



The **Carnivale**
of Risk

The Mountainous
Expedition of Presumption
Injuries

48TH CONFERENCE & EXPO

 **parma**
public agency risk management association





Meet the panel

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What is a presumption?

01 With statutory presumptions, once the employee meets the requisite criteria, the injury is "presumed" to be work-related and eligible for workers' compensation benefits.

02 The purpose of presumption laws is to supersede the "arose out of" test and shift the burden of proof onto employers for certain types of injury or illness and/or within certain classifications of worker.

03 Addresses the concern that the manifestation of certain injury or illness is more likely given the physical and/or emotional challenges of their work but causation as arising directly from work may be difficult to prove.



Types of presumptive injuries

Rebuttable presumption

- Once criteria is met, injury is presumed to be compensable unless the employer can show by a preponderance of evidence the injury manifested outside of the work environment and was not aggravated or accelerated by work duties.

Conclusive presumption

- If injury is determined to be causally related to work, it is conclusively presumed to be permanently totally disabled (100% disabled) and cannot be rebutted with any evidence.
- This conclusive presumption is only afforded to 4 types of catastrophic injury, which is deemed to remove someone from the open labor market.



History of presumption statutes

First California presumptions enacted by Governor Brown in 1979

- Driven by police and fire labor unions (LC 3212.1)
- As of today, 13 presumptive statutes exist to include COVID

Across the nation

- As of April 2020, 33 states has statutes to presumptively cover cancer among fire personnel.
 - Only 13 of these states specifically define the types of cancer covered under the presumption.
- As of October 2019, 37 states cover some form of PTSD for first responders
- As of May 2021, 17 states had taken action to enact presumption for COVID



Coverage comparisons

California

- Labor Code Sections 3212.1-3213.2
 - Cancer
 - Heart
 - Hernia
 - Pneumonia
 - Meningitis
 - Skin Cancer
 - Lyme Disease
 - Duty Belt
 - Blood Borne
 - MRSA
 - Biological substance
 - PTSD
 - COVID

Arizona

- Title 23, Ch 6, Article 12, Sections 23-1102
 - Cancer (Fire only)
 - Heart (Fire only)
 - Pulmonary (Fire Only)
 - PTSD (Police and Fire Carve-out)
 - COVID

Colorado

- Title 29. Government Local § 29-5-401
 - Cancer (Fire only)
 - Heart (Fire only)
 - Hepatitis C (Fire only)
 - Psyche/PTSD
 - COVID

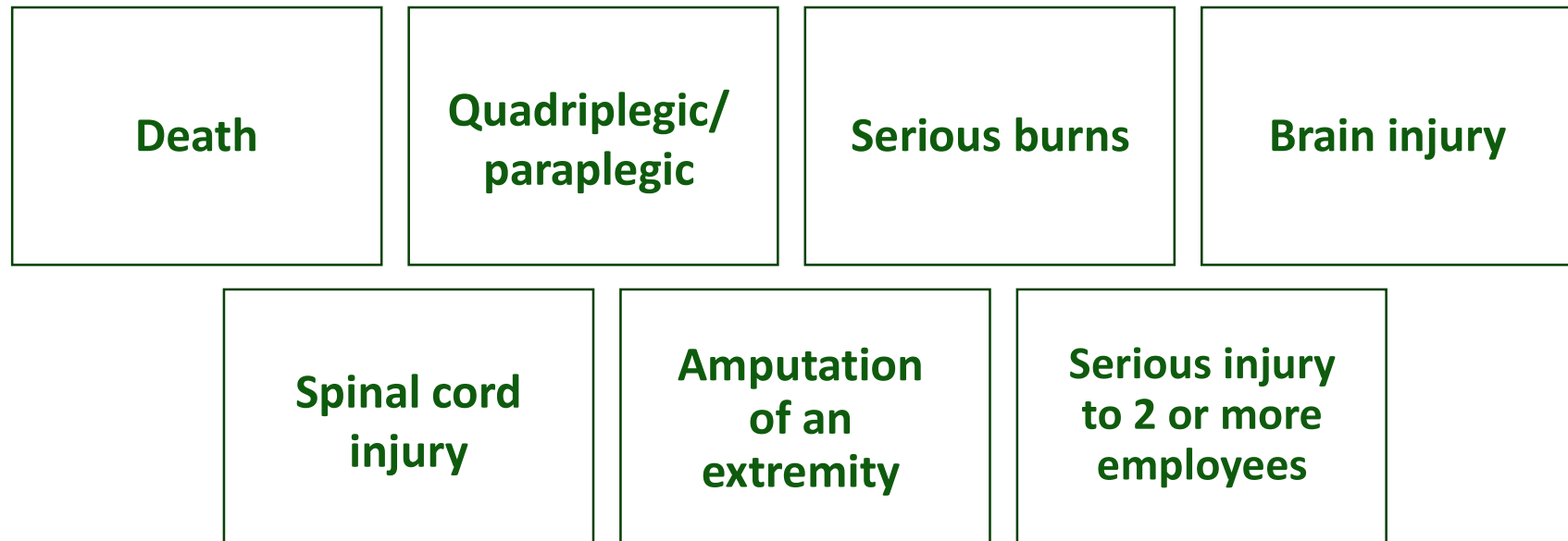
Texas

- Title 6, Ch 607, Sections 607.001-607.059
 - Any disease wherein the first responder could have been and was vaccinated
 - TB or other respiratory illness
 - Cardiac/Heart attack or stroke
 - Cancer (Fire only)
 - COVID



Catastrophic claims

Typically includes the following:





Catastrophic claims

Catastrophic claims are further defined by *Wilson vs. State of CA Cal Fire* (2019)

Wilson I states catastrophic is an adjective and the focus of 4660.1(c)(2)(B) is on nature of injury rather than mechanism

Wilson II (2019) - Court found that the examples contained in the statute are not necessarily a condition that happens immediately after the injury. (i.e., amputation or paralysis)



Focusing on the benefits

Indemnity benefits

Temporary disability benefits

- California Labor Code 4850, Temporary disability or education code
- Arizona temporary disability (66 2/3% of AMW)
- Colorado temporary disability (66 2/3% of AWW)
- Texas temporary income benefits, Statute 52e benefits

Permanent disability benefits

- California - Formula determined by adjusting impairment to age, FEC and occupation.
- Arizona – Scheduled impairment paid for state-determined number of weeks. Unscheduled is based on lost wages post MMI and must be “recertified” annually.
- Colorado – Scheduled impairment paid for state-determined number of weeks.
- Texas – 3 weeks for each percentage of impairment at MMI



Focusing on the benefits

Settlements

California

- Compromise and release
- Stipulated award
- Judicial findings

Arizona

- As of 2017, allows for settlement of all future medical provisions.
- If not settled as "Full and Final," employee has right to reopen claim for lifetime.

Colorado

- Settlements are lump sum or structured, and is voluntary on both sides
- Lump sum settlements are subject to a statutory cap. In 2019, the cap was \$94,330.

Texas

- Cannot settle claims. If future medical is required, can be requested at any time.



Impacting the settlement

**General foundry
(Progressive & insidious)**

Lifetime jurisdiction PD

- Asbestos
- Cancers
- Pulmonary
- Organ failure
- Infection
- COVID (long hauler)



The Costs of the COVID presumption

**As of 12/31/2021,
25,894 COVID claims
have been filed by
employee in the public
entity sector**

15, 909 claims (61%) have
been denied; 7,481
accepted and 2,504 remain
delayed pending
investigation.

**California tops the state
files carrying 28% of the
total filings for the public
sector, with 65% of those
claims falling under the
presumption statute**

Average paid for California
public sector COVID claim is
\$2,400

**Texas follows closely
with 16% of the totaling
of the total filings, with
a 47% acceptance rate.**

Average paid for Texas
public sector COVID claim
is \$942



Defending the claim

There are tools in our arsenal to assist in defending and mitigating the risk

01

**Duty belt
presumption**

5 years of active
law enforcement
using duty belt

02

Cardiovascular

Left ventricular
hypertrophy

5 years
employment

03

Cancer

Latency periods

04

COVID

Thorough desk
level
investigation

Contact tracing

05

**Co-defendants
and
contribution**



Financing the risk

Reinsurance

- Excess Layer
- Buffer Layer
- Different retention limit or separate policy for safety personnel only

Risk pooling

Captive programs



Pending legislation

California

- SB213 – Extends COVID, among “other conditions”, presumption to hospital workers
- AB991 – Expands first responder presumptions to lifeguards in City of San Diego

Arizona

Currently does not have any pending legislation related to presumptive injuries.

Colorado

Currently does not have any pending legislation related to presumptive injuries.

Texas

Currently does not have any pending legislation related to presumptive injuries.



Questions to ponder

- Will advocacy for new rules / laws continue to expand presumption eligibility?
- What will be the extent of cost shifting to workers' compensation loss costs, and what effect will this have on premium levels?
- Will there be indirect impacts of presumption cost increases on other services that municipalities provide?
- How will states and local municipalities balance the rights and financial obligations of employers, employees, and the population at large?
- How will the potential of a single payer healthcare system impact presumptions, coverage in workers' compensation and shift of costs to the employer?



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