ALABAMA

Does COVID-19 qualify as an occupational disease?

Possibly, but only for certain occupations. An occupational disease is one that results from a hazard that the job exposes the employee to in excess of that to which others are exposed to in employment in general AND which is peculiar to that job. Occupations such as health care workers, first responders, pharmacists, etc., may be able to satisfy this requirement.

Second, a disease is defined as a serious disorder that leaves in its wake a chronic, lasting effect. Meeting this requirement is potentially problematic for those who contract COVID-19, but only have mild symptoms, then recover. It is still unknown whether there are permanent and lasting effects of having this virus, except in cases of death. On the other hand, the occupational disease section of the Alabama Workers' Compensation Act (the Act) was not intended to cover temporary and/or ordinary illnesses.

Finally, while this section of the Act was intended to cover diseases resulting from long-term exposure, Alabama courts will dispense with the requirement of long-term exposure, if the amount of exposure increases the risk of contracting the disease. To reiterate, hospital and other health care workers seemingly meet this requirement with ease.

Is TTD owed if someone is working modified duty and the company is temporarily closed due to COVID-19?

In all likelihood, we believe an employee who is not yet at maximum medical improvement (MMI) and is working a modified duty job would be due temporary total disability (TTD) benefits if the employer is forced to close due to COVID-19. Because that employee his restriced, the closure of the business now forces the injured worker into the open labor market, where they would be at a disadvantage in securing employment. Additionally, the employee's likely argument is that the employer is no longer offering modified duty, and that would entitle the injured worker to TTD benefits under ordinary circumstances.

Conversely, an employer can argue that they were able and could continue to offer modified duty, but for the forced closure. These are uncharted waters for all of us, and I would be concerned if trying to make this argument that the emotion and sympathy of the majority of judges might adversely influence their decision and, therefore, I cannot tell you that I think taking such a position would be successful more times than not.

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CALIFORNIA

Will psych and PTSD claims resulting from the virus be easier to prove?

The test for determining the compensability of the claim has not changed. We still look to whether the psych/stress claim arose out of employment (AOE) and occurring in the course of employment (COE). Thus, if an individual is experiencing stress due to fear of getting the disease, financial concerns, stress from a loved one or family member who may need care due to COVID-19 or school/work closures, these are external stressors, unrelated to an employee's work and not a compensable psych claim.

Areas where we see there may be a higher potential for compensable psych/PTSD claims is in businesses that have been deemed essential and remain fully open with employees being exposed to potentially higher risk environments. For example, health care workers, grocery store employees and delivery drivers. Here, the courts and medical professionals will likely find that the higher potential exposure risk will result in the AOE/COE test being met. However, even if the employee can meet the AOE/COE test, they still must show that the actual workplace stress was the predominate cause of the overall psych/PTSD claim/injury. Thus, the employee must show that the workplace stress was 35-40 percent of the overall injury. Any outside stressors as noted above would detract from this 35-40 percent threshold. Therefore, you want to be able to show that the actions you are taking are designed to reduce workplace stress as much as possible, qualify as good faith personnel action and/or constitute business necessity in order to lower the potential for an employee to meet the predominate cause threshold.

Can an employer who requests their workers' compensation policy to be canceled during this crisis create a liability for an insurance carrier who in fact cancels it — if later a state determines that a moratorium should have been in effect and or if a claim is presented and you just happened to be the most recent insurance company on the account?

This is an area where we expect that the legislature will be issuing guidance and new legislation regarding the liability when an employer's policy is cancelled during the COVID-19 crisis. In California, if an employer is uninsured, the applicant's attorney and/or judge will join the Uninsured Employers Benefits Trust (UEBTF). However, before UEBTF will pick up a claim, both the courts and UEBTF will look at whether an employer was insured prior to the alleged injury or during the cumulative trauma period. If a policy was in place, and deemed to have been cancelled prematurely or improperly, the insurance carrier and employer will likely be held liable for the claim. In this situation, an employer's cancelation of a policy in place may be considered bad faith.

Additionally, courts tend to place the burden on the insurance carrier when litigating the claims as coverage issues are an area reserved for arbitration and outside of the WCAB jurisdiction. Therefore, even though we expect further clarification from the legislature regarding this matter, the liability for administering the claim will likely be placed on the insurance carrier who was insuring the employer prior to the cancelation, with coverage issues and potential costs deferred to arbitration.

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FLORIDA

What are the ramifications for TTD/partial TTD; bona fide job offer; delayed care; Exposure to pandemic as an occupational hazard?

Per 440.151(2), for an occupational disease to be compensable in Florida, the claimant must show:

1) it is a condition peculiar to the occupation that caused the disease;
2) the claimant contracted the disease during employment (this will be very difficult to prove as it is nearly impossible to determine the actual moment an individual would have contracted the disease);
3) the occupation presented a particular hazard of the disease;
4) the incidence of ordinary diseases of life (which I would argue this is) is substantially higher in the occupation than in the public;
5) the nature of the employment was the Major Contributing Cause of the disease, and;
6) there must be epidemiological studies showing the exposure to the specific substances involved, at the levels to which the employee was exposure, may cause the precise disease sustained by the employee.

If all of the above criteria is met (by clear and convincing evidence), then a claimant could have a compensable occupational disease. However, as you can see from the above criteria, proving a compensable COVID-19 case in Florida would be quite difficult.

As to ramification on TTD/TPD, if a claimant is out on TTD or TPD for a compensable accident and during that time of TTD/TPD contracts COVID-19, then TTD would remain due so long as the MCC of the TTD/TPD restrictions remains the compensable injury. A COVID-19 diagnosis should not prolong a claimant's entitlement to TTD/TPD benefits. Likewise, if a bona fide light duty job offer is made within the claimant's restrictions, but they are unable to return to work due to a COVID-19 diagnosis, then arguably it would not be the injury, but the COVID-19, that would be the basis for their inability to return to light duty, and therefore a good argument could be made that TPD would not be due. In this circumstance, we would want to be certain that it is a legitimate job that is offered within the light duty restrictions, and that the offer was in fact received by the claimant (send via certified mail).

Finally, as to the question of delayed care, if the claimant contracts COVID-19 while out of work for a compensable injury, then the carrier would likely need to continue payment of any indemnity related to the compensable injury, even if the unrelated COVID-19 is contributing to the delay in the claimant's recovery. Ultimately, this would be a medical question which would require the opinion of the doctor as to whether it is the compensable injury or the COVID-19 that is the MCC for the claimant's disability.

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GEORGIA

Does the virus qualify as a compensable accident?

The Georgia State Board of Workers' Compensation is going to look at each case in detail to determine the real reason behind why the employee is not working. If the work injury restrictions place the employee in a category where work is available, but for the light duty restrictions that cannot be accommodated, then TTD benefits are most likely owed. On the other hand, if the employer can show the lay off or furlough was given across the board to all employees and, for instance, only employees with the most tenure or experience were kept, then that may be a good case where the employee not being at work has nothing to do with the work injury restrictions. Rather, the injured employee is not working because of a general economic slow down caused by COVID-19 along with the fact the employee lacked the tenure/experience needed to be kept. As such, it is not advisable for the employer to commence wage benefits in that setting.

Is TTD/TPD due/owed if the employer elected to close for quarantine even if they are considered essential? For example, an employee was working light duty and, following the outbreak, asked to go to MD and were placed on restrictions. If the employer is operating with minimal staff and light duty work is not available will benefits be due?

In the hypothetical where the employee did not ask for restrictions until after the virus outbreak, but nonetheless had restrictions imposed, the employee is being sent home because of a combination of the economic slowdown caused by COVID-19 AND his work injury restrictions. The hypothetical infers that the employer is still up and operating, but do not have light duty work. In this fact pattern, TTD benefits would most likely be due because the employee is being sent home in part because of his restrictions.

If the claim warrants a denial of liability, what wording should we consider outlining in our explanation?

The most general denial language should be used. For example: Employer/Insurer deny the employee has suffered an accidental injury or disability arising out or and/or transpiring in the course and scope of his/her employment.

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ILLINOIS

What's the permanency value?

We see very little long-term health effects that would result in a large permanency award. There is some indication that more serious strains of the virus will lead to some long-term lung damage. However, most symptoms seem to dissipate after 14 days, so most claims should result in very low permanency awards.

Of course, if your claimant dies from the virus, and otherwise proves a compensable claim, you will owe death benefits.

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KENTUCKY

How does a state-mandated stay-at-home order affect my analysis?

State-mandated stay at home orders have the effect of forcing continued TTD for claimants who were either ordered off of work or on light duty where the light duty cannot be accommodate at the point in time that the mandate was issued while treatment providers and employers remain closed. If, however, treatment providers are open and a claimant has a scheduled appointment/IME, the claimant is obligated to attend and TTD can reasonably be suspended for a failure to show up for an appointment or IME. Likewise, if an employer is open and accommodative light duty work is available and offered (depending on the claimant's current work capacity), failure to present for work will constitute a viable basis to cut off TTD notwithstanding the stay at home order.

Employees, who are already on light duty or pending doctors appointment what happens to them in the process? Can you use telehealth to keep medical continuity going?

This answer is largely similar to the previous question in that claimants are obligated to show for treatment appointments and IMEs if the pertinent provider is open for business, notwithstanding the stay-at-home order as an allowed exception to that mandate. If a provider/employer is open, TTD can be suspended for a failure to show. If a provider/employer is closed and accommodative light duty can no longer be offered, TTD will be owed. Implementing telehealth to the extent it is recommended and available to treatment providers should be utilized to be aggressive and ensure claimants are doing everything available to them to progress through their treatment.

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LOUISIANA

How does a claimant prove causation?

The burden of proof generally lies with the claimant to show a direct connection between the disease and the specific exposure at work (some states provide a presumption of causation for first responders, so be aware of this).

First, the claimant must prove he actually has COVID-19. For many people, the symptoms of COVID-19 are very similar to the flu. Generally speaking, the flu is not a compensable disease. A subjective belief that you have COVID-19 should not be sufficient.

OSHA has made a distinction between the flu and COVID-19 for reporting purposes. The flu and general respiratory colds are not reportable incidences under OSHA, but the contraction of COVID-19 is a reportable incident.

A diagnosis of COVID-19 by a medical expert should be required.

Second, the claimant will need to show a likelihood of exposure at work.

a) The strongest case will be for claimants who will be able to show proof of actual exposure at work. They were in close proximity to a co-worker, client, or vendor who came down with the disease first.
b) The next level would be claimants who show proof of an environment with a greater risk of exposure than what is found in the general public. This would include healthcare workers and first responders, and perhaps even occupations that require constant close contact with the public.
c) The weakest case would be proof that "it had to be from work" because all other possibilities were excluded.

Third**,** most states will require an expert opinion stating that it is more likely that the claimant contracted COVID-19 while at work. The expert's opinion is likely to be found valid if it meets the two criteria above.

Address the compensability of injuries sustained while working from home.

With stay-at-home orders in place throughout the country, many more workers will be performing work duties while at home. How should we handle these types of claims?

In order for an injury to be compensable, it must be caused by an accident that occurs "in the course and scope of employment" and "arising out of" the employment.

Accidents during the course and scope of employment refers to the **time, place and activity** at the time of the accident. If the claimant was hurt during work hours, at a place where he is supposed to be working, and performing work duties, then this will generally be considered as occurring in the course and scope of employment. This will be very fact specific, but unfortunately, the claimant will be in sole possession of the facts for the most part.

What if the accident occurred at an odd time or in the backyard? It would depend if the employer gave the employee flexibility as to time and location for work. Check to see if the employer has a work-at-home policy requiring that the work be performed only during set

hours and/or set location. Does the employee have to "punch in and out?" Is the employee prohibited from working overtime? In the end, the case will revolve around the facts and with the claimant or his family member as the only witness.

The trickier aspect of this claim is whether the accident "arises out of" the employment. This looks to **the nature of the employment and the risk which led to the accident**. Was this the type of accident that one could foresee arise while performing the work duties? Easy examples would be lifting a box of work documents, or bending over to put paper in a printer.

What about a trip and fall? Was it from a height necessitated by work? What if the claimant tripped over the family dog or the Lego castle erected that day by his 10 year old son? You may be able to argue that the nature of the risk did not "arise out of" the employment.

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MISSOURI

How do I move my case forward without hearings, pre-trials, depositions, etc.?

While it is easy to think that everything is currently shutdown, we still have the opportunity to move cases forward.

First, the dockets in Mississippi keep clipping along and although there is definitely a reluctance to have any type of in-person hearing, but the judges are allowing many of the Motion Hearings to be performed telephonically. Currently, the Mississippi Workers' Compensation Commission is closed to the public with the exception of appointments for hearings on the record. The Commission has specifically set aside its largest hearing room for those hearings so that individuals can maintain distance and still accomplish the hearings as needed. That being said, most "record" hearing are continued for now.

Second, the Mississippi Supreme Court has now permitted court reporters to swear in witnesses via an audio-visual connection. Therefore, depositions are still an option for everyone without requiring an individual to be in person for the deposition. Instead of everyone being stuck in a small room within feet of each other, a deposition can be done over a video conference. That does require us to plan how to accomplish that, but it helps prevent discovery from being placed at a standstill.

Also, I have found that claimant's counsel are much more willing to allow recorded statements and additional investigation to take place as they often are reluctant to have individuals in their own office if they can avoid it. Recently, a claimant's counsel who usually never allows a recorded statement after his involvement specifically allowed the statement and I believe it was for that very reason.

One of the biggest drivers in claim in Mississippi is the ever present chase of maximum medical improvement. That has become more difficult to reach; however, there are more and more telehealth options that are opening up to allow treatment to progress rather than being shut down for an extended period. The Commission recently relaxed any restrictions on telehealth and it is now accessible for most all providers instead of just licensed

physicians. This is something that can allow claimant's to use this period as continuing the healing process instead of it merely being stalled for four to eight weeks. After all, the quicker they heal and get back to the work force, the better off the entirety of the claim usually is.

Finally, there does seem to be a drive for a number of cases to be settle in the very near future. The uncertainty of what will happen in the future has led to a number of claimant's and possibly Claimant's counsel wanting to have the funds rather than an open on ongoing claim. To that end, some have become much more reasonable in settlement negotiations. Further, the Commission is still performing settlement reviews via electronic submission so that we can still obtain closure without waiting for the current issues to pass.

How do we determine work relatedness?

In Mississippi, the claimant has to have medical support for that the condition is related to work. To that end, you would need a diagnosis and a causal opinion that more likely than not, the claimant's employment caused the infection. A mere exposure is not enough. The first step to address work-relatedness is to determine if the employer had anyone that has been clinically diagnosed with COVID-19. Further, the investigation would need to take into account the claimant's involvement with the general public as a result of the position. Also, an investigation into the claimant's personal contacts outside of the employment from family members, friends, neighbors, etc. Finally, the investigation needs to expand on the claimant's activities outside of work including eating, shopping, etc., to determine how much they interact with the public outside of work.

The medical causation is "as to a reasonable degree of medical probability." It does not take a great deal of evidence to reach a more likely than not standard. However, every single piece of evidence that shows possible exposure leading to a causation opinion needs to be on the scale to address work-relatedness. As it is a medical question, it will often come down to a battle of experts.

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NORTH CAROLINA

What are the implications for light duty work?

Implications for light duty work during COVID-19 will vary depending on the state. Disability is the incapacity because of the injury to earn the wages the injured worker was earning at the time of the injury in the same or any other employment. In North Carolina, as demonstrated in the Supreme Court decision of *Medlin v. Weaver Cooke Construction* (367 N.C. 414, 760 S.E.2d 732 (2014)), if an injured worker's inability to earn his pre-injury wages is due to a large-scale economic downturn and not attributable to the injury, the injured worker is not disabled because of the injury, and as a result, not entitled to indemnity benefits.

While the question of implications for light duty work resulting from COVID-19 is a bit of a novel issue and the North Carolina Industrial Commission will evaluate disability and make a determination based on the specific facts of each case, based on the fundamental

requirement that the claimant prove disability has occurred as a result of the work-related injury and *Medlin*, in North Carolina, if light-duty work was available prior to COVID-19 and would be available but for a COVID-19 related economic downturn or quarantine or isolation orders, the incapacity to earn wages is not due to the work injury, and the claimant should not be entitled to temporary total disability (TTD) benefits.

However, in some states, the key question is whether the claimant has been released to maximum medical improvement (MMI) or returned to full duty, and in some states, if the answer to either of those questions is no and the claimant's post-injury earnings are less than the average weekly wage — for whatever reason — whether the facility had to close down or not — TTD benefits may be owed.

While not workers' compensation related, or relevance, the Families First Coronavirus Response Act signed into law on March 18, 2020, allows eligible employees up to 80 hours of paid leave if they are unable to work for certain COVID-19 reasons such as the employee being subject to a federal, state or local quarantine or isolation order.

As always, check with your WCDI attorney about how the state or states in which you adjust claims would treat this issue.

If a company closes out of an abundance of caution, are employees who were working light duty owed TTD? Is there a distinction between voluntary closure and a "shelter in place" or "stay at home" order from the government?

While we are in a bit of uncharted territory exploring the implications of COVID-19, if a company closes either voluntarily or mandatorily as a result of a "shelter in place" or "stay at home" order, the key question as to whether the claimant is entitled to TTD benefits is whether the claimant is disabled — whether the claimant is not earning wages equal to or greater than the average weekly wage — as a result of the work injury. In North Carolina, if the employer had suitable light-duty work available work available prior to COVID-19, and would have continued to have suitable light-duty work available for the claimant but for either a company-wide voluntary or mandatory shut down as a result of COVID-19, the claimant would not be disabled as a result of the work injury and should not be entitled to TTD benefits.
As the answer to this inquiry is both fact and state specific, please check with your WCDI attorney about your specific scenario and the state or states in which you adjust claims to get best answer and game plan for dealing with this issue.

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OKLAHOMA

Do we now have to accommodate requests from employees, like bringing children to work because they have no child care?

In Oklahoma, in order for the employer/respondent to avoid paying TTD or terminating TTD, the claimant must refuse light duty. The refusal is taken literally with the Commission. In this case, if the employer is able to accommodate light duty, but for the lack of child care, I do not think we would owe TTD since claimant is refusing the light duty job offer. However as COVID-19 is such a unique situation and the judges in Oklahoma are more claimant oriented, especially when it comes to cutting off benefits, the judges may find that the circumstance is beyond claimant's control and say TTD must continue.

The COVID-19 situation is constantly changing, and with many states or cities now issuing an order to shelter in place or requiring businesses to shut to the public, this raises a question regarding modified duty. Under normal situations when an employer can provide modified duty to an injured worker, no temporary disability is due or temporary partial disability (wage loss) would be paid.

The new governmental orders are, in some cases, forcing the employer to close shop when they would have remained open. Modified duty is now no longer available, but this is not due to anything in the employer's control. What is your opinion regarding temporary disability for the injured workers that have work restrictions?

What about scenarios where we were paying temporary partial disability (wage loss) due to reduced hours or pay? Do we continue to pay at the same rate or would benefits need to be converted to full temporary disability?

TTD may be owed in each of these situations as the employer cannot in good faith offer a light duty job offer, even though it is not within their control.

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SOUTH CAROLINA

What effect do you think this will have on claims from grocery retailers, who are now very busy, and other big box retailers, who are closed?

We are going to see a very high increase in claims filed not only by grocery stores employees, but anything that is considered an essential employee. For example, in Charleston, South Carolina, the quarantine is in effect for two weeks but certain employees are exempt if they are considered an essential employee/business. There is an ordinance that the city came out with specifying who is an essential employee, including grocery stores, food and beverage stores, big box stores, pet stores, convenient stores, gas stations, restaurant and bars for take-out only. The city has labeled who they felt was essential to stay open and by labeling these particular employees, they have increased a higher number of claims filed by these employees who will claim they had to go to work as they were forced to go to work and then deal with all the consumers. In addition, we are

going to see an increase in hospital and medical providers. Further, we will see an increase in claims filed by employees who work hourly versus salary, along with those employees who do not have the ability to work from home or are not fortunate enough to be able to work remotely as they need to make money to support their family. This includes a lot of restaurant employees who survive making tips and by working.

I would like to hear the questions and responses as to how to handle COVID-19 claims and exposures. Employers are confused about how to handle and is reporting even if the employee is not making a claim. They do not have any type of protocols in place to handle the employees that are effected or exposed.

I think COVID-19 claims and/or allegations of this claim should be handled just like any other report of an injury and/or occupational disease. If someone believes they have COVID-19 due to their work place, and/or has been diagnosed with COVID-19, and contact their employer, then the employer should take down the information, date of accident, medical treatment and as much information provided by their employee, and call it into their carrier. Then, the carrier will do their normal investigation with the employee.

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TENNESSEE

What effect does this have on settlement discussions? What about release and resignation?

In Tennessee, like many of your jurisdictions, we are on a safer-at-home order from our state and local authorities. My firm is working at home and it's going really well. Many of you are working from home. Our Bureau of WC administration and mediators are working remotely, as are many of the judges. Our CWCC, as well as state courts, are closed for in-person hearings until at least the end of April.

We are participating in telephonic hearings, mediations and settlement approval hearings. So the major impact to settlements is purely logistical. In Tennessee, the WC courts are requiring that all documents be signed by all parties and received by the court with the filing fee prior to the approval hearing. Initially, they were still requiring original signatures. Last week, we received word that the courts would allow us to use Adobe certificates and Docu-sign to electronically sign pleadings. That is great news for attorneys, but the majority of unrepresented claimants do not have access to Adobe, a printer or a scanner so we are having to use good old snail mail to get these documents back and forth. That takes extra time, but things are still moving, which is good news for all parties involved.

Are employers at risk if their business is considered essential, but certain departments such as marketing and or sales employees still have to come in and work from home is not allowed? If these employees get sick could a claim be filled? Is there an outline of what is considered essential work within essential businesses?

For essential businesses that require employees to continue coming into work, there are two options for potential for not only actual exposure claims but also mental only injuries due to

anxiety over potential exposure. In all cases, an investigation is necessary prior to determining whether to accept or deny the claim.

Compensable claims require both that an employee prove he (1) obtained the virus at work and (2) contracting the virus is a hazard of employment. Employees can allege at-work transmission by showing he was coughed or sneezed on by or came into direct, close and extended contact with someone who tested positive for COVID-19. These situations are likely rare and probably confined only to medical facilities and first responder situation. For most cases in Tennessee, we think exposure "at work" is a difficult for an employee to prove. The coronavirus is easily transmitted; employees could contract the virus from any number of sources outside the workplace. Therefore, most claims are likely properly denied. It is unlikely an employee can prove, considering all causes, that they contracted the virus while working for an employer. Employees carry this burden of proof.

Employers and insurers satisfied an employee can make a compelling case of "at-work" transmission might consider offering a panel. This decision will be heavily influenced by the employment type. An injury only "arises from employment" if the nature of the employment subjected the employee to a higher exposure to the coronavirus than he encounters in the general public. Being "at work" does not make a claim "arise out of" employment. Employers are cautioned, however, if a denial is grounded in a medical causation opinion, to offer a panel and seek that medical causation opinion. Employers are not physicians and cannot create medical causation opinions.

For employees continuing to work for an essential employer, a mental injury from fear of exposure to the coronavirus is certainly possible. Tennessee allows mental injury claims, but in the past courts have denied "fear of exposure" claims. *Guess v. Sharp Mfg. Co. of Am., a Div. of Sharp Elecs. Corp.,* 114 S.W.3d 480, 485 (Tenn. 2003). Compensable mental injury claims require two things. First, a compensable injury must have resulted from an identifiable stressful work-related event that produced a sudden mental stimulus such as fright, shock or excessive unexpected anxiety. Second, the stress produced must be unusual stress, in comparison to the stress ordinarily experienced by an employee in the same type duty. We think it will be difficult for an employee to win these claims based on what we know about the coronavirus at this time.

The legal analysis of your specific question or claim depends on facts that might alter or completely change these opinions. This analysis covers only Tennessee's workers' compensation claims.

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TEXAS

What are the subrogation implications?

For purposes of this discussion, we will assume the claimant has been diagnosed with COVID-19. For that purpose, we are assuming the following definition of diagnosis: "diagnosed with the virus SARS-Co-V-2 or with coronavirus disease 2019 (COVID-19) by a test approved by the United States Centers for Disease Control and Prevention (CDC)." We will also assume the claimant has been able to prove the nexus between work and the diagnosis, and the condition is determined to be compensable.

As a waiver of subrogation provision in the insured's policy will cut off some or all avenues of subrogation recovery, it should be addressed initially. And their bad cousins, indemnity agreements, can also substantially complicate or even eliminate a subrogation target all together. The good news is that while these provisions are ubiquitous in the construction, architecture, oil production, and other large scale operations, they are less likely to be seen in the likely third-party targets associated with COVID-19. But as always, explore the possibility of finding and peeling off entities that are not covered by the language of the provision and not expressly in the list of additional insureds and covered entities.

For diagnosis failures (failure, delay, and perhaps even false positives from mental claims) and treatment failures rising to the level of negligence are always legitimate subrogation possibilities. Tort reform has made these difficult cases to successfully prosecute even under the best of circumstances. And for COVID-19, with no current known standard of care, no generally accepted therapeutic protocols, and even possible equipment/personnel/medicine/vaccine shortages, these will be very difficult cases to make. This difficulty is borne out by our experience with "swine flu" (H1N1) in 2009 and Ebola in 2014. Such medical malpractice cases were largely unsuccessful for all the reasons set out above. In the case of one of the two nurses infected with Ebola after treating the initial Ebola case in the U.S., the nurse's attorneys sued the parent hospital and even obtained an injunction from the trial court to prevent the hospital from requesting a workers' compensation hearing. The case eventually settled for undisclosed terms. That Ebola patient's claim against the initial ER that first sent him home with the "flu" failed.

In other disease cases, likely third parties include manufacturers and distributors of equipment (such as protective equipment) that fail to meet standards, or medicines and vaccines that produce side effects. For instance, the vaccine for H1N1 is known to produce Guillain-Barré syndrome in about 1 in 1,000,000 persons.

The bad news is that COVID-19 and the "counter-measures" for it will most certainly be included in the National Vaccine Injury Compensation Program. The immunity granted for liabilities associated with any listed counter-measure (such as approved vaccines, N-95 masks, and ventilators), will cut off that avenue of subrogation. The goal here is to identify counter-measures that are not covered by the federal immunity statute.

Most of the recent recoveries from the federal program seem to be in the $140,000 to $180,000 range. Unfortunately, the feds get offset for collateral sources such as workers' compensation, and workers' compensation has no subrogation lien against the federal award. And even if you have another subrogation target, the feds also have retained their subrogation rights and may be right there with you.

So, while the subrogation possibilities are minimal here, you may be able to direct claimant's counsel to the federal program where their recovery may be greater, and be offset by any amount the workers' compensation carrier pays. This may be especially helpful in a jurisdiction that allows the employee to make an election between workers' compensation or a third-party recovery.

Some workers' compensation claims will arise from the inevitable claims for complications from vaccines where the employer, for legitimate reasons, requires its employees to receive a given vaccine. Again, the federal program would be available for any vaccine covered in the list of eligible counter-measures issued by the U. S. Secretary of Health and Human Services. And as with all such claims, you may be able to leverage a lower settlement for the workers' compensation claim because of the federal claim.

Are we required to pay income benefits if the facility closes because of COVID-19 if they are on light duty?

The same as any layoff or reduction in force, assuming "disability" means earning less than pre-injury AWW.

If the claimant has returned to light duty at or above the preinjury AWW, and if there is then a facility closure, layoff, reduction in force, etc., there was no "disability" before the layoff, and the claimant is not entitled to the initiation of Temporary Income Benefits in the absence of a change in return-to-work status and medical condition. Some Texas administrative cases hold this as a matter of law (Appeals Panel Nos. 950266, 020785; see also 992019, 012646). Nevertheless, although a carrier clearly has a reasonable basis for refusing to initiate TIBS, this is not a guarantee that it will prevail at a CCH—Some ALJs don't necessarily like this rule.

If the claimant has returned to light duty earning less than the preinjury AWW, then he is by definition disabled during the time that he is working. If there is then a layoff, reduction in force, etc., then disability continues in the absence of a change in return-to-work status and medical condition (i.e., an administratively actionable release to full duty). The claimant is entitled to full TIBS during the period of disability and the layoff, facility closure, etc.… The answer to this scenario may be different in other jurisdictions (e.g., continue to pay the partial rate, or even terminate income benefits during the closure, layoff, etc.).

If working under a written bona fide offer of employment (which presumes disability), the analysis does not change because the a layoff, reduction in force, etc., is effectively a withdrawal of the bona fide offer of employment.

Does COVID-19 qualify for a presumption?

Chapter 607 of the Texas Government Code references several presumptive diseases, including one that applies to certain firefighters, peace officers, or emergency medical technicians who suffer from tuberculosis, or "any other disease or illness of the lungs or respiratory tract."

The agency expects insurance carriers to comply with the statute and rules relating to the prompt investigation and payment of claims, including presumption claims. The Texas Division of Workers' Compensation has now issued guidance that they expect carriers to treat COVID-19 claims as presumption cases.

This means that the carrier can file a PLN-14 (notice of continuing investigation), and avoid the duty to pay or dispute the claim by the 15th day. When the time comes to actually decide whether to accept claims filed by firefighters, EMTs or peace officers, the carrier can then decide how to apply the statutory entitlement criteria found in § 607.054.

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