

SENATE BILL NO. 103

INTRODUCED BY M. CAFERRO

BY REQUEST OF THE STATE AUDITOR

A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING A PRESUMPTION UNDER THE WORKERS' COMPENSATION LAWS IN FAVOR OF PROFESSIONAL FIREFIGHTERS FOR CERTAIN DISEASES; ESTABLISHING CONDITIONS, APPLICABLE FACTORS, AND TERMS FOR INSURER REBUTTAL; PROVIDING FOR A SEPARATE RATING CLASSIFICATION CODE; AMENDING SECTIONS 39-71-116 AND 39-71-2316, MCA; AND PROVIDING EFFECTIVE DATES."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Presumptive disease for firefighters -- rebuttal -- definition. (1) A firefighter as defined in 19-13-104 is presumed to have a presumptive disease that arose out of or was contracted in the course and scope of employment if the firefighter meets the conditions described in [section 2] and subsection (2) of this section.

(2) The presumption in subsection (1) applies only to a presumptive disease contracted:

(a) during the term of employment of the firefighter; or

(b) during a period following termination of employment:

(i) that is the equivalent of 3 months for every year of employment; and

(ii) that does not exceed a period after termination of 60 months.

(3) An insurer may rebut the presumption in this section by showing:

(a) that the conditions of [section 2] have not been met; or

(b) by a preponderance of medical evidence that the presumptive disease did not arise out of and was not contracted in the course and scope of employment. Medical evidence may include use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from nonemployment activities.

(4) For the purposes of [sections 1 through 5], the term "presumptive disease" is an occupational disease that encompasses at least one of the following:

(a) heart disease;

(b) respiratory disease;



- 1 (c) any of the following infectious diseases:
- 2 (i) tuberculosis;
- 3 (ii) hepatitis A, hepatitis B, hepatitis C, or hepatitis D;
- 4 (iii) human immunodeficiency virus;
- 5 (iv) diphtheria;
- 6 (v) hemorrhagic fever;
- 7 (vi) meningococcal disease; or
- 8 (vii) methicillin-resistant staphylococcus aureus; or
- 9 (d) any of the following cancers:
- 10 (i) bladder cancer;
- 11 (ii) colon cancer;
- 12 (iii) lung cancer;
- 13 (iv) malignant melanoma;
- 14 (v) mesothelioma;
- 15 (vi) multiple myeloma;
- 16 (vii) nonhodgkins lymphoma;
- 17 (viii) nonmelanoma skin cancer;
- 18 (ix) primary brain cancer;
- 19 (x) primary kidney cancer;
- 20 (xi) prostate cancer;
- 21 (xii) rectal cancer;
- 22 (xiii) stomach cancer;
- 23 (xiv) testicular cancer; or
- 24 (xv) ureter cancer.

25

26 **NEW SECTION. Section 2. Conditions for claiming presumptive disease.** Except as provided in

27 [section 4(2)], the following conditions must be satisfied for the presumption in [section 1] to apply:

28 (1) The firefighter must have undergone, as a condition of employment, a medical examination that did

29 not reveal substantial evidence of the presumptive disease for which the presumption under [section 1] is being

30 sought, with subsequent periodic medical examinations occurring at least once every 5 years during the first 10

1 years of service and once every 3 years after 10 years of service.

2 (2) To qualify for a heart disease, respiratory disease, or lung cancer presumption, a firefighter may not
3 be a regular user of tobacco products or have a history of regular tobacco use in the past 5 years.

4 (3) To qualify for a cancer presumption, a firefighter must complete 10 years of service as a firefighter.

5 (4) To qualify for the heart disease presumption specifically for a myocardial infarction, the myocardial
6 infarction must occur within 72 hours of a work-related task involving significant physical exertion or exposure
7 to a hazardous substance.

8
9 **NEW SECTION. Section 3. Presumption claim not exclusive.** A firefighter may pursue a claim under
10 this chapter whether the firefighter has a presumption claim under [sections 1 and 2] or is unable to make a
11 presumption claim under [sections 1 and 2].

12
13 **NEW SECTION. Section 4. Presumption applicability.** (1) The provisions of [sections 1 through 3]
14 apply to a claim filed under this chapter on or after [the effective date of this act], including if the firefighter
15 contracted the presumptive disease prior to [the effective date of this act] within the limits provided in [section 2(2)
16 through (4)].

17 (2) A firefighter is not ineligible for a presumption under [sections 1 through 3] if, prior to [the effective
18 date of this act], the employer of the firefighter did not require a physical examination at least as frequently as the
19 intervals set forth in [section 2(1)].

20 (3) The presumption in [section 1(1)] applies only to benefits under this chapter.

21
22 **NEW SECTION. Section 5. Required use of firefighter classification code.** Compensation plans No.
23 1, 2, and 3 must use the classification code filed with the commissioner of insurance, as provided in [section 6]
24 in determining rates for firefighters for the purposes of this chapter.

25
26 **NEW SECTION. Section 6. Rating classification code for firefighters.** The advisory organization
27 designated under 33-16-1023 shall file with the commissioner of insurance a separate classification code and
28 rating plan for firefighters as defined in 19-13-104, recognizing the provisions of [sections 1 through 3] regarding
29 presumptive disease for firefighters.

30

1 **Section 7.** Section 39-71-116, MCA, is amended to read:

2 **"39-71-116. Definitions.** Unless the context otherwise requires, in this chapter, the following definitions
3 apply:

4 (1) "Actual wage loss" means that the wages that a worker earns or is qualified to earn after the worker
5 reaches maximum healing are less than the actual wages the worker received at the time of the injury.

6 (2) "Administer and pay" includes all actions by the state fund under the Workers' Compensation Act
7 necessary to:

8 (a) investigation, review, and settlement of claims;

9 (b) payment of benefits;

10 (c) setting of reserves;

11 (d) furnishing of services and facilities; and

12 (e) use of actuarial, audit, accounting, vocational rehabilitation, and legal services.

13 (3) "Aid or sustenance" means a public or private subsidy made to provide a means of support,
14 maintenance, or subsistence for the recipient.

15 (4) "Beneficiary" means:

16 (a) a surviving spouse living with or legally entitled to be supported by the deceased at the time of injury;

17 (b) an unmarried child under 18 years of age;

18 (c) an unmarried child under 22 years of age who is a full-time student in an accredited school or is
19 enrolled in an accredited apprenticeship program;

20 (d) an invalid child over 18 years of age who is dependent, as defined in 26 U.S.C. 152, upon the
21 decedent for support at the time of injury;

22 (e) a parent who is dependent, as defined in 26 U.S.C. 152, upon the decedent for support at the time
23 of the injury if a beneficiary, as defined in subsections (4)(a) through (4)(d), does not exist; and

24 (f) a brother or sister under 18 years of age if dependent, as defined in 26 U.S.C. 152, upon the decedent
25 for support at the time of the injury but only until the age of 18 years and only when a beneficiary, as defined in
26 subsections (4)(a) through (4)(e), does not exist.

27 (5) "Business partner" means the community, governmental entity, or business organization that provides
28 the premises for work-based learning activities for students.

29 (6) "Casual employment" means employment not in the usual course of the trade, business, profession,
30 or occupation of the employer.

1 (7) "Child" includes a posthumous child, a dependent stepchild, and a child legally adopted prior to the
2 injury.

3 (8) (a) "Claims examiner" means an individual who, as a paid employee of the department, of a plan No.
4 1, 2, or 3 insurer, or of an administrator licensed under Title 33, chapter 17, examines claims under chapter 71
5 to:

- 6 (i) determine liability;
7 (ii) apply the requirements of this title;
8 (iii) settle workers' compensation or occupational disease claims; or
9 (iv) determine survivor benefits.

10 (b) The term does not include an adjuster as defined in 33-17-102.

11 (9) (a) "Construction industry" means the major group of general contractors and operative builders,
12 heavy construction (other than building construction) contractors, and special trade contractors listed in major
13 group 23 in the North American Industry Classification System Manual.

14 (b) The term does not include office workers, design professionals, salespersons, estimators, or any
15 other related employment that is not directly involved on a regular basis in the provision of physical labor at a
16 construction or renovation site.

17 (10) "Days" means calendar days, unless otherwise specified.

18 (11) "Department" means the department of labor and industry.

19 (12) "Direct result" means that a diagnosed condition was caused or aggravated by an injury or
20 occupational disease.

21 (13) "Fiscal year" means the period of time between July 1 and the succeeding June 30.

22 (14) "Health care provider" means a person who is licensed, certified, or otherwise authorized by the laws
23 of this state to provide health care in the ordinary course of business or practice of a profession.

24 (15) (a) "Household or domestic employment" means employment of persons other than members of the
25 household for the purpose of tending to the aid and comfort of the employer or members of the employer's family,
26 including but not limited to housecleaning and yard work.

27 (b) The term does not include employment beyond the scope of normal household or domestic duties,
28 such as home health care or domiciliary care.

29 (16) (a) "Indemnity benefits" means any payment made directly to the worker or the worker's
30 beneficiaries, other than a medical benefit. The term includes payments made pursuant to a reservation of rights.

1 (b) The term does not include stay-at-work/return-to-work assistance, auxiliary benefits, or expense
2 reimbursements for items such as meals, travel, or lodging.

3 (17) "Insurer" means an employer bound by compensation plan No. 1, an insurance company transacting
4 business under compensation plan No. 2, or the state fund under compensation plan No. 3.

5 (18) "Invalid" means one who is physically or mentally incapacitated.

6 (19) "Limited liability company" has the meaning provided in 35-8-102.

7 (20) "Maintenance care" means treatment designed to provide the optimum state of health while
8 minimizing recurrence of the clinical status.

9 (21) "Medical stability", "maximum medical improvement", "maximum healing", or "maximum medical
10 healing" means a point in the healing process when further material functional improvement would not be
11 reasonably expected from primary medical services.

12 (22) "Objective medical findings" means medical evidence, including range of motion, atrophy, muscle
13 strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.

14 (23) (a) "Occupational disease" means harm, damage, or death arising out of or contracted in the course
15 and scope of employment caused by events occurring on more than a single day or work shift or, for a
16 presumptive disease as provided in [section 1], on a single day or more than a single day.

17 (b) The term does not include a physical or mental condition arising from emotional or mental stress or
18 from a nonphysical stimulus or activity.

19 (24) "Order" means any decision, rule, direction, requirement, or standard of the department or any other
20 determination arrived at by the department.

21 (25) "Palliative care" means treatment designed to reduce or ease symptoms without curing the
22 underlying cause of the symptoms.

23 (26) "Payroll", "annual payroll", or "annual payroll for the preceding year" means the average annual
24 payroll of the employer for the preceding calendar year or, if the employer has not operated a sufficient or any
25 length of time during the calendar year, 12 times the average monthly payroll for the current year. However, an
26 estimate may be made by the department for any employer starting in business if average payrolls are not
27 available. This estimate must be adjusted by additional payment by the employer or refund by the department,
28 as the case may actually be, on December 31 of the current year. An employer's payroll must be computed by
29 calculating all wages, as defined in 39-71-123, that are paid by an employer.

30 (27) "Permanent partial disability" means a physical condition in which a worker, after reaching maximum

1 medical healing:

2 (a) has a permanent impairment, as determined by the sixth edition of the American medical
3 association's Guides to the Evaluation of Permanent Impairment, that is established by objective medical findings
4 for the ratable condition. The ratable condition must be a direct result of the compensable injury or occupational
5 disease and may not be based exclusively on complaints of pain.

6 (b) is able to return to work in some capacity but the permanent impairment impairs the worker's ability
7 to work; and

8 (c) has an actual wage loss as a result of the injury.

9 (28) "Permanent total disability" means a physical condition resulting from injury as defined in this
10 chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable
11 prospect of physically performing regular employment. Lack of immediate job openings is not a factor to be
12 considered in determining if a worker is permanently totally disabled.

13 (29) "Primary medical services" means treatment prescribed by the treating physician, for conditions
14 resulting from the injury or occupational disease, necessary for achieving medical stability.

15 (30) "Public corporation" means the state or a county, municipal corporation, school district, city, city
16 under a commission form of government or special charter, town, or village.

17 (31) "Reasonably safe place to work" means that the place of employment has been made as free from
18 danger to the life or safety of the employee as the nature of the employment will reasonably permit.

19 (32) "Reasonably safe tools or appliances" are tools and appliances that are adapted to and that are
20 reasonably safe for use for the particular purpose for which they are furnished.

21 (33) "Regular employment" means work on a recurring basis performed for remuneration in a trade,
22 business, profession, or other occupation in this state.

23 (34) (a) "Secondary medical services" means those medical services or appliances that are considered
24 not medically necessary for medical stability. The services and appliances include but are not limited to spas or
25 hot tubs, work hardening, physical restoration programs and other restoration programs designed to address
26 disability and not impairment, or equipment offered by individuals, clinics, groups, hospitals, or rehabilitation
27 facilities.

28 (b) (i) As used in this subsection (34), "disability" means a condition in which a worker's ability to engage
29 in gainful employment is diminished as a result of physical restrictions resulting from an injury. The restrictions
30 may be combined with factors, such as the worker's age, education, work history, and other factors that affect

1 the worker's ability to engage in gainful employment.

2 (ii) Disability does not mean a purely medical condition.

3 (35) "Sole proprietor" means the person who has the exclusive legal right or title to or ownership of a
4 business enterprise.

5 (36) "State's average weekly wage" means the mean weekly earnings of all employees under covered
6 employment, as defined and established annually by the department before July 1 and rounded to the nearest
7 whole dollar number.

8 (37) "Temporary partial disability" means a physical condition resulting from an injury, as defined in
9 39-71-119, in which a worker, prior to maximum healing:

10 (a) is temporarily unable to return to the position held at the time of injury because of a medically
11 determined physical restriction;

12 (b) returns to work in a modified or alternative employment; and

13 (c) suffers a partial wage loss.

14 (38) "Temporary service contractor" means a person, firm, association, partnership, limited liability
15 company, or corporation conducting business that hires its own employees and assigns them to clients to fill a
16 work assignment with a finite ending date to support or supplement the client's workforce in situations resulting
17 from employee absences, skill shortages, seasonal workloads, and special assignments and projects.

18 (39) "Temporary total disability" means a physical condition resulting from an injury, as defined in this
19 chapter, that results in total loss of wages and exists until the injured worker reaches maximum medical healing.

20 (40) "Temporary worker" means a worker whose services are furnished to another on a part-time or
21 temporary basis to fill a work assignment with a finite ending date to support or supplement a workforce in
22 situations resulting from employee absences, skill shortages, seasonal workloads, and special assignments and
23 projects.

24 (41) "Treating physician" means the person who, subject to the requirements of 39-71-1101, is primarily
25 responsible for delivery and coordination of the worker's medical services for the treatment of a worker's
26 compensable injury or occupational disease and is:

27 (a) a physician licensed by the state of Montana under Title 37, chapter 3, and has admitting privileges
28 to practice in one or more hospitals, if any, in the area where the physician is located;

29 (b) a chiropractor licensed by the state of Montana under Title 37, chapter 12;

30 (c) a physician assistant licensed by the state of Montana under Title 37, chapter 20, if there is not a

- 1 treating physician, as provided for in subsection (41)(a), in the area where the physician assistant is located;
- 2 (d) an osteopath licensed by the state of Montana under Title 37, chapter 3;
- 3 (e) a dentist licensed by the state of Montana under Title 37, chapter 4;
- 4 (f) for a claimant residing out of state or upon approval of the insurer, a treating physician defined in
- 5 subsections (41)(a) through (41)(e) who is licensed or certified in another state; or
- 6 (g) an advanced practice registered nurse licensed by the state of Montana under Title 37, chapter 8.
- 7 (42) "Work-based learning activities" means job training and work experience conducted on the premises
- 8 of a business partner as a component of school-based learning activities authorized by an elementary, secondary,
- 9 or postsecondary educational institution.
- 10 (43) "Year", unless otherwise specified, means calendar year."

11

12 **Section 8.** Section 39-71-2316, MCA, is amended to read:

13 **"39-71-2316. Powers of state fund.** (1) For the purposes of carrying out its functions, the state fund

14 may:

- 15 (a) insure any employer for workers' compensation and occupational disease liability as the coverage
- 16 is required by the laws of this state and, as part of the coverage, provide related employers' liability insurance
- 17 upon approval of the board;
- 18 (b) sue and be sued;
- 19 (c) enter into contracts relating to the administration of the state fund, including claims management,
- 20 servicing, and payment;
- 21 (d) collect and disburse money received;
- 22 (e) adopt classifications and charge premiums for the classifications so that the state fund will be neither
- 23 more nor less than self-supporting. Premium rates for classifications may be adopted and changed only by using
- 24 a process, a procedure, formulas, and factors set forth in rules adopted under Title 2, chapter 4, parts 2 through
- 25 4. After the rules have been adopted, the state fund need not follow the rulemaking provisions of Title 2, chapter
- 26 4, when changing classifications and premium rates. The contested case rights and provisions of Title 2, chapter
- 27 4, do not apply to an employer's classification or premium rate. The state fund is required to belong to a licensed
- 28 workers' compensation advisory organization or a licensed workers' compensation rating organization under Title
- 29 33, chapter 16, part 4, and, except for the required use of a classification code as provided in [section 5], may
- 30 use the classifications of employment adopted by the designated workers' compensation advisory organization,

1 as provided in Title 33, chapter 16, part 10, and corresponding rates as a basis for setting its own rates. Except
 2 as provided in Title 33, chapter 16, part 10, a workers' compensation advisory organization or a licensed workers'
 3 compensation rating organization under Title 33, chapter 16, part 4, or other person may not, without first
 4 obtaining the written permission of the employer, use, sell, or distribute an employer's specific payroll or loss
 5 information, including but not limited to experience modification factors.

6 (f) pay the amounts determined to be due under a policy of insurance issued by the state fund;

7 (g) hire personnel;

8 (h) declare dividends if there is an excess of assets over liabilities. However, dividends may not be paid
 9 until adequate actuarially determined reserves are set aside.

10 (i) adopt and implement one or more alternative personal leave plans pursuant to 39-71-2328;

11 (j) upon approval of the board, contract with licensed resident insurance producers;

12 (k) upon approval of the board, enter into agreements with licensed workers' compensation insurers,
 13 insurance associations, or insurance producers to provide workers' compensation coverage in other states to
 14 Montana-domiciled employers insured with the state fund;

15 (l) upon approval of the board, expend funds for scholarship, educational, or charitable purposes;

16 (m) upon approval of the board, including terms and conditions, provide employers coverage under the
 17 federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq., the federal Merchant Marine
 18 Act, 1920 (Jones Act), 46 U.S.C. 688, and the federal Employers' Liability Act, 45 U.S.C. 51, et seq.;

19 (n) perform all functions and exercise all powers of a private insurance carrier that are necessary,
 20 appropriate, or convenient for the administration of the state fund.

21 (2) The state fund shall include a provision in every policy of insurance issued pursuant to this part that
 22 incorporates the restriction on the use and transfer of money collected by the state fund as provided for in
 23 39-71-2320."

24

25 **NEW SECTION. Section 9. Codification instruction.** (1) [Sections 1 through 5] are intended to be
 26 codified as an integral part of Title 39, chapter 71, part 4, and the provisions of Title 39, chapter 71, part 4, apply
 27 to [sections 1 through 5].

28 (2) [Section 6] is intended to be codified as an integral part of Title 33, chapter 16, part 10, and the
 29 provisions of Title 33, chapter 16, part 10, apply to [section 6].

30

