The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2020
PHILADELPHIA, MARCH 12, 2020
An ALM Publication

Would COVID-19 Be Compensable Under Pa. Workers' Comp Act?

If Pennsylvania employees become infected, become exposed without being infected or develop psychological consequences from either situation, Pennsylvania employers could face wage-loss claims, medical claims, testing claims or claims for psychiatric services or disability under the Pennsylvania Workers' Compensation Act.

BY STEPHEN T. POTAKO, DAWN M. NICHOLSON AND BRIAN F. DUNSTONE
Special to the Legal

Communicable diseases such as the coronavirus (COVID-19) pose risks to the U.S. workforce as well as employees throughout the world. If Pennsylvania employees become infected, become exposed without being infected or develop psychological consequences from either situation, Pennsylvania employers could face wage-loss claims, medical claims, testing claims or claims for psychiatric services or disability under the Pennsylvania Workers' Compensation Act. The question is, are any or all of these claims actually compensable under the act?

Considering that COVID-19 was officially recognized on Feb. 11, by the World Health Organization, (WHO) Pennsylvania workers' compensation judges, the Pennsylvania Workers' Compensation Appeal Board and the Pennsylvania appellate courts have not rendered any specific rulings on the issue. Therefore insurance carriers, third-party administrators and risk managers must rely upon precedent, similar cases and relevant fact patterns to develop case-management strategies, to address the issues as they arise and to develop reasonable prevention strategies.

(l-r) Stephen T. Potako, Dawn M. Nicholson, and Brian F. Dunstone of Weber Gallagher Simpson Stapleton Fires & Newby.

We will begin our compensability analysis by looking to the occupational disease provisions of the act, as amended. In addition to claims for "injuries" brought under Section 301(c)(1) of the act (77 P.S. 411(1)), Section 301(c)(2) of the act (77 P.S. 411(2)) allows claimants to bring claims for compensation related to occupational diseases as defined in Section 108 of the act (77 P.S. 27.1). Section 108 enumerates specific diseases that have been associated with specific workplace exposures such as black lung, asbestosis and hepatitis.

It is important to note that Section 301(e) of the act (77 P.S. 413) provides a "rebuttable presumption" to claimants asserting claims for enumerated occupational diseases set forth in Section 108 in situations where the claimant was employed in the occupation or industry in which the occupational disease has been established to be a hazard. In those situations, it is presumed that the occupational disease is causally linked to claimant's employment. Unless this presumption is rebutted, claimants asserting claims for occupational diseases enumerated in Section 108 of the act would not need to prove that the disease was caused by workplace exposure. COVID-19 is not an enumerated occupational disease under Section 108.

Diseases not specifically enumerated in Section 108 may also be entitled to this "rebuttable presumption" under Section 108(n)'s catch-all provision 77 P.S. Section 27.1(n) which covers all

other diseases to which the claimant is exposed by reason of his employment, and which are causally related to the industry or occupation, and the incidence of which is substantially greater in that industry or occupation than in the general population. To be entitled to the "rebuttable presumption" for nonenumerated diseases via the catch-all provision of 77 P.S. Section 27.1(n), a claimant must establish all three of these elements. This poses several issues for claimants asserting claims under Section 301(c)(2) of the act.

Because COVID-19 is so new, it may be nearly impossible to establish that the incidence of COVID-19 is substantially higher in any particular industry or occupation than in the general population. Accordingly, claimants will have a very difficult time establishing COVID-19 as an occupational disease under Section 108(n)'s catch-all provision. As a result, they would not be entitled to the "rebuttable presumption."

Without the "rebuttable presumption," an infected employee would be left with the "standard" burden of proof associated with nonoccupational disease claims under Section 301(c)(1) requiring that he establish a causal relationship of the disease to a workplace exposure within a reasonable degree of medical certainty. It will often be impossible to pinpoint precisely where and when a particular infection was acquired, especially for generally communicable diseases. For such diseases, while it is possible that an infection was transmitted while the employee was at work, it is also possible that the infection could have been transmitted by a family member or a member of the public in a nonwork setting. If nonwork transmission possibilities cannot be ruled out, claimants will generally not be able to establish the necessary causal relationship to make a successful workers' compensation claim. This is why generally communicable diseases such as seasonal influenza are not commonly presented as claims in the Pennsylvania Workers' Compensation arena.

As difficult as it may seem, there may be cases where the infection can be traced back to a particular moment or event. In those cases, Pennsylvania case law suggests that if an employee can prove the specific source of infection was a workplace exposure that occurred within the scope of employment, then the effects of the resulting disease are compensable. In *New Castle v. WCAB (Sallie)* 546 A.2d 293, the claimant widow filed for fatal claim benefits when her decedent husband died of complications from meningococcal septicemia. Testing established that only one of the decedent's co-workers, whom the decedent kissed on the cheek at work days before the decedent's death, was a carrier of the neisseria meningitis infection. The purpose of the so-called "goodwill kiss" was for the decedent to bid farewell to an employee departing for maternity leave and was considered within the scope of the claimant's employment. Credible medical evidence established that this kiss transmitted the infection. The claim was found compensable as an "injury" because the cause of the disease was proven to be a workplace exposure. Proof of such causal links will be rare.

An equally likely source of possible claims involves employees who allege a psychiatric disturbance from potential exposure to COVID-19, or a psychiatric disturbance from the consequences of an involuntary quarantine, especially for employees involving a quarantine that is far from home that is imposed while the employee was traveling in the course and scope of their employment. Remember that with alleged psychiatric injuries, it is well-settled Pennsylvania law that with mental cases, the employee must establish that they experienced emotional trauma in reaction to an actual objective abnormal working condition. A response to a subjective, perceived or imagined, abnormal working condition is not compensable. The issue for Pennsylvania workers' compensation judges in these cases will be to decide whether the fear of infection, amid some of the significant hysteria reported in the news media, is an injurious reaction to an abnormal working condition. If it is determined that the abnormal working condition includes routine travel or immersion in group settings where there is potential exposure to COVID-19 and its potentially deadly consequences, compensation for a psychiatric injury remains a distinct possibility under the act.

Employers also must determine if they will use their workers' compensation policies to provide COVID-19 testing for employees who have actual or feared exposure to the virus. These decisions should be made on a case-by-case basis.

The Centers for Disease Control and Prevention (CDC) has **offered some recommendations** for what can be done to prevent or limit the risks of widespread transmission of communicable diseases such as COVID-19 in the workplace. Some of these prevention measures include encouraging sick employees to stay home, sending sick employees home, encouraging coughing and sneezing etiquette and routinely cleaning all frequently touched services. Some sources have advocated additional prevention measures based upon "social distancing," such as conducting videoconferences rather than face-to-face meetings and allowing employees to work from home when possible.

Stephen T. Potako, Dawn M. Nicholson *and* **Brian F. Dunstone,** *attorneys in the Philadelphia office of Weber Gallagher Simpson Stapleton Fires & Newby, concentrate their practices on counseling national and regional insurers, employers and third-party administrators in workers' compensation matters. Contact them at* ***spotako@wglaw.com****,* ***dnicholson@wglaw.com*** *and* ***bdunstone@wglaw.com****.*