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Testimony re: AB 451
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I. Introductory Remarks:

PACT provides workers compensation benefits to most of the small and rural governmental agencies with police officers and firefighters. We recognize and value the services provided by our police officers and firefighters and readily provide coverage for their occupational diseases that occur as a result of their employment.

With regard to this bill, the Legislature determined as a matter of public policy that cancer benefits should be extended to all employees pursuant to NRS 617.440 and NRS 617.450. In addition, NRS 617.453 provided that the cancer coverage for firefighters was presumed to arise from employment if it was diagnosed with a period up to 60 months following such employment.

This bill creates a presumption that cancers that result from exposure to specified chemicals arise from employment with no period limiting manifestation. In essence, a presumption that if, at any time in the future after 5 years employment, a firefighter develops any cancer resulting from exposure to the listed chemicals, whether that exposure occurred at work or elsewhere, that cancer is work caused and compensable.

II. Research

In our search for studies about the incident rates for these cancers, we found studies that indicated that firefighters are 1) less at risk than the general public to all types of cancer, 2) only at statistically significant excess risk for certain types of cancer (brain and other nervous system tumors, testicular and some "other" malignant neoplasms) and 3) were more at risk for the types of cancers listed in this bill. These studies were conducted over 20 to 30 years and in the US and other nations.

From reviewing the information, it appears that there is great difficulty in concluding that these cancers did or did not arise from the occupation of firefighter. Some of the chemicals listed as carcinogens also appear as non-occupational sources of cancer. For example, PAHs are formed from incomplete burning of garbage, oil and gas as well as from tobacco or charbroiled meat. Smog, tobacco, gas cookers and fireplaces are major sources of formaldehyde in addition to that released from fires burning building materials. In short, the conclusion is there is no clear conclusion.

III. What do we suggest the committee do with AB 451?

We recommend the following steps be taken:

1. Leave the statutory provisions unchanged as there is no clear evidence of a need to change based upon conflicting studies
2. Commission an LCB study of the risks and costs of cancer and the risks and costs of all other police and firefighter occupational disease benefits.

IV. Financial consequences of this bill

It is very difficult to determine the financial impact. Cancer of all types occurs in about 20% of the population. Depending upon which study is used and the particular treatment required, the costs of these diseases varies widely. We estimated the cost that we needed to have today in order to fund post-employment lifetime heart disease medical costs for police officers and firefighters to be in the range of \$28,000 to over \$50,000 per capita today. Cancer treatment varies widely in its success rates and may or may not incur similar costs.

If caught early and subject to a course of drug treatments, those treatment costs certainly will be less than if caught in later stages, depending upon the type of cancer and available treatment options. However, with a lifetime manifestation period, employers will have little ability to measure the source of exposure to these carcinogens.

PACT exposure to cancer cases arises from these employee and volunteer estimates throughout small and rural communities that comprise our membership base:

Paid Fire 135; Volunteer Fire 997

If we assume that the 20% incidence of cancer is correct, then the number of current employees and volunteers exposed to cancer and the future costs would be:

	Estimated # cases @ 20% probability	Cost @ \$28,000 per case	Cost @ \$50,000 per case
Paid Fire	27	\$ 756,000	\$ 1,350,000
Volunteer Fire	199	\$ 5,583,200	\$ 9,970,000
TOTAL:	226	\$ 5,439,200	\$ 11,320,000

We have no ability to predict appropriate funding levels based on our own experience and have to rely on national data in order to do so. Because of the change to a lifetime exposure for manifestation of cancer, we will need to fund for this risk continuously in anticipation of the impact now and years from now.

It is important to note to the committee that excess insurers for public agencies, whether an association like PACT or an individual self-insured, are few and they have increased their requirements for self-insured retentions dramatically since the Gallagher and Sorenson decisions. To add lifetime coverage for these cancers under this bill on top of the expansion

of benefits for Hepatitis will drive those retentions up further and increase the cost of excess insurance, if anyone stays in the market. Increased retentions add significant volatility in cost pressures for the public agency.

Since the Legislature has added the presumption for Hepatitis, heart and lung lifetime benefits and now is considering adding lifetime cancer benefits, these unknown future costs dramatically affect our ability to predict how to fund these risks adequately now, given the small and rural agency membership base we have. With the economic problems in rural Nevada, a large rate increase simply becomes unaffordable or results in reductions in public service.

It is important to the Legislature, taxpayers and to public sector employers to know objectively what costs will result from including coverage under the workers compensation system on a conclusive presumption basis for all of the presumptions including Hepatitis, cancer, heart and lung diseases. There likely will be significant public policy implications that will arise as a result of such a study, but it is extremely important to all governmental agencies whether self-insured or covered through PACT.

Other Key Issues

Below is a discussion of the effect of the conclusive presumption and its application to former employees as a result of a key court decision and some issues that should be considered regarding the public policy implications and as part of the study of the costs of these benefits.

V. Summary of *Gallagher v. City of Las Vegas, City of Las Vegas v. Sorensen* 114 Nev. Ad. Op. 68 (May 19, 1998)

On May 19, 1998, the Nevada Supreme Court was asked to decide whether veteran firefighters who are disabled by heart disease after they retire are entitled to occupational disease benefits under NRS 617.457 (1). This statutory provision establishes a conclusive presumption that a firefighter's heart disease arises out of and in the course of employment if certain conditions are met. Based on the history and language of the entire statute and the public policy underlying its enactment, the Supreme Court concluded that the veteran firefighters at issue, namely James Gallagher and William Sorensen, were entitled to invoke the conclusive presumption to establish their claims for benefits.

VI. Issues Raised by the Gallagher and Sorensen Decisions

A. Presumption of work relationship

The principles of workers compensation provide coverage for injuries that occur on the job to employees of the particular employer. The conclusive presumption sets aside the employment basis for workers compensation coverage by extending benefits to non-employment related diseases. PACT consistently has opposed the conclusive presumption as unconstitutional and has suggested that a rebuttable presumption or no presumption be substituted for occupational diseases as is the case for nearly all other occupations.

The conclusive presumption that heart, lung, cancer and Hepatitis disease is an occupational disease for persons who have been employed for five years as police officers or firefighters creates significant risk to governmental employers.

B. Eligibility intent – during and post employment

The heart and lung disease provisions require “continuous, uninterrupted and salaried occupation as a fireman or police officer in this state before the date of disablement” in order for the conclusive presumption to apply.

In *Gallagher v. City of Las Vegas* the Nevada Supreme Court ruled that the conclusive presumption applied regardless of the employment status at the time of disablement. The Court decided that “before the date of disablement” meant **at any time** prior to the disablement, **not immediately preceding** the disablement. The Court reached this latter conclusion citing a 1987 legislative amendment that was deleted in 1989 (albeit the amendment at issue related to preexisting conditions immediately preceding employment not disablement). Further, the Court cited language of the statute (NRS 617.457) and the spirit and policy behind the legislation as reasons for their decision.

Based on this case some persons who may be qualified for coverage (based on 5 years continuous employment as a firefighter or police officer) may have joined other member agencies, but others may have gone to non-PACT member agencies or to the state thus transferring the risk to them. Others may have left the profession entirely but still are eligible for coverage. This is important because the courts ruled that the benefit applies to former employees and retirees. While the statute was silent, that silence was interpreted by the courts in *Gallagher* and *Sorensen* to connote eligibility for coverage under heart/lung for life.

When PACT analyzed the potential risk just for eligible former employees for heart disease costs, our actuary advised us to increase our rates by 44%. His study required looking into the demographic trends and health care cost trends going out 30 years. For retirees, since most employees take normal retirement to avoid the PERS offset for workers compensation, the cost estimate as a result of these court rulings depend upon the total number police officers and firefighters currently retired and those expected to retire in the future adjusted by the expected rate of disability. According to the PERS data on those currently receiving disability benefits, 29% of the disabilities were due to heart and lung disease (25% for police; 41% for firefighters). Suffice it to say that cost projections are substantial for known retirees. Given demographic trends, those costs will increase dramatically even without expansion of benefits.

In the 1999 Legislative Session, SB 132 attempted to limit the extension of benefits from lifetime to a formula based on 4 months for each year of service, thus entitling a 30 year employee to a manifestation period of 10 years to connect the occupational disease to employment and workers compensation coverage. That measure did not pass then. However, we expect that the significant fiscal impact of this court decision could result in the unintended consequence of the state’s and local governments’ inability to fund the expected benefit for deserving long-term employees. This concept should be reconsidered. Changing the eligibility and capping the time beyond employment connects delayed manifestation of occupational diseases to employment and enables more certainty in calculation of the fiscal impact of this post-employment coverage. This greater certainty better assures the ability to fund the benefits intended.

C. Uniqueness of election by claimant of permanent total disability

While the *Gallagher* decision did not address this issue, the issue must be considered as an unintended consequence of the decision. Under NRS 617.455 (7) and NRS 617.457 (7), a person who is determined to be partially disabled from heart, lung and Hepatitis

disease, or now cancer for firefighters, and is incapable of performing, with or without remuneration, work as a fireman or police officer, "may elect to receive the benefits provided under NRS 616C.440 for a permanent total disability."

No other categories of occupational disease or injury or other employees have the right to elect permanent total disability (PTD) when partially disabled or solely because they are unable to perform their particular occupation. In fact, such an election removes a key purpose of workers compensation to return injured workers to gainful employment within their abilities on a modified duty basis or after rehabilitation. Also, this right to elect PTD appears inconsistent with existing law that governs PTD. NRS 616A.340; NRS 616C.440. With regard to retirees, there simply is no incentive for returning to any employment. As for those who satisfied the statutory requirements for the conclusive presumption, but have gone on to other occupations subsequently, the former employee may have no incentive other than to elect permanent total disability.

As an example, a police officer, who worked for five years to meet the presumption of eligibility, leaves employment to work in construction for the balance of his working career. Shortly before his retirement, he suffers a heart, lung or Hepatitis disease and files for benefits. The governmental agency that last employed him 20 years ago may face paying for the permanent total disability he will elect since there is no reasonable likelihood that he would be able or willing to return to employment as a police officer.

As an aside, PERS benefits are available to disabled police officers and firefighters. They may apply for disability retirement, which in effect enables them to receive retirement benefits without the penalty for early retirement. However, if they elected a disability retirement and are receiving workers compensation disability benefits, PERS offsets its disability benefits. If they already are retired and receiving benefits from PERS at the time they apply for workers compensation benefits, then there is no offset. Hence, retirees may, when the disease manifests, then apply for workers compensation benefits, elect PTD, and receive both PERS full retirement plus PTD with no offset.

D. Basis for calculation of disability benefits – post retirement

The *Gallagher* decision did not determine the wage basis for calculation of any disability benefit for retirees. Hence, there remain important questions for the Legislature. Is the wage basis none for retirees, since there is no actual wage in retirement, unless there is a combining wage issue as a result of post-retirement employment? Legislative policy should clarify the wage basis if the Legislature determines to continue the benefits in accordance with the *Gallagher* decision.

E. Volunteers eligibility – during and post employment

Volunteer firemen are presumed eligible for coverage of heart, lung disease and cancer, after they have satisfied the statutory requirements. What is implied in the *Gallagher* decision is that if the conclusive presumption creates eligibility for benefits for employees forever, it also creates eligibility for volunteers who no longer volunteer. The only time limitation for volunteer firemen is found in the heart statute in which the disease onset must be before age 55. There is no time limitation for lung disease nor would there be for cancer under AB 451. Considering the sheer number of volunteers and the high rate of turnover even after five years of continuous service, the burden on employers to track volunteers to verify eligibility and to provide coverage in accordance with the *Gallagher* decision virtually is immeasurable.