COVID-19

and the

Pennsylvania Workers' Compensation Act

Thomas, Thomas & Hafer LLP

Introduction

In December 2019, a cluster of pneumonia cases was reported by the health authorities of Wuhan, China, with the majority having links to a local wholesale market which engaged in the trade of various livestock and bushmeat. In the three months which have since passed, that particular ailment has now been identified as COVID-19, an infectious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), typically causing a fever, dry cough, fatigue, and shortness of breath. Although the majority of cases result only in mild symptoms, those of advanced age, as well as those who present with comorbidities such as diabetes and immunosuppression, have experienced multi-organ failure and, in the most severe of circumstances, death.

According to both the Centers for Disease Control and Prevention ("CDC") and the World Health Organization ("WHO"), the infection is spread via respiratory droplets produced from the airways, typically during coughing and sneezing. The time from exposure to the onset of symptoms, known as the incubation period, is generally between two and 14 days, with an average of five days. As of March 2020, over 125,000 cases of COVID-19 have been recorded worldwide, with 4,600 deaths.

Predictably, in consideration of its sudden sweep across the globe, COVID-19 has garnered the attention of every corner of industry. Employers, and those who insure their liabilities, continue to consider the economic impact of the virus, and the appropriate balance between the profit motive at the core of their operations and the human impact of contagion. Squarely within this category, on a local and practical level, questions have arisen as to employers' and carriers' potential liabilities under the Pennsylvania Workers' Compensation Act ("Act") in the context of the novel coronavirus.

Herein, Thomas, Thomas & Hafer LLP offer answers to the most pressing questions surrounding the compensability of COVID-19 under the Act, as well as recommendations with regard to the handling of possible exposures to employees. As always, individual cases and their attendant strategies may vary, and thus, close consultation with counsel to address particular factual circumstances remains vital.

COVID-19 as an Injury

As a threshold matter, any employee contracting COVID-19 in the course of his or her employment will be considered to have sustained a compensable injury under the Act. This is so as Pennsylvania sits at the zenith of liberality amongst jurisdictions in defining a "work injury." Specifically, in the seminal case of *Pawlosky v. WCAB (Latrobe Brewing Co.)*, the Pennsylvania Supreme Court held that, for purposes of workers' compensation, the term "injury" is to be defined as any "adverse and hurtful change" occurring to the body. Quite clearly, such an all-encompassing definition includes the contraction of an infection such as the novel coronavirus. It is to be noted that, unlike in some jurisdictions, Pennsylvania recognizes no exception to compensability for infectious diseases or those of "everyday life."

Accordingly, where a worker becomes infected with COVID-19 as the result of a transmission occurring in the course of his or her employment, that employee will indeed be capable of pleading a cognizable claim under the Act. If accepted by the employer or granted by a judge, resultant wage-loss and medical bills which are incurred as a result of the virus will be payable. Moreover, in the most catastrophic of scenarios, were death to result, a claim for fatal benefits by dependents may also stand.

To establish a compensable claim, an employee must prove the occurrence of an injury which arises in the course of employment and is related thereto, pursuant to Section 301(c)(1) of the Act. In the context of COVID-19, the claimant will be required to show that the transmission of the virus actually occurred while he or she was furthering the interests of the employer. This analysis will, invariably, be greatly affected by whether the stricken worker is considered to be a stationary or travelling employee. To this end, in the context of a stationary employee, compensability will surely exist where contagion occurs in the confines of the employer's physical facilities and the transmitting host can be identified. Compensability may also be found if a travelling employee, traversing public spaces in furtherance of the employer's interests, can persuasively show via credible medical proofs that he or she contracted the virus while engaged in such duties, notwithstanding the fact that, at the time of transmission, the claimant was exposed to identical risks as that of the general public.

Ultimately, whether a claimant's COVID-19 infection can be said to have arisen in the course of employment will, in almost every case, turn on whether medical causation can be established; that is, if the claimant can prove, by a preponderance of the credible medical evidence, that he or she contracted the virus while furthering the interests of the employer, both wage-loss and medical treatment costs incurred as a result of the virus will be compensable under the Act.

COVID-19 as an Occupational Disease

A worker who alleges contracting COVID-19 in the workplace may also file a claim under the occupational disease provisions of the Act. In this regard, Section 108(n), typically referred to as the "catch all" or "omnibus" provision, provides that occupational disease shall mean, amongst other enumerated illnesses:

> All other diseases (1) to which the claimant is exposed by reason of his employment, and (2) which are causally related to the industry or occupation, and (3) the incidence of which is substantially greater in that industry or occupation than in the general population.

77 P.S. § 27.1.

It is worth considering that an employee might be inclined to pursue an allegation of work-related coronavirus infection as an occupational disease for the simple reason that, if he or she is able to establish the three elements required by the statute, a rebuttable presumption of causation will attach. However, it is the third factor, requiring proof that the "incidence" of the disease "is substantially greater" in the employee's industry or occupation than in the general population, which might be most difficult for a claimant to establish.

Despite the evidentiary advantages of the presumption of causation afforded by Section 108(n), it appears more likely that claimants will pursue COVID-19 claims via the general injury provision of the Act, as reviewed in the prior section. This is so as research and literature regarding the novel coronavirus is presently sparse, incomplete, and without peer review, in consideration of the virus' infancy. Given this reality, limited epidemiological studies or other similar evidence would be available for a claimant to rely upon in proving that the contraction of COVID-19 occurs at a substantially greater rate in his or her industry or occupation. Still, it is conceivable that employees of healthcare providers, and most notably hospitals, might well be capable of producing evidence showing a higher rate of COVID-19 transmission than the general population, thus entitling them to a presumption of causation.

Possible Exposures, Testing, and Quarantines

Employees with a documented work-related exposure to an individual who has or is believed to have COVID-19 are likely entitled to appropriate testing under the Act. Currently, the WHO instructs that the standard method of testing for the disease is via real time reverse transcription polymerase chain reaction (rRT-PCR). The test is performed by obtaining respiratory samples, with results typically available within a few hours. Although blood tests can be used, the same require two samples taken two weeks apart. Finally, antibody test kits may also be utilized, which have the advantage of detecting a positive result even if the individual has recovered and the virus is no longer present. By using the antibody test, a claimant may prove that he or she actually contracted COVID-19, even after symptoms have resolved. Similarly, an employer may utilize the results of such a test to prove that the claimant's alleged ailment was not, in fact, the coronavirus.

Assuming that an employer maintains a list of panel providers, and that one or more offer COVID-19 testing, an employee may be directed to utilize such physicians. However, in the event testing cannot be performed by any panel provider, it is recommended that employers swiftly identify local providers to which workers may be referred.

In the leading "medical-monitoring" case of *Jackson Tp. Volunteer Fire Co. v. WCAB (Wallet)*, the Commonwealth Court of Pennsylvania held that "persons exposed to a serious risk of contracting a disease which is commonly known to be highly contagious/infectious and potentially deadly, have been 'injured' for the purpose of receiving compensation under the Act." In the context of the novel coronavirus, the only ambiguity which might present is whether simply being near an individual with COVID-19 reaches the threshold of an identifiable "risk of harm," or instead, is too remote and generalized. While the courts have been silent as to defining this precise threshold, it is foreseeable, particularly in light of COVID-19's status as a global pandemic, that the perceived severity of the contagion would compel a court to conclude that a documented interface with a known or suspected host would be sufficient to trigger compensability under the Act.

Finally, in the event an employer suspends business operations or requests that its employees work from home for a designated period of time for purposes of a "quarantine," no wage-loss benefits would be payable under the Act, regardless of whether the genesis of the quarantine proves to be an infected colleague, as no identifiable or discernable "injury" can be said to exist in such a scenario.

Recommendations

Both self-insured employers and workers' compensation insurance carriers are wise to consider and prepare for the potential exposures which might present in relation to the novel coronavirus. Although it is true that the sudden spread of COVID-19 creates unusual and rare challenges to the Pennsylvania workers' compensation system, the transmission of communicable diseases in the workplace is not an entirely new phenomenon; moreover, the Act anticipates the transmission and infection of diseases, generally, in the workplace. Thus, the foundational analytical tools and risk assessments critical to confronting liabilities created by the pandemic can be said to already fully exist.

To most effectively mitigate liabilities flowing from COVID-19 infections, Thomas, Thomas & Hafer LLP recommends that employers:

1.) Educate employees in the transmission and symptoms of the virus through the distribution of public health guidelines;

2.) Implement common-sense measures to reduce the risk of workplace transmission by ensuring sufficient and easy access to handwashing facilities and/or hand sanitizers, in addition to performing the regular sanitization of public surfaces, such as countertops, doorknobs, and elevator buttons;

3.) Instruct employees to promptly provide notice of any suspected exposure, transmission, or relatable symptoms; and

4.) Immediately send home any employee exhibiting possible symptoms.

By implementing these practices, employers can materially reduce the risk of transmission of COVID-19 in the facilities under their control. As the pandemic continues to develop, Thomas, Thomas & Hafer LLP stands ready to assist its clients in limiting the financial and human toll of the virus. Our attorneys are available to answer specific questions related to claims arising from the novel coronavirus and are fully prepared to advance all available defenses in any litigation which might ensue.

Our History

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With the passage of each month and year, the confidence of this group grew as did the expectations of a satisfied clientele. A vision for the future began to emerge as Thomas, Thomas & Hafer earned the trust of its clients and the respect of its peers in the legal community. It soon established itself as the largest civil litigation defense firm located in Central Pennsylvania.

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