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DEFENDING WORKERS' COMPENSATION CLAIMS FOR COVID-19 EXPOSURE

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The COVID-19 pandemic has affected all of us in one way or another. Within the Workers' Compensation system, COVID-19 has not just resulted in interrupted court schedules, virtual appearances, and the occasional unavailability of parties, attorneys, or witnesses. It has also given rise to a significant number of new claims. When an employee files a Claim Petition with the Workers' Compensation Court alleging that they contracted COVID-19 in the course of their employment and that it has resulted in permanent disability, issues arise that are somewhat unique in our system.

Of course, the first issue that must be addressed, as with any matter, is whether the claim is compensable. Under the workers' compensation statutory scheme, injuries and illnesses to employees are compensable when they occur "in the course of employment". According to the Center for Disease Control, COVID-19 is mainly spread from person to person through respiratory droplets produced when an infected person coughs, sneezes, or talks.[1] In many cases, this makes it nearly impossible to determine exactly when and where a person became infected.

The legislature addressed this uncertainty, when N.J.S.A. 34:15-31.11 to 34:15-14 was enacted in 2020. That statute, known as the Essential Employees Act provides that during the COVID-19 public health emergency declared by the Governor, certain workers that fall within the statutory definition of "essential employee" will be entitled to a rebuttable presumption that the disease is work-related and compensable for the purposes of workers' compensation benefits. Notably, the presumption does not apply to an employee working from home at the time of exposure.

This statute is significant, in that the burden of proof is shifted from the petitioner to the respondent, who is now tasked with disproving compensability. As noted in N.J.S.A. 34:15-31.12, the presumption "may be rebutted by a preponderance of the evidence showing that the worker was not exposed to the disease while working in the place of employment other than the individual's own residence." Obviously, this can be somewhat difficult to prove.

As referenced above, the statutory definition of "essential employees" includes public safety workers, first responders (including any fire, police or other emergency responders), workers providing medical and healthcare services, emergency transportation, social care services, and other care services, as well as employees performing functions involving close proximity to the public that are essential to the public's health, safety, and welfare. The statute then contains a catchall category of "any other employee deemed an essential employee by the public authority declaring the state of emergency." N.J.S.A. 34:15-31.11.

The terms of the Essential Employees Act further state that this presumption of compensability remains in place "during the public health emergency declared by an executive order of the Governor". Governor Murphy signed Executive Order 244 in June 4, 2021,

which became effective 30 days thereafter. That Order announced the end of the public health emergency in New Jersey. For this reason, it is imperative that the correct timeframe of the alleged exposure be identified so it can be determined whether or not it occurred while the public health emergency was in effect and the appropriate arguments can be made regarding the presumption.

When defending COVID-19 claims, employers may be able to challenge whether or not an employee is an "essential worker" under the statute. While there will likely be little dispute for some employees specifically identified in the statute (i.e., police, fire, and medical workers), there are some jobs that do not as clearly fall within the terms of the statute. In those instances, it would be recommended to obtain all information possible about the nature of the employment and the services the employee was providing during the alleged exposure.

Next, respondents may be able to challenge that the exposure took place at work through discovery. As stated above, this could prove difficult given the nature of how COVID-19 is contracted. Investigation by the employer or insurance carrier to determine potential exposure at the workplace may clarify whether or not the exposure was likely to have occurred at work. Interrogatories are also a useful tool in assisting in this defense. Of course, under N.J.A.C. 12:235-3.8 interrogatories may only be served without a motion in limited circumstances. One such circumstance is where the employee brings an occupational disease claim. While some petitioners file COVID-19 claims as occupational claim petitions, many do not, categorizing them instead as traumatic claims. Even when occupational interrogatories are available, they are mostly irrelevant to COVID-19 exposure (although they can provide some insight as to the employee's medical condition). Specialized interrogatories can be served and can be tailored to determine potential other sources of exposure, as well as prior medical conditions and treatment rendered. Since these interrogatories are only able to be served with leave of Court, a motion may be necessary if petitioner's counsel is not willing to engage in such discovery voluntarily.

If COVID-19 interrogatories are appropriate, they can be extremely useful in determining the onset of symptoms, so that the employee's work schedule can be crosschecked for reference to determine potential workplace exposure. They can also assist in determining if there was any other potential source of exposure through petitioner's family or another source outside of work.

Once the compensability investigation is complete, a determination must be made as to compensability. In some instances, depending on the results of the investigation and discovery, the respondent may elect to accept the claim based on the investigation conducted and discovery provided. In other cases, particularly where the burden of proof is not shifted and remains on the employee, the circumstances may be such that petitioner will be unable to prove his or her case. Further, in some matters, judicial intervention may be needed to determine if the claim is going to be compensable.

Moving on from the issue of compensability, discovery must then be conducted to determine the employee's medical condition and course of treatment. Early on in the pandemic, many of those who contracted COVID-19 received treatment on an emergency or urgent basis outside of the workers' compensation system. Testing was typically done on this basis as well. Many COVID-19 patients also treated with various specialists, depending on their symptoms, without going through the workers' compensation claims process. This is understandable, considering the uncertainty of the disease, particularly early in the pandemic. Nevertheless, gathering these records for litigation, several years later, is often difficult. However, such discovery is essential and the claims typically cannot proceed until all such records are obtained.

Even in those instances where COVID-19 claims are quickly accepted by the employers and authorized treatment is provided, difficulties can still arise. In 2020, employers and insurance carriers were required to quickly identify and utilize authorized providers in specialties that are not typical used in workers' compensation cases. Instead of orthopedists, pain management specialists, and physical therapists, COVID-19 claims often involve authorized treatment with pulmonologists, cardiologists, psychiatrists, and neurologists. Unfortunately, some of these practitioners are not familiar with treating workers' compensation patients. This unfamiliarity can lead to delays in providing medical records and in submitting treatment notes, work statuses, or prescription requests.

After all authorized and unauthorized providers are identified, and medical records have been obtained, it must be determined if the matter can proceed to permanency examinations as in any other case. Because the long-term effects of COVID-19 are still somewhat unknown, some petitioners' attorneys are reluctant to move their clients' cases on to permanency.

Once treatment has concluded and the parties agree that permanency examinations are warranted, practitioners have to determine which specialties are necessary and what doctors to use. Again, those who routinely handle workers' compensation cases often have multiple experts in common areas such as orthopedics and neurology, from which to choose. Pulmonologists, internists, and psychiatrists who are willing to perform permanency exams and able to do so in a timely manner may be more difficult to come by and may not be as familiar with performing such examinations.

When both parties have obtained their reports and the matter is ready to proceed, settlement negotiations may begin as in any other matter. Although due to the novelty of COVID-19 long-term effects, evaluating such claims can prove difficult. Another complication is that even in instances where the symptoms appear to be relatively mild, some practitioners are hesitant to enter into settlements under Section 20 due to a fear that the employee's symptoms could worsen and would require further treatment in the future. Of course, if the employee's symptoms appear to be resolved and if the court and all parties are willing to do so, this type of resolution would certainly be favorable to the employer, as it would preclude an application to reopen the matter in the future.

As can be seen, COVID-19 claims present some unique challenges in the workers' compensation system and can differ significantly from the typical case. Early investigation and gathering of all available medical records is likely the best course of action in order to determine what discovery is needed. With these items in place, employers can be in the best position to defend compensability where appropriate and to mitigate damages for any potential permanent disability.

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[1]https://www.cdc.gov/dotw/covid-19/index.html