COVID-19 WORKERS COMPENSATION AND BROWN ACT UPDATES

WORKERS COMPENSATION QUESTIONS

We have received questions from our members regarding what happens if an employee feels that they have been exposed to COVID-19 or are feeling ill and request to be tested.

First and foremost, it should be noted that leave from work to undergo diagnostic testing does not create a TTD entitlement. TTD benefits have not been found owing where an applicant missed work to undergo diagnostic testing on a body part that was ultimately found non-compensable (Potts v. WCAB (1196) 61 CCC 1082 (writ denied)), and TTD benefits have not been found owing where an injured worker was asked to undergo a fitness-for-duty evaluation before the employer would return the applicant to work (Roberts v. WCAB (2000) 65 CCC 219 (writ denied)), though in that case the applicant had already been found permanent and stationary.

Similarly, being exposed to the disease or being placed in quarantine do not actually establish an "injury", so there would likely be no obligation for the employer to provide a claim form in either case. The employer may have other legal obligations to provide pay for lost wages, but it is unlikely the obligation would arise under workers' compensation laws.

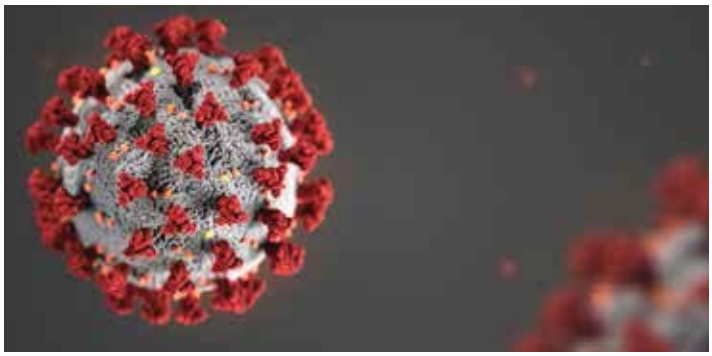
As to compensability in the event that someone does unfortunately contract the coronavirus, the question to ask in determining if a disease is occupational or nonoccupational, is whether the job makes the chances of contracting the disease "materially greater," than the chances of contracting the disease as a member of the general population. It is well established that the common cold, the flu, bronchitis, or conjunctivitis are not generally considered compensable work injuries. The law treats such illnesses differently than other injuries as a matter of public policy due the high cost of avoidance and treatment of common ailments across the entire workforce and the difficulty of establishing a link between the illness and employment.

Even in the case where there is a materially greater chance of exposure due to the job, medical evidence must establish a causal connection between the employment and the disease. The California Supreme Court has stated that the fact that "an employee contracts a disease while employed or becomes disabled from the natural progression of a nonindustrial disease during employment will not establish a causal connection," and goes on to state that an ailment "does not become an occupational disease simply because it is contracted on the employer's premises" (LaTourette v. WCAB (1998) 63 CCC 253 and Johnson v. IAC (1958) 23 CCC 54). Causation in cases like these is difficult to establish. An applicant who worked at a hospital was not found to have a compensable injury when an independent medical examiner could not determine whether it was probable that applicant contracted viral encephalitis (a relatively rare disease) at a hospital as opposed to somewhere else (Vawter v. WCAB (1980) 45 CCC 806 (writ denied)).

There are, of course, exceptions. The California Supreme Court has awarded compensation benefits to a traveling salesman who contracted San Joaquin Valley fever (caused by fungus unique to that region) because he had never and would likely never have been to the region in which the disease is common had it not been for his job (Pacific Employers Insurance Co. v. IAC (Ehrhardt) (1942) 7 CCC 71). A detective's hepatitis B infection was found compensable even

though specific exposure was never proven because his work exposed him to drug paraphernalia and possibly infected individuals at a rate notably higher than that of the general population (City of Fresno v. WCAB (Bradley) (1992) 57 CCC 375 (writ denied)). Contrasting that case, however, a claim for hepatitis filed by a delivery driver who contracted it while eating doughnuts at one of his stops was not found compensable because the applicant was not subject to exposure any different than the general public (McKeon v. WCAB (1988) 54 CCC 332 (writ denied)).

Guidance is provided to employers as to when an employer is required to provide a claim form and report an injury to OSHA in 8 CCR 14300.5. The regulation states that an injury or illness must be considered work-related if an event or exposure



in the work environment caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. At 8 CCR 14300.5(b)(2)(H) the regulation excludes the "common cold or flu," though also states that "contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work."

On the balance then, with current medical information suggesting that the coronavirus is a risk to the general population and not to workers in specific fields, and is in many ways analogous to the common cold or flu, employers in general are not required to provide workers who contract the disease a claim form or provide workers' compensation benefits, unless the facts suggest the injured worker was at a materially greater risk of contracting the disease than the general public and medical evidence supports a link between employment and the disease. Given that the best available scientific evidence suggests that the mortality rate and communicability of the coronavirus may be higher than that of the regular flu, it is very possible that these issues will become litigated, but if every case were to be deemed compensable for all public health workers and first responders, it would have a devastating financial impact on the workers' compensation system.

If an employee states that they are not feeling well and request testing or time off, contact COMPANY NURSE at 1-877-518-6711 to report the incident.

BROWN ACT UPDATE

California Governor Gavin Newsom issued an emergency Executive Order to further the State's efforts to control the spread of the COVID-19 coronavirus and reduce and minimize the risk of infection. The Executive Order follows Newsom's declaration of a statewide emergency. In addition to other measures, the Executive Order enables local government agencies to hold meetings telephonically or electronically and calls

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