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California: Assessing 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 a number of 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 the optimum precautionary measures to protect its employees from exposure to the coronavirus, it may not be able to completely insulate itself from potential workers' compensation liability if an employee can establish they contracted the virus related to an exposure particular to the work and 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 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.

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 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 prove to be extremely challenging. In terms of potential compensability, liability will be based on whether the coronavirus arose out of and in the course of employment and the more challenging issue, as to

whether the coronavirus was caused by conditions peculiar or particular to the work that also created a special risk of contracting the disease to a greater degree and in a different manner than in 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 or that is related 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 established 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 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); *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) Doctor found that a school teacher was more susceptible to injury due to increased exposure related to her interacting with many students.

A General Guide to Assessing Workplace Risk Factors for the Coronavirus: OSHA recently published Guidance on Preparing Workplaces for COVID-19. 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 as separated workplaces and work operations into four risk zones based on the likelihood of an employees' occupational exposure during a pandemic. The four risk zones may also be useful in determining appropriate workplace practices and precautions. The four risk zones are; very high exposure risk, high exposure risk, medium exposure risk and lower exposure risk (caution). 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? In recent weeks 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. A retail grocery cashier physically handles and touches purchased goods touched by customers. Not every retail clerk wears gloves.

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.

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, determines that an employee has or is suspected of having the corona virus 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. The nurse 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.

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 period of weeks.

In compensable coronavirus cases that do result in permanent disability, apportionment under Labor Code 4663 and 4664 would still be applicable 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 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: 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 particular 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 related to the compensability of injuries in the workplace allegedly related to coronavirus exposure. This memo and its content are based upon information received and reviewed as of March 19, 2020.