GOLDBERG SEGALLA

COVID-19 and Potential Exposure in Workers' Compensation Claims

BACKGROUND

Coronavirus Disease 2019 (COVID-19) first developed in Wuhan City, Hubei Province, China. Unfortunately, the advent of fast, efficient intercontinental travel has resulted in the rapid spread of disease around the globe, and COVID-19 is no exception. On January 30, 2020, the World Health Organization (WHO) labeled COVID-19 as a "public health emergency of international concern." A day later, U.S. Department of Health and Human Services Secretary Alex M. Azar II declared a public health emergency in the United States.

COVID-19 is a zoonotic disease originating in bats, with the first reported cases coming from China. The economic impact of its spread has been substantial. Globally, the WHO reports 113,702 confirmed cases and 4,012 deaths as of March 10, 2020. A total of 80,924 of these cases were reported in China. Italy has also been hit particularly hard, with 9,172 confirmed cases and growing fears of the potential impact as the virus continues to spread. In the U.S. there have been 647 total cases in 36 jurisdictions including D.C., with a total of 25 deaths. New York has identified 142 of these cases, in a close second place to Washington State with 162. California has 135 cases reported to date. As a consequence to this, employers in the U.S. are forced to consider and prepare for the effects of COVID-19 as its rapid spread becomes increasingly concerning.

A salient question for employers is whether coronavirus exposure and infection in the workplace is compensable under the Workers' Compensation system in New York. In order to answer this question, we must look to other situations in which claimants have contracted illnesses as a result of their job duties. Categories of particular interest for these purposes include business travelers, flight attendants, emergency personnel, and employers in general.

ANALYSIS

Injuries occurring in the general course are not compensable under the Workers' Compensation system. The claimant must therefore satisfy the burden of showing that the injury arose in the course of employment[1]. In the context of an occupational disease that results from illness, this would require that the claimant establish a **recognizable link** between the condition and a distinctive feature of their employment[2]. In the context of an accidental injury, it has been held that an illness must be assignable to a determinate or single act, identified in space and time[3]. This is also relevant in situations in which a claimant was traveling when they contracted an illness, elucidated below.

Once it is established that infection was acquired as a consequence of their employment, the claimant would need to establish by competent medical evidence that this conclusion is not pure speculation[4]. That medical opinion need not be expressed with absolute or reasonable certainty, but there must be an indication of sufficient probability as to the cause of the injury, supported by rational basis and not a general expression of possibility[5]. Mere speculation by a physician is insufficient to support a finding of causal relationship[6], and credibility of evidence is an issue for the Board to resolve[7].

When evaluating COVID-19 claims, there are some additional distinctions that should be made, both in terms of (1) the type of claim (accident v. occupational disease), (2) the category of the claimant's employment (health care v. non-health care), and (3) the nature of the employment (i.e, outside employment/traveling employees), as each will have different nuances and burdens. Based on what we do know about COVID-19, any claims filed would likely be filed as an "accident." Pursuant to WCL § 2(7), "[i]njury" and "personal injury" mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom. Whether a particular event is an industrial accident is not determined by any legal definition, but by the commonsense viewpoint of the average person[8]. Because workplace accidents must "arise out of" and "in the course of" employment, **an infection must first and foremost be an inherent risk of the claimant's employment**. For example, a retail worker who contracts COVID-19 likely will not have a compensable claim, but a hospital worker who contracts it while performing their job likely will.

Inasmuch as no case law exists providing any specific precedent, we have to look to see how the Board has dealt with other similar contagions to anticipate how they will address COVID-19. Of note, there is no reference to "pandemic" in the New York Workers' Compensation-related case law, nor any reference associated with compensable claims from the last pandemic to hit the U.S. (Swine Flu). As such, the inquiry must be expanded to other viruses and communicable diseases in general. There is case law discussing compensability of "community acquired diseases" and the general rule is: **if the time and space of the "entry" or contracture cannot be specifically identified, it cannot be compensable.**

Under some circumstances, the contraction of an infectious disease can be found to be an accidental injury within the meaning of the WCL[9]. "As to infectious diseases contracted in the course of employment, the accident requirement has been interpreted to mean that 'the inception of the disease must be assignable to a determinate or single act, identified in space or time [internal citations omitted]'"[10]. "Compensation has been allowed for infectious disease in many cases, **but only where there was some discrete event or series of events which could reasonably be deemed to mark the onset of the infection**"[11].

A discrete event resulting in the onset of an infection sufficient to constitute an accidental injury has been found, for example, when the record contains evidence that the **claimant was exposed to a person known to be infected with the disease later contracted by claimant**[12], when a decedent contracted malaria from a mosquito bite[13], and when a decedent was infected though a cut on his hand while handling a gangrenous corpse[14].

However, an infectious disease that is **contracted through normal bodily processes (e.g., breathing), "at a time and place which cannot be specified,"** cannot be considered an accidental injury within the meaning of the WCL[15].

In *Albrecht*, the decedent, a professor, contracted polio and died while traveling in Africa during a sabbatical. The court in *Albrecht* concluded, based on the record before it, that because the decedent contracted polio through "normal channel of entry," at a time and place that could not be specified, he did not sustain in accidental injury[16]. This is the argument to focus on if any traveling employee contracts COVID-19.

CASE EXAMPLES

Employers in General. In *Savin Engineers*, cited above, a claimant was a wastewater/sewage engineer who was diagnosed with myocarditis, which is a thickening of the musculature making up the walls of the heart. The claimant alleged this thickening occurred due to exposure to certain viruses and bacteria during his employment. The Board disallowed the claim, finding the allegations to be purely speculative as the condition could have occurred without the claimant's occupational hazards of sewage and wastewater.

Hospital Employees. In *Employer: Arms Acres*[17], the claimant contracted MRSA while employed in a women's wing of a psychiatric hospital. The claimant alleged personal knowledge of patients in her wing with skin lesions, but there was no conclusive evidence that any of her patients had MRSA specifically. The Board disallowed the case because MRSA is spread by contact and it was purely speculative that the claimant contracted it from work.

However, if a claimant actually works with patients known to have COVID-19, there is no question as to the claimant's exposure during the course of the employment and the Board will find any contracture of COVID-19 to be related[18]. In *Employer: Montefiore Med. Ctr.*, the Board established the case because the physician concluded with a reasonable degree of certainty that the claimant had contracted tuberculosis in connection with his employment at the hospital.

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9 *id.; see also Matter of Connelly v Hunt Furniture Co.*, 240 NY 83 [1925]

10 *Matter of Albrecht v Orange County Community Coll.*, 61 AD2d 1068 [1978], *aff'd* 46 NY2d 959 [1979]

11 *id.* at 1069

12 *Middleton*, 38 NY2d 130 [1975]; *Matter of McDonough v Whitney Point Cent. School*, 15 AD2d 191 [1961]; *Matter of Gardner v New York Med. Coll.*, 280 AD 844 [1952], *aff'd* 305 NY 583 [1953]

13 *Matter of Lepow v Lepow Knitting Mills*, 288 NY 377 [1942]

14 *Connelly*, 240 NY 83 [1925]

15 *Albrecht*, 61 AD2d 1068 [1978], *affd* 46 NY2d 959 [1979]

16 *id.*

17 No. G045 0873, 2012 WL 4962252 (N.Y. Work. Comp. Bd. Oct. 11, 2012

18 No. G072 3354, 2014 WL 3881915 (N.Y. Work. Comp. Bd. Aug. 4, 2014) (where the claimant was a security officer directly handling patients with tuberculosis)

Airline Workers. In *Employer: Am. Eagle Airlines*[19], a claimant, an airline stewardess, contracted blastomycosis, a respiratory disease that is the result of inhalation of certain fungal spores that are present only in some specific areas of the U.S. The Board disallowed the claim due to lack of evidence that all flight attendants were exposed to such spores and found exposure to be acquired in the general course, not in the course of employment.

Business Travelers. In *Rosner Constr. Carrier*, the Board disallowed the claim by relying on *Albrecht* in finding that "an infectious disease that is contracted through normal bodily processes (e.g., breathing), at a time and place which cannot be specified, cannot be considered an accidental injury within the meaning of the [Workers' Compensation Law]." In this case, a claimant was traveling for work when he fell ill due to mold inhalation. There was no definitive evidence proffered as to when and where the mold entered the claimant's body, and the mold is commonly found in many places, including the claimant's home environment. As such, no discrete event or series of events could be identified. In the context of COVID-19 and work-related travel, it could be argued that due to the pandemic, ubiquitous nature of the virus, no exposure event can reasonably be identified.

Ambulance Workers. The Third Department has held that compensable tuberculosis from work as a volunteer ambulance worker requires that the claimant show proof of exposure to the disease[20]. As such, the same should be true of COVID-19. The same logic applies to ambulance workers as hospital employees; pure speculation is not enough to find a compensable claim post-exposure to disease. *Id.*

RECOMMENDATIONS

Based on the foregoing, we can conclude that compensability of claims related to COVID-19 is largely fact-dependent. With the number of confirmed cases of COVID-19 rapidly expanding across New York State, the question of compensability must be addressed, as claims are inevitable. As such, we recommend the following:

- **Controvert these claims at the outset**, particularly as information about the strain is evolving;
- Argue that the following **three components** must exist in order for a claim to be compensable:
  - The risk of contracting COVID-19 is inherent to the claimant's employment;
  - The claimant can identify, by competent medical evidence, a specific time/place/person resulting in exposure to COVID-19; AND
  - The claimant contracts COVID-19.
- **Consult your legal service providers** as the situation progresses such that the virus becomes more common and more information becomes available.

Please do not hesitate to contact Goldberg Segalla with any further questions as to the compensability of claims involving COVID-19, or any other illness which may be at issue in the future.

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19 No. G031 2670

20 *Employer: Port Jefferson Volunteer Ambul.*, No. A403 0021, 2006 WL 2618054, at *3 (N.Y. Work. Comp. Bd. Aug. 29, 2006)

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