



# Virginia's Workers' Compensation System and Disease Presumptions

# Study mandate

- Review Virginia's workers' compensation system
  - Timeliness of workers' compensation claims processing
  - Timeliness and fairness of dispute resolution processes
  - Appropriateness of disease presumptions
  - Reasonableness of evidentiary requirements for disease presumptions

Commission resolution (December 2018)

# Research activities

- Analyzed workers' compensation data (2009–2018)
- Interviewed key stakeholders in Virginia and other states
  - Staff of VWC, DHRM, VRS
  - Workers' compensation claimant and defense attorneys
  - Workers' compensation insurers
  - First responders
  - National subject matter experts and staff in other states
- Surveyed attorneys and firefighters
- Reviewed workers' compensation judicial opinions

VWC = Virginia Workers' Compensation Commission

# Research activities

- Contracted with epidemiologists at Johns Hopkins University Bloomberg School of Public Health to:
  - Review existing medical research on occupation-disease associations (e.g., firefighting and cancer)
  - Determine extent to which workers in certain occupations are at increased risk of certain diseases
- Contracted with Oliver Wyman Consulting to estimate costs of proposed presumptions

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## In brief

VWC generally handles disputes in a timely manner.

VWC is widely viewed as being fair but should improve communications to ensure Virginia workers are aware of workers' compensation processes and rights.

Virginia is the only state where employers are not obligated to compensate workers for work-related cumulative trauma injuries.

Virginia employers and insurers pay more for workers' compensation medical benefits than in other states.

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## In brief

Best available scientific evidence provides some support for existing and proposed disease presumptions.

Evidentiary requirements for the cancer presumption are unreasonably burdensome and appear to be counter to the purpose of the presumption.

A years of service requirement for the cardiovascular disease presumption would reduce the risk that employers pay for non-work related diseases.

Concerns prompting PTSD presumption legislation could be addressed more directly through a statutory clarification of compensable injuries.

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# In this presentation

## Background

Timeliness of workers' compensation system

Fairness in workers' compensation system

Current and proposed cancer presumptions

Other current and proposed disease presumptions

# Workers' comp systems created to compensate injured workers and limit employer liability

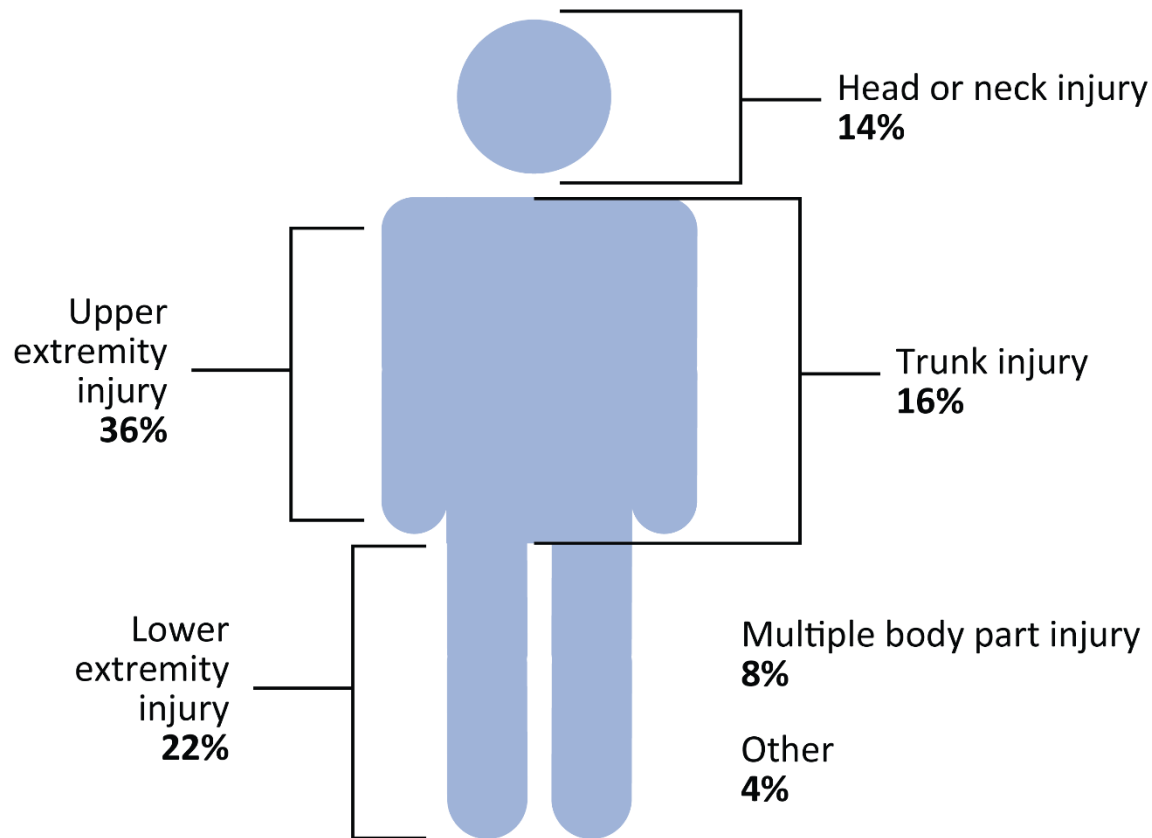
- System created to provide workers with certain benefits for work-related injuries and protect employers from costly class-action lawsuits
  - Workers' Compensation Act is exclusive remedy for workers
  - Employers with three or more employees must participate
- All 50 states have workers' compensation systems, and states have discretion over
  - how systems are administered
  - injuries and diseases that are compensable
  - benefits owed to workers with compensable claims



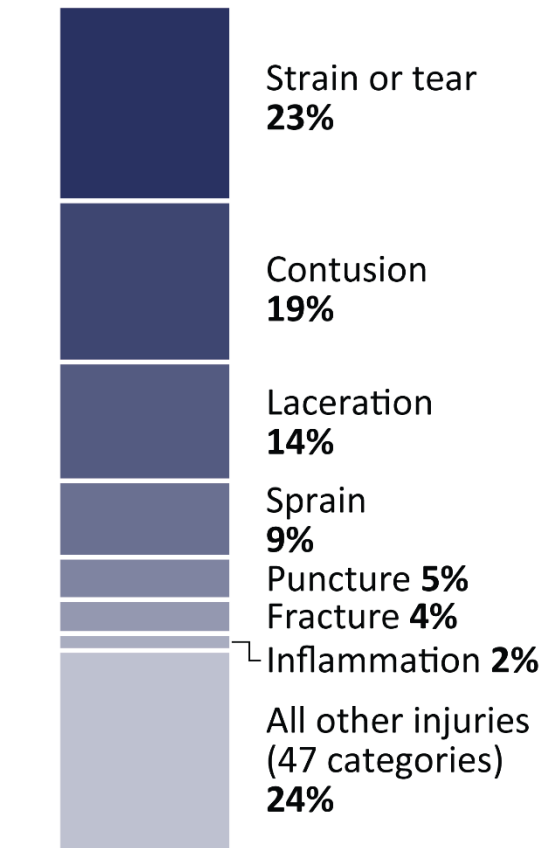
# Workers can be compensated for certain work-related injuries and diseases

- Physical and psychological work-related injuries can be compensable
  - Physical injury generally not compensable in Virginia if injury developed over multiple days, weeks, or years
- Diseases caused by work can also be compensable
  - Occupational disease (specific to hazards of work)
  - Ordinary disease of life (common to general public if caused by work)
  - Presumptive disease (presumed to be caused by work)

# Most common injuries are strains and tears to extremities, 2010–2018



MOST COMMON INJURY TYPES



# Benefits include medical, wage replacement, and death benefits

- Medical care
  - All necessary medical treatment that is related to the compensable injury or disease
  - Provided at no cost to worker
- Wage replacement
  - 66 2/3 percent of average weekly wage for workers who experience wage loss
- Death benefits

Workers may also receive other benefits, including vocational rehabilitation benefits and mileage reimbursement

# Employers purchase workers' compensation insurance; insurers determine compensability

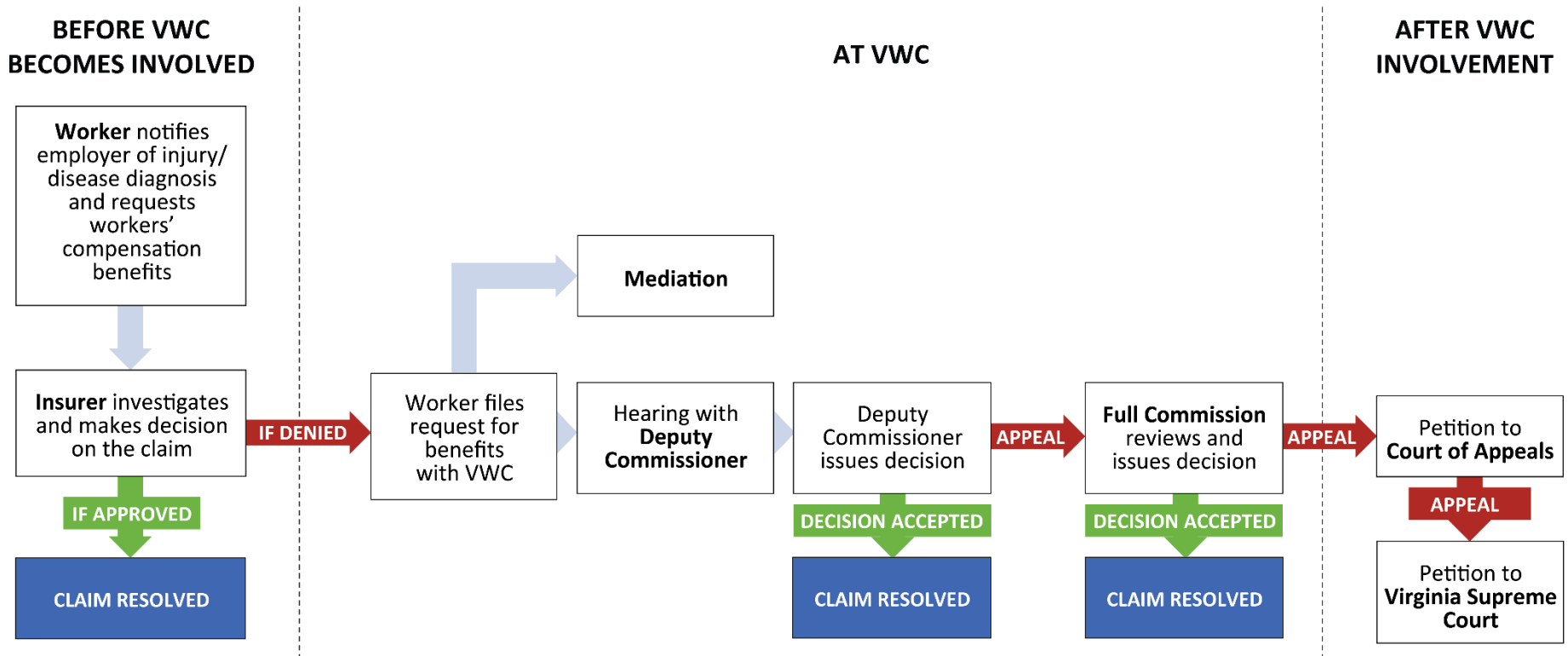
- Employers with three or more employees required to purchase workers' compensation insurance
- Insurers make initial compensability decisions and pay benefits to worker, if owed
- Virginia median total two-year cost per claim of \$11,633
  - Medical benefits: \$8,311
  - Wage replacement benefits: \$3,557
  - Death benefits: \$46,334

Two-year total cost reflects costs of injuries and diseases occurring between 2014 and 2016.

# VA Workers' Compensation Commission resolves disputes involving workers' compensation claims

- Workers have right to dispute insurers' denial of workers' compensation claims through the VWC
- VWC deputy commissioners and commissioners resolve workers' compensation disputes
  - Hearings
  - Mediations
  - Settlement reviews
- Parties can appeal VWC hearing decisions ("opinions") to VA Court of Appeals and then to VA Supreme Court

# VWC's role is limited unless dispute arises regarding a workers' compensation claim



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# In this presentation

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## Finding

Workers' compensation insurers are not statutorily required to respond to claims in a timely manner, which contributes to benefit payment delays.



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## Prolonged insurers' responses to some claims contributes to benefit payment delays

- Firefighters identified responsiveness of insurers as one of the three top challenges they had experienced
- Full extent of insurer-caused delays is unknown because data is not collected by VWC
- At least 40 states require insurer to pay or deny a claim within a statutorily specified timeframe
  - Typically 14 to 21 days after injury reported to insurer
  - Virginia has no statutory requirement

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## Recommendation

General Assembly may wish to consider requiring workers' compensation insurers to determine whether a worker's injury or disease is compensable and notify the worker, as well as the Virginia Workers' Compensation Commission, of this decision within 30 days of receiving notice of the injury or disease.

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## Finding

Workers' compensation cases are handled by VWC in a timely manner, but opportunities exist to improve timeliness in several areas.

## VWC's hearings are generally timely

- Claimant and defense attorneys report satisfaction with wait times for VWC hearings
  - 79% of attorneys agreed VWC appropriately balances need for a timely hearing with need to ensure due process
- Average wait for hearing is 23% (40 days) longer in Fairfax than other offices
  - At least one additional deputy commissioner assigned to Fairfax office would allow hearings to be held sooner

## Issuance of VWC opinions is generally timely

- Deputy commissioners preside over hearings and issue written opinions (i.e., decisions) after hearing
- In survey, 61% of attorneys agreed deputy commissioners issue opinions in a timely manner
  - Some expressed frustration with variation in timeliness across deputy commissioners
- Some deputy commissioners not meeting time goal for issuing opinions
  - Complex cases can delay opinions for simple cases

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# Recommendations

VWC should

- assign at least one additional deputy commissioner to handle hearings and mediations for the Fairfax office.
- communicate to deputy commissioners that they have discretion to prioritize the order in which they write their opinions.
- monitor timeliness with which deputy commissioners are issuing opinions.

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# Finding

VWC is generally viewed as being fair in its application of the Virginia Workers' Compensation Act.



## Deputy commissioners and commissioners are viewed by key stakeholders as being fair

- Stakeholders reported general satisfaction with fairness of VWC's processes and decisions
  - 92% of claimant attorneys and 91% of defense attorneys surveyed agreed full VWC Commission conducts hearings in unbiased manner
  - 80% of attorneys surveyed agreed deputy commissioners consider all relevant facts and evidence when writing opinions
- VWC has strategies to ensure deputy commissioners are conducting hearings in a fair and unbiased manner

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## Finding

Information available to injured workers about their rights and responsibilities is insufficient and unclear.

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## Some injured workers are confused about workers' compensation rights and process

- Injured workers are confused about system, including
  - existence and role of VWC
  - need to file a claim directly with VWC to protect their rights to benefits
  - the right to file a claim with VWC disputing an insurer's denial of benefits
- Insurers and VWC staff confirmed confusion among injured workers about VWC's existence and role

# Firefighters reported being unaware of ability to dispute insurer's denial of their claim with VWC

- In survey, 49% of Virginia firefighters\* (264 individuals) reported not being made aware that they could dispute a denial through VWC
  - Some claims that were denied may still be within statute of limitations and could be disputed

\*Firefighters who reported having been injured at work or diagnosed with a work-related disease during the past five years.

## Several changes would reduce confusion among workers about rights and process

- VWC could improve information provided to injured workers
  - Existing information is scattered, unclear, or unfinished
- State could require all workers' compensation insurers to notify worker of right to dispute denial through VWC
  - Already communicated in some insurers' denial letters
- State could create ombudsman office at VWC to help inform both workers and employers
  - At least 18 states have an ombudsman office

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## Recommendation

VWC should notify, as soon as practicable, workers who have recently reported an occupation-related injury or disease and have not yet submitted a claim for benefits, about the need to file a claim within the statute of limitations.

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# Recommendations

VWC should

- develop a comprehensive and easy-to-understand guide for injured workers and provide this guide to all Virginia workers who are reported to have been injured at work.
- review all of its written and online materials for communicating with and informing workers, employers, and insurers, to ensure that all materials are as clear, accurate, comprehensive, and accessible as possible.

# Recommendations

General Assembly may wish to consider

- requiring workers' compensation insurers to include in letters denying a workers' benefits claim a notice that the injured worker has the right to dispute the denial through VWC.
- creating an ombudsman office within VWC to provide neutral educational information and assistance to unrepresented workers and employers.



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## Finding

Employers and their insurers pay more for workers' compensation medical benefits than in other states.

# Virginia's medical fee schedules provide greater certainty but are not based on provider costs

- Virginia's workers' compensation medical costs have historically been higher than most other states (WCRI)
- Virginia's medical fee schedules were recently created following lengthy negotiations between stakeholders\*
  - Set maximum fees providers can charge for medical services
- Unlike other states, Virginia's fees are not based on the costs to *provide* medical services
  - Based on costs Virginia providers *charged* in 2014/2015

\* Effective January 2018    WCRI = Workers' Compensation Research Institute

## At least some medical fees may be higher than necessary

- Unlike Virginia, majority of states with fee schedules (31 of 44 states) use Medicare reimbursement rates as basis for their workers' compensation fee schedules
- Average fee schedule reimbursement rates are 204% of Medicare rates for the same medical services
  - 5<sup>th</sup> highest, relative to Medicare, among 44 states with fee schedules
- VWC only authorized to reduce fees in limited circumstances

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## Recommendation

General Assembly may wish to consider authorizing and directing VWC to include as part of its biennial reviews of Virginia's workers' compensation medical costs a comparison of medical fees to Medicare reimbursement rates for the same services.

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## Finding

Virginia is only state where employers are not obligated to compensate workers for work-related cumulative trauma injuries.

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## Not covering cumulative trauma is unusual and inconsistent with intent of workers' compensation

- Cumulative trauma injuries, such as back injuries occurring after lifting boxes over several weeks, recognized as category of work-related injuries by NIOSH
- All 49 other states obligate employers to pay for work-related cumulative trauma injuries

NIOSH – Centers for Disease Control and Prevention's National Institute for Occupational Safety and Health

# States do not experience substantial additional costs by covering cumulative trauma injuries

- Cost concerns cited as primary reason Virginia does not cover cumulative trauma
- Evidence from other states suggests that cost concerns may not be warranted
  - States with lower workers' compensation premiums than Virginia cover cumulative trauma
  - Small percentage of total claims in other states
- Virginia's options for covering cumulative trauma should be fully explored with expert

# Recommendations

General Assembly may wish to consider

- making cumulative trauma injuries determined to be caused by work compensable under the Virginia Workers' Compensation Act.
- directing VWC to hire a reputable and independent research organization with expertise in workers' compensation policy to develop options for covering cumulative trauma injuries in Virginia.



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# Presumptions give workers the benefit of the doubt when cause of disease is uncertain

- Presumptions establish in law a presumed causal connection between an occupation and a disease
  - Intended to make it easier for workers to obtain benefits where proving causality is difficult or impossible
- Virginia presumptions for public safety workers are also used by other states
  - Firefighting and cancer: 40 states
  - Firefighting and cardiovascular disease: 34 states
  - Law enforcement and cardiovascular disease: 15 states

# Virginia has four types of disease presumptions for public safety workers

- **Cancer**

- Covered: breast, leukemia, ovarian, pancreatic, prostate, rectal, and throat
- Proposed in 2019 (HB 1804): brain, colon, testicular

- **Cardiovascular disease**

- **Respiratory disease\***

- **Infectious disease\***

Post-traumatic stress disorder presumption also proposed during 2019 session.

\*Workers rarely seek to establish these two types of presumptions.

# National experts consulted to review existing medical research surrounding presumptions

- Epidemiologists from Johns Hopkins University's Bloomberg School of Public Health consulted for study
  - Analyzed and summarized existing research on Virginia's current and proposed disease presumptions
- 83 studies on cancer, cardiovascular disease, respiratory disease, and PTSD among firefighters and/or police officers identified and analyzed
  - Evaluated for quality and bias

PTSD = Post-traumatic stress disorder

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## Finding

Johns Hopkins University epidemiologists determined that the best available evidence provides some support for most of Virginia's current and proposed cancer presumptions.

# Firefighters are exposed to carcinogens and fully avoiding exposure is not possible

- All types of fires release toxic and carcinogenic substances (IARC)
- Firefighters' exposure to carcinogens vary depending on many factors
  - Primary routes of exposure are inhalation and skin absorption
- Fully avoiding exposure to carcinogens is not possible, even with protective gear

IARC = International Agency for Research on Cancer

# Existing research provides some support for most current and proposed cancer presumptions

<u>Evidence indicates increased risk</u>	<u>Evidence is insufficient to determine risk</u>	<u>No research has been conducted</u>
Prostate	Colon ( <i>proposed in 2019</i> )	Ovarian
Throat	Pancreatic	
Brain ( <i>proposed in 2019</i> )	Breast	
Leukemia		
Rectal		
Testicular ( <i>proposed in 2019</i> )		

Source: Review of 2009–2019 epidemiological research studies on firefighting-cancer associations by the JHU epidemiologists.

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## Three proposed cancers could be added to presumptions for firefighters

- Brain and testicular cancers could be added to list of presumptions in statute
- Although evidence is less strong, colon cancer could also be added as a presumption



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## Current cancer presumptions could be maintained and sunset provision added

- Better data on firefighting-cancer associations will be available after new National Firefighter Registry is fully implemented
- General Assembly could maintain all current cancer presumptions in statute, including those with less scientific evidence, but add a sunset provision
  - Cancers with weaker scientific evidence to support occupation-disease associations could be removed if new scientific evidence does not increase support for including them

# Addition of three cancers expected to increase employers' workers' comp and LODA costs

- HB 1804 (2019) expected to result in only about six new compensable claims per year, but five-year total cost per compensable claim expected to be high
- Employers' workers' compensation and LODA premiums expected to increase
  - Workers' compensation premiums – up to \$269 per firefighter in first year\*
  - LODA premiums – up to \$61 per FTE in first year

LODA – Line of Duty Act

\*Includes additional premium costs per active firefighter. Some additional liability would be created for firefighters no longer working with employer and still within statute of limitations.

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## Option

The General Assembly could add brain, testicular, and colon cancers to list of cancers presumed to have been caused by firefighting.

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## Option

General Assembly could consider specifying that the presumptions for breast, ovarian, and pancreatic cancers (and colon cancer, if added) shall not apply to workers' compensation claims submitted after June 30, 2030, and prior to this date, could direct a re-examination of the national research on the association between firefighting and these cancers.

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## Recommendation

General Assembly may wish to consider establishing a process for reviewing the scientific research on proposed additions to or modifications of Virginia's workers' compensation disease presumptions prior to legislative action.

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## Finding

Requirements to establish cancer presumption for firefighters are unreasonably burdensome and appear counter to the purpose of the presumption.

# Most cancer claims disputed at VWC resulted in firefighter not receiving benefits (2009 to 2018)

- In disputed claims, workers must prove at hearing that they meet certain requirements to be eligible for presumption
- Of 20 disputed firefighter-cancer cases heard by VWC between 2009 and 2018:
  - 13 (65%) did not prove toxic exposure or a disability resulting from the cancer and denied benefits
  - 4 (20%) denied benefits for other reasons
  - 4 (20%) met all requirements and were awarded benefits

\*Not all claims initially denied by insurers are disputed by the worker to the VWC. Figures do not sum to 100% because one case failed to meet two requirements.

## Inability to meet toxic exposure requirement resulted in about half of denials

- Presumption covers firefighters who have had “contact with toxic substance encountered in line of duty”
  - Current case law interpretation requires firefighters to prove exposure to specific carcinogen suspected to cause their particular type of cancer
- Of 16 cases heard by VWC in which firefighters did not meet all requirements, the firefighter did not meet the toxic exposure requirement in seven



# Proving exposure to specific carcinogen is difficult and costly

- Johns Hopkins epidemiologists concluded that documenting exposure to carcinogens is extremely difficult and costly
  - Virginia firefighters are not equipped with technology to measure exposure
  - Technology is expensive and requires expertise
- Stringency of requirement is counter to purpose of presumption, which is to relieve firefighters of need to prove work caused their disease

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## Requiring firefighter to show exposure to hazardous conditions would be sufficient

- Less burdensome requirement could instead allow firefighters to demonstrate exposure to *hazardous conditions* that exposed them to carcinogens
- Could require firefighters to show past participation in
  - responses to active fires or
  - fire investigations or clean-up activities

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## Recommendation

General Assembly may wish to consider allowing a firefighter to meet the toxic exposure requirement by demonstrating they responded to fire scenes, either during the fire or afterwards as part of clean-up or investigation.

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## Finding

Virginia's 12 years of continuous service requirement for cancer presumption is highest of any state and lacks scientific basis.

# Cancer presumption's 12 continuous years of service requirement inconsistent with research

- Basis of Virginia's 12-year service requirement is unclear and does not align with scientific research
  - Some scientific evidence that exposure durations shorter than 12 years can lead to increased cancer risk
- Longest of 29 states with a single service requirement
  - Other states' service requirements range from one to 10 years, with five years of service most common
- Requirement that service be *continuous*, rather than *cumulative*, also does not align with research

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# Recommendations

The General Assembly may wish to consider

- reducing years of service requirement for the cancer presumption from 12 years.
- removing the word “continuous” from the years of service requirement for the cancer presumption.

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## Finding

Some scientific research supports heart disease presumption and indicates risk increases with length of service.



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## Stronger support for cardiovascular disease presumption with longer service

- Best available research offers some support that a plausible connection exists between covered public safety occupations and cardiovascular disease
- Several studies indicate risk of cardiovascular disease increases with length of service
- 16 of 34 states with cardiovascular disease presumption have a service length requirement
  - Most require five years (VA has no service requirement)
  - Would reduce risk of employers paying for non-work-related diseases

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## Option

General Assembly could require that workers complete a minimum number of years of service as a firefighter or police officer to claim the cardiovascular disease presumption.

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## Finding

Concerns prompting PTSD presumption legislation could be addressed more directly through a statutory clarification of compensable injuries.

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## Difficult for first responders to prevail on PTSD claim under current case law

- Court of Appeals and Commission have denied benefits for PTSD as an injury (i.e., due to a single traumatic event) because circumstances public safety workers encountered could be expected
- Instead of establishing a presumption, amend the law to allow claims to be compensable regardless of whether the circumstance could have been expected

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## Recommendation

General Assembly may wish to consider specifying that psychological injuries can be compensable even if the event causing the psychological injury could have been expected within the worker's job responsibilities.

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## Key findings

The Virginia Workers' Compensation Commission is generally timely and fair, but some injured workers are confused, and information provided to them is insufficient.

Virginia is the only state where employers are not obligated to compensate workers for work-related cumulative trauma injuries.

Employers and insurers pay more for workers' compensation medical benefits than is the case in other states.

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## Key findings

Best available scientific evidence provides some support for most existing and proposed disease presumptions.

Evidentiary requirements for cancer presumptions are unreasonably burdensome and not supported by science.

Adding a years of service requirement for cardiovascular disease presumption would reduce risk that employers pay for non-work related diseases.

Concerns prompting PTSD presumption legislation could be addressed more directly through a statutory clarification of compensable injuries.

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