WORKERS' COMPENSATION IMPLICATIONS FOR CORONAVIRUS IN MARYLAND, THE DISTRICT OF COLUMBIA, VIRGINIA, AND WEST VIRGINIA

The recent worldwide outbreak of novel coronavirus (COVID-19) has many questioning how this will impact workers' compensation claims. While the initial outbreak occurred in Wuhan, Hubei Province, China, cases have now been confirmed in the United States and Maryland Governor Hogan announced on March 5, 2020 that the first cases were diagnosed in Maryland. On March 11, 2020 the World Health Organization (WHO) declared COVID-19 a pandemic. The Centers for Disease Control (CDC) uses the term pandemic when viruses "are able to infect people easily and spread from person to person in an efficient and sustained way" in multiple regions. https://time.com/5791661/who-coronavirus-pandemic-declaration/

WHAT IS CORONAVIRUS?

Coronavirus is a respiratory disease that was suspected to have originated from a single outbreak from a live animal market in China, suggesting animal-to-person spread. The virus is similar to others that have their origins in bats. However, person-to-person spread was subsequently reported and now community spread is suspected.

"Person to person" spread occurs between people who are in close contact (within about six feet) through respiratory droplets produced when someone coughs or sneezes. The CDC believes it may also be possible to contract the disease by touching a surface or object that has the virus on it and then touching your mouth, nose or eyes. Coronavirus is thought to spread easily and sustainably in some geographic areas, although research on transmission of the virus is still developing. See https://www.cdc.gov/coronavirus/2019-ncov/about/transmission.html

Conversely, "community spread" means people have been infected and it is not known how or where they became exposed. See https://www.cdc.gov/coronavirus/2019-ncov/summary.html.

Currently, widespread sustained transmission has been identified throughout much of the world. See https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html.

THE COMPENSABILITY OF A WORKERS' COMPENSATION CLAIM AS A RESULT OF CORONAVIRUS

With the spread of COVID-19 to Maryland, the District of Columbia, Virginia and now West Virginia there are many implications for businesses beyond the scope of Workers' Compensation. However, one of the most common areas of concern has been whether an

employer would have liability under workers' compensation if an employee contracts COVID-19 at work.

MARYLAND

The Maryland Workers' Compensation Act defines a compensable accidental injury as an accidental injury that arises out of and in the course of employment; an injury caused by a willful or negligent act of a third party directed against a covered employee; or a disease or infection that naturally results from an accidental injury that arises out or and in the course of employment including an occupational disease. Md. Code Ann., Lab. & Empl. § 9-101(b).

An occupational disease is defined as a disease contracted by a covered employee as the result of and in the course of employment and that causes the covered employee to become temporarily or permanently, partially or totally incapacitated. Md. Code Ann., Lab. & Empl. § 9-101(g). Section 9-502 of the Act limits an Employer's liability for an occupational disease to those cases where the occupational disease is due to the nature of an employment in which the hazards of the disease exist or has manifestations that are consistent with those known to result from exposure to a biological, chemical or physical agent that is attributable to the type of employment in which the covered employee was employed. Certain diseases are presumed to constitute an occupational disease suffered by public safety employees in the line of their duty pursuant to Md. Code Ann., Lab. & Empl. § 9-503.

COVID-19 would be treated as any other disease under the Workers' Compensation law. There has been no legislation introduced or passed to date that would treat this recent development any differently. Therefore, considerations for compensability should follow established law on this topic.

We have seen the transmission of communicable diseases being found compensable in certain factual scenarios under Maryland law. Often, this is in the context of an accidental injury where exposure occurs in a health care or public safety setting and there is defined transmission such as a needle stick or exposure to blood and transmission of a disease which is not widespread. We do not generally see claims for transmission of diseases such as the common cold or the flu. This distinction is relevant to the analysis of whether coronavirus claims would be found compensable.

If the transmission of any disease can be traced to a specific, identifiable, accidental injury at work, such as the accidental exposure to bodily fluids, then the contraction of that disease can be said to arise out of and in the course of the employment and could therefore be treated as compensable.

If the transmission of any disease can be established to be due to the nature of an employment in which the hazards of the disease exist or has manifestations that are consistent

with those known to result from exposure to a biological, chemical or physical agent that is attributable to the type of employment in which the covered employee was employed, it could be considered a compensable occupational disease.

In other words, there is a requirement that the employee be able to establish that the exposure to the disease took place at work or that they worked in a setting where exposure to the disease is inherent in the work. A needle stick is an identifiable specific accident and thus can be a compensable claim. However, it may be difficult, if not impossible, in most circumstances, to establish how or when a person contracts a disease that can be spread person-to-person or capable of community spread, such as the common cold, the flu or coronavirus.

DISTRICT OF COLUMBIA

The District of Columbia Workers' Compensation Act provides that an injury is one which arises out of and occurs in the course of an employee's employment, or an occupational disease that arises naturally results from employment. D.C. Code § 32-1501. An employee has a rebuttable presumption that the claim is compensable if something unexpectedly went wrong with his or her body and the working conditions could have caused the harm. D.C. Code § 32-1521. The Employer and Insurer have to produce substantial evidence to rebut the presumption and, once this is done, the burden then shifts back to the employee to prove compensability by a preponderance of the evidence. D.C. Code § 32-1521(a).

The District of Columbia also has the "positional risk" doctrine which provides that an injury arises out of employment if it would not have occurred but for the fact that the conditions or obligations of the employment placed the Claimant in a position where he or she was injured. Clark v. DOES, 743 A.2d 722 (D.C. 2000). This has been used over the years to expand the circumstances under which a claim can be compensable in the District. In addition, the D.C. Court of Appeals has held that where workplace conditions cause an employee's injuries, the resulting disability can be compensable as arising out of and in the course of employment. Howard Univ. Hosp. v. DOESW, 881 A.2d 567 (D.C. 2005).

Under these standards, an injury could be compensable but only if an employee can show that it arose out of and occurred in the course of employment and that it would not have occurred but for the fact that the employee was working in the area where he or she was at the time of the event. Mere speculation that the exposure occurred at the place of employment will not be enough to bring the claim within the parameters of the Act, as the D.C. Administrative Hearings Division has denied those types of claims. While there is a presumption of compensability, this can be rebutted and the Employer and Insurer could produce evidence of general exposures to the coronavirus outside of the place of employment to disprove the link between the virus and the employee's employment. If the coronavirus becomes more widespread in the United States, the presumption will likely become more easily

rebutted. Once the presumption is rebutted, the burden will fall back to the employee to prove compensability.

Just because an employee has been diagnosed with coronavirus in a setting where they were performing their work duties does not make it compensable under D.C. law. If an employee contracts coronavirus at work, there will still be a legal, factual, and medical dispute about whether the exposure actually occurred during the course and scope of the employee's job duties. The transmission would not be compensable if the employee cannot show that it arises out of employment, even if it occurred in the course and scope of the employee's job duties.

As in Maryland, we could see a compensable claim in a situation where an employee works in a healthcare setting and can prove a specific transmission and exposure to a patient diagnosed with coronavirus. However, it would be more challenging for an employee to show compensability merely because they work with a co-employee who was diagnosed with the virus.

VIRGINIA

While the Virginia Workers' Compensation Commission has not issued any information or judicial opinions on the Coronavirus, the Commission will more than likely classify the Coronavirus as an ordinary disease of life. In Virginia, an ordinary disease of life is one that the general public at large is exposed to. Van Geuder v. Commonwealth, 192 Va. 548 (1951). Generally, the Virginia Supreme Court has held that ordinary diseases of life are not compensable. See id. The Virginia Supreme Court has held:

> "It is clear that the Legislature did not intend by enactment of the occupational disease law to provide a general system of health insurance. It provided compensation only for occupational diseases and carefully spelled out what was required to fill that description. It provided that no ordinary disease of life to which the general public is exposed outside of the employment shall be compensable." See id.

However, claimants may try to obtain compensation benefits by establishing that the coronavirus is an occupational disease. The Court of Appeals has held that an ordinary disease of life may be treated as a compensable occupational disease if it is employment related and not resulting from causes outside of the claimant's employment. Greif Companies (GENESCO) v. Sipe, 16 Va. App. 709 (1993). To establish an ordinary disease of life as a compensable occupational disease, the claimant must prove that:

1. The disease exists and arose out of and in the [course of the claimant's] employment with respect to occupational diseases as provided for in Va. Code §65.2-400:

a. An occupational disease shall be deemed to arise out of the employment only if there is apparent to the rational mind, upon consideration of all the circumstances:
    i. A direct causal connection between the conditions under which work is performed and the occupational disease;
    ii. It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
    iii. It can be fairly traced to the employment as the proximate cause;
    iv. It is neither a disease to which an employee may have had substantial exposure outside of the employment, nor any condition of the neck, back or spinal column;
    v. It is incidental to the character of the business and not independent of the relation of employer and employee; and
    vi. It had its origin in a risk connected with the employment and flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction; and
2. did not result from causes outside of the employment, and
3. that one of the following exists:
    a. It follows as an incident of occupational disease as defined in this title; or
    b. It is an infectious or contagious disease contracted in the course of one's employment in a hospital or sanitarium or laboratory or nursing home as defined in §32.1-123, or while otherwise engaged in the direct delivery of health care, or in the course of employment as emergency rescue personnel and those volunteer emergency rescue personnel referred to in §65.2-101; or
    c. It is characteristic of the employment and was caused by conditions peculiar to such employment. See Va. Code. §65.2-401.

At hearing, the claimant will bear the burden to prove by clear and convincing evidence that activities outside of work did not cause the disease. City of Norfolk v. Munker, 2018 WL 326530 (Va. Ct. App. 2018). The Virginia Court of Appeals has held a bare assertion that a condition is "work-related" does not meet the "clear and convincing" standard. Lanning v. Virginia Dept. of Transp., 37 Va. App. 701 (2002). The claimant will not be required to show that the disease resulted from a "single source, to the complete exhaustion of all other sources," but that the "primary source" of the disease was work-related. Ross Laboratories v. Barbour, 13 Va. App. 373 (1991). In Texas Tech Industries v. Ellis, 44 Va. App. 497 (2004), the Virginia Court of Appeals held that causation of a medical condition may be proved by either direct or circumstantial evidence, including medical evidence or the testimony of the claimant.

Finally, the Court of Appeals has held an aggravation of an ordinary disease of life due to exposure at work is not compensable. Head v. Newport News Police Department, 65 O.I.C. 166 (1986).

WEST VIRGINIA

In West Virginia, in order for a claimant to sustain a compensable accidental injury, it must be sustained "in the course of" and "result from" the claimant's covered employment. "In the course of" refers to time, place and circumstances, while "resulting from" relates to the origin of the injury.

Further, an injury is defined as a definite, "isolated fortuitous event." Dickerson v. State Workmen's Comp. Comm'n, 154 W. Va. 7, 173 S.E.2d 388 (1970).

Therefore, as an example, if a claimant were exposed to infected blood, or a needle stick as a consequence of the claimant's employment duties, and the Coronavirus was transmitted to the claimant as a result thereof, this fact pattern would likely result in a compensable accidental injury claim.

In terms of an occupational disease claim, which in all likelihood is how the majority of future Coronavirus claims would be characterized, in West Virginia an occupational disease is defined as a disease incurred in the course of and arising out of employment. There must be an apparent link to a rational mind that there is a direct and causal connection between the alleged occupational disease and the working conditions. An ordinary disease, to which the general public is exposed, would not be compensable unless proven that the disease was proximately caused by the claimant's employment.

While the West Virginia Office of the Insurance Commissioner has not issued any information, nor has the West Virginia Supreme Court of Appeals issued any judicial opinions regarding the Coronavirus specifically, the Coronavirus would most likely be classified as an "ordinary disease of life."

In West Virginia, as referenced above, an ordinary disease of life is one that the general public is exposed to. Casdorph v. W. Virginia Office Ins. Com'r, 225 W. Va. 94 (2009). Generally, the West Virginia Supreme Court of Appeals has held that ordinary diseases of life to which the general public is exposed to outside of employment are not compensable. The West Virginia Supreme Court of Appeals has held that:

"West Virginia Code § 23–4–1 indicates that claims may be filed for diseases that were incurred in the course of and resulting from employment. No ordinary disease of life to which the general public is exposed outside of employment is compensable unless it is apparent:

(1) that there is a direct causal connection between the conditions under which work is performed and the occupational disease;

(2) that it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;

(3) that it can be fairly traced to the employment as the proximate cause;

(4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment;

(5) that it is incidental to the character of the business and not independent of the relation of an employer and employee;

and (6) that it appears to have had its origin in the risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction." Id.

Note that the aforementioned is a six (6) part test that requires all six parts be satisfied to qualify as a compensable occupational disease claim in West Virginia. Therefore, it is expected that in order to establish a compensable occupational disease claim for Coronavirus, the claimant would be required to satisfy all six prongs. From a practical standpoint, and in many cases, it may be difficult, if not impossible to establish exactly how, when or under what circumstances a claimant was in contact with the Virus given that the public at large is susceptible to contracting the Virus.

West Virginia became the last State in the Country to report a positive coronavirus test on Tuesday, March 17, 2020.

Further, and as of the date of this writing, the West Virginia Office of Judges and West Virginia Board of Review, which oversee litigated West Virginia workers' compensation claims, are still operational at the moment. However, on March 16, 2020, the West Virginia Supreme Court of Appeals, which is the final arbiter of workers' compensation claims, has indicated that all nonemergency hearings and trials will be postponed and/or conducted telephonically or by video where available, though at least Friday, April 10, 2020.

INVESTIGATION AND PROACTIVE HANDLING OF CORONAVIRUS CLAIMS

Regardless of the jurisdiction, compensability will turn on a combination of factual and medical considerations. Currently, the medical community in association with governmental agencies appears to be performing extensive investigation into the transmission of the coronavirus. These investigations may seem presumptive on the issue of causation. However, if the spread of the disease is such that it is beyond the capability or capacity of the government

to determine the actual transmission, then it will be more difficult for an employee to establish causation.

Certain specific scenarios may result in compensable claims for coronavirus. For example, if someone contracted the disease after having traveled to Wuhan at the time of the initial outbreak on a work related business trip, it is quite possible such a claim would be compensable. If we see a high number of cases from a single employer (greater than the average seen in the community) after one or more traveled to an area identified as having widespread transmission, these claims may be deemed compensable. Further, we may see compensable claims for health care workers providing treatment for those suffering from the disease where the disease is otherwise fairly contained. Conversely, in a situation where there are multitudes of patients diagnosed with the virus and there are cases that have occurred outside of the health care facility where the employee works, it will be harder for the employee to show causation. Absent facts that clearly establish the disease was contracted at work, such claims should be denied.

When considering a possible claim, the medical evidence will also be critical. An employee who can show a diagnosis and a possible link to employment is going to be required to produce medical evidence establishing causal relationship. An employee's own testimony that he or she was working and they were working with a person who has the virus should not be sufficient to establish that relationship. The employee will need to produce competent medical evidence showing a link.

One of the most important ways to limit your exposure for a potential coronavirus claim will be to thoroughly investigate any alleged exposure. When investigating a possible coronavirus case, there are several considerations you will want to address:

(1) Has the employee traveled to an area where there is widespread transmission of the disease and was that travel work-related?
(2) Has the employee had direct contact with someone who has recently traveled to an area where there is widespread transmission and was that contact work-related?
(3) Does the employee work in a healthcare setting where coronavirus cases have been seen or treated?
(4) Can the employee identify a specific incident or accident that resulted in direct contact with bodily fluids of someone known or suspected to have coronavirus?
(5) Is any healthcare provider able to relate the diagnosis of coronavirus to a specific event or transmission at work?
(6) Has the CDC or other governmental entity investigated the claim to establish when and how the disease was transmitted?

It is important to ensure that any claim of a coronavirus exposure at work is carefully and thoroughly investigated from a factual perspective. Each claim should be evaluated on its own merits to assess whether it is compensable and there is no broad rule that will apply to every coronavirus claim across every setting. In addition, the compensability of claims will likely be impacted by the changing evolution of the virus, its transmission, and how widespread the outbreak becomes.

FEDERAL LEGISLATION

On March 18, 2020 the President signed the Families First Coronavirus Response Act. https://docs.house.gov/billsthisweek/20200309/BILLS-116hr6201-SUS.pdf. Among other things, this legislation mandates that certain Employers with fewer than 500 employees provide employees with two weeks of sick leave to either quarantine, seek coronavirus diagnosis or care for themselves as well as certain benefits to care for a family member with coronavirus. From a workers' compensation perspective, these benefits should operate to offset any exposure an Employer may face for lost time benefits in the first two weeks of a potential claim. Congress also established PUA (Pandemic Unemployment Assistance) benefits under the CARES Act, which is available to any worker who cannot receive state unemployment benefits.

PRESUMPTIONS

Around the country, many states are starting to enact presumptions addressing the compensability of coronavirus claims. In many states, this is a presumption that a worker who comes down with COVID-19 contracted the disease at the workplace, thus making them eligible for workers' compensation. As of May 26, 2020, 11 states have introduced legislation establishing a presumption and five have passed legislation (AK, MN, UT, WI, WY). In addition, 18 states have taken executive action to create a presumption. In most states, the presumption has been limited to first responders, health care workers, and correctional officers. However, some states have gone further and expanded the presumption to include grocery store workers or essential industry workers. In Illinois, the Workers' Compensation Commission passed an emergency rule creating a presumption that would apply to workers in "essential industries," however they later withdrew this rule after litigation was commenced by the Illinois Manufacturer's Association and the Illinois Retail Merchants Association to block the new rule.

THE IMPACT ON THE JUDICIAL SYSTEM

On March 12, 2020, Local Federal and Maryland State Courts announced the suspension of civil jury trials. The Maryland courts are resuming limited operations as of June 8, 2020, with a phased-in plan to reopen and resume normal proceedings and jury trials by October 5, 2020. The Maryland Workers' Compensation Commission had postponed all hearings through May 1, 2020, and began to set limited video remote hearings beginning May 6, 2020, by the consent of the parties. As of June 8, 2020, the Commission is resuming limited in-person hearings with

staggered start times and social distancing measures. The District of Columbia Administrative Hearings Division has also postponed all Formal Hearings until May 29, 2020, and has begun setting video hearings for those Formal Hearings that were set in May 2020. The Compensation Review Board has extended filing deadlines until after the state of emergency is lifted in the District of Columbia. We will notify clients individually as to the impact this will have on their claims.

It seems clear at this point that, at the very least, the effort to manage the spread of coronavirus will have a significant impact on the judicial process.

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