FIRE FIGHTER CANCER PRESUMPTIVE/WORKERS' COMPENSATION INFORMATION PROVIDED BY ATTORNEY MIKE DRYDEN

Michael G. Dryden

Attorney Mike Dryden was guest speaker at the recent Pennsylvania Legislative Federation Meeting and presented his experiences and explained the processes of accessing benefits under the recently passed Pennsylvania Fire Fighter Cancer Presumption Act.

This is an edited version of a court steno transcript of this presentation.

You may contact Attorney Dryden for further information on Cancer Presumption and other Workers comp related issues, call toll free at 1-886-413-2667 or 215-656-3645. You may also contact him by e-mail at mdryden@wwdlaw.com. or visit his website at wwdlaw.com.

Attorney Mike Dryden was introduced by Tom Savage, First VP of the Federation who explained that Dryden is chair of the workers' compensation department with the law firm of Willig, Williams and Davidson. He supervises handling workers' compensation matters; and is also active in the firm's management of Heart and Lung Act and Act 534 cases throughout Pennsylvania. It includes occupational disease, claims for cancer, heart disease and toxic exposures. He also trains union leadership on issues involving injured members and conducts educational seminars for union stewards. Mike has been very active in helping firefighters and others in workers' comp claims.

Attorney Drydens' presentation was published in the July Issue of the PA FIREMAN.

Following Attorney Drydens' presentation a series of questions were raised and the discussion continued on specific issues reported as follows.

A Member: I'd like to clarify that. One of the questions we get a lot is, there doesn't have to be a physical done at the time of employment or an annual physical that the NFCA talks about. It is a physical sometime prior to the diagnosis.

MR. DRYDEN: That's exactly right; a physical prior to diagnosis. And this one is becoming a bit of a problem. For a volunteer firefighter to establish a claim, they have to establish direct exposure to International Association for Research on Cancer (IARC), Group 1 known carcinogens as documented by Pennsylvania Fire Information Reporting System (PennFIRS).

Now, the exposures I'll talk about in a minute. This Pennsylvania Fire Information Reporting System requirement, I have a few people that I represent whose companies do not participate in PennFIRS. As written, the law says you have to be able to document your fire smoke exposure through PennFIRS. So, if there's a possibility of getting in it and you weren't in it, it's a smart thing to do for your membership. If you haven't done it and someone is diagnosed with cancer, we're working on a contingency plan to try to argue our way around it by showing whatever reporting that you've done complies with or is consistent with what PennFIRS would require.

But I have to be straight with you. I don't know, and I don't think anybody knows, whether that's going to be good enough for a judge. Because, as written, the statute says a volunteer firefighter must establish direct exposure to IARC Group 1 carcinogens as documented by the Pennsylvania Fire Information Reporting System. If none of your fires or jobs were documented with PennFIRS, and I'm a defense lawyer, I say you don't have a case. I say, judge, no PennFIRS; no claim. How that's going to play out yet we don't know.

A MEMBER: how many years has PennFIRS been in?

MR. DRYDEN: It's been in for a while. We're working on a contingency plan for how to present evidence to try to get around that.

Editorial Note: Visit PA St Fire Commissioners website www.osfc.state.pa.us for information on PennFIRS

A MEMBER: Seems that you're implying that, in the narrative on those reports, we need to start putting in there firefighter exposed to plastic combustion; firefighter is exposed to carbon monoxide.

Continued on Page 100

MR. DRYDEN: Yeah. If a firefighter is exposed to fire smoke -- How many people in here wear a Scott pack during overhaul? How many people have spent a big part of their career not wearing a firefighter Scott pack or overhaul? Probably everybody, right? Per the studies that I have read, the overhaul is the worst; is where most of this exposure occurs.

If we had a fire in this room, how long would it take you guys to knock the fire? Five minutes? Come in here and bang out the fire, extinguish it. To go and pull the ceilings, pull the walls apart, make sure there's no hidden fire, you're in the environment a lot longer. Your adrenaline was running when you were in here with the pack on fighting the fire; you're huffing and puffing. Every firefighter I know admits it. The second that fire is down, the Scott pack hits the floor; Scott packs off. Now you're in there breathing heavy; still in the environment, heat-charged environment; mist, smoke, gas, vapors all in there with you during overhaul. You're in there for longer than you are during suppression. In my mind, and from the studies I've read, that's where the exposure occurs.

To go back to your point; if you just document that it was a working fire, when I get your member to come to me, I'm going to say, what do you do during overhaul? It's going to be, the Scott Pack hits the floor and I'm participating in overhaul with no Scott Pack, or maybe now that changes and they're using it more now. But for how many years before it wasn't used, then I'm going to establish the exposures.

I don't really need to have too many specifics. If it's some very, very notable fire; if there was something you were in, you know, a plant that manufactures car batteries and that was on fire, something like that would be nice to say; probably would already be registered as some kind of hazardous-materials event.

Reality is, when you have fires in any structure; any structure like this; any place where they have painted the walls, there's wallpaper that's sealed with chemicals; the wood is treated. There are Group 1 carcinogens at every working fire. Every structure fire there's going to be Group 1 carcinogens.

Benzine is a IARC Group 1 carcinogen; IARC Group 1 carcinogen asbestos; formaldehyde; group 1 carcinogens. Benzine is a product of combustion. Soot; straight-up soot that's on your bodies; after a good job, guys are talking about the work they do with the black face and black hands. Soot is a Group 1 carcinogen. There are studies on chimney sweeps that have this unbelievably increased risk of cancer from soot because of what they find in that soot. A lot of it is benzene and some other chemicals that are products of combustion. The fact that soot, benzene, asbestos and formaldehyde are Group 1 carcinogens, I think one of the four of them will be at every structure fire.

MEMBER: To clarify what I heard you say before on reporting, if you check structure fire, that provides Mike with what he needs to prove benzene was produced. What you don't want to do is try to create a list of the exposures specifically, because then somebody from the other side is going to go through and say, look at what was missed. You might do a good job of thoroughly analyzing what was in the smoke, but if I'm doing that at three o'clock in the morning, I'm saying it was black, gray or white. If you just check structure fire, it creates benzene, and benzene is a Class 1 4 carcinogen.

MR. DRYDEN: And that's absolutely true. I grew up in a neighborhood in Philly with older row-home housing. I was talking to my mother about what we were doing. We had a vinyl kitchen floor. When we got a new vinyl kitchen floor--My father was a truck driver; wasn't the most handy human being on the planet--he just dropped the new vinyl floor on the old vinyl floor. The first vinyl floor was asbestos-backed.

So, as I was talking to her about the things in the house and asbestos, even though everyone knows it's a problem, and to a large extent they've taken it out or reduced it very dramatically in new housing products, the fires you guys fight aren't in new developments all the time. You're going to an older house that may have asbestos shingles where you've got to ventilate the floor, now you're cutting through the first layer of vinyl floor and there's no asbestos in that one, but the second one is asbestos-backed. Now that stuff is blowing around in there, too.

To come to Your point, when you're trying to report it, where's the detail and who's responsible for going and finding out that the second vinyl floor was asbestos-backed vinyl flooring when, because of

Continued on Page 102

the cases the way they are, I'm just going to bring an expert. I'm going to bring somebody to say these houses were built in 1923. They were built in these neighborhoods where they fight fires. The housing stock there will include asbestos in many fires. We're going to be able to establish asbestos exposure without having to write it down just because of it being a structure fire.

The other issue with regard to bringing a case is the weight of giving the judge sort of the volume of fires that are fought and then in places where you wouldn't expect it. Firehouses --

A MEMBER: Before we go on, is there any case law on that that specifically addresses the PENNFIRS?

MR. DRYDEN: No, not yet. That's why we're pulling out a plan, because there's really nothing comparative to it. The point of having it in the law is something we were forced to agree to. It wasn't something that Fireman's Legislative Group came up with or the union people came up with. To get it passed, they demanded to have that in the law. So because of that, that tells me we're going to see it again. That's not in there by accident.

A MEMBER: The reason I ask that is, there may be some small fire companies in remote counties in Pennsylvania that are doing their part to get that data; to collect the data and doing their part to get it to the county. Basically what I'm trying to say is, there are a lot of contingencies.

MR. DRYDEN: You're right. There are some people waiting on a federal grant, and have been waiting for years to get it because of the money struggles in their volunteer fire company. I understand now, it may not even be necessary. But that's something I've heard back from folks. Why would the guy lose his cancer case because he's serving a community that's financially strapped seems disgusting. We have a contingency we're working on, but I don't have the answer to that.

MEMBER Two points. After we talked about that issue this week, I did talk to George Stapleton who runs the PENNFIRS program out of the Commissioner's office. George tells me that you can reconstruct your data and put it in PENNFIRS if you have good data on a paper-based form that's similar to what they collect in PENNFIRS.

And now with the web-based system, you can do that and report automatically even if your county doesn't. If you get a hold of the Fire Commissioner's office, they'll put you in touch with how to do that; do some training for you. So there's no longer a necessity to have your county upload that data to the state.

MR. DRYDEN: Good. The next phase of bringing these cases, even if it's a case within 300 weeks, but absolutely if the case is between 300 and 600, then I'm looking for a doctor to say that this particular firefighter's cancer is a substantial contributing factor in the development of the disease. For a presumption case you don't necessarily need that. Think about how this plays out when you run these cases.

Let's say a guy develops cancer within that 300-week window. All I technically need to do to show up is, he has more than four years of fire service; that he has IARC Group 1 carcinogen, because we're going to establish his exposure to fire smoke. He has those two things. He's got a diagnosis of cancer. Once he has that diagnosed cancer, the burden shifts to them to show that it is not due to his service. The way they're going to do what is with a hired-gun oncologist or occupational medicine physician, or even a toxicologist; a doctor to come in and say that cancer is not related to his fire service because of X, Y and Z. What I will need then to respond to that is a doctor on our side to say, it is a substantial contributing factor; not the cause, not the substantial contributing factor; a substantial contributing factor, and then we can prevail.

When we run these cases, before I start to fight, before we go to court, I want and need that opinion of a substantial contributing factor from a doctor. Because if I go to court without it on a presumption case and they show up with a doctor, the judge could give me as little as 90 days to find that guy. What we've been doing with the people we're representing is sending out packets to folks connecting their particular cancer to firefighting with the studies that are out there. If you have bladder cancer, whatever it is, we have studies that relate them. We send them to the firefighter to take to his treating doctor and ask his treating doctor, is this a substantial contributing factor?

Continued on Page 104

The reason we do that is, when we first started, doctors were saying we can't say what the cause of cancer is. We're not charged with saying what the cause is. A substantial contributing factor. I have been on the phone probably with 25 different treating doctors. Many of them say they agree with me and they think it's true; that it is likely a contributing factor, but they don't like to get involved. Especially oncologists; I don't know why exactly, but they don't like getting involved. I have a couple doctors I'm working with who can help us do that.

So, to come back again to points of leadership for you guys; if they go to their doctor and they talk to their doctor and the doctor says, nobody can say what the cause is, I can't say that. That's not the end of the case. In many situations for me, it's just the beginning of the case, because there are doctors out there who I have sort of made into a cancer expert by giving them all the studies and by focusing on a substantial contributing factor.

That means, even if you're a smoker, you may get this benefit, because if smoking is the contributing factor or the most significant; if firefighting is still a substantial contributing factor, a smoker could still get this benefit. It obviously complicates things, depending on the cancer. If it's lung cancer, it really complicates things. If it's leukemia, it doesn't complicate it quite as much. It varies. From a learning standpoint, if the doctor can't answer the question, that's not where the inquiry ends.

I'm getting close to the end of my time. I want to focus a little bit on the benefits that are available when you win these cases. If you win these cases, you can receive what are called indemnity benefits, which is a biweekly workers' compensation check for the time you're disabled due to the cancer.

So, for a volunteer firefighter, your average weekly wage can't be less than statewide average weekly wage. But if you're a retiree and you're living on a Social Security check, and you're still running and fighting fires and you get hurt in any way; not just cancer; you tear a knee, or do whatever, you have a right to receive workers' compensation benefits based on the statewide average weekly wage from the municipality; not from your local; not from your volunteer fire company.

They don't have to go out and take a loan or do something to pay you. The municipality who you're serving is responsible by law because of that irrebuttable presumption. So if the cancer disables you, you're going to get a biweekly check that can't be worse than the statewide average weekly wage, but if it also disables you from your regular job and that pays more than the statewide average weekly wage, which this year is $888 a week, then you'll get two-thirds of that number while you're out.

You'll get medical coverage for the cancer, which is a huge thing; no co-pays; the freedom to treat where you want to treat. I've been dealing with someone now who we won one of these for, who his insurance didn't cover these, like, Cancer Centers of America. He's in a Cancer of America site, I forget where--it might be Texas--to get treated and he's doing well with sort of an experimental treatment that Blue Cross/Blue Shield wouldn't cover. So, the coverage is a significant thing.

The last thing we alluded to a minute ago was the fatal claim benefits for spouses and dependents. I represent a fella who, now that he retired from the Philly Fire Department and went down to Jersey Shore, and they're not going to receive any indemnity benefits when we win. They will receive medical benefits when we win. But the real reason they're doing it is if, God forbid, the cancer takes their life, their spouse is going to be entitled to two-thirds of their average weekly wage for the rest of her life or until she remarries for fatal claim benefits. I've done that for a few people.

When I spoke at the last conference that we had, I referenced a case where a Chester firefighter, who was 33 years old, his wife was 32 years old, when he passed away from cancer. They had two very young kids, and she's now going to receive two-thirds of his check for the rest of her life, which will enable her to do a lot of things for her kids. It's a real benefit for people who are left in that terrible situation.

So, if you have folks who are diagnosed with cancer, that's the benefits that are available to them. I'll explain it more to them if they call or if they have questions.

In conclusion, having the ability to get the word out to folks and the word to check into things; to ask for information is the key. Whether they go forward or not, that's up to them, but to have the right issue

Continued on Page 106

put in front of your member and have them make their decision I think is, unfortunately, for you guys likely your responsibility now. You have to let them know what's out there and what's available, and then they make their own decision.

A MEMBER: Not to drag this out, but what are the implications for someone that, over the course of their fire service career, served multiple municipalities or was a volunteer in their home community but paid, or maybe even was a suppression-level instructor.

MR. DRYDEN: It gets complicated that way. Ultimately what would happen is, everybody would be brought in. If I'm representing somebody who was a career and a volunteer and had three stops, obviously, the older stops -- If you've been a volunteer or career firefighter for three years, four years, five years in one place, that's probably going to be the target. In most occupational disease cases, the last employer or the employer now sort of carries the bag for what came before unless they can specifically point to something and say, you fought that fire in whatever chemical building it was, and that's what it was.

For me, someone representing employees, I don't care how many people show up, the potential to pay. If there's 10 people to bring into this, we'll bring them all in and, hopefully, sit back while they all point at each other. At the end of the day, the benefit that the firefighter or his spouse will get is the same no matter who has to pay. It's going to be the same benefit either way.

A MEMBER: How does that change things? If you went to a fire and you realized right away after you got there that there was asbestos involved or hazardous chemicals, our insurance companies always told us, report that as an occupational exposure.

A company near us had to deal with a house that had home-based pesticides in it. They ended up, the insurance company bought a whole new all turn-out here. People who were exposed filed workers' compensation claims at that point, had baseline blood work done, physical, and that kind of thing. It's been 20, 25 years, but I can think of three or four of those guys who have gotten cancer. Is that something in addition to this law?

MR. DRYDEN: It would be in some ways similar to this fella's question. Now that insurance company who was on the risk at that point, they're going to be brought into it, but I would still bring the case under Section 108(r) over the whole volume of that firefighter's service. Because, while the insurance industry knows enough to say this pesticide fire is a big deal and we have to make sure we check because there's some heinous things in this one fire, there's heinous things in every fire. So we're not going to just limit us to that one fire and try to prove it off of that one fire. We'll expand it; and if somebody comes in, an expert, and says that's what it was, then that's what it is. The firefighter or the family still gets their benefits.

A MEMBER: Would that be considered opening a claim if you file the paperwork?

MR. DRYDEN: It would be for that particular claim. The opening and filing that paperwork won't stop you 10, 15, 20 years later from bringing a claim under this.

A MEMBER: What if your fire company serves several communities who contributes towards the workmen's comp when there's injuries, do they all get proportioned or --

MR. DRYDEN: No. They're all going to be in.

A MEMBER: We've had two firefighters at our station diagnosed in the past two weeks with cancer. They're both retired; been active firefighters for several years. So you're saying there's an opportunity here to file with the workers' comp law right now?

MR. DRYDEN: Absolutely. For me, when I'm saying filing, I'm talking about filing a claim petition to bring a claim. I'm talking about going to court. If you're going to try it out--I have other places that have tried it--to say, this is Firefighter Smith. He served from point A to point B. He didn't wear a SCBA during overhaul. We know he was exposed to the smoke for all these years. He got cancer, and his last fire was within 300 weeks. This is presumed work related. We're letting you know we think this is work related. They'll take a position. Once they take a position on that, he'll have three years from that answer.

Continued on Page 108

When they say no, he'll have three years to file a petition. So, they can go ahead and try that on their own and see what happens, or they call us up front and try it. Either way is okay.

A MEMBER: Have you seen a lot of these issues with workers' comp pushing back so far?

MR. DRYDEN: Yeah, they're going to push back. Even if you think of the medical in some of these cases -- I represent a career firefighter from Warren who passed away. His medicals are over a million dollars. So if you win the case, we turn around and we go to whatever the insurance -- Travelers, and say, Travelers, you owe this lady this money, but you also owe these people, the insurance company, you owe them a million dollars. So, they're going to fight these cases.

MEMBER: You mentioned the denial. My municipality is one of 67 that's in a pool. Is the pool function different at all in relation to this? I know they're going to be more aggressive on the denial. But are they any different in how we would approach the process?

MR. DRYDEN: No, they're not. They all have to live with the procedures set by the workers' comp law. They pool themselves to help deal with the risk. They're going to have an adjuster to call the shots on that. If they say no, you guys have to do everything that we're going to do anyway. Nothing changes.

A MEMBER: How much push-back, denial, do you get from an individual not wearing a Scott Pack? Do you have to prove that?

MR. DRYDEN: No. I think they're going to come in and say it. I'm bringing an expert to say what carcinogens are in the smoke. I've been racking my brain about who to bring and how to present it. As I'm talking to the guy I'm going to bring, some occupational doctor who I'm trying to convince to help me do it, she made a good point. Who are they going to be? It's my element. I have to prove there are carcinogens in there, but they're in there. There's studies back and forth. The fact is, the guys don't wear Scott Packs during overhaul in 99 percent of the cases and for many years fought fires. So, it is a fact.

In Philly they have a memo that, supposedly, you're -- you're supposed to wait for the all clear before you take the SCBA off. I've talked to chiefs, every level of firefighter, no one has ever heard of an all clear. In overhaul everything's down on the floor.

MEMBER: Mike, committing an unsafe act isn't a defense for workers' comp, is it? If I walk into a building with an ungloved hand and I grab something hot and burn my hands, I may be stupid, but it's still a compensable injury.

MR. DRYDEN: It's still a compensable injury. It's a no-fault statute. On a difference thought, the one thing to point out on is, if you go in and your supervisor directly tells you do not take that glove off, that glove stays on until you're out of the fire and you, for whatever reason, take it off, they can try to come defend themselves not on the fact that you're negligent, but there was a direct work rule that you violated.

The SCBA, the cat's out of the bag on that. They're not going to be able to say, we directly told you in 1975 to wear it during overhaul. And since then, no one said it again, but you all took a loss and you're beaten, that's not going to work. They'll try, but they won't win. Thank you.

MEMBER: One of the concerns we had in the union after we got the law passed was that we were going to make bad case law, because a firefighter somewhere in Pennsylvania was going to go hire his wife's uncle who does real estate law to represent him in a workers' comp case and get hammered. It affects all of us. I would suggest Mike. If you don't use Mike, find somebody that's in the specific area of the law. And you can tell Mike has some passion and a lot of expertise in the subject. The insurance company isn't finding some guy who does real estate law four days a week. You need to have a guy who is competent and understands the law and has done this. This isn't his first rodeo, as you could tell, with workmen's compensation. Just be careful, if you get denied, on where you go for representation.

MR. DRYDEN: We'll go anywhere. I mentioned Warren. I didn't even know where that was before I went there. Again, thank you for the time.