

QUARTERLY REVIEW

★ Letter from the Public Counsel



Dear Friends,

When I began as the Office of Injured Employee Counsel’s Public Counsel last October, one of my biggest priorities was to prepare for the legislative session. In order for it to be a meaningful session I needed to present a

clear plan for the agency, and I couldn’t have done that without the input of my talented team. I am pleased to report that it was a very successful session for the agency. Our legislative recommendation passed and we also received \$400,000 from the legislature to retain, train and fairly compensate our front-line staff. I also testified before key legislative committees and worked with a number of offices to further the affairs of injured employees and OIEC.

By no means was the agency’s success a solo effort this session. We appreciate the support that our recommendation received from such a diverse group of organizations including: Texas Mutual Insurance Company; Texas AFL-CIO; Texas Association of Business; Combined Law Enforcement Associations of Texas; Texas Workers’ Advocates; Workers’ Defense Project; Texans Care for Children; and Texas Family Council.

Before session began, I sent my staff a list of goals I would like to achieve this year and we have been making incredible progress. Chief amongst them is to continue rolling out the two new job classifications we have created—Ombudsman Assistants and Case Development Officers. The addition of these new positions in the agency allows OIEC to function more like a law office does. We initially rolled out these positions in our Houston and Waco field offices and I have been very pleased with the results.

It is also important to me that I meet everyone in the agency face-to-face, and that they know I am always available to them. I have already visited a number of field offices and I plan to visit the remaining field offices at least once before the end of the year.

I’m looking forward to the interim period and always welcome your input on how to better serve the injured employees of Texas. ♦

Sincerely,

Jessica Corna, Public Counsel

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★ 84th Legislative Session Adjourns



This session, 11,356 bills and resolutions were filed with 46 bills addressing workers' compensation; 12 of which were signed into law by Governor Greg Abbott.

OIEC's Legislative Recommendation Passes

For the 84th Legislative Session OIEC had one recommendation and a request for additional funds to create an agency career ladder. OIEC's legislative recommendation—**SB 901 by Senator Eltife**—adjusted the benchmark earnings rate from \$8.50 per hour to \$10.00 per hour. The last time the benchmark earnings rate was adjusted was in 1993. This means that injured employees making less than \$10.00 per hour will receive an additional 5% in temporary income benefits for up to 26 weeks following their injury. That additional 5% equates to between \$17 and \$20 per week for injured employees. SB 901 was signed by Governor Abbott on May 21, 2015 and will take effect on September 1, 2015.

Senate Bill 901 received wide support ranging from labor and advocacy groups to insurance trade associations. It also received nearly universal support in both chambers of the legislature with only 1 nay vote in each the house and the senate.

Division of Workers' Compensation's Legislative Recommendations

The Division of Workers' Compensation (DWC) made two legislative recommendations this session.

- **SB 653 by Eltife** raises the maximum burial benefit payable by an insurance carrier from

\$6,000 to \$10,000. It will go into effect on September 1, 2015.

- **HB 2466 by Collier** would have created a safety grant program for employers with up to 50 employees. Under this grant program, an employer could have received up to \$5,000 for making safety improvements to their business. This bill was vetoed by the Governor on June 20, 2015.

Workers' Compensation Benefits for First Responders Improve

Some of the other notable workers' compensation bills directly affecting injured employees that passed this session are:

- **HB 1094 by Geren** which removes the 104-week cap on death benefits for surviving spouses of first responders killed in the line of duty if the surviving spouse remarries.
- **HB 2771 by Martinez** expands the definition of course and scope to include firefighters and emergency medical personnel who respond to an emergency in their personal vehicles. This bill is primarily targeted at volunteer firefighters who frequently respond to emergencies from their personal residence and in their personal vehicle.
- **HB 1388 by Bohac** imposes a requirement that an insurance carrier must detail the supporting evidence before they can rebut the presumption that certain illnesses or diseases are compensable for first responders (Gov't Code § 607.058). The bill's author asserts that under current law, insurance carriers can raise the rebuttal of presumption without adequate supporting evidence.

If you have any questions regarding OIEC's legislative affairs, please contact Brian Tickle, Legislative Liaison, at brian.tickle@oiec.texas.gov or at 512-804-4170. ♦



★ OIEC Teams up with DWC, Offers Outreach Presentations



OIEC’s Public Affairs department has been busy reaching out to injured employee groups and labor organizations and giving outreach presentations across the state to increase public awareness about the agency. This year, OIEC has been focused on building meaningful partnerships and managing long-term stakeholder relationships.

OIEC has partnered with the Division of Workers’ Compensation to hold joint educational outreach courses designed to help injured employees increase their knowledge and understanding of the Texas workers’ compensation system and what to expect when processing a workers’ compensation claim. These classes are held on a regular basis across the state in both English and Spanish.

We want to thank all of the team members who give their time to help get the word out about OIEC during these outreach presentations. Since January, OIEC has participated in 136 “DWC Fundamentals” presentations and reached more than 400 injured employees in-person. The feedback about OIEC’s representatives from DWC has been positive allowing our outreach partnership to expand into joint specialized outreach engagements, the first is scheduled for July, 2015.



This year, OIEC’s community outreach presentations reached more than 275 attendees at our various speaking engagements across the state. In May, OIEC representatives spoke at the San Antonio Police Officer’s Association Board of Directors’ monthly meeting. We also gave a presentation in Fort Worth to the International Association of Fire Fighters. Groups like these are extremely important for OIEC to speak to and build stronger relationships with in order to help more injured employees. If you have a suggestion about a group in your service area that would benefit from an OIEC outreach event let us know.

Upcoming Outreach Events:

- July 1st - Texas Labor Management Meeting, *Austin*
- July 16th - AFL-CIO Convention, *Austin*
- August 31st - Labor Week, *Houston & Dallas*

For questions about OIEC’s outreach initiatives, please contact Tracy Bracy, Public Affairs Manager, at 512-804-4195 or tracy.bracy@oiec.texas.gov. ♦

★ Case Study: Compensability of Cancer in Firefighter.

Recently, OIEC Ombudsman JoAnn Flores assisted a firefighter who was attempting to establish that he sustained a compensable injury in the form of an occupational disease, specifically non-Hodgkin’s lymphoma. At issue, was the application of Chapter 607 of the Texas Government Code, Subchapter B, Disease or Illness Suffered by Firefighters and Emergency Medical Technicians (EMT).

Initially, a firefighter or EMT has to meet the applicability criteria in Section 607.052, which states that the section applies to a firefighter or EMT who:

- on becoming employed or during employment received a physical examination that failed to reveal evidence of the illness or disease for which benefits are sought using a presumption established by the subchapter;
- is employed for 5 or more years as a firefighter or EMT; and

- seeks benefits or compensation for a disease or illness covered by this subchapter discovered during employment.

Section 607.052(b)(4) also establishes that the presumption under the subchapter does not apply if the claimed disease or illness is known to be caused by the use of tobacco and either the firefighter/EMT used tobacco or has a spouse who is a smoker.

Section 607.055 is the provision that addresses cancer. Subsection (a) of that section states that a firefighter or EMT who suffers from cancer is presumed to have developed the cancer during the course and scope of employment if the firefighter or EMT:

- regularly responded on scene to calls involving fires or firefighting; or
- regularly responded to an event involving the documented release of radiation or a known or suspected carcinogen while the person was employed as a firefighter or EMT; and
- the cancer is known to be associated with firefighting or exposure to heat, smoke, radiation, or a known or suspected carcinogen.

Section 607.055(b) further provides that the “section applies only to a type of cancer that may be caused by exposure to heat, smoke, radiation, or a known or suspected carcinogen as determined by the International Agency for Research on Cancer.”

Under 607.057, the presumption established under this subchapter “applies to a determination of whether a firefighter’s or [EMT’s] disability or death resulted from a disease or illness contracted in the course and scope of employment for purposes of benefits or compensation provided under another employee benefit, law, or plan, including a pension plan.” Finally, Section 607.058 establishes that a presumption under the subchapter “may be rebutted through a showing by a preponderance of the evidence that a risk factor, accident, hazard, or other cause not associated with the individual’s service as a firefighter or [EMT] caused the individual’s disease or illness.”

Ombudsman and Injured Employee Present Case

The claimant and Ms. Flores created a strong partnership in pursuing the claim. He provided significant

information about the existence and operation of statutory cancer presumptions around the country and information from the International Agency for Research on Cancer about the types of cancers where a connection between firefighting and cancer has been recognized.



At the benefit review conference, the ombudsman assisted the claimant in presenting the argument that he met the criteria for Chapter 607 to apply and that, as a result, his non-Hodgkin’s lymphoma is presumed to have been contracted in the course and scope of employment. The carrier disagreed, arguing that the claimant was required to present expert medical evidence to prove the causal connection between his employment and his cancer. In response, the claimant and Ms. Flores argued that he was not required to present a causation opinion. To the contrary, the presumption operated to establish the causal connection and since the presumption applied in this instance, the mechanism for the carrier to avoid paying for the claim was to rebut the presumption under Section 607.058 by showing that “a risk factor, accident, hazard, or other cause not associated with the individual’s service as a firefighter or [EMT] caused the individual’s disease or illness.”

Parties Attend Formal Hearing

The parties were not able to resolve the dispute at the benefit review conference and the case was set for a contested case hearing. At the hearing, the claimant and his wife testified, but the claimant’s evidence did not include a causation opinion from an expert. The carrier cross-examined the claimant about the number of fires he fought in various time periods in an effort to address the question of what it meant by the requirement that he “regularly responded on the scene to calls involving fires or firefighting.” The carrier presented expert testimony. The doctor testified that the medical community does not know what causes non-Hodgkin’s lymphoma. However, she also testified that the claimant had not had sufficient exposure to carcinogens as a firefighter to have contracted non-Hodgkin’s lymphoma.

In addition, the doctor challenged the evidence that the claimant presented from the International Agency for

Research on Cancer concluding that “non-Hodgkin’s lymphoma is considered a probable cancer risk for firefighters.” On cross-examination, the expert acknowledged in response to questioning from Ms. Flores that she did not have any information about the claimant’s activities outside of firefighting.

Injured Employee Prevails at Hearing

In her decision and order, the hearing officer noted that two theories of presumption exist concerning cancer presumption statutes. Under the first theory, the presumption is treated as procedural. If the presumption is treated this way, the presumption “drops out” of the case once the carrier presents evidence that the cancer is not work-related, and the firefighter once again has the burden of proving the causal connection between his work as a firefighter and his cancer. Under the second theory, the presumption is treated as a substantive rule of law. When the carrier presents rebuttal evidence, the presumption does not go away. It remains in the case and the fact finder considers the causation opinion created by the presumption along with the expert opinion from the carrier that the cancer was not caused by firefighting. The carrier retains the burden of persuading the fact finder that there is not a causal connection between the work activities and the cancer.

The hearing officer found from reviewing the language of the Texas statute that the second presumption theory applied and that once the claimant established that the presumption applied to him, it became incumbent on the carrier to rebut the presumption by establishing that some factor other than the employment as a firefighter was the cause of the cancer. The hearing officer noted that the carrier expert “did not provide any persuasive evidence that activities outside the realm of Claimant’s firefighter duties or a genetic pre-disposition was the more credible explanation or a cause of Claimant’s non-Hodgkin’s lymphoma.” Accordingly, the hearing officer determined that the carrier failed to rebut the presumption of causation and that the claimant’s non-Hodgkin’s lymphoma was, therefore, compensable.

Letter of Appreciation Sent to Ombudsman



Following the hearing, the claimant sent a letter to Ms. Flores’s supervisor expressing his thanks and appreciation for her assistance. The claimant said:

I was the first firefighter in the state of Texas to win at the CCH level. My case has been appealed, but I fully expect to be successful there as well with JoAnn’s assistance given once again. I am expecting the city may well push on from there and file in District Court if (when) the Appeal is ruled in my favor. However this ends, I know that I could not have prevailed at any level without the guidance of JoAnn.

As the claimant predicted, the Appels Panel affirmed the hearing officer’s decision in his case without writing a separate decision. ♦

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