



**Testimony Before the
Senate Committee on Workforce
In Opposition to SB 507 – 3 amendment**

*Presented by: Hasina Wittenberg, Special Districts Association of Oregon & Oregon Fire
District Director's Association
March 19, 2019*

Members of the committee, my name is Hasina Wittenberg and I appear before you today to present testimony in opposition to the -3 amendment to SB 507 on behalf of the Special Districts Association of Oregon (SDAO) and the Special Districts Insurance Services (SDIS). SDIS was formed in the mid-1980s in response to an extremely adverse public liability insurance market. Currently, SDAO has approximately 956 members statewide and approximately 60% of those districts obtain workers' compensation coverage from the SDIS insurance pool; nearly 200 rural fire protection districts participate in our workers compensation plan. Rural fire protection districts are the largest type of special district that belongs to our association (approximately 253 of the 956 special districts). SDIS's pool includes but is not limited to the following types of special districts: rural fire protection districts; park and recreation districts; water districts; sanitary districts and; port districts.

The Oregon Fire District Directors Association's membership represents the elected officials (approximately 800 fire district director board members) of 162 rural fire protection districts.

SDAO and SDIS opposes the -3 amendment to SB 507 for the following reasons:

The presumption proposed under SB 507-3 remains functionally irrebuttable.

SB 507-3 changes the originally proposed standard for rebutting the presumption from an employer's having to prove that the condition is "unrelated" to employment to instead having to prove that the condition was not "caused or contributed to in material part" by employment. In the context of mental disorder conditions, these two standards are virtually identical. An employer's having to prove, through clear and convincing evidence, that a subjectively-driven mental disorder was not "caused or contributed to in material part" by an employee's work exposures is essentially impossible.

The standard "in material part" appears elsewhere in the workers' compensation law. It is not an unfamiliar standard. In 2006, the Court of Appeals looked to the Oregon courts' go-to dictionary for a definition of this phrase. In *Mize v. Comcast Corp.*, the court found the dictionary definition to mean that "a 'material part' must be 'of real importance or great consequence:

SUBSTANTIAL...”¹ In then applying that definition, the court inexplicably dropped the qualifier “great,” and proceeded to treat “in material part” as implying any “fact of consequence.”² While the omission of the qualifier “great” did not matter in the context of the court’s analysis of the facts in *Mize*, that omission has since been given real importance by the Workers’ Compensation Board in its application of the “in material part” standard.

The “in material part” standard appears in the cancer presumption, as well. There, the Board has interpreted the phrase to require, effectively, that the employer prove that employment conditions were not a cause of the cancer at all. This extreme application of the “in material part” standard is perhaps most evident in a 2017 Board case, *Robert B. Ritchey, Jr.*³ There, the expert evidence was that firefighting was “at most, an ‘extremely minor contributor to the overall number of [testicular cancer] cases,” and that “scientifically it is extraordinarily unlikely that [claimant’s] occupation contributed to the development of testicular cancer.”⁴ The Board found the expert’s acknowledgement that work was “at most, an ‘extremely minor contributor’” to constitute evidence that work caused the condition “in material part.”⁵ So the expert’s opinion that it was “extraordinarily unlikely” that work contributed to development of the cancer was not enough to rebut the cancer presumption.⁶

In other words, as the Board sees it, any contribution, however minor or minimal, constitutes a “material part.” This means that to establish that a condition was not caused or contributed to “in material part” by work exposures, an employer effectively must prove that work played no role in bringing about the condition.

That standard remains at least *arguably* workable in the context of cancer cases where there is robust scientific evidence that firefighting exposures are not recognized causes of some of the enumerated cancers. But such a standard would not be workable in the context of mental disorders. The reason is that mental disorders are inherently subjective. Because of that subjectivity, it is effectively impossible for an expert to entirely rule out work exposures playing any role — however minor or minimal — in development of the condition. In short, proof that a worker’s mental disorder was not caused or contributed to “in material part” by work exposures — as the Board currently understands that phrase — would be an impossible burden for employers to meet.

On the other hand, if the mental disorder presumption were to specifically *define* “in material part” in the way the Court of Appeals first defined it in *Mize*—that a “‘material part’ must be ‘of real importance or great consequence: SUBSTANTIAL,’”⁷ the standard understood that way *could* be workable. But without statutory clarification on the meaning of “in material part,” the proposed presumption is functionally irrebuttable.

¹ *Mize v. Comcast Corp.—AT&T Broadband*, 208 Or. App. 563, 569 (2006).

² *Id.*

³ 69 Van Natta 325 (2017).

⁴ *Id.* at 328 (emphasis added).

⁵ *Id.*

⁶ *Id.*

⁷ 208 Or. App. At 569 (underlining added).

SB 507-3 remains unreasonably overbroad in its identification of conditions subject to the presumption.

SB 507-3 now explicitly links the presumptively compensable conditions to those listed in the DSM-V as being “Trauma- or Stressor-Related Disorders.” While SB 507-3’s language used to identify conditions subject to the presumption is more understandable than the original proposal to include any “mental or emotional trauma or a stress-related disorder,” the fact remains that SB 507-3 casts far too wide a net.

On its face, the list of conditions covered is absurd. The bill specifically includes, among the presumptively compensable conditions, “reactive attachment disorder” and “disinhibited social engagement disorder.” If one looks at the DSM-V, it is readily apparent that these two diagnoses apply only to children. There is zero reason why these two conditions should be listed in the bill.

More concerning is that the proposed bill includes adjustment disorder among those that would be presumptively compensable. Adjustment disorder includes multiple subtypes, with most adjustment disorder diagnosed in the general population characterized by elements of anxiety and depressed mood. DSM-V describes adjustment disorder as being “common.”

Importantly, the types of stressors that can lead to adjustment disorder are not limited to those that firefighters and public safety personnel experience more frequently than people in the general population. A comparison between PTSD, acute stress disorder, and adjustment disorder is telling. PTSD requires exposure to “actual or threatened death, serious injury, or sexual violence.” Similarly, acute stress disorder requires exposure to “actual or threatened death, serious injury, or sexual violation.” For either, the exposure giving rise to the condition can include directly experiencing it, witnessing it in person, learning that it occurred to a close family member or friend, or “experiencing repeated or extreme exposure to aversive details of the traumatic event(s).” DSM-V even points to first responders and police officers as examples of people who may be repeatedly exposed in a way that would be diagnostically significant. In contrast, adjustment disorder requires no such unusual or uncommon stressors. Rather, it requires merely that a person experience the development of emotional or behavioral symptoms in response to any identifiable stressor—common or uncommon. Why should a presumption be afforded to firefighters and public safety personnel for conditions that are common in the general population and that are triggered by common—not unusual—stressors?

Finally, although not explicitly listed, the conditions for which the presumption would apply also include “other specified” and “other unspecified” trauma- and stressor-related disorders. According to the DSM-V, these categories are used when an individual “does not meet the full criteria for any of the disorders in the trauma- and stressor-related disorders diagnostic class.” In other words, here, anything goes, and whatever limits one may think exist on what falls under the presumption dissolve.

SB 507-3 would cover not only career employees, but also volunteers and others whose actual time working in one of the covered employments would be considerably less than “full time.”

The class of people for whom the presumption would apply is not limited to career firefighters and public safety personnel. It is arguably not even limited to *paid* firefighters and public safety personnel. Rather, the proposed bill would apply to *all* firefighters and public safety personnel, whether full time or part time, and, at least arguably, whether paid or not.

There are different levels of exposure between full-time career firefighters and public safety personnel and those who are in such positions on a part time or even volunteer basis. Part time workers are exposed to fewer potentially traumatic events while working in covered employment than are full time career professionals. And because they spend more of their time away from the covered employment, part time workers also have more opportunity to experience other non-covered stressors in their day-to-day lives away from the covered employment. Because of this disparity in the time part time and volunteer workers spend in the covered employment relative to the full time professionals, it makes little sense to extend the same presumption to a class of workers having fewer exposures.

The proponents of SB 507-3 have said before that one of the primary goals of the presumption legislation is to make it more likely that the people who deserve benefits get them. But with that necessarily comes the risk that people who should not get the benefits wrongly get them. To employers, that risk represents real costs. And that risk and the associated costs increase when more people with fewer exposures are afforded the presumption. To the extent a presumption is “needed” at all, it should be limited to full time, paid professionals.

SB 507-3 has no exception for workers with pre-existing mental health conditions; their “death, disability, and impairment of health” is presumed compensable too.

Once again, the proposed bill does not exclude pre-existing mental health conditions. Presumably, the theory for why excluding pre-existing conditions is not needed is the illusion that employers can somehow rebut the presumption in cases involving pre-existing conditions. But this theory assumes the false premise that the presumption, as written, would be functionally rebuttable. As discussed above, it is not. Based on the manner in which the courts and, more particularly, the Board have interpreted the phrase “in material part,” essentially any contribution from work, however small, would be enough to defeat an employer’s attempt to rebut the presumption.

Consider, as an example, a worker with long-standing adjustment disorder that, over time, has been tied to whatever work the person was doing at the time. Once the worker becomes employed as a firefighter or in other covered public safety employment, it is predictable that the worker would continue to experience job stress. That has been the pattern all along. After two years, that person’s adjustment disorder would become presumptively compensable. And because the worker or his or her mental health provider could likely identify some firefighting or

public safety stress as being at least a minimal factor in the ongoing adjustment disorder, the employer would not likely be able to rebut the presumptive compensability.

Without an exclusion for pre-existing problems, and because the ability to “rebut” the presumption is little more than an illusion, it is predictable that long-standing mental health problems such as this will become presumptively compensable essentially as soon as workers reach the two-year employment milestone. The “solution” to the “problem” of firefighters and public safety personnel not getting benefits they should get under the current system should not require a wholesale giveaway of benefits. Rather, the “solution” should be more narrowly tailored to fairly compensate those who should be compensated without imposing unnecessary costs on employers.

Any presumption MLAC approves to move forward should apply only to claims filed after the effective date of the Act, not also to claims that are “pending” as of the effective date.

In Section 2, SB 507-3 would make the presumption applicable not only to future claims but to “pending” claims as well. Though “pending” is not defined, this arguably means any claims for which a denial is not yet final. That would include claims currently in various stages of litigation. In some of those cases, the evidentiary record is now closed, and so to the extent an employer would want to try to rebut the presumption, it would be foreclosed from developing the necessary evidence to do so. Cases on review by the Workers’ Compensation Board or the Court of Appeals would be decided based on law that was not in existence at the time the evidence was being prepared. Neither MLAC nor the legislature should endorse a fundamentally unfair process whereby cases would be decided without the parties being afforded a chance to address the applicable law.

In the past five years SDIS has had 25 stress related disorder claims submitted for firefighters. Of those claims, 56% were accepted (14 accepted and 11 denied). Of the 25 claims filed from 2014 – 2018, fourteen claims were approved, seven were settled and four were denied. The seven claims that were settled were settled under a disputed claims settlement process for amounts ranging from \$2,000 to \$50,000. This compares to a historic percentage of accepted stress related claims for other professions of 7%.

SDAO Firefighter Stress Related Claims – 5 Year History

Year	2014	2015	2016	2017	2018	Total
Approved	0	9	1	2	2	14
Denied	0	1	0	5	5	11
Total	0	10	1	7	7	25

Many of the claims that were denied, were denied because the predominating causes were determined to be items like: spouse recently passed away, custody issues with children after divorce, history of sexual abuse, ex-spouse murdered, mother recently died, employment performance issues – including termination from past employment, significant-other living in another state, conflict with the district’s board of directors, and pre-existing depression disorder.

SDAO does not believe there is any reason to make statutory changes to the workers compensation system at this time as it relates to a PTSD presumption.

SDAO does believe that there is a mental health issue that should be addressed for emergency service providers. It is important that we support our public safety workers ability to secure mental health treatment with a focus on preventative treatment. To that extent we are proactively addressing this issue with the Oregon State Firefighters Council by launching a specialized EAP program for every career fire service first responder. I have attached a summary of the new program's benefits to this testimony.

Thank you for the opportunity to express our opposition to this legislation.

MEMORANDUM

DATE: January 11, 2019
TO: Management Labor Advisory Committee (MLAC)
SUBJECT: EAP Program for Oregon Career Professional Fire Fighters

The Special Districts Association of Oregon (SDAO) has partnered with Public Safety EAP a Division of ESI to provide all career professional firefighters in Oregon an Employee Assistance Program (EAP) specifically designed for emergency responders. The program will be unveiled to all local government career professional fire fighters in January 2019 free of charge to the individual. Although SDAO only insures fire districts the program is available to cities and fire districts for whom we do not provide workers compensation coverage.

The program is specifically designed for fire and public safety and utilizes mental health professionals that specialize in fire and EMS issues.

The EAP program offers many services and benefits for its users. It is a simple process to get help, there is one phone number for Oregon's career professional fire fighters to call.

The benefits include:

Employee Benefits and Services

- Unlimited 24/7 phone access to confidential counseling – Family members are covered as well
- Up to 6 in person counseling sessions per year, per issue
- Work-Life Benefits
 - Legal, financial, caregiver benefits, adoption benefits, special needs benefits, personal assistant, information resources, public safety resource center, tools for tough time, pet information
- ESI Training and Personal Benefits
 - Personal development, personal finance and education center, management academy
- Wellness Resource Center and Lifestyle Benefits
- Stress Assessment and Services

Peak Performance Coaching and Benefits and Services

- Certified financial coaching, balancing life at work and home coaching, resilience coaching, effective communication coaching, yoga and relaxation coaching for beginners, workplace conflict coaching, certified student debt coaching, home purchase coaching, retirement coaching, succeeding as a supervisor coaching

Certified Wellness Coaching

Administrative Services

- EAP member and supervisor orientation, EAP ongoing communication and engagement, automated digital communication, EAP mobile App

Manager, Supervisor and HR Services

- Human Resource consultations, Administrative Referral, Supervisor resource center, drug free workplace, HR web café



CAREER DEVELOPMENT AND TRAINING BENEFITS

Our online training and resources help with personal growth. If you are a supervisor or hope to become one, we offer an entire online supervisory training resource. You can balance your work, life and career objectives with the help of tutorials, exercises and worksheets.

PEAK PERFORMANCE COACHING

Personal and professional coaching is available from senior-level ESI coaches. Get one-to-one telephonic coaching and support, as well as online self-help resources and trainings.

Coaching is available for:

- ▣ Certified Financial Coaching
- ▣ Balancing Life at Work and Home
- ▣ Resilience
- ▣ Effective Communication
- ▣ Home Purchasing
- ▣ Student Debt
- ▣ Yoga & Relaxation for Beginners
- ▣ Workplace Conflict
- ▣ Retirement
- ▣ Succeeding as a Supervisor



Call any time for confidential assistance.
To reach a counselor 24 hours a day, call toll free:

888.327.1060

or log on to **PublicSafetyEAP.com**

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You protect the public, but
where can you turn for support?



S D A O Special Districts
Association of Oregon

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WHAT IS PUBLIC SAFETY EAP?

Public Safety EAP is a confidential counseling and support service staffed by trained professionals 24 hours a day to assist public safety personnel and their families. We currently serve thousands of sworn police officers, firefighters, state troopers, EMS personnel, corrections officers, civilian staff and their families. Public Safety EAP is one of the most experienced in the country and nearly 99% of those who use the EAP are satisfied with the experience.

MORE BENEFITS FOR YOU

Your EAP provides access to more problem solving solutions than any other EAP. Detailed here are just some of the many resources available.

HOW DOES THE EAP WORK?

Getting the help you need is simple. You can call the EAP 24 hours a day, 7 days a week to reach a professional counselor. Call our toll free number or log on to our website to access other benefits.

888-327-1060

PublicSafetyEAP.com

COUNSELING BENEFITS

Many complex issues are best resolved with counseling assistance from a behavioral health professional. You will want to consider calling for help if you encounter problems such as:

- Relationship and family issues
- Depression, stress, or anxiety
- Grief or loss of a loved one
- Eating disorders or substance abuse
- Workplace difficulties

When you call, you connect immediately with a counselor. Each of our experienced counselors has a Masters or Ph.D. level of training. Should you need to be referred to a local counselor for personal visits, we have more than 40,000 providers available to ensure that you will have a counselor near your home or workplace.

WORK/LIFE BENEFITS

Assistance for personal, family, financial, and legal issues is available for your everyday work/life problems, including:

- Debt counseling and restructuring
- Legal problems not related to employment or medical concerns
- Child care and elder care assistance
- Financial information
- Caregiver help and resources
- Real estate and tenant/landlord concerns
- Interpersonal skills with family and co-workers
- Pet Help Center

PUBLIC SAFETY RESOURCE CENTERS

Public Safety EAP addresses specific stressors and issues that public safety personnel and their families face every day.

- Challenges of military deployment and homecoming
- Budget helpers for public safety personnel
- Mental health issues for first responders
- Social media for first responders
- Public safety family matters

SELF-HELP RESOURCES

Self-help Resources give you access to a vast collection of thousands of tools and informative articles covering virtually every problem you might face. You can log on to the website to access these benefits. Some available resources include:

- Behavioral Health - information on everything from alcohol abuse to personal stress
- Financial - articles, tools and information to help with virtually every financial question
- Legal Information - topics ranging from adoption to wills
- Tools for Tough Times - resources to assist with difficult financial issues

LIFESTYLE BENEFITS

Your Lifestyle Benefits include discounts to help you enhance your quality of life. Call or check the website for nutrition, fitness and weight loss discounts.



Information Resources:

A vital benefit to help with everyday issues

Public safety professionals face daunting challenges: budget crises, rapidly changing technology and the impact of social media are just a few emerging issues. Public Safety EAP offers extensive links, tools, discounts, and resources to help public safety personnel deal with these and other professional challenges.

- Challenges of Military Deployment & Homecoming
- Budget Helpers, Grants & More for Public Safety Personnel
- CISM, Stress, Depression & Other Mental Health Issues



To access this benefit, you can call the EAP or log on to the website, **www.PublicSafetyEAP.com**, for thousands of articles, videos and tools to help you resolve personal problems. Find information on thousands of topics including:

- Adoption & Childcare
- Financial Planning
- Consumer Rights
- Mental Health
- Divorce
- Home Ownership
- Legal Issues
- Loss and Grief
- Stress
- Elder Care & Childcare Locators
- Family Violence
- Work-Life Balance
- Wills and Other Legal Forms
- Training & Education

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TO ACCESS THE WEBSITE AND RESOURCES FOR EMPLOYEES

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2. Click **Employee & Family Login**
3. If you've already created a User Name and Password, simply enter that information in the appropriate boxes.
If you have not registered, complete steps 4 - 7.
4. Click on REGISTER HERE
5. Enter your employer's name and click Continue
6. Your employer's name will appear; select the button and click Continue
7. Fill out the Registration Form and create your own User Name and Password, then click Continue. **You only need to register once.**

You'll find an entire library of problem-solving resources including assessments, trainings, videos, tools and calculators such as 2,000+ Harvard Medical School articles

- Thousands of Legal articles
- 800,000 Child/Elder care providers
- Personal Growth programs
- Mental and Physical Health assessments
- Financial tools and calculators
- Career Development information
- 900 Health videos

• Plus, important new resources that include:

CAREGIVER CENTER

A vast array of tools designed to help those providing care for a chronically ill, disabled, or aging family member or friend.

TRAINING CENTER

Access hundreds of personal and professional development trainings and courses.

LOCATORS

Search for childcare and eldercare resources in your local area.

RESILIENCE JOURNEY

An interactive new benefit to help you develop your maximum potential, experience less stress, less depression and improve physical and emotional health.

ESI WELLNESS CENTER

Articles, health assessments, courses, videos, and FAQs related to dieting, nutrition, stress, smoking, and physical fitness.

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