



LIVES & LABOURS LOST COVID-19 IN THE WORKPLACE

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***To Pay or Not to Pay?—
That is the Question Hamlet,
Act III Scene I
(with apologies to the Bard)***

Unfortunately, the answer to that question insofar as the availability of workers' compensation to employees who may have contracted COVID-19 in the workplace is ... it depends.

Cases involving those medical personnel on the front lines of the early days of the pandemic; ICU workers, physicians, nurses or nursing home workers in contact with dozens or hundreds of COVID-19 patients for long hours per day, were generally paid without contest.

The larger issue is, of course, what about the many thousands of other workers dealing with the public in mid to late 2020, who may have contracted the Coronavirus as a result of their exposure to the general public or co-workers are they covered by workers' comp.?

The first place to start in the analysis of any such case is to look at the law of the particular jurisdiction which would be providing workers' compensation coverage.

Each of the 50 states, along with the various other workers' compensation programs, such as the Federal Employees' Compensation Act, Longshore and Harbor Workers' Act and others, have their own statutory or other provisions governing the availability of

workers' compensation benefits for victims of disease.

**COVID-19 AS AN OCCUPATIONAL
DISEASE**

***The sickness doth infect the very life
blood of our enterprise
Henry IV, Port 1 Act 4***

In many jurisdictions, there is a distinction between a workers' compensation claim as a result of an injury as opposed to an occupational disease. Attention must be paid to whether or not there is such a distinction in a particular jurisdiction and what set of facts would qualify as an "occupational disease". At first blush, it would seem that a disease such as a pandemic causing an exposure in the work place, would be an occupational disease, and from a purely medical point of view, that might be correct. However, the term "occupational disease" has very specific meanings in a variety of jurisdictions.

Several states, such as Alabama, Florida and Georgia, have a general definition of occupational disease.

Others use the term "injury" to refer to work-related disease exposure and other states have entirely separate statutory provisions for occupational diseases, such as Montana and Pennsylvania.

Generally, for a disease to be considered an occupational disease, it must be one peculiar to a particular trade, occupation or

employment; that is not an ordinary disease of life to which the general public is equally exposed outside the employment, and that a causal relationship exists between the disease and the employment.

In the case of *Goldberg v. 954 March Corp.*, 276 N.Y. 313, 318-319 (1938), the State of New York Court of Appeals defined an occupational disease as:

One which results from the nature of employment, and by nature is meant, not those conditions brought about by the failure of the employer to provide a safe place to work, but conditions to which all employees of a class or subject, in which produced the disease as a natural incident of a particular occupation, and attached to that occupation, a hazard which distinguishes it from the usual run of occupations and is in excess of a hazard attending employment in general.

STATUTORY EXCLUSIONS OR DEFENSES

***He shall not breathe infection in this air.
Henry VI, Part 2***

Also, one must look at any particular other statutory exclusions or defenses for infectious or contagious diseases. Massachusetts, for example, in General Law, Chapter 152, Section 1(7A), states:

"Personal Injury" includes infectious or contagious diseases if the nature

of the employment is such that the hazard of contracting such diseases by the employee is inherent in the employment.

The phrase “inherent in the employment” has generally been to be confined to health care facilities such as hospitals, nursing homes and physician’s offices where staff would be exposed to patients with a wide variety of contagious or infectious conditions. Retail cashiers, warehouse persons, assembly line workers, office workers who might have contracted a communicable or infectious disease such as a cold, the flu or pneumonia as a result of exposure to the public or co-worker, in a setting in which disease is not inherent in the employment, would be precluded from workers’ compensation benefits by virtue of the Massachusetts statute.

Very few cases have been litigated so there is no body of available case law or, for that matter, anecdotal evidence as to whether or not during the partial economic shutdown in early to late 2020, where the workers who were deemed essential workers and who contracted the disease, might successfully argue that the risk of contracting COVID-19 in a Walmart was, “inherent in the employment”.

BURDEN OF PROOF

***As to the proof, as mountains are for winds, that shakes not, though they blow perpetually
Taming of the Shrew, Scene 1***

In most jurisdictions, a claimant must establish by a preponderance of the evidence medical causation for a workers’ compensation claim based on a disease. The worker must be able to prove the existence, causation and consequences of the disease as being more probable than not.

In an article prepared by John F. Burton, Jr. entitled COV/D-19 as an Occupational Disease: The Challenge for Workers’ Compensation published in the *Workers’ First Watch* Journal by the Workers’ Injury Law & Advocacy Group* (WILG*), Professor Burton notes that, among other issues surrounding the compensability of COVID-19, is the fact that the disease is highly contagious, there is a lag time between exposure and onset of symptoms and, also, because of an asymptomatic but infected person can spread the disease, the cause or source of a person’s COVID-19 infection is often difficult, or impossible, to determine.

As in any toxic exposure case prior to the pandemic, they could be successfully maintained by, first of all, establishing the nature and conditions of the work place, especially the environment, and the availability of any safety data materials, air quality measurements, as well as the particular facts of a claimant’s exposure inside the workplace versus any potential exposures outside the workplace. Fact gathering should also include the availability or lack thereof, of personal protective equipment.

The next step would be to identify and establish any pre-existing conditions that might account for none, some or all of the claimant’s complaints, together with a medical causation opinion that there is, more probably than not, a cause-and-effect relationship between the identified toxic exposure in the workplace and the development of the claimed disease.

COVID-19 cases will be extremely fact dependent, unique to the particular claimant, and there will be a likelihood of inconsistent awards or decisions among various jurisdiction, or even within individual jurisdictions simply because of the variety of the facts in each particular case, and the quantum of medical evidence to either support or rebut the claim of a work- related exposure to COVID-19.

An important point to be made is that the claimants’ standard in most jurisdictions to prevail in a claim for workers’ compensation benefits, is to prove their case by the civil standard of a preponderance of the evidence. Any such medical opinion that it is more probable than not, that a causal connection exists between exposure and disease, must be stated with a reasonable degree of medical certainty, but the opinion itself is one that simply is that it is more probable than not that there is such a connection. Again, reference should be made to the particular jurisdiction in which a claim is being brought as to the standard of proof, and whether the preponderance of the evidence standard is all that is required. That is a much easier hurdle to clear than a reasonable medical certainty standard.

PRESUMPTIONS

***Thy son I’d kill for his presumption
Henry VI, Act 5***

In the immediate aftermath relating to the general topic of the compensability of

COVID-19 claims, there were efforts in many jurisdictions to enact presumptions.

The concept of presumptions in workers’ compensation or the law, in general, is well established. The purpose would be to facilitate the establishment that COVID-19 is a compensable disease. Presumptions operate as rules of evidence which call for a certain result in a case unless the other party can overcome the presumption with other evidence. A presumption, therefore, can be said to shift the burden or production of evidence or the burden of persuasion to the party who seeks to overcome the presumption.

There are both rebuttable presumptions and conclusive presumptions. These two types of presumptions have been commented upon by Pennsylvania Judge David B. Torrey, a frequent contributor to workers’ compensation dialogue, and Professor Michael Duff, from the University of Wyoming Law School, also in the aforementioned WILG* article.

Judge Torrey discusses that a rebuttable presumption is one that once an insurer can produce an expert medical opinion contrary to the causation presumption, i.e., medical evidence showing that COVID-19 was not work related, the presumption would simply disappear. Commentators have utilized the term “bursting bubble” if this were to occur. This does not mean that the employee would lose the case, but the burden of production would then shift back to the claimant, who would then have to satisfy what he or she would have had to satisfy without the existence of a rebuttal presumption.

Duff explains that a more useful presumption for claimants would be the type of presumption where said presumption would create positive evidence of causation and the actual burden of proof would then shift to the employer to prove that the work did not cause the disease in question. This type of presumption would then place the burden of non-causation on the employer as a matter of law.

The most familiar source of presumptions to workers’ compensation practitioners that pre existed COVID-19 were cancer presumptions in the setting of firefighters.

Professor Arthur Larson, in his treatise, notes that in connection with the firefighter disease presumptions, one must measure how

much evidence would it take to rebut or overcome the presumption, and he notes that the “possible grounds for rebutting the presumption varies so widely that the end product varies from a virtually irrebuttable to a virtually worthless presumption.”

At the time of this paper, the following states created presumptions of compensability by Administrative Action or Executive Orders: Connecticut, Florida, Kentucky, Michigan, Missouri, New Hampshire, North Dakota. States adopting presumptions by legislation are: Alaska, California, Illinois, Minnesota, New Jersey, Utah, Vermont, Wisconsin and Wyoming. The next question is whom do these presumptions apply. For the most part, they seem to apply to first responders and other medical personnel. Some have extended coverage to funeral directors and funeral home workers, emergency medical technicians, police officers and the like.

ESTABLISHING CAUSATION
Find out the cause far this effect
Hamlet Act II Scene 2

The general approach for relating COVID-19 exposure to work would be similar to relating any occupational disease as a work-related condition. First would be to establish the diagnosis which would also include the time line from the period of workplace exposure to the onset of symptoms (we have learned that in COVID-19, this can be anywhere from 3 to 5 days up to 2 weeks after exposure).

The physician would then try to document the intensity and duration of the work-related exposure, comparing or contrasting same to potential non-workplace exposure. Length of exposure and dose of exposure are interconnected. Exposure relates to the environment while dose relates to the degree to which the exposed person has inhaled or ingested a particular toxic agent into the body. Once a diagnosis is made based upon symptoms and appropriate diagnostic laboratory testing, as well as the time line, an assessment of the workplace risk should follow. One would look to contact with any potential infectious sources such as the general public, patients, customers, or co-workers. One would also look to any sources to see where clusters or outbreaks have been reported in either scientific literature or municipal, county or state health agencies.

Attention should also be given to an assessment of any cluster or outbreak of

COVID-19 in a particular work site or workplace.

Many state agencies and/or federal government through OSHA may require reporting of cases of COVID-19 among employees to relevant state or federal agencies. Next should follow an assessment of specific work practices in the 14-day period preceding an onset of symptoms or diagnosis. One would want to assess how physically close a patient or claimant would be to others in the performance of their current job; how often during a normal work day might the individual be less than 6 feet from another, and how long have these interactions lasted. One should also be assessing non-work place risk for the 2 weeks prior to the onset of symptoms or diagnostic establishment of the disease.

Once all of this done, a determination must be made by a qualified medical expert as the relevant importance of workplace versus non-workplace risks and exposures, with a careful

comparison of both.

Acknowledgement is hereby given to Edward L. Baker, M.D., MPH and Robert J. Harrison, M.D., MPH, occupational and environmental medicine specialists, who continue to study the interrelationship between work and contagious disease.

CONCLUSION
All's Well That Ends Well {hopefully}

Whether a healthy system of workers' compensation among and between the various states and with or without presumptions, is an adequate program to deal with the particular unique qualities of pandemics such as COVID-19 remains an open question and will likely be subject to a variety of scholarly medical and legal articles and papers going forward. Certainly, our collective experiences will, hopefully, allow society in general and workers' compensation systems in particular, to be better prepared to deal with the economic consequences of potentially work-related pandemic exposures in the future.

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