Expert Commentary

Coronavirus (COVID-19)—Is It Compensable?

The World Health Organization has now declared the recent coronavirus

outbreak to be a pandemic. Whether infections from the coronavirus will be compensable under workers compensation depends on the jurisdiction and th facts surrounding the claim.

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Workers Compensation Issues

Since the workers compensation system is unique to each of the 51 jurisdictions, the response to the issue o COVID-19 compensability will undoubtedly be varied. Almost all of the jurisdictions have a provision in their respective workers compensation acts requiring that the injury/illness arise out of and in the course of employment. There are other Act provisions that can also play into the compensability decision, such as that injury/illness must be traceable to a point in time. As the coronavirus becomes widespread in the United Stat will be almost impossible to determine that exact moment an individual became infected and whether it was course and scope of employment.

Individuals working in specific industry segments (e.g., medical professionals and those in the service sector) have an easier time pursuing a workers compensation claim as it can be shown that they were at higher risk their workplace due to their occupation.

Historically, many communicable disease workers compensation claims have been resolved through litigatio Following are a sampling of pertinent case law. These cases could provide a clue as to how coronavirus work compensation claims will be resolved. At the outset, it is important to note that the majority of workers compensation cases regarding communicable diseases require a showing of increased exposure to the conta at work to be compensable.[1]

Traveling Employee Dies of *Neisseria Meningitidis:* Illinois

The case of an executive that contracted *Neisseria meningitidis* while traveling on business to Brazil is illustrat the evidence necessary to show the causal connection (and increased exposure) between the disease (infecti and his employment. In *Omron Elecs v. Illinois Workers' Comp. Comm'n,,* 2014 IL App (1st) 130766WC, 387 Ill. D 21 N.E.3d 1245 (2014), the employee, Craig Bauer, worked for the employer, Omron Electronics, as the comp president and chief operating officer. Mr. Bauer traveled to Japan and China from June 7–14, 2006. He then returned home to Chicago and worked from his office

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He reported having a slight upper respiratory infection at this time. On June 20, 2006, he left Chicago and flew Brazil. He left Brazil on June 22 and returned to Chicago. Upon his return, he stated he did not feel well. His symptoms dramatically increased over a short period of time, resulting in his death on June 25, 2006. The au showed that he died of meningococcemia (another word for *Neisseria meningitidis*).

A person can only contract this infection from another human. The most common transmission is airborne respiratory droplets (from coughing, sneezing, talking, or singing). The incubation period is 2–10 days. Interna travel increases the risk of contracting the disease, especially travel to Brazil where there is a *significant* incre prevalence of the disease. Given his travel to Brazil and the timing of his onset of symptoms, the medical exp for the employee's administrator opined that Mr. Bauer contracted the disease in Brazil while on business. However, conflicting medical testimony was offered by the employer, contending that it was impossible to determine exactly when Mr. Bauer contracted the disease, given all of his recent international travel.

The court noted that the claimant in an occupational disease case has the burden of proving not only that he she suffers from an occupational disease but also that there is a causal connection between the disease and her employment. However, proof of a "direct" causal connection is not required by the Illinois Act. The comm found the opinions of the experts who concluded that the disease was contracted in Brazil to be more persu and ruled in favor of compensation. Noting that it is the function of the commission to judge the credibility o witnesses and weigh the evidence, the court affirmed the commission's ruling of compensability.

Nurse Develops *Pseudomonas Aeruginosa:* Louisiana

In contrast, in another case, an employee failed to prove that he contracted a *Pseudomonas aeruginosa* infect during the course and scope of his employment at a hospital. In *Dunaway v. Lakeview Reg'l Med. Ctr.,* 2002-231 So. 2d 131 (La. App. 1 Cir. 08/06/03), Timothy K. Dunaway worked at the Lakeview Regional Medical Center as nurse. While off-duty, he was operating his boat when it struck a sandbar resulting in multiple facial and nasa fractures requiring extensive reconstructive surgeries. Because the healing of his wounds was incomplete, ar attempt was made to avoid scheduling him with patients with open wounds. Nevertheless, at times, Mr. Dun did work "the floor," requiring him to handle IV lines, chest tubes, urinary bladder catheters, and other woun drainage.

Mr. Dunaway developed a bacterial infection in his sinuses, *Pseudomonas aeruginosa*. Six months later, he underwent an additional surgery and found that he still had the infection. Because of his condition, Mr. Duna was unable to return to work. He then sought workers compensation benefits, claiming that he contracted th infection while on the job.

The Office of Worker Compensation (OWC) judge denied the benefits due to Mr. Dunaway's failure to establi reasonable probability the causal link between his illness and his work-related duties. The OWC judge noted the claimant's experts were not infectious disease doctors, unlike the expert for the employer. The evidence showed not only that this type of infection can be acquired outside of a hospital setting but also that none of Dunaway's patients showed signs of the infection. Since the disease can be community-acquired (like the coronavirus) and because Mr. Dunaway could have been exposed to the infection at other times, for instance during his own surgery and hospital stay, the court affirmed the denial of benefits.

Nurse Contracts Ebola: Texas

The current coronavirus outbreak is reminiscent of the Ebola outbreak in 2014. However, unlike the recent coronavirus outbreak, there were very few persons infected with Ebola in the United States. Thus, tracing the source of the Ebola infection was much easier, as was the case in *Texas Health Resources v. Pham*, No. 05-15-0 CV, 2016 Tex. App. LEXIS 8336 (Tex. App.—Dallas Aug. 3, 2016). There, Nina Pham worked as a nurse at Presbyterian Hospital in Dallas. She was part of the medical team that treated Thomas Duncan, who turned o have Ebola. Ms. Pham then contracted Ebola and, thankfully, survived. She sued Texas Health Resources (TH owner of Presbyterian Hospital, which in turn contended that it was her coemployer along with the hospital. case, it was clear that Ms. Pham was infected on the job, so she was entitled to workers compensation from l employer, Presbyterian Hospital.

Her contention was that only the hospital was her employer, not THR, and thus she was free to sue THR. Ms. sought a temporary injunction seeking to prevent THR from litigating the coemployer issue in any other foru such as the Division of Workers Compensation.

In declining to enforce an injunction, the Dallas Court of Appeals held that Ms. Pham's affidavit did not suppo of her causes of action since it failed to show that she would not have contracted Ebola had the hospital ado different policies and procedures, provided different training, or provided her with different personal protect equipment. The court held that these issues were beyond a layperson's common understanding and, therefo expert testimony was needed to support causation. Since Ms. Pham did not have expert testimony supportir claims, the court denied the request for injunction, sending the case back to the trial court for further handli Thereafter, the parties entered into a settlement, so the issue of coemployer status was never fully litigated.

Lab Tech Dies from Serum Hepatitis: North Carolina

Unlike Ebola, the coronavirus may be much more difficult to trace to a source, even for healthcare workers, i

outbreak is widespread in the area where the employee resides. Nevertheless, healthcare workers are at an increased risk that would factor in favor of compensation. When a person's employment increases the risk o contracting the disease, then the courts are more likely to find compensability. See *Booker v. Duke Med. Ctr.*, 2 N.C. 458, 256 S.E.2d 189 (1979), where a claimant died of serum hepatitis allegedly as a result of working as a technician for Duke Medical Center.

Firefighter Develops Valley Fever While Traveling: Washingt

First responders may also be at a higher risk. However, many states have very specific statutes on what types infectious diseases are covered for such professionals. Since the coronavirus is a new disease threat, it is like specifically identified under any state statute. Take the case of *Gorre v. City of Tacoma*, 357 P.3d 625 (Wash. 20 where a firefighter contracted Valley Fever, which he had acquired while on a business trip in Nevada. Since V Fever wasn't one of the enumerated diseases that allowed for a rebuttable presumption that the disease occ during the course of employment, a firefighter who contracted the disease was required to prove causation. that the majority of cases hold that the unexpected contraction of infectious diseases is an injury by accident a disease.[2]) For a disease like the coronavirus, which may become widespread in the community, proving cau arising out of employment is likely to be quite difficult.

Family Members Contract MRSA: Texas

Family members pose another unique challenge. Do infected family members of an infected employee who contracts the disease in the course of employment also have a compensation claim under the pertinent act? answer is yes *if* they can show the necessary nexus between the exposure to the employee and their resultin illness. In one case, *Beshears v. Pilgrim's Pride Corp.*, 954 F. Supp. 2d 500 (N.D. Tex.–Fort Worth 2013), employe a chicken plant who contracted methicillin-resistant Staphylococcus aureus (MRSA) were found to have contr the infection while in the course of employment. Those same employees unknowingly carried the infection h on their skin and clothing, thus exposing their families to the disease. There was a direct correlation to the di contracted by the employees and that contracted by the family members. Therefore, the families' claims wer compensable under the Act.

This case suggests that if a healthcare worker contracts the coronavirus and then infects their family, then th family's claims may be covered under the Act. However, if the family members have been potentially expose other ways, then they may not be able to prove the causal connection needed to support a finding of compensability.

Conclusion

Each case of the coronavirus will have to be evaluated independently to determine whether it was contracted during the course of employment. Should the disease become widespread, proving that an employee contra during the course of employment may be insurmountable.

[1] Lex K. Larson, *Larson's Workers' Compensation, Desk Edition*, § 5.05[2] (Matthew Bender, Rev. Ed).

[2] Lex K. Larson, *Larson's Workers' Compensation, Desk Edition*, § 51.03 (Matthew Bender, Rev. Ed).

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