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## **Recommendation to Adopt Heart & Lung Guidelines**

The Heart and Lung Act was amended in 2006, effective January 1, 2007, in order to include sheriffs and deputy sheriffs within the list of “law enforcement officers” who are entitled to receive benefits under the Heart and Lung Act. In short, the Heart and Lung Act allows a law enforcement officer, including a sheriff or deputy sheriff, to receive his or her full salary and benefits for temporary disability due to a work related illness or injury. Unlike workers’ compensation claims which incorporate return-to-work provisions, there is little or no incentive for the ill or injured claimant who is receiving benefits under the Heart and Lung Act to return to work, although the act is intended for temporary illness and injury. The increased costs fall to counties whenever a claim under the Heart and Lung Act arises, as the salary payments are incurred by the county general fund.

Heart and Lung Act benefits, although tied to a work-related disability, are independent of the Workers’ Compensation Law (although the county is to be either reimbursed for any workers’ compensation payments or an offset of workers’ compensation benefits can be applied). Furthermore, unlike the Workers’ Compensation Law, the Heart and Lung Act does not provide either an administrative mechanism for the submission and resolution of claims, or an administrative oversight agency.

Although CCAP, in 2006, made recommendations concerning the implementation of the Heart and Lung Act, and sheriffs and deputy sheriffs now have been entitled to benefits under the Heart and Lung Act for more than 10 years, many counties remain uncertain as to how to handle these claims. As a result, CCAP is again recommending that counties adopt administrative policies to address claims under the Heart and Lung Act. These policies invoke the Local Agency Law. Because the sheriff is a potential beneficiary under the Heart and Lung Act, the Board of Commissioners or the home rule equivalent should be vested with the authority to conduct all administrative matters relative to Heart and Lung claims. A template developed for CCAP by Campbell, Durrant, and Beatty, along with supporting documents, are below.

If a county has not already done so, the county solicitor should be consulted to confirm that procedures are in place to address claims under the Heart and Lung Act.

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**BACKGROUND INFORMATION  
SUPPORTING PROTOTYPE HEART & LUNG ACT  
IMPLEMENTATION GUIDELINES**

The Enforcement Officer Disability Benefits Law, 53 P.S. § 637, is known unofficially as the Heart & Lung Act (the "Act"). It was amended by Act 95 of 2006 to cover county sheriffs and deputy sheriffs. The amendment took effect January 1, 2007.

The Act "...does not take the place of workers' compensation, but functions instead concurrent therewith, where the injured employee is entitled to Heart and Lung benefits." City of Erie v. W.C.A.B. (Annuziata), 838 A.2d 598, 605 (Pa. 2003)(footnote omitted). The Act provides specific benefits to defined law enforcement personnel for periods of total temporary disability. Although these benefits are somewhat broad, the Act gets its name from one aspect of the law which establishes a legal presumption that an employee covered by the Act who, after four continuous years of service develops a disease of the heart or the respiratory system, is presumed to have contracted that disease as a result of his/her employment. This is a rebuttable presumption, requiring the county to use standard concepts of proof (medical evidence, family history, etc.) to prove that a cardiopulmonary disability was not related to the performance of official duties by the sheriff or deputy sheriff. To take initial advantage of the presumption, a sheriff or deputy sheriff would not have to demonstrate that, for example, he had a heart attack while actually performing an official duty. If the officer had an off duty heart attack, and had met the four years of continuous service criteria, it would be presumed, subject to rebuttal, that the heart attack was caused by the officer's history of performing his official duties. Buchanan v. PSP, 620 A.2d 575 (Pa. Commw. 1993).

While the foregoing represents the concept behind the Act's informal name, the real effect of the Act is broader, covering many work-related, temporary, full disabilities. It pulls out of the workers' compensation system, for designated classes of employees (which now include sheriffs and deputy sheriffs), certain categories of work related injuries leading to disability and treats them differently than they would have been treated if they had remained subject to the workers' compensation system. Employees who have these kinds of disabilities receive more generous benefits than are available under workers' compensation.

This aspect of the Act will apply to sheriffs and deputy sheriffs (1) when they are injured while they are performing an official duty; (2) where the initial expectation is that the injury will be temporary; and (3) where the injury completely prevents the employee from doing his job during this temporary period. Each of these criteria is significant.

From case law, the Act is to be strictly (narrowly) construed. Colyer v. Pennsylvania State Police, 644 A.2d 230 (Commw. Ct. 1994). For example, a deputy sheriff who is in uniform, in the County Courthouse, during his regular shift, and who is injured while taking it upon himself to clear ice from the Courthouse steps might not be covered by the Act. The question would be was clearing that ice part of the deputy's official duty? On the other hand, if a deputy, while attempting to serve a warrant, slams his thumb in his cruiser door, the resultant injury will be subject to a Heart & Lung Act analysis. In other words, the Act's application does not depend on who or what caused the injury or the nature of the injury (other than that it creates a temporary full disability).

If, as a result of slamming his finger in that car door, a deputy sheriff cannot perform one or more of the essential duties of his job (effectively use his weapon; effectively, in a physical sense, manage prisoners, etc.), then the deputy is disabled under the Act even if he can do such things as

drive a car, operate an ATM, fill out paper work, or do any number of other things. Generally, fingers which are slammed in car doors heal, i.e., the accident creates a temporary disability. But, if the finger became infected and had to be amputated, the injury would be permanent, and the Act would no longer apply. Remember, the Act applies to temporary injuries that totally disable the deputy, but it has no application to permanent disabilities or to "temporary" disabilities which subsequently become permanent once it is clear that is what has occurred. If, on the basis of medical evidence, it appears that the recovery period from the injury is indeterminate, or recovery cannot be projected for the foreseeable future, then the disability is not "temporary." Cunningham v. Pennsylvania State Police, 507 A.2d 40 (Pa. 1986).

Note as well that the Heart & Lung Act does apply to part-time deputy sheriffs. Brandt v. Pennsylvania State Police, 632 A.2d 986 (Pa. Commw. 1993).

The benefits a covered and qualified individual receives under the Heart & Lung Act are defined in the Act. A successful claimant receives his full rate of salary and benefits as fixed by ordinance or resolution (including by collective bargaining agreement or interest arbitration award) during the period of the covered disability. In addition, the deputy is protected from losing a benefit entitlement tied to seniority. For example, the deputy would continue to accrue sick leave (an officer with a Heart & Lung Act disability cannot be forced to utilize or exhaust sick leave), and the deputy would continue to accrue seniority for furlough, longevity, vacation and any other similar term or condition of employment. A deputy's salary would include base salary, longevity, pay for having achieved certain academic standards, e.g., if these are part of the applicable benefit package. If a Heart & Lung Act disability continues from one year to the next, the deputy will receive any compensation benefit increase he would have received if he had remained "active." Note, however,

that overtime compensation, even where the employee has a history of earning certain minimum levels of overtime, is not included in the calculation of Heart & Lung Act benefits. Schimdt v. Borough of Stroudsburg, 670 A.2d 208 (Pa. Commw. 1996).

The Internal Revenue Service (IRS) has determined that Heart & Lung Act payments are not taxable, so federal income taxes should not be taken from Heart & Lung Act payments. During the first six months of a Heart & Lung Act leave of absence, Social Security and Medicare deductions should be taken from Heart & Lung Act benefits, but, after six months, even those deductions should not occur. Pension deductions should still be taken from the benefits paid under the Act.

Practically, this means that a sheriff or deputy receiving Heart & Lung Act payments has a much greater take home pay than would be the case if he were actively employed; if the disability lasts more than six months, that sheriff or deputy sheriff receives as much as 133% of his normal take home pay through the Heart & Lung Act benefits.

While the employee is receiving Heart & Lung Act benefits, any insurance benefits to which the sheriff or deputy would have been eligible had he continued to be active must be maintained on the employee or on behalf of his dependents. Note that the sheriff or deputy would continue to have the responsibility to make any contributions to premium normally required of employees.

If the injury is compensable under the Workers' Compensation Law, the Heart & Lung Act provides for a workers' compensation offset that entitles the county to any relevant workers' compensation benefits received or collected by an employee while that employee is receiving Heart & Lung Act benefits. If an employee receives such workers' compensation benefits and does not turn the payments over to the county, or cause the payments to be turned over to the county, then the county may deduct that amount from the anticipated Heart & Lung Act payment. It should probably be the

policy of every county which has a collective bargaining agreement with deputy sheriffs to require, through language in that agreement, that deputy sheriffs seeking or receiving Heart & Lung Act benefits apply for workers' compensation.

Heart & Lung Act benefits are not subject to workers' compensation procedures, and the county should not allow Heart & Lung Act eligibility to be determined by workers' compensation referees. And, it is important to note that no workers' compensation referee can terminate Heart & Lung Act benefits. Wisniewski v. WCAB, 621 A.2d 1111 (1993).

Unlike workers' compensation claims, claims under the Act are administered and paid by the county and not the county's workers' compensation carrier, including the Pennsylvania Counties Workers' Compensation Trust ("PComp"). Determination of a sheriff's or deputy sheriff's eligibility for Heart & Lung Act benefits can be either a one or a two step process. Initially, an administrative decision on eligibility is made. If, administratively, it is determined that the sheriff or deputy should receive Heart & Lung Act benefits, then the determination has been made and that decision is implemented. If there is an administrative denial of benefit eligibility, the sheriff or deputy has a right to a hearing and a formal, written adjudication of his eligibility. This adjudication will take place using procedures dictated by the Local Agency Law. Sidlow v. Township of Nether Providence, 621 A.2d 1105 (1993).

The Local Agency Law gives the county governing body the authority to serve as the adjudicatory body. Insofar as the sheriff is a covered employee under the Act, any initial administrative determination of eligibility or subsequent adjudication of eligibility should fall to the county governing body, and not the sheriff.

Once it has been determined that a deputy is eligible for Heart & Lung Act benefits, those benefits cannot be discontinued without the deputy's permission, or until the discontinuation issues have been adjudicated in a full due process proceeding, again under the dictates of the Local Agency Law. Note, however, that the collective bargaining or interest arbitration process can result in a grievance arbitration process and award being substituted for the Local Agency Law process and adjudication relative to determining Heart & Lung Act benefits entitlement or continued entitlement.

A question that is not resolved by case law is the potential duration of benefits for the sheriff who, as an elected official, has a defined term of office. An argument can be made that if the sheriff chooses not to run again for office he has made himself ineligible to return to work, and is thus no longer temporarily disabled.

As to deputies, however, a county, when making a determination of eligibility, duration, or continuation of benefits, should carefully weigh the case and potential outcomes with counsel, and particularly the determination of whether the injury is, or continues to be, "temporary". Case law provides that if the disability is of a duration unable to be determined, then it is not temporary in nature, and, as a result, Heart & Lung Act benefits can be denied. Care has to be taken in how this decision is framed, however, since other case law has found that declaring the officer to be "permanently" disabled in order to avoid Heart & Lung Act benefits allows an officer, who is later found to be fully recovered and able to return to duty, to refuse to return to work, citing his "permanent" disability status. Courts have similarly found that, under the theory of "collateral estoppel," a Local Agency hearing finding of "permanent disability" was binding even in the workers' compensation system.

**PROTOTYPE COUNTY  
HEART & LUNG ACT IMPLEMENTATION GUIDELINES  
TO MANAGEMENT PERSONNEL**

**Background:**

A county sheriff or deputy sheriff who suffers an injury while performing an official duty as a county sheriff or deputy sheriff may be eligible for Heart & Lung Act benefits. Eligibility will depend upon four factors: (1) a determination that the sheriff or deputy sheriff was injured while “in the performance of his duties;” (2) a determination that the resultant disability is temporary; (3) a determination that the injury temporarily prevents the sheriff or deputy from performing at least one of the essential functions of his job; and (4) a decision by the county not to accommodate the sheriff’s or deputy’s situation by temporarily re-structuring his employment to take into account his limitations.

**Procedure When Injured:**

A sheriff or deputy sheriff who receives an “official duty” injury should be required to complete, as soon as possible, an injury report. The form utilized shall be the standard form used, pursuant to the Workers’ Compensation Law, to report job-related injuries. Where a sheriff or deputy sheriff indicates a belief that his injury meets the Heart & Lung Act criteria, he should be required to append to the injury report a statement detailing why he believes the injury was incurred in the performance of official duties, why he believes the injury to be temporary, and why he believes he will be temporarily unable to perform at least one of the essential functions of his job. Other employees with personal knowledge of facts going to one or more of these issues should also be required to file

written statements providing their information. These reports shall be sent to the Director of Personnel [or other person responsible for personnel administration] who shall, after making a reasonable investigation of the situation, issue a written report to the sheriff or deputy sheriff seeking Heart & Lung Act coverage of his or her decision as to whether the sheriff or deputy sheriff is eligible for Heart & Lung Act benefits, with copies to the Chief Clerk, County Commissioners [or home rule equivalents], and, in the case of a deputy sheriff, to the sheriff. Note that HIPPA rules of confidentiality apply to this report.

If it has been determined by the Director of Personnel that the claimant is eligible for Heart & Lung Act benefits, those benefits shall be awarded beginning on the first work day following the start of the disability. If the Director of Personnel determines that the sheriff or deputy sheriff is not eligible for Heart & Lung Act benefits, the written decision shall explain the basis for this determination, shall indicate to the claimant that he may appeal this decision to the Board of County Commissioners [or home rule equivalent] and shall provide notice as to how and when to appeal the decision. This written decision and notice shall be provided to the claimant in a manner reasonably designed to insure that he receives the written decision and notice. The claimant shall be informed that any challenge to the decision must be in writing, must be received in the office of the Director of Personnel, and must be delivered to that office within ten work days following delivery of the written decision to the claimant. This ten work day appeal period should be expanded where circumstances demonstrate that, for reasons beyond the claimant's control, it was unreasonably restrictive.

Upon receipt of any such appeal, the Director of Personnel shall inform the Chief Clerk and County Solicitor, who shall make arrangements for a due process proceeding before the Board of County Commissioners [or home rule equivalent]. This proceeding will be held pursuant to the Local

Agency Law. At that point, except for the purpose of dealing with administrative issues (establishing hearing dates for example) county administrative personnel and legal counsel shall take care not to discuss with the county commissioners matters relating to the upcoming hearing. The commissioners shall take reasonable efforts to avoid pre-hearing discussions or receipt of information about the issues and shall not form a judgment about them prior to receiving evidence and testimony at the hearing.

**Local Agency Law Hearing:**

The hearing on the claimant's appeal will be before the Board of County Commissioners [or home rule equivalent]. The hearing may be opened or closed at the claimant's discretion. The hearing will be transcribed by a qualified court stenographer. The Board of County Commissioners will be advised by the County Solicitor or other lawyer of its choice. The burden of proof will be on the County, typically by the Director of Personnel, who may also be represented by legal counsel. The claimant may be represented by legal counsel and/or his Union if he is in a collective bargaining unit.

The issues to be decided will be those identified in the correspondence to the claimant stating the bases for denial of the Heart & Lung Act claim. Witnesses shall be placed under oath. In general, the proceeding shall be governed by the rules of evidence applied in the liberal sense with which they are generally used in Pennsylvania administrative law proceedings. Fair opportunity to present documentary evidence, and to examine and cross-examine witnesses, shall be provided to both parties. The County Commissioners shall render a written adjudication, based solely upon the evidence presented during the Local Agency Law hearing, in the following format: Introduction; Findings of Fact; Conclusions of Law; Opinion/Adjudication/Award. As part of the decisional process,

the Board of County Commissioners may require the parties to present to it, following the close of evidentiary proceedings, a proposed adjudication. Any appeal from the written adjudication of the Board of County Commissioners must be taken pursuant to the requirements of the Local Agency Law.

### **Termination of Benefits:**

Generally, Heart & Lung Act benefits will not be ended except where the employee has agreed to the termination of benefits or it has been determined, pursuant to a Local Agency Law adjudication, that the sheriff or deputy sheriff is no longer eligible for Heart & Lung Act benefits. Heart & Lung Act benefits may be terminated when it is determined that a disability once considered temporary has become permanent, or when it is determined that a sheriff or deputy sheriff once believed to be disabled is no longer disabled. Pursuant to the requirements of Cleveland Board of Public Education v. Loudermill this discussion between the administration and the sheriff or deputy shall involve the following elements: (1) the administration shall provide justification to the employee for its belief that he is no longer eligible for Heart & Lung Act benefits; and (2) the employee may, if he chooses to do so, respond, explaining why he believes himself to continue to be eligible for those benefits. If represented by a Union, a deputy sheriff may request the presence of a Union representative during the Loudermill hearing and one shall then be provided.

An employee who has been receiving Heart & Lung Act benefits may agree that he has ceased to be eligible for such benefits. Where an employee receiving Heart & Lung Act benefits does not agree that his eligibility for such benefits has ended, and the County administration (Chief Clerk or Director of Personnel) does not accept the sheriff's or deputy sheriff's explanation, the administration

may convene a Local Agency Law hearing before the County Commissioners [or home rule equivalent] to determine the sheriff's or deputy sheriff's entitlement to continue Heart & Lung Act benefits. Again, the burden of proof will be on the administration; the Local Agency Law hearing and adjudication should follow the process/procedure described above. Except for the purpose of dealing with administrative issues (establishing hearing dates for example), county administrative personnel and legal counsel shall take care not to discuss with the County Commissioners matters relating to the upcoming hearing. The Commissioners shall take reasonable efforts to avoid pre-hearing discussions or receipt of information about the issues and shall not form a judgment about them prior to receiving evidence and testimony at the hearing.

**Exceptions to the Requirement of an Adjudication as a Prerequisite to the Ending of Heart & Lung Act Benefits:**

Certain events which preclude the sheriff or deputy sheriff from ever returning to work as a sheriff or deputy sheriff can operate to end Heart & Lung Act eligibility. For example, this would occur if a claimant was administratively or through an adjudication found eligible for a disability pension or Social Security disability. It could also occur if a claimant suffered, separate and apart from his Heart & Lung Act disability, a totally disabling, permanent disability as determined by an independent third party.