

Work Comp Road Map for Fire Fighters

**By John A. Ferrone Esq.
Adams, Ferrone & Ferrone**

Fire fighters face dangers every day. It is no surprise the job is one of the toughest in California. With these dangers comes the increased likelihood of an injury on duty (IOD). There are countless examples of exposures, lifting patients, motor vehicle accidents, and the daily physical demands of the job. What happens when you sustain an on duty injury? This article will provide a general road map of what to expect in the workers' compensation process.

A. Types of Injury

In worker's compensation there are two types of injury claims-specific and continuous trauma (C.T.). A specific injury is an injury arising from a single event such as a fall or motor vehicle accident. A C.T. claim relates to ongoing exposures, which can be physical or stressful in nature. For example, over the course of several years the fire fighter develops pain in the knees or back due to the repetitive nature of the job duties.

When a fire fighter files a claim for benefits, they are asked for a date of injury. If there was no specific date, then the claim may likely be a C.T. In the case of a C.T claim, the fire fighters would list the date of injury as the

beginning date of employment to the present date the fire fighter began experiencing symptoms.

B. Presumptions

Fire fighters enjoy certain presumptions of injury in workers' compensation. The Labor Code provides that if a fire fighter sustains an injury to the following parts of body, the claim is presumed to be industrial. The parts of body include: Heart, Cancer, Pneumonia, MRSA, Tuberculosis, Hernia, Meningitis, and Blood-Borne Pathogens, i.e. Hepatitis. If a fire fighter manifests an injury, such as the heart, the claim is presumed to be industrial. However, the presumption may be rebutted by medical evidence.

For cancer cases, the fire fighter must show that he/she was exposed to a known carcinogen i.e. benzene, diesel exhaust or smoke from a fire. It is important to log all exposures to carcinogens, since the cancer cases are routinely denied. A log of exposures will assist in proving the claim.

C. 4850 Benefits

When a fire fighter is off duty from a work injury, the fire fighter is entitled to 4850 benefits. 4850 benefits are payable for 52 weeks and constitute 100% of the fire fighter's gross salary, tax free. After the 52 weeks of 4850 have been paid, the fire fighter is entitled to temporary total disability, or TTD, paid at two-thirds the fire fighter's wages up to the maximum state rate currently at \$1010.50 per week. The temporary

disability will extend for another 104 weeks. Thus, the total period of payments for 4850 and TTD is 3 years.

A frequent issue that arises when a fire fighter is on 4850 benefits is whether the employer has light duty work that would accommodate the fire fighter's restrictions. If the employer has light duty, the fire fighter's entitlement to 4850 benefits may be challenged. It is important to obtain a specific job description of the light duty assignment for the treating physician to review and discuss with the injured firefighter.

D. Medical Evaluations

If a dispute arises, such as whether the fire fighter sustained a work injury or whether the fire fighter needs a type of treatment like surgery, the fire fighter will be required to attend a medical evaluation by an Independent Medical Examiner (IME). The City is required to set the exam within 30 days and the IME is further required to issue a report 30 days later.

E. Medical Treatment

When a fire fighter sustains a work injury, they are entitled to medical treatment to cure the effects of the injury. Since the 2004 changes to the work comp system, medical treatment benefits have undergone significant changes. Now, the injured fire fighter must select physicians within the Medical Provider Network (MPN). A fire fighter is allowed to pre-designate a primary treating physician (PTP) which allows the fire fighter to bypass

the County's MPN Network. The treating physician must be a family physician and has maintained regular treatment records.

The physician's treatment recommendations are subject to Utilization Review (UR). UR is a separate entity that reviews all treatment recommendations. Since 2004, UR has largely been responsible for delaying and denying recommended treatment. If UR denies the treatment, the primary treating physician will need to prepare a written report appealing the denial. If UR continues to deny the treatment recommendations, the fire fighter will need to be referred to an IME to resolve the dispute. Once the claim has been accepted, either by way of litigation or a formal medical evaluation, the employer will then be responsible to adjust the medical expenses.

F. Permanent Disability

When the fire fighter has been released from active medical care, the fire fighter has reached what is referred to as Permanent and Stationary (P/S). The primary treating physician or medical evaluator will typically assign a percentage of disability under the AMA Guides for Impairment. The rating percentage is based upon objective criteria outlined in the AMA Guidelines 5th Edition for Permanent Impairment. The percentage of disability equates to a specific monetary value in the Labor Code. The issues under Permanent Disability can be very complicated and contested.

Another issue may arise if a firefighter has “work restrictions”. In certain circumstances, the City may initiate the inter-active reasonable accommodation process. The purpose of the inter-active process is to determine if the fire fighter can continue working or needs accommodation. The City may further request a medical evaluation by the Health Department to determine if the member is incapacitated from duty. If the fire fighter is currently working, it is imperative to advise the treating and evaluating physicians of the work status.

There are further issues under apportionment, such as whether there was any pre-existing disability or whether there were other factors that caused the injury. The purpose of the current apportionment laws was to afford employers an easier burden in reducing the percentage of disability to non-industrial causes. The presumptive injuries, however, are not subject to any apportionment.

G. Personal Injury- 3rd Party Insurance Benefits

When a fire fighter is involved in a motor vehicle accident (MVA) there exist additional insurance benefits from the 3rd party driver that may be recovered by the injured fire fighter. The 3rd party cases can be complicated since the employer will request a recovery for all the work comp expenses out of the 3rd party recovery. Moreover, when a fire fighter receives a monetary settlement from the 3rd party case, the employer is entitled to a credit against all benefits including future medical care in the workers’

compensation claim. Fire fighters need to be very careful in this arena. Another issue arises when the 3rd party does not have sufficient insurance or no insurance.

Uninsured and Underinsured Motorist Coverage (UM/UIM) can be a significant benefit to fire fighters as you are frequently on the road all the time and, therefore, run an increased risk of injuries, which are caused in motor vehicle collisions. When a fire fighter is injured in an accident with a motor vehicle, the value of his or her claim may exceed the required minimum limits of \$15,000 per person.

Approximately one out of every three drivers on California roads today is uninsured or inadequately insured (i.e., under-insured). It is imperative to examine your own insurance policy limits for UM/UIM. These benefits could be significant if the injury is career ending and the 3rd party has minimum or no insurance.

H. Vocational Rehabilitation

The 2004 work comp changes essentially eliminated vocation rehabilitation and replaced it with the Supplemental Job Displacement-Benefit Voucher. The voucher is a cash stipend for education related retraining expenses. The voucher amounts depend on the percentage of permanent disability. For example, if the percentage permanent disability is less than 15% the voucher is \$4,000. If the percentage of permanent

disability increases the value of the voucher will also go up to a maximum of \$10,000. For injuries after 2013, the voucher has been capped at \$6,000.

I. Death Benefits

If a fire fighter sustains an injury that results in death, the surviving spouse and minors may be entitled to death benefits under the workers' compensation system. The surviving spouse typically is entitled to a Special Death Benefit under the Retirement System, which can be 50% of the gross salary, tax-free. The surviving minor children may also be entitled to a worker's compensation death benefit. Currently, a single total dependent is entitled to \$250,000. If a family is faced with this unfortunate situation, it is important to consult with an attorney to make sure the dependents are receiving the correct benefits.

J. Discovery

The ADR program has built in discovery that the fire fighter will face. The goal of the claim is to expedite the resolution of the dispute. The City will send the member releases covering past medical and employment records. The releases are designed to obtain the records for review by the Independent Medical Examiner (IME). If there are concerns about the release, a quick call to our office will help clarify the issue. The City also uses an investigator to obtain a statement from the injured fire fighter. The goal is again to expedite the collection of the facts that will be presented to

the IME. A member may decline the statement, but the City will most likely request a formal deposition.

K. Inter-active Process

If the injured firefighter has permanent work restrictions as a result of the injury, the City's HR department may conduct an inter-active process to determine if the firefighter can return to full duty. The City's inter-active process is usually a meeting with HR and a medical examination with the Health Department. The purpose of the process is to determine whether the injured firefighter can return to full duty. If the member's physician has placed work restrictions on their activity, the City will likely initiate the interactive process.

The California Fair Employment and Housing Act (FEHA) generally requires the employers to the following:

- 1) Employers must provide reasonable accommodation for those employees who, because of their disability, are unable to perform the essential functions of their job.
- 2) Employers must engage in a timely, good faith interactive process with employees in *need* of reasonable accommodation.

The interactive/reasonable accommodation process triggers when an employee has a disability and is in need of an accommodation to maintain or obtain employment. The process is voluntary. The employer must offer the interactive process when the employee has a disability and needs help to

continue to work and has requested the process. The employee may decline the interactive process if he/she has no need for accommodation.

When there is a firefighter who is injured and cannot perform the essential job functions, then the City is obligated to conduct the interactive process to determine if the disability can be accommodated. The goal is simple- ascertain an accommodation so the injured firefighter can maintain employment. The City will typically refer the injured firefighter to the Health Dept. for a medical evaluation.

The process should not be used where a prophylactic work restriction arises; the injured firefighter is working full duty, and has NOT requested accommodation. The facts and the medical evidence will dictate whether the City will initiate the inter-active process. If you or a member is faced with the City's inter-active process, please contact your Association for further information.

This general outline deals with the most common issues that an injured fire fighter might face in a work comp case. It is important to realize that each industrial injury is unique unto itself, which will require examining each case individually. It is also important to speak with counsel to make sure the case is on the right track.

About the Author-John A. Ferrone is a partner in the law firm of Adams, Ferrone & Ferrone. The law firm is on retainer for worker's compensation with the LBFPA. If you have further inquires, please e-

mail them to jferrone@adamsferrone.com or call the office at (866)
373-5900.