# Analyzing COVID-19 claims under the Longshore & Harbor Workers' Compensation Act

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American employers have faced unprecedented adversity in keeping their businesses sustainable for the past year due to the world-wide novel coronavirus pandemic. Significantly, thousands of workers have lost time due to being infected themselves with the coronavirus. Among them are workers covered under the Longshore & Harbor Workers' Compensation Act. Such workers include traditional longshoremen, off-shore oil workers and overseas defense-base contractors, who have begun filing COVID-19 claims for wage benefits and medical benefits under the Act and its extensions.

Employers and their insurance companies are now faced with many questions, beginning with "How do we assess these claims?" and "How do we defend these claims?' To date, few COVID-19 claims have been litigated, and as of the publication of this article, no administrative law decisions associated with COVID-19 claims have been rendered.

In anticipating how these types of claims may play out before the Office of Workers' Compensation Programs and the Office of Administrative Law Judges, there are two key legal issues that will impact how this novel disease would be treated under the Longshore & Harbor Workers' Compensation Act:

(1) Will COVID-19 be treated as an "accidental injury" or "occupational disease" for purposes of defining an "injury" under the Act?

(2) How will courts analyze the statutory presumptions under the Act?

## Accidental injury or occupational disease?

As we have learned since March 2020, the novel coronavirus primarily presents as flu-like symptoms. Medically, COVID-19 more closely resembles respiratory illnesses that we frequently see under the Longshore & Harbor Workers' Compensation Act (such as mesothelioma, asbestosis, lung cancer, and silicosis) rather than the more "traditional" work-related orthopedic injury.

However, COVID-19 typically develops within 10-14 days following exposure to coronavirus, while mesothelioma, for example, takes decades to develop post-exposure. Additionally, coronavirus infection is not unique to a particular type of worker; mesothelioma would require exposure to asbestos, and silicosis would require exposure to silica. Based on these two distinctions, we would expect that COVID-19 would not be treated similarly to traditional respiratory diseases because of how the law distinguishes between "accidental injury" and "occupational disease."

The Benefits Review Board defined an occupational disease under the Longshore & Harbor Workers' Compensation Act in the 1989 case, *Gencarelle v. General Dynamics Corp.*, as characterized by two factors. The first is unexpectedness, i.e., an inherent hazard of continued exposure to conditions of a particular employment. The second is a gradual, rather than sudden, onset.

In addition, the 9th U.S. Circuit Court of Appeals in the 1999 case, *Port of Portland v. Director, OWCP,* held that an occupational disease must be peculiar to a condition of employment and further emphasized that the key factor of occupational illness is a long latency period.

What makes COVID-19 different is there is neither a long latency period, nor is there anything about the illness that would be peculiar to any individual employment. Anyone who is exposed to the coronavirus is susceptible to contracting COVID-19. Mesothelioma and asbestosis would be unique to those who worked around asbestos, and silicosis would be unique to those exposed to silica.

The general public is not at risk for occupational diseases like asbestos and silicosis. The general public is at risk for COVID-19. Therefore, it is likely that COVID-19 would be treated as an accidental injury.

## Statutory presumption of compensability

### What does the employee have to show?

Section 20(a) of the Longshore & Harbor Workers' Compensation Act affords an employee with a presumption that the injury they sustained is causally related to his employment based on two elements. The first is that the employee sustained some physical harm or pain. The second is that an accident occurred in the course of employment, or conditions existed at work, which *could have* caused, aggravated, or accelerated the harm or pain.

The first element should be viewed as objective, i.e., the employee should have written confirmation of a positive test. If prospective employees are going to be seeking benefits due to this viral infection, employers and carriers are entitled to written confirmation

of an actual positive test before accepting any claims. This is a very objective criterion to satisfy the first element.

The second element, that they were exposed in the course of employment or conditions existed at work to cause exposure, is much more subjective. To satisfy this second element, an employee would have to identify some credible and direct exposure to someone whom they encountered in the course of their employment who also tested positive for COVID-19. If the employee can identify a condition of employment that ***could have*** caused their COVID-19 infection, then the employee will have met the statutory presumption.

## What does the employer have to show?

If an employee can demonstrate a positive test result and make a credible allegation that they had some work-related exposure, then it is likely that they will be entitled to the statutory presumption of compensability. The burden then shifts to the employer to rebut the presumption with substantial evidence which establishes that the employee's employment did not cause, contribute to, or aggravate their condition.

If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, then the statutory presumption of compensability no longer controls, and the issue of causation must be resolved based on the evidence as a whole.

Whether an employee's positive COVID-19 test is causally related to their employment will be a medical question. Thus, to rebut the Section 20(a) presumption, it will be up to the employer and its carrier to present expert medical evidence to evaluate the employee's allegations of exposure and render an expert opinion as to whether or not the employee's alleged exposure caused their coronavirus infection. This will require an assessment of the employee's allegation of a work-related exposure and likely will require development of an alternative theory of non-work-related exposure.

## What can we conclude?

As with most claims brought under the Longshore & Harbor Workers' Compensation Act, the employee will have an extremely low burden to demonstrate the two elements that make a prima facie case of compensability due to the benefit of the statutory presumption. The burden will ultimately shift to the employer to rebut the presumption and defend the claim on the basis of medical causation. This will require employers to expend resources to both develop an alternative theory of exposure as well as develop expert medical testimony to address the issue of causation.

Employers and their insurance carriers will need to weigh the costs and benefits of developing litigation against the value of the claims themselves. Because COVID-19 is indeed a unique coronavirus, it is unknown what its long-term medical effects might be. This raises the question, how do employers and their insurance carriers value these claims when future medical care is uncertain?

There could be significant exposure for future medical care for employers and their carriers, although there is insufficient medical knowledge to give guidance to either side of the claim at this time.

## About the authors

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