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Workers' Compensation and COVID-19 Frequently Asked Questions

The Workers' Compensation Group at O'Meara, Leer, Wagner & Kohl, P.A. provides the following discussion about the novel coronavirus (COVID-19).

March 13, 2020. The novel coronavirus, "COVID-19," is raising a plethora of concerns, issues and action plans around the world and in the United States. One concern across the United States and here in Minnesota is determining whether COVID-19 is a compensable personal injury or occupational disease entitling employees suspected of contracting or contracting COVID-19 to workers' compensation coverage and benefits.

Statutory Guidance and Case Law

The distinction between a "personal injury" and an "occupational disease" under Minnesota's workers' compensation law is often difficult to perceive and, some would argue, a legal distinction without a practical difference. A "personal injury" under Chapter 176 includes "physical injury arising out of and in the course of employment *and includes personal injury caused by occupational disease…*" Minn. Stat. 176.011, Subd. 16.

Minn. Stat. 176.011, Subd. 15, defines an "occupational disease" to include "physical disease arising out of and in the course of employment peculiar to the occupation in which the employee is engaged and due to causes in excess of the hazards ordinary of employment and shall include undulant fever."

The statute specifically states, "*ordinary diseases of life to which the general public is equally exposed outside of employment are not compensable, except where the diseases follow as an incident of an occupational disease, or where the exposure peculiar to the occupation makes the disease an occupational disease hazard. A disease arises out of the employment only if there be a direct causal connection between the conditions under which the work is performed and if the occupational disease follows as a natural incident of the work as a result of the exposure occasioned by the nature of the employment. An employer is not liable for compensation for any occupational disease which cannot be traced to the employment as a direct and proximate cause and is not recognized as a hazard characteristic of and peculiar to the trade, occupation, process, or employment or which results from a hazard to which the worker would have been equally exposed outside of the employment.*"

The question for Minnesota employers and insurers when investigating potential work-related claims involving COVID-19 will be whether the employee's work activities and/or job duties, rather than general exposure as a member of the public, resulted in exposure to COVID-19 and caused her COVID-19. If an employee can establish that she, more probably than not, was

exposed to COVID-19 as a result of her work activities, her coronavirus condition- whether legally characterized as a "personal injury" or "occupational disease" - will be compensable.

Minnesota courts have specifically addressed when employee exposure to "ordinary diseases of life" are compensable as work-related injuries. Case law shows where an employee can prove the exposure was peculiar to the employment, the condition is work-related.

In Olson v. Executive Travel MSP, Inc. 41 WCD 793, 437 NW2d 645 (Minn. 1989), an employee contracted Influenza-Type B while traveling on business to Asia and developed subsequent complications, including chronic bronchiectasis. The employer denied the claim, alleging the employee sustained a non-compensable ordinary disease of life. A compensation judge concluded she sustained a personal injury in the nature of bilateral bronchiectasis arising out of the course of employment when she became infected with influenza type B on her work-related trip to Asia. (At that time, the virus was not present in the U.S.) The Minnesota Workers' Compensation Court of Appeals (WCCA) affirmed, concluding the trip to Asia was a "special hazard" putting her at greater risk for contracting the virus and that she sustained an occupational disease. The Supreme Court affirmed the WCCA and noted that although the parties focused their arguments on the occupational disease issue, "[w]e are of the opinion, however, that this case involves the compensability of a personal injury under [Minn. Stat. ' 176.011, subd. 16], thus obviating the need to address whether there was also a compensable occupational disease under subdivision 15." Olson, 437 N.W.2d 645, 646, 41 W.C.D. 793, 794 (Minn. 1989). In a footnote, the Olson court indicated that, while the employer had "asserted that a claimant cannot seek compensation for a disease under the personal injury subdivision of the Act," [a]pplication of this provision had not been previously so limited." Id. At n.1. The Court's aside seems to reflect their conclusion that the bilateral bronchiectasis, caused by a work-related exposure to influenza B, was a "personal injury"

In Baker v. Farmer's Union Marketing and Processing, slip op. (W.C.C.A. Mar. 14, 2000), the employee worked for an employer that operated a rendering plant. His job duties included unloading semi-trailers containing dead animals, including pigs, cows, turkeys and chickens, and putting them in a grinder. The employee developed a myriad of symptoms and was eventually diagnosed with histoplasmosis. He filed a workers' compensation claim alleging his histoplasmosis was the result of his work activities. The employer denied his claim, asserting the injury or occupational disease did not arise out of and in the course of employment. A compensation judge concluded the histoplasmosis "can be traced to the employment as a direct and proximate cause" and ordered the employer to pay benefits. The WCCA affirmed, concluding that the histoplasmosis was a "personal injury" and that the compensation judge's conclusion, including his adoption of expert opinions, was supported by substantial evidence.

Exposure Issues, Facts and Defenses for Potential COVID-19 Workers' Compensation Claims

If an employee submits a claim of COVID-19 as a work-related condition, an employer and insurer should conduct a swift investigation. Factors to consider when admitting or denying the claim include whether the type of work performed by the employee could result in an increased exposure to COVID-19. Some occupations will have a stronger position to argue the exposure was peculiar to the employment and that there is a direct causal connection between the job duties and any diagnosis of COVID-19.

The following occupations could present more difficult cases in which to assess compensability:

- Minn. Stat. 176.011 subd. 15(b) already provides any employee on active duty with fire or police, State Patrol, paramedic, licensed nurse, emergency medical services provider, corrections officers and other many other government enforcement positions a statutory presumption for certain occupational diseases including, but not limited to, pneumonia. If they had an exam when hired and did not have pneumonia at that time, the pneumonia is presumed to be work-related. A judge, liberally applying "legislative intent," could find COVID-19 is a sufficiently similar condition for these types of employees and find it compensable.

- Subd. 15(b) also provides that "If immediately preceding the date of disablement or death, any individual who by nature of their position provides emergency medical care, or an employee who was employed as a licensed police officer …; firefighter; paramedic; state correctional officer; emergency medical technician; or licensed nurse providing emergency medical care; *and who contracts an infectious or communicable disease to which the employee was exposed in the course of employment outside of a hospital*, then the disease is presumptively an occupational disease and shall be presumed to have been due to the nature of employment and the presumption may be rebutted by substantial factors brought by the employer or insurer."

- Even without a statutory presumption, other healthcare workers, nursing home employees, child care workers, teachers and others working with large populations of people that could result in COVID-19 may be more likely to be able to prove, by a preponderance of the evidence, that they were exposed at work versus elsewhere. Again, a prompt and thorough investigation of the exposure history, safety protocols in place at the time of alleged exposure, etc., will be imperative to assessing compensability of the claim.

- Employees required to travel for work to areas with significant numbers of COVID-19 diagnoses that contract the virus. This situation appears directly on point with the Olson case. It will be necessary to investigate any potential personal exposure to COVID-19 unrelated to the business travel to determine any potential defense that the condition is compensable.

We expect there could also be potential exposure for claims of work-related COVID-19 in many other employment situations including:

- Employees working with the public in food service and retail with increased exposure to masses of people.

- Employees working in large facilities including manufacturing, distribution, construction and large employers in office settings.

In these employment situations, it will be easier for an employer and insurer to argue the employment did not constitute a "special hazard" resulting in exposure beyond potential exposure as a result of daily living including shopping, dining, etc. Vetting these claims by

determining if there is any clear, actual and specific contact with an individual diagnosed with COVID-19 as a result of the employment will be imperative to defending any compensability.

Current Outlook and Handling of COVID-19

Minnesota and other states are currently getting up to speed on how to handle the rapid numbers of COVID-19 diagnoses, including those from possible occupational exposure to the virus.

On March 12, the Minnesota Department of Labor and Industry advised stakeholders "Due to the changing nature of the COVID-19 pandemic, until further notice the Department of Labor and Industry prefers administrative conferences and mediations be conducted by telephone. The parties also have the option of rescheduling events to a later date." As of March 12, the Minnesota Office of Administrative Hearings, has publicly advised stakeholders that it is following a "business as usual" approach. However, OAH stated it is *considering* whether to schedule settlement conferences, discontinuance (.239) and stipulation status conferences by telephone.

OSHA has deemed the 2019 COVID-19 a recordable illness when a worker is infected on the job. If an employee becomes infected while traveling for work or at work, the employer would be required to prepare and file appropriate reports with OSHA. State laws also have applicable reporting requirements, however, in many states the reporting of disease is again the responsibility of healthcare providers. Employers should be prepared to file appropriate reports with OSHA for those who have been exposed to the virus at work. Employers should also take action to become familiar with any state and local laws that will require them to report incidences of the virus to the state.

Many states are taking action to address these issues. For example, in Washington State, Governor Jay Inslee, along with the Washington Department of Labor & Industries (L&I), changed state policy around workers' compensation coverage for quarantined health care workers and first responders. These changes are effective immediately. The Washington State Department of Labor and Industries will provide benefits to quarantined workers if they have been exposed to COVID-19 on the job.

Washington State is a monopolistic workers' compensation system and prohibits employers from purchasing private workers' compensation coverage through a commercial insurer, making this change much easier. (Washington does allow employers to self-insure for workers' compensation.) Washington's action raises questions about whether Minnesota lawmakers or the governor could take similar action. For example, could the State, through legislative action or even "emergency" rule-making, require the Special Compensation Fund or insurers/self-insureds to pay for testing relating to COVID-19 cases if Minnesota sees a significant number of cases causing concern and the need for state involvement? The Minnesota Legislature remains in session. Could legislators amend Chapter 176 to create a rebuttable presumption of coverage for employees, or specific classes of employees (e.g., healthcare workers, first responders, teachers) exposed to an infectious disease if the governor declares a State of Peacetime Emergency in the State of Minnesota upon a declaration of a "pandemic" by the Minnesota Department of Health or the U.S. CDC? It is certainly possible the state could address these issues by statutory changes, rule-making, executive action or some combination of them.

O’Meara, Leer, Wagner & Kohl will provide updates on the legal implications of COVID-19.

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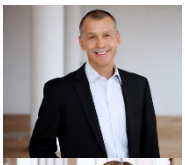

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