



Compensability and Wage Loss Questions in the Wake of COVID-19

By Elizabeth Chambers-Brown

These are uncertain times and the rapid rise of the coronavirus has left many insurance companies grappling with questions regarding the short-term and long-term impact on workers compensation claims. Brown & Carlson is committed to keeping you updated on how the pandemic will impact your workers' compensation claims and litigation and will be sending you updates in the days to come in response to frequently asked questions we have received. Many have inquired about the underlying compensability of coronavirus claims, as well as what obligation Insurance companies have regarding payment of indemnity benefits to injured workers as we experience an unprecedented number of layoffs. The following is intended to provide a general analysis in response to these questions.

This is not intended to provide specific legal advice on specific claims. If you have questions about a specific case or scenario, we encourage you to contact one of our attorneys at Brown & Carlson. We are happy to answer questions and provide recommendations regarding this ever changing and unprecedented situation.

1. Are coronavirus claims compensable as a work-related injury?

An employee has the burden of proving where the exposure occurred and that it arose out of and in the course of employment as opposed to exposure through community transmission. If an employee can establish that they did come into contact with someone who had the coronavirus and subsequently tests positive for COVID-19, this will likely be enough to establish compensability. However, as the virus progresses, it may become more difficult to determine how/where the exposure occurred, as we are seeing an increasing number of cases of community exposure. The central question will be whether it is more likely than not the employee was exposed to COVID-19 in the course of employment. Many employees are now working from home to avoid the spread of community transmission. We anticipate the courts will err on the side of awarding claims for those employees who are required to come into contact with the general public as part of their job duties (e.g. grocery store clerks, sanitation workers, gas station attendants).

In Minnesota, the Department of Labor & Industry has already proposed legislative language to provide presumptive eligibility to include all first-responders and employees employed in a health care, long-term care, or home health care setting. We anticipate the legislature will address this issue shortly.

If you see cases being reported as work-related, I recommend addressing the compensability issue on a case-by-case basis, and we are happy to answer questions you may have about a specific case.

2. Does an Insurer owe TTD to an injured worker laid off due to the coronavirus?

The answer to this depends on the specific facts of the case, but just because an injured worker with restrictions is laid off due to the coronavirus does not automatically mean you have to pay temporary total disability (TTD) benefits. The following scenarios may help shed some light on when TTD would or would not be owed.

a. If an Employee is already at MMI

An employee who is more than 90 days post MMI is not entitled to TTD benefits unless he/she is “medically unable to continue working as a result of the work injury.” If someone is laid off due to COVID-19, they are not medically unable to continue working due to the injury, but rather, due to the virus and economic factors. You would not start paying TTD for any other illness under those circumstances. An economic recession, lay off or pandemic does not change MMI as a defense to TTD.

b. If not at MMI but TPD was being paid

If the entire work force was laid off or if the company closed, even for an employee on light duty after an admitted injury and not yet at MMI, we do not recommend payment of TTD. Under these facts, the work injury is not a substantial contributing cause for the wage loss, as the entire company was laid off due to the coronavirus. While the courts may ultimately rule differently on these issues, you have a good faith defense to payment of TTD in these circumstances. The new unemployment law also waives the waiting period for unemployment benefits so employees will be able to obtain some benefits right away through unemployment if they are laid off due to the pandemic.

Alternatively, an insurer may choose to (1) pick up TTD at the Compensation Rate or (2) alternatively argue that TTD should be paid at the same rate TPD was being paid under the theory that the coronavirus represents a superseding/intervening cause for the differential.

c. If not at MMI, no TPD was paid, but Employee was working light duty prior to the lay off

The work injury needs to be a substantial contributing factor to the loss of earning capacity. In the present COVID-19 circumstances, if the job was lost because of economic factors, and other job opportunities are limited due to economic factors, that employee's loss of earning capacity is not causally related to the work injury just because he/she *just so happens to have restrictions*.

It is the employee's burden to establish that his/her loss of earnings are causally related to a compensable injury. There is a long line of cases on that point. See *Arouni v. Kelleher*, 426 NW2d 860 (MN 1988). If the only reason that the employee is not working, or is working at a wage loss, is the economic

collapse due to the coronavirus pandemic, then he/she should not automatically be entitled to wage loss benefits even if he/she does have work restrictions.

A similar argument could be made that you don't need to pick up TTD as the coronavirus represents a superseding/intervening cause for off work status. However, once the employee establishes he/she is conducting a diligent job search, there may be an obligation to pick up TTD down the road.

At the end of the day, each case should be reviewed individually for whether you should or should not be picking up wage loss benefits and to make sure you are applying the case law and statutes fairly and accurately.

If you have specific questions about a case, please contact the attorney you are working with at Brown & Carlson. However, if urgent, or your attorney is unavailable, please feel free to call the **Brown & Carlson Hotline** at **1.855.844.7070**.

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