



Pennsylvania Municipal  
**League**



August 16, 2021

Dear Senator,

You are receiving this letter because you are listed as a sponsor of Pa. Senate Bill 775. As vested stakeholders serving the first responder community, the Delaware Valley Municipal Management Association, Pennsylvania Municipal League, Pennsylvania State Association of Township Commissioners, Pennsylvania State Association of Boroughs, the Pennsylvania State Association of Township Supervisors and the County Commissioners Association of Pennsylvania want to help ensure that Pa. SB 775 provides a true and reliable benefit for our first responders - one that is sustainable over the long-term and funded by a prudent financial model that is insurable at a reasonable cost to local governments and their taxpayers. To that end, we enclose relevant information for your consideration as Pa. SB 775 is further developed and shaped through the legislative process. We appreciate this opportunity to contribute to creating a solution that balances the needs of our first responders, local government entities and the Commonwealth's taxpayers.

This letter provides an overview of how post-traumatic stress disorder ("PTSD") claims currently are evaluated under the Pa. Workers' Compensation Act ("Pa. WCA"), drafting suggestions on how to craft financially sustainable legislation to enhance the current Pa. WCA benefit structure for PTSD, links to similar legislation enacted in other states and alternative approaches to allocate resources for first responders suffering from PTSD. Enclosed with this letter is a marked-up version of Pa. SB 775.

### **Current State of the Law in Pennsylvania**

Work-related mental injuries have been compensable under the Pa. WCA for almost 50 years. These injuries are divided into three distinct categories – a physical condition resulting in mental impairment, mental condition resulting in physical impairment, and mental condition resulting in mental impairment. Each category carries its own burden of proof. PTSD, a mental condition that is caused by psychological trauma and causes a mental impairment, falls into the third category – a mental/mental claim.

After years of litigation and due to concerns regarding over-utilization of the mental/mental type of claim, the Pa. Supreme Court decided *Martin v. Ketchum, Inc.* in 1990, which ultimately required a claimant to demonstrate that his/her mental injury arose out of an objective "*abnormal working condition*". The rationale for this standard is that mental injuries are inherently more subjective than physical injuries and therefore require a mechanism to distinguish mental injuries that had an appropriate

causal relationship to employment from those that arose from an employee's subjective reactions to normal working conditions. The Court noted in *Martin* that refusing to recognize the distinction between normal and abnormal working conditions would eliminate the element of causation and destroy the fundamental principle underlying the scheme of the Pa. WCA – for an injury to be compensable, it must be work-related.

In 2013, the Pa. Supreme Court decided *Payes v. WCAB (State Police)*, which involved a state trooper who killed a pedestrian after she jumped in front of the vehicle he was driving. The Court acknowledged in *Payes* that there is no “bright line test” to determine an abnormal working condition in a mental/mental claim. The Court noted that these cases require a highly fact-sensitive analysis by the Workers’ Compensation Judge (“WCJ”) and the WCJ’s decision should only be overturned if arbitrary and capricious. The Court went on to promulgate a standard in *Payes* that can be utilized in absence of a bright line test – has the claimant established that the mental injury was a “reaction to a highly unusual and singular event”. This standard essentially requires the WCJ to determine whether the claimant was subjected to conditions to which an employee in his position is not normally subject. The Court made a point to emphasize that the abnormal working condition analysis does not end when it is established that the claimant generically belongs to a profession that involves certain levels or types of stress, which means first responders are given an opportunity for a full and fair review of their claim.

In 2020, the Commonwealth Court cited *Payes* in its *City of Lower Burrell v. WCAB (Babinsack)* decision where it affirmed the order of the WCAB and WCJ granting total disability benefits for a police officer with PTSD that resulted from being called to a crime scene where a fellow officer and friend had been shot and killed while approaching a suspect. The claimant aggravated a preexisting mental disorder upon witnessing the deceased officer’s dead and bloodied body – which was determined to be an abnormal working condition.

While Pennsylvania courts have long utilized the abnormal working condition requirement to distinguish between compensable and non-compensable claims, decisions in recent years suggest that the once high bar for PTSD has been significantly lowered as science and societal attitudes have changed – recognizing that first responders are not somehow immune to PTSD because they willingly chose a stressful and potentially dangerous occupation.

### **Hallmarks of Successful Legislation**

Despite the judicial progress that has been made in recent years, if the Pennsylvania legislature feels the need to craft legislation to provide a wider avenue for first responders to receive compensation and benefits under the Pa. WCA for PTSD, it should ensure such legislation is appropriately tailored to ensure financial sustainability, minimize specious claims and reduce the likelihood of legal challenges. Inclusion of the following criteria would support these goals.

1. Limit the compensable injury to PTSD and make it an “injury” under Section 301 of the Pa. WCA and not a presumptive occupational disease under Section 108 of the Pa. WCA.
2. Specify that the PTSD diagnosis be made in accordance with the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (“DSM-5”) to ensure it is made based on generally accepted scientific standards. Please note that the specific edition should be referenced to avoid constitutional issues (*see e.g., Protz v. WCAB (Derry Area School District)*).
3. Require the claimant’s PTSD be caused by direct exposure to a defined traumatic event, consistent with the DSM-5 diagnostic criteria. This requirement serves two purposes:

- a. Provides an objective evidentiary basis for assessing the PTSD diagnosis and therefore the credibility of the claim itself; and
  - b. Tying the PTSD diagnosis to a “traumatic event” will allow a factfinder to identify the responsible employer. For example, if a police officer works 20 years for one police department and then moves to another where the officer is diagnosed with PTSD, it is important to determine when the triggering traumatic event(s) occurred.
4. Provide a specific list of “traumatic events” that qualify for a bona fide “mental-mental” PTSD injury in accordance with the DSM-5 diagnostic criteria, such as:
    - a. Viewing a deceased minor;
    - b. Witnessing the death of a person or an incident involving the death of a person as a result of a violent event, including, without limitation, a homicide, suicide or mass casualty incident;
    - c. Witnessing an injury to a person who subsequently dies before or upon admission at a hospital as a result of the injury and not as a result of any other intervening cause;
    - d. Having physical contact with and treating an injured person who subsequently dies before or upon admission at a hospital as a result of the injury and not as a result of any other intervening cause;
  5. Require the PTSD diagnosis be made by a licensed psychiatrist or psychologist with appropriate clinical expertise.
  6. Require incident reports or other documentation of the qualifying traumatic event(s) as a pre-condition for submitting any PTSD claim. Police, fire, and EMS reports are issued for each incident requiring response from those departments, so this would not be a high burden.
  7. The quality of the evidence presented by both parties should be “substantial competent evidence”, so that incompetent or speculative medical testimony is excluded from consideration.
  8. Although the three (3) year limitations period for filing a claim would begin to run when the claimant is diagnosed with PTSD, it is important to identify the responsible employer by adding the following provision:
    - a. For purposes of determining liability under the act, the date of injury shall be the last date of the claimant’s direct exposure to the traumatic event(s) which caused the injury.
  9. Expressly exclude compensation for PTSD caused by any employment actions, including, but not limited to, any disciplinary action, job performance evaluation, job transfer or termination of employment.
  10. Make the legislation effective at least twelve (12) months after enactment to provide state and local governments and their insuring entities with time to adjust workers’ compensation premiums based on this new exposure.
  11. Include a sunset provision in the law to allow the legislature to gather more information on the associated costs.
  12. Predicate the ability to receive benefits on the direct exposure to a defined traumatic event occurring on or after the legislation’s date of enactment.
  13. Include a duration cap on benefits to guard against runaway claims.

### **PTSD Legislation in Other States**

In many states other than Pennsylvania, claimants alleging PTSD from a work-related exposure were completely barred from seeking relief through their state’s workers compensation system. As a result, enacting PTSD legislation was a top priority of first responders and their representatives nationwide in recent years. Below is a chart of similar laws enacted in other states. As you review these laws, please keep in mind that the workers compensation system can, and often does, differ between states.

It’s worth noting that the PTSD/workers compensation laws passed in other states contain fiscally responsible provisions that are omitted from Pa. Senate Bill No. 775. Such provisions include:

1. Duration cap on benefits<sup>1</sup>
2. Precluding injuries that occurred prior to the legislation enactment date<sup>2</sup>
3. Sunset provision<sup>3</sup>
4. Specific list of traumatic events<sup>4</sup>
5. Allowing local government entities to “opt-in” to provide this enhanced benefit<sup>5</sup>

These features act as important governors on this type of legislation where underwriting data is lacking and not mature.

<b><u>State</u></b>	<b><u>Date of Enactment</u></b>	<b><u>Act or Bill Number</u></b> <i>(hyperlinked to viewable document)</i>
<b>Wisconsin</b>	April 27, 2021	<a href="#">Act 29 of 2021</a>
<b>West Virginia</b>	April 10, 2021	<a href="#">House Bill No. 3107</a>
<b>Ohio</b>	January 9, 2021	<a href="#">House Bill No. 308</a>
<b>Nebraska</b>	August 15, 2020	<a href="#">Legislative Bill No. 963</a>
<b>Virginia</b>	April 22, 2020	<a href="#">Senate Bill No. 561</a>
<b>Wyoming</b>	March 26, 2020	<a href="#">Enrolled Act No. 56</a>
<b>California</b>	October 1, 2019	<a href="#">Senate Bill No. 542</a>
<b>Connecticut</b>	June 18, 2019	<a href="#">Substitute Senate Bill No. 164</a>
<b>Oregon</b>	June 13, 2019	<a href="#">Senate Bill No. 507</a>
<b>Nevada</b>	June 3, 2019	<a href="#">Assembly Bill No. 492</a>
<b>Idaho</b>	March 12, 2019	<a href="#">Senate Bill No. 1028</a>
<b>Minnesota</b>	May 20, 2018	<a href="#">House File No. 3873</a>
<b>Florida</b>	March 27, 2018	<a href="#">Senate Bill No. 376</a>
<b>Washington</b>	March 26, 2018	<a href="#">Substitute Senate Bill No. 6214</a>
<b>Maine</b>	July 24, 2017	<a href="#">Public Law, Chapter 294</a>
<b>Vermont</b>	June 15, 2017	<a href="#">Act 80 of 2017</a>
<b>Texas</b>	June 1, 2017	<a href="#">House Bill No. 1983</a>

### **Costs to the Workers Compensation System**

<sup>1</sup> See Connecticut, Virginia, Wisconsin and Wyoming.  
<sup>2</sup> See California, Connecticut, Idaho, Minnesota, Texas and Virginia.  
<sup>3</sup> See California, Idaho, Maine and West Virginia.  
<sup>4</sup> See Connecticut, Florida, Nevada and Virginia.  
<sup>5</sup> See West Virginia.

Providing this enhanced benefit to first responders through the Pa. WCA is likely to come at an extremely high financial cost to the tax paying public. The table below is an excerpt from a cost study prepared by the actuary for the Delaware Valley Workers' Compensation Trust and PennPrime, an insurance service of the PA Municipal League, and provides an average cost per case by injury type.

<u>Injury Classification</u>	<u>Indemnity</u>	<u>Medical</u>	<u>Total</u>
<b>Fatal</b>	\$326,922	\$175,258	\$502,180
<b>Permanent Total</b>	\$678,465	\$2,995,553	\$3,674,018
<b>Permanent Partial</b>	\$77,329	\$58,816	\$136,145
<b>Temporary Total</b>	\$10,690	\$11,652	\$22,342

Excluding the costliest classification listed above (permanent total injury) and assuming that temporary total, permanent partial, and fatal average costs exemplify low, most likely, and maximum values of a triangular distribution modelling PTSD claim values, gives an average cost per PTSD claim of \$220,000 and approximately **\$240,000** when you include allocated loss adjustment expenses or "ALAE" (which are costs associated with processing and adjusting a claim). Additional cost details can be provided upon request.

### Alternatives to Using the Workers Compensation System

While SB 775 focuses on enhancing benefits for first responders suffering from PTSD through the workers compensation system, there are alternatives. A few examples of which we are familiar are provided below.

1. In April 2021, Ohio created a new standalone fund separate from the workers compensation system, the State Post-Traumatic Stress Fund, to pay for compensation and medical benefits to public safety officers disabled by post-traumatic stress disorder (PTSD) received in the course of, and arising out of, employment as a public safety officer but without an accompanying physical injury. (<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-308>)
2. South Carolina appropriates money at the state level that goes into a fund to defray the medical expenses associated with PTSD treatment that are incurred under a first responder's health plan (e.g., reimbursement of copays and deductibles).
3. Colorado pioneered a heart and cancer benefits trust that seemingly could be applied in the PTSD context. Essentially, these trusts provide a parallel track to workers compensation without the legal complications typically found in workers compensation. Here are links to the Colorado trust which include a wealth of detailed information on how the programs work - <http://www.cfhtrust.com/heart/> and <http://www.cfhtrust.com/cancer/>.

4. In Pennsylvania, Governor Wolf signed Act 69 of 2020 into law, which requires the establishment of mental wellness and stress management guidelines for first responders, establishes peer-to-peer support programs for first responders to discuss mental health issues, establishes a toll-free helpline that first responders can call when dealing with mental health issues, establishes the Statewide Critical Incident Stress Management Program and increases required training for a variety of topics including PTSD.
5. Governor Wolf also signed Act 59 of 2020 in law, which provides law enforcement officers with mental health evaluations for PTSD upon officer request, recommendation of a supervisor or after the use of lethal force. Act 59 also requires law enforcement officers be assigned to “administrative duty” if experiencing symptoms of PTSD until they are cleared to resume full duty.

We look forward to working with you on this important issue to craft a solution that does not inject additional fiscal uncertainty into the budgets of state and local government entities. If you would like to discuss the contents of this letter further, you may reach out to any of the stakeholders listed below.

Respectfully submitted,



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Jonathan Calpas, Esq.  
General Counsel  
Delaware Valley Municipal  
Management Association  
719 Dresher Road  
Horsham, PA 19044  
(267) 803-5735  
[jcalpas@dvtrusts.com](mailto:jcalpas@dvtrusts.com)



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Amy Sturges  
Director of Governmental Affairs  
Pa. Municipal League & Pa. State  
Assoc. of Twp. Commissioners  
414 North Second St.  
Harrisburg, PA 17101  
(717) 236-9469 ext. 225  
[asturges@pml.org](mailto:asturges@pml.org)



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Edward C. Troxell  
Director of Government Affairs  
Pennsylvania State Association of  
Boroughs  
2941 N. Front Street  
Harrisburg, PA 17110  
(717) 236-9526 ext. 1021  
[etroxell@boroughs.org](mailto:etroxell@boroughs.org)



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Joseph Gerdes, III  
Director of Governmental Affairs  
Pennsylvania State Association of  
Township Supervisors  
4855 Woodland Dr  
Enola, PA 17025  
(717) 763-0930 ext. 122  
[jgerdes@psats.org](mailto:jgerdes@psats.org)



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Ashley Lenker White  
Director of Governmental Affairs  
County Commissioners Association  
of Pennsylvania  
P.O. Box 60769  
Harrisburg, PA 17106-0769  
(717) 526-1010 ext. 3355  
[awhite@pacounties.org](mailto:awhite@pacounties.org)