PTSD & FIREFIGHTERS' PRESUMPTIONS

WHY MIGHT SOMEONE RESIST THE IDEA OF PTSD COVERAGE

- Long history of legal system resisting "emotional distress" claims
- Too many fraudulent claims
- Too many trivial claims
- Too many authentic claims (This is the argument that resonates with my students — see recent WorkCompCentral story on
 - Virginia Beach shootings)
 - See Justice Thomas's opinion in Consolidated Rail Corporation v. Gottshall, 512 U.S. 532 (1994)

DYNAMIC QUID PRO QUO & NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

- Circa 1911: very weak NIED law
- NIED: Negligently causing <u>emotional</u> harm
- Hard to think of workers' compensation for tort quid pro quo as including something like NIED
- But then NIED evolves through "zone of danger"

IN PRACTICE

- Collins v. COP Wyoming, 126 P.3d 886 (Wyo. 2006)
- Father and son employed by same company
- Son killed on job by track hoe
- Father witnessed death & brings NIED claim
- ER/State argued immunity/exclusive remedy
- Wyoming Supreme Court allows action

WYOMING DEFINITION OF INJURY DOES **NOT** INCLUDE

- Any mental injury unless it is caused by a compensable physical injury, it occurs subsequent to or simultaneously with, the physical injury and it is established by clear and convincing evidence
- No quid pro quo = viable tort action (otherwise EE has no remedy)
- (Many states: no mental-mental for bona fide personnel action & higher thresholds like "predominant cause" – but still covered)

SOME PARALLELS BETWEEN MENTAL INJURY AND OCCUPATIONAL DISEASE

- At time of quid pro quo American states thought occupational disease not appropriate for workers' compensation—like mental-mental injury
- But early English Act both covered occupational disease and provided for presumptive causation (not unlike a firefighter presumption)
- Some American states (beginning with N.Y. in 1920) adopted a similar model
- Early statutes did not discuss mechanics of presumption

WHAT CREATES PRESUMPTIONS

- Statutorily designated job classification
- Pre-employment physical reveals no evidence of illness or disease for which benefits are sought
- Employed for statutorily required period before presumption can apply
- Seeking benefits for illness or disease covered by the law that is discovered during employment in the classification
- Usually cancers but heart-lung statutes can be broader, e.g., tuberculosis, heart disease, or hypertension

PRESUMPTION BURDEN SHIFTING MECHANICS

- Bursting bubble presumption (weakest) (Thayer-Wigmore): After presumption created ER offers some evidence that disease **not** caused by employment presumption drops out of case and EE must rely on evidence other than presumption **burden of production shifts to EE** to prove causation (**burden of persuasion never leaves EE**)
- Morgan presumption (intermediate): After presumption created it stays in case as positive evidence (opposing whatever evidence ER offers) burden of both production and persuasion shifts to ER to show disease is not caused by employment
- Morgan-like but when burden shifts (strongest): "Such heart trouble, hernia, or pneumonia so developing or manifesting itself in such cases shall in no case be attributed to any disease existing prior to such development or manifestation." California Lab. Code § 3212.4 or must prove both not work-related and specific non-work-related cause (Fairfax County Fire & Rescue Services v. Newman, 222 Va. 535, 539 (1981))

CONCLUDING POINT

- Workers' compensation confers tort immunity
 - Periods of WC expansion often follow periods of tort law expansion & potential liability
 - Evaluating state policy probably requires consideration of all costs/benefits
 - Costs don't go away they shift