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# *Viral Pandemics, COVID-19, and the Work Place in Colorado*

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Pandemic influenza is discussed and defined by OSHA as follows:

> A worldwide outbreak of influenza among people when a new strain of the virus emerges that has the ability to infect humans and to spread from person to person. During the early phases of an influenza pandemic, people might not have any natural immunity to the new strain; so the disease would spread rapidly among the population. A vaccine to protect people against illness from a pandemic influenza virus may not be widely available until many months after an influenza pandemic begins. Pandemics can vary in severity from something that seems simply like a bad flu season to an especially severe influenza pandemic that could lead to high levels of illness, death, social disruption and economic loss.

OSHA advises that in the event of a viral pandemic, employers will play a key role in protecting employees' health and safety as well as in limiting the impact of the virus on the economy and society.

A disease's classification as a pandemic depends on both its geographical spread, the ease with which it passes from person to person, and it's severity. The coronavirus outbreak, which originated in China in 2019, and causes the respiratory illness COVID-19, was officially declared a global pandemic by the World Health Organization on March 11, 2020.

On March 10, 2020, Colorado Governor Jared Polis declared a state of emergency in response to COVID-19. This memorandum will address dilemmas faced by Colorado employers struggling to respond to the threat of COVID-19 in the work place.

1. ***An employee has been diagnosed with a confirmed case of COVID-19. The employee reports to his supervisor that he believes he acquired the illness through exposure at work. What should the employer do?***

   Follow your normal employer protocols for when any employee reports an alleged workers' compensation claim or occupational disease.

   - Complete incident and investigation paperwork.
   - Provide the employee with a Designated Provider Letter.
   - Report the claim to the worker's compensation carrier/third party administrator (TPA) within 10 days.
   - The carrier/TPA should report the claim to the Division of Worker's Compensation within 10 days.
   - If there is lost time in excess of 3 days, a fatality, or anticipated permanent impairment, the carrier/TPA must take a position on compensability within 20 days.

2. ***If there was an exposure to COVID-19 in the work place is the employee likely to establish a compensable worker's compensation claim?***

   The Act does not specify what a claimant must show to prove that a contagious disease arose out of and occurred within the course and scope of employment. In Colorado, injuries fall into two categories: (1) accidental injuries, which are traceable to a particular time, place, and cause, and (2) occupational diseases, which are the result of exposure occasion by the nature of the employment.

   - Contagious diseases simply do not fit well within either category. A survey of Colorado case law shows that, because of this uncertainty in the law, claimants tend to bring a claim under both categories when seeking compensation for a contagious disease.

   - **Under either category, a claimant must still prove that the contagious disease resulted from the work environment.**

   Accidental Injury

   For an accidental injury, a claimant must show that he or she contracted the disease at a particular point in time and specify the cause. *See Hallenbeck v. Butler*, 101 Colo. 486, 74 P.2d 708 (1937). Several cases outside of Colorado have allowed recovery on

the "preponderance of probabilities," when the place of work was attended with a *much higher* proportional risk of infection.

Essentially, the argument is that the employment throws people together in close quarters and thereby increases the risk of contagion or that the employee's job duties such as travel place him or her in the midst of an epidemic. However, several Colorado cases have concluded that showing an increased risk does not, as a matter of law, entail a finding of causation.

- In *Likens v. Colo. Dept. of Corr.*, W.C. No. 4-272-604 (Aug. 28, 1997), the Panel distinguished between testimony showing an increased risk of exposure to a contagious disease and whether it was probable that the claimant contracted the disease at work. Based on the testimony of the claimant's expert, there was an increased risk of exposure to Hepatitis C because of claimant's work as a correctional officer. However, the Panel upheld the ALJ determination that it was "possible" but not probable that the claimant contracted Hepatitis C at work.

- In *Franks v. Apria Healthcare*, Inc., W.C. No. 4-484-507 (Nov. 20, 2002), the claimant worked as a nurse treating AIDS patients and she contracted tuberculosis during the course of her employment. She presented evidence that a greater percentage of AIDS patients have tuberculosis versus the general population and therefore her condition was work related. Respondents showed that none of the patients with whom the claimant worked had TB. The Panel affirmed the ALJ's determination that the claimant failed to prove that it was more likely than not that she actually sustained a work related exposure to TB.

- In *Cassianni v. Hospice & Palliative Care of W. Colo.*, W.C. No. 4-887-148-03 (Nov. 5, 2013), a nurse who worked in a hospice contacted MRSA. She presented evidence of a greater likelihood of exposure to MRSA in the hospice setting than in the general population. Respondents presented evidence that the claimant likely had community-acquired MRSA based on a set of risk factors including claimant's frequent use of antibiotics. The evidence also showed that the claimant had not been exposed to any patients at the hospice who had her form of MRSA. The ALJ concluded that the claimant had not sustained her burden to show a compensable injury.

A critical factor in all of these cases is that the claimants were not able to show a specific instance of infection. Simply showing an increased risk was not enough to show that the incident was work related. However, none of these cases address an epidemic. In that context, the causation analysis should consider: (1) whether the epidemic is localized to

the workplace; (2) if not, whether there is an increased risk of infection because of the workplace? In theory, the claim should only be deemed compensable if the evidence shows the workplace was attended with a *much higher* proportional risk of infection than the general population.

*Occupational Disease*

In Colorado, claimants might also bring claims for infectious disease under the guise of an occupational disease.

- A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment duties or working conditions. *Wal-Mart Stores, Inc. v. ICAO*, 989 P.2d 251, 252 (Colo. App. 1999).

- The Act also imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

Arguably, an infectious disease is not the same as an occupational disease. Generally, an occupational disease requires multiple exposures from work related activities, i.e. an "occupational" low back injury requires extended periods of lifting and twisting. Conversely, infectious diseases typically are contracted after a single exposure to a contagion.

Currently, there is no case law in Colorado distinguishing occupational diseases from contagious diseases, but some other states have drawn this distinction. If claimants are allowed to bring their claim as an occupational disease, they still have the burden to show that the working conditions directly and proximately caused the infection.

Claimant must additionally demonstrate the risk of a contagious disease was peculiar to the work environment. Simply showing that there is an increased risk should not necessarily satisfy the claimant's burden to show that the working conditions directly and proximately caused the disease.

3. ***<u>An employee reports to his supervisor that he believes he was exposed to COVID-19 at work because he worked with a co-worker who has confirmed COVID-19. Does the employer need to report the alleged work exposure to the worker's compensation carrier/TPA?</u>***

In most circumstances, no. Exposure to a contagious disease does not necessarily mean the employee sustained a compensable injury. A compensable injury is one that causes a disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).

Testing and <u>post</u>-exposure preventative treatment may be compensable under some circumstances where the exposure results from an accident. Mere exposure to a contagion, without an "accident", should be insufficient to establish a causal connection such that preventative measures are covered by the Act.

- In *Vanbuskirk v. Eagle Picher*, WC 4-613-913 (ICAO April 13, 2005), Claimant was exposed to cadmium. Further testing revealed elevated enzyme levels, which required continued monitoring. The ALJ found the continued monitoring to be a compensable medical benefits. The ICAO reversed, concluding the ALJ did not adequately find that elevated enzyme levels related directly to the exposure or that Claimant contracted a disease.

- In *Aranda v. Integrated Cleaning Services*, WC 4-451-413 (ICAO February 21, 2001), Claimant sustained a needle stick. As a result, Claimant was required to undergo preventative measures pursuant to OSHA regulations. Claimant sought worker's compensation benefits under the theory of an accidental injury. The ICAO concluded such preventative measures, which the accidental injury precipitated, flowed from the employment relationship and were compensable.

- In *Littleton v. Schum*, 553 P2d 399 (Colo Ct App 1976), the claimant believed that he had been exposed to hepatitis by a co-worker who had confirmed hepatitis. The claimant was a firefighter and he asserted that he had been exposed to hepatitis because he used the same dishes and shared the same personal protective equipment that had been used by his co-worker. As a precautionary measure the claimant had himself and his family inoculated. Claimant did not contract the disease, but he requested reimbursement for the inoculation. The court of appeals concluded the claim should be denied because (1) infectious hepatitis is not an "occupational disease" as exposure to hepatitis is not indigenous solely to claimant's occupation and (2) claimant did not contract the disease.

With COVID-19, if there is a compensable accident that results in a possible exposure to the coronavirus, preventative measures per the CDC include self-quarantining for approximately two weeks. If the employee is unable to work remotely while quarantined, temporary disability benefits could be due to the employee per the Worker's Compensation Act.

4. ***Can employers send employees home who exhibit potential symptoms of contagious illnesses at work?***

   Yes. If an employee displays viral or influenza type symptoms at work, the Americans with Disabilities Act (ADA) does not prohibit an employer from encouraging or requesting that the employee leave work.

5. ***May an employer encourage employees to telework as an infection-control strategy?***

   Yes. The Equal Employment Opportunity Commission (EEOC) has opined that telework is an effective infection-control strategy. The EEOC has also stated that employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation under the ADA to reduce their chances of infection during a pandemic.

6. ***Must an employer offer telework as a reasonable accommodation under the ADA during a viral pandemic?***

   Generally, no. In most cases COVID-19 is a transitory condition and therefore not a disability for purposes of the ADA. However, if an employee develops complications from COVID-19, an employee could make an argument that the ADA is implicated if the virus substantially limited a major life activity, such as breathing. Moreover, if an employer "regards" an employee with COVID-19 as being disabled, that could trigger ADA coverage.

7. ***Can an employer take an employee's temperature at work to determine whether they might be infected?***

   Generally speaking, the ADA places restrictions on the inquiries that an employer can make into an employee's medical status, and the EEOC considers taking an employee's temperature to be a medical examination under the ADA. The ADA prohibits employers from requiring medical examinations and making disability-related inquiries unless (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) the employer has a reasonable belief that the employee poses a "direct

threat" to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

On March 18, 2020, the EEOC gave employers the green light to take employees' temperatures in an effort to ward off the spread of the coronavirus. Not all carriers of the virus have symptoms or a fever, so the efficacy of taking temperatures may be limited.

8. ***Can an employee refuse to come to work because of fear of infection?***

Employees are only entitled to refuse to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act (OSH Act) defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."

OSHA discusses imminent danger as where there is "threat of death or serious physical harm," or a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency. The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem.

For most employment situations, COVID-19 should not pose an imminent danger sufficient to satisfy OSHA's test for refusal to work. However, COVID-19 may be a sufficient basis for an employee to refuse some work related assignments, such as international travel.