

CONTAINING COVID-19: Initial Impressions on Assessing and Mitigating Claims Exposure

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The growing outbreak of COVID-19 is concerning for not only public health, but also for employers who could soon be faced with an influx of workers' compensation claims. Allegations of exposure are most likely to arise in sectors of the economy where job duties place employees in close and frequent contact with the public. These "high risk" sectors include health care workers, public safety officers, teachers, those in the travel and leisure industry, and those working in the gig economy. If the outbreak continues to spread, employers should have a framework for assessing risk, with particular emphasis on early employer investigation.

COMPENSABILITY WILL BE FACT-DRIVEN

Compensability of claims arising out of COVID-19 infections will be a fact-driven inquiry. Existing case law regarding other illnesses, such as Hepatitis, HIV, San Joaquin Valley Fever, is instructive on the issue of AOE/COE. Applicants will still bear the burden of proving they were exposed to COVID-19 during the course of their employment by a preponderance of the evidence. It may be difficult for employees to prove the virus was contracted during the course of their employment versus during non-work activities, when so much is still unknown about the spread of the virus. However, the location of the job site and the nature of their job duties could bolster the employee's allegation of industrial exposure.

OCCUPATIONAL DISEASES VS. NON-OCCUPATIONAL DISEASES

The Labor Code specifically defines "occupational illnesses" as any abnormal condition or disorder caused by exposure to environmental factors associated with employment, including both acute and chronic illnesses or diseases which may be caused by inhalation, absorption, ingestion, or direct contact with dangerous materials or chemicals. However, occupational diseases have also been found to include infectious diseases, such as tuberculosis, keratoconjunctivitis, HIV, Hepatitis, and Valley Fever.

In occupational illness cases, employees are required to provide medical evidence of a causal connection between the employment and the disease. However, in these cases, employees need not prove with exact certainty the exposure to certain substances; instead, they are only required to prove causation by a reasonable medical probability. For example, the WCAB found causation between a sewage worker's employment and contraction of Hepatitis C, when Applicant's QME opined that it was well known that Hepatitis C virus was present in human feces, and the applicant's job duties included standing in raw sewage. (*City of Turlock v. Workers' Compensation Appeals Bd.*, 72 Cal. Comp. Cases 931 (Cal. App. 5th Dist. July 27, 2007) (writ denied)).

Generally, the court has held that common colds or the flu are not considered work-related injuries or illnesses. These “non-occupational diseases” are not considered to be work related because it is difficult to discern their origin due to their prevalence in the public at large. “An ailment does not become an occupational disease simply because it is contracted on the employer's premises.” (*LaTourette v. Workers' Comp. Appeals Bd.*, 17 Cal. 4th 644, 63 Cal. Comp. Cases 253; see also *Johnson v. Industrial Acci. Com.*, 23 Cal. Comp. Cases 54, (Cal. App. 2d Dist. February 24, 1958)). The Board may be inclined to distinguish COVID-19 from a common cold or flu, at least in the short term, insofar as the risk of death from COVID-19 appears to be greater than the flu, and the number of COVID-19 infections is relatively small compared with the general population. As such, applicants might be able to identify the origin of their infection and meet their burden of proof.

INCREASED RISK COMPARED TO GENERAL PUBLIC

The Court has carved out an exception to the general rule of non-compensability for non-occupational diseases for situations where employees are subject to increased risk compared with the general public due to the demands of their employment. Several cases have found compensability where there was evidence that employees contracted illnesses due to their employment subjecting them to a higher risk of contracting an illness or virus, than that of the general public. For example, benefits were awarded to an employee who was required to travel for work, and contracted San Joaquin Valley Fever due to exposure to a mold or fungus that exists in the San Joaquin Valley. (*Pacific Employers Ins. Co. v. Industrial Acci. Com.*, 7 Cal. Comp. Cases 71, (Cal. February 27, 1942)). The Supreme Court reasoned that the employee, by reason of his employment, came in contact with the infection, and that his risk of contracting the infection was greater than that of the public in the endemic area, as the majority of inhabitants possessed an immunity to the disease, which the employee lacked.

The Supreme Court has also found keratoconjunctivitis a compensable injury, despite an epidemic in the city, when there was evidence that the disease started in the shipyards and was more prevalent among shipyard workers than the general public. (*Bethlehem Steel Co. v. Industrial Acci. Com.*, 8 Cal. Comp. Cases 61, (Cal. March 19, 1943)). The Appeals Board has found compensability for Hepatitis B infection, even without evidence of a specific exposure to Hepatitis B. The Board reasoned that a detective's job duties exposed him to drug addicts and paraphernalia, which subjected him to a higher risk of exposure to Hepatitis B than that of the general public. (*City of Fresno v. Workers Compensation Appeals Bd. of California*, 57 Cal. Comp. Cases 375, (Cal. App. 5th Dist. June 11, 1992) (writ denied)).

Most applicable to the anticipated claims from COVID-19 infection, the WCAB has found that teachers have greater risk for viral respiratory tract infections due to constant exposure to viruses brought into the classroom by small children. (*Culver City Unified Sch. Dist. v. Workers' Comp. Appeals Bd.*, 82 Cal. Comp. Cases 757, (Cal. App. 2d Dist. June 15, 2017) (writ denied)).

PRESUMPTION OF INJURY FOR PUBLIC SAFETY EMPLOYEES

By statute, certain public safety officers have the benefit of a presumption of industrial injury respecting certain medical conditions. The Labor Code includes presumptions for tuberculosis, meningitis, biochemical exposures, and blood borne infectious diseases or MRSA. While COVID-19 does not fall within the presumptions referenced above, we would expect Workers Compensation Judges to find injury AOE/COE in COVID-19 cases given public safety officers' frequent and close contact with the public, including those requiring medical assistance.

QUARANTINED WORKERS

Based on the case law addressing liability for occupational illnesses, we believe that employees' participation in a quarantine may support a finding of industrial injury and liability for temporary disability. To that end, we believe several factors should be considered when conducting a compensability analysis. We believe quarantines at a hospital or other facility with medical staff provide more compelling support for medical treatment beyond first aid, compared to self-isolation at home. The reason for the quarantine should also be relevant. Was the employee placed in quarantine because of an alleged exposure at work, or elsewhere? If the employee is eventually diagnosed and exhibits symptoms, has the source of the infection been identified? If an employee is placed in a hospital quarantine, is monitored by health care professionals because of a potential work exposure, and the source of exposure is later confirmed to be work-related, then retroactive temporary disability may be owed for the quarantine period. We note that the Centers for Disease Control and local health officials in some cases have been unable to pinpoint sources of exposure, creating an assumption that the exposure occurred in the wider community, and we would contend that the employee did not meet their burden of proof on industrial exposure in those circumstances.

HOW TO PREPARE FOR COVID-19 CLAIMS

Certain job sectors, such as health care workers, public safety officers, teachers, those in the travel and leisure industry, and those working in the gig economy, should anticipate an influx of COVID-19-related claims. Work attendance in these sectors may be mandated, and the nature of these workers' job duties places them at heightened risk for exposure given their frequent and close contact with the public.

COVID-19 claims may ultimately be found compensable if the employee's job duties place him or her at a greater risk of becoming infected than that of the general public. It goes without saying that precautionary measures should be made by the employer on-site to mitigate potential exposure. The scope of the measures taken will depend on the type of business operated by the employer. The failure to do so on the part of the employer may expose the employer to a potential serious and willful claim. Additionally, there should be an emphasis on early investigation, to gather information regarding industrial and non-industrial activities in the days and weeks leading up to the alleged exposure. While these investigative efforts may be stunted if the employee is in quarantine, the circumstances surrounding the quarantine should be examined to the extent possible. Looking ahead, as additional information regarding the virus' incubation period, how long it survives on surfaces, and mode of transmission becomes known, medical experts should be consulted if compensability is disputed.

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