Veatch Carlson, LLP is a Martindale-Hubbell AV rated firm with 64 years of litigation and trial experience. The firm is comprised of creative and experienced attorneys. We assertively advocate for our clients and work to obtain efficient outcomes through beneficial settlement, trial or other resolution-oriented strategies. We attract, recruit and hire experienced attorneys recognized by respected industry organizations. We have never varied from the vision of Wayne Veatch, which was to provide aggressive representation for all clients while continually reevaluating the variables that are brought into any legal dispute.

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Musings From The Peanut Gallery

COVID-19 WC FAQ

IS IT INDUSTRIAL?

In the absence of new presumptions for compensability, it is expected that the legal principles already in place will be dispositive of whether an employee's COVID-19 diagnosis is determined to be work related.

The COVID-19 virus is different from other infectious viruses in that it has been declared a worldwide pandemic, it is highly contagious and it is believed that up to 25% of infected people may go completely asymptomatic and therefore such individuals may unknowingly be transmitting the virus both inside and outside the workplace.

As the COVID-19 symptoms may first appear up to 14 days after initial exposure, there are a plethora of potential scenarios where an employee may claim his/her COVID-19 diagnosis was contracted at work. In the absence of a statutory presumption, the employee must show that there was some peculiar condition or particular to the work environment that created a special risk of contracting the virus to a greater degree and in a different manner than by the public at large.

This "special exposure" requirement for non-industrial diseases requires that the employee prove by a preponderance of the evidence that the risk of contracting the disease is materially greater than that of the general public. While the burden is on the employee to prove this special exposure or increased risk, there are many cases that have found that the employee met his/her burden. (School teacher had a special exposure due to interacting with large numbers of students. Culver City v. WCAB 82 CCC 757).

In Harman v. Republic Aviation Corp., 298 N.Y. 285, the court pointed out: 'An ailment does not become an occupational disease simply because it is contracted on the employer's premises. It must be one which is commonly regarded as natural to, inhering in, an incident and concomitant of, the work in question.'

There is no catch-all formula for determining industrial causation but claims professionals and counsel will have to make a case determination based on the facts of each case.

One thing to consider is OSHA's recent publication "Guidance on Preparing Workplaces for COVID-19" which may provide a general

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threshold evaluation since OSHA has separated workplaces into four risk zones:

(1) Very High Exposure – healthcare or laboratory personnel,

(2) High Exposure – Healthcare delivery, support staff, medical transport

(3) Medium Exposure – Employees with high-frequency contact with the public like schools, retail workers.

(4) Lower Exposure – Office workers or those that have minimal occupational contact with general public or other coworkers.

This should be highlighted to the trier of fact especially where the employee's job falls into the "lower exposure" risk zone and refer the WCAB to the requirement of "special exposure" that is greater than the general public.

"SAFER AT HOME" ORDER AND MODIFIED DUTY

What happens when the employer has been providing alternate or modified work in lieu of temporary disability and the employer is not an essential service or the employee's job is not essential as defined by a local, state or federal proclamation?

Since the current pandemic is unprecedented, there is no clear answer. The argument is that, "but for" the government shutdown the employee would be working and therefore not eligible for temporary disability. Specifically, we will take the position that the government proclamation is akin to the job position was eliminated for cause. Specifically, the employer is precluded from offering the alt/mod work due to the government order. This would invoke Civil code §3531 "The law never requires impossibilities" and Civil code §3532 "The law neither does nor requires idle acts"

However, please recall that although the initial burden of proof is on the employee, Labor code §3202 requires that all reasonable inferences are to be found in favor of extending benefits to injured workers. As such, there will be many court hearings on the issue of whether TD is now owed where the alt/mod positions are no longer available. The argument to be made is that Civil code 3531 says since it is impossible for the the employer to offer the alt/mod work then the loss of earning capacity, which is required for there to be liability for temporary disability, is not due to the industrial injury but instead due to the absence of available work.

FRAUD

"The world of workers' comp may never be the same again. This may be where the most dramatic long-term effect comes, from COVID-19," said Matt Smith, executive director of the Coalition Against Insurance Fraud.

The COVID-19 pandemic has already produced what appears to be an increase in vehicle related fraud and we can expect to see these coming up more in workers compensation cases. With millions of workers working from home, we can expect workers to claim they were injured in the home during work hours. If the employee says they were walking from the desk where they are doing work and were somehow injured in the home, how do you investigate that without witnesses.

With the push for telemedicine appointments, we will have to watch the medical providers since the providers can more easily claim additional appointments that are more difficult to disprove.

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DECREE/LEGISLATION

The California Labor Federation on March 19 sent a letter to Governor Newsom requesting a workers' compensation presumption that exposure to the coronavirus counts as job-related for essential employees.

The California Applicants' Attorneys Association said they are looking into drafting a possible executive order for Newsom to issue, according to a CAAA email newsletter sent Monday.

The CAAA said it hopes for "a conclusive presumption rather than rebuttable presumption" to avoid red tape or legal obstacles for workers who remain on the job and may be exposed to the coronavirus every day.

The proposed presumption would cover workers Newsom declared essential as well as "any employees deemed essential thereafter," and disaster workers, CAAA said.