ALABAMA

What effect has the shutdown had on your claims that were already in litigation? Have you been allowed to move forward with discovery and hearings?

In regard to the shutdown and effect on our claims in litigation, our courts are semi shut down. We have no in-person hearings or trials thru April 30. The courts are allowed to conduct hearings by phone or Zoom. Some courts are doing this and some are completely closed and not conducting any hearings. We will have to see what transpires and if our courts open back up after April 30.

As for discovery, it is allowed to continue. Many depositions, mediations, etc. have been cancelled. Although some discovery continues in person and some by Zoom. I anticipate that this will increase after April 30.

WCDI Attorney Contact:
Kyle Kinney - Miller, Christie & Kinney, PC
kkinney@mck-law.com
205.807.1084

CALIFORNIA

How does a designation of "essential employment" change your analysis for considering whether the illness is considered an occupational disease? And whose such designation must you, or should you, rely upon?

In California, non-occupational diseases, such as colds, flus, and infections, are generally considered to be non-industrial in nature, and thus non-compensable. This was established by the California Supreme Court in *Latourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644. The basis for the determination relies on the fact that with non-occupational diseases, an applicant, generally cannot meet the two prongs of the AOE/COE test. Specifically, an applicant cannot show that the illness actually arose out of the employment and/or that illness was actually caused by or aggravated by the scope of the employment. Thus, as COVID-19 is a form of a cold/flu, it would at least initially fall into this non-occupational disease category and be considered non-industrial.

However, case law has also established two important exceptions when dealing with non-occupational diseases. It is under these two exceptions that we need to analyze "essential employees/employment" and the compensability of a COVID-19 exposure. The two exceptions to consider when addressing compensability for non-occupational diseases include:

1. Whether the individual's employment subjects the employee to an increased risk of exposure compared to the general public; and
2. When the immediate cause of the injury/exposure is an intervening human agency or instrumentality of the employment. In other words, when the employment or a condition of the employment itself causes or aggravates the disease.

We are currently seeing individuals working in "essential businesses" file cases by applying the first exception regarding the higher risk of exposure. In particular, we are seeing the increased risk of exposure exception being applied to healthcare workers and first responders as these employees, by the nature of their job requirements, are placed at a higher risk of

exposure than the general public. However, we are also seeing labor unions and legislators referencing these two exceptions when questioned regarding compensability of COVID-19 cases for all "essential employees/businesses."

This in turn raises the question of what qualifies as an essential business, and thus the employees whose claims would need to be analyzed through the two exceptions discussed above. At present, state legislatures and governors are actively passing legislation to address this issue. Therefore, the first place to look with regard to whether a business qualifies as "essential" would be to Executive and Statewide Orders themselves. These often directly identify business that are deemed "essential" and can remain open during the COVID-19 Shelter In Place or Stay At Home Orders.

We are also seeing legislatures and governors take more direct action through new laws and executive orders defining "essential business" and applying the increased risk exception. For example, in California, Assembly Bill 664, would create a conclusive presumption for first responders that would make their claims industrial and compensable should they contract COVID-19. At present, the Bill is only a proposal and would only extends to first responders (police, firefighters, doctors, nurses, EMTs, etc.) as these businesses are generally accepted by the courts as "essential." However, the legislature has indicated that they will be proposing additional legislation to more broadly address presumptions of compensability for additional employment areas. Based on the current legislation, the primary justification for the presumptions appears to be the application of the increased risk of exposure exception to non-occupational diseases.

We expect the presumptions being created by the executive orders and legislative action will be challenged in the courts, particularly as the laws vary drastically regarding breath and scope between each state. However, until the courts can rule on the new laws and the presumptions they are creating, these laws will need to be applied when addressing who would qualify as an "essential business/employee," and thus potentially fall under the two exceptions to compensability for non-occupational diseases and COVID-19.

WCDI Attorney Contact:
Emily Edwards – Manning & Kass
ece@manningllp.com
213.624.6900

FLORIDA

How to handle allegations of exposure to the coronavirus (but not a diagnosis of COVID-19) in your jurisdiction? What if the employer sends the employee home for 14 days due to a known exposure to a co-worker who tested positive?

For an allegation of exposure, it would be prudent to send the employee home in order to avoid further potential exposure. This scenario would need to be handled under FMLA laws, as FL has not deemed that a mere allegation of exposure would be compensable under existing workers' compensation laws.

The same holds true even if there is a known exposure, as opposed to a mere allegation of exposure. In FL, the claimant still carries the burden of establishing that the virus arose out of and in the course and scope of employment in order for the virus to be compensable.

However, First Responders in FL who have a confirmed diagnosis are now presumed to have contracted the virus in the line of duty.

WCDI Attorney Contact:
Chris McCue - McConnaughhay, Coonrod, Pope, Weaver & Stern P.A.
cmccue@mcconnaughhay.com
850.222.8121

GEORGIA

IMEs and even ongoing medical care have come to a standstill, but benefits continue. Policyholders expect you to continue to do something to move the case forward. What alternatives are there to demonstrate ongoing claims handling, developing support for the suspension benefits where appropriate, support for alternative methods of providing documentation of ongoing medical care and return to work efforts, and support bringing the case to final resolution?

The key is to remain aggressive in pushing forward on medical treatment and offers of light duty employment as best you can. In these unprecedented times, medical practice groups have either greatly reduced appointments or temporarily shut their doors altogether. Some have turned instead to telemedicine or remote appointments, if and when possible. All elective procedures have been cancelled, though that position is beginning to ease. An employer/insurer's ability to aggressively pursue bringing injured workers back to work or getting them off of workers' compensation benefits has been greatly limited by these developments. This has been further complicated by the statewide shutdown of the court system. Georgia quite often requires judicial review or involvement in workers' compensation claims, and hearings have been stayed, further limiting an employer/insurer's ability to immediately address issues with the State Board outside of the WC-PMT process. Looking forward, with a possible expiration of the stay order after May 13, 2020, claims handlers should continue to push as aggressively as possible within the construct of the law. Policyholders will need to understand, that to some degree, there may not be immediate recourse. That said, given the future economic uncertainty, the current environment may present an opportunity to resolve problematic claims at a reduced cost. Fortunately, mediations have continued via video conferencing and may be the preferred means of resolving claims for the immediate future. They have proven effective and easy to schedule in a quick time frame.

If your jurisdiction places the burden on the claimant to prove continuing disability or otherwise allow for the suspension of benefits based upon abandonment of medical care, how should you handle the situation where the claimant claims he cannot get access to medical care or evidence of continuing physical disability?

Georgia does not allow for unilateral suspension of benefits based upon abandonment of medical care. The law in Georgia states as long as an employee is receiving compensation, he shall submit himself to examination by the authorized treating physician at reasonable times. If the employee refuses to submit himself for medical treatment or in any way obstructs treatment upon order of the Board the right to compensation shall be suspended until the refusal or obstruction ceases. The employer/insurer can now file WC-PMTs which allows the employer/insurer to request a "show cause" telephonic hearing as to why the claimant missed a scheduled appointment. The Act allows only for suspension of benefits if the refusal to attend

a medical appointment to be unjustified. I believe the Board will be very lenient on forcing claimants to attend in person medical appointments, including physical therapy. Instead, I recommend encouraging our authorized providers to provide telemedicine.

WCDI Attorney Contact:
Chad Harris – Swift, Currie, McGhee & Hiers, LLP
chad.harris@swiftcurrie.com
404.888.6248

Caitlin Beyl - McConnaughhay, Coonrod, Pope, Weaver & Stern P.A.
cbeyl@mcconnaughhay.com
904.363.1950

ILLINOIS

Let's say you have taken the position that, although the illness might have been contracted while the employee was at work, the claim is not compensable under workers' compensation because it does not qualify as an occupational disease as it was not characteristic of or peculiar to the occupation. Would that position deprive you of asserting exclusive remedy tort immunity to a negligence claim filed against the employer by the employee?

Answering this question requires an analysis of a recent lawsuit filed in Cook County. On April 6, 2020, the administrator of the Estate of Wando Evans filed suit against Walmart and local property owner, J2-M Evergreen, LLC, alleging that Walmart and Evergreen negligently, willfully and wantonly caused the death of Walmart employee, Wando Evans (Cook County, Cause No. 2020 L 003938). The estate alleges that Walmart and J2-M Evergreen:

- failed to implement social distancing guidelines promulgated by the federal and state authorities;
- failed to properly cleanse and sterilize the store to prevent infection, and failed to properly train personnel to implement and follow procedures designed to minimize the risks of contracting COVID-19;
- failed to provide Wando Evans and other employees with personal protective equipment such as masks, latex gloves and other devices designed to prevent infection of COVID-19, as well as failure to provide employees with antibacterial soaps, antibacterial wipes and other cleaning agents as recommended by the CDC;
- failed to periodically interview and evaluate its employees for signs and symptoms of COVID-19, as well as failure to warn Wando Evans and other employees that individuals at the store experiencing symptoms may have been infected by COVID-19;
- failed to follow recommendations and descriptions for mandatory safety and health standards promulgated by the DOL and OSHA, and failure to conduct periodic inspections of the conditions and cleanliness of the store to prevent and/or minimize the risk others contracting COVID-19 as recommended by the CDC;
- failed to follow the guidelines promulgated by the CDC with regard to keeping a safe and healthy environment, including failure to prepare and implement basic infection prevention measures, failure to develop an infectious disease preparedness and response plan and failure to implement engineered-controlled devices designed to prevent COVID-19 infection, such as installation of high efficiency air filters and physical barriers such as sneeze guards;

- failed to develop policies and procedures for prompt identification and isolation of sick people and failure to cease store operations and close when employees were experiencing symptoms of COVID-19; and
- hired employees via telephone or other remote means in an expedited process without personally interviewing or evaluating employees to see if they were experiencing signs and symptoms of COVID-19.

Plaintiff alleges that as a result of these acts of omissions, Wando Evans contracted COVID-19 and ultimately died as a result of complications.

So, your question is, "Why isn't this suit barred by the exclusive remedy provision of the Illinois Workers' Compensation Act?" Good question.

The exclusive remedy provision is certainly the jumping off point for evaluating just how far this plaintiff and other similar plaintiffs can go with direct actions against their employers for COVID-19 exposure. The Illinois Workers' Compensation Act is meant to be the exclusive remedy for workers' compensation benefits against his or her employer. The employee is barred from bringing a common lawsuit against his employer unless the employee can show a legally recognized exception to The Exclusive Remedy Provision of the Act exists. In order to circumvent the Exclusive Remedy Doctrine on common law actions, a plaintiff must prove that the injury:

1. was not accidental;
2. did not arise out of employment;
3. was not incurred during the course of employment; or
4. was non-compensable under the act.

There are exceptions to the exclusive remedy provision. For example, under Illinois law, an intentional tort is not "accidental" and therefore the exclusive remedy provision does not preclude an employee from suing his employer directly for injuries sustained as a result of an intentional tort.

Here, however, the plaintiff has not alleged that Walmart's actions were intentional. The plaintiff has only alleged that Walmart's acts and omissions were negligent and/or willful and wanton. Negligent acts are "accidental" and not excepted from the exclusive remedy provision. While it may sound more heinous, willful and wanton conduct does not rise to the same level of purposefulness as an intentional tort. As such, the exclusive remedy provision would bar the claim of willful and wanton conduct.

The second major basis for circumventing the exclusive remedy provision is to assert that the cause of action is not based on a plaintiff's employment and/or that the injuries were not caused during the course of employment. Under Illinois law, the exclusive remedy provision can be avoided by asserting that employer's liability is based upon an employer's second dual capacity.

This capacity creates legal obligations on the employer's part to the general public, and not just to its employees. This exception is known as the Dual Capacity Doctrine or Dual Persona Doctrine.

Applying that doctrine here, the plaintiff alleged that some of the acts and omissions affected not only employees, but also by "employees and others," which presumably includes members of the general public.

Looking at the plaintiff's specific acts and omissions allegations, some of them are solely related to protecting employees. Those alleged acts and omissions clearly have to be dismissed under the exclusive remedy provision. We are curious to see how the court will treat those allegations that address not only employees, but "employees and others." It may be possible for the plaintiff to move forward based on those acts and omissions.

With the number of people who have and likely will be exposed to COVID-19, *Evans* will be an important case to monitor. Ultimately, new law will be made on novel issues such as whether CDC recommendations can serve as a basis for a legal duty and how a plaintiff can prove causation when COVID-19 is more widespread than just the subject Walmart store. See our video discussion of the case here.

WCDI Attorney Contact:
Rich Lenkov - Bryce Downey & Lenkov LLC
rlenkov@bdlfirm.com
312.327.0032

KENTUCKY

Address the question of the respective state governors' executive orders finding the coronavirus to be an occupational disease and mandating expedited acceptance of compensability.

On April 9 the Governor of Kentucky entered an Executive Order (EO) ***requiring all providers of workers' compensation benefits to pay temporary total disability (TTD) benefits*** to certain classes of employees (who) have been removed from employment by their physician, that is will be assumed to be the result of the contraction of Corvid-19. He furthered specifically found:

1. "An employee removed from work by a physician ***due to occupational exposure to COVID-19 shall be entitled to temporary total disability*** payments pursuant to KRS 342.730(1)(a), during the period of removal even if the employer ultimately denies liability . . . for the claim."

2. "In order for the exposure to be "occupational," there must be a ***causal connection between the conditions under which the work is performed and COVID 19***, and which can be seen to have followed as a natural incident to the work as a result of the exposure occasioned by the nature of the employment."

Can he do this?
The Governor's power includes "general administrative control of those executing the laws," within the Executive Branch. Seeing that the laws are faithfully executed vests in the governor or president the power to provide guidance and supervision to his subordinates.

Governors do have wide-ranging powers to declare a "state of emergency," issuing Executive Orders to protect public safety, temporarily suspend state statutes and regulations, seize property, and to command individuals to disperse from the scene of an emergency. In other words, **a Governor can generally issue Executive Orders to carry out his constitutional functions, in emergencies.** Ordinarily, the "executive order" must ultimately be subordinated to statutes enacted by state legislatures, Congress and the

constitution. The Governor cannot take on the role of the legislature or judiciary and create new entitlements.

Provided the **order** has a solid basis either in the respective Constitutions, and the powers it vests in the governor or president—as head of state, head of the **executive** branch, an **executive order** has the **force of law**.

There are recognized limits, however:
The federal and state judiciary and legislature are also empowered to review the constitutionality of EOs. Indeed, it is the recognized duty of the courts to preserve the Constitution's safeguards. In the past, the courts have invalidated executive orders that exceeded presidential power. The legislature can overrule an EO. Accordingly, these EOs can be modified and/or vacated by the legislature or the judiciary where they conflict with the perceived prerogatives of the respective legislature and judiciary.

Where this immediately affects us is when ***a governor tries to define an "occupational" disease.*** That is a matter for the legislature, not the executive. In other words, the governor cannot arbitrarily designate the corona virus as an "occupational disease." He could urge greater speed in decision making or in paying benefits, but it would be unconstitutional for him to require the payment of TTD for a condition not described by the legislature as a compensable condition.

In a perfect world, this would be found unconstitutional. The Order is an infringement of the powers of the Legislature and the Judiciary; as well as the U. S. Constitution. As I previously mentioned, a governor can generally issue EOs to carry out his constitutional functions, in emergencies. However, **here** appears to be peremptorily determining and defining compensable conditions, making up definitions of "occupational disease," and funding these pronouncements with what amounts to a seizure of the funds of the insurance companies operating in Ky. No due process.

I have outlined, below, pertinent parts of the Order, along with my possible "remedy."

1. Reading through the Order, we see in subparagraph (1.) that, "An employee removed from work by a physician ***due to occupational exposure to COVID-19*** shall be entitled to temporary total disability payments pursuant to KRS 342.730(1)(a), during the period of removal even if the employer ultimately denies liability . . . for the claim."

One can only determine the presence of COVID-19 through a specific medical test. Without such a test, how could a physician determine that the employee's condition is not the flu? Furthermore, given the widespread nature of this virus, there is no legitimate way today to determine the site of the "exposure," so as to characterize it as an "occupational disease."

Secondly, it is hardly the power of the governor to determine what constitutes an "occupational disease." This is for the Legislature and Judiciary.

2. The governor then states that, "In order for the exposure to be "occupational," there must be a ***causal connection*** between the conditions under which the work is performed and COVID-19, and which can be seen to have followed ***as a natural incident to the work*** as a result of ***the exposure occasioned by the nature of the employment";***

How does one establish a "causal connection" to work and the disease. How does one rule out other exposures? How can one then determine that it is, "a natural incident to the work" or

that "the exposure" is occasioned why the nature of the employment? How is this different than the flu?

This will be determined by a "helpful" family physician or physician's assistant who will have little or no interest or knowledge of the etiology of infectious diseases, or even have access to a COVID-19 test.

Where there is no test, then we could respond with a physician who has a more thorough knowledge of infectious disease. ***Despite this EO, a contrary finding by a physician may ordinarily bar a requirement to pay TTD.***
[Notwithstanding this, the courts have ruled that the payment of TTD prelitigation is voluntary on the parts of the employers.]

3. Subparagraph 3 sets up a presumption that when certain classes of employees have been removed from employment by their physician, that is will be assumed to be the result of the contraction of COVID-19. Again, that should ideally be beyond the powers of the governor.

4. Subparagraph 4 is basically a seizing of assets of the various insurance companies in order to fund causes of action not contemplated by the original insurance agreements or by the companies in deciding to sell insurance to Kentucky companies. I do not see how the Governor has the ability to order this.

As I said above, one way to combat this is to have the affected employees undergo examinations by our more knowledgeable physicians and/or medical opinions obtained which find the corona virus to be a disease condition which affects the general population as opposed to an "occupational disease," thereby creating a question of compensability. A second action would be to enjoin the EO in court. One factor, though, is that this disease appears to have possibly peaked, and this may be irrelevant in two months.

WCDI Attorney Contact:
Walter Harding – Boehl, Stopher & Graves, LLP
WHarding@BSG-Law.com
502.589.5980 Ext. 2620

LOUISIANA

I am currently paying my employees while they remain home not working. Do I need to include their payroll for my workers' compensation premium assessment?

NCCI has gone on record stating that insurers should not include payroll of employees who are at home but not working for purposes of workers' compensation premium calculation. NCCI will file the change in the 36 states where it is the official rating bureau.

If your workers are currently performing work on a remote basis, but are performing activities that are a lot more clerical and/or a lot less injury prone in nature than in their normal positions, the employer may ask the insurer for a mid-year rate audit to allow for a less costly rate experience modifier to apply to your workers payroll when calculating premiums.

WCDI Attorney Contact:
Jeff Napolitano – Juge, Napolitano, Guilbeau, Ruli & Frieman
jnapolitano@wcdefense.com
504.831.7270

MISSISSIPPI

How do you handle indemnity claims for existing compensation claimants who had returned to work, but are now laid off/furloughed/voluntarily stopped appearing for work?

For Mississippi, if the claimant was working at full duty I would not resume benefits for a claimant laid off or furloughed. However, if the claimant is on modified/restricted duty, then you would likely need to resume benefits unless the claimant has found work elsewhere. In either situation, coordination between the employer and carrier need to occur as the employer may have reasons to keep the claimant receiving his wages like under the Paycheck Protection Program.

The reasoning behind the opinion is that if the claimant is in a temporary state (before MMI) and is work on modified duty, the employer can reduce or eliminate the TD exposure by offering the claimant and accommodated position. However, if the employer does not have an accommodated position, the presumption is that the claimant is temporarily and totally disabled from work. In this question, the employer did have an accommodated position, yet the employer will be considered to no longer have the position.

The situation is different for someone who voluntarily stops appearing for work. If there is a mere fear of exposure and that is the reason for refusing the position, then I would not recommend paying benefits. If they elect not to go into the office due to needing to provide childcare for children that are not in school, taking care of someone that is exposed, or one of the other enumerated provisions from the Family First Act (assuming it applies) then they will be entitled to pay under the provisions of that Act, but not through workers' compensation.

Ideally, the claimant has already been working in the modified position. If so, I would not resume benefits. If the claimant is being offered a modified position while currently receiving benefits, I would ensure the job offer is in writing and the claimant is informed that if they refuse the accommodated position, their benefits will be suspended as documentation helps prove the offer.

In this situation, the employer/carrier have control of the benefits, but the claimant could file a Motion to Compel payment of benefits for the period of time. The ultimate result will depend on the administrative judge and the documentation versus the reasoning for refusing to accept the accommodated position.

WCDI Attorney Contact:
Daniel Culpepper – Anderson, Crawley & Burke
DCulpepper@ACBLaw.com
601.707.8796

NORTH CAROLINA

What are the implications for light duty work? On March 30, CMS loosened some restrictions on telemedicine and telehealth services. Perhaps the best way to leverage telemedicine is to facilitate its use for routine office visits, referrals and for anyone in the hospital, all to keep the flow of "care" going. Otherwise, one may see delays in receiving medical attention as an excuse for not applying the common/mandated discharge criteria, and treatment, disability and return-to-work guidelines. Has your state permitted use of telemedicine?

Telemedicine, or the practice of medicine using electronic communication, can be a great option to keep an accepted or compensable workers' compensation claim moving forward when many medical practices are closed for in-person visits or operating in reduced capacities as a result of COVID-19. Telemedicine or telehealth ensures the injured worker is receiving necessary and causally related medical care and progresses the injured employee towards maximum medical improvement (MMI) and possibly a return to work release, either full duty or light duty. Once an employee is released to return to work, to the extent suitable employment may be offered, or depending on the state, if the defendants can show that suitable employment would have been available but for an economic downturn resulting from COVID-19, defendants may take the position the injured worker is not disabled as a result of the work injury and file a Form 24 Application to Terminate or Suspend Compensation to request permission from the Industrial Commission to stop weekly indemnity benefits.

Telemedicine or telehealth has been recognized by the North Carolina Medical Board as an appropriate avenue for medical providers to provide patients with care and holds medical providers providing care via telemedicine to the same standard of care as those practicing in traditional in-person medical setting.

Within the workers' compensation claim setting, the Industrial Commission has determined that neither the North Carolina Workers' Compensation Act nor any Industrial Commission Rule disallows telemedicine or telehealth.

Per the North Carolina Industrial Commission, evaluation and management visits conducted via telehealth care should be billed using the same evaluation and management codes that are used for in-person office visits.

If either party refuses a telehealth visit, the North Carolina Industrial Commission has determined it has the ability to decide this issue, just like any dispute concerning medical treatment. Either party may file a Medical Motion seeking an Order either to allow the telehealth visit to proceed or to compel the injured worker to comply with reasonable treatment directed by defendants by attending the telehealth evaluation. Pursuant to 11 NCAC 23A. 0609, the parties may either seek an administrative ruling by the Executive Secretary or an expedited full evidentiary hearing before a Deputy Commissioner. Currently, in response to COVID-19, the North Carolina Industrial Commission is accepting electronically filed Motions via EDFP and conducting expedited full evidentiary hearings on Medical Motions with all parties appearing remotely. The expedited full evidentiary hearing policy on Medical Motions will be in effect through May 31, 2020.

If the defendants successfully move the North Carolina Industrial Commission for an Order compelling the injured worker to comply with reasonable medical treatment through participating in a telemedicine visit, and the injured worker still refuses to comply, the defendants may file a Form 24 Application to Terminate or Suspend Compensation to request

permission from the Industrial Commission to suspend weekly indemnity benefits until the injured workers' refusal to comply with reasonable medical treatment per Industrial Commission Order ceases.

WCDI Attorney Contact:
Jennifer Morris Jones – Cranfill, Sumner & Hartzog, LLP
JJones@cshlaw.com
919.863.8846

OKLAHOMA

Would the severity of the claim (or lack of severity) affect your advice to the employer as to whether they should accept a COVID-19 claim as compensable?

Perceived severity should not be the sole determining factor on whether you accept a claim. It certainly can be a factor you rely on heavily when determining how much of your organization's time and resources are going to be devoted to investigating a claim.

COVID-19 specifically presents problems with evaluating and gauging severity and exposure. The disease is so new that we really have no idea what, if any, long term health issues are going to arise. A claim that may seem relatively benign when it comes across your desk may grow exponentially as the months and years pass. Until we know more about the disease, I would hesitate to accept any claim based on a perceived lack of severity.

WCDI Attorney Contact:
Travis Colt – Latham Steele Lehman
tcolt@law-lsl.com
918.970.2000

SOUTH CAROLINA

With more employees now working remotely from their home, how would you advise employers to handle accidents that occurred due to the environment more directly associated with the home rather than associated with the work (i.e. tripping over the dog)?

This issue has come up before outside of COVID-19 with employees who work at home remotely. I would think all other states would follow their same law regarding compensable claims and you still need causation to be compensable. South Carolina would treat this like any other claim and tripping over the dog, or getting hurt during laundry, has no benefit to the employer and does not arise out of and is not in the course and scope of employment. However, if a worker at home gets hurt falling out of their chair or picking up their printer, then this would most likely be compensable as being at home does not make it any different than being at work.

WCDI Attorney Contact:
Regan Cobb – Holder, Padgett, Littlejohn + Prickett, LLC
rcobb@hplplaw.com
843.277.0944

TENNESSEE

The employee of your insured, currently working in essential employment, just tested positive. What advice or list of questions would you recommend for the employer/adjuster to ask in investigating whether the exposure actually occurred at work? What would be important to know to potentially point the finger elsewhere?

First, make sure the employee is actually asserting a workers' compensation claim. If the employee is merely notifying the employer that she tested positive for COVID-19 then that does not necessarily constitute notice of a work-related injury. If the employee is making a workplace exposure claim, then whether or not the claim is compensable will hinge on the facts. In Tennessee, the employee still has the burden of proving her exposure occurred in the course and scope of employment. At the time of this response, there have been no special allowances made for COVID-19 workers' compensation claims.

The claimant's argument will be that she was at a higher risk for exposure due to the essential work performed. But while states will differ on the analysis, in Tennessee, it is going to be very difficult for an employee to pinpoint that the only exposure to the virus was at work.

Your investigation and recorded statement will be key to determining compensability. You will be looking for everything and everyone the claimant has come in contact within the month preceding the alleged exposure. Sample questions would include:

- Have you been in contact with anyone that has tested positive for COVID-19?
- Have you been in contact with anyone who has been exposed but not necessarily tested positive?
- Have you been anywhere other than your home and workplace, such as a:
    - physician's office?
    - grocery store?
    - a hardware store?
    - the post office?
- Have you ordered take-out, carry-out or delivery food?
- Have you gone outside to get your mail?
- Have you received packages at you home?
- Have you visited family or friends?
- Have you visited with neighbors?
- Have you done any traveling?

You will also want to ask the same questions about each person living with the claimant. The more places the employee has gone and the more people with whom she has had contact the more difficult it will be for the employee to prove a compensable workplace exposure.

Please remember every case will be different. You will need to look at the facts of the case, as well as the laws of your state in order to properly evaluate each claim. Please seek the advice of legal counsel with specific questions.

WCDI Attorney Contact:
Heather Hardt Douglas – Manier & Herod
hdouglas@manierherod.com
615.742.9342

TEXAS

If benefits are tied to a work search requirement, how does COVID-19 impact that? In many states, claimants normally must comply with the Workforce Commission's work search requirements. Has your state suspended this requirement? Are there other requirements available to challenge entitlement?

This is no work search requirement for TIBs. An employee who is disabled has no obligation to look for work to qualify for TIBs. Therefore, any suspension of a work search requirement will have no effect on TIBs entitlement.

How to Evaluate TIBs Entitlement
If the employee is earning the preinjury AWW at the time of the shutdown, then the employee did not have disability up to that point. The shutdown, in and of itself will not result in disability being established. In other words, if the employee was earning the preinjury wages at the time of the shutdown, the shutdown itself did not establish disability. The reason the employee cannot retain employment would be due to the shutdown and TIBs would not be owed.

If the employee was earning less than the preinjury wage at the time of the shutdown and the reduction in wages was due to the work-related injury, then the employee already had disability prior to the shutdown. The employee would have been paid partial TIBs up to the point of the shutdown. Those partial TIBs would be based upon 70 percent of the difference between the average weekly wage and post-injury earnings. Once there was the shutdown, the employee was no longer receiving post-injury earnings such that the employee would now be entitled to TIBs based upon 70 percent of the average weekly wage. This will result in an increase in TIBs for those employees.

How to Evaluate SIBs Entitlement
On March 27, 2020, Governor Abbott approved DWC's request to suspend work search compliance standards for supplemental income benefits (SIBs) under Labor Code Section 408.1415(a) and 28 Texas Administrative Code Section 130.102(d). Commissioner's Bulletin # B-0012-20.

What are the limits on the Governor's powers during an emergency?
The Governor has substantial powers to suspend statutory provisions during times of emergency. This is the basis for the suspension of the work search compliance standards for SIBs. Those powers are not, however, unencumbered by any limits. There are constitutional restrictions on what the Governor can do, even in a time of emergency. As the Texas Supreme Court wrote on April 23, 2020, in In Re Greg Abbott, Governor of the State of Texas:

> The Constitution is not suspended when the government declares a state of disaster. Nor do constitutional limitations on the jurisdiction of courts cease to exist.

To the extent that the Governor's attempts to suspend statutory provisions violate the Texas Constitution, those orders and executive actions will be subject to challenge.

WCDI Attorney Contact:
Robert Stokes – Flahive, Ogden & Latson
RDS@fol.com
512.435.2162