

Report to the Governor and the General Assembly of Virginia

# Virginia's Workers' Compensation System and Disease Presumptions

2019



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### **JLARC staff**

Hal E. Greer, Director

Tracey Smith, Associate Director  
Drew Dickinson, Project Leader  
Danielle Childress  
Brittany Utz  
Keegan Edgar

Information graphics: Nathan Skreslet  
Managing Editor: Jessica Sabbath

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# Summary: Virginia's Workers' Compensation System and Disease Presumptions

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## WHAT WE FOUND

### **Claims are generally handled by VWC in a timely and fair manner**

Disputes between employers/insurers and workers involving workers' compensation claims are adjudicated by the Virginia Workers' Compensation Commission (VWC) in a timely manner, and workers' and employers' attorneys are generally satisfied with the timeliness and fairness of VWC's handling of disputed claims. However, VWC could take steps to improve the timeliness of hearings held in the Fairfax office and deputy commissioners' issuance of opinions.

### **Delays in the claims process sometimes occur before claims reach VWC**

Employers' workers' compensation insurers make the first determination about the compensability of a worker's injury. The timeliness of insurers' compensability determinations was noted as the second most common challenge experienced by firefighters who had filed a workers' compensation claim during the past five years. Virginia is one of only a few states that does not require insurers to make claims decisions within a statutorily specified timeframe.

### **Workers are not well informed about the process to file claims or their rights to dispute insurers' compensability decisions**

Workers are sometimes confused about how to access and navigate Virginia's workers' compensation system. Workers have an insufficient understanding of the process to file for workers' compensation benefits and the role that VWC plays in resolving disputes between workers and their employers. The information that VWC provides to workers about their rights and responsibilities in the workers' compensation system is (1) scattered across VWC's website, (2) not well organized within each docu-

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## WHY WE DID THIS STUDY

In December 2018, the Joint Legislative Audit and Review Commission (JLARC) directed staff to conduct a review of Virginia's workers' compensation system and use of disease presumptions. Specifically, staff were directed to assess whether workers' compensation claims were reviewed and processed promptly and fairly (including as part of VWC's dispute resolution process), assess the measures in place to minimize the potential for fraud and abuse in the system, and determine whether Virginia's disease presumptions are appropriate and whether the level of evidence required to claim or rebut them is reasonable and appropriate.

## ABOUT WORKERS' COMPENSATION

The workers' compensation system is intended to protect workers from the economic burden of work-related injuries or diseases. When Virginia workers are unable to work because they have been injured on the job or have contracted a work-related disease, they may receive partial wage replacement, known as "indemnity benefits," coverage of associated medical costs, and/or coverage of vocational rehabilitation expenses. Certain public safety workers can also seek compensation for certain diseases considered "presumptive diseases," which the General Assembly has decided must be presumed to have developed through employment unless an employer can provide compelling evidence to rebut the connection.

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ment, (3) unclear, and (4) incomplete. Moreover, employers and their workers' compensation insurers do not consistently provide information to workers about their rights to dispute initial compensability decisions.

Workers' lack of awareness about workers' compensation procedures can jeopardize their ability to fully pursue and potentially receive compensation for their work-related injuries. For example, over 200 firefighters with a work-related injury or disease reported that they were unaware of their right to dispute a denial by their employer's insurer to VWC. Additionally, a number of firefighters who had been diagnosed with cancer or cardiovascular disease told JLARC staff they thought they had filed a claim with VWC because they reported their injury to their employer. This misperception could prevent them from fully pursuing and potentially receiving workers' compensation benefits.

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

In contrast to the 49 other states, Virginia does not provide a remedy through the workers' compensation system for injuries due to repetitive work activities, such as lifting boxes over several weeks (also known as "cumulative trauma injuries"). As a result, Virginia workers are required to bear the costs associated with cumulative trauma injuries, even when they arise out of and in the course of employment.

Employer costs have been cited by multiple stakeholders as the primary reason why Virginia's workers' compensation system does not cover cumulative trauma injuries. However, it does not appear that cumulative trauma injuries are a major cost driver of workers' compensation premiums in other states.

### **Employers in Virginia pay comparatively high medical costs for workers' compensation claims**

The cost of medical services paid by insurers to treat injuries or diseases appears to be comparatively high. Medical fee schedules that were put in place in 2018 to provide greater cost certainty for insurers appear to have somewhat reduced costs, but at least some reimbursement rates in Virginia's medical fee schedules appear to be high compared with other states.

### **Best available scientific evidence indicates that existing and proposed cancer presumptions are appropriate**

Disease presumptions are intended to relieve workers in certain occupations of the need to prove a causal connection between their work and their disease. A key premise of disease presumptions is that a plausible connection exists between a presumptive disease and the workers' occupation, but evidence to prove a connection is difficult or impossible to obtain.

According to epidemiologists at Johns Hopkins University's Bloomberg School of Public Health, who conducted a systematic review of the existing scientific research related to Virginia's disease presumptions, research is mixed on the extent of a causal connection between firefighting and the 10 existing and proposed cancer presumptions. Although mixed, the existing research is sufficient to support a plausible connection between firefighting and the cancers currently included as presumptive diseases in the Code of Virginia. A plausible connection also exists between firefighting and three cancers that House Bill 1804 (2019) proposed adding to Virginia's statute: colon, testicular, and brain cancer. Among these three, the evidence of a link between firefighting and colon cancer is the least strong but still plausible according to epidemiological research.

### **Requirements to establish cancer presumptions are unreasonably burdensome and not supported by science**

Most disputed cancer claims from 2009 to 2018 resulted in firefighters not receiving benefits, primarily because firefighters failed to prove their exposure to the specific carcinogen that caused their cancer (a requirement in existing case law) or failed to meet the presumption's disability requirement. The application of these two statutory requirements—to prove contact with a toxic substance that caused a firefighter's cancer and to prove a period of disability—is unreasonably burdensome and possibly counter to legislative intent.

According to Johns Hopkins University researchers, it is unreasonable to require firefighters to document exposure to carcinogens that cause their particular cancer, because doing so is difficult or impossible with existing technology and is cost prohibitive. Additionally, requiring a firefighter to identify a single carcinogen that is known to cause his or her type of cancer appears counter to the purpose of the presumption, which is to relieve firefighters of the need to prove that their occupation caused the disease.

The application of the disability requirement has been problematic because, in some cases, a firefighter's cancer was not presumed to be caused by work simply because the worker did not have a period of wage loss. Whether a firefighter loses wages because of his or her disease does not appear to be relevant to whether his or her employment caused the disease.

Virginia's cancer presumption statute also requires firefighters to serve 12 or more years of continuous service in the occupation, but the basis for this service requirement is unclear and does not align with research on cancer among firefighters. Johns Hopkins University researchers identified scientific evidence that some exposure durations shorter than 12 years can lead to increased cancer risk. Virginia's 12-year requirement is one of the longest service requirements to claim a cancer presumption among states.

### **Cardiovascular disease presumption is difficult, but not impossible, for employers to rebut**

Rebuttal requirements for Virginia's cardiovascular disease presumption are more difficult to meet than those of some states. However, workers' compensation is intended to favor injured workers, and presumptions are not supposed to be easy to rebut. Moreover, Virginia's cardiovascular disease presumption is not impossible to rebut—23 percent of cardiovascular disease cases decided by VWC between 2009 and 2018 were successfully rebutted by employers.

### **Risk of cardiovascular disease increases with years of service**

Scientific evidence supports that public safety workers' risk of work-related cardiovascular disease increases over time. Unlike Virginia, other states have a years of service requirement for public safety workers to benefit from a cardiovascular disease presumption. Establishing a years of service requirement would be consistent with epidemiological research, put Virginia more in line with other states' practices, and help ensure that employers and workers' compensation insurers do not pay for the costs of non-work-related diseases.

### **Virginia should pursue improvements to the existing system before considering an alternative benefit program**

Since 2017, several states have created disease benefit programs for firefighters, in place of workers' compensation programs, to address employer and worker frustrations with disease presumption statutes. Creating such a program in Virginia may not be necessary at this time. Implementing this report's recommendations to address shortcomings in the current system could be considered before pursuing such a wholesale change.

## **RECOMMENDATIONS**

### **Legislative action**

- Establish a timeframe in statute for insurers to make initial compensability determinations on injuries and diseases reported to them and require VWC to monitor compliance with the requirement and impose financial penalties for noncompliance.
- Require workers' compensation insurers, including employers who are self-insured, to notify injured workers about their right to dispute insurers' denials of workers' compensation benefits.
- Allow cumulative trauma injuries to be compensable.
- Authorize and direct VWC to include as part of its biennial reviews of workers' compensation medical costs a comparison of Virginia's medical fees to Medicare reimbursement rates.



- Modify the cancer presumption to allow firefighters to meet the toxic exposure requirement through evidence that they responded to fires.
- Clarify that the disability requirement for claiming a disease presumption can be met through medical evidence.
- Reduce the years of service requirement for the cancer presumption.

### **Executive action**

- Hire at least one additional deputy commissioner to be assigned to the Fairfax office.
- Review and revise all written materials for communicating with and informing workers, employers, and insurers to ensure that information is accurate and clear and develop a comprehensive guide for injured workers explaining their rights and the role of VWC.
- Notify, as soon as practicable, all injured workers who have not yet submitted a claim for benefits, about their right to dispute insurers' denials and the need to file a claim directly with VWC within the statute of limitations to preserve their right to benefits.

### **Policy options**

- Add brain, colon, and testicular cancers to the list of cancers presumed to be caused by firefighting.
- Add a years of service requirement to the cardiovascular disease presumption.

The complete list of recommendations and policy options is available on page vii.



# **Recommendations and Options: Virginia’s Workers’ Compensation System and Disease Presumptions**

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## **RECOMMENDATION 1**

The Virginia Workers’ Compensation Commission should appoint at least one additional deputy commissioner assigned to handle hearings and mediations for the Fairfax office. (Chapter 2)

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## **RECOMMENDATION 2**

The Virginia Workers’ Compensation Commission should ensure that its chief deputy commissioner issues guidance to deputy commissioners that communicates that they have discretion to prioritize the order in which they write their opinions so that they can maximize the number of opinions issued within 21 days. (Chapter 2)

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## **RECOMMENDATION 3**

The Virginia Workers’ Compensation Commission should (i) modify its electronic reporting capabilities to calculate the number of days that each deputy commissioner has taken to issue opinions after the record close date; (ii) generate quarterly reports that will identify any deputy commissioners who have taken longer than the 21-day goal to issue a majority of their opinions; (iii) require the chief deputy commissioner to work with deputy commissioners to develop strategies to improve the timeliness with which these deputy commissioners issue opinions; and (iv) require the chief deputy commissioner to report annually to the full Commission on the timeliness with which deputy commissioners are issuing their opinions. (Chapter 2)

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## **RECOMMENDATION 4**

The Virginia Workers’ Compensation Commission should expand the number of time slots available for full and final mediation by allowing staff attorneys to conduct full and final mediations in cases where neutral facilitation is selected by the parties. (Chapter 2)

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## **RECOMMENDATION 5**

The Virginia Workers’ Compensation Commission should no longer refer to issue mediation (or issue facilitation) those dispute types that are infrequently resolved through issue mediation. (Chapter 2)

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## **RECOMMENDATION 6**

The Virginia Workers’ Compensation Commission should assign at least one deputy commissioner to the Fairfax office who is certified to conduct mediations. (Chapter 2)

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#### **RECOMMENDATION 7**

The General Assembly may wish to consider amending Title 65.2 of the Code of Virginia to require (i) workers' compensation insurers, including those employers who are self-insured, to make a determination as to whether a worker's injury or disease is accepted as 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, and (ii) VWC to enforce this requirement through monetary penalties imposed on insurers and self-insured employers for noncompliance. (Chapter 2)

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#### **RECOMMENDATION 8**

The General Assembly may wish to consider including language in the Appropriation Act to direct the Virginia Workers' Compensation Commission to report annually on (i) the extent to which workers' compensation insurers, including those employers who are self-insured, are making compensability determinations and notifying workers of their decisions in a timely manner after receiving notice of work-related injuries and diseases and (ii) actions taken by VWC to ensure the timeliness of these decisions. The first report should be submitted by VWC to the House Appropriations and Senate Finance committees no later than June 30, 2022. (Chapter 2)

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#### **RECOMMENDATION 9**

The Virginia Workers' Compensation Commission should provide interpreters for mediations upon request. (Chapter 3)

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#### **RECOMMENDATION 10**

The Virginia Workers' Compensation Commission (VWC) should develop a comprehensive and easy-to-understand guide for injured workers, publish this guide online, and provide this guide to all Virginia workers who are reported to have been injured at work. At a minimum, the guide should include information on the rights of Virginia workers under the Workers' Compensation Act, the role of VWC in Virginia's workers' compensation system, the process for filing a claim and resolving disputes, services available at VWC, and how injured workers can find an attorney to represent them. (Chapter 3)

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#### **RECOMMENDATION 11**

The Virginia Workers' Compensation Commission (VWC) should review by January 1, 2021 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. (Chapter 3)

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### **RECOMMENDATION 12**

The General Assembly may wish to consider amending § 65.2-200 of the Code of Virginia to create an ombudsman office within the Virginia Workers' Compensation Commission, led by an attorney in good standing with the Virginia State Bar. The office should (i) provide timely and confidential educational information and assistance to unrepresented parties to help them understand their rights under the Workers' Compensation Act and the various processes available to them; (ii) carry out duties with impartiality and not provide legal advice; and (iii) maintain data on inquiries received, types of assistance requested, and actions taken. (Chapter 3)

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### **RECOMMENDATION 13**

The General Assembly may wish to consider amending the Code of Virginia to require workers' compensation insurers, including those employers who are self-insured, to include a notice in any letter denying workers' compensation benefits that the injured worker has a right to dispute the claim denial through the Virginia Workers' Compensation Commission (VWC). The notice should indicate (i) VWC's neutral role within the workers' compensation system to adjudicate disputed claims; (ii) the need to file a claim for benefits with VWC within the applicable statute of limitations; and (iii) contact information for VWC. (Chapter 3)

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### **RECOMMENDATION 14**

The Virginia Workers' Compensation Commission (VWC) should send a notice to all injured workers for whom it has received a First Report of Injury, but who have not yet submitted a claim for benefits to VWC and are still within the applicable statute of limitations, which explains (i) the rights of injured workers to dispute an insurer's denial of workers' compensation benefits with VWC; (ii) the existence and role of VWC in Virginia's workers' compensation system; and (iii) the importance of filing a claim with VWC within the statute of limitations to protect the worker's right to benefits. This notice should be sent to all applicable injured workers as soon as possible, but no later than January 31, 2020. (Chapter 3)

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### **RECOMMENDATION 15**

The General Assembly may wish to consider including language in the Appropriation Act to direct the Virginia Workers' Compensation Commission (VWC) to hire an independent and reputable national research organization with expertise in workers' compensation policy to (i) develop options for covering workers' cumulative trauma injuries through Virginia's workers' compensation system and (ii) summarize key policy considerations associated with modifying statute to cover cumulative trauma injuries. The research organization should take into consideration (i) the annual number of cumulative trauma injuries in Virginia and other states; (ii) other states' evidentiary requirements for claiming workers' compensation benefits for such injuries; (iii) necessary changes to Virginia's statutory provisions; and (iv) impacts on workers, employers, and insurers. VWC should ensure the proposed options and policy considerations are submitted to the House Appropriations and Senate Finance committees by November 30, 2020. (Chapter 3)

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#### **RECOMMENDATION 16**

The General Assembly may wish to consider amending Title 65.2 of the Code of Virginia to make cumulative trauma injuries compensable under the Workers' Compensation Act. (Chapter 3)

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#### **RECOMMENDATION 17**

The General Assembly may wish to consider amending § 65.2-605.2 of the Code of Virginia to authorize and direct the Virginia Workers' Compensation Commission (VWC) to include in its existing biennial reviews of Virginia's workers' compensation medical costs a comparison of Virginia's medical fees to Medicare reimbursement rates for the same services in Virginia. (Chapter 3)

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#### **RECOMMENDATION 18**

The General Assembly may wish to consider amending §65.2-101 of the Code of Virginia to specify that psychological injuries can be compensable even if the event causing the psychological injury could have been reasonably expected by the worker to have occurred as part of his or her job responsibilities. (Chapter 4)

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#### **RECOMMENDATION 19**

The General Assembly may wish to consider amending Title 65.2 of the Code of Virginia to establish a process for reviewing the scientific research on proposed new presumptions or modifications to existing presumptions under the Virginia's Workers' Compensation Act prior to legislative action, with consideration given to (i) the strength of the association between the occupation and the disease and the relevant hazards to which workers in the occupation are exposed and (ii) the relevance, quality, and quantity of the literature and data available to determine the strength of evidence. (Chapter 4)

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#### **RECOMMENDATION 20**

The General Assembly may wish to consider amending § 65.2-402.C of the Code of Virginia to provide that a firefighter may meet the toxic exposure requirement either by demonstrating (i) exposure to a toxic substance, as is currently required, or (ii) participation in responses to fire scenes, either during the fire or afterwards as part of clean-up or investigation. (Chapter 5)

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#### **RECOMMENDATION 21**

The General Assembly may wish to consider amending § 65.2-402 of the Code of Virginia to clarify that, for the purposes of establishing the presumptions, (i) a total or partial disability may be demonstrated through wage loss, lost work time, or medical evidence and that (ii) workers seeking only medical benefits may demonstrate a total or partial disability solely through medical evidence. (Chapter 5)

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## **RECOMMENDATION 22**

The General Assembly may wish to consider amending § 65.2-402.C of the Code of Virginia to reduce the years of service requirement from 12 years. (Chapter 5)

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## **RECOMMENDATION 23**

The General Assembly may wish to consider amending § 65.2-402.C of the Code of Virginia to remove the word “continuous” from the years of service requirement. (Chapter 5)

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## **RECOMMENDATION 24**

The Auditor of Public Accounts (APA) should conduct an audit to (i) determine the frequency and magnitude of errors in calculating and paying wage replacement benefits for workers' compensation and the Virginia Sickness and Disability Program; (ii) assess the extent to which these errors are ultimately corrected; and (iii) identify opportunities to better coordinate payments between these two programs. (Chapter 6)

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## **RECOMMENDATION 25**

The Department of Human Resource Management and the Virginia Retirement System should convene a stakeholder group composed of staff from the Department of Accounts and payroll and human resources staff from various state agencies to improve training and resources to be provided to state agencies for appropriately calculating the benefits that should be paid to workers eligible for workers' compensation benefits and Virginia Sickness and Disability Program benefits. (Chapter 6)

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## **OPTION 1**

The General Assembly could amend § 65.2-402 of the Code of Virginia to add brain and testicular cancers to the list of cancers that are presumed to have been caused by firefighting. (Chapter 4)

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## **OPTION 2**

The General Assembly could amend § 65.2-402 of the Code of Virginia to add colon cancer to the list of cancers that are presumed to have been caused by firefighting. (Chapter 4)

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## **OPTION 3**

The General Assembly could consider amending § 65.2-402 of the Code of Virginia to specify that the presumptions for breast, colon, ovarian, and pancreatic cancers covered by the statute shall not apply to workers' compensation claims submitted after June 30, 2030. Prior to June 30, 2030, the General Assembly could direct an examination of the latest national research on the association between firefighting and these cancers. (Chapter 4)

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**OPTION 4**

The General Assembly could amend § 65.2-402 of the Code of Virginia to require that workers' compensation claimants have completed a minimum number of years of service as a firefighter or police officer, including any time spent in required training, to claim the cardiovascular disease presumption. (Chapter 4)

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# 1 Virginia's Workers' Compensation System

**SUMMARY** Workers' compensation systems are designed to compensate workers who are injured at work or who develop an occupation-related disease. The Virginia Workers' Compensation Act outlines employer requirements and the benefits awarded to workers for compensable injuries and diseases. All workers with a compensable injury or disease are entitled to medical benefits to fully cover the cost of medical care related to the injury or disease. Workers may also receive wage replacement benefits if they experience a period of disability and cannot work. These benefits are paid by employers through their workers' compensation insurers. For workplace injuries or diseases occurring between 2014 and 2016, workers' compensation benefits were provided to 42,442 Virginia workers, with a median total benefit value of approximately \$11,600 over the first two years after the injury. The Virginia Workers' Compensation Commission (VWC) oversees the system by maintaining records of injuries reported by employers and injured workers; adjudicating or mediating disputes between injured workers and their employers or insurers; and ensuring that employers and insurers are complying with relevant state laws related to workers' compensation.

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In 2018, the Joint Legislative Audit and Review Commission (JLARC) directed its staff to review Virginia's workers' compensation system. The study resolution directed staff to assess whether: workers' compensation claims are reviewed and processed promptly and fairly by the Virginia Workers' Compensation Commission (VWC); VWC's dispute resolution process is timely, effective, and equitable to all parties; Virginia's disease presumptions are appropriate; the level of evidence required to claim or rebut a disease presumption is reasonable and appropriate; appropriate measures are in place to minimize the potential for fraud and abuse; and workers' compensation benefits are appropriately coordinated with other benefits available to injured workers. (See Appendix A for study resolution.)

To address the study resolution, JLARC staff interviewed VWC staff including commissioners and deputy commissioners, workers' compensation attorneys, workers' compensation insurers, public safety officers and associations, federal and academic experts in occupational health and epidemiology, and staff in other states. JLARC staff also surveyed firefighters who have experienced a work-related injury or disease and workers' compensation attorneys. Staff analyzed data provided by VWC on workers' compensation injuries, claims, awards, and payments, and contracted with occupational health experts at Johns Hopkins University to review the medical and scientific evidence regarding Virginia's disease presumptions. JLARC staff also contracted with actuarial consultants to project costs of disease presumptions proposed in 2019. (See Appendix B for more detail on the research methods used in this study.)

## Workers' compensation systems were created as a compromise between employers and workers

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All 50 states have workers' compensation systems, but there is no federal law that requires states to maintain a workers' compensation system or that sets minimum standards. Therefore, states have complete discretion over how systems are administered, the injuries and diseases that are compensable, and benefits available to workers with compensable injuries and diseases.

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Wage replacement benefits are calculated based on the worker's **average weekly wage** earned in the 52 weeks prior to the injury. However, there is a maximum weekly value of benefits that a worker may receive. As of July 1, 2019, the maximum weekly rate is \$1,102.

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Although workers' compensation is defined as a "no-fault" system, there are circumstances under which a **worker would not receive benefits**, such as willful misconduct or intoxication at work.

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Workers' compensation systems were developed by states in the early 20th century as a "grand bargain" between industry and labor. Before the creation of workers' compensation systems, workers sought benefits and reimbursement for workplace injuries through the civil court system. Common-law doctrine required a worker to prove the injury or disease occurred because of employer negligence, and an employer could readily argue the worker was negligent or had assumed the risk of injury or disease by choosing to work for the employer. This provided little protection or recourse to injured workers. Employers were also dissatisfied with the civil court system because payouts to workers—though relatively uncommon—were costly.

As a compromise, states developed workers' compensation systems to (1) provide workers with certain guaranteed benefits for workplace injuries and diseases and (2) protect employers from costly and unpredictable class-action lawsuits (sidebar).

The Virginia Workers' Compensation Act (Title 65.2) governs Virginia's system through requirements for workers, employers, insurers, and medical providers. The law defines guaranteed benefits for workplace injuries and diseases that are deemed compensable. The law stipulates the value of some benefits based on the worker's pre-injury wages, the severity of the injury or disease, and the body part affected.

If a worker's injury or disease is deemed compensable under the law, workers receive coverage for all medical costs for "reasonable, necessary, and authorized medical treatment causally related to the work related injury." These medical benefits last the length of the injury, which could require lifelong care in some cases. Workers who may be unable to work for a certain period of time can receive temporary or permanent wage replacement benefits, set at two-thirds of a worker's pre-injury pay (sidebar). Other potential benefits include vocational rehabilitation services to help injured workers return to work and death benefits for surviving dependents, which may cover wage loss and funeral expenses.

The Virginia Workers' Compensation Act applies to most employees in Virginia, and it is the "exclusive remedy" through which a worker can seek compensation from an employer for a workplace injury, disease, or death. Although workers may have private health insurance or short-term disability coverage to help pay for work-related injuries, workers' compensation benefits are typically the most robust benefit package available to injured workers because of the medical benefits and the potential for wage replacement benefits. In addition, workers' compensation is a "no-fault" system; workers receive certain defined benefits regardless of who is at fault for the injury or disease, although there are some exceptions (sidebar).

Statute requires employers with three or more employees to carry workers' compensation insurance to provide these benefits to injured workers. In Virginia, employers

can purchase coverage from an independent insurer or can self-insure, where employers agree to pay any benefits directly out of their self-insurance reserve rather than paying insurance premiums. Several of Virginia's largest localities self-insure for workers' compensation, and employers must apply and be approved by VWC to self-insure. Employers may also join licensed self-insurance associations to obtain coverage.

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

Under the Virginia Workers' Compensation Act, workers are entitled to certain benefits for both injuries and diseases "arising out of and in the course of employment." However, injuries are much more commonly claimed and awarded benefits than diseases. Among reported injuries and diseases diagnosed in 2018, nearly 95 percent were for physical and psychological injuries and approximately 5 percent were for disease diagnoses.

### Physical and psychological injuries caused by an accident may be deemed compensable

For an injury to be deemed compensable in Virginia, the worker must prove three elements: (1) the injury was caused by an accident; (2) it arose out of the employment; and (3) it occurred in the course of employment (sidebar). In most cases, a preponderance of evidence is required for the worker to prove his or her claim (sidebar).

Cumulative trauma injuries, or injuries from overuse like stress fractures or tendonitis, are not compensable under the Virginia Workers' Compensation Act. A worker must be able to isolate a specific accident that caused his or her injury, and the injury must be a "sudden mechanical or structural change" for the injury to be compensable. The most common physical injuries reported to VWC are strains, tears, contusions, and lacerations, and the most commonly injured body parts include fingers, hands, shoulders, backs, knees, and ankles (Figure 1-1).

The workers' compensation system will also provide benefits for psychological injuries if they are related to a compensable physical injury or related to an "obvious sudden shock or fright" that occurred at work. An example of a psychological injury is post-traumatic stress disorder (PTSD). Psychological conditions like PTSD can be claimed as a disease, rather than an injury, if the PTSD was caused by traumatic experiences over time rather than a specific event.

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Throughout this report, the term "insurers" refers to both **private insurance carriers as well as employers and associations that self-insure.**

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To prove that an injury **arose out of employment**, the injured worker must provide evidence that something *about* the employment caused the injury, such as a task, the equipment, or surroundings. To prove that the injury occurred **in the course of employment**, the worker must provide evidence that the injury occurred in the time and place of employment.

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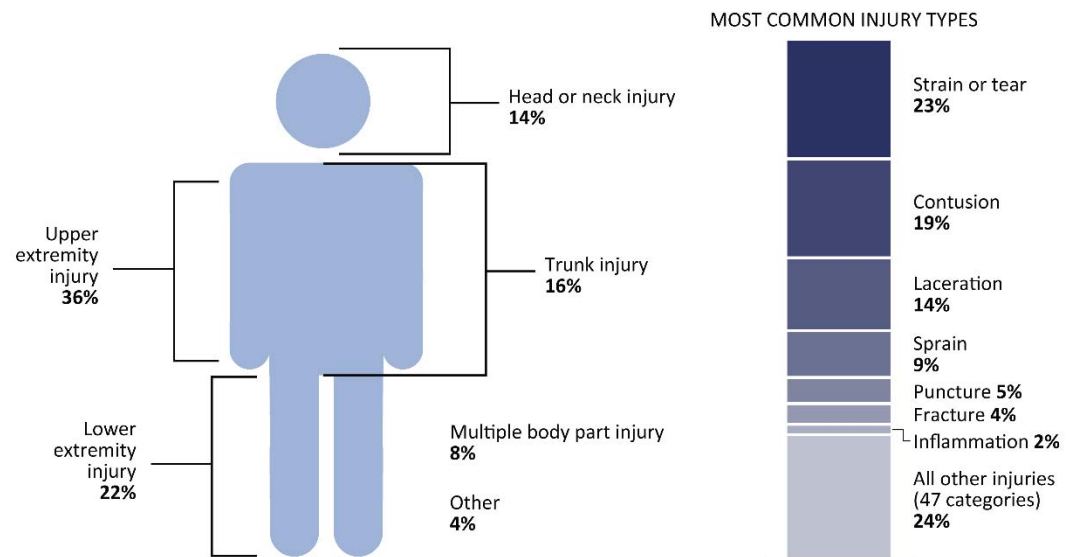
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In practice, the burden of proof is met under the **preponderance of evidence** standard when the commissioner or deputy commissioner is convinced there is a greater than 50 percent chance the evidence is true.

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**FIGURE 1-1**

**Most common injuries are strains and tears, injuries most commonly affect extremities, 2010–2018**



SOURCE: JLARC analysis of VWC data on injuries, 2010–2018.

## **Occupational diseases are also compensable under the Workers' Compensation Act**

Virginia workers who are diagnosed with a disease caused by their employment may also be entitled to benefits under the Virginia Workers' Compensation Act. The law provides benefits to workers for three general categories of diseases, each of which has different evidentiary requirements.

### ***Ordinary diseases of life***

Workers seeking compensation for a disease that is common to the general public, called an “ordinary disease of life,” may receive compensation if it is caused by their employment. An example of an ordinary disease of life would be hypertension or asthma. To successfully claim compensation for an ordinary disease of life, the worker must provide clear and convincing evidence that his or her disease was caused by employment—the highest evidentiary standard required of workers seeking compensation for a disease (sidebar). This standard is also higher than the preponderance of evidence standard workers must meet to successfully claim compensation for a workplace injury.

### ***Occupational diseases***

Workers seeking compensation for a disease they wish to argue is an “occupational disease,” like silicosis experienced by miners, can do so if they can prove by a preponderance of evidence (i.e., “more likely than not”) that their disease was caused by their

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The burden of proof is met under the **clear and convincing evidence** standard when the commissioner or deputy commissioner is convinced the evidence is highly and substantially more likely to be true than untrue.

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employment. Workers must meet specific criteria to successfully claim occupational diseases, such as that “apparent to the rational mind...it can be seen as a natural incident of the work as a result of the exposure occasioned by the nature of the employment... [and] that it is incidental to the character of the business.” As is the case with an ordinary disease of life, the worker bears the burden of proof when seeking compensation for an occupational disease. However, the worker must only meet the preponderance of evidence standard, which is lower than the clear and convincing evidence standard required for ordinary diseases of life.

### ***Presumptive diseases***

In Virginia, certain workers (mostly public safety) can also seek compensation for specific diseases considered “presumptive diseases,” which the General Assembly has decided must be *presumed* to have been contracted through employment unless an employer can provide compelling evidence to rebut the presumed causal connection. Disease presumptions, which are common in other states, are intended to give workers in certain occupations the benefit of the doubt when there is uncertainty regarding the cause of a worker’s disease. To do this, disease presumptions shift the burden of proof *away from the worker* to show employment caused his or her disease—as is the case for injuries, occupational diseases, and ordinary diseases of life—to *the employer* to show that the worker’s disease was caused by something other than employment. Although a causal connection between the occupation and the disease is assumed in law, all of Virginia’s presumptions are intended to be rebuttable by employers where compelling evidence exists that the occupation was not the cause of a worker’s disease.

Virginia’s disease presumptions provide coverage for cardiovascular diseases, respiratory diseases, infectious diseases, and certain cancers for specific public safety workers. (See Appendix C for a detailed table of Virginia’s disease presumptions.) In 2019, the General Assembly passed legislation (HB 1804) that, if re-enacted, would add three additional cancers to Virginia’s disease presumption statute for firefighters (brain cancer, colon cancer, and testicular cancer). An additional bill introduced during the 2019 Session (SB 1465) would have created a PTSD presumption for firefighters and police officers, as well as 9-1-1 dispatchers, animal protection officers, and “similarly situated employees.”

All of Virginia’s presumptions have requirements that must be met to prove eligibility. For example, to claim any of the cancer presumptions, a worker must have 12 years of continuous service in that occupation, as well as prove contact with a toxic substance that is known or suspected to cause that particular type of cancer. See Chapter 5 for more information on the requirements to establish Virginia’s presumptions.

## Workers' compensation awards vary per injury, and some can be significant

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Data analyzed for this section includes **workplace injuries occurring during the three-year period from 2014 to 2016**. These years were chosen because workers have two years after the date of injury to file a claim, and the process to adjudicate disputes between the worker, employer, and insurer can take months. Most, though not all, compensable injuries from 2016 should be reported and compensated by 2019.

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Employers and insurers may choose to provide **voluntary payments** to injured workers. Voluntary payments are those paid without a formal award established ("entered") by VWC. Without an award, the worker's benefits are not guaranteed, and an employer may choose to stop paying benefits at any time. For the purposes of JLARC's analysis, only injuries for which an award has been entered by VWC are considered compensable.

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Over 42,000 workplace injuries and diseases occurring between 2014 and 2016 were determined to be compensable and were accompanied by an award of workers' compensation benefits, according to VWC data (sidebar) (Table 1-1). These represent only a small portion of reported workplace injuries and diseases. From 2014 to 2016, VWC received reports of 408,495 injuries and diseases from employers, insurers, or workers (as required by law). Many workers may not seek benefits for minor injuries or instead use their private health insurance to cover the cost of treating their injury or illness.

Employers bear the cost of workers' compensation benefits paid to injured workers, and pay these costs either through premiums paid to insurers (who then pay the benefits) or directly (in the case of self-insurers). For all compensable injuries and diseases occurring between 2014 and 2016, employers and their insurers paid over \$1.4 billion in wage replacement, medical, and death benefits within the first two years of the injury.

The value of workers' compensation awards varies substantially depending on the severity of the injury or disease, but some workers' benefits can be significant. All workers with a compensable injury or disease are entitled to medical benefits for care related to the work-related injury or disease—even if those injuries require lifetime care. The average value of medical benefits paid through the first two years after injury was approximately \$25,300 per claim; although, medical costs are heavily skewed by particularly costly claims. The median value of medical benefits paid through the first two years was about \$8,300. (However, some of these medical claims will continue to be paid beyond the two-year timeframe.)

Workers also received wage replacement benefits for over half (63 percent) of compensable injuries and diseases between 2014 and 2016. These also can be significant, depending on the length of time workers' injuries prevent them from returning to their jobs.

Temporary total benefits—those paid to workers who are completely out of work for a period of time, but return—are the most common wage replacement benefits awarded. Workers injured between 2014 and 2016 were paid temporary total benefits for over 25,100 injuries and diseases, with a median value of approximately \$3,300 for the two-year period after the worker was injured. Temporary partial benefits—those paid to workers who are placed on light-duty work for a period of time—were paid to approximately 4,500 workers within the first two years of injury, with a median value of nearly \$1,000.

Wage replacement benefits can be awarded for permanent disabilities caused by work-related injuries and diseases as well. Permanent partial benefits are payable to workers for the permanent loss of use of a body part. The length of benefits is outlined in statute and is determined by the affected body part. Permanent partial benefits were

paid for approximately 1,600 injuries and diseases with a median value of \$6,500 over the two-year period after the worker was injured. Permanent total benefits may be awarded for injured workers who are completely and permanently incapacitated. Only one injured worker from 2014 to 2016 was awarded permanent total benefits, according to VWC data.

Among compensable injuries from 2014 to 2016, nearly 8,100 (19 percent) were paid as a result of a settlement between insurers and workers within the first two years after the date of injury. Settlements may be full or partial settlements. For example, parties may choose to settle the wage replacement portion of a claim, the medical benefits portion of a claim, or the entire claim. Insurers and workers may decide to settle for several reasons. An insurer, for example, may seek a settlement to pay an injured worker a lump sum to end its liability for all workers' compensation benefits of a claim, including lifelong medical treatment for the compensable injury or disease. This would mean the injured worker would be responsible for paying any future medical expenses if the lump sum does not cover all costs. Parties may also opt to settle during a long hearing and appeal process when the injured worker prefers to receive payment rather than continue to litigate.

**TABLE 1-1**  
**Over 42,000 compensable injuries and diseases occurring from 2014 to 2016**  
**were paid workers' compensation benefits (values cover only two-year period)**

<b>Benefit type</b>	<b>Number of injuries and diseases</b>	<b>Average value</b>	<b>Median value</b>
Medical benefits	33,263 <sup>a</sup>	\$25,304	\$8,311
Wage replacement	26,542 <sup>b</sup>	11,167	3,557
Temporary partial	4,515	2,700	975
Temporary total	25,170	10,466	3,322
Permanent partial	1,599	11,597	6,521
Settlements	8,083	32,093	13,253
Death benefits	82	50,539	46,334
<b>Total benefits paid</b>		<b>\$37,688<sup>c</sup></b>	<b>\$11,633<sup>d</sup></b>

SOURCE: JLARC analysis of VWC data on claims, awards, and payments.

NOTE: Table only provides information on awards entered within the first two years from the date of injury, for injuries and diseases occurring from 2014 to 2016. Permanent total wage replacement payments were not included in the table because only one injury had a permanent total award entered, but 23 injuries and diseases had permanent total payments reported. JLARC staff and VWC staff suspect most of the reported permanent total payments were the result of miscoding by insurers when reporting payments.

<sup>a</sup> All workers with a compensable injury or disease are entitled to medical benefits, but payments for medical benefits were reported for less than 34,000 because claims may be settled instead.

<sup>b</sup> Workers may receive more than one type of wage replacement benefit or receive wage replacement benefits for more than one period of time, so total wage replacement figures will be lower than the sum of each benefit type.

<sup>c,d</sup> This is the average and median of each injured worker's total value of benefits paid.

The families of workers who died as a result of a work-related injury or disease were awarded death benefits for about 80 compensable injuries and diseases reported between 2014 and 2016. Death benefits provide wage replacement and funeral expenses to spouses, children, or dependents after the death of a worker with a compensable injury or disease if the death was caused by the injury. The median value of death benefits paid within the first two years of injury was over \$46,300.

## **VWC oversees the workers' compensation system and adjudicates disputes**

The Virginia Workers' Compensation Act is administered by the Virginia Workers' Compensation Commission (VWC). Under the law, VWC is responsible for keeping a record of all workplace injuries, diseases, and deaths; overseeing and regulating payment of workers' compensation benefits; adjudicating disputes through mediation and legal hearings; enforcing compliance with the law; and administering and maintaining the Uninsured Employers Fund (UEF).

## **VWC employs about 300 staff and is funded through taxes on workers' compensation insurance premiums**

VWC is an independent non-general fund agency. VWC is led by three commissioners and an executive director. The agency employs 295 staff, including three commissioners and 23 deputy commissioners who preside over hearings when disputes arise between workers, employers, medical providers, and insurers. Staff are organized into 14 departments that carry out the main functions of the agency. The three commissioners, also referred to as the full Commission, are chosen by the General Assembly, serve six-year terms, and are responsible for all judicial aspects of the agency, including serving as an appellate court for decisions made by VWC deputy commissioners. The executive director is responsible for overseeing the administrative and financial operations of VWC.

In FY19, VWC was appropriated over \$49 million, most of which was generated by a 2.7 percent tax on workers' compensation insurance premiums paid by employers. The tax pays for VWC's operations—salaries and benefits, supplies and equipment, information technology, etc.—and the UEF, which pays for workers' compensation benefits to workers whose employers are not properly insured at the time a worker is injured. VWC pays claims through the UEF only in these cases. If the worker's employer is insured in accordance with the law, the insurer pays those benefits. Additionally, VWC attempts to recover the cost of benefits paid by the UEF directly from the injured worker's employer.



## Insurers initially determine compensability of workers' compensation claims; injured workers can seek review of denial by VWC

As the regulatory authority over workers' compensation, VWC receives notification of all work-related injuries. Regardless of the severity of the injury or disease, the employer (or employer's insurer) is required by law to file a First Report of Injury (FROI) with VWC. Upon receiving the FROI, VWC sends information to the worker to explain his or her rights to file a claim with VWC.

As the parties responsible for paying benefits to workers, employers and insurers make an initial determination of whether the injury or disease is compensable under the Virginia Workers' Compensation Act. If an employer or insurer accepts the injury or disease as compensable, the injured worker and insurer can sign an agreement that states the extent of the injury or disease, resulting disability, and benefits owed to the worker. The parties can then submit the agreement to VWC, where staff will enter an award that details the value and duration of benefits owed to the worker as outlined in statute.

Once the award is formally established (or "entered"), employers are required by law to begin paying benefits to the worker within two weeks in accordance with the terms of the award agreement. Employers or insurers must continue to send additional documentation to VWC, known as a Subsequent Report of Injury (SROI), to report payments and whenever benefits are suspended, terminated, or changed. This allows VWC to maintain a record of benefits paid and ensure workers are receiving the benefits they are entitled to under the Workers' Compensation Act. If an employer chooses to make voluntary payments without an award agreement, the value of benefits paid is not overseen by VWC (sidebar). Workers received voluntary payments for at least 4.6 percent of injuries and diseases (a total of 1,944) occurring between 2014 and 2016.

If the insurer determines that the injury or disease is *not* compensable, the worker has a right to file a claim with VWC to dispute the insurer's denial. Injured workers typically have two years from the date of injury to file a claim. Unlike the statutory requirement for reporting an injury to VWC, employers and insurers are not required to decide compensability of an injury or disease within a certain timeframe. After an injury has been deemed compensable, workers also may file claims for any disputes with insurers over what benefits are owed. All disputes are adjudicated by VWC.

VWC serves as an administrative court system where commissioners and deputy commissioners hear cases and issue their decision (known as their "judicial opinion"). Hearings are conducted as judicial proceedings before deputy commissioners across the state, during which each party presents its case. Typically, within a few weeks of the hearing, the deputy commissioner that heard the case issues a written decision outlining what benefits the worker is owed, if any.

If a party disagrees with the initial deputy commissioner decision, it may appeal to the full Commission, but most opinions are not appealed. For example, in 2018, 2,833

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According to state law, insurers must **submit a first report of injury within 10 days of the injury, or within 10 days of the employer learning of the injury**, for most injuries.

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A worker's rights to workers' compensation benefits are **only protected when an award has been entered**. If an employer pays voluntary benefits—those paid without an award agreement—to a worker, there is no oversight by VWC to ensure the worker is being paid benefits as outlined in statute. This is because an injury or disease is not considered compensable until an award is entered by VWC. If a worker is dissatisfied with the value of voluntary payments made, he or she can file a claim with VWC.

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opinions were issued by deputy commissioners, and 518 of those disputes (18 percent) had an opinion issued by the commissioners as well. Decisions by the full Commission can be further appealed to the Virginia Court of Appeals and subsequently to the Supreme Court of Virginia.

### **VWC also conducts mediation, approves settlements, and enforces requirements for employers to carry insurance**

VWC also conducts voluntary, informal mediations between parties. In an effort to reduce the number of disputed claims docketed for a hearing, VWC implemented an Alternative Dispute Resolution mediation program in 2013. VWC mediation staff are certified in mediation and facilitate communication between parties with the goal of resolving disputes without going to a hearing. Mediation is typically used for less significant disputes, such as whether or not mileage should be reimbursed for trips to the doctor, but may also be used to resolve (or “settle”) a worker’s claim entirely. VWC is statutorily responsible for approving all workers’ compensation settlement agreements between employers (or their insurers) and workers to ensure they are in the best interest of workers.

Workers’ compensation coverage is compulsory for most employers in Virginia, and VWC is required to enforce the law’s insurance requirements. VWC is responsible for ensuring that employers carry workers’ compensation insurance coverage in accordance with state law and penalizing employers that do not. VWC may penalize employers with a civil penalty of up to \$250 per day that the employer did not have coverage, to a maximum of \$50,000, and an employer who knowingly fails to comply may also be found guilty of a misdemeanor. Any injured worker whose employer is not properly insured is paid benefits from the UEF, which is maintained and administered by VWC.

## 2 Timeliness of the Workers' Compensation System

**SUMMARY** Overall, stakeholders, including attorneys representing claimants (injured workers) and defendants (employers), report general satisfaction with the timeliness of the Virginia Workers' Compensation Commission's (VWC) resolution of workers' compensation claim disputes. However, Virginia workers tend to wait slightly longer to receive benefits than workers in other states, and some process and staffing improvements could be made to improve timeliness. Hearings on disputes are held in a timely manner but take significantly longer in the Fairfax office because of insufficient staffing. Claimant and defense attorneys expressed some dissatisfaction with the time it takes for certain deputy commissioners to issue opinions after hearings. This concern could be addressed by VWC prioritizing relatively straightforward and time-sensitive cases and more actively managing deputy commissioners' performance in this area. VWC's mediation services have helped to resolve some disputes more quickly and could be expanded by shifting staff resources away from certain types of disputes that are unlikely to be resolved through mediation. Delays may also arise from prolonged claims decisions by insurers, and Virginia is one of only a few states that does not require insurers to make claims decisions within a statutorily specified timeframe.

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Delays in the workers' compensation system negatively affect injured workers and employers. Injured workers do not begin receiving payments for lost wages or related medical care until either workers' compensation insurers have agreed to cover the claim or disputed claims have been adjudicated by the Virginia Workers' Compensation Commission (VWC) and final decisions have been made. If there are unnecessary delays in VWC scheduling hearings or deputy commissioners issuing opinions, injured workers may experience unnecessary financial hardship until a decision is rendered. Employers and insurers also benefit from timely hearings and decisions because they receive certainty about the claims they will be liable to pay.

Delays within the workers' compensation system can occur at various points between when a worker reports an injury and the claim reaches a resolution. Delays could potentially occur (1) during the time period before the employer's workers' compensation insurer decides whether to pay benefits to an injured worker or (2) after a request for workers' compensation benefits has been submitted by the injured worker to VWC. For example, delays could occur if insurers are not completing their claim investigations in a timely manner or if VWC hearings to resolve disputed claims are not held promptly.

In comparison with other states, injured workers in Virginia wait slightly longer to receive workers' compensation benefits after they are injured. Among the member

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**The Workers Compensation Research Institute**

is an independent, not-for-profit research organization that provides data and analysis on various aspects of the workers' compensation system. It has 18 member states that are geographically diverse, have varying costs per claim, and represent a range of workers' compensation system features.

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**Disputes may arise at any point throughout a claim.**

The employer and the injured worker may initially disagree as to whether the claim is compensable. Alternatively, after compensability has been agreed on, parties may disagree over other issues, such as average weekly wage or when a worker is capable of returning to work.

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**JLARC staff surveyed workers' compensation attorneys** with recent experience with the workers' compensation system. JLARC received responses from 216 attorneys, including both claimant and defense attorneys. The survey response rate was 27 percent. (See Appendix B for more information.)

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states of the Workers Compensation Research Institute (WCRI), the median wait time to receive wage replacement benefits after date of injury is 23 days (sidebar). Median wait times across WCRI states range from 16 days in Minnesota to 30 days in Georgia and Indiana. The median wait time to receive wage replacement benefits in Virginia after date of injury is 27 days. The longer wait time for workers in Virginia does not appear to be a result of workers taking a longer time to give notice of their injury, as Virginia insurers are notified within a median of two days after the injury—the same or sooner than other WCRI states.

## **The Virginia Workers' Compensation Commission generally handles disputes in a timely manner**

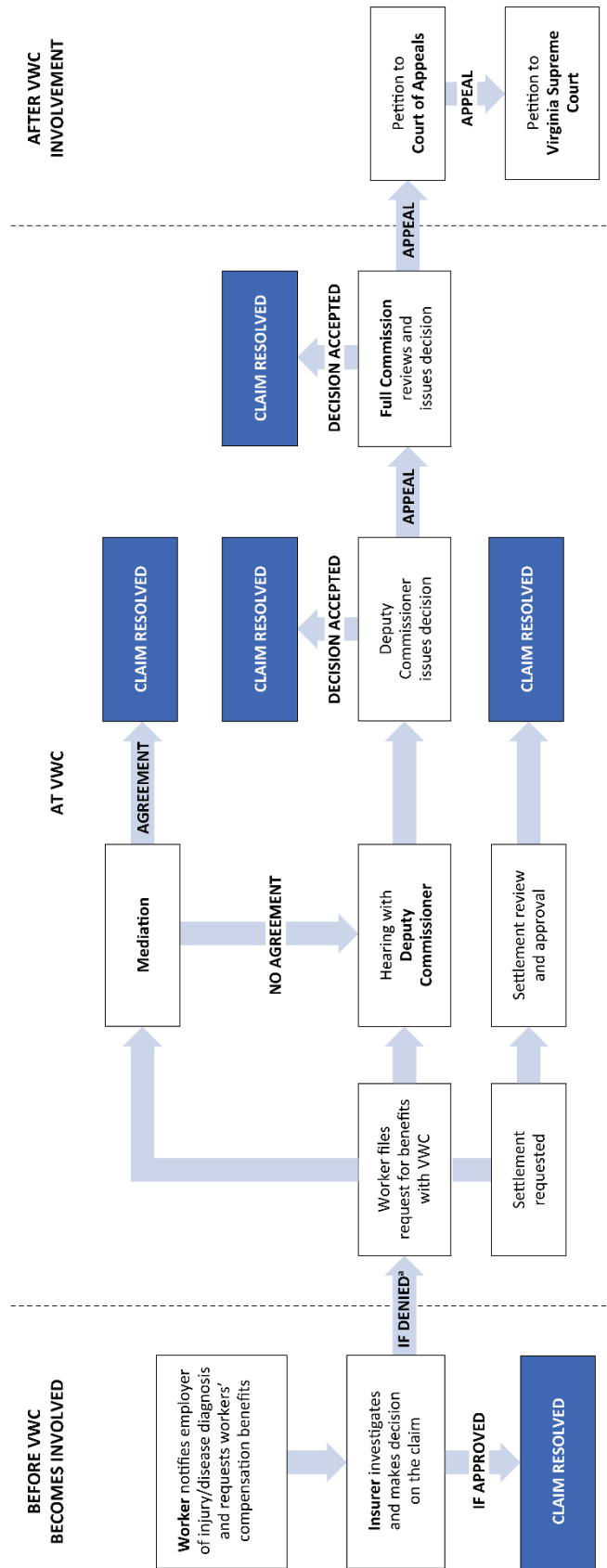
One of VWC's primary responsibilities is to adjudicate disputes between the parties of workers' compensation claims. Disputes between employers (or their workers' compensation insurers) and workers vary significantly in complexity. Claims can involve complex issues, such as whether a disease is compensable under the Workers' Compensation Act, or relatively simple disputes, such as whether a worker should be reimbursed for his or her mileage to visit a doctor. Insurers and medical providers may also seek VWC's dispute resolution services to solve their disagreements, such as whether certain medical care is necessary to treat an injury or occupational disease.

After a worker is injured (or receives a disease diagnosis) and requests workers' compensation benefits, the claim moves through the workers' compensation system (Figure 2-1). If the claim is disputed between the employer and the injured worker, it is VWC's role to resolve the dispute. For simple disputes, VWC may assist by mediating the dispute to help the parties reach a resolution. For disputes that are more complex or that could not be mediated successfully, VWC's judicial department adjudicates and issues decisions. Finally, if a worker wishes to settle his or her claim for a lump sum payment, VWC reviews and approves settlements to ensure settling the claim is in the worker's best interest.

### **Attorneys are generally satisfied with the timeliness of hearings at VWC, although wait times are atypically long at the Fairfax office**

Stakeholders are generally satisfied with the timeliness with which VWC schedules and holds hearings for disputed claims. During interviews with JLARC staff, attorneys and public safety worker stakeholder groups expressed few concerns regarding the timeliness with which VWC schedules and holds hearings. Additionally, 74 percent of attorneys who responded to a JLARC survey agreed that VWC schedules and holds hearings in a timely manner, and 79 percent agreed deputy commissioners appropriately balance the need for a timely hearing with the need to ensure due process.

**FIGURE 2-1**  
Disputes about compensability of workers' compensation claims are resolved through VWC's mediation, hearing, or settlement review processes



SOURCE: JLARC staff interviews with VWC staff and review of VWC documents.

NOTE: Employers/insurers are required to submit a First Report of Injury (FROI) to notify VWC of each workplace injury within 10 days after being made aware of the injury by the worker. Employers/insurers are *not* required to notify VWC of their initial compensability determination. For most injuries, the statute of limitations to file a claim for benefits under the Virginia Workers' Compensation Act is two years after the date of injury. As a general rule, workers should file a claim with VWC to protect their right to benefits *in addition to* benefits to requesting workers' compensation benefits with their employer.<sup>a</sup> Disputes may initially arise between the employer/insurer and the injured worker over whether the claim is compensable but can also occur after compensability has been determined. For example, parties may also disagree over average weekly wage or when a worker is capable of returning to work.

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**Hearings are not always held on the date they were originally scheduled for various reasons,** such as attorney scheduling conflicts or additional time needed to complete discovery. Requests to reschedule a hearing are submitted by one or both parties and reviewed by the presiding deputy commissioner. If approved, the deputy commissioner grants a continuance on the case, and the hearing is rescheduled.

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**Deputy commissioners each have a set number of hearing days each month.** Deputies that exclusively conduct hearings have eight hearing days per month, and those that also do mediations have six hearing days and three mediation days per month. This setup helps to ensure deputies have adequate time to write their opinions.

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Over the past few years, however, parties have consistently waited longer for hearings in the Fairfax office than the six other regional offices. Across hearings that occurred between 2016 and 2018, the average number of days before a hearing was held after being requested was 23 percent longer in the Fairfax office than in other offices (215 days in the Fairfax office compared with 175 days across other regional offices).

During interviews with JLARC staff, attorneys and VWC staff suggested longer wait times for hearings in Fairfax could be due in part to attorney scheduling conflicts, but data indicates this is unlikely. VWC data shows the Fairfax office has the lowest proportion of cases with at least one continuance. Deputies may reschedule hearings for several reasons, including scheduling conflicts for attorneys (sidebar). From 2016–2018, 39 percent of cases in Fairfax had at least one continuance, compared with an average of 49 percent across other offices. A smaller percentage of rescheduled hearings may indicate attorneys in the region do not have as many scheduling conflicts as other regions.

VWC has tried to reduce wait times for hearings in the Fairfax office by reallocating additional staffing support from the Manassas office, but is planning to decrease this staffing support during 2020. Even with the additional staffing resources, wait times at the Fairfax office remain considerably longer than the other regional offices. These longer timeframes can impede injured workers in the Fairfax region from having a timely hearing.

At least one additional deputy commissioner, assigned exclusively to handle hearings and mediations in the Fairfax office, would likely allow for hearings to be held sooner. Across all offices, deputy commissioners each have the same number of hearing days per month, so the current deputy commissioners in the Fairfax office do not have the capacity to add additional hearing days (sidebar). The addition of a deputy commissioner would add up to six additional hearing days at the Fairfax location per month (taking into account VWC's planned decrease in staffing support from the Manassas office) and would increase the capacity for hearings in that office by about 23 percent, allowing for hearings in that region to be held sooner. Two additional deputy commissioners could add 14 additional hearing days per month (a 54 percent increase).

After appointing at least one additional deputy commissioner, VWC should continue to monitor the average number of days between a hearing request and when the hearing is held in the Fairfax region, as well as the volume of hearing requests, and make additional staffing adjustments as needed.

## **RECOMMENDATION 1**

The Virginia Workers' Compensation Commission should appoint at least one additional deputy commissioner assigned to handle hearings and mediations for the Fairfax office.

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## Some deputy commissioners take significantly longer than others to issue opinions

Deputy commissioners preside over hearings and issue written opinions for disputed workers' compensation cases. After a hearing, deputy commissioners issue a written opinion explaining their decision on the case. Deputy commissioners typically do not begin writing an opinion until the record has closed, which can occur on the same day as the hearing, or at a later date if the record is held open to allow one or both parties additional time to submit evidence.

The amount of time it takes deputy commissioners to issue opinions was not a major concern identified by stakeholders, although some expressed frustration with the variation in timeliness across deputies (sidebar). In a JLARC survey, 61 percent of attorneys who responded agreed deputy commissioners issue opinions in a prompt and timely manner. Attorneys interviewed by JLARC staff did not have general agreement on a reasonable timeframe, in part because the time needed to write an opinion will vary on a case-by-case basis. However, some attorneys expressed frustration that the amount of time it takes deputy commissioners to issue opinions does not always seem to correspond with the complexity of the case.

VWC data supports stakeholder concerns regarding variation in timeliness of opinions. From 2016–2018, 57 percent of deputy commissioners were able to issue a majority of their opinions within 21 days, VWC's internal goal for issuing opinions (sidebar). Across deputy commissioners, however, the proportion of opinions issued within 21 days ranged from 17 percent to 99 percent. Several took two to three times longer than 21 days to issue half of their opinions (Figure 2-2).

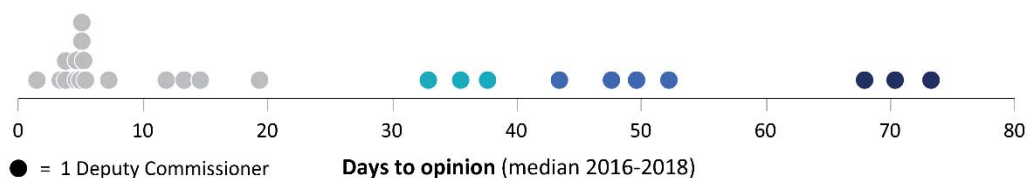
“Some deputies are very timely. Others seem inordinately slow... Long delays in the issuance of opinions should be minimized, or at least should be the subject of a communication from the deputy indicating that the matter remains in process; sometimes claimants wonder if the judge has forgotten about their case.”

– Claimant attorney

VWC's longstanding 21-day goal for issuing opinions is similar to guidelines used by other states. For example, decisions must be rendered within 14 days of the hearing in Delaware and within 30 days in Arizona.

FIGURE 2-2

Majority of deputy commissioners meet VWC's goal of issuing opinions within 21 days for a majority of their cases, but some take two or three times longer



SOURCE: JLARC analysis of VWC data.

NOTE: Number of days to opinion is measured from the record close date, which can occur on the same day as the hearing, or at a later date if the record is held open to allow one or both parties additional time to submit evidence.

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Cases are randomly assigned to each deputy commissioner by VWC's computer system, which helps to ensure the number and complexity of cases assigned are similar across deputies.

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“ I try to take the opinions in the order they come. The problem is you might get five or six in a row that are really complicated and that backs you up.

”  
– VWC deputy commissioner

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Because the number and complexity of cases are similar across deputies, the variation in timeliness of opinions appears to be attributable to the prioritization of written opinions (sidebar), and deputies who are taking a longer time to issue opinions tend to write opinions strictly in the order that cases are heard. Of the deputies who take the longest to issue their opinions, the top six indicated they write their opinions primarily in the order they are heard, while the deputy commissioners interviewed by JLARC staff who are able to meet VWC's 21-day goal for all or a majority of their cases instead prioritize straightforward, simpler cases. When opinions are written strictly in the order that the cases were heard, a simple opinion that could be written in a few hours may be held up by a complex case that includes numerous medical records and multiple witness testimonies. This process creates avoidable delays for some workers to have timely decisions on their cases.

Some deputy commissioners may not be *aware* they have the discretion to issue opinions in a different order than cases are heard. The chief deputy commissioner indicated during an interview that at least some deputies may be unaware they can use their discretion to prioritize the order in which they write their opinions. Because VWC currently has no formal guidance in this area, the chief deputy commissioner should issue guidance to the deputy commissioners that outlines their ability to exercise discretion in prioritizing the order in which they write and issue their opinions. The guidance should include examples of the types of cases in which opinions can and should be issued more quickly.

## RECOMMENDATION 2

The Virginia Workers' Compensation Commission should ensure that its chief deputy commissioner issues guidance to deputy commissioners that communicates that they have discretion to prioritize the order in which they write their opinions so that they can maximize the number of opinions issued within 21 days.

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The chief deputy commissioner supervises the other deputies and ensures they are adhering to VWC's timeliness guidelines. VWC's computer system is able to track how long deputy commissioners take to issue an opinion, and the chief deputy commissioner can run a report to check whether opinions are being issued within the 21-day timeframe. However, VWC currently uses this information primarily to measure timeliness on a case-by-case basis rather than to measure timeliness trends for deputy commissioners over time.

The chief deputy commissioner should begin proactively monitoring the timeliness with which each deputy commissioner is issuing opinions. To do so, VWC should modify its system reporting capabilities to notify the chief deputy commissioner when any deputy commissioners take longer than 21 days after the record close date to issue a majority of their opinions over the prior six-month period. The chief deputy commissioner should work with deputy commissioners who are typically unable to meet the 21-day goal to develop strategies to improve opinion timeliness.



Maintaining a specific goal, such as 21 days, is important to ensure accountability, consistency, and efficiency. However, requiring that a majority of opinions, rather than all, be issued within 21 days allows for flexibility, given that complex cases may take longer to write.

Additionally, the chief deputy commissioner should begin reporting information related to opinion timeliness to the full Commission on an annual basis (sidebar). To foster accountability, the chief deputy commissioner's report could identify the deputies who are taking substantially longer than the 21-day goal to issue a majority of their opinions. For example, the report could identify those deputy commissioners who are taking more than a certain number of days to issue a majority of their opinions, such as 30 days or 42 days (i.e., twice the 21-day goal).

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**The full Commission** refers to the three commissioners who oversee VWC and serve as an appellate court for decisions made by deputy commissioners.

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### RECOMMENDATION 3

The Virginia Workers' Compensation Commission should (i) modify its electronic reporting capabilities to calculate the number of days that each deputy commissioner has taken to issue opinions after the record close date; (ii) generate quarterly reports that will identify any deputy commissioners who have taken longer than the 21-day goal to issue a majority of their opinions; (iii) require the chief deputy commissioner to work with deputy commissioners to develop strategies to improve the timeliness with which these deputy commissioners issue opinions; and (iv) require the chief deputy commissioner to report annually to the full Commission on the timeliness with which deputy commissioners are issuing their opinions.

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### **VWC's mediation processes have helped resolve disputes in a timely manner, and opportunity exists to expand full and final mediations**

VWC's mediation services are appealing to parties of disputed workers' compensation claims because they enable parties to arrive at their own resolution, rather than have a decision imposed on them by a deputy commissioner. Additionally, the procedural rules that dictate what can be discussed during a hearing do not apply during mediation. This allows workers to feel their concerns are being heard, where they may not have been able to discuss them in a hearing setting. From 2016–2018, there were 14,253 disputes that went through mediation. Mediation services offered by VWC include two types of mediation: issue mediation and full and final mediation.

Issue mediation is a process to address specifically disputed issues that, if resolved, eliminates the need for a full hearing. For example, an issue mediation may address a dispute over whether or not mileage should be reimbursed for trips to the doctor. Issue mediations typically occur over the phone and are primarily conducted by VWC staff attorneys. Mediation specialists at VWC proactively identify and refer disputes to issue mediation, considering factors such as whether or not initial compensability of the claim has been determined.

Full and final mediation settles a claim, either in whole or in part. In many instances, the mediation fully settles the claim, and the worker receives a lump sum payment. In

other instances, the parties may decide to settle only one portion of the claim. For example, the wage replacement portion of the claim may be fully settled while the medical benefit portion remains open. Full and final mediations occur in person and are conducted by a deputy commissioner. This type of mediation is conducted only upon request.

In addition to these two *types* of mediation, VWC also offers two *styles* of mediation: neutral evaluation and neutral facilitation. In neutral evaluation, the mediator may offer an objective assessment of the strengths and weaknesses of a claim or defense, or a valuation of what the case might be worth should it proceed to a hearing. In neutral facilitation, the mediator guides the discussion of issues but does not provide an opinion of the likely judicial outcome.

In general, disputes that are successfully mediated appear to be resolved much more quickly than disputes that are routed through the traditional hearing process—although the timeliness may be at least partly because less complex disputes are more likely to be mediated. Disputes resolved through the hearing process were resolved in an average of 189 days, according to VWC data, whereas disputes that are resolved through mediation reach a resolution in an average of 60 days.

Workers' compensation attorneys were generally complimentary of VWC's mediation services overall but were less positive about the use of issue mediation to resolve disputes. In a JLARC survey, 88 percent of attorneys agreed *full and final mediations* have been effective in resolving disputes, compared with 55 percent who agreed *issue mediations* have been effective in resolving disputes. In interviews, attorneys who have had experiences with VWC's mediation services also expressed some frustration with VWC's issue mediations—noting that some types of disputes are rarely solved through mediation.

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**Deputy commissioners who conduct full and final mediations have three mediation days per month, and each full and final mediation is set for three hours—limiting the total number of full and final mediations that deputy commissioners are able to conduct each month.**

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VWC should shift more resources to full and final mediation, but certain policy changes would be needed. VWC policy allows only deputy commissioners—and not staff attorneys—to conduct full and final mediations because of their ability to provide valuations. Deputy commissioners are able to provide a valuation on a case because they also preside over hearings and are therefore the most qualified to predict the likely judicial outcome. However, in cases where the parties select a neutral *facilitation* style rather than an *evaluation* style of mediation, staff attorneys could conduct full and final mediations because a valuation of the case would not be needed. VWC could increase the availability of full and final mediations by allowing staff attorneys, who currently only conduct issue mediations, to conduct full and final mediations as well in cases where neutral facilitation is selected by the parties.

#### RECOMMENDATION 4

The Virginia Workers' Compensation Commission should expand the number of time slots available for full and final mediation by allowing staff attorneys to conduct full and final mediations in cases where neutral facilitation is selected by the parties.

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VWC could also create more time slots for mediations by reallocating resources away from the types of issue mediations (including any preceding issue facilitations) that are unlikely to be successful (sidebar). VWC data shows that some issues, particularly those where there is less middle ground for compromise, are unlikely to be resolved through mediation and therefore may not be a good use of VWC's mediation staff resources (Figure 2-3). For example, disputes over which body parts are included in a compensable injury are only successfully mediated 16 percent of the time, and disputes over changes in authorized treating physicians are only successfully mediated 18 percent of the time. If disputes are unlikely to be resolved in mediation, VWC's practice of referring cases to mediation may inadvertently prolong the amount of time it takes for those cases to reach a resolution.

VWC should consider no longer referring certain types of disputes to issue mediation or issue facilitation that are unlikely to be resolved successfully through VWC's mediation services, such as those involving body parts. This would provide VWC staff attorneys and other VWC staff more time to assist parties with mediations that are more likely to be successful. (However, mediations for these dispute types could still be conducted upon request.) Prioritizing resources in this way would also provide greater capacity for VWC to accommodate additional demand for mediations that may arise after VWC begins to provide interpreters for non-English speakers during mediations (Chapter 3, Recommendation 9).

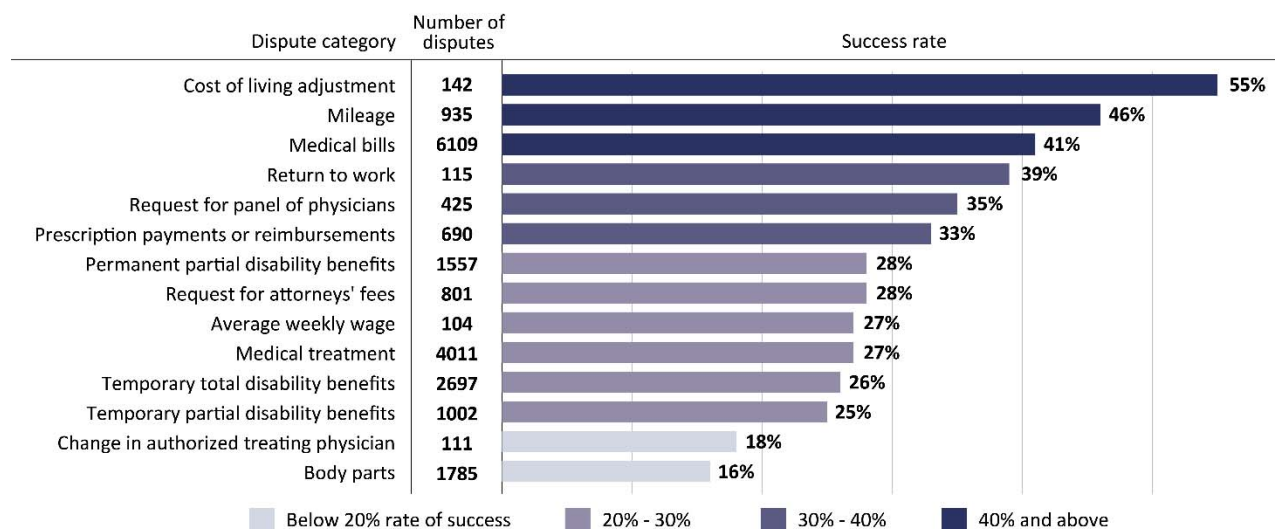
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**As a precursor to issue mediation, VWC staff may attempt an issue facilitation to see if any communication gaps between parties or misunderstandings about case information can be resolved before proceeding to an issue mediation.**

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**FIGURE 2-3**

**Certain disputes referred to issue mediation/issue facilitation are rarely resolved and ultimately proceed to a hearing**



SOURCE: JLARC analysis of VWC data.

### RECOMMENDATION 5

The Virginia Workers' Compensation Commission should no longer refer to issue mediation (or issue facilitation) those dispute types that are infrequently resolved through issue mediation.

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VWC could expand time slots available for full and final mediation in the Northern Virginia region with the addition of at least one deputy commissioner assigned to handle cases for the Fairfax office. Neither of the two deputy commissioners currently assigned to the Fairfax office conduct mediations. In hiring a new deputy commissioner for the Fairfax office (Recommendation 1), VWC should plan to certify this individual in mediation to expand the number of time slots available in this region for full and final mediation.

### RECOMMENDATION 6

The Virginia Workers' Compensation Commission should assign at least one deputy commissioner to the Fairfax office who is certified to conduct mediations.

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## Prolonged insurers' responses to some claims could contribute to benefit payment delays

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**JLARC staff surveyed firefighters** across the state who were injured on the job or diagnosed with a work-related disease within the past five years. JLARC received survey responses from 1,152 firefighters. (See Appendix B for more information.)

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**The term "insurers"** refers to both private insurance carriers as well as employers and associations that self-insure.

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Some workers' compensation insurers are not responding to injured workers in a timely manner, according to interviews and responses to a JLARC survey of firefighters who have been injured on the job or developed an occupational disease. Responsiveness of the employer's insurance company was the second most common challenge experienced by firefighters seeking workers' compensation benefits, cited by 20 percent of firefighters who responded to the JLARC survey. Additionally, during group interviews, firefighters indicated to JLARC staff that they experienced difficulties in communicating with their employers' insurers. For example, firefighters expressed difficulties with insurers responding to inquiries about the status of their claims. One firefighter reported filing a claim with the insurer but not receiving a decision for 18 months.

Virginia is one of the few states that does not require workers' compensation insurers, by law, to notify the worker of their decision within a certain timeframe. VWC has an administrative rule that insurers must respond to an injured worker's requests for benefits within 20 days, but VWC has little ability to enforce it. At least 40 states require an insurer to pay or deny a claim within a *statutorily* specified timeframe, typically 14 to 21 days. WCRI has identified Virginia's lack of a requirement that insurers make a decision on claims within a specified timeframe as a possible reason why Virginia workers wait longer than workers in other states to receive wage replacement benefits.

A statutorily defined timeframe may improve the timeliness of insurers' decisions. Because this phase in the process currently occurs *before* VWC becomes involved, VWC

does not have data on the amount of time it takes insurers to pay or deny claims, and the full extent of insurer-caused delays is unknown.

Virginia could establish a similar statutory timeframe, such as 30 days after a worker's injury or disease is reported to an insurer, within which an insurer must notify a worker whether it has approved or denied the claim. This requirement would provide workers with greater certainty as to when they can expect to receive a determination from the insurer about the compensability of their injury or disease and help ensure that if they wish to dispute an insurer's decision through the VWC process, they can do so in a timely manner.

VWC would be responsible for enforcing this statutory requirement and could report on insurer compliance annually. Other states have imposed monetary penalties on noncompliant insurers (sidebar), and VWC currently imposes monetary penalties on employers for noncompliance with other requirements. For example, the Code of Virginia requires VWC to assess a civil penalty of not more than \$250 per day for each day employers do not carry workers' compensation insurance, up to a maximum of \$50,000. Statute provides for these penalties to be assessed by VWC in an open hearing with the right of review and appeal. Assessed penalties are paid into the VWC administrative fund and the Uninsured Employers' Fund. The General Assembly could require VWC to monitor compliance with the 30-day rule and to assess a similar penalty on workers' compensation insurers, including those employers who are self-insured, that do not comply with the statutory timeframe for notifying the worker and VWC of their compensability decision.

VWC's report on insurer compliance could include the proportion of insurers that notify workers of their compensability decisions within 30 days of receiving notice of work-related injuries or diseases. The report could also summarize enforcement actions taken by VWC. To give VWC sufficient time to develop the capacity to monitor insurer compliance with this statutory requirement, the first annual report could be required no later than June 30, 2022.

## RECOMMENDATION 7

The General Assembly may wish to consider amending Title 65.2 of the Code of Virginia to require (i) workers' compensation insurers, including those employers who are self-insured, to make a determination as to whether a worker's injury or disease is accepted as 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, and (ii) VWC to enforce this requirement through monetary penalties imposed on insurers and self-insured employers for noncompliance.

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**In North Carolina and Tennessee, if insurers do not make decisions on claims within the statutory timeframes, penalties are assessed, and the insurer must pay additional wage replacement benefits.**

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**Statute requires VWC to assess penalties against employers who fail to report required information to VWC.** For these violations, the penalty is fairly minimal; it is limited to \$500 for each failure to report information. If VWC determines that the failure to report is willful, the penalty can range from \$500 to \$5,000.

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**RECOMMENDATION 8**

The General Assembly may wish to consider including language in the Appropriation Act to direct the Virginia Workers' Compensation Commission to report annually on (i) the extent to which workers' compensation insurers, including those employers who are self-insured, are making compensability determinations and notifying workers of their decisions in a timely manner after receiving notice of work-related injuries and diseases and (ii) actions taken by VWC to ensure the timeliness of these decisions. The first report should be submitted by VWC to the House Appropriations and Senate Finance committees no later than June 30, 2022.

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# 3 Fairness in the Workers' Compensation System

**SUMMARY** Attorneys representing claimants (injured workers) and defendants (employers) generally view the Virginia Workers' Compensation Commission's (VWC) dispute resolution services, including hearings, mediations, and settlement approvals, as being fair to all parties. However, because workers are not uniformly aware of their rights and responsibilities within the workers' compensation system, VWC should provide more accurate and clear information to injured workers. Although VWC is generally perceived as fair, certain features of Virginia's workers' compensation system are out of line with other states and may be unfair to Virginia workers or employers. Specifically, Virginia is the only state that does not allow workers to receive compensation for most injuries resulting from repetitive actions, such as a back injury occurring after lifting boxes over several weeks. Additionally, the costs of medical services associated with workers' compensation claims may be higher than necessary for insurers and should be examined as part of the existing process to periodically review Virginia's medical fee schedules.

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It is important that the workers' compensation system is fair to all parties because participation in Virginia's system is workers' sole recourse to receive employer compensation for work-related injuries and diseases. Participation in the system is also mandatory for most employers. Outside of the workers' compensation system, Virginia workers have no other means to pursue compensation for work-related injuries or diseases, except in cases of negligence by the employer. For employers and their workers' compensation insurers, a determination that a worker's injury or disease is compensable can be costly, particularly because they must cover all medical costs for the duration of the injury or disease.

The Virginia Workers' Compensation Commission (VWC) is responsible for ensuring that the adjudication of disputed claims between injured workers and employers is fair. As the administrative court for workers' compensation disputes, VWC should apply the Virginia Workers' Compensation Act with impartiality, in accordance with the Supreme Court of Virginia's Canons of Judicial Conduct (sidebar). Acting with impartiality requires ensuring all individuals who have a legal interest in the case are heard, deciding cases without bias or prejudice, and ensuring all decisions adhere to the statutory provisions of the Virginia Workers' Compensation Act. Other factors that may affect whether the system is fair to injured workers and employers are outside of VWC's oversight and need to be addressed through statute.

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A judge shall perform the  
duties of judicial office  
impartially and  
diligently.  
”

– Canons of Judicial  
Conduct, Supreme  
Court of Virginia

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

As the administrative court created to adjudicate disputes between workers and employers, it is critical that both VWC's *processes* and *decisions* (or "judicial opinions") reflect a fair application of the Virginia Workers' Compensation Act. If not, workers may be unduly prevented from receiving full (or any) compensation for their work-related injuries, or employers may be required to pay for the costs of non-work related injuries.

The perspectives of stakeholders who frequently interact with VWC's dispute resolution processes, including attorneys representing injured workers and employers, are useful in assessing the fairness of VWC's process.

### Stakeholders widely view VWC's hearings and opinions as fair

*"The majority of deputy commissioners are fair, neutral, and conduct the hearings with an interest in impartiality, fairness, and efficiency."*

– Defense attorney

**JLARC staff surveyed workers' compensation attorneys** with recent experience with the workers' compensation system. JLARC received responses from 216 attorneys, including both claimant and defense attorneys. The survey response rate was 27 percent. (See Appendix B for more information.)

During interviews with JLARC staff, few stakeholders expressed concerns about the fairness of VWC's processes or decisions. In fact, individuals with the most experience with VWC's dispute resolution services—claimant and defense attorneys—complimented the neutrality of VWC's services. Insurers, public safety workers, and public safety employers who had interacted with VWC also indicated they had few, if any, concerns about the fairness of VWC's processes or decisions.

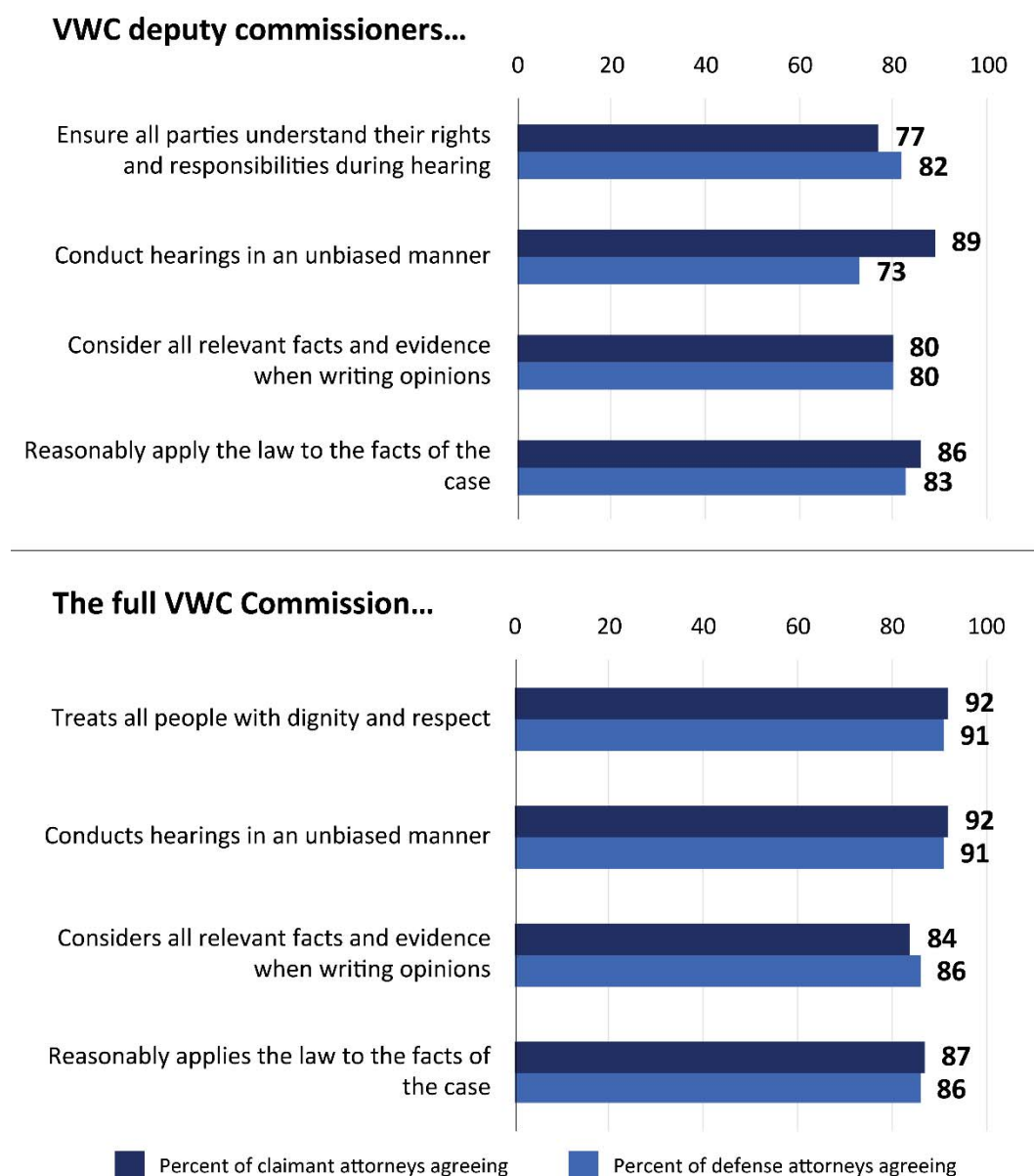
Attorneys reported satisfaction with the fairness of both the commissioners and deputy commissioners during and after hearings, according to a JLARC survey of workers' compensation attorneys throughout Virginia who have had recent experience with VWC's dispute resolution process (sidebar) (Figure 3-1). For example, 77 percent of claimant attorneys and 82 percent of defense attorneys agreed deputy commissioners ensure all parties understand their rights and responsibilities during hearings, and 80 percent of both sides agreed that 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. For example, VWC has a structured onboarding process for new deputy commissioners to prepare them to conduct hearings and write opinions, which includes sitting in on hearings with other deputy commissioners and writing several opinions that are reviewed by the chief deputy commissioner before they are issued. The chief deputy commissioner also regularly reviews a sample of hearing recordings for all deputy commissioners to ensure hearings are held in accordance with the judicial division's procedural fairness guidelines.



**FIGURE 3-1**

**Most claimant and defense attorneys reported satisfaction with the fairness of VWC deputy commissioners and commissioners**



SOURCE: Survey of workers' compensation attorneys who have interacted with VWC's dispute resolution services within the past 24 months.

NOTE: A total of 216 attorneys responded to the survey, for a response rate of 27 percent. See Appendix B for more information.

Deputy commissioners also ensure workers and employers without attorney representation understand the process and have the opportunity to share their concerns. This has been reflected in JLARC staff observations of deputy commissioner hearings, reviews of VWC judicial opinions, and interviews with deputy commissioners. For example, at the start of a hearing, deputy commissioners will explain hearing proceedings

and what to expect to injured workers who are unrepresented. If the injured workers do not believe they are prepared to proceed, deputy commissioners offer them the opportunity to seek counsel. Many deputy commissioners also noted that they will acknowledge evidence provided by an injured worker who is unrepresented, even if it is less relevant to their decision, to make sure the worker understood that they took this evidence into consideration when reaching a decision.

### **VWC takes reasonable steps to ensure settlements are in the best interest of the injured worker**

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**Workers' compensation claims can be settled in whole or in part.** For example, a worker may decide to settle the wage replacement portion of the claim if he or she no longer wishes to comply with vocational rehabilitation requirements but would like to keep the medical benefit portion of the claim open.

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*“The settlement department is one of the best things at the Commission. The staff is incredibly thorough... The department does a wonderful job reviewing and picking up mistakes.”*

– Claimant attorney

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VWC is required by the Code of Virginia to ensure settlements are in the best interest of injured workers. Twenty-seven percent of compensable injuries that occurred between 2009–2018 had at least one part of the claim settled. Settlement review and approval is an important responsibility, as settlements end insurers' future liability for portions of a workers' compensation claim, or for a claim in its entirety (sidebar). If a worker decides to settle his or her entire claim, it ends the worker's ability to receive compensation for the injury in the future, including any compensation for medical expenses.

Attorneys with experience settling workers' compensation claims reported satisfaction with VWC's settlement approval services. JLARC staff did not hear any concerns from defense attorneys regarding the fairness of VWC's settlement review process. Importantly, VWC's statutory responsibility is solely to ensure settlements are in the best interest of injured workers, and claimant attorneys indicated VWC takes reasonable steps to do this. Of those claimant attorneys who responded to JLARC's survey, 92 percent agreed VWC has done a good job ensuring settlements are in the best interest of injured workers.

VWC has a thorough process to ensure each proposed settlement is in the worker's best interest. VWC staff review important aspects of each settlement, including whether outstanding medical expenses are likely to be costly, the strength of the injured worker's case, and whether the settlement agreement curtails the worker's right to benefits from other programs (e.g. VRS retirement benefits). Injured workers (or their attorney) are required to submit a written statement to VWC explaining to the settlement department why they believe settlement is in their best interest. This statement is reviewed by the deputy commissioner who oversees the department to help decide whether to approve the settlement.

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**Maximum medical improvement** refers to when a worker's condition has stabilized and is unlikely to change substantially, with or without further medical treatment.

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The deputy commissioner may consider several factors when evaluating whether a settlement is in the worker's best interest, including the worker's age, future medical treatments that may be necessary, and whether the worker has reached maximum medical improvement (sidebar). For example, if an injured worker is currently receiving medical benefits, the deputy commissioner is unlikely to approve the settlement unless the medical records, along with the worker's written statement, indicate the worker's condition has improved such that high medical costs in the future are unlikely.

## **VWC's mediation services are widely viewed as being fair, but access to these services should be expanded to non-English speakers**

VWC's mediation services are also viewed by both claimant and defense attorneys as being fair to all parties. During interviews with JLARC staff, attorneys expressed they frequently use mediation to resolve disputes because VWC's mediation services are widely regarded as being fair. Moreover, 95 percent of attorneys who responded to the JLARC survey and who had experience with VWC's mediation services, agreed that VWC's mediation services have been fair to all parties.

Non-English speakers are likely, however, at a disadvantage to use VWC's mediation services. In contrast to its policy of providing interpreters during hearings as needed, VWC does *not* provide interpreters during mediations, although there appears to be a demand for them. For example, 71 cases came through mediation in the first six months of 2019 that indicated an interpreter would be needed if the case went to a hearing. Because interpreters are currently not provided for mediations, staff of the claims services department will typically bypass mediation altogether and instead refer such cases directly to the hearing docket.

Staff at VWC cite cost as the primary rationale for not providing interpreters for mediations. However, it is not clear that this policy will have a substantial cost impact, because if an injured worker does not speak English and cannot participate in mediation without an interpreter, the case will proceed to a hearing where an interpreter will be provided.

Given the apparent demand for mediation among non-English speakers and without a clear reason to provide interpreters at hearings and not mediations, VWC should begin providing interpreters for mediations upon request so that these individuals can take full advantage of these services.

### **RECOMMENDATION 9**

The Virginia Workers' Compensation Commission should provide interpreters for mediations upon request.

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In 2017, VWC hired interpreters for 404 hearings, providing interpretation in 32 different languages.

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**VWC will provide interpreters for mediation orientation sessions.** Deputy commissioners may order parties of a disputed workers' compensation claim to attend an orientation session if they feel the dispute is better suited for mediation. Parties learn about mediation during the session to determine if it is an appropriate means for resolving their dispute.

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**To ensure adequate availability of interpreters,** VWC staff indicated interpreters can be used during mediations on the telephone and in-person.

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

While most claimant and defense attorneys view VWC's adjudication process as fair, injured workers are sometimes confused about how to access and navigate Virginia's workers' compensation system. JLARC surveys and interviews indicate injured workers were confused about several issues, including

- the existence and role of VWC;
- the need to file a claim directly with VWC to protect their rights to workers' compensation benefits; and

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**JLARC staff surveyed firefighters** across the state who were injured on the job or diagnosed with a work-related disease within the past five years. JLARC received survey responses from 1,152 firefighters. (See Appendix B for more information.)

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**Workers' rights to workers' compensation benefits are not protected** unless they file a claim with VWC or sign a formal award agreement with their employer within the relevant statute of limitations (typically within two years of the date of injury), even if the employer is making voluntary payments to the injured worker.

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- the right to file a claim with VWC disputing an insurer's denial of benefits.

For example, among the firefighters who responded to the JLARC survey, the most commonly identified challenge they faced while seeking workers' compensation benefits was "understanding the next steps after reporting the injury or disease diagnosis to the employer."

Similarly, firefighters who had been diagnosed with cancer and/or cardiovascular disease told JLARC staff they thought they had filed a claim with VWC because they reported their injury or disease to their employer. If, as a result of this misperception, workers do not file a claim with VWC within two years (or within the workers' relevant statute of limitations), this could prevent them from ever being compensated for their work-related injury or disease (sidebar). Insurers and VWC staff also reported substantial confusion among injured workers they interact with about VWC's existence and role.

It is difficult to quantify whether confusion among Virginia workers is preventing workers from filing claims with VWC. However, any potential confusion could be mitigated by ensuring injured workers receive clear and useful information about their rights and Virginia's workers' compensation system. Following the lead of other states, as well as practices of some insurers in Virginia, VWC and the General Assembly could improve awareness among injured workers of their rights and the remedies available to them should their workers' compensation claim be denied by their employer.

### **VWC provides inadequate information to injured workers on their rights and the workers' compensation process**

VWC is required by the Code of Virginia to provide information to injured workers about their rights under the Virginia Workers' Compensation Act. Although technically meeting this statutory requirement, the information available to workers about their rights and the workers' compensation system is (1) scattered across VWC's website, (2) not well organized within each document, (3) unclear, and (4) incomplete. For example, the "Injured Worker FAQs" document online lacks important details about filing a claim, includes a broken link to a guide that does not exist on VWC's website, and is unfinished (Figure 3-2). Similarly, a brochure that VWC sends to each injured worker is difficult to read and insufficient. The brochure emphasizes too many items and does not explain the role of VWC in the workers' compensation system or the fact that it is a state agency (unrelated to the insurer or third-party administrator handling an injured worker's claim).

FIGURE 3-2

Examples of VWC materials presenting unclear or incomplete information to injured workers (November 2019)

Excerpts from VWC's "Injured Worker FAQs"

**Unclear guidance.** As a general rule, injured workers should also still file a claim with VWC to protect their right to benefits, not only if they cannot resolve a dispute with their employer.

What do I do if I have a problem getting benefits?

First, talk with your employer's insurance carrier or your self-insured employer to find out why your claim is denied. Often disputes can be resolved by sharing information or obtaining medical records. If you cannot resolve the dispute, you must file a Claim for Benefits.

**Broken link.** No document entitled "Guide for Employees" is available on VWC's website, and embedded link included in PDF is inactive.

I have to appear at a hearing before a deputy commissioner. What will happen at that hearing?

Hearings before deputy commissioners are evidentiary proceedings. This means that parties and their witnesses may testify under oath. Everyone testifying will be subject to questioning by all parties. For more information about the Commission's hearing procedures, please refer to our "Guide for Employees."

**Unfinished document.** Document ends abruptly with question.

Does the Commission offer mediation services?

Yes. The Virginia Workers' Compensation Commission offers the parties the opportunity to mediate disputed issues. This service is provided to speed the resolution of claims through the intervention of a neutral third party. Mediation services are provided, without charge, by the Commission at the request of any party to a workers' compensation dispute (employee, employer, insurance carrier/representative, or healthcare provider.) Does the Commission have an informational package about settling a case by petition and order (P & O)?

Excerpts from VWC's "A Brief Guide to Workers' Compensation for Injured Workers"

**Key information underemphasized.** Information of varying importance to newly injured workers is similarly formatted within the same document, underemphasizing that injured workers should file a claim for benefits with VWC *in addition to* filing a claim with their employer to protect their rights to compensation.

You must file your claim with the Workers' Compensation Commission (not just your employer) within two (2) years from the date of your accident to protect your rights unless the Commission has already entered an Award.

Injured Workers have a duty to disclose their current residential address to the Commission and to report any changes of address as they may occur. Failure by an injured worker to do so may adversely impact the injured worker's receipt of compensation benefits.

SOURCE: JLARC staff excerpts from VWC documents.

Other states provide injured workers with clearer and more accessible outreach and information than VWC. For example, Texas has developed an online series of informational videos for injured workers on topics such as benefits, resolving disputes, and returning to work. California holds monthly, one-hour workshops for injured workers at regional offices to provide information about the workers' compensation system, the rights of injured workers, and the process for resolving a disputed claim.

Because the success of this system in compensating injured workers who are entitled to benefits depends on workers' ability to understand their rights, VWC should consolidate and clarify materials available to injured workers to improve the adequacy, accessibility, and completeness of information. VWC can build on the work currently underway by staff in VWC's claims services department, which includes a new information guide outlining injured workers' rights and responsibilities within the workers' compensation system.

As part of this effort, VWC should review some of the outreach strategies used in other states and determine whether similar strategies could be used in Virginia to reach injured workers, including those who may not have strong literacy skills or speak fluent English. At a minimum, the revised guide for injured workers should be published in both English and Spanish.

#### **RECOMMENDATION 10**

The Virginia Workers' Compensation Commission (VWC) should develop a comprehensive and easy-to-understand guide for injured workers, publish this guide online, and provide this guide to all Virginia workers who are reported to have been injured at work. At a minimum, the guide should include information on the rights of Virginia workers under the Workers' Compensation Act, the role of VWC in Virginia's workers' compensation system, the process for filing a claim and resolving disputes, services available at VWC, and how injured workers can find an attorney to represent them.

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Additionally, because of the complexity of the workers' compensation system, VWC should review all of the written materials it uses to communicate with employers, injured workers, and insurers to ensure that they are clear and accurate. This should include online information, the guide for injured workers, and letters sent after VWC has received notice that a Virginia worker was injured. Because external feedback is vital to evaluating the clarity of its communications, VWC should solicit input and feedback from workers, employers, and insurers about the clarity and usefulness of its communications to identify necessary changes.

#### **RECOMMENDATION 11**

The Virginia Workers' Compensation Commission (VWC) should review by January 1, 2021 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.

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## **VWC should establish an ombudsman office to help unrepresented parties navigate the workers' compensation system**

Many states have established an ombudsman office to help injured workers navigate the workers' compensation system and understand their rights. At least 18 other states currently have ombudsman programs within their workers' compensation systems. While the setup of each office varies, the basic goal of each program is to help injured workers, particularly those without attorney representation, navigate the complexities of the workers' compensation system. The program can help clarify injured workers' rights to workers' compensation benefits, the necessary steps to file a claim, the dispute resolution process, and what to expect during a hearing.

VWC previously had an ombudsman program that was disbanded, and VWC has signaled an interest in re-establishing and codifying the program. It is unclear why the program was disbanded, but claimant and defense attorneys, as well as VWCs staff, reported that the previous ombudsman program was helpful.

The ombudsman office at VWC should be re-established to help unrepresented parties, including both injured workers and employers, navigate the workers' compensation system. The primary role of the ombudsman office should be to provide educational information to help parties understand their rights under the Workers' Compensation Act, as well as the services available to them at VWC.

The ombudsman, if created, should provide only legal information, not legal advice, to retain VWC's neutral role within the workers' compensation system. To help ensure the office has sufficient knowledge of the Virginia Workers' Compensation Act and does not inadvertently provide legal advice, the ombudsman should be an attorney in good standing with the Virginia State Bar, who has substantial workers' compensation experience.

The ombudsman could also help unrepresented parties find an attorney. Currently, Virginia does not have a program to help parties find legal representation for disputed workers' compensation claims. However, according to VWC data, 54 percent of hearings held from 2016–2018 had at least one party who was unrepresented. Given the complexities of the workers' compensation system and the potential benefit attorney representation can have on the outcome of a case, the ombudsman could assist injured workers and employers with retaining legal counsel.

Communications of the ombudsman office should be deemed confidential so that statements made to the ombudsman by injured workers or employers cannot be used against them by the opposing side during a hearing.

The ombudsman office should initially have two staff because demand for these services is unknown. After the ombudsman program has been established, VWC could expand the office to accommodate greater demand if necessary. VWC leadership indicated they likely have the resources to create this office without additional appropriations or staffing by using vacant positions created through efforts to automate other

*“ I only discovered that an online application had to be made to gain workers' compensation benefits by accident. I was not clearly informed of this requirement.... There is a great need for an ombudsman to help the cancer patient with the workers' compensation requirements. ”*

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**– Firefighter**

agency processes. VWC should adequately publicize the ombudsman office and the services it offers, including in its revised communications to injured workers (Recommendation 11).

## RECOMMENDATION 12

The General Assembly may wish to consider amending § 65.2-200 of the Code of Virginia to create an ombudsman office within the Virginia Workers' Compensation Commission, led by an attorney in good standing with the Virginia State Bar. The office should (i) provide timely and confidential educational information and assistance to unrepresented parties to help them understand their rights under the Workers' Compensation Act and the various processes available to them; (ii) carry out duties with impartiality and not provide legal advice; and (iii) maintain data on inquiries received, types of assistance requested, and actions taken.

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### **Insurers do not consistently notify injured workers of their right to dispute a denied claim through VWC**

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The term "insurers" refers to both private insurance carriers as well as employers and associations that self-insure.

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If an injured worker's claim is denied by his or her employer's workers' compensation insurer, Virginia could require the insurer to inform the worker of his or her right to dispute this decision with VWC. This information could be included in the insurer's denial letter. Some Virginia insurers already provide this information to workers when their claim is denied, but this practice is not universal statewide. In fact, 49 percent (266 individuals) of firefighters who had been injured at work or diagnosed with a work-related disease, and who responded to JLARC's survey, indicated they were not aware that if their insurer denied their claim they could dispute the denial through VWC.

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The Virginia Court of Appeals has held that only the filing of a claim, and not simply notifying the employer of the accident, invokes VWC's authority to award workers' compensation benefits (*Garcia v. Mantech International Corporation*, 1986).

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Virginia requires workers to *proactively* file a claim with VWC to request workers' compensation benefits. This is not the case in some other states. Virginia's workers' compensation system includes a two-step process: (1) the worker must notify the employer/insurer of the injury or disease diagnosis, and (2) the injured worker must file a claim directly with VWC to formally request benefits if he or she wishes to dispute the employer's/insurer's decision. The initial notification of the injury or disease diagnosis does not count as a claim filed with VWC (sidebar). In contrast, in other states this initial notification generally does begin the claim process.

Because VWC is ultimately responsible for making compensability determinations in disputed cases, injured workers who are not made aware of the need to file a claim with VWC or their right to dispute an insurer's decision may not receive workers' compensation benefits to which they are entitled. Therefore, the General Assembly could consider requiring all insurers to include information about a worker's right to file a claim with VWC disputing the denial in the insurers' letter denying benefits. This would help to permanently address any confusion among workers about the two-step process for requesting benefits and ensure workers are aware of their right to dispute an insurer's denial of workers' compensation benefits.



The injured worker should receive notice in the following form:

If you disagree with this denial, you have the right to dispute the decision by filing a request for a hearing with the Virginia Workers' Compensation Commission. The Workers' Compensation Commission is a state agency responsible for making final decisions on disputed workers' compensation claims. However, such claim may be lost if you do not file it with the Virginia Workers' Compensation Commission within the time limit provided by law, typically two years after the injury. You may find out the applicable time limit for your claim by contacting the Virginia Workers' Compensation Commission.

Such notice should also include the contact information for VWC, including website URL, address, and telephone number. This notice should also be used to provide information regarding the existence of the ombudsman office to assist injured workers (Recommendation 12).

### **RECOMMENDATION 13**

The General Assembly may wish to consider amending the Code of Virginia to require workers' compensation insurers, including those employers who are self-insured, to include a notice in any letter denying workers' compensation benefits that the injured worker has a right to dispute the claim denial through the Virginia Workers' Compensation Commission (VWC). The notice should indicate (i) VWC's neutral role within the workers' compensation system to adjudicate disputed claims; (ii) the need to file a claim for benefits with VWC within the applicable statute of limitations; and (iii) contact information for VWC.

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Recommendation 13 would improve workers' understanding of their rights over the long term. However, JLARC staff spoke with and surveyed many workers who had recently been denied workers' compensation benefits and were not aware of their right to dispute an insurer's denial through VWC. These workers are therefore potentially still eligible for benefits but may have limited time remaining to file a claim because of the two-year statute of limitations. Given the time-sensitive nature of this problem, VWC should notify workers who are known to have suffered injuries or been diagnosed with potentially work-related diseases of their right to dispute an insurer's denial of workers' compensation. This notification should be issued as soon as practicable, but no later than January 31, 2020, to enable workers to preserve their claims and avoid the expiration of the two-year statute of limitations. This would provide information to those workers who have already been injured or diagnosed with a potentially work-related disease but who have had their claim denied by their employer.

VWC should send a notice to all injured workers for whom it has received a First Report of Injury, but who have not yet submitted a claim for benefits with VWC and are still within the applicable statute of limitations. VWC could use its existing second notice of rights letter, which is sent out by VWC staff 16 months after the date of injury, as a starting point for developing this notice. The notice should clearly explain

to workers (1) their right to dispute an insurer's denial of workers' compensation benefits with VWC; (2) the existence and role of VWC, which is separate from a worker's employer or workers' compensation insurance company; and (3) the importance of filing a claim with VWC within the statute of limitations to protect their right to benefits.

#### RECOMMENDATION 14

The Virginia Workers' Compensation Commission (VWC) should send a notice to all injured workers for whom it has received a First Report of Injury, but who have not yet submitted a claim for benefits to VWC and are still within the applicable statute of limitations, which explains (i) the rights of injured workers to dispute an insurer's denial of workers' compensation benefits with VWC; (ii) the existence and role of VWC in Virginia's workers' compensation system; and (iii) the importance of filing a claim with VWC within the statute of limitations to protect the worker's right to benefits. This notice should be sent to all applicable injured workers as soon as possible, but no later than January 31, 2020.

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**The Workers Compensation Research Institute (WCRI)** is an independent, not-for-profit research organization that provides data and analysis on various aspects of the workers' compensation system. It has 18 member states that are geographically diverse, have varying costs per claim, and represent a range of workers' compensation system features.

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In practice, the burden of proof is met under the **preponderance of evidence** standard when there is a greater than 50 percent chance the evidence is true.

The burden of proof is met under the **clear and convincing evidence** standard when the evidence is highly and substantially more likely to be true than untrue.

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## Unlike other states, workplace injuries due to repetitive trauma are uncompensated in Virginia

Virginia is the only state in which employers are not obligated to compensate workers for workplace injuries resulting from cumulative trauma, such as a back injury occurring after lifting boxes over several weeks. Cumulative trauma injuries have long been recognized as a category of work-related injuries by the Centers for Disease Control and Prevention's National Institute for Occupational Safety and Health (NIOSH). NIOSH defines cumulative trauma as an injury developing gradually over weeks, months, or even years, as a result of repeated mechanical stresses on a particular body part. These types of injuries are considered to be cumulative because of repetition of a workplace activity that produces wear and tear on particular tissues or joints in the body over time. Cumulative trauma can include soft tissue injuries and musculoskeletal disorders.

Cumulative trauma injuries are covered under workers' compensation in other states, but the burden of proof to show that they are work-related injuries varies. According to data from the Workers Compensation Research Institute (WCRI) (sidebar), all 49 other states include some type of workers' compensation coverage for cumulative trauma. However, the level of evidence required to prove that a cumulative trauma injury was work-related varies by state. Some states, such as Indiana and West Virginia, cover cumulative trauma in a similar manner to any other "slip, trip, fall" injury, in which workers must prove by a preponderance of evidence (sidebar) that the injury was work-related. Other states, such as Florida, cover cumulative trauma at a higher clear and convincing evidence standard (sidebar).

There is no clear policy reason why Virginia employers are not obligated to pay for work-related cumulative trauma injuries, with the exception of hearing loss or carpal tunnel syndrome, although concerns about employer costs have been cited by multiple stakeholders during interviews with JLARC staff. However, it is not clear that cumulative trauma injuries are a major cost driver of workers' compensation premiums in other states. For example, nine states have lower workers' compensation insurance premiums than Virginia, including Indiana, Texas, and West Virginia, and all cover cumulative trauma at an evidentiary standard that is lower than "clear and convincing." Additionally, in 2018, cumulative trauma injuries made up only 2 percent of reported injuries in Nebraska and 3 percent of total claims in Tennessee. However, cumulative injuries made up 9 percent of injuries in Minnesota that occurred between October 2017 and September 2018.

Both medical benefits and wage replacement benefits paid for cumulative trauma claims in other states were slightly lower than their average benefits paid for all injuries. For workers' wage replacement claims in Minnesota that closed between October 2017 and September 2018, average costs for cumulative trauma claims were \$15,900, slightly lower than the average wage replacement costs for non-cumulative trauma claims at \$16,900. For medical benefits associated with cumulative trauma injuries, Tennessee and Arkansas report average medical costs of \$800 and \$1,967 per claim, respectively—lower than the overall average medical costs per workers' compensation claim in both states.

Because cumulative trauma injuries are a well-established workplace injury, recognized by NIOSH and all other states, Virginia should expand cumulative trauma coverage beyond hearing loss and carpal tunnel syndrome. An important consideration in establishing coverage would be whether cumulative trauma should be covered as an ordinary disease of life or as an injury. This decision would have implications for the evidentiary standard required to be met to prove a cumulative trauma injury was work related, and ultimately, how many workers would receive workers' compensation benefits for cumulative trauma.

Covering cumulative trauma as an *ordinary disease of life* would require workers to meet the higher clear and convincing evidentiary standard but would be consistent with how Virginia covers hearing loss and carpal tunnel syndrome. Workers in Virginia are currently able to receive compensation for work-related hearing loss or carpal tunnel as ordinary diseases of life. To receive workers' compensation benefits for either of these two conditions, workers must prove by clear and convincing evidence that the disease (1) arose out of the employment, (2) did not arise from causes outside the employment, *and* (3) is characteristic of the employment and was caused by conditions peculiar to such employment. Fewer workers would receive benefits by expanding coverage for cumulative trauma as an ordinary disease of life than an injury because it would be harder to meet the clear and convincing evidentiary standard.

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**The definition of injury by accident in Virginia was recently expanded by the Court of Appeals in 2016, but the timeframe over which an accident can occur is still limited to less than a full work day.**

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Alternatively, covering cumulative trauma as an *injury* would allow workers to meet the lower preponderance of evidence standard, which applies to other compensable injuries and occupational diseases. This would provide cumulative trauma coverage to more workers because it would be easier to meet the evidentiary standard. However, this would appear to be somewhat inconsistent with current statutory treatment of coverage of hearing loss and carpal tunnel syndrome. Additionally, providing coverage to more workers for cumulative trauma would likely increase costs borne by employers and insurers.

The General Assembly should follow the lead of all other states and ensure workers have a remedy for work-related cumulative trauma injuries. To inform its decision as to how to expand cumulative trauma coverage, as well as how to avoid unintended effects on Virginia workers, employers, and insurers, the General Assembly could direct VWC to hire an independent and reputable national research organization with expertise in workers' compensation policy. The research organization could be directed to propose options to make cumulative trauma injuries compensable in Virginia that balance workers' ability to obtain compensation for these workplace injuries with protecting employers from bearing the costs of non-workplace injuries. When developing the options, the research organization should consider (1) the frequency of cumulative trauma injuries in Virginia and other states; (2) evidentiary requirements in other states to claim cumulative trauma injuries; and (3) any necessary changes to current statutory provisions in Virginia related to conditions commonly considered to be cumulative trauma in other states, such as carpal tunnel syndrome and hearing loss.

Considering the options developed by the research organization hired by VWC, the General Assembly could decide how to afford Virginia workers the opportunity to obtain compensation for work-related cumulative trauma injuries while also protecting Virginia employers and insurers from bearing the costs of non-workplace injuries.

#### **RECOMMENDATION 15**

The General Assembly may wish to consider including language in the Appropriation Act to direct the Virginia Workers' Compensation Commission (VWC) to hire an independent and reputable national research organization with expertise in workers' compensation policy to (i) develop options for covering workers' cumulative trauma injuries through Virginia's workers' compensation system and (ii) summarize key policy considerations associated with modifying statute to cover cumulative trauma injuries. The research organization should take into consideration (i) the annual number of cumulative trauma injuries in Virginia and other states; (ii) other states' evidentiary requirements for claiming workers' compensation benefits for such injuries; (iii) necessary changes to Virginia's statutory provisions; and (iv) impacts on workers, employers, and insurers. VWC should ensure the proposed options and policy considerations are submitted to the House Appropriations and Senate Finance committees by November 30, 2020.

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## RECOMMENDATION 16

The General Assembly may wish to consider amending Title 65.2 of the Code of Virginia to make cumulative trauma injuries compensable under the Workers' Compensation Act.

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## Medical costs of Virginia workers' compensation claims are high compared with other states

Employers and insurers are required by law to pay for wage replacement and medical benefits to workers whose injuries are deemed compensable under the Workers' Compensation Act. Employers generally pay the costs of these expenses through workers' compensation premiums paid to insurers. In turn, insurers pay wage replacement benefits directly to the injured worker and pay medical providers for services needed to treat the work-related injury or disease.

In January 2018, Virginia implemented medical fee schedules that established maximum reimbursement rates providers could charge for medical services for workers' compensation claims. These fee schedules, which were created by the 2016 General Assembly, provided greater certainty for providers and insurers of the costs of these services. However, Virginia's existing process for reviewing maximum reimbursement rates could be improved to help ensure employers and insurers are not required to pay more than necessary to treat work-related injuries and diseases.

## Workers' compensation premiums in Virginia are lower than most other states, but medical costs per claim are higher

Workers' compensation premiums paid by Virginia employers appear to be generally lower than most other states. Although the premiums vary by employer and by industry, in 2018, Virginia employers paid, on average, the 11<sup>th</sup> lowest workers' compensation premium rate per worker of all states, including the District of Columbia, according to the 2018 Oregon Workers' Compensation Premium Rate Ranking.

Although Virginia's workers' compensation premiums appear to be relatively low compared with other states, the cost of medical services paid by insurers to treat injuries or diseases are comparably high, according to studies conducted by WCRI (sidebar). In 2019, WCRI compared the three-year costs of compensable claims from 2015 in Virginia to 17 other states—adjusting for differences across states in wages and types of industries—and found that Virginia had the highest medical costs per claim for workers' compensation claims with more than seven days of lost time from work (sidebar). WCRI found that the average three-year medical cost per claim paid in Virginia (\$25,169 per claim) was 57 percent higher than the median of other WCRI states (\$16,014 per claim) (sidebar). Importantly, because WCRI's 2019 report includes three years of payments for medical services—from 2015 to 2018—these figures largely include the costs of medical services paid before the fee schedules were implemented in January 2018. This comparison therefore reflects higher relative medical costs for

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Premiums in Virginia are relatively low primarily because of its relatively low number of workers' compensation claims per worker, according to WCRI.

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Claims costs include only those with more than seven days of lost time to ensure comparability of costs across states. The statutory waiting period for benefits varies across states, and claims made during shorter waiting periods could include injuries that are less severe than those with longer waiting periods.

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Virginia's relatively high medical costs per claim has remained the highest (or second highest) of all 18 comparator states since at least 2016, according to WCRI.

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Virginia than is currently the case, but Virginia's costs are still likely higher than many other states for several reasons.

### **Fee schedules resulted in greater certainty and at least some decrease in medical costs**

The new medical fee schedules appear to have created more certainty for medical costs associated with workers' compensation claims. Medical fee schedules allow providers to better anticipate the maximum fees they can anticipate receiving from insurers and allow insurers to better anticipate what they can expect to pay. Before Virginia's medical fee schedules were implemented, providers could charge insurers medical fees that they deemed reasonable—although insurers could dispute the fees through VWC's dispute resolution processes.

Cost reductions also occurred with the implementation of the medical fee schedules. The medical fee schedules were based on actual payments made to providers in 2014 and 2015 and did not adjust for inflation or any other price increases that occurred between 2015 and 2018. From 2017 to 2018, medical costs per active claim decreased by approximately 10 percent overall, according to the National Council on Compensation Insurance (NCCI) (sidebar). NCCI notes that Virginia's new medical fee schedules were the primary driver of these recent decreases in medical costs.

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**The National Council on Compensation Insurance** is a data collection bureau, which aggregates and analyzes workers' compensation data. NCCI recently conducted an evaluation on the impacts of Virginia's medical fee schedules on paid workers' compensation claims.

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### **At least some fees in Virginia appear to be higher than necessary and will likely remain so without periodic, targeted review**

The long-term effects of Virginia's medical fee schedules on the medical costs of workers' compensation claims are unclear. Virginia's fee schedules differ from most other states' fee schedules because they are not based on the costs *required to provide* specific medical services—as is considered in determining Medicare's fee schedule, for example. Instead, Virginia's rates are based on the rates providers *charged* in 2014 and 2015, without regard for whether these rates were reasonable at that time. In contrast, although a great deal of variation exists across states' medical fee schedules, a majority of states with fee schedules (31 of 44 states) use Medicare's payment system, the resource-based relative value scale, to inform their workers' compensation fee schedules (sidebar).

Several indications suggest that at least some reimbursement rates in Virginia's medical fee schedules are higher than necessary, when using Medicare rates as the point of comparison. For example, as of February 2019, the maximum reimbursement rates for a subset of medical services in Virginia ranged from 159 percent of Medicare rates to 486 percent of Medicare rates. On average, these reimbursement rates were about twice as high as Virginia's Medicare rates—the fifth-highest overall rates relative to Medicare among states with fee schedules (Table 3-1). Additionally, according to WCRI, Virginia had more service groups (e.g., emergency services, minor radiology, and major surgery) with reimbursement rates set at more than *triple* Medicare rates than any other state, with the exception of Alaska.

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**Medicare's fee schedule is based on its resource-based relative value scale (RBRVS).** The RBRVS was created by researchers at Harvard University and is designed to account for physician work, practice expenses, and malpractice expenses associated with a given procedure. Medicare adjusts these costs based on geography. A growing number of states are setting their workers' compensation fee schedules as a premium over Medicare rates, according to WCRI.

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**TABLE 3-1**  
**Virginia's workers' compensation medical fee schedule rates exceed Medicare rates for same services to greater degree than other states (February 2019)**

<b>Category of medical service</b>	<b>Virginia fee schedule rates relative to Medicare rates for same services</b>	<b>VA ranking among 44 states and D.C.</b>
Neurological testing	260%	Highest
Emergency services	436	Highest
Pain management injections	310	3rd highest
Minor radiology (technical component)	323	3rd highest
Minor radiology (professional component)	334	5th highest
Major radiology (professional component)	285	7th highest
Major radiology (technical component)	486	8th highest
Major surgery	295	11th highest
Evaluation and management	159	13th highest
Physical medicine	160	14th highest
<b>Overall</b>	<b>204%</b>	<b>5th highest</b>

SOURCE: WCRI Compscope™ Medical Benchmarks for Virginia, 2019.

NOTE: Because Virginia has distinct fee schedules for different regions of the state, WCRI calculated a single statewide weighted average based on the working population of each region. Includes all nonhospital services used by WCRI to compare fee schedule prices across states.

Currently, an advisory board to VWC biennially considers changes to the fee schedules and may recommend adjustments to the fee schedules for inflation or deflation as well as other factors, such as calculation errors, access issues, and provider incentives. However, current statute prohibits VWC from reducing fees “unless such a reduction is based on deflation or a finding by the Commission that advances in technology or errors in calculations made in preparing the Virginia fee schedules justify a reduction in fees.”

To keep policy makers informed on the extent to which employers and insurers may be paying higher than necessary medical fees, VWC could be required to report to the General Assembly every two years the extent to which the existing medical fee reimbursement rates exceed Medicare reimbursement rates for the same services in Virginia, and how these excess rates compare to those in other states. This information could be used by the General Assembly to determine whether Virginia's medical fee schedules should be modified to better reflect the cost of providing medical services. This requirement could be accomplished through VWC's existing statutory authority and funding, as VWC is already required to have an independent research organization compare workers' compensation medical costs in Virginia to other states. Statute does not explicitly direct VWC to compare costs to Medicare reimbursement rates, although this is a benchmark used by most other states with fee schedules.

**RECOMMENDATION 17**

The General Assembly may wish to consider amending § 65.2-605.2 of the Code of Virginia to authorize and direct the Virginia Workers' Compensation Commission (VWC) to include in its existing biennial reviews of Virginia's workers' compensation medical costs a comparison of Virginia's medical fees to Medicare reimbursement rates for the same services in Virginia.

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# 4 Appropriateness of Disease Presumptions

**SUMMARY** Existing research provides some support for most of the cancers that are either included or proposed to be included under the cancer presumption in Virginia’s workers’ compensation statute. There is, however, insufficient epidemiological evidence to determine whether firefighters are at a greater risk of developing colon, pancreatic, breast, and ovarian cancer. This does not mean that there is not a connection between firefighting and these cancers—only that the available research is mixed or no research has been conducted. Based on the evidence, the General Assembly could add brain and testicular cancer to Virginia’s list of disease presumptions. The General Assembly could also add colon cancer because, although the evidence is mixed, some studies have identified an association between firefighting and colon cancer. The existing epidemiological research also provides some support for Virginia’s cardiovascular disease presumption and a post-traumatic stress disorder (PTSD) presumption. Instead of creating a PTSD presumption, the General Assembly could consider specifying in the workers’ compensation statute that psychological injuries can be compensable even if the event causing the psychological injury could have been reasonably expected to have occurred as part of a worker’s job responsibilities.

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Disease presumptions are used by states to give workers in certain occupations (mostly public safety workers) the benefit of the doubt when there is uncertainty regarding the cause of a worker’s disease. These presumptions establish in law a presumed causal connection between an occupation (e.g., firefighter or police officer) and a disease (e.g., cancer or heart disease). Disease presumptions relieve these workers of the need to prove the connection, especially when evidence to prove a causal connection can be difficult or impossible to obtain. When seeking workers’ compensation benefits, disease presumptions shift the burden of proof *away from the worker* to show that employment caused his or her disease, *to the employer* to show that the worker’s disease was caused by something other than his or her employment.

## Majority of states have disease presumptions in their workers’ compensation laws

Like Virginia, most states have disease presumptions for public safety workers, although the specific occupations and diseases covered vary by state. For example, 41 states, including Virginia, provide a statutory cancer presumption for firefighters (Table 4-1). Just over half of states cover each of the three additional types of cancer that were proposed by the 2019 General Assembly through HB 1804 (sidebar). Cardiovascular disease presumptions, which Virginia includes for firefighters and police officers,

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House Bill 1804 (2019) will add brain, colon, and testicular cancers to the list of cancers presumed to have been caused by firefighting if it is re-enacted during the 2020 General Assembly session.

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are also common in other states and are more commonly provided for firefighters (34 other states) than for police officers (15 other states).

**The Code of Virginia also provides respiratory and infectious disease presumptions for certain public safety workers.** JLARC staff only identified one instance (in 2009) in which a public safety worker sought to establish the respiratory disease presumption over the past decade, and no instances where a public safety worker sought to establish the infectious disease presumption. See Appendix C for a detailed table of conditions and occupations covered under a disease presumption in Virginia.

**The various law enforcement officers covered under Virginia's disease presumptions are collectively referred to as "police officers" in this chapter.** They include local police officers, local sheriffs and deputy sheriffs, state police officers, marine police officers, capitol police officers, special agents of Virginia ABC, and conservation officers.

Virginia also has respiratory and infectious disease presumptions for certain public safety workers, but these appear to be claimed far less frequently than cardiovascular or cancer presumptions (sidebar). Twenty-five other states provide a respiratory disease presumption to firefighters, and 20 other states provide an infectious disease presumption to firefighters, police officers, and/or emergency medical services personnel.

**TABLE 4-1**

**Like Virginia, most states also provide cancer and cardiovascular disease presumptions for certain public safety workers (April 2019)**

<b>Virginia Presumption</b>	<b># of other states with similar presumption</b>
<b>Cancer – Firefighters</b>	40 <sup>a</sup>
Brain ( <i>proposed in 2019</i> )	28
Testicular ( <i>proposed in 2019</i> )	28
Colon ( <i>proposed in 2019</i> )	27
Prostate	27
Leukemia	26
Rectal	26
Breast	21
Throat	18
Ovarian	17
Pancreatic	17
<b>Cardiovascular Disease – Firefighters</b>	34
<b>Cardiovascular Disease – Police Officers</b>	15
<b>Respiratory Disease – Firefighters</b>	25
<b>Infectious Disease – Police Officers, Firefighters, and/or EMS personnel</b>	20
<b>PTSD – Firefighters (<i>proposed in 2019</i>)</b>	4
<b>PTSD – Police Officers (<i>proposed in 2019</i>)</b>	4

SOURCE: JLARC staff review of other states' statutes.

NOTE: <sup>a</sup> States with statutory presumptions that presume at least one type of cancer is caused by firefighting. Counts for specific types of cancers include cancers not listed in state statute but covered under a broader category. For example, the counts for testicular and ovarian cancers include states with presumption statutes that do not specifically list these cancers but include "cancers of the reproductive system."

## Supreme Court of Virginia considers presumptions appropriate even if scientific research is mixed

According to the Supreme Court of Virginia, a disease presumption does not violate an employer's due process rights if there is a plausible connection between the occupation and the disease presumed to have been caused by the occupation. A plausible connection between an occupation and a disease can still exist even when the existing

research evidence on the connection between the occupation and the disease is inconclusive or mixed:

The legislature, in enacting [VA Code § 65.2-402], necessarily considered whether to shift the burden of proving the relationship between occupation and disease from the fireman to his employer. The legislature knew that the causes of pulmonary and cardiac diseases are unknown and that the medical community is split regarding the impact of stress and work environment on these diseases... The legislature's conclusion that a fire fighter who contracts a respiratory disease after he has started work suffers from an occupational disease is a reasonable and logical deduction. (*Fairfax County Fire and Rescue Services, v. Newman, 1981*)

The Supreme Court of Virginia has not defined the specific conditions that must be met for a plausible connection to exist beyond noting that there should be a “reasonable and logical” connection or a “natural and rational nexus” between the occupation and the disease.

## Best available scientific evidence provides some support for most of Virginia’s cancer presumptions

A plausible connection exists between firefighting and most of the cancers included in Virginia’s disease presumption statute, as well as those proposed during the 2019 General Assembly Session through HB 1804, according to existing research (sidebar). National and international epidemiological research, including research conducted by the Centers for Disease Control and Prevention’s National Institute for Occupational Safety and Health (NIOSH), shows that firefighters are exposed to a variety of carcinogens during firefighting activities, mostly through inhalation or skin absorption. It does not appear to be possible to fully avoid exposure to carcinogens with current technology.

### Firefighters are exposed to a variety of carcinogens while at work, and fully avoiding exposure does not appear to be possible

Firefighters are exposed to a variety of carcinogens while engaged in firefighting activities. According to the International Agency for Research on Cancer (IARC), which evaluated the carcinogenicity of firefighting in 2010, all types of fires release toxic and carcinogenic substances. Known carcinogens detected in structural and wildland fires include arsenic, asbestos, benzene, cadmium, and formaldehyde. Table 4-2 identifies the substances that have been detected at fires in one or more studies, according to IARC. All of the cancers included in Virginia’s disease presumption statute, as well as the three proposed by HB 1804, are caused (or are suspected to be caused) by one or more carcinogens listed in Table 4-2. For example, according to IARC, there is sufficient evidence that gamma radiation causes rectal, breast, throat, brain, and colon cancers, as well as leukemia, and relatively strong evidence that 2,3,7,8-tetrachlorodibenzo-*para*-dioxin increases risks of *all* types of cancers among humans (sidebar).

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**Epidemiologists from the Johns Hopkins University (JHU) Bloomberg School of Public Health** conducted a systematic literature search and narrative review of the existing scientific research surrounding Virginia’s disease presumptions for this study. In 2019, the Bloomberg School of Public Health was ranked as the top school of public health in the United States by U.S. News and World Report. More details on JHU’s methodology can be found in JHU’s full report.

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**2,3,7,8-tetrachlorodibenzo-*para*-dioxin** may be released during the combustion of fossil fuels and wood, according to the U.S. Environmental Protection Agency.

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**TABLE 4-2**  
**Carcinogenic, or possibly carcinogenic, substances detected in fires (IARC, 2010)**

<b>Carcinogenic to humans (IARC Group 1)</b>	<b>Probably carcinogenic to humans (IARC Group 2A)</b>	<b>Possibly carcinogenic to humans (IARC Group 2B)</b>
Arsenic	Dibenz[a,h]anthracene	Acetaldehyde
Asbestos	Lead compounds, inorganic	Benz[a]anthracene
Benzene	Polychlorinated biphenyls (aroclor; 54%) (chlorodiphenyl)	Benzo[b]fluoranthene
Benzo[a]pyrene	Tetrachloroethylene (perchloroethylene)	Benzo[k]fluoranthene
1,3-Butadiene		Benzofuran (coumarone)
Cadmium		Carbon black (total)
Formaldehyde		Chrysene
Radioactivity (gamma activity)		Dichloromethane (methylene chloride)
Radionuclides (alpha-particle-emitting)		Ethylbenzene
Radionuclides (beta-particle-emitting)		Furan
Silica (crystalline)		Indeno-1,2,3-[cd]pyrene
Sulfuric acid		Isoprene
2,3,7,8-tetrachlorodibenzo- <i>para</i> -dioxin		Naphthalene
		2-Nitroamisol
		Polychlorophenols
		Styrene
		Toluene diisocyanates
		Trichloromethane (chloroform)

SOURCE: IARC Monograph 98 (2010).

A firefighter's exposure to carcinogens will vary depending on many factors, including total time spent at fires, the materials burning in the fire, whether a firefighter is a municipal or wildland firefighter, and the role of the firefighter within a fire department. However, fully avoiding exposures to carcinogens as a firefighter does not appear to be possible. According to Johns Hopkins University epidemiologists, existing protective gear for firefighters can mitigate, but not fully prevent, a firefighter's exposure to carcinogens while combatting fires. Firefighters are also exposed to carcinogens when not directly attacking fires, such as those in diesel exhaust from fire trucks idling at the scene of a fire, according to IARC.

Nationwide, the firefighting community is becoming increasingly aware of firefighters' exposure to carcinogens and taking several measures to reduce exposure. For example, fire departments are installing diesel exhaust extractors to remove diesel exhaust from fire stations and washing machine extractors to remove carcinogens from firefighters' turnout gear. However, in Virginia, as in other states, the availability and consistent use of equipment to mitigate exposures to carcinogens vary across fire departments, according to fire chiefs, staff at the Virginia Department of Fire Programs, and other stakeholders in Virginia's career and volunteer firefighting communities. The equipment, such as additional sets of turnout gear, can be costly to purchase and maintain.

### **Epidemiological research provides some support for most of Virginia's current and proposed cancer presumptions**

According to epidemiologists at the Johns Hopkins University (JHU) Bloomberg School of Public Health, the best available epidemiological research provides some scientific support for most of Virginia's current and three proposed cancer presumptions (sidebar). However, the strength of evidence indicating an increased risk among firefighters varies by type of cancer, and there is insufficient evidence to determine firefighters' risk for some types. More information on JHU's findings, including study confidence intervals, can be found in JHU's full report.

According to JHU staff, studies of the association between firefighting and cancer showed mixed findings as to the extent to which firefighters are at increased risk of specific types of cancer (Figure 4-1). For example, estimates across studies of the incidence or mortality of throat cancer ranged from 25 percent *lower* to 290 percent *higher* incidence or mortality compared with non-firefighters. Similarly, findings for colon cancer ranged from 35 percent *lower* to 40 percent *higher*.

Estimates of prostate cancer were most consistently greater among firefighters than non-firefighters across studies. Most of these prostate cancer studies showed a statistically significant increase in rates of mortality or incidence among firefighters. JHU's findings are consistent with findings from a systematic review of the research literature conducted in 2009 by IARC, which found that firefighters had an increased risk of prostate cancer.

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**The primary routes through which firefighters are exposed to carcinogens are inhalation and skin absorption.**

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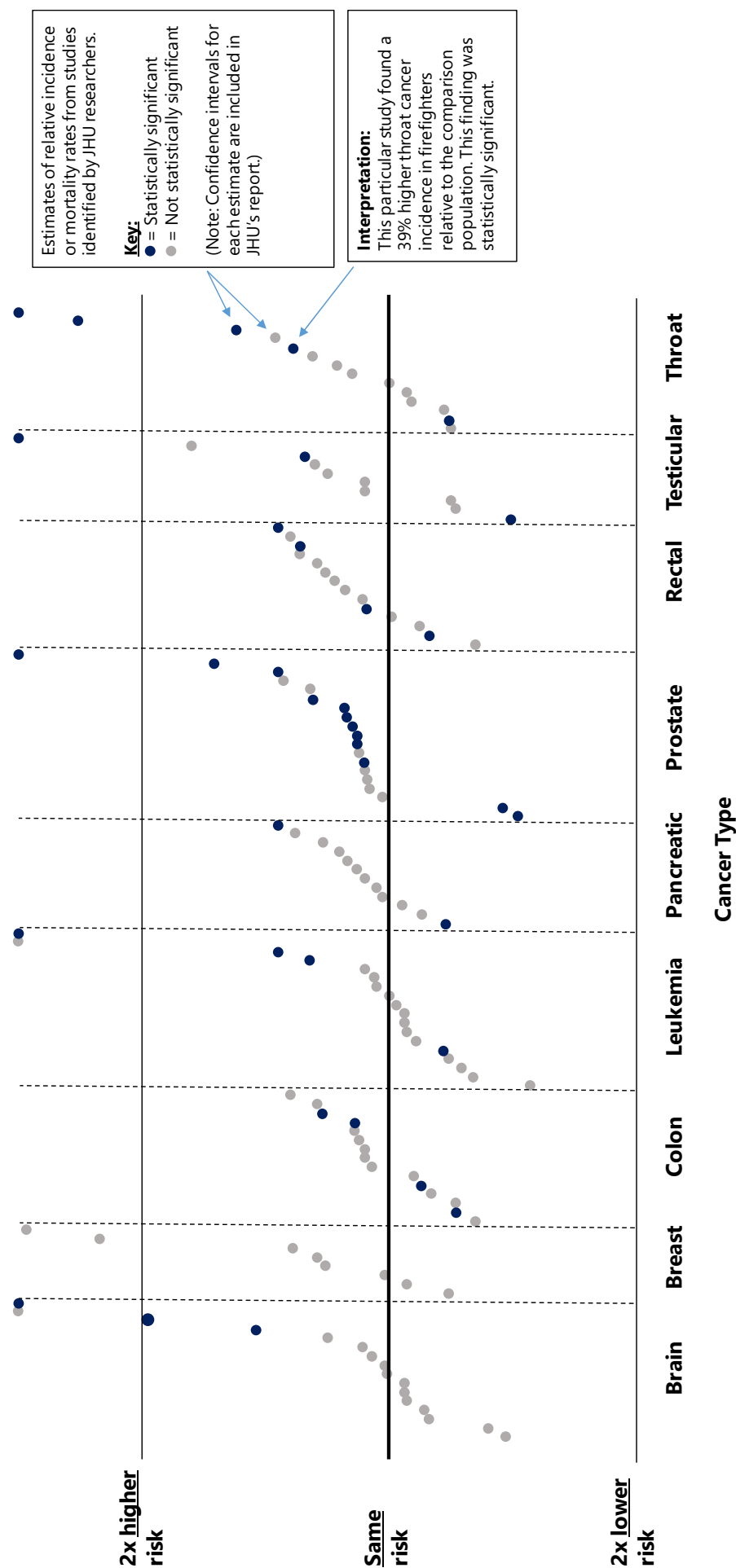


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**Johns Hopkins University (JHU) researchers consulted for this study identified 19 epidemiological studies, including two systematic reviews, that assessed the association between firefighting and the specific cancers covered under Virginia's disease presumptions. The studies were published between January 2009 and May 2019. More details on JHU's methodology and strength of evidence determinations can be found in JHU's full report.**

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**FIGURE 4-1**  
**Epidemiological studies show mixed evidence of increased risks of cancers among firefighters (2009–2019)**  
**Estimated risk of cancer among firefighters relative to comparison populations**  
**across studies identified by JHU epidemiologists (2009 to 2019)**



SOURCE: Review of 2009–2019 epidemiological research studies on firefighter-cancer associations by the Johns Hopkins University Bloomberg School of Public Health.  
 NOTE: Shows estimates of each study of relative incidence or mortality of cancer in firefighters relative to comparison population. Measures of relative incidence and mortality vary across studies, including standardized incidence ratios, odds ratios, hazard ratios and standardized mortality ratios. Seven point estimates at top of graphic exceeded 2.5x incidence or mortality: brain (3.63 and 5.74), leukemia (6.54 and 83.65), prostate (2.59), testicular (11.9), and throat (3.9). More information on each study's findings, including each study's confidence intervals can be found in JHU's full report.

In contrast, findings for other cancers were more mixed. Findings for breast, colon, and pancreatic cancers had either no statistically significant findings or an equal number of statistically significant studies showing higher and lower risk (sidebar). Other types of cancer presented similar variation across studies, but had either (1) more statistically significant findings of increased risk than decreased risk and/or (2) statistically significant findings of increased risk of cancer at more than twice the rate of the comparator populations. For this reason, for example, JHU epidemiologists concluded that the evidence supporting a link between firefighting and leukemia is stronger than the evidence supporting a link between firefighting and colon, breast, and pancreatic cancer.

Across the 10 cancers analyzed, considering the strength and consistency of findings across studies, including whether the findings from each study were statistically significant, JHU epidemiologists determined that the strongest evidence exists of an association between prostate cancer and firefighting, and that the *existing* research evidence at least suggests there *could be* an association in five of the remaining nine types of cancer (throat, brain, leukemia, rectal and testicular) (Table 4-3).

TABLE 4-3

According to JHU epidemiologists, most of Virginia's current and proposed cancer presumptions are supported by evidence, although to varying degrees

Cancer presumed in VA statute to be caused by firefighting	# of studies identified by JHU	JHU determination of strength of evidence of risk among firefighters
Prostate	13	●
Throat	13	◐
Brain ( <i>proposed in 2019</i> )	13	◐
Leukemia	14	◐
Rectal	10	◐
Testicular ( <i>proposed in 2019</i> )	9	◐
Colon ( <i>proposed in 2019</i> )	12	?
Pancreatic	11	?
Breast	6	?
Ovarian	0	○

**Key:**

- = Sufficient evidence of increased risk
- ◐ = Supportive evidence of increased risk
- ◐ = Suggestive evidence of increased risk
- ⊕ = Insufficient evidence to determine risk
- = No research to determine risk

**Studies of breast cancer** mostly showed evidence of increased risk, but none that were statistically significant—in part because of the small sample sizes of women firefighters.

**Studies of colon cancer** showed evidence of both increased risk and decreased risk, with an equal number of studies with statistically significant findings on both sides.

**Studies of pancreatic cancer** also showed evidence of both increased risk and decreased risk, with one study showing statistically significant findings on each side of the risk spectrum.

When a finding is statistically significant, there is a low probability (e.g., less than 5 percent chance) that the finding occurred by chance alone.

SOURCE: Review of 2009–2019 epidemiological research studies on firefighter-cancer associations by the Johns Hopkins University Bloomberg School of Public Health.

NOTE: Several studies have multiple measures of risk for each type of cancer. Therefore, the number of statistically significant studies may differ from the number of statistically significant measures shown in Figure 4-1. An explanation of JHU epidemiologists' criteria for determining the strength of the evidence can be found in JHU's full report.

For the remaining four types of cancer evaluated, JHU epidemiologists determined that there was either (1) insufficient evidence to conclude that there could be an association between firefighting and cancer (pancreatic, breast, and colon) or (2) no research on the association of the particular type of cancer and firefighting (ovarian). This does not mean that a connection does not exist between firefighting and these cancers—only that the available evidence makes it difficult to conclude whether firefighters are at a greater risk for these cancers than the general population or that research has not been conducted. Additional research is needed to determine whether a connection is likely between firefighting and these cancers. Nevertheless, between 17 and 27 states cover these types of cancers as a presumption in their statutes.

### **Addition of colon, brain, and testicular cancers would increase employers' workers' compensation and Line of Duty Act costs**

Relatively few additional workers' compensation claims are expected to arise if the three proposed cancers in HB 1804 (2019) were added to Virginia's list of disease presumptions, according to an analysis by Oliver Wyman, an actuarial consultant retained for this study. The addition of colon, brain, and testicular cancer would likely add only about five or six new claims per year among Virginia career and volunteer firefighters. This expected low frequency is a result of the low incidence rates of these cancers, particularly brain and testicular cancers. Of the six estimated new claims, four are expected to be colon cancer claims (Table 4-4).

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Adding compensable injuries or diseases to workers' compensation statutes will create at least some unfunded liability among insurers and self-insurers. This unfunded liability is a one-time event and is a consequence of not collecting premiums for employees who are no longer actively employed but still within the relevant statute of limitations to claim benefits for the injury or diseases.

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#### ***Estimated cost per compensable claim of colon, brain, and testicular cancers***

Insurers or localities (if self-insured) are expected to pay more for workers' compensation claims if colon, brain, and testicular cancers are added to the list of presumptions. Although the frequency of cancer claims is expected to be low, the five-year total cost *per compensable claim* is expected to be high for all cancers. For example, the expected average total cost (wage loss benefits, medical benefits, and claim-related expenses) per claim over the next five years resulting from colon cancer claims is expected to range from \$403,019 to \$790,475. Statewide total costs would depend on the number of compensable claims for each type of cancer and the actual cost of these claims.

#### ***Employer costs to provide workers' compensation benefits would increase***

As a result of the additional claims that are expected if these disease presumptions are added, all firefighters' employers are expected to pay more in workers' compensation premiums. On a per-employee basis, employers are expected to pay an additional \$102 to \$269 in premiums per firefighter per year to cover the three cancers included in HB 1804, although premiums would vary among employers. These premium charges include provisions for claim costs as well as for insurance company expenses. Cost estimates for self-insured employers, which do not purchase workers' compensation insurance but rather fund the cost of claims themselves, range from \$78 to \$206 per



firefighter per year. The cost estimates for self-insured employers provide only for claim costs (i.e., the cost of wage loss benefits, medical benefits, and claim-related expenses only).

More details on the estimated cost impacts of HB 1804, including Oliver Wyman's methodology and assumptions, can be found in the actuary's full report.

TABLE 4-4

**Few additional cancer claims per year are expected to result from HB 1804 (2019), but costs per compensable claim can be substantial**

Estimated number of compensable claims statewide		Costs per claim <sup>a</sup>		Employer costs per employee			
		Estimated average cost per compensable claim over next five years <sup>b</sup>		Estimated first year (2020) premium cost per employee (for employers that purchase workers' compensation insurance)		Estimated first year (2020) claim cost per employee (for employers that self-insure)	
				Low	High	Low	High
<b>Cancer</b>		<b>Low</b>	<b>High</b>	<b>Low</b>	<b>High</b>	<b>Low</b>	<b>High</b>
Brain	1	\$377,453	\$768,153	\$16	\$51	\$12	\$39
Testicular	1	\$90,313	\$447,928	\$4	\$30	\$3	\$23
Colon	4	\$403,019	\$790,475	\$82	\$189	\$63	\$145
All cancers	6			\$102	\$269	\$78	\$206

SOURCE: Actuarial analysis conducted by Oliver Wyman.

NOTE: Numbers may not sum because of rounding. "Per employee" costs represent costs per employee within a specific employee insurance classification (e.g., firefighter) that would be covered under the presumption, not all employees in the locality. Low- and high-end estimates, according to Oliver Wyman, are reasonable limits on the potential impact, but costs could be lower or higher for any individual claim. These estimates cannot be averaged to calculate an average expected impact. Additional details on Oliver Wyman's actuarial analyses, methodology, and assumptions can be found in their full report.

<sup>a</sup>For localities that purchase insurance, insurers will pay these claim costs. Localities that self-insure pay these costs directly, rather than through an insurer.

<sup>b</sup>Includes costs associated with wage replacement benefits and medical benefits, as well as loss adjustment expenses.

### ***Employers' Line of Duty Act costs would increase***

To the extent individuals meeting eligibility for these claims are also covered by the Line of Duty Act (LODA) program and are determined to be eligible for these benefits, employer costs for that program would also increase (sidebar). Using the frequency of newly compensable claims estimated by Oliver Wyman, the Virginia Retirement System (VRS) plan actuary estimates that employers (including state agencies and local governments) would pay an additional \$4.78 per full-time equivalent position annually in LODA premiums in FY21, an increase of 0.7 percent above the projected \$695.18 LODA premium per full-time equivalent for FY21. The percentage increase in premiums is expected to generally remain similar through FY26, when employer LODA premiums are projected to be \$11.43 (1.1 percent) higher than the current projected employer premium of \$1,007.13 for fiscal year 2026.

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**Public safety workers covered under a disease presumption may also be eligible for Line of Duty Act (LODA) benefits** if their death or incapacitating disability is determined to be a direct or proximate result of the presumptive disease. LODA eligibility determinations are overseen by the Virginia Retirement System (VRS).

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Localities that have opted to cover LODA expenses independently (nonparticipating employers) are expected to experience similar proportionate increases in their LODA costs.

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These LODA premium estimates assume the provisions of HB 1804 (2019) would apply only to *future* deaths and disabilities resulting from the three cancers, not deaths and disabilities occurring prior to the effective date of the legislation. Applying the changes to deaths and disabilities prior to July 1, 2020 and still within LODA's five-year statute of limitations is estimated to increase annual projected LODA premiums by \$61.01 per full-time equivalent position in FY21 (an 8.8 percent increase) and by \$37.99 per full-time equivalent position in FY26 (a 3.78 percent increase).

### **National research on firefighting-cancer association will provide better information to inform future presumption decisions**

In 2018, Congress established the National Firefighter Registry to assess the links between firefighting and cancer. This effort, which is being led by NIOSH, is intended to improve the data available to epidemiologists to monitor the incidence of cancer among firefighters nationwide and provide epidemiological information needed to understand cancer incidence and trends among firefighters.

National Firefighter Registry data, when it becomes available, should provide better information to determine the strength of an association between firefighting and specific types of cancer than is currently available. For example, according to NIOSH, the registry will collect information on cancer incidence among minorities and women, groups that are underrepresented in existing research.

### **General Assembly could consider adding colon, brain, and testicular cancers to the list of presumptions and re-evaluate appropriateness as research advances**

Although there are no specific criteria available to determine when a presumption should be created, the existing research literature provides support for adding brain and testicular cancers to the list of cancer presumptions. The General Assembly could, therefore, consider adding these two presumptions to the list of cancers presumed to be caused by firefighting.

#### **OPTION 1**

The General Assembly could amend § 65.2-402 of the Code of Virginia to add brain and testicular cancers to the list of cancers that are presumed to have been caused by firefighting.

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There is less evidence to conclude that firefighters are at higher risk of colon cancer, as the research shows generally equal evidence of both higher and lower risk compared to the general population. Because the research evidence is mixed, but at least some statistically significant studies indicate higher risk, the General Assembly could also consider adding colon cancer to the list of disease presumptions.

## OPTION 2

The General Assembly could amend § 65.2-402 of the Code of Virginia to add colon cancer to the list of cancers that are presumed to have been caused by firefighting.

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The General Assembly could create a sunset period, such as 10 years, for those types of cancers for which JHU epidemiologists concluded there is currently insufficient or no evidence of increased risk among firefighters at this time (pancreatic, breast, and ovarian) as well as for colon cancer, if it is added. Prior to the end of the 10-year sunset the General Assembly could direct a review of the research literature, similar to the one that JHU epidemiologists conducted for this study, through the process proposed at the end of this chapter.

## OPTION 3

The General Assembly could consider amending § 65.2-402 of the Code of Virginia to specify that the presumptions for breast, colon, ovarian, and pancreatic cancers covered by the statute shall not apply to workers' compensation claims submitted after June 30, 2030. Prior to June 30, 2030, the General Assembly could direct an examination of the latest national research on the association between firefighting and these cancers.

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## Some scientific research supports heart disease presumption and shows greater risk with service length

According to JHU epidemiologists, the best available research offers some support that a plausible connection exists between the covered public safety occupations (firefighting and law enforcement) and the most common cardiovascular diseases. However, the research supporting this connection varies across studies, as well as by type of cardiovascular disease and occupation (Figure 4-2 and Table 4-5).

As with findings from cancer studies, the risk among firefighters and police officers of the most common types of heart diseases vary substantially, and the link between specific cardiovascular diseases and firefighting/law enforcement is mixed. For example, rates of coronary heart disease among public safety workers varied from 50 percent *lower* incidence or mortality to 450 percent *higher* incidence or mortality.

Across cardiovascular diseases reviewed, JHU epidemiologists identified several studies indicating that public safety workers' risk of developing cardiovascular disease increases with length of service. Currently, there is no years of service requirement to establish the cardiovascular disease presumption, as there is for the cancer presumption. However, JHU's identification of this link, known as a dose-response relationship, provides some support for consideration of a years of service requirement to establish the cardiovascular disease presumption (sidebar).

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**JHU researchers consulted for this study identified 35 epidemiological research studies** that assessed the association between the covered occupations (firefighters and police officers) and most common cardiovascular diseases. The studies were published between January 2009 and May 2019 and a majority of studies focused on hypertension. More details on JHU's methodology and strength of evidence determinations can be found in JHU's full report.

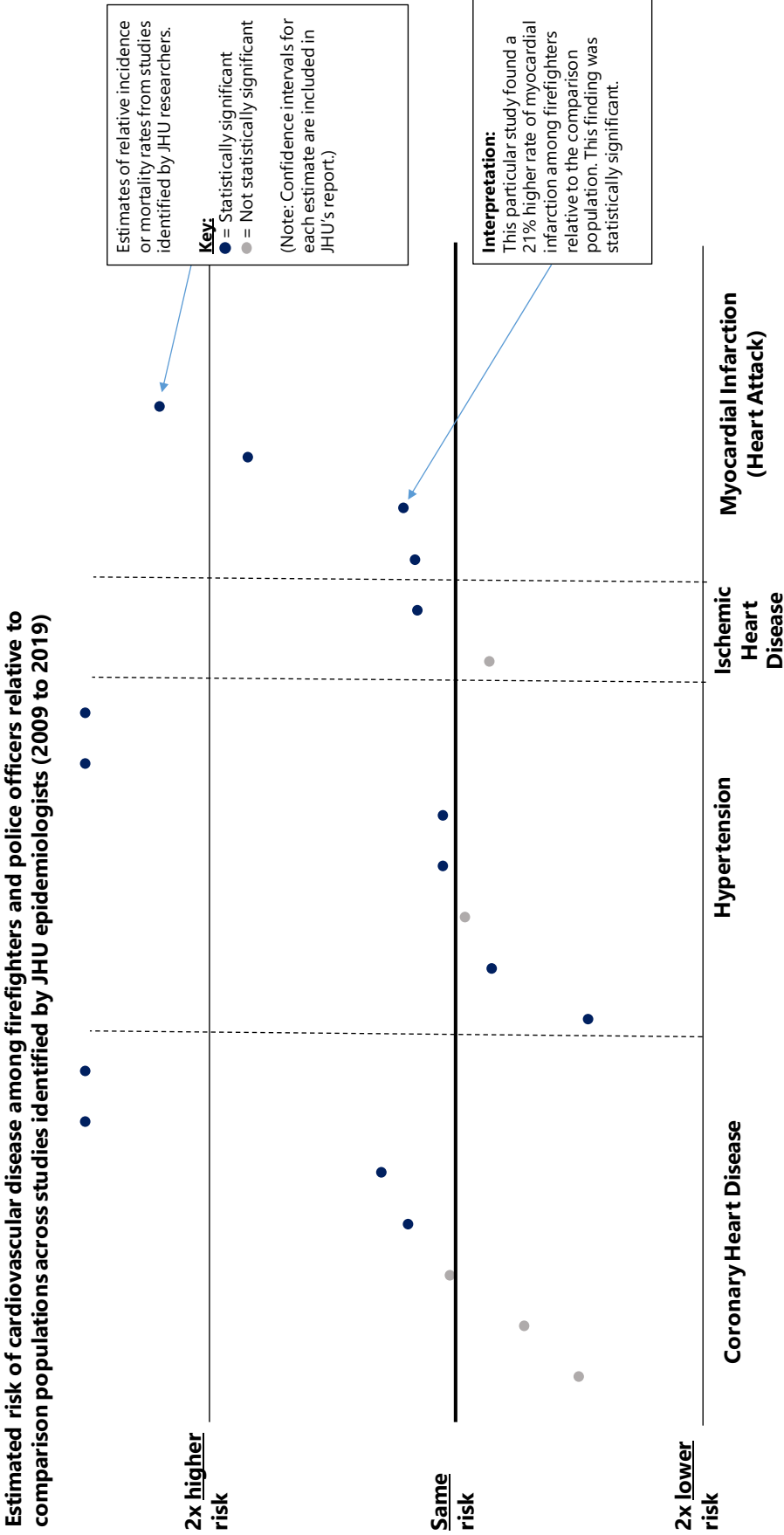
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**In epidemiological research, a dose-response relationship** shows an association between the duration or intensity of exposure to a hazard (e.g., coal dust) and rates of a disease (e.g., black lung).

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**FIGURE 4-2**  
Epidemiological studies show mixed evidence of increased risks of cardiovascular diseases among firefighters and police officers (2009-2019)



SOURCE: Review of 2009–2019 epidemiological research studies on associations between public safety occupations (i.e., law enforcement and firefighting) and cardiovascular diseases by the Johns Hopkins University Bloomberg School of Public Health.

NOTE: Shows estimates of each study of relative incidence or mortality of cardiovascular diseases in firefighters or police officers relative to comparison population. Measures of relative incidence and mortality vary across studies, including incidence rate ratios, odds ratios, hazard ratios and standardized mortality ratios. Four point estimates at top of graphic exceeded 2.5x incidence or mortality: Coronary Heart Disease (3.2 and 5.5) and Hypertension (4.2 and 5). More information on each study's findings, including each study's confidence intervals can be found in JHU's full report.

To account for the apparent relationship between length of service and risk of cardiovascular disease, Virginia could consider adding a service length requirement, such as five years, to its cardiovascular disease presumption. Sixteen of 34 other states (47 percent) with a cardiovascular disease presumption have a service length requirement for firefighters or police officers to be eligible for the presumption, and service requirements range from two years to 10 years. Nine of the 16 states (56 percent) with length of service requirements require five years of service to benefit from their cardiovascular disease presumption (Figure 4-3).

TABLE 4-5

According to JHU epidemiologists, existing research indicates firefighters and police officers may be at greater risk of certain cardiovascular diseases

Cardiovascular Disease	JHU determination of strength of evidence of risk among...	
	Police officers	Firefighters
Myocardial Infarction (Heart Attack)	●	●
Hypertension	●	?
Coronary Heart Disease	?	●
Ischemic Heart Disease	○	?

**Key:**

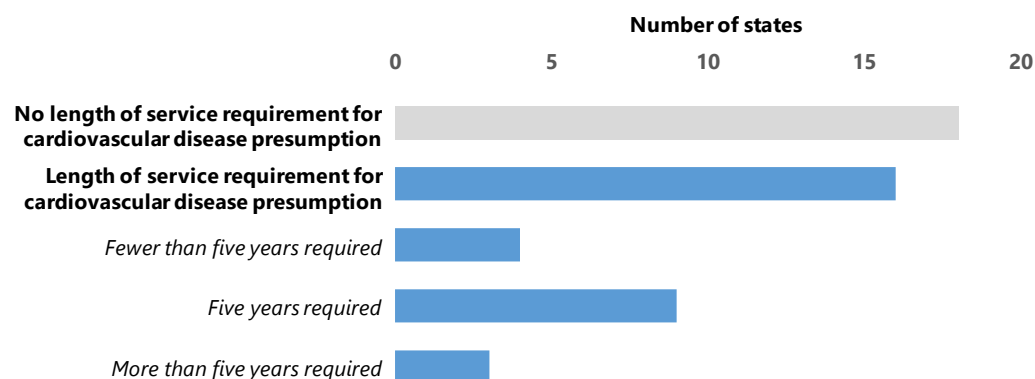
- = Sufficient evidence of increased risk
- = Supportive evidence of increased risk
- = Suggestive evidence of increased risk
- ⊗ = Insufficient evidence to determine risk
- = No research to determine risk

SOURCE: Review of 2009–2019 epidemiological research studies on cardiovascular disease associations conducted by epidemiologists at the Johns Hopkins University Bloomberg School of Public Health.

NOTE: JHU epidemiologists' specific criteria for determining the strength of the evidence can be found in JHU's full report.

FIGURE 4-3

About half of states with length of service requirements for cardiovascular disease presumptions set them at five years of service (April 2019)



SOURCE: JLARC staff review of other states' statutes.

OPTION 4

The General Assembly could amend § 65.2-402 of the Code of Virginia to require that workers’ compensation claimants have completed a minimum number of years of service as a firefighter or police officer, including any time spent in required training, to claim the cardiovascular disease presumption.

Some scientific research supports Virginia’s respiratory disease presumption

The best available research on the association between firefighting and the most common respiratory diseases provides mixed scientific evidence of a connection, according to JHU epidemiologists (Table 4-6). As with the cancer and cardiovascular disease presumptions, the research supporting the connection between firefighting and respiratory disease varies across studies and by type of disease.

According to JHU epidemiologists, studies of the prevalence of respiratory diseases among firefighters indicate a higher prevalence compared with the general U.S. adult population (sidebar). For example, seven studies identified by JHU epidemiologists on asthma among firefighters indicated a prevalence range between 9.3 percent to 16.1 percent of all firefighters, compared with a U.S. adult prevalence of 7.7 percent. Similarly, data from six studies indicate a Chronic Obstructive Pulmonary Disease (COPD) prevalence among firefighters of 16 percent—higher than the 3.7 percent prevalence among U.S. adults.

JHU researchers consulted for this study identified 14 epidemiological research studies that assessed the association between firefighting and the most common respiratory diseases. The studies were published between January 2009 and May 2019. More details on JHU’s methodology and strength of evidence determinations can be found in JHU’s full report.

A limitation of studies of prevalence is that they reflect only the frequency of a disease in a population and generally do not control for factors other than employment that may contribute to higher or lower prevalence, such as age or prior employment history.

TABLE 4-6  
According to JHU epidemiologists, existing research provides mixed evidence of risk of respiratory diseases among firefighters

Respiratory Disease	JHU determination of strength of evidence of risk among firefighters
Asthma	●
Chronic Obstructive Pulmonary Disease	Evidence of decreased risk
Emphysema	?

- Key:
- = Sufficient evidence of increased risk
  - = Supportive evidence of increased risk
  - = Suggestive evidence of increased risk
  - ⊗ = Insufficient evidence to determine risk
  - = No research to determine risk

SOURCE: Review of 2009–2019 epidemiological research studies on respiratory disease associations conducted by epidemiologists at the Johns Hopkins University Bloomberg School of Public Health.  
NOTE: An explanation of JHU epidemiologists’ criteria for determining the strength of the evidence can be found in JHU’s full report.

However, existing studies formally evaluating the association between firefighting and respiratory diseases and the extent to which firefighters are at greater risk, indicate mixed findings. For example, although JHU epidemiologists determined that there is some evidence of an increased incidence of asthma among firefighters, they also found some evidence that firefighters are at a decreased risk of developing chronic obstructive pulmonary disease than non-firefighters. There was insufficient evidence to determine whether firefighters are at greater risk of developing emphysema.

Through interviews and analyses of data from VWC, self-insurance pools, and large self-insured localities, JLARC staff only identified one instance over the past decade in which a firefighter disputed his employer's workers' compensation denial through VWC and sought to establish the respiratory disease presumption.

## Concerns prompting PTSD presumption legislation could be addressed through statutory clarification

Epidemiological research on the causal connection between PTSD and public safety occupations is more limited than research on the connections between cancer or cardiovascular disease and these occupations. However, the best available evidence provides some support for an association between public safety occupations and PTSD, according to epidemiologists at JHU.

The goal of SB 1465 (2019), which would have created a PTSD presumption for firefighters and police officers, as well as 9-1-1 dispatchers, animal protection officers, and “similarly situated employees,” could be addressed more directly with a clarification to the statutory definition of “injury” in §65.2-101 of the Code of Virginia. Specifically, according to public safety stakeholders interviewed for this study, the primary goal of the proposed PTSD presumption was to ensure public safety workers are able to receive workers' compensation for PTSD when it is caused by a single, sudden traumatic incident, even if they could have reasonably expected, or have been trained to expect, the traumatic incident to occur.

## Epidemiological research on public safety occupations and PTSD is more limited than other diseases but indicates some association

According to JHU, the existing epidemiological research indicates that there is some association between public safety occupations and PTSD (Table 4-7). Most existing research assesses the prevalence of PTSD among public safety workers, rather than formally assessing the association between the occupation and the disease (sidebar). Existing studies generally indicate greater prevalence of PTSD among public safety workers compared with the general population. For example, according to JHU staff,

- of four studies of police PTSD prevalence, all four show increased prevalence compared with the general population and

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**JHU researchers consulted for this study identified 15 studies of PTSD among police or firefighters** that were published between January 2009 and May 2019. Most of these studies (13) assessed prevalence among police or firefighters. Only two formally evaluated the association between firefighting and law enforcement and PTSD. More details on JHU's methodology and strength of evidence determinations can be found in JHU's full report.

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**A limitation of existing research on the connection between public safety occupations and PTSD is that most of this research focuses on** comparing the prevalence of PTSD in public safety workers to PTSD prevalence in the general public. These comparisons were not typically evaluated through a statistical analysis. Further, these prevalence studies do not account for individuals' previous experiences, including military employment, that could contribute to higher rates of the disease.

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- of nine studies of firefighter PTSD prevalence, six studies show increased prevalence compared with general population rates.

The ranges of estimated prevalence of PTSD vary substantially across studies and public safety occupations but are generally higher than rates of PTSD among the general public. For example, according to JHU epidemiologists, estimates of PTSD among firefighters ranged from 4 percent to 26 percent of firefighters, and estimates of prevalence of PTSD among police officers ranged from 8 percent to 35 percent. These estimates are generally higher than the best available estimates on PTSD among U.S. adults (3.6 percent) and non-U.S. adults (0.7 percent to 4.4 percent).

Only two studies identified by JHU epidemiologists formally evaluated measures of association between PTSD and firefighting or law enforcement. Both studies had statistically significant findings of increased risk. JHU epidemiologist determined that there was “suggestive” evidence of increased risk among both firefighters and police officers of PTSD, in part because of the limitations of existing research.

**TABLE 4-7**  
**According to JHU epidemiologists, existing research provides some support for PTSD presumption**

Disease	Existing research evidence of increased risk among...	
	Firefighters	Police Officers
Post-Traumatic Stress Disorder (PTSD)	●	●

**Key:**

- = Sufficient evidence of increased risk
- = Supportive evidence of increased risk
- = Suggestive evidence of increased risk
- = Insufficient evidence to determine risk
- = No research to determine risk

As with the cancer presumption, adding a PTSD presumption to workers’ compensation statutes would create at least some unfunded liability among insurers and self-insurers. This unfunded liability is a one-time event and is a consequence of not collecting premiums for employees who are no longer actively employed but still within the relevant statute of limitations to claim benefits for the injury or diseases.

SOURCE: Review of 2009–2019 epidemiological research studies on PTSD among firefighters and police officers conducted by epidemiologists at the Johns Hopkins University Bloomberg School of Public Health.  
NOTE: An explanation of JHU epidemiologists’ criteria for determining the strength of the evidence can be found in JHU’s full report. JHU determinations of strength of evidence included a consideration of the findings from prevalence studies (13 studies), given the limited number of studies that formally evaluated the association between public safety occupations and PTSD (two studies).

**Estimates of additional employer costs for PTSD presumption vary widely, largely because of uncertainty regarding PTSD incidence rates**

Developing reliable cost estimates for the SB 1465 (2019) bill is difficult, primarily because of the lack of data on incidence rates of PTSD among public safety workers. In addition, the data that is available is highly variable. Reliable measures of incidence rates are critical to an analysis of the expected costs for any disease, because they inform estimates of the extent to which new claims are expected to be filed each year by workers.



Using the best available data, Oliver Wyman determined that a substantially higher number of public safety workers are expected to seek benefits under the PTSD presumption than the cancer presumption. Oliver Wyman estimated that between 280 and 592 additional compensable workers' compensation claims could be expected to arise as a result of SB 1465 (Table 4-8).

**TABLE 4-8**

**Expected per employee costs of SB 1465 range considerably, largely because of uncertainty about additional new compensable claims**

			Costs per claim <sup>a</sup>		Employer costs per employee			
			Estimated average cost per compensable claim over next five years <sup>b</sup>		Estimated first year (2020) premium cost per employee (for employers that purchase workers' compensation insurance)		Estimated first year (2020) claim cost per employee (for employers that self-insure)	
	Low	High	Low	High	Low	High	Low	High
PTSD – Law Enforcement <sup>c</sup>	118	249	\$20,694	\$60,485	\$123	\$773	\$95	\$593
PTSD – Firefighters	162	343	\$20,418	\$45,118	\$119	\$560	\$91	\$429
PTSD – Combined	280	592	\$20,564	\$53,253	\$121	\$671	\$93	\$515

SOURCE: Actuarial analysis conducted by Oliver Wyman.

NOTE: Numbers may not sum because of rounding. "Per employee" costs represent costs per employee within a specific employee insurance classification (e.g., firefighter) that would be covered under the presumption, not all employees in the locality. Low- and high-end estimates, according to Oliver Wyman, are reasonable limits on the potential impact, but costs could be lower or higher for any individual claim. These two ranges cannot be averaged to calculate an average expected impact. Additional details on Oliver Wyman's actuarial analyses, methodology, and assumptions can be found in the company's full report.

<sup>a</sup>For localities that purchase insurance, insurers will pay these claim costs. Localities that self-insure pay these costs directly, rather than through an insurer.

<sup>b</sup>Includes costs associated with wage replacement benefits and medical benefits, as well as loss adjustment expenses.

<sup>c</sup>Includes animal control workers and EMS dispatchers—occupations that would also be covered by the presumption.

### ***Estimated cost per compensable PTSD claim***

Insurers or localities (if self-insured) are expected to pay more for workers' compensation claims if PTSD is added to the list of disease presumptions. The estimated average cost per compensable claim over the next five years is expected to range from \$20,564 to \$53,253 across all covered occupations (e.g., police officers, firefighters, animal control workers). As with the additional cancer presumptions, the total costs statewide, would depend on the number of claims filed for PTSD and the severity of the PTSD.

Costs per employee are expected to be higher for the bill to create the PTSD presumption than for the bill to add three additional cancers, in part because the estimated incidence rates of PTSD among public safety workers are substantially higher than cancer incidence rates. Also, there is no years of service requirement to claim the PTSD presumption, as there would be to claim the cancer presumptions.

***Employers’ costs to provide workers’ compensation benefits would increase to pay for additional claims***

As a result of the additional PTSD claims expected if Virginia adds a PTSD presumption, employers are expected to pay more for workers’ compensation premiums. Employers are expected to pay an additional \$121 to \$671 per public safety worker per year in premiums to cover the costs associated with claims arising from the PTSD presumption. Cost estimates for self-insured employers, which do not purchase workers’ compensation insurance but rather fund the cost of claims themselves, range from \$93 to \$515 per public safety worker per year. The cost estimates for self-insured employers provide only for claim costs (i.e., the cost of wage loss benefits, medical benefits, and claim related expenses only).

More details on the estimated cost impacts of SB 1465, including Oliver Wyman’s methodology and assumptions, can be found in the actuary’s full report.

***Employers’ Line of Duty Act costs would increase, but magnitude of increase is unknown***

As with the cancer presumption, to the extent individuals meeting eligibility for these claims are also covered by the Line of Duty Act program and are determined to be eligible for these benefits, employer costs for that program would also increase. No cost estimates have been produced for these impacts.

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The “sudden shock or fright” requirement, which is established in case law, only applies to circumstances where claimants are seeking compensation for PTSD that developed in response to a specific incident (as an injury). Claimants seeking compensation for PTSD that developed over time (as a disease) do not need to meet this requirement.

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The full Commission refers to the three commissioners who oversee VWC and serve as an appellate court for decisions made by deputy commissioners.

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

Currently, PTSD may be compensable as an injury or an occupational disease, depending on how it develops. According to current case law, if the PTSD is a result of a single physical injury or a “sudden shock or fright,” it may be compensable as a psychological *injury* (sidebar). Alternatively, if a worker’s PTSD is a result of repeated exposure to traumatic stressors, it may be compensable as an *occupational disease*.

SB 1465 (2019), which would have created a statutory PTSD presumption for public safety workers, was introduced in response to a police officer who was denied workers’ compensation for PTSD, according to public safety stakeholders. In the case—*Dustin Hess v. Virginia State Police, 2016*—the Virginia Workers’ Compensation Commission determined Hess did not meet the “sudden shock or fright” requirement (sidebar) necessary for his psychological injury to be compensable. Hess sought workers’ compensation benefits for PTSD and major depressive disorder resulting from his experience responding to a specific fatal traffic accident scene. After reviewing the evidence, the full Commission determined that the fatal accident scene was neither sudden nor unexpected for a state trooper with his training or experience (sidebar). Therefore, his psychological injury was not compensable. The Commission noted that Hess had received training on crash investigations, had seen pictures of mutilated bodies, and had nearly a decade of experience responding to traffic accidents. It also noted that Hess’s

co-workers testified that the scene was “not to be unexpected.” The Commission’s decision was upheld by the Virginia Court of Appeals.

The Commission’s decision in the Hess case appears to be consistent with decisions in previous cases in which public safety officers sought coverage for their psychological injury resulting from a single traumatic event. In these cases, the Commission determined that the situation causing their PTSD did not meet the “sudden shock or fright” requirement. For example,

- A deputy sheriff who developed PTSD after encountering, and administering aide to, an unconscious inmate was denied workers’ compensation benefits by the Commission. In its decision, the Commission noted that the event did not rise to the level of a sudden shock or fright necessary to be compensable as an injury by accident, because such situations were to be expected as part of the job, and the worker had received training on similar circumstances. (*Smith v. County of Arlington*, 2010)
- A correctional officer who developed PTSD after an inmate threw feces and urine at him was denied benefits because, according to the Commission, “the claimant’s job responsibilities included interacting with inmates, and he was trained to anticipate the event that occurred as part of his employment... the incident at issue was neither extraordinary in terms of the claimant’s work duties, nor so dramatic or frightening as to shock the conscience.” (*Scalf v. Wallens Ridge State Prison*, 2010)

The General Assembly could more directly ensure that public safety officers are able to receive workers’ compensation benefits for PTSD that developed as a psychological injury by amending the definition of “injury” in §65.2-101 of the Code of Virginia rather than creating a PTSD presumption. The General Assembly could amend the definition of “injury” to specify that psychological injuries can be compensable even if the event causing the psychological injury could have been reasonably expected by the worker to have occurred as part of his or her job responsibilities. Such a modification would not *presume* the PTSD came from the worker’s occupation, as the presumption legislation would do, but would ensure public safety officers are *not precluded* from receiving compensation for PTSD if they could have reasonably expected the traumatizing situation to have occurred. As is the case with all other workers who seek workers’ compensation for a workplace injury, they would need to prove through a preponderance of evidence that their psychological injury arose out of and in the course of employment.

#### **RECOMMENDATION 18**

The General Assembly may wish to consider amending §65.2-101 of the Code of Virginia to specify that psychological injuries can be compensable even if the event causing the psychological injury could have been reasonably expected by the worker to have occurred as part of his or her job responsibilities.

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## **State should establish scientific review process for proposed changes to disease presumptions**

The decision to shift the burden of proof from the worker to the employer in certain circumstances is ultimately a policy decision for legislators, but this decision can have significant due process and cost implications for employers. For example, when defending against a claim involving a presumptive disease, an employer cannot challenge the scientific basis for the law—the connection is presumed unless the employer can present evidence in its specific case to rebut it. Additionally, rebutting an established presumption is generally very difficult, and if the disease is deemed compensable as a workers' compensation claim, the employer (or its insurer) is required to pay the full cost of medical procedures needed to treat the disease, which can be several hundred thousand dollars for a single claim.

Given these implications, the decision whether to establish new or modify existing statutory presumptions that a worker's employment caused his or her disease should be informed by the most objective and quality scientific research available. Currently, no formal process exists in Virginia to ensure that legislators consider objective information as legislation is considered to add to or modify the list of disease presumptions.

In 2019 the Washington state legislature recognized the difficulty and implications of adding disease presumptions to statute without objective information on the existing scientific research. To address this challenge, the legislature established a process to review proposed disease presumptions. In Washington's process, reviews of the science behind proposed disease presumptions are requested by legislators and conducted by an advisory committee, which is composed of two epidemiologists, two preventive medicine physicians, and one industrial hygienist. The committee then assesses the existing scientific research on the presumed causal connection between a disease and a presumption and issues a report and recommendation on whether the proposed presumption for a disease should be added to statute.

Washington's process appears to provide a reasonable framework through which quality and objective information can be obtained and provided to a legislature to provide for consideration of proposed presumptions. According to the Washington statute, the advisory committee's process for developing a recommendation

must include a thorough review of the scientific literature on the disease or disorder, relevant exposures, and strength of the association between the specific occupations and the disease or disorder proposed for inclusion in this section... [and] must give consideration to the relevance, quality, and quantity of the literature and data.

Washington statute also allows the advisory committee to consult subject matter experts to develop its recommendations, and requires the advisory committee to estimate the number of workers possibly affected by the presumption and the anticipated costs.

Virginia should consider following Washington's lead and establish a review process for legislation that proposes to add new or modify existing diseases presumptions. Similar to Virginia's current process for reviewing mandated health benefits, the review process could be initiated when legislation is introduced to add new presumptions or to modify existing presumptions. Virginia's review process could also include a periodic review of the appropriateness of existing presumptions, similar to the review proposed for the breast, colon, ovarian, and pancreatic cancer presumptions (Option 3), to ensure that the list of presumptions in statute is appropriate and informed by the best available scientific evidence.

#### **RECOMMENDATION 19**

The General Assembly may wish to consider amending Title 65.2 of the Code of Virginia to establish a process for reviewing the scientific research on proposed new presumptions or modifications to existing presumptions under the Virginia's Workers' Compensation Act prior to legislative action, with consideration given to (i) the strength of the association between the occupation and the disease and the relevant hazards to which workers in the occupation are exposed and (ii) the relevance, quality, and quantity of the literature and data available to determine the strength of evidence.

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# 5 Establishing and Rebutting Virginia's Disease Presumptions

**SUMMARY** Some firefighters and police officers benefit from Virginia's cancer and cardiovascular disease presumptions, as these conditions are more commonly determined to be compensable for public safety officers than non-public safety officers. However, the current requirements firefighters must meet to establish the cancer presumption are unreasonably burdensome, lack scientific basis, or are contrary to the intent of the presumption. For example, the evidence that is required for firefighters to meet the toxic exposure requirement is nearly impossible to obtain, and Virginia's requirement that firefighters serve 12 continuous years in the occupation to be eligible for the cancer presumption lacks scientific basis and does not align with other states' policies. The evidentiary standards that employers must meet to *rebut* certain disease presumption claims—particularly cardiovascular disease—are difficult but not impossible to meet, and other states appear to have similarly difficult requirements to rebut disease presumptions. A few states have recently implemented benefit programs as an alternative or replacement for presumptions under their workers' compensation systems, but these programs could offer lower benefits for firefighters with diseases than the lifetime medical coverage included in workers' compensation systems.

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The Virginia Workers' Compensation Act presumes certain diseases were caused by certain occupations. (See Chapter 4 for more details.) The purpose of disease presumptions is to give workers the benefit of the doubt when there is uncertainty regarding the cause of a worker's disease. Disease presumptions shift the burden of proof *away* from the worker to prove that the work caused his or her disease and shifts it *to* the employer or workers' compensation insurer to prove the disease was *not* caused by employment if they want to dispute the claim. Workers who are not eligible for the presumption because they work in other occupations or do not meet the presumption requirements may still seek benefits for diseases, but the burden of proof is much higher (clear and convincing evidence). Because conditions like cancers and cardiovascular disease often have several contributing factors, meeting this higher standard of proof that employment caused a worker's disease would be difficult without the presumption.

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The burden of proof is met under the **clear and convincing evidence** standard when the commissioner or deputy commissioner is convinced the evidence is highly or substantially more likely to be true than untrue.

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Although disease presumptions make it easier for workers to obtain workers' compensation benefits, presumptions do not automatically ensure that workers will be able to obtain an award. In Virginia, and in other states, workers must meet specific requirements to be eligible for each presumption. Virginia's presumptions include requirements regarding occupation, years of service, a demonstrated disability resulting from the cancer, and exposure to a toxic substance.

Additionally, each presumption must be rebuttable by the employer to be constitutional, according to the Supreme Court of Virginia. If a presumption is not rebuttable, the employer is denied due process, or its constitutional right to fair treatment under the law (*Fairfax County Fire and Rescue Services v. Newman, 1981*). In Virginia, to successfully rebut Virginia's disease presumptions, an employer must (1) demonstrate the worker's disease was not caused by employment and (2) identify a non-work-related cause of the disease.

## Public safety workers appear to benefit from the existence of heart and cancer presumptions

In data reported to VWC, it is common practice to list only the city or county as the employer for public employees, limiting JLARC staff's ability to definitively say that all public employees seeking compensation for cancer or cardiovascular disease through the presumption statute are public safety workers. JLARC staff used several assumptions to most accurately identify pre-sumption claims within VWC's claim data. JLARC staff identified presumption claims through injury descriptions provided by insurers in VWC claim data. JLARC staff also requested presumption claim information from seven of the largest self-insured localities, two insurance groups that insure localities, and DHRM, and used that data to verify its assumptions. The assumptions used are further discussed in Appendix B.

Public safety workers appear to be approximately twice as likely to have their work-related cardiovascular disease and cancer claims compensated than workers in other occupations, according to VWC claim data (Table 5-1). From 2009 to 2018, nearly 40 percent of cardiovascular disease claims from employees of local fire departments, local police departments, and state law enforcement agencies were awarded workers' compensation benefits (sidebar). In comparison, 18 percent of cardiovascular disease claims from all other Virginia workers were compensated. Similarly, 45 percent of cancer claims from public safety workers were awarded benefits compared with 25 percent of the cancer claims from all other workers.

**TABLE 5-1**  
**Public safety workers are more likely to be compensated for presumptive diseases than other Virginia workers (2009 to 2018)**

Disease	Proportion of claims compensated among Virginia public safety workers	Proportion of claims compensated among other Virginia workers
Cardiovascular disease	308 of 763 (40%)	48 of 273 (18%)
Cancer	37 of 83 (45%)	4 of 16 (25%)

SOURCE: JLARC analysis of VWC claims and award data, 2009 to 2018.

NOTE: JLARC staff identified cardiovascular disease claims as those where insurers labeled the condition as hypertension, myocardial infarction, angina pectoris, vascular heart disease, occupational heart disease, or cumulative heart disease. According to data analyses, reviews of judicial opinions, survey responses, and interviews with stakeholders, JLARC staff identified very few cases in which workers sought to establish the respiratory or infectious disease presumptions.

While there are hundreds of claims filed by public safety workers that may involve a disease for which there is a presumption, the worker must prove that he or she meets each requirement of the presumption only if the claim goes to a hearing at VWC. If a worker can establish that the presumption requirements have been met, the worker's disease is presumed to have been caused by his or her employment unless the employer can rebut the presumption with credible evidence. Although 83 cancer claims were filed by public safety workers from 2009 to 2018, the worker did not dispute his or her employer's determination of compensability in 36 of those cases (43 percent), and an



additional 27 cases (33 percent) were disputed but did not go to a hearing. In these 27 cases, the claim may have been mediated or settled between parties. While 37 cancer cases resulted in the award of benefits (see Figure 5-1 and the figure note) they did not necessarily meet the requirements to establish the presumption. The employer or insurer may have simply agreed to an award. Evaluating VWC's judicial opinions on cancer cases is the best way to determine whether workers are successful in meeting the requirements of the presumption.

## Requirements to establish cancer presumption are unreasonably burdensome or lack a scientific basis

Virginia's cancer presumption statute includes several requirements that a worker must meet to benefit from the presumption. A worker must demonstrate (1) a diagnosis of a covered cancer (sidebar); (2) total or partial disability resulting from the cancer; (3) 12 years of continuous service in a covered occupation; and (4) exposure to a toxic substance in the line of duty. The Code of Virginia defines a toxic substance as "a known or suspected carcinogen, as defined by the International Agency for Research on Cancer, ...which causes or is suspected to cause" the cancers listed in § 65.2-402.

Most *disputed* cancer claims from 2009 to 2018 resulted in the worker not receiving benefits (Figure 5-1). JLARC staff reviewed all 20 judicial opinions on public safety claims in which workers attempted to claim eligibility for the cancer presumption. Only four workers (20 percent) were awarded benefits by VWC commissioners or deputy commissioners. The remaining 16 workers did not meet the requirements to establish the presumption. Reasons for failing to meet presumption requirements included:

- failure to prove exposure to a toxic substance that causes the worker's type of cancer (seven cases);
- failure to prove a period of disability (six cases);
- failure to meet the years of service requirement (one case);
- failure to file claim within the statute of limitations (one case); and
- cancer was not a covered cancer under the presumption (two cases).

Thirty-one firefighters whose cancer claims were denied by their employers' insurers chose not to dispute the denial at a VWC hearing, so there was no judicial opinion to evaluate. Firefighters may choose not to dispute a workers' compensation denial from their employer or insurer because the hearing process is lengthy, expensive, and requirements are difficult to meet, according to interviews with firefighter stakeholder groups and firefighter survey responses. Firefighters may also be unaware of their right to dispute an insurer's denial, as discussed in Chapter 3. Without a written record for these claims, JLARC staff were unable to identify which requirements these workers did not meet (as determined by employers and insurers).

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**Virginia's cancer presumption covers seven types of cancer:** pancreatic, prostate, rectal, throat, ovarian, breast cancer, and leukemia. Legislation in 2019—which must be re-enacted in 2020—amended the statute to include colon, testicular, and brain cancer. Public safety workers who are diagnosed with cancers not listed in statute are ineligible for the presumption.

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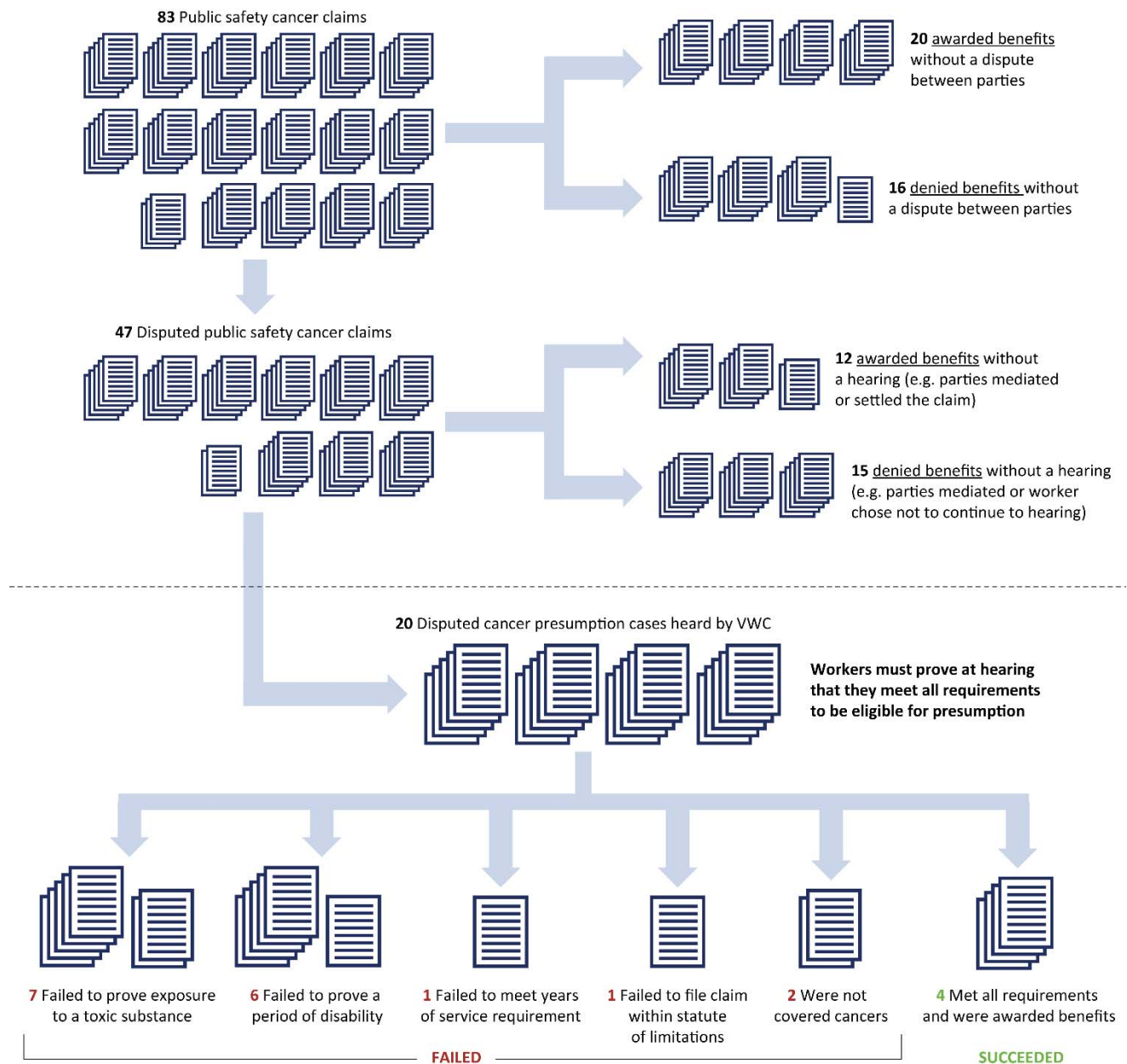
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If a deputy commissioner finds that one requirement of the presumption is not met, **he or she may not comment on whether a separate requirement was met.** For example, a deputy commissioner can choose not to rule whether the toxic exposure requirement was fulfilled if the worker failed to prove a period of disability. Therefore, the actual number of workers that failed to meet each requirement may be understated.

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FIGURE 5-1

Only about a quarter of public safety workers' cancer claims had to be resolved by a VWC hearing, and only four of those claims were awarded benefits (2009 to 2018)



SOURCE: JLARC review of VWC claims data and judicial opinions issued by VWC deputy commissioners and commissioners, 2009–2018.  
 NOTE: The number of disputed cases that met and failed to meet requirements do not sum exactly to 20 because one case failed to meet two requirements. One case that failed to meet all requirements during the hearing was awarded a settlement after the judicial opinion was issued.

## The current toxic exposure requirement for cancer presumption claims creates an unreasonable burden for firefighters

Virginia's cancer presumption statute covers firefighters who have had "contact with a toxic substance encountered in the line of duty." The law defines a toxic substance as a carcinogen defined by the International Agency for Research on Cancer (IARC) that causes, or is suspected to cause, one of the covered cancers. The Virginia Court of Appeals has interpreted the statute as requiring a worker to prove (1) exposure to a carcinogen and (2) that the carcinogen causes or is suspected to cause the worker's *particular type of cancer* (*Whiting v. City of Charlottesville*, 2015).

In practice, the toxic exposure requirement is hindering some firefighters' ability to claim the presumption. Of the 16 cancer cases heard by VWC in which the worker did not meet all requirements to establish the presumption, workers failed to meet the toxic exposure requirement in at least seven. In three of those seven cases, the worker proved exposure to *a* carcinogen, but not a carcinogen that causes *his or her particular type of cancer* (sidebar).

### Proving exposure to specific carcinogens is difficult and appears to be counter to purpose of the presumption

The toxic exposure requirement appears especially difficult to meet when a worker's particular cancer is associated with carcinogens that are not easily identified or documented at a fire scene. For example, few firefighters have been able to successfully prove exposure to a carcinogen when filing a claim for prostate cancer, even though it is more strongly linked to firefighting than any other cancer currently covered under statute or proposed to be added in 2019, according to Johns Hopkins University (JHU) epidemiologists. (See Chapter 4 for additional information.) Prostate cancer is known or suspected to be caused by a variety of carcinogenic agents, including arsenic and cadmium, which can be difficult to identify and document at a fire, but were identified by IARC as substances detected in fires. Among judicial opinions reviewed by JLARC staff, only one out of seven (14 percent) workers with a diagnosis of prostate cancer was able to meet the toxic exposure requirement.

According to JHU epidemiologists, it is unreasonable to require firefighters to document exposure to carcinogens that cause their particular cancer, because doing so is difficult with existing technology and is cost prohibitive. JHU staff indicate that collecting both external samples of carcinogens in the environment and internal measurements of carcinogens absorbed into the body provides the most accurate and rigorous assessment of exposure. Doing so would require collecting and testing multiple samples per firefighter, per exposure, and researchers in the field currently spend approximately \$100 to \$300 per sample to collect and test skin swabs or personal air filters for carcinogens after firefighters exit a fire scene. Firefighters in Virginia generally have access only to equipment that can measure their exposure to a limited number of compounds present at a fire scene, such as the level of oxygen, carbon monoxide, cyanide, and sulfide, according to staff of the Virginia Department of Fire Programs

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IARC publishes a list of **carcinogens by cancer type** that outlines which carcinogens are associated with which cancers. The IARC list is commonly used by firefighters when attempting to demonstrate that a carcinogen causes or is suspected to cause their type of cancer. See Table 4-2 in Chapter 4 for the list.

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**Cadmium** is a soft metal used in certain batteries, solar panels, and televisions. **Arsenic** is found in insecticides and can be used to make glass or preserve wood.

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*"I should not have to indicate the specific date, incident, and/or agent which generates the cancer... We do not stop to develop an inventory of the chemicals present [at a fire scene] and compare with a list of known carcinogens."*

– Firefighter

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and interviews with firefighter stakeholder groups. Firefighters are not equipped with technology to measure their exposure to the carcinogens identified by IARC as having been identified in fires (see Table 4-2 in Chapter 4). In a JLARC survey of public safety workers, 15 of 26 (58 percent) firefighters who filed a claim for a cancer diagnosis indicated that obtaining documentation and evidence to support their claim was one of the biggest challenges they experienced when seeking benefits.

The toxic exposure requirement, as is currently interpreted, appears unnecessary and counter to the purpose of the presumption. Scientific research has shown that all types of fires release toxic and carcinogenic substances and that firefighters are exposed to carcinogens, even when wearing protective gear (Chapter 4). Requiring a firefighter to prove they were exposed to a specific carcinogen that causes his or her type of cancer does not align with the intent of the presumption, which is to relieve firefighters of the need to prove that their occupation caused the disease. Additionally, the tools required to identify many carcinogens at fire scenes are unavailable to fire departments.

### ***States typically require firefighters to demonstrate some form of exposure to toxins***

While Virginia's current toxic exposure requirement places an unreasonable burden on firefighters, it is not unusual for states to require firefighters and other public safety workers to demonstrate *some* type of exposure to be eligible for cancer presumptions. JLARC staff identified 11 other states that require in statute that firefighters prove exposure to radiation or a known or suspected carcinogen. An additional eight states instead require that the type of cancer be one caused by heat, smoke, radiation, or a known or suspected carcinogen.

Given that the current requirement presents both logical and logistical challenges, the General Assembly should consider amending the toxic exposure requirement outlined in § 65.2-402.C of the Code of Virginia to make it less burdensome for firefighters to meet. To do this, the General Assembly should *add* conditions under which a public safety worker can meet the exposure requirement without documenting their exposure to specific carcinogens. For example, Montana, which added a firefighter cancer presumption in April 2019, requires that the cancer become manifest after the firefighter was “engaged in firefighting activities for an employer” and defines “firefighting activities” as

actions required of a firefighter that expose the firefighter to heat or inhalation or physical exposure to chemical fumes, smoke, particles, or other toxic gases arising directly out of employment as a firefighter.

A standard that requires firefighters to show that they were exposed to conditions that included carcinogenic hazards should be added to, rather than replace entirely, Virginia's existing toxic exposure requirement. Preserving the existing requirement is useful because some public safety workers who are also covered by the presumption, such as hazardous materials officers or State Police commercial vehicle enforcement officers, are not likely to be exposed to the same conditions as firefighters. Individuals in

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Among 12 claimant attorneys—those who represent workers—surveyed by JLARC who indicated they had worked on cancer presumption cases, **eight (67 percent) found the toxic exposure requirement to be unreasonable.** Two found the requirement to be reasonable and two had no opinion.

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these occupations are also more likely than firefighters to be able to identify and document exposure to specific substances, and therefore should be more readily able to meet the existing toxic exposure requirement.

### RECOMMENDATION 20

The General Assembly may wish to consider amending § 65.2-402.C of the Code of Virginia to provide that a firefighter may meet the toxic exposure requirement either by demonstrating (i) exposure to a toxic substance, as is currently required, or (ii) participation in responses to fire scenes, either during the fire or afterwards as part of clean-up or investigation.

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### **Application of the disability requirement is inconsistent and prevents some firefighters from benefiting from cancer presumption**

Virginia's cancer presumption statute requires workers to demonstrate that the cancer resulted in a "total or partial disability" for it to be presumed to have been caused by their work. Of the 16 cancer cases reviewed by JLARC staff in which the workers failed to meet presumption requirements, workers failed to meet the disability requirement in six. (Virginia's disease presumptions for cardiovascular disease, respiratory disease, and infectious disease also include a disability requirement.)

VWC commissioners and deputy commissioners have been inconsistent in their application of the disability requirement in cancer cases. They cite a lack of clarity in both statute and case law on what evidence firefighters need to show the disease resulted in a total or partial disability. In some cases, firefighters failed to meet the disability requirement (and were therefore not eligible for the presumption) simply because they did not request wage replacement benefits. For example, JLARC's review of judicial opinions identified four cancer presumption cases that cite a 1985 case where the Commission found that "a claimant is not entitled to the presumption where the only award sought is for medical benefits." In other cases reviewed by JLARC staff, deputy commissioners have allowed workers to meet the disability requirement through other types of evidence, such as medical evidence, when the worker is seeking only medical benefits.

Whether firefighters experience wage loss because of their disease is more relevant to whether firefighters are entitled to receive wage replacement benefits and less relevant to whether their work caused the disease. However, as currently interpreted by at least some deputy commissioners, if firefighters do not experience wage loss as a result of their illness, the cancer is not presumed to have been caused by their work. Such an interpretation lacks a logical basis and creates an unnecessary impediment to benefiting from the presumption.

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**Disability requirements are common in other states.** As of April 2019, nearly two-thirds of states had language in their presumptive cancer statutes that requires the claimant to demonstrate incapacity or disability to establish the presumption.

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*"Review panel determined that since I didn't miss work while beginning treatment for a life-time ailment, [I was not owed benefits]."*

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**– Firefighter**

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Because all of Virginia's disease presumptions in VA Code § 65.2-402 include a disability requirement, **inconsistent definitions of "disability" impact all presumption cases**, not just cancer claims.

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“Disability should have no impact on whether or not a condition exists and is related to the employment. The standard is completely arbitrary and unrelated.”

– Claimant attorney

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VWC commissioners and deputy commissioners acknowledge that the case law is currently unclear on what is required to prove “total or partial disability,” and the requirement is barring at least some firefighters from meeting the requirements of the presumption if they are only seeking medical benefits. Requiring a period of wage loss to prove a worker's occupation caused his or her disease is inconsistent with how statute treats other types of workers' compensation claims that are seeking only medical benefits. In cases not involving disease presumptions, Virginia workers seeking only medical benefits (i.e. no wage replacement benefits) for their work-related injuries or diseases are not required to prove a period of wage loss.

Because a worker's wage loss, or lack thereof, is unrelated to whether his or her disease was caused by employment, and because medical evidence should be sufficient evidence to prove a total or partial disability, the General Assembly should clarify that “total or partial disability,” for the purposes of the presumptions, may be demonstrated through wage loss, lost work time, *or* medical evidence. As part of this clarification, the General Assembly should also clarify that workers seeking only medical benefits may meet the disability requirement through medical evidence alone.

#### RECOMMENDATION 21

The General Assembly may wish to consider amending § 65.2-402 of the Code of Virginia to clarify that, for the purposes of establishing the presumptions, (i) a total or partial disability may be demonstrated through wage loss, lost work time, or medical evidence and that (ii) workers seeking only medical benefits may demonstrate a total or partial disability solely through medical evidence.

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

Virginia's cancer presumption statute requires firefighters to continuously serve 12 or more years in the occupation to establish the presumption. One case among the judicial opinions reviewed by JLARC staff was denied benefits because the worker did not meet the years of service requirement. Stakeholders indicate there are more firefighters who were denied benefits by their employer or insurer because of the service requirement. These workers did not request a hearing, so there was no judicial determination for staff to review regarding their eligibility.

While these denials align with the statutory requirement, the basis for Virginia's 12-year service requirement is unclear and does not align with research on cancer among firefighters. According to JHU staff, there is some scientific evidence that exposure durations shorter than 12 years can lead to increased cancer risk. Some cancer studies reviewed by JHU staff included firefighters with less than one year of service and reported an increased risk for one or more types of cancer.

Virginia's 12-year requirement is the longest among all states that have the same years of service requirement for all cancer presumptions. Thirty-two states, including Virginia, require workers to work in the occupation for a specified number of years to be eligible for cancer presumptions. Three states (Idaho, New Mexico, and Montana) have varying requirements ranging from four to 15 years of service depending on the type of cancer claimed. The remaining 29 states have the same service requirement for all cancers, and among those, Virginia's 12-year requirement is the highest. Other states' requirements range from one year to 10 years, with a five-year requirement being the most common.

Current research literature also does not support the statute's requirement that the firefighters' exposure be *continuous*, rather than cumulative. Research demonstrates that increased exposure is associated with an increased cancer risk, and the exposure required to contract cancer will depend on the duration, intensity, and type of exposure. Additionally, presumption statutes in only three other states require continuous service.

Without scientific evidence to inform a reasonable years of service requirement, selecting a requirement is ultimately a policy decision, which could be informed by other states. The General Assembly could reduce the years of service requirement from 12 years given the lack of evidence supporting the rationale for this time period. It could be reduced to five years to align Virginia's policy with that of other states. The General Assembly could also allow firefighters with cumulative rather than continuous years of service to be eligible for the presumption.

#### RECOMMENDATION 22

The General Assembly may wish to consider amending § 65.2-402.C of the Code of Virginia to reduce the years of service requirement from 12 years.

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#### RECOMMENDATION 23

The General Assembly may wish to consider amending § 65.2-402.C of the Code of Virginia to remove the word "continuous" from the years of service requirement.

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## Employers are able to rebut Virginia's cardiovascular disease presumption

In Virginia, a worker who meets all the requirements of a disease presumption is entitled to the presumption unless the employer can rebut it by showing "both that (1) the claimant's disease was not caused by his employment and (2) there was a non-work-related cause of the disease," (*Bass v. City of Richmond Police Department*, 1999). The employer must demonstrate both by a preponderance of evidence (sidebar). This rebuttal standard applies to the cancer, cardiovascular disease, respiratory disease, and infectious disease presumptions. Because few respiratory and infectious disease claims

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The burden of proof is met under the **preponderance of evidence** standard when the commissioner or deputy commissioner is convinced there is a greater than 50 percent chance the evidence is true.

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were filed, and because few cancer claims met all requirements to establish the presumption, JLARC staff focused on the cardiovascular disease presumption when assessing whether Virginia's requirements to rebut the presumptions are reasonable.

Case law imposes limitations on what evidence may be used by employers to rebut presumptions. For example, identifying risk factors for a condition that is unrelated to employment—such as family history of the disease—is not on its own sufficient evidence to rebut the presumption by demonstrating a non-work-related cause (*City of Norfolk v. Lillard*, 1992). In addition, employers are precluded from presenting evidence that there is insufficient research linking the disease and occupation as a means to rebut the presumption.

### **Rebutting Virginia's cardiovascular disease presumption is more difficult than in other states, but not impossible**

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Among 29 surveyed defense attorneys—those representing employers and insurers—who indicated they had worked on cardiovascular disease presumption cases, **18 (62 percent) found the requirements to rebut the presumption unreasonable.**

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States vary in their rebuttal requirements for cardiovascular disease presumptions, but other states appear to have similarly difficult standards for employers to meet. For example, to rebut disease presumptions in Louisiana, the defense (employers or insurers) must rule out employment as a cause of the disease. In Tennessee, the defense must present “affirmative evidence” that the work did not cause the disease (*Coffey v. City of Knoxville*, 1993). Most other states also do not allow employers to challenge the underlying premise of the presumption. For example, a Colorado court ruled an “employer gains nothing by challenging the wisdom or the evidentiary foundation of the legislature’s decision,” (*City of Littleton v. Indus. Claim Appeals Office (Christ)*, 2012).

Virginia's rebuttal requirements, however, appear to be more difficult to meet than those of some states. For example, the Colorado Supreme Court has ruled an employer needs only to establish by a preponderance of evidence that employment did not cause the worker's cancer. A specific alternative cause is not required. According to case law in Massachusetts and Texas, employers can rebut the presumption with evidence that risk factors outside of work caused the disease. New Mexico's statutory language clarifies the evidence required to rebut the presumption, stating that the presumption may be rebutted “by a preponderance of the evidence... showing that the firefighter engaged in conduct or activities outside of employment that posed a significant risk of contracting or developing a described disease.”

“If you meet the threshold requirements for application of the presumption, by statute, the burden of proof shifts to the other side. It's not supposed to be easy to rebut it.”

— VWC deputy commissioner

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Based on a review of VWC judicial opinions, it appears to be difficult but not impossible for employers in Virginia to rebut cardiovascular disease claims, which is consistent with the intent of the presumption. JLARC staff reviewed 69 judicial opinions issued from 2009 to 2018 in which public safety workers attempted to claim eligibility for the cardiovascular disease presumption. In 44 cases (64 percent), the worker successfully met all requirements to claim the presumption. Of those 44 cases:

- the worker was awarded benefits in 34 cases (77 percent), and
- the employer was able to successfully rebut the presumption in 10 cases (23 percent).



Opinions ruling that the employer had rebutted the presumption appeared to have a reasonable basis. For example, JLARC staff reviewed a judicial opinion regarding a sheriff who was diagnosed with cardiovascular disease in 2012. He met all the requirements for the presumption, but his employer was able to rebut the presumption because he had a history of smoking, high cholesterol, high-blood pressure, and excessive weight. The sheriff's father also had a history of heart disease. Two doctors argued that the sheriff's cardiovascular disease was more likely to be caused by these contributing factors rather than his employment. His treating physician indicated the worker's condition was not related to his employment. In another case reviewed by JLARC staff, a deputy sheriff was denied benefits for cardiovascular disease after his doctors asserted the condition was more likely to be hereditary and related to a history of sleep apnea than his work. One physician indicated specifically that there was no direct causal connection between the claimant's employment and disease.

### **Adjustments to cardiovascular disease presumption requirements would reduce risk of employers paying for non-work-related diseases**

Attorneys indicate that employers' ability to rebut the presumption appears to largely rest on testimony of medical providers, and medical providers reportedly tend to *not* rule out employment as the cause of a disease. Doctors may not be willing to rule out employment as a cause of a worker's condition, because the actual cause of the worker's cardiovascular disease is often unknown or could be attributed to several factors. For example, in one 2018 opinion, a retired firefighter was awarded benefits after his employer failed to rebut the presumption. The firefighter had a history of smoking and "moderate-to-heavy" drinking, but the treating physician could not rule out occupational stress as a contributing factor so the presumption was not rebutted. When a provider does not rule out employment as the cause of a worker's disease, the employer is not able to rebut the claim. The implication of this provider tendency is that at least some workers could receive benefits for conditions *not* caused by their employment, increasing employers' costs.

Although there will always be some degree of uncertainty as to the cause of any individual worker's cardiovascular disease, one statutory change could better align Virginia's cardiovascular disease presumption requirements with existing research and help manage employers' and insurers' costs. Some stakeholders have asserted that employers and insurers could be at risk of paying for unjustified cardiovascular claims because Virginia's cardiovascular disease presumption does not have a length of service requirement. Therefore, public safety officers can claim the presumption early in their careers, before sufficient time has passed for the nature of the work to affect cardiovascular health (e.g. claims have reportedly been filed while public safety officers are still in the training academy). According to JHU staff, the best available epidemiological research indicates that the risk of developing a cardiovascular disease increases

*“There must be a doctor who explicitly states that [the disease] was caused by something outside of the work, which is hard to find.”*

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**– Defense attorney**

with longer service. Chapter 4 of this report includes an option for the General Assembly to consider adding a years of service requirement to the cardiovascular disease presumption statute (Option 4).

## **Some states have replaced presumptions, but Virginia should first try to improve current system**

Virginia firefighters and insurers both appear to have some degree of frustration with Virginia's disease presumptions and the process required to meet their requirements or rebut them. Frustrations with presumptions include the adversarial process to pursue workers' compensation benefits, delays in receiving benefits while the case is being adjudicated with VWC, and insurers' uncertainty about the ultimate costs of claims. However, these challenges cannot be fully avoided without adversely affecting the rights of the employer or worker. For example, VWC must give employers adequate time to build their case and collect evidence to rebut a presumption, which can take many months. Additionally, the high, unpredictable costs of at least some claims cannot be avoided as long as the employer is required to pay all "reasonable, necessary, and authorized medical treatment" causally related to the work-related disease.

Since 2017, several states have created benefit programs for firefighters as an alternative to pursuing presumptions under the workers' compensation system. These programs, which have included benefits for firefighters diagnosed with cancer and/or heart disease, appear to offer both advantages and disadvantages compared to the workers' compensation system model. For example, alternative benefit programs involve a less adversarial process, more timely benefits for firefighters, and more predictable costs for employers. A disadvantage to this benefit model for firefighters is the requirement that they assume the financial responsibility of the lifetime medical costs of treating their disease.

Creating such a program in Virginia does not appear necessary at this time. Implementing this report's recommendations appears to be a more prudent approach to addressing shortcomings in the current system and should be considered before pursuing such a wholesale change.

## Several states have created alternative benefit programs for firefighters to address problems with presumptions

Six states have created alternative benefit programs for firefighters who are diagnosed with certain diseases as an alternative to requiring firefighters to pursue compensation through the workers' compensation system (sidebar). Rather than providing wage loss and medical benefits through the workers' compensation system, these programs provide capped cash payments to firefighters soon after they are diagnosed. These cash payments can generally be used at the firefighters' discretion, including for out-of-pocket medical expenses related to the cancer or to help replace any income lost as a result of the disability. Under alternative benefit programs, the costs of medical treatment for a firefighter's disease are shifted from the employer's workers' compensation insurance to the employer's medical insurance.

The overall goals of the alternative benefit programs across states appear to be similar. All programs eliminate the need for eligible firefighters to pursue their disease claims through the workers' compensation system and reduce uncertainty among employers (and their insurers) about the costs they are required to pay for claims that are found to be compensable. These programs also remove the adversarial nature of the workers' compensation process because the eligibility criteria are clearly articulated, and benefits are paid to eligible employees without the need to demonstrate the disease was caused by work.

States' alternative benefit programs have several key differences, including benefits and eligibility requirements, employer costs, structure, and whether it is optional or mandatory for employers to participate. (Appendix D provides examples of key differences across alternative benefit programs of the three states that were the first to create them: Colorado, Georgia, and New York.)

Although an alternative benefit program does not appear to be necessary or prudent at this time, if Virginia were to pursue a benefit program as an alternative to the presumptions and workers' compensation system, the state would need to follow a deliberative process, inclusive of all affected stakeholders. According to a national subject-matter expert on benefit programs who has been involved in the creation of five of the six state programs, inclusion of all affected stakeholders in designing and negotiating the details of the program is critical. Both Colorado and Georgia included stakeholder feedback during the development of their programs. Stakeholders in Colorado met for 18 months to decide on program details, including benefit levels, administration, and eligibility requirements. In Virginia, other important considerations before creating an alternative benefit program would need to include how the new program would be (1) funded, (2) administered, and (3) coordinated with the Line of Duty Act program, which uses Virginia's presumptions as a basis for eligibility and provides additional benefits to public safety workers, and any other disability benefits to which workers may be entitled.

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Since the creation of Colorado's and Georgia's cancer benefit programs in 2017, four other states (New York, Florida, Mississippi, and Alabama) have created similar programs.

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### **Alternative benefit program could offer some advantages for firefighters and employers**

An alternative benefit program might provide some advantages over reliance on disease presumptions in the workers' compensation system. Key advantages include relatively timely benefit payments to firefighters, greater cost predictability for employers, and avoidance of the adversarial process, including the need to establish or rebut presumptions.

#### ***Timeliness of benefits***

One of the advantages of alternative benefit programs is the timeliness with which individuals receive compensation after they are diagnosed with a disease. In Georgia, for example, claims must be processed by the program administrator within 30 days of receiving documentation to request benefits; in Colorado this waiting period is typically 10 days. In both states, at least some portion of awards are paid immediately following this review period. In contrast, employers in Virginia are not required to pay workers' compensation benefits until compensability is determined, which can take more than a year in some cases. Recommendations in Chapter 2 of this report would improve timeliness within the current system.

#### ***Limitation of total costs for each claim***

For employers, the primary advantages are (1) greater predictability of the costs for each claim and (2) limited total potential liability. Within workers' compensation, the employer is responsible for the medical costs associated with treating the disease—with no limit on the total lifetime amount they may need to pay. In contrast, alternative benefit programs limit the benefits an eligible firefighter can receive.

#### ***Avoidance of adversarial process and need to establish or rebut presumptions***

For both the firefighter and employer, an advantage is the avoidance of the adversarial process inherent in disputed workers' compensation claims. Disputed workers' compensation claims can involve reviews of firefighters' personal lives as employers seek evidence of a non-work-related cause of their disease (one part of the rebuttal requirements for Virginia's presumptions). In contrast, in states with alternative benefit programs, as long as a firefighter meets the eligibility requirements for the benefit program, he or she will receive benefits.

### **Alternative benefit program presents some potential disadvantages for firefighters and employers**

There are some potential disadvantages for both firefighters and employers when comparing the alternative benefit programs with reliance on presumptions under workers' compensation. A disadvantage for firefighters is the shifting of the financial risk of paying the total medical costs to treat a disease from the employer to the firefighter and his or her health insurance (which is likely employer sponsored, as is worker's

compensation insurance). A disadvantage for employers is requiring the employer to pay benefits for *all* claims, as long as firefighters meet the program's eligibility requirements.

***Firefighters assume risk of insufficient funds to pay for medical treatment***

Alternative benefit programs' primary disadvantage for firefighters is that they assume the financial risk of having insufficient funds to pay for the total costs of treating their disease. These costs may be limited to out-of-pocket expenses (e.g., co-pays and deductibles) if the firefighter can remain employed and on his or her employer-sponsored health insurance. These costs would vary for firefighters but could be especially expensive for firefighters who cannot return to work or afford medical insurance.

***Employers cannot rebut claims for benefits if eligibility requirements are met***

For employers, the main disadvantage of alternative benefit programs is that they are required to pay a certain amount for all (or almost all) instances when firefighters are diagnosed with a disease. Under alternative benefit programs, employers and their insurers largely give up their ability to investigate and rebut claims. Certain evidence employers currently use in Virginia to rebut presumptions does not affect claim acceptance in other states. For example, while some programs allow insurers to deny a claim or reduce benefits based on physicals or smoking status, no program allows insurers to investigate employees' family history or activities outside of work. As a result, claims are nearly universally approved. In Colorado, for example, 96 percent of claims have been accepted under the trust program. If Virginia were to use a similar design, insurers would likely pay claims which would not have been compensable in the workers' compensation system.

**Certain concerns about Virginia's disease presumption benefits could be addressed without creating a new benefit program**

Although there is frustration among firefighters about Virginia's workers' compensation system, switching to an alternative benefit program may not be necessary or prudent at this time. Many of the key concerns with the current system could be addressed by implementing the recommendations and options presented in this report.

***Addressing concerns through recommendations and options in this report***

The recommendations and options presented in this report, if implemented, would address key concerns voiced by firefighters, including unreasonably high evidentiary requirements and delays in receiving benefits. For example, modifying the toxic exposure requirement for the cancer presumption would address a substantial frustration expressed by firefighters about having to identify the specific carcinogen that caused their type of cancer (Recommendation 20). Additionally, recommendations to improve

the timeliness with which insurers (Recommendations 7 and 8) and the VWC (Recommendations 1, 2, and 3) are making decisions on the compensability of their claims should also address some concerns about the timeliness of benefits.

The report's findings also identify opportunities to mitigate employers' concerns about the total costs of presumption claims. More attention by VWC on the extent to which Virginia's medical fee schedule rates exceed Medicare rates, and how these rates compare to those in other states, would provide the General Assembly with information to determine whether Virginia's medical fee schedule should be modified to more closely reflect the actual costs of providing medical services (Recommendation 17). A length of service requirement for public safety workers to benefit from the cardiovascular disease presumption would align this policy with the best available scientific research and would likely reduce employers' overall costs for presumption claims (Option 4).

Additionally, employers would benefit from the creation of a process for reviewing legislation proposing to create or modify disease presumptions (Recommendation 19). Such a process, although beneficial to both workers and employers, would ensure that decisions on whether to add presumptions—and require employers to pay the costs associated with this decision—are informed by the best available epidemiological research and do not require employers to pay for diseases where there is no plausible or scientific evidence of a causal relationship.

### ***Other approaches Virginia could consider***

Virginia could consider other approaches to ease firefighters' and employers' frustrations with presumptions in Virginia's workers' compensation system not already addressed by the recommendations and options above. These frustrations include firefighters' financial instability while a claim is pending, unpredictable high costs for insurers, and lack of funding for preventive measures. To mitigate these concerns, the General Assembly could

- establish a fund to provide a limited amount of financial relief for a firefighter's out-of-pocket cancer treatment expenses while his or her case is pending at VWC;
- amend § 65.2-308 of the Code of Virginia to add job protections specifically for employees who have filed a claim for benefits under one of Virginia's disease presumptions;
- establish a fund to provide a limited amount of financial relief to insurers on behalf of localities (or localities directly, if self-insured) when the total costs of individual presumption claims exceed a certain threshold (e.g., \$500,000); and/or
- increase Fire Program Funds (§ 38.2-401 of the Code of Virginia) provided to localities and designating these additional funds for equipment and training to prevent or mitigate firefighter exposure to carcinogens.

The rationale for these potential actions is further explained in Appendix E, but each would help address challenges identified by stakeholders during the course of the study. Important details, such as the feasibility, costs, funding, and administration of each of these other approaches would need to be considered before they are implemented. For example, if a new state fund is created to offset firefighters' out-of-pocket medical expenses, the General Assembly would need to identify a funding source, select an agency to administer the fund, determine appropriate benefit levels, and clarify how the fund would be repaid through workers' compensation benefits. In addition to the purpose of each action, implementation considerations are described in Appendix E.





# 6 Preventing Fraudulent or Inaccurate Workers' Compensation Benefits

**SUMMARY** The Department of Human Resource Management (DHRM), which is responsible for administering Virginia's workers' compensation self-insurance program for state employees, takes steps to mitigate against the risk of fraud and abuse among workers and medical providers. DHRM uses nurse case managers and surveillance programs to ensure workers are being truthful about their injuries and medical providers are not providing unnecessary services. The Virginia Workers' Compensation Commission (VWC), which administers the Uninsured Employers' Fund (UEF), conducts similar surveillance activities to minimize unnecessary payment from the fund, and also takes reasonable steps to identify, educate, and penalize employers who are not carrying workers' compensation insurance in accordance with state law. Additionally, DHRM and the Virginia Retirement System (VRS) effectively coordinate benefits for state employees and public safety workers who may be eligible for multiple benefit programs after a work-related injury or disease. However, calculating accurate wage replacement benefits for these employees is difficult for some agencies, and DHRM and VRS should work with the Department of Accounts, which oversees payroll functions, to identify how more training could be provided to agencies.

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The study resolution directed JLARC staff to review whether appropriate measures are in place to minimize the potential for fraud and abuse in Virginia's workers' compensation system, as well as whether workers' compensation benefits are appropriately coordinated with other benefits available to workers. Most workers' compensation benefits in Virginia are paid through private insurers who have their own fraud prevention programs, and this study did not examine the effectiveness of these private programs. However, the state is responsible for administering two pools of funds for workers' compensation benefits: (1) the state employee workers' compensation program, administered by the Virginia Department of Human Resource Management (DHRM), and (2) the Uninsured Employers' Fund (UEF), administered by the Virginia Workers' Compensation Commission (VWC). As the administrators of these funds, both DHRM and VWC are responsible for implementing appropriate measures to minimize the risk of fraud in these programs from both injured workers and medical providers. This study focuses on the effectiveness of these efforts.

Throughout the course of research, JLARC staff heard no anecdotal reports of fraud, and only one instance of fraud was identified among DHRM's claims over the past decade. This may be in part because several protections exist to mitigate the risk of fraud in Virginia's workers' compensation system. Employers themselves have a key role in preventing fraud. For example, an employer can deny a claim it suspects is illegitimate and require the worker to prove his or her case through a hearing at VWC

to receive benefits. Additionally, employers may suspend workers' compensation benefits and request a hearing at VWC if the employer or insurer believes the worker should no longer be receiving payments. For example, the employer may believe the worker is medically able to return to work.

VWC's insurance department is also tasked with ensuring employers are complying with state laws that require them to carry workers' compensation insurance. Compliance with this law reduces the number of claims that must be paid through state UEF funds. Part of VWC's compliance effort is to identify employers that should be carrying insurance but are not.

In general, coordination of state workers' compensation benefits is handled by DHRM and the Virginia Retirement System (VRS). DHRM and VRS are required by statute to coordinate workers' compensation benefits with Virginia Sickness and Disability Program benefits.

## **DHRM has controls to mitigate fraud in the state employee workers' compensation program**

The Department of Human Resource Management (DHRM), with the assistance of its contractor, MC Innovations (MCI), administers Virginia's self-insurance program for workers' compensation coverage for state employees. Therefore, it is DHRM's responsibility to implement measures to minimize the risk of fraud and abuse within the state employee workers' compensation program.

Fraud or abuse in the system can occur from both the injured worker as well as medical providers. For example, an injured worker whose claim is initially deemed compensable may misrepresent his or her condition to continue receiving benefits, rather than return to work. Alternatively, a medical provider may provide, and bill DHRM for, more medical services than necessary to treat a patient's condition.

## **DHRM has measures in place to protect against worker fraud and abuse**

DHRM takes steps to ensure that workplace injuries and diseases are legitimate, both initially and on an ongoing basis. State employees report work-related injuries and diseases to their agency management, who then report them to DHRM. Only certain DHRM-authorized employees within each agency have authority to report an injury or disease diagnosis to DHRM. Claims with more than seven days of lost time are investigated by a benefit coordinator and require supervisory approval at DHRM for a claim to be accepted or denied. For example, if a claim is submitted for a workplace injury in which there were no witnesses, the benefit coordinator will collect additional information from the agency to determine whether the worker's account of the accident is credible. If DHRM determines the claim is fraudulent or not compensable under the Workers' Compensation Act, it can deny the claim. To receive benefits after this denial, the worker would need to appeal to VWC and present evidence to support his or her claim.

For compensable claims in which the worker is totally disabled from work or is on modified duty for more than 30 days, DHRM assigns a nurse case manager to monitor the condition of the injured worker. A surveillance vendor is also used to confirm ongoing disability, as needed (sidebar). Reports of suspected fraud received from agencies, outside parties, and the Office of the Inspector General are uncommon, but any reports are investigated fully by DHRM and MCI through the use of surveillance, social media checks, and employment checks through the Virginia Employment Commission. If DHRM suspects that a worker is misrepresenting his or her condition to continue receiving benefits rather than return to work, DHRM can request a hearing with VWC. As with an initial denial of benefits, it is then the responsibility of the worker to present his or her case to a deputy commissioner, who evaluates the merit of the claim and determines whether the worker is still entitled to benefits.

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**Surveillance vendors** use various tactics to investigate and confirm ongoing disability. For example, the vendor may search the injured worker's social media pages for evidence of medical improvement that has not been previously reported to DHRM.

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DHRM also operates a return-to-work program to mitigate abuse of workers' compensation benefits and to help and encourage injured workers to return to the workforce as they are able. Once workers are injured, they are monitored closely by a nurse case manager, not only to verify ongoing disability but to actively coordinate with the injured workers and the employing agencies to help facilitate their return to work. When successful, this helps reduce the wage replacement costs incurred by the state and reduce the agency's costs related to hiring and training temporary employees. Of those state employees who were medically released to go back to work, 99 percent returned to work in FY19. Since overall return-to-work rates have been high for the program, DHRM is also beginning to evaluate how quickly employees return to work to develop strategies for improving return-to-work timeliness.

### **DHRM has measures in place to protect against provider fraud**

DHRM also takes steps to ensure medical services are necessary to treat the worker's condition and are billed as provided. For example, DHRM uses a medical bill adjudication vendor who reviews bills for errors, including duplicate bills or unbundled services. Staff also have official disability guidelines related to expected medical treatment for certain types of injuries and can flag files that do not appear to meet those guidelines. Files can also be referred to a medical director on contract with MCI for review, and the director will contact the treating physician to discuss the treatment plan if any medical treatment seems out of the ordinary. Additionally, Virginia's new medical fee schedule caps the amounts providers can bill for services, which can help mitigate the risk of overbilling for medical services by providers.

### **VWC has measures to protect the UEF from fraud and unnecessary treatment costs**

VWC is responsible for administering the Uninsured Employers' Fund (UEF), which pays benefits to workers with a compensable injury or disease that occurred while their employers were not carrying workers' compensation insurance. The benefits paid by

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VWC staff also aim to reduce costs against the fund by attempting to **recover the cost of benefits paid by the UEF** from responsible employers. In FY18, UEF expenditures totaled over \$2.7 million, and \$289,000 (11 percent) was recovered from employers. VWC finance staff indicate it is difficult to recover costs from employers because businesses go bankrupt, cannot afford the costs of benefits, or refuse to pay.

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the UEF are paid for with taxes on premiums paid by employers to insurers for workers' compensation insurance, and UEF staff are obligated to minimize costs by mitigating the risk of fraud and abuse, similar to DHRM. For workers whose employers were not appropriately insured, the UEF functions as the insurer and is responsible for paying workers' compensation benefits, minimizing unnecessary costs, and submitting regular payment and claim status changes (sidebar). VWC has hired a third-party administrator to assist with administration of the UEF.

UEF staff, and staff of the third-party administrator, use similar approaches to those used by DHRM and private insurers to mitigate against fraud and abuse. For example, to minimize unnecessary treatment and ensure injured workers are healing as expected, UEF staff hire nurse case managers to attend doctors' visits and speak to medical providers regarding a patient's status and ability to work. To verify the status of workers' injuries or diseases, investigators also may conduct surveillance on workers who administrators suspect are not being truthful.

UEF can also use the dispute resolution services available through VWC's hearings and mediations to vet claims that administrators do not believe are compensable, both initially and after a claim has been accepted. UEF staff indicate they will investigate, request a hearing for, and defend against all instances where they believe a worker is not entitled to benefits.

## **VWC has a process to ensure compliance with workers' compensation insurance provisions**

To reduce the number of claims for which benefits must be paid by the UEF and to enforce compliance with state law, VWC is responsible for ensuring public and private employers carry workers' compensation insurance coverage, as required by the Virginia Workers' Compensation Act. VWC can issue a maximum penalty of \$250 per day, up to \$50,000, for non-compliance with state insurance requirements.

### **Few reported injuries are associated with uninsured employers, indicating effective processes at VWC to ensure compliance**

One way in which VWC staff may be notified that an employer is out of compliance with insurance provisions is through the claims process. In most cases of workplace injury, the *employer* (or the employer's insurer) is required to report the injury to VWC through a First Report of Injury (FROI). However, an injured worker whose employer was not carrying insurance at the time of the accident may still report his injury and file a claim with VWC directly. When this occurs, VWC's insurance department will conduct an investigation and may choose to refer the employer to the show-cause docket for a hearing. In a show-cause hearing, the employer has the opportunity to provide evidence to demonstrate why it is not required to carry insurance, or provide an explanation for why it is out of compliance.

The vast majority of injuries reported to VWC occur among employers who carry workers' compensation insurance. For example, from 2009 to 2018, only 2,038 injuries (0.15 percent) reported to VWC took place at an uninsured employer. Although it is likely there are some injuries where the employer is out of compliance and the injury is not reported, a low incidence of worker-reported injuries is one indicator that VWC's processes for identifying and penalizing noncompliant employers are effective.

### **VWC takes targeted measures to proactively identify noncompliant employers**

VWC has two key measures to identify employers who *should* be carrying workers' compensation, but are not: (1) automated reports from the National Council on Compensation Insurance (NCCI) on active insurance policies and lapses in coverage and (2) targeted, unannounced site visits and investigations to ensure employers are carrying workers' compensation insurance. VWC insurance staff have access to data from NCCI, the proof of insurance clearinghouse for Virginia's workers' compensation system, which allows VWC staff to verify which businesses have active insurance policies. Insurance carriers are required to report policy information to NCCI.

NCCI alerts VWC insurance staff of policy cancellations, and VWC uses this information to investigate employers who are potentially out of compliance with insurance requirements. When an employer has a lapse in coverage or policy cancellation lasting 45 days or longer, NCCI sends notice to VWC's insurance department. VWC insurance staff may then attempt to identify evidence of new coverage, contact the employer to inquire why they did not renew the insurance policy, subpoena records, or refer the employer to the show-cause docket. In 2018, over 56,000 NCCI notices of lapses in coverage among Virginia employers were processed; the insurance department contacted nearly 21,600 employers for more information, issued nearly 4,600 subpoenas, and referred over 1,000 employers to the show-cause docket.

VWC also conducts proactive, targeted, and unannounced investigations in an effort to identify noncompliant employers. The VWC insurance department employs five investigators who conduct targeted site visits (or "sweeps") of businesses through the state. Monthly sweeps focus on specific areas of the state or industries based on time of year or complaint information. For example, investigators focus on the Hampton Roads area during the summer months when seasonal businesses are more likely to be open. Sweeps can involve approaching businesses door-to-door or surveilling businesses that appear to have three or more employees but have no record of insurance, according to NCCI data.

### **VWC's process of educating and penalizing employers found to be out of compliance is reasonable**

When employers are found to be out of compliance, either through a worker's report of an injury or through the insurance department's proactive identification practices,

VWC takes several steps to educate employers and ensure they obtain appropriate insurance coverage. Twice a year, VWC attends employer conferences sponsored by the Virginia Employment Commission to inform employers of which businesses are required to carry workers' compensation insurance. The insurance department also takes an "education-first" approach and gives uninsured employers 30 days to comply with insurance provisions before referring the company to the show-cause docket.

Employers that do not comply are fined in accordance with a schedule matrix depending on (1) past instances of non-compliance, (2) payment history of past penalties, and (3) time spent out of compliance. A schedule matrix ensures that fines are issued consistently across employers, and that employers who continue to operate without insurance pay higher penalties. According to VWC staff, the majority of first-time offenders are issued a \$500 suspended fine. The employer is not required to pay the fine, but if the company is found to be out of compliance again, the employer is treated as a repeat offender. Repeat offenders who paid previous fines are penalized \$25 per day of noncompliance; repeat offenders who did not pay previous fines are penalized \$50 per day. Employers with a history of noncompliance who have been issued more severe penalties, such as cease and desist letters, are penalized \$125 per day.

Insurance department staff and the deputy commissioner responsible for the show-cause docket indicate there are a small number of employers who repeatedly fail to meet insurance requirements or pay issued fines. In those instances, VWC may send the case to a collections agency or to the Office of the Attorney General (OAG) for debt collections, or file a cease and desist order in an effort to shut down the employer's operations.

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State employees hired prior to January 1, 1999 who did not elect VSDP during an open enrollment period, as well as public safety officers who are covered under enhanced hazardous duty benefits, are not eligible for VSDP and may instead receive work-related disability retirement benefits.

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Other benefits may be available to injured workers in addition to workers' compensation, such as the Virginia Local Disability Program benefits, work-related death in service benefits, and group life insurance.

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## **Agencies appropriately coordinate benefits available to injured workers, but enhanced training is needed**

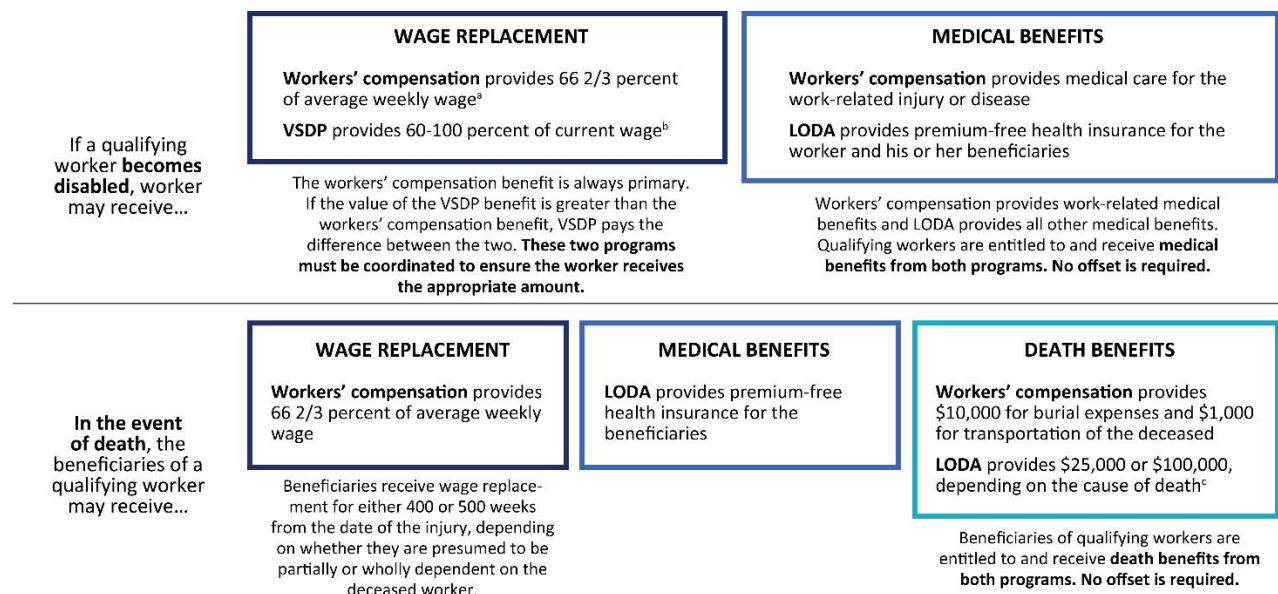
Some state and local employees are eligible for other benefit programs in addition to workers' compensation benefits, depending on their occupation and severity of the injury (Figure 6-1). Most state employees who have a work-related disability are eligible for wage replacement provided through the Virginia Sickness and Disability Program (VSDP) (sidebar). Individuals in certain occupations, such as firefighters or police officers (and/or their spouses and certain dependents), also may be eligible for Line of Duty Act (LODA) benefits. Both VSDP and LODA eligibility determinations are overseen by the Virginia Retirement System (VRS). Injured workers may also be eligible for other benefit programs, but availability varies depending on the employer, occupation, and length of disability (sidebar).

LODA benefits include a death benefit and premium-free health insurance for qualifying employees who become disabled or die in the line of duty. For example, a police officer with cardiovascular disease, who has been determined unable to continue working, may be entitled to premium-free health insurance under LODA in addition to

workers' compensation benefits. The cost of medical services related to the cardiovascular disease are paid through the workers' compensation medical award, but all other medical care would be covered by the LODA health insurance program. DHRM is responsible for administering both the state employee workers' compensation program and the LODA health benefits plan—allowing the agency to determine whether medical care should be paid through workers' compensation (i.e., if it is related to the work-related compensable injury or disease) or through the LODA program (i.e., if it is unrelated to the compensable injury or disease). Because DHRM is responsible for administering both programs, the potential for overlapping medical benefits is minimal.

FIGURE 6-1

**Workers and beneficiaries may be entitled to similar benefits from multiple programs depending on occupation and the severity of the injury**



SOURCE: JLARC staff interviews and review of documents from DHRM, VRS, and VWC.

NOTE: Other benefits may be available to injured workers (depending on the employer, occupation, and length of disability), such as the Virginia Local Disability Program benefits, disability retirement benefits, work-related death in service benefits, and group life insurance. <sup>a</sup> Qualifying workers receive workers' compensation wage replacement benefits for up to 500 weeks. Benefits are subject to statutory minimum and maximum compensation rates.

<sup>b</sup> VSDP benefit amounts vary by hire date, tenure of state employment, and the length of the short-term disability.

<sup>c</sup> Death benefits for LODA are set at \$25,000 for deaths attributed to one of the applicable presumptions and at \$100,000 for deaths as the direct and proximate result of the performance of a qualifying employee's duties.

VSDP provides wage replacement to most state employees through short-term and long-term disability coverage for total and partial disabilities. Once a worker's claim is deemed compensable under the Workers' Compensation Act, the worker is also eligible to receive work-related VSDP wage replacement, according to a schedule of benefits based on length of service. For example, workers who were hired before July 1,

2009 with more than five years of service are entitled to 100 percent wage replacement for up to 85 days.

It is important that these benefit programs are coordinated to ensure workers are being compensated appropriately. There are two primary areas of benefit overlap: (1) death benefits between workers' compensation and LODA and (2) work-related wage replacement benefits between workers' compensation and VSDP. Death benefits for LODA and workers' compensation are separate one-time lump-sum payments, both of which are payable to the families of the deceased employee, and, therefore, no offset is required. Wage replacement benefits for workers' compensation and VSDP, however, are not "stackable"—VSDP benefits must be offset by workers' compensation benefits.

### **Some overlap exists between LODA and workers' compensation benefits**

Death benefits may be paid by both LODA and workers' compensation, but minimal coordination is necessary because the programs have individual eligibility determination processes and are both payable to the beneficiaries of the deceased worker. DHRM determines compensability for workers' compensation benefits, and VRS has an independent process to determine eligibility for LODA. Because eligibility determinations for workers' compensation and LODA are made separately, it is possible for a worker to receive only one death benefit. However, if a qualifying employee dies of a work-related injury or disease, the beneficiary will typically receive \$10,000 in workers' compensation benefits for burial expenses and \$1,000 for transportation of the deceased individual in addition to the amount of the LODA death benefit, depending on the cause of death. Death benefits for LODA are set at \$25,000 for deaths attributed to one of the applicable presumptions and at \$100,000 for deaths as the direct and proximate result of the performance of a qualifying employee's duties.

Statute does not require that there be an offset made between these two programs when benefits are paid. Death benefits from both workers' compensation and LODA are payable to the beneficiaries of the qualifying employee.

### **Coordinating workers' compensation and VSDP benefits is complex, and many payments appear to be initially miscalculated**

VRS and DHRM take steps to coordinate VSDP and workers' compensation benefits to ensure injured workers are not being excessively compensated (Figure 6-2). Injured workers indicate whether their injury is work related when they file a claim for VSDP wage replacement benefits. VRS and DHRM share information about claims and report updates daily through a web portal.

After DHRM has made a compensability determination on the workers' compensation claim, VRS approves work-related VSDP benefits for the same timeframe. For injured workers who are on short-term disability, VRS then sends a report to the employing



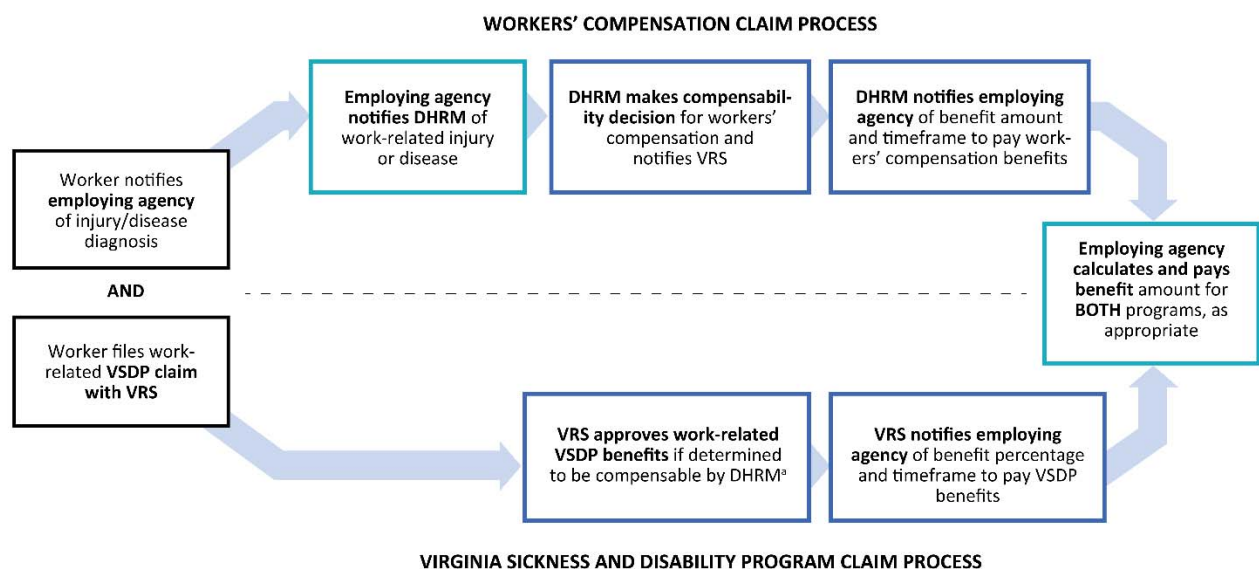
agency notifying them that short-term disability has been approved, the designated time period, and the corresponding wage replacement percentage. VSDP benefit amounts vary by hire date, tenure of state employment, and length of the short-term disability.

The employing agency is responsible for calculating and paying benefits for both programs to the injured worker through payroll, and DHRM reimburses the agency for workers' compensation benefits. If there is a miscalculation that results in an overpayment, it is most commonly recovered through withholding future benefits, according to VRS staff.

The workers' compensation program is always the primary payer when workers are eligible for both VSDP and workers' compensation benefits. Any benefits paid to workers through VSDP are offset by what is being paid through workers' compensation benefits. For example, if a worker is owed \$500 in workers' compensation benefits and \$600 in VSDP benefits, the worker is paid \$600 total (\$500 paid through workers' compensation and \$100 paid through VSDP).

In the event that a state employee transitions from short- to long-term disability, **long-term disability benefits** are paid by ReedGroup, VRS's third-party administrator for VSDP. ReedGroup coordinates with DHRM to calculate and pay the appropriate VSDP benefit amount to the injured worker. In general, workers' compensation benefits are then paid directly to the injured worker by DHRM.

**FIGURE 6-2**  
**DHRM and VRS take steps to coordinate VSDP and workers' compensation benefits**



SOURCE: JLARC staff interviews and review of documents from DHRM and VRS.

NOTE: <sup>a</sup> If DHRM determines the injury is not compensable under workers' compensation, the worker may still be entitled to non-work-related VSDP benefits. VRS will separately determine whether a worker is eligible for non-work-related VSDP benefits, and the employing agency will pay benefits for the approved benefit percentage and timeframe.

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**The Federal Insurance Contributions Act** is a federal payroll tax designated to fund Social Security and Medicare programs.

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There are many nuanced differences between workers' compensation and VSDP that make it difficult for agencies to accurately pay benefits. For example, workers' compensation and VSDP wage replacement benefits are calculated based on different values of compensation. Workers' compensation benefits are based on 66 2/3 percent of the worker's *average weekly wage for the 52 weeks prior to the injury*. Statutory minimums and maximums for average weekly wage also apply. In contrast, VSDP benefits are based on a percentage of the worker's *current wage*, and there is no statutory maximum on the value of wage replacement benefits VSDP can pay. Non-work-related VSDP benefits are also taxable and workers' compensation benefits are not. If VSDP begins paying benefits (as a non-work-related injury) before the workers' compensation claim is accepted as compensable, adjustments must be made to reclassify past payments as nontaxable workers' compensation benefits, and the worker receives a Federal Insurance Contributions Act (FICA) reimbursement (sidebar).

The Department of Accounts (DOA) provides various tools, such as a spreadsheet on its website, to assist in calculating benefits for workers' compensation and VSDP, but miscalculations by agencies that require reconciliation may be frequent. In interviews with JLARC staff, DHRM, VRS, and DOA staff indicated that coordinating benefits between the two programs is confusing to agencies. In particular, agencies that have infrequent workers' compensation and work-related VSDP claims have difficulty calculating and making the appropriate benefit payments.

DOA staff have estimated that as many as 60 percent of payments are *initially* miscalculated and must later be reconciled. While these mistakes are reportedly adjusted to ensure the worker is being paid the appropriate amount, frequent adjustments can cause fluctuations in paychecks and potential financial uncertainty for injured workers receiving benefits from both programs.

Because the determination of appropriate benefit payments for workers' compensation and VSDP can be complicated, and because the frequency of initial miscalculations is reportedly high, the processes used to coordinate these two programs should be reviewed. The staff of the Auditor of Public Accounts (APA) possess the expertise necessary to determine the frequency and magnitude of errors, so the APA could conduct an audit to determine the frequency of errors in calculating and paying wage replacement benefits for workers' compensation and VSDP and the extent to which these errors are corrected. APA could also identify opportunities to better coordinate payments between these two programs and determine whether a periodic audit of benefit payments is warranted to ensure accurate payments in the future.

#### **RECOMMENDATION 24**

The Auditor of Public Accounts (APA) should conduct an audit to (i) determine the frequency and magnitude of errors in calculating and paying wage replacement benefits for workers' compensation and the Virginia Sickness and Disability Program; (ii) assess the extent to which these errors are ultimately corrected; and (iii) identify opportunities to better coordinate payments between these two programs.

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DHRM and VRS are statutorily required to jointly develop guidelines and procedures for coordination of benefits and case management. Although some training currently exists for agencies, additional training is needed. Several years ago, DHRM coordinated a traveling presentation for state agencies—including representatives from DHRM, DOA, VRS, and VWC—to educate human resources (HR) and payroll staff on the intricacies of paying benefits accurately for the two programs. DHRM and VRS should evaluate the need for revising and conducting another similar training program and identify additional resources that could further assist state agencies with coordinating benefit payments. VRS has also developed several resources to assist agencies, including an employer manual and the VSDP handbook.

Given the continued challenges experienced by agencies in coordinating these benefit programs, DHRM and VRS should convene a stakeholder group, composed of payroll and HR staff from various agencies as well as staff from the DOA, to help identify what additional training and resources should be made available to agencies to better coordinate payment of workers' compensation and VSDP benefits. In developing training and resources for state agencies, the stakeholder group should consider the findings from the APA audit of coordinating benefit payments for the two programs, as well as any recommendations included in the report.

#### **RECOMMENDATION 25**

The Department of Human Resource Management and the Virginia Retirement System should convene a stakeholder group composed of staff from the Department of Accounts and payroll and human resources staff from various state agencies to improve training and resources to be provided to state agencies for appropriately calculating the benefits that should be paid to workers eligible for workers' compensation benefits and Virginia Sickness and Disability Program benefits.

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## Appendix A: Study resolution

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### Review of Workers' Compensation

Authorized by the Joint Legislative Audit and Review Commission on December 10, 2018

WHEREAS, the Virginia Workers' Compensation Act (hereinafter referred to as "the Act") was enacted in 1918 to balance the interests of injured workers, employers, insurers, and other stakeholders in the spirit of the "compensation bargain" between employers and employees; and

WHEREAS, under the "compensation bargain" and the Act, in exchange for agreeing not to sue employers in tort via common law for workplace injuries, employees were guaranteed a no-fault system of wage replacement and medical treatment for injuries they might sustain due to their employment; and

WHEREAS, the Virginia Workers' Compensation Commission administers the workers' compensation program in Virginia and oversees the resolution of claims in accordance with the Act through mediation and hearings; and

WHEREAS, the Virginia Workers' Compensation Commission received more than 48,000 claims, and docketed nearly 12,000 cases for adjudication in 2017; and

WHEREAS, in most cases, in order to receive benefits under the Act, employees are required to prove by a preponderance of the evidence that they were injured and that they suffered the injury during and in the scope of the employment; and

WHEREAS, exceptions were created in the Act over the years to allow the presumption that certain conditions and diseases occur as a result of certain types of employment, unless these presumptions are overcome by a preponderance of evidence to the contrary; and

WHEREAS, at the time these presumptions were enacted, employees were having a difficult time proving claims for these particular types of conditions and diseases due to limitations in medical science, and there have been significant advancements in medical knowledge, diagnostic technology, and in exposure prevention since these presumptions were enacted; now, therefore be it

RESOLVED by the Joint Legislative Audit and Review Commission (JLARC) that staff be directed to review the operation and performance of the Virginia workers' compensation system and use of presumptions. In conducting its study, staff shall assess (i) whether claims are reviewed and processed promptly and fairly; (ii) whether the dispute resolution process is timely, effective, and equitable toward all parties; (iii) whether appropriate measures are in place to minimize the potential for fraud and abuse; (iv) whether Virginia's disease presumptions are appropriate and how they compare to presumptions established in other states; (v) whether the level of evidence required to claim or rebut a disease presumption is reasonable and appropriate; and (vi) whether workers' compensation benefits are appropriately coordinated with other benefits available to injured workers. JLARC shall make recommendations as necessary and review other issues as warranted.

All agencies of the Commonwealth, including the Workers' Compensation Commission, local governments, the Virginia Association of Counties, the Virginia Association of Counties Risk Pool, the Virginia Municipal League, the Virginia Municipal League Insurance Programs, public safety and firefighter stakeholder groups, and private employers of firefighters shall provide assistance, information, and data to JLARC for this study, upon request. JLARC staff shall have access to all information in the possession of state agencies pursuant to § 30-59 and § 30-69 of the Code of Virginia, including all documents related to all claims adjudicated or otherwise resolved by the Workers' Compensation Commission. No provision of the Code of Virginia shall be interpreted as limiting or restricting the access of JLARC staff to information pursuant to its statutory authority.

## Appendix B: Research activities and methods

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Key research activities performed by JLARC staff for this study included

- structured interviews with leadership and staff of state agencies; representatives of local and state organizations representing firefighters, police, and emergency medical services personnel; workers' compensation attorneys and insurers; and subject-matter experts nationally and in Virginia;
- surveys of workers' compensation attorneys and first responders;
- collection and analysis of data from the Virginia Workers Compensation Commission (VWC);
- reviews of judicial opinions obtained from VWC;
- contracts with epidemiological and actuarial consultants;
- reviews of national research; and
- reviews of laws, regulations, and policies relevant to the administration of workers' compensation in Virginia.

### Structured interviews

Structured interviews were a key research method for this report. JLARC staff conducted 86 interviews. Key interviewees included:

- leadership and staff of VWC, the Department of Human Resource Management, and the Virginia Retirement System;
- representatives of local and state organizations representing firefighters, police, and emergency medical services personnel; and
- stakeholders and subject-matter experts in Virginia and nationally.

### *Leadership and staff of state agencies*

JLARC staff conducted interviews in person and by phone with staff from Virginia agencies and offices, including the

- Virginia Workers' Compensation Commission,
- Department of Human Resource Management,
- Virginia Retirement System,
- Department of Fire Programs,
- Department of Accounts, and
- Department of Transportation.

Topics varied across interviews but included the policies, implementation, and effectiveness of Virginia's workers' compensation system, approaches to improve the workers' compensation system, and coordination between workers' compensation and other state benefit programs.

### *Deputy Commissioners at VWC*

JLARC staff conducted interviews in person and by phone with 13 deputy commissioners assigned to VWC's seven office locations across the state. Interview topics included regional differences in

workers' compensation claims, challenges faced by unrepresented parties in navigating the workers' compensation system, as well as opportunities to improve the timeliness of resolving disputes in workers' compensation claims.

***Firefighters, police, and emergency medical services personnel***

JLARC staff conducted interviews in person and by phone with representatives of Virginia public safety organizations, as well as leadership and staff of local and state emergency services departments. Interview topics included the experience of filing a workers' compensation claim, awareness of VWC and its dispute resolution processes, evidentiary requirements for obtaining benefits, and opportunities to improve the timeliness or fairness of Virginia's workers' compensation system. JLARC staff's structured interviews with representatives of Virginia public safety organizations included interviews with the:

- Virginia Professional Fire Fighters,
- Virginia State Firefighters Association,
- Virginia Association of Hazardous Materials Response Specialists,
- Virginia Association of Volunteer Rescue Squads,
- Virginia Chapter of the International Association of Arson Investigators,
- Virginia Fire Chiefs Association,
- Virginia Fire Prevention Association,
- Virginia State Police Association, and the
- Virginia Sheriffs' Association.

JLARC also conducted structured phone interviews and structured group interviews with leadership and staff of emergency services departments across the state. The topics covered varied across interviews, but generally focused on individuals' experiences with the workers' compensation system and Virginia's disease presumptions, as well as ideas for improving Virginia's workers' compensation system. Participants in interviews and group interviews with local staff and leadership included individuals from:

- City of Charlottesville,
- City of Chesapeake,
- Chesterfield County,
- Fairfax County,
- City of Hampton,
- City of Harrisonburg,
- City of Newport News,
- City of Norfolk,
- City of Portsmouth,
- City of Salem,
- Spotsylvania County,
- Stafford County,



- City of Suffolk, and
- City of Virginia Beach.

***Workers' compensation attorneys, insurers, national subject-matter experts, and staff in other states***

JLARC staff also conducted structured interviews by phone and in person with workers' compensation claimant and defense attorneys, workers' compensation insurers, and third-party administrators to understand their perspectives on a variety of topics, including the timeliness and fairness of Virginia's workers' compensation system, their satisfaction with the services of the Virginia Workers' Compensation Commission, and their experiences with disease presumption claims. National subject-matter experts were interviewed to understand national trends in workers' compensation legislation and administration, and to learn more about the existing research that has been conducted on the association between firefighting and cancer. Individuals in other states were also interviewed about alternative approaches to reviewing the appropriateness of presumptions and providing cancer benefits to public safety personnel. Interviewees included representatives from the:

- Virginia Trial Lawyers Association,
- Virginia Association of Defense Attorneys,
- Virginia Municipal League,
- Virginia Risk Sharing Association (formerly VML Insurance Programs),
- Virginia Association of Counties,
- Virginia Association of Counties Group Self-Insurance Risk Pool,
- CorVel Corporation,
- MC Innovations,
- Virginia Coal and Energy Alliance,
- Colorado Firefighter Heart and Cancer Benefits Trust,
- Georgia Municipal Association,
- Willis Towers Watson,
- Centers for Disease Control and Prevention's National Institute for Occupational Safety and Health,
- Washington Safety and Health Assessment and Research for Prevention, and the
- Workers' Compensation Research Institute.

JLARC staff attended the Virginia Self-Insurers Association annual conference to observe the organization's discussion of disease presumptions and recent changes to Virginia's workers' compensation system. JLARC staff also attended a symposium on Occupational Cancer and Incident Safety hosted by the Virginia Professional Firefighters.

**Observations of hearings and other VWC dispute resolution services**

During the course of the study, JLARC staff observed each of VWC's services provided to resolve disputes in workers' compensation claims. Between February 2019 and November 2019, JLARC staff

attended six evidentiary hearings before a deputy commissioner, one hearing before the full Commission, and three mediation sessions. JLARC staff also observed the three-step settlement review and approval process conducted by the Petition and Order Department.

## **Surveys**

Two surveys were conducted for this study: (1) a survey of workers' compensation attorneys and (2) a survey of Virginia firefighters.

### ***Survey of Workers' Compensation Attorneys***

The survey of workers' compensation attorneys was administered electronically to attorneys who had an email address on file with VWC. Individuals were selected for the survey using a subset of attorneys with experience with VWC's dispute resolution services within the past 24 months. The subset of 810 attorneys included both claimant and defense attorneys with experience across VWC's adjudication, mediation, and settlement approval services. JLARC received survey responses from 216 attorneys for an overall response rate of 27 percent.

Of the 216 individuals who responded to the survey, 46 percent represented claimants, 45 percent represented defendants, and 9 percent represented both claimants and defendants.

Respondents answered different questions depending on whether they represented claimants or defendants, which VWC services they had experience with, and what type of cases they had worked on (e.g., disease presumption cases).

Topics covered in the sections regarding VWC services included whether VWC's dispute resolution services have been used to resolve disputes in a timely manner, whether the dispute resolution services have been fair to all parties, and any opportunities to improve the timeliness or fairness of VWC's services.

Topics covered in the disease presumption section of the survey included whether their clients have been able to successfully establish/rebut a given presumption, whether the evidentiary requirements to establish/rebut the presumption are reasonable, and any opportunities to improve the evidentiary requirements to better balance the ability of workers to obtain benefits under the presumption with the ability of employers and insurers to rebut the claims.

### ***Survey of Firefighters***

JLARC also administered an electronic survey to a sample of firefighters in Virginia. Because there is no statewide list of firefighters, JLARC worked with the Virginia Fire Chiefs Association, Virginia Professional Fire Fighters, and Virginia State Firefighters Association to survey their network of firefighters across the state.

To ensure the survey reflected recent experiences, the survey focused on obtaining the perspectives of respondents who had been injured on the job or diagnosed with a work-related disease within the past five years. Respondents who had been injured on the job or diagnosed with a work-related disease within the past five years but had not filed a workers' compensation claim completed an abbreviated survey to learn more about the reasons they chose not to file a claim. Respondents who had filed a workers' compensation claim filled out the full survey.

JLARC received 1,152 responses from firefighters and emergency medical services personnel. Topics covered in the survey included: (1) experiences seeking workers' compensation benefits; (2) satisfaction with their employer's insurer and VWC (if applicable); and (3) experiences seeking benefits under one of Virginia's disease presumptions (if applicable).

## **Data collection and analysis**

JLARC staff collected several types of data from VWC and workers' compensation insurers to analyze for this study. JLARC received VWC data on injuries, claims, awards, payments, hearings, and mediations. Insurers representing localities and localities that self-insure for workers' compensation also provided data on possible presumption claims.

### ***Analysis of injuries and workers' compensation benefits in Virginia (Chapter 1)***

VWC maintains an electronic data system that houses the agency's information on claims, awards, service, payments, and employer reports (CASPER). CASPER also functions as VWC's task management system, prompting VWC staff to conduct required tasks to process, file, and adjudicate claims. To understand the number of injuries and claims reported to VWC and the awards and payments issued to injured workers, JLARC staff received CASPER datasets identifying all injuries and claims reported to VWC for injuries that occurred from 2009 to 2018. JLARC staff also received CASPER datasets identifying and describing all awards entered and payments issued for the same 2009–2018 cohort of injuries.

Injury data provided information such as the date of injury, type of injury, body part injured, cause of injury; claim data provided information on the date the claim was filed and contact information for the worker, employer, insurer, and claims administrator associated with the claim. JLARC staff calculated the number of injuries per year and claims filed per year. JLARC staff also calculated the proportion of injuries and claims reported for each type of injury and body part injured.

The awards dataset included fields for the award type, date the award was entered, award beginning and end dates, and the value of the award, among others. The payments dataset included fields for the date of payment report, the type of benefit paid, and the total value of benefits paid to date for each benefit type. All CASPER datasets included the jurisdiction claim number, or JCN, a unique identifier for each injury. JLARC staff used the awards and payments datasets to calculate the average and median workers' compensation benefit among workers with compensable injuries. JLARC staff only calculated benefits for injuries that had an award entered—those that either the worker and insurer agree are compensable or VWC has deemed compensable through the dispute resolution process. JLARC staff also limited calculations to include benefits paid within the first two years of the date of injury to ensure comparability.

### ***Analysis of dispute adjudication process timeliness (Chapter 2)***

JLARC staff received CASPER datasets from VWC that provided detail on the agency's two dispute resolution processes—hearings and mediation. The hearing dataset included data on the hearing request date, hearing type, an indicator for whether the hearing was held, an indicator for whether the hearing was rescheduled, the presiding deputy commissioner or commissioner, whether there was an appeal, what date the record was closed after the hearing, what date the judicial opinion was issued,

what date the request was removed from the docket, and the parties involved (worker, employer, insurer, and attorneys). The hearing dataset included all hearings requested from 2010 through 2018. Similarly, the mediation dataset included fields for the mediation request date, mediation start date, mediation end date, whether mediation resolved the dispute, the type of issue in mediation, and the parties involved (worker, employer, insurer, and attorneys). The mediation dataset included all mediations requested from 2016 through 2018.

JLARC staff used both the hearing and mediation datasets to calculate the average and median number of days between dispute “start” and “end” dates. JLARC used the hearing or mediation request date as the “start” date, and the date either the mediation ended or the hearing opinion was issued or the hearing was removed from the docket as the “close” date. JLARC also calculated the total length of time it took for a dispute that went through an unsuccessful mediation to be resolved through the hearing process. Once the length of each dispute was calculated, JLARC staff could assess whether some issues were resolved more quickly than others during mediation and whether the hearing process took longer under some deputy commissioners or commissioners. The findings of this analysis can be found in Chapter 2.

### ***Identification of possible presumption claims (Chapter 5)***

JLARC staff also used VWC’s CASPER data to identify potential presumption claims. Any claim that was filed by a worker from a locality, certain state agencies covered under the presumptions, or an employer with “fire,” “police,” “sheriff,” “city,” or “county” in the name was initially identified as a public safety worker claim. JLARC staff then removed employers that were not public safety workers, such as local school districts and libraries, and businesses that were inadvertently captured, such as “Party City.”

JLARC staff then used the injury type, body part, and injury cause variables found in the CASPER injury dataset to identify claims where workers might try to establish a disease presumption—cancer, respiratory disease, cardiovascular disease, and infectious disease claims. One injury type code was “cancer.” One injury type code was “respiratory diseases.” The data also included several injury type codes of infectious diseases. JLARC identified the following injury type, body part, and nature codes as possible cardiovascular disease claims: hypertension, myocardial infarction, angina pectoris, vascular heart disease, occupational heart disease, and cumulative heart disease. JLARC staff identified public safety workers through the employer listed on each claim. This process identified 1,105 claims filed by public safety workers for diseases that may be covered by a presumption between 2009 and 2018.

In an effort to identify additional claims where the worker may be eligible for a presumption, JLARC staff also collected data from the two main groups that insure localities—the Virginia Municipal League (VML) and the Virginia Association of Counties Group Self-Insurance Risk Pool (VACORP), as well as seven large localities that self-insure (Chesterfield County, City of Richmond, Fairfax County, Henrico County, Loudoun County, City of Norfolk, and City of Virginia Beach), and the Virginia Department of Human Resource Management (DHRM). JLARC asked these localities and self-insurers to provide the JCN, date of injury, and type of injury for all claims that insurers identified as possible presumption claims. JLARC staff then attempted to match the claim information provided by localities and insurers to the CASPER data. JLARC staff successfully matched 81 percent of claims provided by localities and insurers, and identified 353 additional potential presumption claims. This

allowed JLARC staff to identify injuries and claims where the injury type, nature of injury, and cause of injury codes did not provide sufficient information to identify the claim was possibly presumptive; however, this is likely a liberal estimate of potential presumption claims as not all workers identified through this process will be eligible for presumptions. For example, a firefighter may not meet the years of service requirement, or a Department of Game and Inland Fisheries employee other than a conservation police officer (the only covered occupation within the department) may have submitted a claim.

JLARC staff then requested judicial opinions for all possible presumption claims that went to a hearing for JLARC's judicial opinion review (Chapter 5).

### **Review of judicial opinions**

JLARC staff reviewed judicial opinions for all identified cancer, respiratory disease, and cardiovascular disease claims filed by public safety workers. For each, JLARC staff reviewed and identified: (1) the year of injury, (2) the type of hearing (either in front of a deputy commissioner or the full Commission), (3) the presiding deputy commissioner or commissioner who authored the opinion, (4) the type of disease claimed, (5) the worker's occupation and locality, (6) the worker's years of service, if mentioned, (7) whether the worker met the exposure requirement, where applicable, (8) whether the worker met the disability requirement, (9) whether the presumption was applied, and (10) whether the presumption was rebutted.

JLARC staff reviewed 20 judicial opinions on cancer cases, 69 judicial opinions on cardiovascular cases, and two judicial opinions on respiratory disease cases. The findings of this judicial opinion review are outlined in Chapter 5.

### **Contracted with consultants**

JLARC contracted with Johns Hopkins University to assess the occupation-disease associations currently presumed in statute, as well as the reasonableness of the existing requirements to claim the cancer presumption. Additionally, JLARC contracted with Oliver Wyman, an actuarial firm, to estimate the costs of adding three additional cancer presumptions and a PTSD presumption to statute.

### ***Epidemiologists at Johns Hopkins University's Bloomberg School of Public Health***

Johns Hopkins University's Bloomberg School of Public Health (JHU) was contracted to review existing peer-reviewed national and international research and summarize the extent to which the current body of scientific research shows an association/causal relationship between certain occupations and certain diseases. As part of their work, JHU epidemiologists were contracted to

- identify all peer-reviewed epidemiological studies that assess the occupation-disease associations (e.g., firefighting and cancer) that are currently included in statute as a disease presumption (§ 65.2-402 and § 65.2-404) and proposed during the 2019 General Assembly session (HB 1804 and SB 1465);

- assess the quality of each of the identified studies, including the soundness of the methodologies used, the extent to which the studies controlled for known risk factors for diseases, and the extent to which studies were sponsored by organizations with a possible or definite vested interest in the results of the study;
- summarize the extent to which each methodologically sound and independent study that compared the incidence or mortality rates among those in the occupation to that of the control found a statistically significant increased or decreased incidence and/or mortality rate;
- summarize the extent to which each methodologically sound and independent study that examined a dose-response relationship found a statistically significant dose-response relationship between the occupation and the disease; and
- determine the extent to which, for each occupation-disease combination examined, the research literature indicated an association between the occupation and the disease.

JHU was also contracted to assess Virginia's requirements to claim the cancer presumption, including the toxic exposure and length of service requirements, and determine whether these requirements could be modified to better align with the current state of the scientific research literature and technology available to measure and monitor exposure.

Additional information on JHU's findings and methodologies can be found in JHU's full report.

### ***Actuarial consultant***

Through its existing agency contract with GRS, JLARC staff subcontracted with Oliver Wyman, a national actuarial firm, to estimate the cost impacts of adding new presumptive diseases (colon, brain, and testicular cancer, and PTSD) to Virginia's workers' compensation statute, as proposed in HB 1804 (2019) and SB 1465 (2019). For each type of cancer and PTSD, Oliver Wyman was contracted to produce a report that estimated the change in (1) newly compensable workers' compensation claims; (2) costs of medical, indemnity, and death benefits associated with newly compensable claims; and (3) employer premiums associated with newly compensable claims.

As part of this work, Oliver Wyman was contracted to

- estimate the incidence rates of cancers and PTSD among covered occupations and number of newly compensable claims in Virginia as a result of the legislative changes;
- use national medical claims data to determine the current market cost of various cancer and PTSD treatments, while also making necessary adjustments to account for Virginia's medical fee schedules;
- estimate the lifetime costs by stage of cancer diagnoses; and
- estimate wage replacement benefits associated with newly compensable cancer and PTSD claims.

Oliver Wyman also conducted interviews with Virginia insurers that would be affected by changes proposed in HB 1804 and SB 1465, and collected data from insurers to understand their past experiences with similar claims in Virginia.

Additional information on Oliver Wyman's findings and methodologies are available in their full report.

## **Review of national research**

JLARC staff reviewed numerous publications from national organizations, including the Workers' Compensation Research Institute (WCRI), the National Council on Compensation Insurance (NCCI), the National Institute of Medicine, the National Academy of Social Insurance, the National League of Cities, and the RAND Corporation, among others.

JLARC staff also reviewed research from other sources, such as other government agencies and advocacy groups. JLARC staff reviewed publications from the Centers for Disease Control and Prevention's National Institute for Occupational Safety and Health, the International Agency for Research on Cancer, the U.S. Department of Labor, the Oregon Department of Consumer and Business Services, and the Washington State Department of Labor and Industries. JLARC staff also reviewed research published by the First Responder Center for Excellence, the International Association of Fire Fighters, the International Association of Fire Chiefs, the National Fire Protection Association, and the Firefighter Cancer Support Network.

## **Document review**

JLARC staff reviewed the various VWC informational documents and materials made available to injured workers, as well as information presented on VWC's website, and assessed the documents for (1) accuracy of information, (2) clarity, (3) completeness, and (4) organization. JLARC staff also reviewed numerous other documents and literature pertaining to workers' compensation in Virginia and nationwide, such as:

- Virginia laws, regulations, and policies relating to the responsibilities and requirements of the Virginia Workers' Compensation Commission, the Department of Human Resource Management, and the Virginia Retirement System;
- informational materials used in other states to educate injured workers on their rights and responsibilities within the workers' compensation system;
- other states' laws, regulations, and policies, including related workers' compensation case law; and
- legislative reviews of other states' workers' compensation systems.

## Appendix C: Virginia's disease presumptions

The Code of Virginia provides four general categories of disease presumptions for certain public safety personnel, covering respiratory diseases, hypertension, and heart disease (“cardiovascular diseases”), certain cancers, and certain infectious diseases. Table C-1 provides a summary of Virginia’s statutory disease presumptions and the occupations they cover.

**TABLE C-1**

**Virginia provides certain disease presumptions to firefighters/HAZMAT officers and law enforcement officers**

Occupations	Respiratory diseases	Hypertension/heart disease	Cancer							Infectious diseases			
			Leukemia	Pancreatic	Prostate	Rectal	Throat	Ovarian	Breast	Hepatitis	Meningococcal meningitis	Tuberculosis	HIV
Volunteer or salaried firefighters	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
VDEM HAZMAT officers	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
State Police commercial vehicle enforcement officers and motor carrier safety troopers			✓	✓	✓	✓	✓	✓	✓				
Full-time sworn member of DMV's enforcement division			✓	✓	✓	✓	✓	✓	✓				
Members of State Police Officers' Retirement System		✓								✓	✓	✓	✓
Members of county, city, or town police		✓								✓	✓	✓	✓
Sheriffs and deputy sheriffs		✓								✓	✓	✓	✓
City of Richmond sergeants and deputy city sergeants		✓								✓	✓	✓	✓
Virginia Marine Police officers		✓								✓	✓	✓	✓
Capitol Police officers		✓								✓	✓	✓	✓
Officers of the Metropolitan Washington Airports Authority police force		✓								✓	✓	✓	✓
Officers of Norfolk Airport Authority police force		✓								✓	✓	✓	✓
Sworn officers of the Virginia Port Authority		✓								✓	✓	✓	✓
Special agents of Virginia ABC		✓								✓	✓	✓	✓
Campus police officers		✓								✓	✓	✓	✓
Full-time sworn DGIF conservation police officers		✓								✓	✓	✓	✓
DCR conservation officers										✓	✓	✓	✓

SOURCE: §§ 65.2-402 and 65.2-402.1 of the Code of Virginia.

NOTES: VDEM = Virginia Department of Emergency Management, DMV = Virginia Department of Motor Vehicles, ABC = Virginia Alcoholic Beverage Control Authority, DGIF = Virginia Department of Game and Inland Fisheries, DCR = Virginia Department of Conservation and Recreation.



The Code of Virginia also provides a pneumoconiosis presumption for workers exposed to a pneumoconiosis-causing hazard, including coal dust and asbestos, for at least 90 work shifts. Pneumoconiosis is a general term given to any lung disease caused by inhaled dusts that cause damage. It includes asbestosis, silicosis, and coal workers' pneumoconiosis ("black lung disease").

The Virginia Workers' Compensation Commission (VWC) appears to have a reasonable process for determining whether a worker has pneumoconiosis, and, if so, at what stage. Reviews of chest x-rays are sent to and conducted by an independent "pulmonary committee" comprising physicians who have been certified by the Centers for Disease Control's National Institute for Occupational Safety and Health as demonstrating proficiency in classifying radiographs of the pneumoconiosis. The pulmonary committee review process follows national best practices, as established by the International Labour Office for reviewing and classifying radiographs of pneumoconiosis. The results of the review are used by VWC deputy commissioners and commissioners to determine whether the claim is compensable and, if so, the compensation owed to the worker, pursuant to § 65.2-504 of the Code of Virginia.

The reviews conducted by the pulmonary committee are provided at no cost to the worker and are entirely separate from the federal Black Lung Program's review process led by the U.S. Department of Labor's Division of Coal Mine Workers' Compensation. The federal Black Lung Program also provides compensation to workers who are diagnosed with coal workers' pneumoconiosis.

## Appendix D: Alternative benefit programs in Colorado, Georgia, and New York

Among the states that have alternative benefit programs, some important differences exist, including the programs' benefits and eligibility requirements, costs to employers, structure, as well as whether it is optional or mandatory for employers to participate. Table D-1 provides examples of key differences across the alternative benefit programs among the three states that were the first to create them: Colorado, Georgia, and New York. Colorado also offers a cardiovascular disease benefit program for firefighters.

**TABLE D-1**  
Details of firefighter cancer insurance programs vary across states

	Colorado	Georgia	New York
<b>Firefighter population covered</b>	All firefighters and support staff	All firefighters	Volunteer interior structural firefighters
<b>Minimum service requirements</b>	5 years (full-time) or 10 years (part-time/volunteer)	1 year	5 years
<b>Eligibility after leaving service</b>	10 years	Firefighter may remain eligible indefinitely; must pay pre-mium	5 years (lump sum and death only)
<b>Cancers covered</b>	"Brain, digestive, genitourinary, hematological, and skin cancers"	"Bladder, blood, brain, breast, cervical, esophageal, intestinal, kidney, lymphatic, lung, prostate, rectum, respiratory tract, skin, testicular, and thyroid cancer; leukemia; multiple myeloma; and non-Hodgkin's lymphoma"	"Breast, digestive, hematological, lymphatic, melanoma, neurological, prostate, reproductive, and urinary" *Optional coverage for all cancer
<b>Benefits available</b>	Lump sum	Lump sum, Wage replacement	Lump sum, Wage replacement, Death
<b>Lump-sum benefit</b>	Varies by cancer and stage, from \$200 to \$229,000	\$25,000 for severe, \$6,250 for less severe	\$25,000 for severe, \$6,250 for less severe
<b>Wage replacement</b>	None	60% of earnings up to \$5,000 (career) or \$1,500 (volunteer) monthly	\$1,500 monthly
<b>Death benefit</b>	None	None	\$50,000
<b>Annual cost to employers per covered firefighter (2019)</b>	\$265 (full-time), \$80 (part-time/volunteer)	\$213 (career), \$188 (volunteer)	\$156 (specified cancers), \$199 (all cancers)
<b>Insurance provided through</b>	Trust fund	Insurance companies <sup>a</sup>	Insurance companies <sup>a</sup>
<b>Employer participation</b>	Optional	Mandatory	Mandatory

SOURCE: JLARC review of other states' legislation and documents and JLARC interviews with subject-matter experts

NOTE: States vary in other eligibility requirements not listed here, including tobacco use, physicals, and measures of a firefighter's job activity. <sup>a</sup> Statute permits employers to self-insure, though most employers purchase plans negotiated by locality associations. Lump-sum benefits in Colorado are paid in twice monthly installments for any award greater than \$4,000.

## Appendix E: Examples of other approaches to address concerns with disease presumptions

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As mentioned in Chapter 5, Virginia could consider other options to address firefighters' and employers' frustrations with presumptions. Examples of other approaches Virginia could pursue include providing financial relief and/or job protections to firefighters who have filed a claim for benefits under one of Virginia's disease presumptions with the Virginia Workers' Compensation Commission (VWC). Approaches to assist employers with the costs of presumptions include financial relief for particularly expensive presumption claims and/or increasing funding to prevent firefighters' exposures to carcinogens.

Before implementing these alternative approaches, important implementation and policy details, such as their feasibility, costs, funding, and administration would need to be considered. The following sections include implementation details that could be considered by the General Assembly.

### ***Establishing a fund to provide limited financial relief for firefighters' out-of-pocket medical expenses while awaiting a decision on their presumption claim***

One concern noted during this study by firefighters and fire chiefs regarding presumption claims was the financial instability that can be caused by out-of-pocket medical expenses firefighters incur while waiting on a decision on their case. To mitigate these challenges, the General Assembly could establish a fund to provide a limited amount of financial relief for a firefighter's out-of-pocket medical treatment expenses while his or her case is pending at VWC. The fund could be reimbursed by any workers' compensation benefits ultimately paid to the firefighter, and could be funded through a fee paid by insurance companies on premiums for property, accident, and/or life insurance policies, because firefighters play an important role in limiting insurers' losses in these types of policies. Alternatively, the General Assembly could amend §65.2-1000 of the Code of Virginia to allow for VWC's Administrative Fund, which is funded through taxes on workers' compensation premiums, to be used to pay for these benefits.

### ***Providing job protections for firefighters awaiting a decision on their presumption claim***

According to interviews with firefighters and fire chiefs, some Virginia firefighters have lost their jobs while awaiting a final decision on their benefits claims for a presumptive disease because they have been unable to return to work in a timeframe acceptable to their employer. To prevent this situation from occurring for Virginia firefighters (as well as police officers), the General Assembly could amend §65.2-308 of the Code of Virginia to add job protections specifically for employees who have filed a claim for benefits under one of Virginia's disease presumptions. Such job protections could prohibit employers from discharging employees or disenrolling them from their employer-sponsored health insurance while their claim is being reviewed by insurers or VWC.

***Establishing a fund to provide limited financial relief for employers with particularly expensive presumption claims***

One of the most substantial concerns about presumption claims that was noted by insurers and self-insured localities during interviews with JLARC staff was the risk that even a few claims can become very expensive. This risk was also noted by Oliver Wyman, an actuarial firm retained for this study. Virginia could consider helping insurers (or self-insured employers) cover the costs of presumption claims. The state could establish a fund to provide a limited amount of financial relief to insurers on behalf of localities (or localities directly, if self-insured) when the total costs of individual presumption claims exceed a certain threshold (e.g., \$500,000). As with the firefighter fund mentioned above, this program could also be funded through a fee paid by insurance companies on premiums for property, accident, and/or life insurance policies. This would ease the burden of particularly high-cost presumption claims.

***Increasing funding for equipment and training to prevent firefighters' exposure to carcinogens***

According to firefighters, fire chiefs, and the Department of Fire Programs, the availability and consistent use of equipment to mitigate exposures to carcinogens varies across fire departments. The General Assembly could therefore consider increasing Fire Program Funds (VA Code §38.2-401) provided to localities and designating these funds for equipment and training to prevent or mitigate firefighter exposure to carcinogens, such as a second set of turnout gear, machine washer extractors, or evidence-based training on effective decontamination techniques. All or a portion of any newly appropriated Fire Program Funds could be set aside exclusively for these purposes and be used to meet fire departments' documented needs for equipment and training.

## Appendix F: Agency responses

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As part of an extensive validation process, the state agencies and other entities that are subject to a JLARC assessment are given the opportunity to comment on an exposure draft of the report. JLARC staff sent an exposure draft of this report to the Virginia Workers' Compensation Commission, the Department of Human Resource Management, the Virginia Retirement System, and the Auditor of Public Accounts. A draft was also sent to consultants for this report, Johns Hopkins University's Bloomberg School of Public Health and Oliver Wyman Consulting, for review and comment.

Appropriate corrections resulting from technical and substantive comments are incorporated in this version of the report. This appendix includes response letters from the

- Virginia Workers' Compensation Commission,
- Department of Human Resource Management, and the
- Virginia Retirement System.



## COMMONWEALTH of VIRGINIA

R. FERRELL NEWMAN, Chairman

WESLEY G. MARSHALL, Commissioner

ROBERT A. RAPAPORT, Commissioner

### WORKERS' COMPENSATION COMMISSION

333 East Franklin Street  
Richmond, Virginia 23219

[www.workcomp.virginia.gov](http://www.workcomp.virginia.gov)  
(877) 664-2566

JAMES J. SZABLEWICZ  
Chief Deputy Commissioner

EVELYN MCGILL  
Executive Director

JASON S. QUATTROPANI, CLERK

December 6, 2019

### Hand-Delivered

Mr. Hal E. Greer, Director  
Joint Legislative Audit and Review Commission  
919 East Main Street, Suite 2101  
Richmond, Virginia 23219

Dear Director Greer:

Thank you for the opportunity to review and comment on the Exposure Draft JLARC Report *Virginia's Workers' Compensation System and Disease Presumptions*. We appreciate your recognition that this agency generally handles disputed workers' compensation claims in a timely and fair manner, consistent with our agency's Mission and Core Values. We also appreciate the efforts of your staff in identifying potential areas for improvement and recommendations for making those improvements.

We have carefully reviewed the report's recommendations with the agency's Senior Leadership and are pleased to offer the following specific responses.

**Recommendations 1 and 6:** The Commission agrees with these recommendations and will take appropriate steps to implement them during the 2020 calendar year.

**Recommendation 2:** The Commission agrees with this recommendation and it has been fully implemented.

Mr. Hal E. Greer, Director  
Joint Legislative Audit and Review Commission  
December 6, 2019  
Page 2 of 3

**Recommendation 3:** The Commission agrees with this recommendation. Item (i) of this recommendation has been fully implemented. The Commission will implement all remaining items of this recommendation no later than December 31, 2020.

**Recommendation 4:** The Commission agrees with the recommendation to allow staff attorneys to conduct full and final mediations in cases where neutral facilitation is selected by the parties as the only style of mediation and will undertake training of staff attorneys to allow them to conduct full and final mediations. Additionally, the Commission will study and evaluate ways in which issue mediation might be more successful in resolving disputes.

**Recommendation 5:** The Commission agrees that issue mediation should be conducted only upon the request of the parties for disputes involving only the issues of change in authorized treating physicians and body parts. To the extent that the recommendation includes issue facilitation, the Commission is concerned that implementing the recommendation would result in slower resolution of the disputed issues because an alternative process for initially handling those disputed issues would be necessary. The current issue facilitation process is based on a 14-day turnaround for an initial response from an employer/insurer. The Commission suggests that claims raising only the issues of a change in authorized treating physician and/or body parts continue to be referred to ADR for issue facilitation, but that the process be expedited for these claims to avoid delay, with immediate referral to the hearing docket if the claim is denied. The Commission will continue to look for new ways to improve the resolution of disputes involving these issues.

**Recommendations 7 and 8:** The Commission will implement and administer this recommendation if it is adopted by the General Assembly. In considering whether to mandate reporting of the date of first payment and denials, the General Assembly should consider whether doing so will subvert the voluntary payment of benefits made by employers and insurers, lead to increased denials, and propagate greater litigation.

**Recommendation 9:** The Commission agrees with this recommendation and it will be fully implemented by December 31, 2019.

**Recommendation 10:** The Commission agrees with this recommendation and will develop an easy-to-read comprehensive guide for injured workers that includes all of the items identified in the recommendation. The guide will be placed on the Commission's website and will be provided to all Virginia workers who have been reported to be injured.

Mr. Hal E. Greer, Director  
Joint Legislative Audit and Review Commission  
December 6, 2019  
Page 3 of 3

**Recommendation 11:** The Commission agrees with this recommendation and will complete the review by January 1, 2021, as suggested by JLARC, with all written materials and website updates being made to improve communications to workers, employers and insurers.

**Recommendation 12:** The Commission agrees with this recommendation and will establish an ombudsman office during the 2020 calendar year if it is adopted by the General Assembly.


**Recommendation 13:** This is a policy matter for the General Assembly to consider and the Commission takes no position.

**Recommendation 14:** The Commission agrees with this recommendation and will fully implement it no later than January 31, 2020.

**Recommendations 15 through 25:** These recommendations raise policy matters for the General Assembly to consider and the Commission takes no position. The Commission will comply with any legislative changes that are adopted based on these recommendations.

Thank you again for the opportunity to respond to the draft report. Thanks also to the JLARC staff who worked so diligently on this study – Associate Director Tracey Smith, Project Leader Drew Dickinson, Associate Legislative Analyst Danielle Childress, Associate Legislative Analyst Brittany Utz and Assistant Legislative Analyst Keegan Edgar. The professionalism and thoroughness of the entire JLARC team was apparent throughout the process and it was our pleasure to work with them.

Sincerely yours,

A handwritten signature in black ink, appearing to read "R. Ferrell Newman".

R. Ferrell Newman  
Chairman

Cc: Wesley G. Marshall, Commissioner  
Robert A. Rapaport, Commissioner  
James J. Szablewicz, Chief Deputy Commissioner  
Evelyn McGill, Executive Director





EMILY S. ELLIOTT  
DIRECTOR

**COMMONWEALTH of VIRGINIA**  
*Department Of Human Resource Management*

James Monroe Building  
101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, Virginia 23219  
Tel: (804)225-2131  
(TTY) 711

December 2, 2019

Mr. Hal E. Greer, Director  
Joint Legislative Audit and Review Commission (JLARC)  
919 East Main Street, Suite 2101  
Richmond, VA 23219

Dear Mr. Greer:

The Department of Human Resource Management (DHRM) appreciates the opportunity to review the draft of Chapter 6 of the report on Virginia's Workers' Compensation System and Disease Presumption. We did note some technical corrections that were communicated to your team by email to Drew Dickinson; however, DHRM does acknowledge the findings that were identified.

We have tasked our new Director of the Office of Workers' Compensation; Aubrey Chigwada, with working on implementing the recommendations set forth in the report, and look forward to working with all of our stakeholders in an effort to make improvements to our program, and the Workers' Compensation System statewide.

Sincerely,

A handwritten signature in blue ink that reads "Emily S. Elliott".

Emily S. Elliott



Patricia S. Bishop  
Director

1200 East Main Street  
P.O. Box 2500  
Richmond, VA 23218-2500  
Toll-free: 1-888-VARETIR (827-3847)  
Website: [www.varetire.org](http://www.varetire.org)  
Email: [vrs@varetire.org](mailto:vrs@varetire.org)  
Fax: 804-786-1541

December 6, 2019

Mr. Hal Greer  
Director  
Joint Legislative Audit and Review Commission  
919 East Main Street  
Suite 2101  
Richmond, VA 23219

Dear Mr. Greer:

Thank you for the opportunity to review portions of the exposure draft of "*Virginia's Workers' Compensation System and Disease Presumptions*" report dated November 19, 2019. My staff and I appreciate the time and research that has gone into producing this report, and we believe that the members of the General Assembly and stakeholders will find it helpful.

As noted in the exposure draft of the report, there is overlap between the Line of Duty Act (LODA), VRS disability retirement, the Virginia Sickness and Disability Program (VSDP), the Virginia Local Disability Program (VLDP), death-in-service retirement benefits, and Workers' Compensation determinations. In order to assist employers, VRS provides robust training and education resources. VRS maintains an employer website dedicated to providing benefit information and resources to assist employers in administering disability retirement, VSDP, and VLDP. It features overviews of the disability programs, links to an e-learning curriculum for employers and a webinar curriculum that includes coverage of regular and work-related disability retirement, and administration of VSDP and VLDP benefits. The site provides various job aids and checklists for employers to use as guides when administering the benefits, along with the Employer Manual, which provides chapters dedicated to providing more detailed information on these benefits, including coordinating payments with the wage indemnity benefit under Workers' Compensation.

VRS also maintains a dedicated website for the Line of Duty Act, which features program information, training modules for first responders, a participant guide, and employer-specific information on administering the benefit, which includes an employer training video.

The report notes that it is difficult to coordinate Workers' Compensation and VSDP benefits. While VRS and DHRM administer and coordinate benefit programs, the DOA is responsible for providing training and assistance to state agency payroll personnel, including

Mr. Hal Greer  
Page 2  
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payment of these benefits. The DOA website features many training resources and aids to assist agencies in calculating benefits and making appropriate payments.

The exposure draft of the report that we reviewed includes a recommendation that DHRM and VRS should evaluate the need for revising and conducting training programs and should convene a stakeholder group to identify additional training and resources that should be made available. As ensuring that benefits are provided accurately not only includes case management and benefit administration, but also payroll administration, we believe that the inclusion of agency finance or payroll personnel will be critical to the success of such an initiative. Further, as DOA is the agency responsible for providing training and resources to state agency payroll personnel, its expertise will continue to be critical in assisting agency personnel with the accurate payment of benefits.

The portions of the exposure draft that we were able to review indicated that at this time consideration of possible changes to the existing Workers' Compensation process would appear to be preferable to setting up an entirely new benefit program. As you know and while VRS will, of course, take on additional future responsibilities if directed by the General Assembly to do so, VRS cannot use pension trust funds for any purpose other than for the benefit of its members, retirees and beneficiaries. The exclusive benefit rule in IRC § 401(a) stipulates that all activities of a qualified governmental plan must be for the exclusive benefit of its members.

While the inclusion of any additional presumptions is informed by the work done in this report and will ultimately be a policy decision, we note that solely from a fiscal impact perspective the addition of presumptions will increase not only Workers' Compensation costs but also VRS disability retirement costs, work-related death-in-service costs and Line of Duty Act benefit costs. Additional presumptions will necessarily result in an increase in the number of paid Workers' Compensation claims, approved disability retirement applications, and approved Line of Duty Act benefits claims.

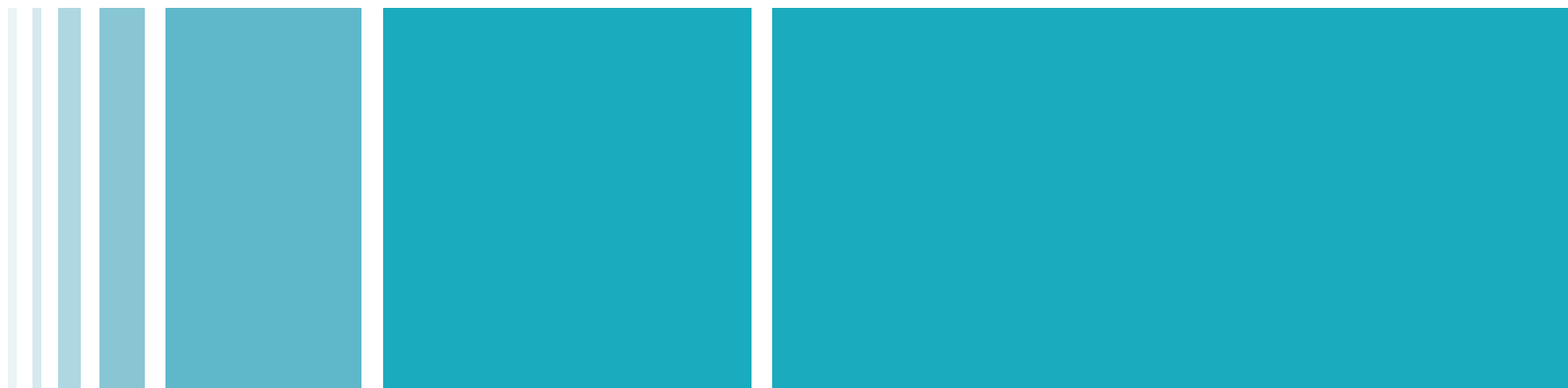
Thank you again for the opportunity to comment on portions of the exposure draft. We would be happy to provide additional assistance to JLARC and the members of the General Assembly as the proposals included in this report are considered.

Sincerely,



Patricia S. Bishop  
Director





[JLARC.VIRGINIA.GOV](http://JLARC.VIRGINIA.GOV)

919 East Main Street Suite 2101 Richmond, VA 23219