

## **PROVIDING A PRESUMPTION OF CAUSATION IN A WORKERS' COMPENSATION CLAIM FOR COVID EXPOSURE POSES A SERIOUS THREAT TO WORKERS' COMPENSATION SYSTEM**

Under current law, an injured employee is required to demonstrate that an injury arose out of and in the course of employment. This is the case whether the claim is for a back injury, a broken bone or a disease.

As a result of the COVID-19 crisis, the business community has not suggested modifications to the existing Workers Compensation Act. The Act already provides a fair opportunity for an employee diagnosed with COVID-19 to make a claim and an employer to either pay or defend the claim. An employee who believes he was exposed to COVID-19 at work can file a workers' compensation claim and, if successful, be awarded benefits. As in any other case, the employee would bear the burden to prove that the injury arose out of and in the course of employment. In other words, the employee would have to prove it is more likely than not likely that he contracted COVID-19 at work.

While a disease like asbestosis may be compensable under the Act, COVID-19 is far different. Typically, an asbestosis claim arises from exposure to asbestos at work. Generally, a person could not be exposed to asbestos at the Post Office, on the greenway or in a park. However, a person with COVID-19 could have easily been exposed to that highly contagious disease at the Post Office, while bumping into someone who is asymptomatic on the greenway, or while touching a park bench. The documented community spread of COVID-19 can be caused by exposure to anyone, anywhere without the person even knowing where or when they were exposed.

Shifting the evidentiary burden to employers would have drastic and unintended consequences:

- Generally, employers are required by law to purchase workers compensation insurance to cover their workers. Insurers calculate premiums based on rate classifications for specific jobs of employees and associated risks due to the nature of a business. For example, performing roofing tasks are classified as a higher hazard than performing clerical work. As a result, the premium is higher for roofing than for clerical work. Since COVID-19 was unknown until weeks ago, no risk to businesses was considered in determining the workers compensation premium. The premium was determined months before this crisis and thus does not contemplate the payment of COVID-19 claims.
- Even now, there is no way to include such risk in the calculation of premiums. Any effort to make employers *retroactively* responsible for COVID-19 claims which they could not prepare for is even more unfair. Putting the burden on employers to prove "by clear and convincing evidence" that the employee contracted the virus outside of work will be impossible.
- As a result, these claims will cause additional and substantial economic damage to an already struggling employer base. For example, before a similar proposal was enjoined by a court and withdrawn in Illinois, the National Council on Compensation Insurance estimated that the cost of a similar presumption that an employee contracted COVID-19

at work at between \$66 million and \$4.453 billion. (See Preliminary Economic Analysis from NCCI dated April 16, 2020).

- Both self-insured employers and insurers who provide traditional workers' compensation coverage must purchase reinsurance to cover claims that exceed a certain monetary threshold. Reinsurance is critical to the system because it provides millions of dollars in catastrophic coverage, typically in layers, to ensure that all valid workers' compensation claims are paid. While the State might be able to shift the burden of proof in COVID-19 claims to the employer, reinsurance companies will not be bound contractually by a change in North Carolina law and will not reimburse self-insured employers or insurers for COVID-19 claims. Self-insured employers and insurers will be forced to pay all of the costs of COVID-19 claims including catastrophic claims. And on the local government side, for example, counties in North Carolina employ more than 70,000 people, and counties would be responsible for these increased costs.

In summary, any employee who contracts COVID-19 may have a compensable claim under current law. These claims, like most workers compensation claims, will be case-specific. If an employee can prove exposure to COVID-19 at work and that the work placed the employee at increased risk to contract the disease, there exists a remedy. On the other hand, creating a presumption that forces an employer to prove a negative (that the employee contracted the virus at some place other than work) will guarantee that every claim will be held compensable. The proposal being advanced is a fundamental threat to the continued viability of the workers compensation system in our state.

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