE BY SUB. H. B. 27 TO THE PRESUMPTIVE CANCER AND WORKERS COMPENSATION LAWS

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Substitute House Bill 27, enacted June 28, 2017, and signed by the Governor on June 30, makes several changes to the workers compensation and the presumptive cancer laws. Some changes benefit injured workers; others will work to their disadvantage. Highlights include the following.

WORKING WAGE LOSS ADDED FOR CANCER CLAIMANTS

Originally, firefighters who have cancer contracted in the course of hazardous duty are entitled to compensation only in the event of temporary total disability (TTD), permanent total disability (PTD), or death. **HB 27 adds working wage loss** to the compensation a firefighter may receive under the presumption in the Workers' Compensation Law that a firefighter who is disabled due to cancer incurred the cancer while performing official duties as a firefighter. The working wage loss provision applies to workers' compensation claims pending on the provision's effective date and to any claim filed on or after that date. With the change, a firefighter with cancer, who may be able to perform jobs other than firefighting, may be entitled to some compensation in the form of working wage loss.

TEMPORARY TOTAL DISABILITY MEDICAL EXAMINATION MAY BE WAIVED

Under the old law, the BWC must refer an employee who has received 90 consecutive days of TTD compensation to the BWC Medical Section for a medical examination. If a medical examiner determines that the employee remains temporarily and totally disabled, the medical examiner must recommend a date when the employee should be reexamined. The BWC must schedule, and the employee must attend, medical examinations until an examiner determines that the employee is no longer temporarily totally disabled, or the employee is no longer receiving TTD compensation. **HB 27 authorizes BWC, for good cause, to waive the requirement that an employee receiving TTD compensation undergo a medical examination.** However, the medical examination must be scheduled if the employee's employer objects to the waiver.

PAYMENT OF TTD EVEN IF WEEKLY WAGE HAS NOT BEEN ESTABLISHED

Under the bill, if an employee is eligible for TTD compensation, but the employee's full weekly wage has not yet been determined at the time payments are to start, the employee is entitled to 33 1/3% of the statewide AWW. Once the employee's full weekly wage has been determined, the employee's TTD compensation is adjusted accordingly.

EXTENSION OF TIME TO APPEAL WC CLAIM TO COURT

HB 27 extends the time to appeal an Industrial Commission order from 60 days to 150 days if a party provides notice of intent to settle a claim and the opposing party does not object.

ATTORNEY FEES INCREASED

HB 27 increases to **\$5,000** (from \$4,200 under current law) the amount of attorney's fees a workers' compensation claimant can recover in an appeal to a court of common pleas.

FEES FOR EXAMS PROHIBITED

HB 27 prohibits a public employer from requiring an employee, prospective employee, or applicant for employment to pay the cost of a medical examination required by the public employer as a condition of employment or continued employment.

TIME TO FILE A WC CLAIM REDUCED

Injured employees used to have two years to file a worker's compensation claim. HB 27 decreases the amount of time a person has to initiate a workers' compensation claim based on an employee's injury or death to **one year** after an employee sustains the injury or dies.

SUSPENSION OF PAYMENTS TO INCARCERATED DEPENDENTS

Claimants cannot receive WC compensation while incarcerated. However, an injured worker's dependents were able to receive death benefits even if the dependent was in jail. HB 27 prohibits, for claims arising on or after the provision's effective date, compensation or benefits from being paid to a deceased employee's dependent while the dependent is incarcerated as a result of a conviction of any state or federal criminal law.

PPD MEDICAL EXAMS

With regard to permanent partial disability (PPD) applications filed on or after the provision's effective date, if an employee fails to respond to an attempt to schedule a medical examination by the BWC Medical Section or fails to attend a scheduled medical examination without notice or explanation, HB 27 requires the **dismissal** of the PPD application. The employee may re-file a dismissed application, **assuming the statute of limitations has not been reached**.

CHIPPING AWAY AT THE CANCER PRESUMPTION LAW

HB 27 provides that the presumption does not apply if it has been more than **15 years** since the firefighter was last assigned to hazardous duty as a firefighter (rather than 20 years or more as under current law).

HB 27 adds to the circumstances under current law in which the presumption can be rebutted.¹ The presumption that the cancer is work related does not apply if there is evidence that shows, by a preponderance of competent scientific evidence, that **exposure to the type of carcinogen alleged did not or could not have caused the cancer being alleged**. This is very problematic. Does it open the door to (1) an argument that the firefighter must show which particular carcinogen caused his/her cancer, and/or (2) the use of scientific studies to, in effect, nullify the presumption?

DRUG TESTING

HB 27 revises the types and amounts of controlled substances to which the law regarding the rebuttable presumption that an employee was under the influence at the time of injury applies. The changes raise a number of questions and are certain to generate litigation. Even the Legislative Service Commission, in analyzing the Act, wondered whether and how drugs such as barbiturates, benzodiazepines, methadone, and propoxyphene were covered and what levels applied to those drugs, which sample types are to be used for valid drug tests, which types of tests (for example, enzyme multiplied immunoassay technique or gas chromatography mass spectrometry) are required for the presumption to apply, and what levels (such as initial test cutoff concentration level or the confirmatory test cutoff level) are to be used.

¹Ohio law states the presumption is rebuttable in any of the following situations:
“(a) There is evidence that the firefighter's exposure, outside the scope of the firefighter's official duties, to cigarettes, tobacco products, or other conditions presenting an extremely high risk for the development of the cancer alleged, was probably a significant factor in the cause or progression of the cancer.
(b) There is evidence that the firefighter was not exposed to an agent classified by the international agency for research on cancer as a group 1 or 2A carcinogen.
(c) There is evidence that the firefighter incurred the type of cancer alleged before becoming a member of the fire department.
(d) The firefighter is seventy years of age or older.”