

Protecting Township Firefighters from Cancer & Protecting Townships from Large Claims

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Ohio Rev. Code §4123.68 (X)

- ▶ Introduced 2015.
- ▶ Signed into law by Governor Kasich; effective April 6, 2017.
- ▶ Creates a **presumption** that a firefighter diagnosed with cancer, incurred the cancer performing their official duties as a firefighter.
- ▶ Ohio and 41 other states now have “cancer presumption” legislation for firefighters.



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Employers Impacted

- Firefighters working for:
 - State fund, public employers
 - Public, self-insured employers
 - Private employers



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Occupational Diseases

Two types of occupational diseases.....

1. Scheduled
2. Non-scheduled

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Occupational Diseases

Scheduled Diseases

- ▶ Burden of Proof: if a claimant establishes a diagnosis of a scheduled disease and also shows an exposure through a scheduled process, there is exists a "circumstantial likelihood" of relationship.
- ▶ Examples: lead poisoning, exposures of firefighters or police officers to heat, smoke, gases, chemical fumes and other toxic substances.

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Occupational Diseases

Non-Scheduled Diseases

- ▶ Burden of Proof: three required criteria:
 1. Disease is contracted in the course of employment;
 2. Nature of employment creates an increased hazard of contracting the disease different from employment generally; and
 3. Employment creates a risk of contracting the disease in greater degree and in a different manner that the general public.

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Occupational Diseases

Regardless of which approach the claimant seeks, (scheduled or non-scheduled occupational disease), the claimant must always establish that the claim arose out of employment . . .

Or do they?



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Occupational Diseases

Statute of Limitations for filing an OD claim

Two years from date of the disability or death due to the disease OR within up to an additional six months from the date that diagnosis is made.

BUT, the Ohio Supreme Court has stated.....



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Occupational Diseases

Per the Ohio Supreme Court...filing within two years from the latest of:

- The date the claimant was first made aware of the disease through medical diagnosis;
- The date on which the claimant first received treatment for such disease OR
- The date the claimant quit work due to the disease.



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Occupational Diseases

Per the BWC.....

For a firefighter to be eligible, his or her cancer must have been first diagnosed, first treated or caused him or her to quit work on or after April 6, 2017. However, if the firefighter was first diagnosed or treated prior to April 6, 2017, but has not yet quit work due to the disease, the claim is eligible for the presumption.

The presumption cannot be applied to claims for firefighters who died of cancer prior to April 6, 2017.

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Essence of 4123.68(X) Criteria

- In essence, a **firefighter** assigned to at least **six years of hazardous duty** who has been exposed to an agent classified as a Class 1 or Class 2A carcinogen and contracts cancer is presumed to have incurred the cancer from performing their official duties.

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“Hazardous Duty”

- Firefighters assigned to **at least 6 years of hazardous duty**.
- Hazardous duty means duty performed under circumstances in which an accident could result in serious injury or death. 5 CFR 550.902.

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“Hazardous Duty” Examples

- Duty performed on high structure where protective facilities are not used.
- Open structures where adverse conditions such as darkness, lightning, steady rain or high wind velocity exist.

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“Hazardous Duty” - con’t

- No indication hazardous duty has to be continuous.
- Bill (and now the statute) merely states, “at least six years.”

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“Disabled”

- Applies to firefighters who are “disabled”.
- For purposes of workers’ compensation law, makes compensation for cancer under presumption payable only in the event of temporary total disability, working wage loss, permanent total disability, or death.

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Applies if Exposed to Certain Agents

- The presumption applies if the firefighter was exposed to an agent classified by the International Agency for Research on Cancer (IARC) as a Group 1 or 2A carcinogen.

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Rebuttable Presumption

The law details 6 elements that can be used to rebut the presumption.

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The Presumption is “Rebuttable”

#1. The firefighter incurred the type of cancer being alleged before becoming a member of the department. ORC §4123.68 (X)(2)(d)

- Course of employment applies.
- Review all employment/pre-employment and HR records.
- Diagnosis vs. hire date.
- Obtain signed medical release and a list of ALL providers including primary care physician.
- May need to use subpoena powers of IC or discovery process.

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The Presumption is “Rebuttable”

#2. The firefighter’s exposure 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. ORC §41 23.68 (X)(2)(a)

- Cigarettes and tobacco....exposure!
- “Other conditions”.....

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The Presumption is “Rebuttable”

#3. The firefighter was not exposed to an agent classified as a Group 1 or 2A carcinogen. ORC §4123.68 (X)(2)(c)

Agents classified by the IARC monographs, volumes 1–117:

- **Group 1:** “Carcinogenic to humans” There is enough evidence to conclude that it can cause cancer in humans. Examples include asbestos, benzene and ionizing radiation.
- **Group 2A:** “Probably carcinogenic to humans” There is strong evidence that it can cause cancer in humans, but at present it is not conclusive. Examples include diesel engine exhaust, Formaldehyde and PCBs.

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The Presumption is “Rebuttable”

- The BWC Form C–265 contains a checklist of exposures which includes “shiftwork that involves circadian disruption.”

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The Presumption is “Rebuttable”

- #4. The firefighter is 70 years of age or older. ORC §4123.68 (X)(2)(e)
- #5. If the exposure to the type of carcinogen alleged could not have caused the type of cancer alleged. ORC § 4123.68 (X)(2)(b).

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The Presumption is “Rebuttable”

- #6. If it has been more than 15 years since the firefighter was last assigned to hazardous duty as a firefighter. ORC §4123.68 (X)(3)

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Practice Tips

1. Be sure to secure list of all providers and medical records.
2. Records pertaining to work history.
3. Causal relationship.
4. Consider your expert.
5. Public policy issues.
6. BWC file review process.
7. Impact on alternative rating programs.

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Other issues Relevant to the Adjudication of Firefighter cancer claims.

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The Application and Impact of the Statute so far.

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When originally proposed, the statute would have applied the presumption to only certain specific types of cancer:

- > Cancer of the lung, brain, kidney, bladder, rectum, stomach, skin or prostate
- > Non-Hodgkin's Lymphoma
- > Leukemia
- > Multiple Myeloma; and
- > Testicular or colorectal cancer

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As ultimately enacted, no such list was included, and all types of cancer can potentially qualify.

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Almost immediately after it went into effect, the statute was revised, with the revisions effective September 29, 2017.

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▶ The 9/29/17 Revisions included:

(1) Not applying the presumption if it has been more than 15 years since the firefighter last performed hazardous duty (down from 20 in the original version).

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(2) Allowing the presumption to be rebutted by “competent scientific evidence” that the type of exposure alleged could not have caused the type of cancer alleged.

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The Legislature required the BWC to maintain records and provide status updates as to the number of claims filed, the number allowed and denied, and the costs associated with the allowed claims.

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As originally enacted, the BWC predicted that over 560 such claims would be filed annually, with potential annual claim costs of \$75 million.

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▶ So far, the number of claims and the costs involved have been far less than originally predicted.

▶ Much of this difference is likely due to the 9/29/17 changes which make the presumption somewhat easier to rebut.

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The BWC is now estimating the filing of approximately 50 such claims per year, with annual claim costs of approximately \$7.7 million.

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As of July 18, 2019, the BWC has paid out in cancer presumption State Fund claims:

- Medical: \$2,572,247
- Compensation: \$679,341

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So far the BWC reports: (as of 7/18/19)

- 77 claims allowed
- 3 claims dismissed
- 22 claims denied
- 1 claim suspended; and
- 21 claims still in hearing status



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BWC reports that in first 81 firefighter cancer claims it has addressed, the elements of the presumption were found in 61 (75%). The most common reason the presumption did not apply? No diagnosis of cancer!



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Of the 98 claims accepted by the BWC, 66 were appealed. Of those 66 appealed claims:

- 13 were denied (at the IC)
- 37 were allowed by the IC
- 1 was dismissed; and
- 14 are still in hearing status



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Of the 41 claims denied by the BWC, 32 were appealed by the claimants. Of those 32 appealed claims:

- 10 were allowed at hearing
- 1 was suspended
- 9 were denied again at the IC; and
- 7 are still in hearing status

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Multiple Employers:

Due to the nature of firefighting employment, it is not uncommon for a firefighter to have worked for multiple fire departments, sometimes simultaneously.

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In such cases, the BWC/IC may apply the so-called "last injurious exposure" rule.

The "last injurious exposure" has been defined by Ohio courts as an exposure which proximately causes a disease, or one which "augments or aggravates" a pre-existing disease.

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In such situations, the BWC typically allocates the entire claim to the employer where the "last injurious exposure" occurred. Conveniently, this is also generally the employer most likely to have a claim impact its rating experience.

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Loss of Use Awards:

Recall that Occupational Disease claims can be either "scheduled" or "non-scheduled." The presumption is available only under the scheduled cancer claims. ORC 4123.68(X)

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For a claim allowed via the scheduled presumption, compensation can only be paid for:

- Temporary Total Disability
- Working Wage Loss
- Permanent Total Disability; and
- Death

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Missing from that list is Permanent Partial Disability, including so-called "scheduled loss" awards for the loss or loss of use of certain body parts.

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At least one claimant's firm in Ohio pursued a firefighter cancer claim as a non-scheduled occupational disease. Presumably, they are choosing to give up the benefit of the presumption based upon a belief they would be able to pursue loss of use awards if the claim were allowed.

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Death Benefits

Under the workers' compensation statute, the dependents of an employee killed in a work-related accident, or who dies as the result of an occupational disease, are entitled to recover statutory death benefits. In the case of a surviving spouse, the benefit generally consists of a weekly amount payable for the remainder of the spouse's life, unless the spouse remarries, in which case the benefit is stopped after a final lump sum payment representing two years of death benefits. Ohio Rev. Code § 4123.59. In the case of dependent children, the benefits continue until the age of 18, but can be extended to as long as age 25 if the dependent child is a full time student.

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Scheduled Loss

A different type of benefit is provided to employees who suffer an injury which results in the amputation of, or the complete loss of use of, certain body parts. This compensation is referred to as "scheduled loss" compensation, and is paid pursuant to a schedule provided in Ohio Rev. Code § 4123.57(B).

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Scheduled Loss (con't)

Set forth below are the number of weeks provided for the loss of use of certain body parts, and the monetary amounts which those weeks represent for a 2019 injury:
Loss of Arm: 225 weeks (\$213,750)
Loss of Leg: 200 weeks (\$190,000)
Complete Loss of Vision: 125 weeks (per eye) (\$118,750)
Complete Loss of Hearing: 125 weeks (\$118,750)

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Thus, if an injured worker were to sustain an injury severe enough to cause the amputation or loss of use of both arms and both legs, the loss of vision in both eyes, and the complete loss of hearing, the total scheduled loss benefits payable would be \$1,163,750 for a 2019 injury.

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The Moorehead Case: State, ex rel. Moorehead v. Indus. Comm., (2006-Ohio-6364)

Factual Background

In *Moorehead*, an employee fell approximately 15–20 feet, head first, onto a concrete floor. Unrebutted medical evidence established that the employee sustained a spinal cord injury which rendered him a quadriplegic. The employee never regained consciousness, and died approximately 90 minutes after the fall. His widow, Sandra Moorehead, applied for death benefits. In addition, pursuant to Ohio Rev. Code § 4123.57(B), she also applied for scheduled loss compensation for 850 weeks of benefits representing the loss of use of both arms and both legs.

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Industrial Commission Ruling

The Industrial Commission denied the widow's request for scheduled loss benefits, finding that the loss of use award was contingent upon the employee's survival. In addition, the Commission further relied upon the fact that the decedent was comatose after the accident, and completely unaware of the extent of his injuries.

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Supreme Court Ruling

The Ohio Supreme Court reversed, emphasizing that, although the decedent may only have survived the fall for the short period of approximately 90 minutes, the statute does not specify a required length of time for survival before loss of use benefits are payable. In addition, the Court noted that statute likewise does not contain a requirement that the employee be conscious of his paralysis in order to qualify for a scheduled loss benefit. The Court remanded the case back to the Industrial Commission for a determination of the amount of benefits due to the decedent's widow.

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Concurring Opinion

The *Moorehead* decision was a unanimous 7-0 decision. However, two justices, Justice Lundberg Stratton and Justice O'Donnell issued a concurring opinion. In that concurring opinion, Justice Lundberg Stratton explained that, while she agreed with the majority's decision that the decedent's widow was entitled to a scheduled loss award, the amount of the award would consist of one week of scheduled loss benefits, representing the length of time her husband survived the fall, and not the potential 850 week award of benefits.

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Ohio Rev. Code § 4123.57(B)

In addition to specifying the number of weeks payable for the loss or loss of use of various specified body parts, § 4123.57(B) also contains two paragraphs addressing the question of when payments under the scheduled loss provisions are payable in the event that the injured worker dies. The first paragraph concerns claims where an award of scheduled loss compensation has been made prior to the employee's death, stating, in relevant part: "When an award under the division has been made prior to the death of an employee all unpaid installments accrued or to accrue under the provisions of the award shall be payable to the surviving spouse . . . (or other dependents)."

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The second paragraph addresses situations in which no scheduled loss award has been made prior to the employee's death, and provides, in relevant part: "When an employee has sustained the loss of a member by severance, but no award has been made on account thereof prior to the employee's death, the Administrator shall make an award in accordance with this division for the loss which shall be payable to the surviving spouse . . . (or dependents)."

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Ohio Rev. Code § 4123.60

Like § 4123.57(B), this section likewise contains two provisions relevant to the payment of scheduled loss awards to dependents following an employee's death. Also like § 4123.57(B), this statute likewise distinguishes between claims where an award has been made prior to the employee's death, and those in which an award had not yet been made. Where an award of scheduled loss benefits had already been made, the statute allows for any unpaid balance of the award to be paid to the dependents of the decedent.

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Where no such award is already in place, the statute provides: "If the decedent would have been lawfully entitled to have applied for an award at the time of his death, the administrator may . . . award and pay an amount, not exceeding the compensation which the Decedent might have received, but for his death, for the period prior to the date of his death" to the dependents of the decedent.

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Thus, in the case of a firefighter cancer death, their plan was to use a medical report to argue that, for at least a short period of time immediately prior to his death, the firefighter lost the use of his arms and legs, vision in both eyes, and hearing in both of his ears.

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If successful, the additional scheduled loss awards would total over \$1,100,000.

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Thank you!

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