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California: A Preliminary Assessment of Potential Workers' Compensation Liability Related to the Coronavirus (COVID-19)

California Case Law Related to Non-Occupational Diseases and Special Exposure or Special Risk Exceptions-Introduction: There is no reason to believe that the holdings and related legal principles derived from the key cases discussed hereinafter will not govern and control determinations of whether an alleged work related exposure to the coronavirus (COVID-19) will be found to be compensable as an injury arising out of and in the course of employment (AOE/COE).

However, it should be stressed that the coronavirus is different in many ways from other infectious diseases and viruses in terms of assessing potential workers' compensation liability issues. The coronavirus has been officially declared a pandemic worldwide by the World Health Organization while the current seasonal flu is not. In addition, the coronavirus is highly virulent and contagious and unlike the flu, may be unknowingly transmitted by asymptomatic infected individuals to uninfected individuals both outside and in the workplace for an unspecified period of time. As the cases discussed below indicate, even if an employer implements stringent precautionary measures to protect its employees from exposure to the coronavirus, an employer may not completely insulate itself from potential workers' compensation liability, if an employee is able to establish they contracted the virus related to an exposure particular to the work and that created a special or increased risk to contracting the virus that was materially greater than the exposure common to the general public.

Also, unlike the seasonal flu, the Occupational Safety and Health Administration (OSHA) requires that any incidents of employees contracting the novel coronavirus at work are deemed recordable illnesses, subject to the same rules and failure-to-record fines as other workplace injuries and illnesses. OSHA specifically exempts employers from recording incidents of employees contracting common colds and the seasonal flu in the workplace.

(https://www.osha.gov/SLTC/covid-19/standards.html;
https://www.dir.ca.gov/dosh/dosh_publications/ATD-Guide.pdf)

At the present time the CDC is of the opinion that coronavirus symptoms may first appear after a few days or as long 14 days after initial exposure. Therefore, assessing the myriad potential

scenarios where there may be potential workers' compensation liability when an employee alleges they have contracted the coronavirus while at work will be extremely challenging. In terms of injury AOE/COE and potential compensability of an alleged coronavirus industrial injury, the most challenging issue is whether the coronavirus was caused by a condition or conditions peculiar or particular to the work environment or specific work duties and assignments that may have created a special risk of the employee contracting the coronavirus to a greater degree and in a different manner than by the general public.

Case Law: There are numerous cases holding that non-occupational disease claims such as common colds, the flu, and other similar viruses and diseases are compensable only if it is established by the employee that there was a special exposure to the particular disease or disease causing agents that exposes an employee to an increased risk that is materially greater than what is experienced by the general public. A non-occupational disease is characterized by being one that is not contracted solely due to work exposure as opposed to a exposure attributable to a particular type of work such as black lung disease suffered by coal miners.

The "special exposure" exception has also been characterized as employment that causes an "increased risk", a "materially greater risk", or where there is a "higher probability" of the employee contracting the particular disease than the general public. In order for an employee to establish compensability, an employee must prove that the risk of contracting the disease by virtue of employment is materially greater than that of the general public. (see, *Bethlehem Steel Company v. IAC (George)* (1943) 21 Cal.2d 742, 8 Cal.Comp.Cases 61).

The leading case which is still good law, is from the California Supreme Court in *Pacific Employers Ins. Co. v. Industrial Acc. Com. (Ehrhardt)* (1942) 19 Cal.2d 622, 70 Cal.Comp.Cases 71. In *Ehrhardt,* the applicant was a coffee salesman whose sales route included the San Joaquin Valley where he was exposed to dust and fungal spores that cause San Joaquin Valley Fever (coccidioidomycosis). He never resided in the San Joaquin Valley and only traveled there by train and car for work.

The court in *Ehrhardt* also emphasized that each case involving whether there is a special exposure exception to the general rule that non-occupational diseases are noncompensable is "necessarily dependent on its particular facts." Assessing and determining whether there is a special exposure exception is very fact specific and factually nuanced. "Each case must be decided upon its particular facts and no comprehensive formula is available." (citation omitted). More importantly, a special exposure exception may be established and injury AOE/COE found even if the exposure may "not be the kind anticipated by the employer or peculiar to the employment."

Burden and Standard of Proof: The burden of proof is on the applicant to establish that he or she was subject to a special or materially greater risk of contracting a disease than that of the general public. (see *Bethlehem Steel Company v. IAC,* supra). What is required is some special employment exposure in excess of that experienced by the general population. Industrial causation need only be established based on reasonable probability and an applicant is not required to prove industrial connection in exacting detail. The applicant for workers' compensation benefits has the burden of establishing the reasonable probability of industrial causation. The applicable standard of proof is proof by a preponderance of the evidence (Labor Code 3202.5).

Based on the decision from the California Supreme Court in *McAllister v. WCAB* (1968) 69 Cal.2d 408, 33 Cal.Comp.Cases 660, the WCAB is obligated to uphold a claim in which the proof of industrial causation i.e., AOE/COE "…is reasonably probable, although not certain or convincing."(*Rosas v. WCAB* (1993) 16 Cal.App.4th 1692, 58 Cal.Comp.Cases 313. This is true even where the exact mechanism of injury is unclear or even unknown. (*Federal Insurance Company v. WCAB (John P. Doe)* (1995) 60 Cal.Comp.Cases 422.

Case Examples of Situations Where Applicant's Established "Special Exposure", "Increased Risk", or a "Materially Greater Risk" than the General Public: The following cases illustrate various situations and scenarios where compensability has been found based on a special or increased risk analysis.

1. **Valley Fever/Coccidiomycosis:** *Luis Morales (Dec'd), Arlene Morales (Widow) v Prime of California, Inc.* 2013 Cal.Wrk.Comp. P.D. LEXIS 389 (Death claim found compensable. Decedent's widow was able to establish that he was subject to a greater risk of contracting Valley Fever by virtue of his employment. Applicant worked for a company maintaining and servicing fuel stations and was exposed to soil, dust, and sand 4 days out of a 5 day work week and contracted Valley Fever. Similar result in *Jacobs v. Western Municipal Water District, PSI*, 2011 Cal.Wrk.Comp. P.D. LEXIS 74 (WCAB panel decision) (Applicant contracted Valley Fever by virtue of exposure to fungus and dust at work)).

2. **Flu:** *San Francisco v. IAC (Slattery)* (1920) 183 Cal. 273 (Hospital employee working as a steward, contracted influenza).

3. **Pneumonia/Pneumoconiosis:** *Fireman's Fund Indem. Co. v. IAC (Whitaker)* (1949) 93 Cal.App. 2d 244, 14 Cal.Comp.Cases 151 (Aggravation of Pneumoconiosis from grinder dust established a "special exposure".).

3. **Hepatitis B and C:** *City of Fresno v WCAB (Bradley)* (1992) 57 Cal.Comp.Cases 375 (writ denied) (A police officer exposed to drug addicts and paraphernalia contracted Hepatitis B); see also, *County of Los Angeles v. WCAB (Gleason)* (2002) 67 Cal.Comp.Cases 1049 (writ denied);

Argonaut Ins. Co. v. IAC (Doehrer) (1960) 25 Cal.Comp.Cases 65 (writ denied); *Southern California Permanente Medical Group v. WCAB (Hunt)* (1982) 47 Cal.Comp.Cases 1175 (writ denied) (Hepatitis C contracted by nurses).

4. **Acquired Sensitivity or Reactions to Certain Substances and Chemicals:** *Nielsen v. WCAB* (1974) 36 Cal.App. 3d 756, 39 Cal.Comp.Cases 83; *Duke v. WCAB* (1988) 204 Cal.App.3d 455, 53 Cal.Comp.Cases 385 (Due to special exposure in the work environment, applicants acquired sensitivity to certain chemicals and substances which caused a variety of symptoms including dermatitis and headaches).

5. **Hypertension due to Viral Cardiomyopathy:** *Culver City USD v. WCAB (Grane)* (2017) 82 Cal.Comp.Cases 757 (writ denied) (Physician found that a school teacher was more susceptible to injury due to increased exposure related to her interacting with large numbers of students).

A General Guide to Assessing Workplace Risk Factors for the Coronavirus: OSHA recently published "Guidance on Preparing Workplaces for COVID-19". (https://www.osha.gov/Publications/OSHA3990.pdf) These guidelines if used for the purpose of a general threshold analysis may prove helpful in assessing whether a particular workplace or work operations may pose a special risk, increased risk, or materially greater risk or higher probability for an employee to contract the corona virus than by the general public.

OSHA separated workplaces and work operations into four risk zones based on the likelihood of an employees' occupational exposure during a pandemic. These four risk zones may also be useful in determining and implementing appropriate workplace precautions. The defining characteristics of each risk zone are:

1. **Very High Exposure Risk:**

A. Healthcare employees performing aerosol-generating procedures on known or suspected pandemic patients.

B. Healthcare or laboratory personnel collecting or handling specimens from known or suspected pandemic patients.

2. **High Exposure Risk:**

A. Healthcare delivery and support staff exposed to known or suspected pandemic patients.

B. Medical transport of known or suspected pandemic patients in enclosed vehicles.

C. Performing autopsies on known or suspected pandemic patients.

3. **Medium Exposure Risk:**

A. Employees with high-frequency contact with the general population (such as schools, high population work environments, and some high-volume retail).

4. **Lower Exposure Risk (Caution):**

A. Employees who have minimal occupational contact with the general public and other coworkers (such as office employees).

There Is No All-Purpose General Formula for Determining Compensability Related to the Coronavirus: For purposes of assessing potential workers' compensation liability related to the coronavirus, the CDC risk zones are only illustrative general guidelines. Potential workers' compensation liability in California will be based on a detailed and focused assessment of the particular facts and circumstances related to each individual's workplace and the nature of the mechanism(s) of exposure for each employee. Since each case of an alleged industrial coronavirus injury must be decided upon its particular facts, there is no comprehensive formula available for determining whether a particular case is compensable or not. An exposure to coronavirus may prove compensable even if the exposure is not the kind anticipated by the employment or particular to certain types of employment.

By way of example "some high-volume retail" is characterized by the CDC as a medium exposure risk zone. This assumes a normal high-frequency contact rate with the general public. However, what if the frequency, duration, and intensity of the contacts between a retail clerk/cashier and customers changes dramatically due to special circumstances related to wide spread panic buying and hoarding?

Recently there has been a veritable tsunami of shoppers converging on retail grocery stores nationwide. Retail clerks and cashiers are being subjected to extraordinarily prolonged contact with shoppers without appropriate social distancing in place between themselves and the customers and between the customers themselves. One media report indicated that at one Costco location on a Friday, between the hours of 9AM to 8:30PM more than 10,000 member customers shopped at one store. Sales surpassed Black Friday figures.

A retail grocery cashier routinely handles and touches purchased goods touched by customers. Not every retail clerk wears gloves. In late March, Wal-Mart, Kroger's and Albertsons announced they would be installing Plexiglas sneeze shields at checkout stations in order to protect both cashiers and customers. Also in late March, there were media reports of retail grocery clerks and cashiers contracting COVID-19 in Southern California. The media also

reported a number of warehouse workers employed by online shopping companies had contracted the virus.

If a retail clerk/cashier were to contract the coronavirus within a reasonable period of time during and shortly after the documented increase in the number of shoppers described hereinabove, a reasonable argument could be made that the particular circumstances related to the dramatic increase in shoppers over a defined period of time posed a materially greater and increased risk creating a higher probability that a retail clerk would contract the coronavirus during a time period that could be readily quantified and documented. Perhaps under these particular facts, working in a high-volume retail work environment would be elevated to constitute a high exposure risk as opposed to a medium exposure risk.

This is only one example of many potentially different and complex scenarios that employers and their workers' compensation carriers will have to assess in order to make an informed decision as to the compensability of an alleged industrial injury related to an employee contracting the coronavirus at work.

<u>April 2, 2020 Update:</u> In terms of new developments, media reports on April 1, 2020 reflect that various labor and worker advocacy groups as well as the California Applicant's Attorneys Association (CAAA), have requested that Governor Newsom issue an emergency order creating a conclusive presumption that COVID-19 constitutes a compensable injury AOE/COE as an occupational disease. The California Labor Federation in their request to the governor, focused primarily on safety members and other first responders and health providers. They advocated that the conclusive presumption should apply if any of these enumerated occupational groups contracted COVID-19, were exposed to COVID-19, or where there is a physician ordered quarantine directly related to COVID-19. They also argued that the conclusive presumption of compensability should encompass post-traumatic stress disorder claims by health workers providing direct patient care due to their constant exposure to the virus as well as the emotional trauma related to having to make life and death determinations for individuals related to treatment triage policies.

CAAA also advocated for an executive order from the Governor to establish a conclusive as opposed to a rebuttable presumption of compensability for any employees who were engaged in occupations or businesses that were classified as essential by existing orders or any future executive orders that would expand the list of essential occupations and businesses. CAAA indicated that if the Governor was not inclined to issue such an executive order they would draft and pursue legislation creating a conclusive presumption of compensability.

It remains to be seen whether the Governor would issues such an order and what the nature of any order or legislation would be also the duration of such an emergency order and whether it would be conclusive as opposed to a rebuttable presumption of compensability as to all occupations or businesses deemed essential now or in the future.

Compensability Related to the Coronavirus Based on Testing and Treatment: There may be some situations where an employer for a variety of reasons beneficial to the employer, makes a determination that an employee has or is suspected of having the coronavirus and therefore requires the employee to be tested or treated as a condition of continued employment or returning to work after recovering from the coronavirus. As previously stated, the general rule is that an alleged industrial injury from a non-occupational disease does not arise out of or occur in the course of employment. However, there is a second exception to this general rule based on situations where the cause of an alleged corona virus industrial injury is attributable to what is characterized as "an intervening human agency or instrumentality of the employment."

If an employee is required by the employer or their carrier to undergo testing or treatment for the coronavirus and as a consequence develops an adverse reaction such as a related illness, disability or death, then it will be highly likely the injury or death will be deemed to be industrial. In *Roberts v. U.S.O. Camp Shows, Inc.* (1949) 91 Cal.App.2d 884,885, the applicant's "incapacity caused by an illness from vaccination or inoculation may properly be found to have arisen out of the employment where such treatment is submitted to pursuant to the direction or for the benefit of the employer." (cited in *Latourette v. WCAB* (1998) 17 Cal. 4th 644, 654).

In *Maher v WCAB* (1983) 33 Cal. 3d 729, 48 Cal.Comp.Cases 326 a nurse's assistant was required by her employer to undergo a physical examination that included a test for tuberculosis. She tested positive for the disease and was required to undergo treatment for tuberculosis as a condition of continued employment. She developed a significant adverse reaction to the treatment and the court held that employer-required medical treatment for what would normally be characterized as a non-occupational disease did arise out of employment and was compensable.

In California there are specific statutory provisions related to health care provided by an employer to health care workers which expands the definition of an industrial injury to reactions and side effects arising from health care provided by an employer to expressly defined types of health-care workers (Labor Code 3208.05 (a)-(c)). Under this statute, the employer provided health care must be related to preventing the development of or manifestation of any blood-borne disease, illness, syndrome, or condition, including Hepatitis or HIV, recognized as occupationally incurred by Cal-OSHA or the Federal Center for Disease Control and other similar agencies. There are some exceptions related to HIV related treatment

conditioned on when a healthcare worker tests positive for HIV and when the health worker claims a work related exposure to HIV.

Anticipated Extent of Potential Workers' Compensation Benefits if an Alleged Coronavirus Injury Is Found Compensable:

At the present time the total number and severity of coronavirus cases in California is still evolving. Therefore it is difficult to quantify the percentage of individuals contracting the virus and suffering the need for medical treatment, loss of earnings, and permanent residuals who may file workers' compensation claims alleging their exposure is work related and compensable.

April 1, 2020 Update: Recently it was announced that the Workers Compensation Insurance Organizations (WICO) updated their injury description tables to reflect new and specific coding related to "cause of injury' and "nature of injury" related to the COVID-19 pandemic. The California Division of Workers' Compensation (DWC) has adopted these new codes for COVID-19 claims reporting. (https://www.dir.ca.gov/dwc/WCIS.htm)

In those cases where an alleged coronavirus injury is either admitted or found compensable by the WCAB and the courts, the majority of these cases will hopefully only involve the need for short term medical treatment and short periods of temporary total disability without significant residuals that would result in permanent disability. In terms of medical treatment, the more severe cases might require inpatient hospitalization for a number of weeks.

In compensable coronavirus cases that do result in permanent disability, impairment in most cases will probably be determined under the AMA Guides 5th Edition, Chapter 5, and more specifically Chapter 5.10 related to "Permanent Impairment Due to Respiratory Disorders." Table 5-12 lists various objective testing criteria for estimating the permanent impairment rating due to respiratory disorders that are separated into four different classifications. While the Table 5-12 impairment classification system considers only pulmonary function measurements, there is recognition that pulmonary impairment can occur that impacts the ability of an individual to perform activities of daily living (ADL's). In these limited cases, a physician may be able to use an alternative rating method to assess impairment based on the guidelines set forth in Chapter 5.10 and applicable case law.

Coronavirus cases resulting in permanent disability would also be subject to potential apportionment under Labor Code 4663 and 4664 in determining whether in addition to the industrially related coronavirus, there may be other nonindustrial contributing causal factors of the applicant's permanent disability. Also if it is alleged that the coronavirus has aggravated and accelerated any underlying conditions that preexisted the work related coronavirus, apportionment would also potentially apply.

It is also safe to assume there may be work related death claims filed alleging an applicant's death was caused by work related coronavirus exposure. It is important to remember in death cases the applicable causation standard of proof is whether the workplace exposure to the coronavirus merely "contributed" to the applicant's death and this will be sufficient to establish the death as compensable. (See *South Coast Framing, Inc. v. Workers' Comp. Appeals Board* (2015) 61 Cal.4th 291).

IMPORTANT NOTE AND DISCLAIMER

Given the current fluid and rapidly evolving nature of the Cornavirus-COVID-19 pandemic in the United States, this memo constitutes our preliminary analysis and is provided solely as a reference tool to be used for informational purposes and is subject to change based on evolving information. Therefore it should not be construed or interpreted as providing legal advice related to any specific case or cases. Each insurance company, claims administrator and employer should seek their own independent legal advice and opinion before they determine a course of action on a specific case or cases related to the compensability of injuries in the workplace and any liability for benefits related to an alleged COVID-19 injury.

April 15, 2020