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A Look at Occupational Disease and COVID-19

By Rahul Sheth April 15, 2020

COVID-19 claims have started in other states and in the Federal workers' compensation system, although we do not know of any in Georgia, yet. Can COVID-19 claims be held compensable under Georgia workers' compensation law?

We are celebrating the 100-year anniversary of the Georgia Workers' Compensation Act ("the Act"), the drafting of which has been called "The Grand Bargain." When the Workers' Compensation Act was first enacted, occupational diseases were not covered. Only occupational injuries. Prior to May 1, 1946, the Act did not allow an injured worker to collect benefits for an occupational disease, and thus it did not afford the employer the exclusive remedy defense for tort immunity. Effective May 1, 1946, the Act was amended to narrowly allow four types of occupational diseases to qualify for workers' compensation benefits: poisoning by certain agents, disease condition caused by x-ray or radioactive substance exposure, asbestosis, and silicosis. In 1971 this was amended to include a catch-all provision.

In 1986, the Georgia legislature overhauled the occupational disease statutes to what we currently know, including the elimination of the Medical Board, which required the State Board to refer any medical issue in an occupational disease case to it, and the overhaul allowed for the recovery of TPD benefits in addition to TTD and PPD. However, the authors of the current statutes likely did not contemplate a worldwide pandemic such as COVID-19.

By now, we have all heard and been affected by this pandemic with many of us trying to alter the way we work, telework, meet with clients, and litigate cases. Aside from workers' compensation, there are other avenues available for a worker who may contract COVID-19, such has FMLA or Families First Coronavirus Response Act ("FFCRA") recently passed by the U.S. Congress. However, what options are available to a worker who alleges that he or she contracted COVID-19 while at work? Diseases can be considered in two different ways when bringing a workers' compensation claim. Generally, occupational injuries are those that arise out of and occur in the course and scope of employment. However, the occupational disease statutes place a much higher burden of proof on the injured worker.[i] For this reason, there may be disputes as to whether contracting COVID-19 is an occupational injury or disease.

When a disease is one that results from the "unusual, sudden, and unexpected exposure to an injurious risk at work," it is a compensable injury under the Act if it is not the result of conditions incidental to the work being performed.[ii] On the other hand, where the disease results from the usual, gradual, and expected exposure to an injurious risk at work, it will be treated as an occupational disease.[iii] However, the courts have treated diseases similar in kind (not scale) to COVID-19 as "occupational diseases" governed by O.C.G.A. § 34-9-280 et. seq., despite the fact that the exposure to the virus may not have been unusual, sudden, or unexpected.[iv] Therefore, it may be very difficult for an employee to prove that his or her contraction of COVID-19 is a compensable work injury.

If COVID-19 is classified as an occupational injury rather than disease, the standard for the injured worker will be much lower. However, if the courts classify it as an occupational disease, as we believe they will, an injured worker must prove that the disease arose out of and in the course of the particular trade, occupation, process, or employment in which the employee is exposed to such disease, provided that the employee (or his or her dependents) first prove all of the following:

A. A direct causal connection between the conditions of work and the disease;

B. The disease followed as a natural incident of exposure by reason of the employment;

C. The disease is not of a character to which the employee may have had substantial exposure outside of the employment;

D. The disease is not an ordinary disease of life to which the general public is exposed; and

E. The disease must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence.[v]

The last two prerequisites seem to flow from the "peculiar risk" doctrine and will likely be the factors upon which most claims hinge in an occupational disease scenario. Where an EMT contracted hepatitis B (an infectious viral disease), he failed to prove that it was an occupational disease when the evidence established that hepatitis B is of a character to which the EMT may have had unknowing and substantial exposure outside of his employment and it is an ordinary disease of life to which the general public is exposed.[vi] Similar to hepatitis B, COVID-19 is classified as a viral disease by the World Health Organization.[vii] The difficulty an injured worker will have alleging that COVID-19 is a compensable occupational disease lies in the fourth prong regarding the exposure of the general public and the third prong regarding substantial exposure outside of the employment. As of April 14, 2020, Georgia has 14,223 confirmed cases of COVID-19, and the number continues to rise. There is an argument to be made that during a mandatory "shelter-in-place," that the general public is not exposed to the virus, as they should be sheltering in place. However, even in a mandatory "shelter-in-place," individuals are allowed to go to grocery stores, pharmacies, exercise in public, visit certain beaches, etc., such that the general public is still exposed to the virus.

Additionally, for a worker to recover income benefits in an occupational disease claim, he or she would have to show disablement which the Code defines as being actually disabled to work due to the occupational disease.[viii] Further, when an employee's disability is the product of his or her employment circumstances and circumstances unrelated to his or her employment, the amount of benefits are apportioned.[ix]

Whether and to what extent COVID-19 claims are going to be held compensable will depend on the facts of each specific case and the applicable state law. On March 5, 2020, Washington state's Department of Labor and Industries changed its policy related to workers' compensation coverage for healthcare workers and first responders, such that these types of workers will receive coverage for medical testing, treatment expenses if the worker becomes ill or injured, and provide indemnity payments for workers who cannot work if they are sick or quarantined.[x]

Around April 14, 2020, the Illinois Workers' Compensation Commission adopted evidentiary rules for "COVID-19 First Responder[s] or Front-Line Worker[s]" to have a rebuttable presumption that their exposure to COVID-19 during a COVID-19-related state of emergency arose out of and in the course of their employment and causally connected to the hazards or exposures of their employment.[xi] "COVID-19 First Responder or Front-Line Worker" was further defined to include police, fire personnel, EMTs, paramedics, health care providers, correction officers, and "crucial personnel" which work in stores that sell groceries, medicine, and hardware supplies, food, beverage, and cannabis production and agriculture, organizations that provide charitable and social services, gas stations and businesses needed for transportation, financial institutions, "critical trades," mail, post, shipping, logistics, delivery, and pick-up services, educational institutions, laundry services, restaurants for consumption off-premises, supplies to work from home or for essential businesses and operations, transportation, home-based care and services, residential facilities and shelters, professional services, day care centers for exempt employees, hotels and motels, funeral services, and critical labor union functions.[xii]

On April 7, 2020, Gov. Tim Walz of Minnesota signed MN HF 4537 providing employees on the front lines of the COVID-19 pandemic a rebuttable presumption that they contracted a workers' compensation occupational disease if they become ill with COVID-19.[xiii] Minnesota's definition of a front-line worker is much more narrow than Illinois', as it only includes first responders, certain health care workers, and child care providers who care for children of the designated individuals.[xiv] Minnesota's bill also requires proof of a positive test result or documentation of a diagnosis by a certified medical provider.[xv]

It is unclear how the Georgia courts will treat exposure to COVID-19 as a work injury or occupational disease at this time. Arguably, the governors in Washington, Illinois, and Minnesota have broader powers than Georgia's governor. However, regardless of whether it's considered an injury or a disease, a worker will certainly have great difficulty in proving that the exposure occurred at work and that it is compensable. With the spread of the virus to more and more people, it will become more of a disease of ordinary life, which is likely not to be covered by the Act, absent a statutory exception. But keep in mind that the FFCRA contains a number of provisions intended to relieve the logistical and financial burden of COVID-19 on qualifying employees, with certain tax relief to certain affected employers.
The FFCRA created the Emergency Paid Sick Leave Act ("EPSLA") which may apply to employees of covered employers to the extent that the employee is unable to work (or telework) because the employee was advised by a health care provider to self-quarantine due to COVID-19, the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis, or the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, among other categories. If an employee falls into one of these categories, he or she may be entitled to paid sick leave. For more information on the FFCRA visit www.dol.gov/agencies/whd. Additionally, NCCI reports that under general health insurance, at least 10 states have issued mandates for coverage of COVID-19 testing and treatment, which "could have the impact of limiting claim activity in the [workers' compensation] market" in some cases.[xvi]

If you or your company have any questions on the compensability of a workers' compensation claim, or have any concerns regarding the FFCRA, please contact one of our attorneys. A complete list of our workers' compensation attorneys can be found here.

About the Author: Rahul Sheth is an attorney at Bovis, Kyle, Burch & Medlin, LLC. He has been practicing for eight years, and he focuses on representing employers and insurers in workers' compensation matters as well as protecting insurer's subrogation interests in third-party fault situations. He also has experience in products and premises liability, nursing home defense, and negligent security.

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[i] O.C.G.A. § 34-9-280 et. seq.

[ii] *Hopkins v. Employers Mut. Liab. Ins. Co.*, 103 Ga. App. 579 (1961).

[iii] *Nowell v. Employers Mut. Liab. Ins. Co.*, 93 Ga. App. 288 (1956).

[iv] *Fulton-DeKalb Hosp. Auth. v. Bishop*, 185 Ga. App. 771 (1988) (finding hepatitis B to be an occupational disease); *McCarty v. Delta Pride*, 247 Ga. App. 734 (2001) (finding malaria to be an occupational disease).

[v] O.C.G.A. § 34-9-280.

[vi] *Bishop*, 185 Ga. App. 771.

[vii] https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it

[viii] O.C.G.A. § 34-9-280(1).

[ix] O.C.G.A. § 34-9-285.

[x] https://www.ncci.com/Articles/Pages/Insights-COVID19-WorkersComp.aspx

[xi] https://www2.illinois.gov/sites/iwcc/news/Documents/13APR20-Emergency_Amendment_Only-50IAC9030_70.pdf

[xii] *Id.*

[xiii] https://www.house.leg.state.mn.us/dflpdf/a7308a83-b58d-4578-93b1-1ac3f8475906.pdf

[xiv] *Id.*

[xv] *Id.*

[xvi] https://www.ncci.com/Articles/Pages/Insights-COVID19-WorkersComp.aspx