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COVID-19 & Claims Management in Illinois

In light of the current events surrounding COVID-19, the workers' compensation defense team at Kopka Pinkus Dolin wanted to share their insight and recommendations on how to handle the COVID-19 virus in terms of case management as this will become a prevalent part of day-to-day work in the coming months. Should you have any questions, please do not hesitate to contact us.

I. How to Handle an Employee Who Has Tested Positive for COVID-19

As COVID-19 becomes more widespread throughout the nation, we will begin to see this appear throughout our workers' compensation claim management. While contraction of the virus is definitely something that will be new to handle, we recommend handling these claims the same way you would handle any other workers' compensation claim. The following 4-step analysis should be completed for each potential COVID-19 workers' compensation claim:

A. STEP 1—Diagnosis.

First, determine if the claimant has been medically diagnosed with a positive case of COVID-19.

As it is clear by now, the symptoms of COVID-19 are not significantly different than the common cold or common flu—cough, sore throat, fever. In recent CDC press conferences regarding COVID-19, some experts have advised that other symptoms include extreme weakness and gastrointestinal issues.

Much like the prior symptoms, these symptoms can be seen as common and linked to various other conditions. It is important to establish if the claimant was actually tested, and if those tests reported a positive result.

B. STEP 2—Accident: Did it arise out of or in the course of employment?

The claimant has the burden to prove all elements of his or her claim by a preponderance of the evidence. With regard to accident, the claimant must prove both the "arising out of" and "in the course of" prongs to meets its burden to prove a compensable accident.

As it relates to COVID-19, the claimant is going to have a difficult time proving that the exposure was at his or her employment as opposed to another location. As we have learned from the experts, this virus is rampant everywhere in society. For the claimant to clearly show that he or she was exposed at work will be a difficult obstacle to overcome. We will argue that COVID-19 is a risk to the general public and is not a risk inherent to employment.

How to defend/refute: Establish the abundance of other places where the claimant exposed himself or herself prior to contracting the virus and the positive test. Does the claimant go to the gym? Had he or she been in a store, library, movie theatre, coffee shop, bar/restaurant? Was he or she in close proximity or in contact with a friend, family member or even the person next in line for coffee?

If the CDC cannot find and trace a location of exposure, we anticipate that Petitioners will face a high hurdle on this element of proof. The CDC is saying there are many positive cases where the location of the exposure cannot be determined. Additionally, given the world's current state, infectious disease experts are so busy, this will hamper the ability of an employee to obtain an expert opinion.

As you can see, there are endless possibilities as to where the virus could have been contracted. If these claims eventually proceed to Hearing, this is the type of investigation and cross-examination that the Respondent will need to refute the claimant's allegation.

Additionally, what will make it even more difficult for a claimant to prove his or her case is that expert epidemiologists are struggling to trace the origin of the virus, or how one contracted it. As it stands currently, there is no science to determine how long the virus lasts on certain types of material.

As a Respondent, this will help the defense of our case. There have been some claims by experts that the virus can last up to three days on metal, but even this has yet to be medically verified and it can vary depending if the virus was "counteracted" with potential disinfectant or the like.

A laboratory test has suggested that the virus can survive on cardboard, possibly as long as 24 hours. That test has not been peer reviewed and not all cardboard boxes are in a laboratory. Again, what is currently known about COVID-19 is limited and seemingly changing everyday as the world tries to contain it. We will argue that the scientific knowledge of COVID-19 is not yet medically certain, nor peer reviewed. This is understandable as the virus is new. We will argue there is not yet enough agreed upon scientific knowledge upon which to form a medical opinion to be rendered within a reasonable degree of medical certainty regarding exposure to the virus to constitute a work accident, which is the standard.

C. STEP 3—Causation: Can the claimant prove that his or her current condition of ill-being was caused by exposure of the virus at work?

If the claimant successfully proves accident, it then becomes a medical question as to whether his or her current condition of ill-being was related to exposure of the virus at work. In some cases, the accident and causation prongs may go hand in hand and once accident is proven, so too is causation.

This will not be the case in claims for COVID-19. Again, it is the claimant's burden to prove *all* elements of his or her claim. The claimant must have a medical opinion causally relating his or her diagnosis of the virus to the alleged work exposure. Absence of a medical opinion provides the Respondent with a good faith basis for denial of the claim.

It should be noted that the line of causation is better defined in cases where there is a confirmed positive test at the workplace and an employee subsequently tests positive. The line of causation is further strengthened if the claimant can prove direct contact or close proximity in the workplace with an employee/person who as tested positive for the virus.

Please note that employees will not only have claims for COVID-19 exposure in terms of just other employees. This can apply to any and all persons that have come into the workplace, such as delivery persons, mail persons, clients, prospective clients, etc. If the claimant can draw a direct line to any of these persons while work-related, it is possible that they have a compensable claim. These situations are certainly more attenuated than for example, "Employee A sits next to Employee B, who tests positive." Nonetheless, these are still likely scenarios that employers will be faced with in the coming months.

Even in the example of Employee A and Employee B sitting next to each other, the question becomes, "when or even how, if at all, did Employee B contract the virus from Employee A?" This is virtually impossible to answer at this juncture as we would need to pinpoint the exact day Employee A contracted the virus and began to experience symptoms.

Furthermore, we run into the issue of Employee B contracting symptoms outside the unfounded "14-day incubation period."

Determining *when* the claimant was exposed to the virus. This is another area where it is going to be difficult for a claimant to prove. Experts are still trying to further define the incubation period of the virus and pinpoint the exact duration of this period. As we stand currently, experts have opined that it can be anywhere from 1-14 days. The claimant will not be able to prove this without a medical opinion. Since there is so much speculation as to when the virus was contracted, the claimant will struggle to prove causation.

If anything, the claimant will have an easier time proving causal connection in the earlier months of the virus as it is not as widespread, and we have not yet hit the peak of the virus. The claimant's ability to prove that contracting the virus was related to workplace exposure will become more and more difficult in these later months. Experts have opined that mid-April to May will be extremely difficult to prove causal connection as the virus will have spread by tenfold.

Additionally, many states, cities and municipalities have enacted the "Stay at Home" order. This order will make it even more difficult for employees to allege that their workplace was the cause of their contraction—especially the longer that the order stays in place.

D. STEP 4—Permanency: Can an Employee *actually* have Permanency?

Short answer to the question of permanency is yes, in some cases. For many people who contract COVID-19, it is no different than the common cold or flu. However, as we have learned, the elderly and those with compromised immune systems or other immunodeficiencies have a more violent response to the virus. Even people without pre-existing conditions could develop severe symptoms compared to others.

Those who develop pneumonia after contracting COVID-19 have the possibility of developing post-infection fibrosis. This type of condition is determined and measured through pulmonary function and spirometry testing, which is not something that is normally tested through the course of one's life unless he or she was previously tested for things such as asbestos or mold exposure.

What that means for the Respondent is that we are unable to establish a true baseline. Therefore, it may be easier for a claimant with a pretty clean medical history to claim permanency from COVID-19 should some sort of post-viral issue result.

Finally, death claims may be a potential claim stemming from this pandemic. The work injury only has to be "a factor, not the only cause." Thus, those with pre-existing lung conditions and/or prior pneumonia are more susceptible to infection and death as a result of COVID-19.

A death claim includes a funeral fee of $8,000.00 pursuant to the Act. While we hope that we are not faced with fatality cases, this can become a very real possibility through the course of case management and litigation. It is exceptionally vital that employers, carriers and defense attorneys work together to thoroughly investigate each and every claim.

II. How to Handle Employees Who May Have Been Exposed to COVID-19 in the Workplace

If there are employees being tested for COVID-19 due to potential exposure while at work, the employer will likely be liable for the testing and doctor visit **if the employer is requiring the employees to get tested in order to be cleared to work.** There are many companies that are considered essential to the daily function and are therefore excluded from the "Stay at Home" order. In these cases, it may be prudent of the employer to require testing in order to allow for the running and production of their business.

Taking the above into consideration, this does not mean that payment for these tests are or should be covered under workers' compensation. In fact, by covering the tests and doctor visit under workers' compensation insurance, the employer is opening itself up to potential workers' compensation and workplace exposure cases down the road. Paying for the test and doctor visit through workers' compensation would actually *hurt* the employer's defense as it tacitly implies that there was some sort of "claim", no matter the result.

Determining how to handle other employees that may have been exposed to COVID-19 becomes more of an employment question and strays away from workers' compensation (for the time being). Some employers have simply sent employees that were in close proximity of an infected employee home to quarantine for 14 days. We know of employers that are paying home quarantine employees the normal scheduled hours for those 14 days.

The process that the employer decides to exert is an employment question and comes down to the business itself. Is it an essential business? Do you need the employees to come in and work to keep production going? If that is the case, the employer should be more inclined to test its employees.

We hope that you found this beneficial and that everyone is staying safe during this most challenging time. Should you have any questions, please do not hesitate to contact any member of our Workers' Compensation Team. We are more than happy to assist and answer any questions possible.

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