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COVID-19
Workers' Compensation Presumption

By Chris Yoshimura-Rank

The employer and insurer must show the employment was not a direct cause of the disease

"The employer may **only** rebut the presumption by proving the employee's employment was not a direct cause of the disease" Minn. Stat. § 176.011 Subd. 15(f)(3). A FAQ provided by MN DOLI indicates that this can be done by showing either that "while performing his or her job duties, the employee was not exposed to COVID-19 or the exposure to COVID-19 could not have been a cause of the employee's illness." Minn. Dept. of Labor and Industry, *New law FAQs: Workers' compensation coverage for employees who contract COVID-19* (April 14, 2020). Given the word "only" in the statute, opportunities to rebut the presumption appear to be limited, and proving that the employment was not the direct cause of the illness is the most definitive method of avoiding liability.

HIPAA Considerations for Patients – Who is entitled to information about which patients/residents are or are not diagnosed with COVID-19?

The HIPAA Privacy Rule permits a covered entity to disclose the protected health information of an individual who has been infected with, or exposed to, COVID-19, with law enforcement, paramedics, other first responders, and public health authorities without the individual's HIPAA authorization in certain circumstances. These circumstances include when a responder may be at risk of infection or when disclosure is necessary to prevent or lessen a serious and imminent threat to the health and safety of the person or the public. *See* 45 CFR 164.512. In practice, this means that most, if not all, individuals covered under the COVID-19 Presumption will be entitled to information from their employers about exposures that they have had to individuals with COVID-19 through the course of their employment. *See also* U.S. Dept. of Health and Human Servs., *COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities* (2020) https://www.hhs.gov/sites/default/files/covid-19-hipaa-and-first-responders-508.pdf.

What happens when employees work for multiple employers at once with COVID-19 exposure?

Minn. Stat. § 176.66 Subd. 10 states that the employer who will be liable for an occupational disease will be the place of employment where an employee had their "last significant exposure." This tends to be more relevant in cases of subsequent, rather than concurrent, employers, but the principle may be relevant here. For example, where an employee works with COVID-19 patients specifically at Hospital A, but works with only mental health patients at Hospital B, there is an argument to be made that, if the employee contracts COVID-19 in the course of employment, the substantial contributing cause of the disease is the employment at Hospital A rather than Hospital B. Insofar as the statute and subsequent case law are quite clear about prohibiting apportionment of liability for occupational diseases (*see* Minn. Stat. § 176.66 Subd. 10 and *Tyler v. Fegles Power Service*, 45 W.C.D. 453 (W.C.C.A. 1991)), it is unclear how a situation may play out where an employee is concurrently employed by multiple employers with seemingly comparable COVID-19 exposures. Perhaps, given the complex nature of this disease and its variable incubation period, courts would be more willing to apportion liability, finding that multiple employers could have provided the "last significant exposure."

Can the presumption be rebutted by showing the employee does not have COVID-19? What happens if an employee diagnosed based on symptoms, later tests negative?

We do not yet know if the presumption can be rebutted by showing that an employee does not have COVID-19. Based on a plain language reading of the statute, the answer would seem to be no given the inclusion of the word "only" preceding the statutory provisions about how to rebut the diagnosis. This is bolstered by the notion that, in other areas of workers' compensation presumptions, the language for rebutting is written much more broadly. *See* Minn. Stat. § 176.011 Subd. 15 (for example, the ordinary presumption that a police officer's coronary sclerosis is work-related "may be rebutted by substantial factors brought by the employer or insurer" as opposed to the COVID-19 presumption which is only rebuttable "by proving the employee's employment was not a direct cause of the disease").

However, there is still an argument to be made as to why proving an employee did not actually contract COVID-19 should be sufficient to avoid the statutory presumption. In order for an employee to be granted presumption, two criteria must be met: (1) the employee must be employed in one of the statutorily listed occupations; and (2) "the employee's contraction of COVID-19 must be confirmed" by a positive lab test or a physician's diagnosis. Minn. Stat. § 176.011 Subd. 15 (emphasis added). If the employee never truly contracted COVID-19

in the first place, then the presumption should have never applied and rebutting per the "only" method available per the statute would be unnecessary. However, this could also be read to say that once a lab test or physician's diagnosis confirms the disease, that is sufficient to prove contraction for the presumption to apply regardless of what is discovered after the fact.

Can you dispute a diagnosis based on symptoms? Can we rebut a diagnosis?

If it is permissible to rebut the presumption based on a showing that an employee never contracted COVID-19 (see above), presumably employers and insurers would have to be allowed to dispute a diagnosis. Nothing in the text of the COVID-19 Workers' Compensation Presumption statute indicates that Minn. Stat. § 176.155 regarding independent medical examinations would not apply. As such, it seems as though an employee would be required to submit to an exam at the request of the employer and the employer would be able to use a favorable IME report in order to rebut a diagnosis.

Analogously, the Minnesota W.C.C.A. has allowed the use of medical expert testimony in order to dispute a diagnosis and rebut the presumption of compensability in a case of a peace officer claiming benefits for myocarditis. *See Ganfield v. City of Richfield*, (W.C.C.A. 2004), illustrating that, even where a statutory presumption applies, employers may rebut the presumption of an occupational disease by disputing the diagnosis and the source of an employee's symptoms.

Can we require a blood draw to test for antibodies at an IME to disprove a COVID-19 diagnosis?

See above regarding the availability of IMEs. Per the exams statute, there does not appear to be any reason why an IME doctor would not be permitted to require a blood draw for COVID-19 antibodies. *See* Minn. Stat. § 176.15. There may ultimately be disputes about the strength of an IME report that shows no COVID-19 antibodies, given the current concerns with accuracy of antibody tests to detect COVID-19, but this would go to the strength of the defense, not the admissibility of the report or the ability to perform the test in the first place. *See* Cochrane, *New Cochrane review assesses how accurate antibody tests are for detecting COVID-19* (June 25, 2020) https://www.cochrane.org/news/new-cochrane-review-assesses-how-accurate-antibody-tests-are-detecting-covid-19; Minn. Dept. of Health, *Symptoms and Testing: COVID-19* https://www.health.state.mn.us/diseases/coronavirus/symptoms.html.

Presumably, diagnoses from only symptoms will be based on histories obtained by phone

Diagnoses from symptoms only will likely come from either histories

obtained by phone, or from in-clinic consultations in facilities where COVID-19 tests are not available. However, at this point, most clinics and facilities in Minnesota have the ability to administer a lab test, so presumably most symptoms-only diagnoses would come from telehealth visits or from cases early on before widespread lab testing was available. *See* Minn. Dept. of Health, *Symptoms and Testing: COVID-19* https://www.health.state.mn.us/diseases/coronavirus/symptoms.html.

If you have specific questions concerning compensability, please do not hesitate to contact me or any Brown & Carlson attorney to discuss the relevant facts of your case.

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