LD 848, now enacted as Public Law 2017 ch. 294, establishes a rebuttable presumption under the laws governing Workers’ Compensation which provides that when a law enforcement officer, firefighter or emergency medical services worker is diagnosed by a licensed psychologist or a licensed allopathic or osteopathic physician as having post-traumatic stress disorder (PTSD), the injury is presumed to have arisen out of and in the course of the worker’s employment, and is therefore compensable. The bill, identified as a mandate, was adopted by a two-thirds majority vote in both the House and Senate, enabling the Legislature to impose these new PTSD presumption related costs onto municipalities without providing state funding for 90% of those new expenditures. A fiscal impact analysis developed by MMA estimates that this new presumption has the potential to increase statewide municipal expenses by as much as $2.5 million annually.

In recent years, the Legislature has been reluctant to enact new unfunded mandates on municipalities, especially if the cost of the mandate is significant. Moreover, bills that propose to shift new Workers’ Compensation burdens onto the state are hardly ever enacted, and would be almost certain to receive a veto. In that context, one might ask how LD 848 was able to receive a unanimous “Ought to Pass as Amended” report from the Labor, Commerce, Research and Economic Development (LCRED) Committee, pass the House and Senate, and actually gain the Governor’s signature.

After much head scratching and reflection, it appears this legislation benefitted from three factors, one of which was expected and another of which was unexpected. The third factor reflects the unfortunately complex intersection of Maine’s mandate law, the legal concept of burdens-of-proof, and the difficulty in predicting the quantity of and cost associated with future insurance claims.

**Empathy for Proponents.** The expected factor is the great degree of sympathy for the constituency backing LD 848. Legislators on both sides of the aisle understandably acknowledge their own readiness to vote in favor of proposals supported by law enforcement, firefighters, and emergency medical personnel, and a reluctance to oppose these groups. Members of the first responder community are bipartisan, come from all areas of the state, and undertake an important public service. As such, they present a formidable lobbying force.

**State Agency Support.** The Executive Director of the state Workers’ Compensation Board testified in support of the legislation. Members of the LCRED Committee traditionally afford great deference to the Director with respect to legislation impacting workers’ compensation.

Winter will soon be upon us and with it accumulating snow on roofs and buildings. Last winter saw the collapse of several buildings due to snow load. FEMA has released a publication “Snow Load Safety Guide” that details the risks of snow load, and measures to mitigate it. Some highlights:

- One foot of fresh snow can range from three pounds a square foot to 21 pounds per square foot depending on moisture content.
- Unbalanced snow load such as snow sliding, drifting or otherwise accumulating on building additions, around roof obstructions such as HVAC equipment and chimneys, or in roof valleys places greater risk on the structure than an evenly distributed snow load.
- Ice dams can create an unbalanced roof loading situation in addition to causing water intrusion into the building interior.

Section 4 of FEMA’s guide details monitoring steps to implement to prevent a structural failure and warning signs that a roof system is overstressed.
PTSD Presumption (cont’d)

the Workers’ Compensation system. The Committee was quick to notice the Director’s position in light of the fact that he had previously opposed all bills proposing to shift new burdens of proof to employers.

The Director acknowledged in his testimony that he had in the past testified against enacting presumptions into statute based on his view that doing so “tip[s] the scales of justice”, is unwise, and is out of step with fundamental legal principles. He went on to explain his support for LD 848 came from a belief in the importance to the public at large of first responders being able to function fully and in the proper frame of mind. The Director also believes that, with respect to PTSD, “the sooner a diagnosis is made and the condition treated, the greater likelihood for recovery...”. In short, the Director suggested that first responders would be incentivized to seek treatment once the governmental employer is required to prove that a diagnosis of PTSD resulted from experiences outside of that person’s employment as a first responder.

Before moving on to the third factor, it might be helpful to note the interplay between the first and second factors. At the public hearing, the Director was joined by at least 20 proponents including several firefighters and first responders, sheriffs, the National Association of Firefighters, the National Alliance on Mental Illness (NAMI), the Maine Chiefs of Police Association, the bill’s sponsor, and the Maine Association of Police. The testimony painted a clear picture of the perception of a stigma associated with acknowledging PTSD throughout the first responder community. The testimony pointed to this stigma as the reason why these employees do not avail themselves of the early intervention treatment solutions that would allow them to address the trauma before their mental stress grows into PTSD. The primary proponent of LD 848, the Maine chapter of the National Alliance on Mental Illness, explicitly stated in its testimony that their advocacy for this presumption was “due to the pervasive stigma that prevents officers from practicing positive self-care.” Not a single person who testified, however, indicated that they had submitted a Workers’ Compensation claim which was denied. In its opposition to LD 848, MMA pointed to the fact that mental injury claims are both in law and in practice compensable. The legal concept of a “rebuttable presumption” is intended to be applied out of fairness, when clear evidence of work-relatedness is difficult by its nature to obtain. Evidence of the types of traumatic work events that can lead to PTSD is not by its nature difficult to obtain. Rather, these incidents are ordinarily well-documented and that documentation very often justifies the coverage of claims. Without any indication that claims are in any way regularly being denied, imposing a new burden on employers to disprove a claim did not seem to be a sensible solution to the stigma issue identified by the bill’s proponents.

Cost Confusion. It is not uncommon for a bill with strong bipartisan support to ultimately die for lack of funding. LD 848 applies in part to state police, and in large part to county and municipal employees. Bills which carry a cost to the state must be funded to be enacted, whereas legislation that would impose new costs on local government can be enacted provided the Legislature either pays 90 percent of the local costs or acknowledges the new mandatory cost to the local government and votes to enact the law by a two-thirds majority in both the House and Senate without providing funding. For these reasons, the cost estimate for LD 848 loomed large after the public hearing as it could impact the fate of the bill.

According to the fiscal note prepared by the Legislature’s Office of Fiscal and Program Review,

This legislation will result in additional costs to the State as a direct reimbursement employer and to the Department of Public Safety associated with increased payments of Workers’ Compensation benefits and legal and administrative expenses. The impact will depend on actual experience.

This legislation will also increase costs to local governments in the form of both higher premiums for Workers’ Compensation insurance and increased legal and administrative costs. The impact to individual units of government will depend on actual experience.

Mandate Question. For a quarter-century, Maine’s mandate law has put legislators on notice that bills they are considering will place even greater burdens on property taxpayers in the absence of state funding, requiring a two-thirds vote for passage (rather than a simple majority). The definition of a state mandate involves a two-part test. The first test asks whether local government will be required to expand or modify its activities as a result of the new law. The second test asks whether the new law comes at an increased cost to local government. Each test must be met in order for the proposal to constitute a mandate.

The Committee’s legal analyst and multiple members of the Committee appeared to narrowly interpret the law (which Maine’s Constitution requires to be “liberally construed”) by claiming that a new rebuttable presumption on the municipal employer would not necessarily count as an expansion or modification of current municipal activities. A letter from the Committee to the Legislature’s Appropriations and Financial Affairs Committee, which approves state funding, even stated “Testimony revealed that many law

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PTSD Presumption (cont’d)

enforcement officers and first responders do seek and are treated for PTSD already, so there may be no increase or even a decrease in costs if they are encouraged by this legislation to self-identify earlier, making treatment less acute.”

Past Experience. The municipal officials who have handled claims under a rebuttable presumption law that was enacted in 2009 with respect to firefighter cancer know better. At that time, staff at the Maine Workers’ Compensation Board issued a cost estimate of the legislation under consideration, LD 621 in the 124th Legislature, which stated, “I don’t think this legislation would have any particular cost effect … for municipalities who employ firefighters … claims would be extremely rare.”

Prior to the passage of LD 621, the MMA Risk Services Division had four claims submitted for cancer. Since LD 621 passed, MMA Risk Services has handled 27 claims. In addition to insurance claims costs and attorneys’ fees, municipal employees have spent significant amounts of time responding to discovery requests including researching and documenting information on fire calls occurring over large periods of time.

In contrast to the 2009 predictions that LD 621 would not create new costs for municipalities, the experience of towns and cities throughout the state shows this legislation has resulted in significant new costs being placed on municipal government. Based on this experience, as well as the proponents’ interest in passing the legislation to encourage new claims, municipal officials have clear reason to expect a significant fiscal impact from LD 848, which applies not only to firefighters but law enforcement and emergency medical responders as well.

Splitting the Baby. Due, at least in part, to the Committee’s difficulty reaching agreement as to whether a bill encouraging employees to file claims will in fact lead to an increase in claims and insurance payouts, the Committee’s Senate co-chair offered an amendment to the bill that automatically repeals or “sunsets” the new PTSD presumption after five years, on October 1, 2022. Additionally, her proposal requires the Director of the Workers’ Compensation Board, the Maine Municipal Association, and a representative of the state to report back to the Legislature prior to the sunset, by January of 2022. The report would include information relating to the fiscal impact of this new presumption, which applies exclusively to public employees.

Conclusion. For the reasons explained above, Maine’s 128th Legislature showed little reluctance to become the first legislature in the nation to enact LD 848. Effective November 1 as Public Law 2017 ch. 294, this law will mark the fourth (out of five total) Workers’ Compensation presumption in state laws which predominantly impact Maine’s municipal employers.

This new law will impact the rates used for all first responder class codes in the years to come. 2018 rates for the MMA Workers Compensation Fund are being promulgated this fall. The amount of the increase has not been fully determined as yet. You should check with your assigned underwriter to see what effect this change will have on your municipality.

Snow Load Safety (cont’d)

from snow load.

When in doubt, get people out! If warning signs are apparent the building should be evacuated, and a structural engineer consulted to check the buildings integrity. FEMA’s “Snow Load and Safety Guide” can be found by accessing Risk Management Services, then Loss Control and Loss Control Advisories in the MMA web site.

Also see:

OSHA- Falls and Other Hazards to Workers Removing Snow From Rooftops and Other Elevated Surfaces in the Loss Control Advisories section of the MMA web site.

Welcome New Members
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Town of Washburn

The Property & Casualty Pool provides coverage and risk management services to 461 municipalities and governmental entities. We thank our dedicated members for their partnership.

MEWEA Convention

Risk Management Services is pleased to continue our support of the Maine Water Environment Association by being an exhibitor at the annual convention held September 20-22.

We would like to thank all of the attendees that visited our booth to discuss the programs and services offered by MMA Risk Management Services.

For more information about the Property & Casualty Pool, Workers Compensation Fund or the Unemployment Compensation Fund, please contact Marcus Ballou at mballou@memun.org or by calling 800-590-5583, ext. 2244.
MMA Risk Management Services Delivers Dividends to Membership

All of us at MMA Risk Management Services (RMS) would like to recognize the extraordinary efforts and continued commitment of our membership. We are pleased to announce that the Property & Casualty Pool and Workers Compensation Fund have awarded dividends to those members who met the dividend criteria. Because of the efforts of our member’s sound management, responsible underwriting and favorable loss experience, this year the Workers Compensation Fund has distributed almost $650,000 in dividends to participants and the Property and Casualty Pool has paid dividends of nearly $550,000, for total payments of just under $1.2 million returned directly to MMA members. Since 1997, the two programs have returned almost $20 million in dividends to participating members.

Unemployment Compensation Fund

Assisting Members Since 1978

MMA’s Unemployment Compensation Fund (The Fund) was created in 1978 at the request of MMA members, municipalities, service districts and related nonprofit organizations to assist in meeting their obligations under the Employment Security Act in an efficient and cost effective manner.

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- Simplification – All communications, mailings and quarterly reporting are directed by MMA. MMA has over three decades of experience working with the Maine Employment Security Law and with the Maine Department of Labor, Unemployment Compensation Bureau.

- Return of Dividends and Excess Balances Dividends, interest and excess Fund balance are returned to members annually, based on the actuary’s conservative estimation of each member’s Fund balance adequacy for the coming year’s claims.

- Technical Guidance – MMA staff person is available to assist with fact findings, appeals, wage reports and wage audits

New members can join the Fund on January 1 or July 1.

If you would like more information or to obtain a quote, please contact Denise Kolreg, UC Coordinator, at (800) 590-5583 x 2237 or dkorleg@memun.org.

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