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Covid-19 tests comp coverage

Workers' compensation carriers in Washington state and Kentucky say they will provide benefits to healthcare workers and first responders exposed to the coronavirus. Beyond those two categories, coverage is likely to be decided on a case-by-case basis, according to industry analysts.

Typically, workers' compensation laws exclude ordinary diseases of life, and provide compensation only for occupational diseases that arise out of and in the course of employment. Washington State's Department of Labor and Industries recently announced it will provide benefits to healthcare workers and first responders during the period they are quarantined and cannot work. The agency has received several workers' compensation claims related to the coronavirus.

The benefits would pay for medical testing, treatment, and provide indemnity payments. The policy decision extends wide as employers in Washington are required to purchase coverage from the government-operated insurance fund.

Kentucky Employers Mutual Insurance Co. has also said it will pay wage-replacement benefits to first responders or healthcare workers quarantined because of direct exposure to the coronavirus. Separately, the National Council on Compensation Insurance reports the pandemic has prompted nearly a dozen states to require health insurers to cover coronavirus.

"The mandates vary by state, but they include coverage for testing and visits to emergency rooms or urgent care facilities either in-network or out-of-network without deductibles or copays. These measures, if expanded to more states, could have the impact of limiting claim activity in the WC market in those cases where only testing or quarantine are necessary," NCCI notes.

Observers note employees other than healthcare workers and first responders are likely to have a difficult time claiming workers' compensation benefits because they would have to prove their jobs put them at greater risk of being infected. "But where there is an outbreak of the virus at a plant or facility, there may be some argument to support coverage for certain workers," says Bob Robenalt, an attorney with Fisher Phillips in Columbus, Ohio.

For instance, he noted to ***SHRM***, the receptionist and cleaning staff at a healthcare facility where the virus has become rampant may argue they were at a greater risk of contracting the virus. But the more widespread COVID-19 becomes, the more difficult it may be for an employee to show the disease is work-related rather than an ordinary disease of life.

States differ considerably on their rules for compensability. John Burton, a well-known workers' compensation expert, told ***SHRM*** a few states apply the test of whether a disease arises out of and in the course of employment, but many states instead have a list of compensable diseases.

"Surely coronavirus is not going to be on the list," he said.

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Confusion Over Futility and Suitable Employment

By: Lindsay Underwood

In a recently issued decision, *Griffin v. Absolute Fire Control, Inc*., the Court of Appeals found that, even where a claimant was working with his pre-injury employer, and there were two jobs available to him, he could still prove disability.

Plaintiff worked as a pipe fitter for Defendant. In 2014, Plaintiff was injured. He returned to work a month later and was restricted from lifting greater than 20 pounds, or standing longer than 30 minutes. His pre-injury job was outside his restrictions, so he was offered, and accepted, work in the fabrication shop. Plaintiff was ultimately assigned permanent restrictions. In 2016, Plaintiff underwent non-work related heart surgery and asked to return to work in the field, stating that walking would improve his back condition. Defendants allowed Plaintiff to return to work in the field as a helper.

Plaintiff later requested a hearing seeking a determination of whether either job was suitable. The Deputy Commissioner concluded Plaintiff was not disabled. The Full Commission determined the fabrication shop position was suitable because it was a real, actual position and that the field position was never offered as suitable employment, but was an accommodation offered to Plaintiff at his request. Therefore, Plaintiff failed to prove disability. Plaintiff appealed.

Plaintiff argued the Commission erred in concluding he did not prove disability through a showing of futility. Under *Russell*, an employee can meet his burden of proving disability by showing he is capable of some work, but it would be futile to look for other work because of pre-existing conditions like age or lack of education. In this case, the Commission found as a fact that Plaintiff failed to show it would be futile, and concluded as a matter of law that he had not proven futility.

The Court noted the Full Commission found that Plaintiff was 49 years old, had a 9th grade education, and worked primarily as a pipe-fitter. They also found Plaintiff had a permanent 20-pound lifting restriction, would sometimes need to leave work because of pain, and reached MMI in 2017. The Court of Appeals opined it was unclear how the Full Commission could conclude Plaintiff had presented no evidence on futility given its findings were similar to other cases where Courts supported futility. These factors included age, education, work experience, and restrictions.

The Court also disagreed with the Commission's suitable employment analysis. "Make work" (e.g., non-suitable) positions are those that have been altered such that they are not ordinarily available on the job market. The Court reasoned that, whether a position existed with employers, beyond a given Defendant-Employer, was an essential part of the make work inquiry, as the Act does not allow employers to avoid paying benefits by offering a job that does not exist outside of the Defendant-Employer's business.

Because the Commission's findings failed to address whether the job was available with employers *other* than Defendant-Employer, the Commission's assessment was flawed. Additionally, the Commission's finding that "Defendant's *unique* hiring practice of hiring based upon word of mouth and personal recommendations" meant the position was "available to individuals in the marketplace," exemplified this shortcoming in the Court's view and defined the marketplace based on Defendant-Employer's employment practices (i.e., if it exists with this employer, then it must be available on the open market).

Ultimately, this case sets a precedent that, even if the claimant is working with Defendant-Employer, they may still be able to show disability if there is no evidence that the position is available in the general marketplace. We will argue this case is distinguishable due to its specific facts, like the unique hiring practice the employer utilized.

Further, to prove disability like the claimant did in this case, the "futility" factors like age, education level, and work experience still need to be present. It is also important to note that there was a dissent in this case, as Judge Tyson agreed with the Commission. This case has been appealed to the North Carolina Supreme Court, so we will certainly be discussing it further as it proceeds on appeal.

Lindsay Underwood is an attorney in Teague Campbell's Raleigh office. She is a graduate of Cleveland State University and Wake Forest University School of Law.

President's Note

Journey into the Unknown

It is stunning how rapidly we have descended into a strange new world, replete with a new vocabulary and even new forms of social etiquette. Who could have imagined even three weeks ago that coronageddon would hit the U.S. with such vengeance?

Social distancing and shelter in-place policies may turn the tide, and perhaps Mother Nature in the form of warm weather will give us a much-needed assist. One of the peculiarities of this novel virus is that as of now at least it seems to have largely spared India, Indonesia, and Brazil, heavily populated countries ill-equipped to control such a destructive contagion. Surely, if in these countries an unusually high number of people were dying or presenting at hospitals the alarm would have sounded by now.

Similarly, it is not clear why Italy, with a population of around 60 million, has suffered nearly 7,000 deaths, while Greece, with a population of about 10 million, has seen a total of 25 deaths. These rapidly changing numbers were current when this column was being written, and by now there may well be a simple explanation for the lags I have noted above.

Once we are on the other side of this catastrophe, it would be interesting to know whether the halt in economic activity in the U.S. resulted in fewer deaths from traffic accidents and workplace injuries. Nearly 37,000 people lose their lives on the road each year, and we experience close to 5,300 workplace fatalities. Also, will our newfound dread of an airborne illness help reduce the toll from the flu? In 2017-2018, flu in the U.S was responsible for 61,000 deaths and 810,000 hospitalizations.

The novel coronavirus is bound to create some novel case law, as employers and employees assert new rights and obligations. This is your opportunity to blow us away with creative presentations at our 2021 annual conference. What impact did the pandemic have on workplace safety at your company? What adjustments did you make in your workers' compensation program? What were your biggest lessons?

It is not too early to start planning for next year's conference, which is scheduled for March 24-26 at Wrightsville Beach. I hope to see you in record numbers so we can properly mark our association's 30th year anniversary.

With very best wishes,

Stephanie Gay

Wearable devices promise to lower injuries

Warehouse operators and manufacturers, including Walmart and Toyota, are testing wearable devices that promise to reduce injuries from repetitive motion. Overexertion from lifting or lowering is one of the most-common occupational injuries.

Embedded sensors can detect when workers engage in hazardous movements—say, bending their backs without squatting—and prompt them to change their form in real time. The devices also collect data that employers can use to assess how worker safety is affected by new equipment, tasks, or changes in production-volume.

"Some firms also are testing light but strong garments called exosuits, and more-flexible types of exoskeletons that help unload strain from the lower back or shoulders but are designed to be less cumbersome than versions with rigid metal frames," ***the Wall Street Journal*** reports.

Australian wholesaler Metcash Ltd. is conducting a six-month pilot of wearable sensors. Workers wear the harness-mounted devices on their chests as they pick out cases of beer or hardware items and drive pallet-laden forklifts around the warehouse.

"The sensors vibrate to remind workers to keep their backs straight or not twist too quickly. Companies are using the data to assess riskier tasks in their workflows, and to supplement the vibrational prompts with feedback and on-site training to reinforce proper techniques," the newspaper adds.

Walmart is running a pilot of the same devices at eight distribution centers. Toyota used data collected by the sensors during a trial to assess individual differences in movement patterns and how the order in which tasks are performed might affect safety.

Some observers fear wearable devices encroach on privacy and are too intrusive. Sensor makers counter their devices aren't meant to be used to penalize workers or to track information beyond the ergonomic data.

"The device doesn't have a GPS, it doesn't have a camera, it doesn't have a microphone," says Haytham Elhawary, co-founder and chief executive of One Million Metrics Corp., a New York startup that does business as Kinetic and whose pager-like sensors clip on to workers' belts to measure their body mechanics.

"We really insist with managers that it's not punitive," he noted to the ***Wall Street Journal.***

coming up

March 24-26, 2021

NC Association of Self-Insurers' Annual Conference. **Holiday Inn Resort, Wrightsville Beach**

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Industrial Commission Update

By Bruce Hamilton

Gov. Roy Cooper has nominated Wanda Blanche Taylor for a six-year term as a Commissioner to the Full Commission. Ms. Taylor's appointment is pending confirmation by the North Carolina General Assembly. If confirmed, Ms. Taylor would take the position currently held by Charlton Allen, whose term ends June 30, 2020.

Many of you will know Wanda Taylor from her 20+ years as a Deputy Commissioner at the IC, including several years as the Chief Deputy Commissioner. Previously, she represented both employees and employers/insurers in private practice and, currently is the director of Litigation/Counsel at Key Risk Insurance. She also serves as a member of the North Carolina Board of Certified Public Accountant Examiners. She received her undergraduate degree at Duke University and her JD from UNC-Chapel Hill and is a Fellow of the College of Workers' Compensation Lawyers.

The IC recently proposed some amendments to the Form 33 regarding claims for extended benefits. Specifically, the Form 33 was amended to allow a party to indicate on a separate line that a claim for extended compensation was being filed pursuant to G. S. 97-29 (c) and a new document type had been added to the EDFP menu as well.

However, following feedback from various stakeholders, including the North Carolina Association of Self-Insurers, the IC decided to revert back to using the prior version of the Form 33. The IC it also indicated that cases involving a request for extended compensation would not be ordered into mandatory mediation, but that the parties would be encouraged to engage in mediation if they thought it would be fruitful.

It is unclear whether the decision to not require mandatory mediation was also rescinded, but the IC has asked various stakeholders for further input and recommendations regarding potential procedures regarding extended benefit cases.