WORKERS' COMPENSATION | WEBINAR SERIES

GOLDBERG SEGALLA

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COVID-19 Litigation for Workers' Compensation Claims in New York

Todd M. Jones
Partner | Garden City, NY
tjones@goldbergsegalla.com | 516.281.9815

Review to Date

- COVID-19 a/k/a "SARS-CoV-2"
- World Health Organization
  - 1/30/20: "Public health emergency of international concern"
  - 3/11/20: "Pandemic"
  - 3/13/20: President Trump declares a national emergency
  - 3/13/20: Gov. Cuomo declares state of emergency.
  - Apr., 2020: NYS WCB publishes its first guidance on the Board's COVID-19 Outbreak Response.
  - County, Business, School Closures, Public events, Sporting events and festivals including upcoming holidays – Thanksgiving & Christmas – all effected by restrictions and potential "lock downs" as concerns of a second wave are on the rise.
- COVID-19 symptoms: (2-14 day incubation period)
  - Ranges from "mild" fever/coughing to pneumonia
  - "Severe" requiring supplemental oxygen.
  - "Critical" respiratory failure or multi-organ failure

NYS WC Response

- The NYS WCB adjusted its handling of claims in response to the pandemic.
- Adjustments included the following:
  - All hearings were handled remotely/virtually. Parties may appear using the Board's website, phone app, or by teleconference.
  - The 90 day requirement for up to date medical evidence for "temporary" disability was relaxed while doctor's offices were closed.
  - Failure of a claimant to attend IMEs was given more deference during the pandemic and results in fewer suspensions of ongoing benefits as a result of a claimant's failure to attend independent examinations.
  - The Board would consider late filed appeals/rebuttals at its discretion if the pandemic had led to late service.
  - Payor Compliance standards were relaxed to a degree within the discretion of the Board's analysis if delays and defaults are due to the pandemic.

NY Litigation to Date

- In follow up to our webinar we held in March, we have seen some developments consistent with our expectations. Other expectations are being set aside by way of agency discretion and policy preferences.

WC Compensability

- Compensability
  - Claimant bears the burden and requires "recognizable link" between condition and a distinctive feature of their employment
- Most COVID-19 claims, arguably, should be classified as an accident, not occupational disease
  - Exposure will occur from a single incident, not slowly over time (e.g. asbestos)
  - For accidents, illness must be assignable to a determinate or single act, identified in space and time

Definition – Accident vs. OD

- Most COVID-19 claims, arguably, should be classified as an accident, not occupational disease
  - Exposure will occur from a single incident, not slowly over time (e.g. asbestos).
  - For accidents, illness must be assignable to a determinate or single act, identified in space and time.
- This has largely been the application embraced by the Board. They are establishing injury and death claims as accidents. There is no Sec. 44 analysis done as part of the litigation – but there is consideration given to the concept of "viral loading" in terms of the application of the accident.

Medical Evidence

- Mere speculation by a physician is insufficient to support a finding of causal relationship
  - Medical evidence must demonstrate that infection was acquired as a consequence of their employment, but 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. Mere speculation by a physician is insufficient to support a finding of causal relationship, and credibility of evidence is an issue for the Board to resolve
- This is where the Board has largely deviated in its trial-level decisions. The Board is looking for COVID-19 testing, but is relying on the "Prevalence Theory" to bridge the gap left by a lack of competent medical evidence.

The Usual Medical Standard for Causal Relationship

- It is **axiomatic** that a claimant bears the burden of establishing a causal relationship between his or her employment and a disability by the proffer of **competent medical evidence**. Williams v. Colgate University, 54 A.D.3d 1121, 1122 (3d Dept. 2008). To meet this burden, "a medical opinion on the issue of **causation must signify a probability** as to the underlying cause of the claimant's injury which is supported by a rational basis." Mayette v. Village of Massena Fire Department, 49 A.D.3d at 922.
- Furthermore, the Board **may not "rely upon a medical opinion that is purely speculative** rather than demonstrating a reasonable probability as to the cause of an injury." Shkreli v. Initial Contact Services, 55 A.D.3d 1067 (2008).

Origin of Prevalence Theory

- As judges began to preside over pre-hearing conferences in COVID-19 related claims, they began to intimate that the usual medical reporting standards may not be necessary.
- Cases cited by some judges are progeny of a 1996 case – *Castiglione v. Mechanical Tech.*
- The case involved a WC claimant who developed acute pancreatitis due to toxic fumes at work. The treating doctor could not distinguish in his testimony whether the exposure to toxins at work "possibly" or "probably" caused the pancreatitis diagnosis.
- The decision in *Castiglione* bridged the gap and said distinct use of the word "probable" was not essential to complete the analysis of causal relationship.
- "The form of the answers is less important than context and background." (Citing *Matter of Miller v. National Cabinet Co.*)

Prevalence Theory – Cont'd

- Throughout the summer much of this was conjecture based on the Judges approach to claims and their ultimate decisions.
- A September, 2020 Board Panel Decision, however, confirmed that the Board is embracing the theory in its application of COVID-19 litigation.
- "When alleging that COVID-19 was contracted at work, the claimant may show that an accident occurred in the course of employment **by demonstrating prevalence**. Prevalence is evidence of significantly elevated hazards of environmental exposure that are endemic to or in a workplace that demonstrates that the level of exposure is extraordinary."

Flaws or Openings?

- The Board is drawing on "context" and common sense assertions while overlooking a few key points:
- FIRST, COVID-19 is ubiquitous. It is not a toxin found in certain places that can lead us to reasonable common sense conclusions.
- SECOND, there was medical in the original *Castiglione* claim. The Board said it could use context and common sense to bridge the rhetorical gap between "possible" and "probable." The Board appears ready to use this theory to **forego the standards pertaining to medical evidence altogether**.

CONCLUSION

- A thorough investigation remains ESSENTIAL.
  - Focus on the injured worker's occupation
  - Whether their occupation placed them at a higher risk
  - Whether exposure could be identified to the work environment
- Be aware of updated CDC and OSHA guidelines and what documentation you have available to aid your investigation.
  - Exposure, for instance, is not simply knowing someone at work contracted the virus.
- Information related to the virus continues to evolve. We anticipate that there will continue to be developments --- in medicine, legislation, and regulation --- that will lead to our adjusting our litigation strategy over the next few YEARS.

Q&A

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