

Coronavirus and Workers' Compensation

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A pandemic is defined as, an outbreak of a disease that occurs over a wide geographic area and affects an exceptionally high proportion of the population." Although the media lives by the motto, "If it bleeds, it leads," declaring a pandemic anytime more than a few people contract a virus, this time even the World Health Organization (WHO) is warning of a possible Coronavirus (COVID-19) pandemic. One Coronavirus expert, Professor Gabriel Leung, Chair of Public Health at Hong Kong University, says that unchecked, the virus could infect 60 percent of the global population meeting the definition of a pandemic.

My intent is not to accuse the media of sensationalism, nor to intimate that WHO is overreacting (I don't think they are); my purpose is to answer the question, what makes an illness an occupational illness" and thus compensable under workers' compensation? More specifically, how does or might workers' compensation respond to the Coronavirus?

Two tests must be satisfied before any illness or disease, including the Coronavirus, qualifies as occupational and thus compensable under workers' compensation:

1. The illness or disease must be occupational," meaning that it arose out of and was in the course and scope of the employment; and
2. The illness or disease must arise out of or be caused by conditions **peculiar**" to the work.

Whether an illness arises out of and in the course and scope of employment is a function of the employee's activities. The simplest test toward determining whether an injury arises out of and in the course and scope of employment" is to ask: Was the employee benefiting the employer when exposed to the illness or disease? Be warned, this test" is subject to the interpretations and intricacies of various state laws.

Qualifying as occupational" is the relatively low hurdle. The higher hurdle is whether the illness or disease is peculiar" to the work. If the illness or disease is not **peculiar** to the work, it is not occupational and thus not compensable under workers' compensation. An illness or disease is peculiar" to the work when such a disease is found almost exclusively to workers in a certain field or there is an increased exposure to the illness or disease because of the employee's working conditions.

For example, black lung disease in the coal mining industry is a disease that is **peculiar** to the work of a miner. Coal miners are subject to prolonged exposure to higher-than-normal concentrations of coal dust leading to black lung disease. This makes the disease peculiar to the coal mining industry.

Another example of an exposure peculiar" to the work is a healthcare worker contracting an infectious disease such as HIV or hepatitis as a result of contact with infected blood. The worker's unusual or peculiar" exposure to such diseases results in an illness that is occupational and compensable.

Qualifying an illness or disease as occupational and, more importantly, peculiar to the work (and thus compensable) may ultimately require industrial commission or court intervention to sort medical opinion from legal facts. No one test" is available to declare an illness or disease compensable or non-compensable; each case is judged on its own merits and surrounding circumstances.

Concluding that an illness is occupational, peculiar to the work and ultimately compensable is not necessarily based on the disease in question but on the facts surrounding the worker's illness. Factors investigated and considered by medical professionals and the court include:

- The timing of the symptoms in relation to work: Do symptoms worsen at work and improve following prolonged absence from work (in the evening and on weekends);
- Whether co-workers show or have experienced similar symptoms;
- The commonality of such illness to workers in that particular industry;
- An employee's predisposition to the illness (an allergy or other medical issue); and
- The worker's personal habits and medical history. Patients in poor medical condition (overweight, smokers, unrelated heart disease, etc.) and/or with poor family medical histories may be more likely to contract a disease or illness than others in similar circumstances. Bad habits and poor medical history (and heredity) cloud the relationship between the occupation and the illness. For example, smokers may be ill-equipped to fight off the effects of illnesses to which others may have no problem being exposed.

What About Coronavirus?

Judged against the qualifying factors presented, does **any** disease or virus declared a pandemic create a true workers' compensation exposures? Does the Coronavirus create a workers' compensation exposure? The short answer is, not likely." Other than the fact that the Coronavirus is currently garnering intense attention, in most cases it is no more occupational than the flu.

Unless!

Only if it is proven that the employee has an increased risk of contracting the virus due to the peculiarity of his or her job might the Coronavirus be considered occupational and thus compensable. Remember, compensability as an occupational illness requires something about the job that increases the risk of exposure and illness.

As intimated earlier, healthcare workers may be able to prove the necessary peculiarity being face-to-face with sick people ALL day to assert a compensable injury.

Which Policy Responds to Qualifying Occupation Illnesses and Diseases?

While the Coronavirus has a relatively short gestation period, other occupational illnesses and diseases often have long gestation" periods. Employees may be exposed to the harmful condition for many years before the illness manifests. It is also possible that the employee doesn't contract the disease until years after the exposure ends.

The workers' compensation policy specifically states that the policy in effect at the employee's *last* exposure responds to the illness even if the employee is working for another employer or even retired at the time the disease manifests itself.

The Coronavirus Isn't Special

Coronavirus may be a humankind exposure rather than one peculiar to most employments. Contracting the virus at work is not enough to trigger the assertion that it is a compensable occupational illness. To be occupational and compensable requires something peculiar about the work that increases the likelihood of getting sick. It is unlikely that both the occupational" and peculiar" thresholds can be satisfied to make most illnesses compensable" for the vast majority of individuals; the same is true of the new Coronavirus.

Last Updated: March 5, 2020