Consulting the Crystal Ball

What does the future hold for current COVID-19 Workers' Compensation Claims?

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Before the COVID-19 pandemic, workers' compensation occupational disease claims most commonly arose from latent conditions such as cancer, carpal tunnel syndrome, and asbestos-related illness. In cases like these, the burden of proof generally lays with injured workers to prove that their conditions arose out of and in the course of their employment. While excluding "ordinary diseases of life," such as the common flu, workers' compensation laws have, over time, incorporated diseases that are characteristic to a particular job. [See N.J.S.A. § 34:15-31 (covering "all diseases arising out of and in the course of employment, which are due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment") (New Jersey); CA Labor Code § 5500.6 (California); 77 P.S. Workers' Compensation § 1401(c) (Pennsylvania).] While some occupational claims involved infectious diseases, like methicillin-resistant staphylococcus aureus (MRSA), such claims generally were only common in health care settings.

With the emergence of COVID-19, some states amended their governing laws to shift the burden of proof for COVID-19-related cases to the employer and impose a presumption of compensability (i.e. infected workers were presumed to have contracted COVID-19 at work). According to the National Council on Compensation Insurance, these states included Alaska, Arkansas, California, Connecticut, Illinois, Kentucky, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, North Dakota, Utah, Vermont, Washington, and Wisconsin. While the language of the presumption does not vary greatly from state to state, the states differ with regard to its application. Differences include the types of employees covered, how the initial presumption is met, and how employers can rebut it.

Rebutting the presumption of compensability will likely be the biggest challenge for employers. In some of the states listed previously, the presumption can be overcome by "a preponderance of the evidence" that demonstrates an injured worker was exposed outside of the workplace.

Since the official declaration by the World Health Organization of the COVID-19 pandemic more than a year ago, states have reported large numbers of COVID-19 workers' compensation claims. In California, there were 56,854 COVID-19 reported injuries from Jan. 1, 2020 to Nov. 30, 2020, whereas in Florida, there were 23,452 claims filed from Jan. 1 to Oct. 31, 2020. Courts around the nation are still developing and fine-tuning what facts are necessary and

what is needed from experts in litigating COVID-19 workers' compensation cases. In the meantime, however, most claims have resolved quietly, especially in the states that have adopted a presumption of compensability. Thus far, the body of published case law is scarce.

For guidance, employers should consider a recent decision by Delaware's Industrial Accident Board, though this case is currently on appeal to the Superior Court in Kent County under No. K21A-01-002 NEP. In *Carl Fowler v. Perdue Inc.*, No. 1501167 (Del. I.A.B. Dec. 31, 2020), the board found that a worker failed to meet his burden of proving that it was more likely than not that he contracted COVID-19 at his place of employment. The worker alleged that he contracted the virus in March 2020 at work, where he was stationed in a box room on the night shift, had 30-minute meal breaks, and visited the lunchroom on a regular basis with approximately 200 other employees. He claimed that, prior to the onset of his symptoms on March 27, 2020, he did not eat out, go shopping, or socialize with friends. However, his wife testified that he went shopping at Walmart and Royal Farms at least weekly.

The employer, through its safety manager, testified that, although there were other employees who tested positive for COVID-19 between March 18 and April 15, 2020, the worker was the only COVID-19 positive employee who worked in the box room on the night shift.

Medical evidence was presented by the worker's family physician, who testified that the worker most likely was exposed at work, but acknowledged that he could not opine to a reasonable degree of medical probability as to where, specifically, the worker contracted the disease. The physician had only briefly discussed the worker's other activities/contacts outside of work.

Interestingly, the employer presented an internist who specialized in infectious diseases, who also opined that the worker likely contracted COVID-19 at work. However, despite both experts' opinions that the worker likely acquired COVID-19 at work, in determining the injured worker had not met his burden of proof, the board noted the case was "incredibly fact-intensive" and pointed to the significance of the lack of credibility of the injured worker's testimony and lack of complete information obtained by the medical experts.

While Delaware is not one of the states that has adopted a presumption of compensability, Fowler nevertheless offers employers an in-depth look into the facts and circumstances relevant for proving—and for defending—workers' compensation claims involving COVID-19.

But some attorneys in New Jersey, where the presumption exists, who have conferenced COVID-19 cases, have offered insight into what courts may be looking for. It is undoubtedly difficult for employers to obtain information to demonstrate a worker contracted COVID-19 outside of work. Unlike the Delaware case, employers will likely have to provide more concrete evidence of COVID-19 exposure elsewhere, i.e. a positive test by a family member or exposure from a different source, such as a grocery store, restaurant, etc., with confirmed cases. Of course, there are other serious ramifications, such as whether

family members' medical records should be available to employers and whether other stores would provide the public with more specific COVID-19 information, especially if it pertains to confidential employee information.

Claims adjusters, employers, attorneys, and the courts are still trying to navigate COVID-19 claims and determine what information is needed, particularly with respect to rebuting the presumption of compensability. The best strategy will always be reducing risk through compliance with public health guidelines. This could include providing employees with personal protective equipment in the form of masks, gloves, and gowns; performing temperature checks before shifts; filling out log-in sheets; and encouraging handwashing and staying home if any symptoms are present.

However, if a claim is filed, an adjuster should be involved with the employer from the onset to try and identify the place of exposure. Having the employee fill out a COVID-19 questionnaire with tailored questions should assist in obtaining information on other possible sites of exposure. This investigation should include interviewing co-workers and supervisors as well as searching social media to determine if the employee was potentially exposed outside the workplace. The more information that can be presented to the court about where the potential for exposure was, the more likely it will be that the presumption of compensability can be overcome. As more decisions become available from various jurisdictions, it will help more narrowly tailor the type and extent of proof required by employers to overcome the presumption.

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