

COMPENSABILITY OF COVID-19 WORKERS' COMPENSATION CLAIMS

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I. Compensability of COVID-19 Workers' Compensation Claims.

Infectious diseases such as COVID-19 can be compensable as either a personal injury or occupational disease. For example, other jurisdictions have found compensable a nurse who contracts tuberculosis in a hospital,¹ polio in a polio ward of a hospital,² a teacher who contracts mumps during an epidemic of that disease at the school,³ and a daycare worker who contracts herpes.⁴ A causal connection with employment is needed in all types of infectious-related occupational diseases.⁵ To establish a personal injury, the Employee essentially has to satisfy a two-step test. The Employee has to prove that the work exposure created an increased risk and medical causation.

An occupational disease means a disease arising out of and in the course of employment peculiar to that occupation which the employee is engaged. Occupational disease excludes ordinary diseases of life. An ordinary diseases of life is defined as one to which

¹ *In re Gaites*, 251 A.D. 761.

² *Industrial Commission v. Corwin Hospital*, 250 P.2d 135 (1952).

³ *McDonough v. Whitney Point Central School*, 15 A.D.2d 191 (1961).

⁴ *Portman v. Camelot Care Center, Inc.*, Tennessee Special Workers' Compensation Appellant Panel March 2, 2000.

⁵ For example, the Texas case *Vore v. Colonial Manor Nursing Center*, 2004 WL 2348229 (N.D. Tex. 2004). In *Vore*, charge nurse at a long-term care facility, sued under the ADA for failure to accommodate disability and entitlement to benefits under the nursing center's occupational injury benefit plan. Court found no connection to work and MRSA, as MRSA developed six-months after his employment ended. Court noted that current medical research indicated that MRSA infection is due to overuse of antibiotics and employee was under extensive antibiotic therapy before development of MRSA. *Id.* at *7-8.

the general public is equally exposed outside the employment field.⁶ However, ordinary diseases of life may be compensable if the employment peculiarly exposes the employee to an increased risk or special hazard of developing the disease.⁷

To prevail on an occupational disease theory, the employee must prove a direct causal connection between the conditions under which the work is performed and the disease.⁸ The relevant provision of the statute contained in Minn. Stat. § 176.011, subd. 15 is as follows:

Occupational disease means a disease arising out of and in the course of employment **peculiar to the occupation** in which the employee is engaged and due to causes in excess of the hazards of ordinary employment and shall include undulant fever. Ordinary diseases of life to which the general public is equally exposed outside of employment are not compensable, except where the diseases follows as an incident of an occupational disease, or where the exposure peculiar to the occupation makes the disease an occupational disease hazard . . . An employer is not liable for compensation for any occupational disease which cannot be traced to the employment as a direct and proximate cause and is not recognized as a hazard characteristic of and peculiar to the trade, occupation, process, or employment or which results from a hazard to which the worker would have been equally exposed outside of employment.

In reality COVID-19 is an ordinary disease of life. It is important to note that other ordinary diseases of life such as tuberculosis, polio, HIV, mumps and herpes have been found to be compensable by workers' compensation courts under specific conditions or situations.⁹

A. Minnesota Infectious Disease Claims Brought as Personal Injury

It is well established in Minnesota that infection disease claims can be found to be compensable based upon the concept of a personal injury. As referenced previously, the employee has to establish that the injury arises out of the employment. The employee has to satisfy the increased risk test. Under this test, an employee must show an increased risk which the employee as distinct from the general public, was subjected to by his or her employment.¹⁰ Additionally, an employee must also establish the medical link between the alleged exposure and the actual illness or disease.

⁶ Minn. Stat. § 176.011, subd. 15.

⁷ See *Tofte v. Hubert J. Tofte, P.A.*, 39 W.C.D. 10 (1986) (Workers' compensation benefits were awarded when employee, a dentist, developed herpes keratitis as a result of exposure from his patients).

⁸ *Bohlin v. St. Louis County*, 61 W.C.D. 69 (W.C.C.A. 2000).

⁹ See notes 38-42.

¹⁰ See *Maker v. Kelly Law Registry*, slip. op. (WCCA 2006).

1. *Olson v. Executive Travel MSP, Inc.*

In *Olson v. Executive Travel MSP, Inc.*, the employee traveled to the Orient on work-related business and contracted Influenza-type B. The evidence showed that this particular virus was not present in the United States.¹¹ The infection impaired the employee's immune defenses, and she developed bilateral staphylococcal pneumonia. The pneumonia resulted in chronic bronchiectasis, a permanent impairment.

The claim was denied as an ordinary disease of life. Both the compensation judge and Workers' Compensation Court of Appeals addressed the claim as an occupational injury. The Minnesota Supreme Court applied the personal injury test to award compensation. The Employee, who was in the Orient because of her employment, became infected by a specific virus. The Minnesota Supreme Court held because this was a specific virus with a specific origin of infection, this is a personal injury and not an occupational disease. The issue of ordinary disease of life was not addressed.¹²

2. *Baker v. Farmers Unuin Mktg. & Processing Ass'n*

In *Baker v. Farmers Unuin Mktg. & Processing Ass'n*, an individual contracted histoplasmosis through exposure at work with dead animals being processed for dog and cat food. Histoplasmosis is associated with turkeys, which the employee testified he worked extensively with. The court reaffirmed in Minnesota, "the unexpected contraction of an infectious disease may be compensable as a personal injury whether or not the disease could also be characterized as an occupational injury."¹³

3. *Ebert v. Yellow Freight System*

In *Ebert v. Yellow Freight System*, an over-the-road truck driver was successful in claiming a compensable personal injury in the nature of a streptococcal infection. The infection eventually led to cellulitis and toxic shock syndrome.¹⁴ The employee claimed that he contracted the streptococcal infection when he stayed in a dirty motel room in the course of his employment.¹⁵ He had cracks or fissures in his foot because of athlete's

¹¹ 437 N.W.2d 645 (Minn. 1989).

¹² *Id.* See also *Lemire v. Montgomery Ward*, 45 W.C.D. 296 (W.C.C.A. 1991) (No showing that stress was more than ordinary during period atherosclerosis was developing. Notably, whether work produced greater than ordinary hazard is factual determination by compensation judge that will be affirmed by appellate court if substantial evidence supports finding); *Dessin v. Minnehaha Super Valu*, 1985 WL 47428 (W.C.C.A. June 3, 1985) (viral myocarditis disease of ordinary life).

¹³ slip. op. 2000 MN Wrk.Comp. LEXIS 278 (WCCA March 14, 2000).

¹⁴ 2006 WL 1666113 (W.C.C.A. May 15, 2006).

¹⁵ *Id.* The employee was required by the employer to stay at the particular hotel. The employer also admitted the employee was in the course of employment at the time he contracted the infection. *Id.* at *2.

foot (non-work related condition). The defense argued that the causation opinion relied upon by the employee was speculative.¹⁶ The compensation judge awarded benefits pursuant to the personal injury theory. On appeal, the Workers' Compensation Court of Appeals noted that the employer did not allege that this was an ordinary disease of life.¹⁷ Implicit in the *Ebert* decision is the potential defense that an infection may be an ordinary disease of life even when the employee claims it as a personal injury, not an occupational disease.¹⁸ Notably, the *Ebert* decision treated the infection as a personal injury, not an occupational disease.

All three of the above-referenced cases illustrate the "increased risk" test. Their employment subject them to an increased risk of infection. Additionally, the work-related exposures were found to be substantial causal factors to their infections. As such, the claims were found to be compensable.

B. Minnesota Infectious Disease Claims brought as Occupational Disease

Minnesota courts have rendered decisions on the compensability of other infectious diseases, such as tuberculosis. In the tuberculosis cases discussed below, employees brought claims for an occupational disease in the nature of tuberculosis infection. The success or failure of these claims depended on whether the contraction of the disease was peculiar or a natural incident of the employment.

These cases are relevant to COVID-19 cases. While healthcare providers will undoubtedly come into contact with COVID-19 infected patients, COVID-19 is also a disease of ordinary life. In determining the compensability of a COVID-19 claim, an investigation is needed as to whether there was some occupational hazard (such as caring for a COVID-19 patient) which distinguishes it from other occupations. If, however, there is no evidence of an occupational hazard peculiar to or incidental to the job, the claim will and should be denied.

1. *Gray v. City of St. Paul*

¹⁶ *Id.* The doctor's report was handwritten and stated the employee's illness "likely began in the 24 hours prior to admission . . . and the portal of entry for his infection most likely related to the cracks between the toes from (athlete's foot), although this is speculative." *Id.* at *2.

¹⁷ *Id.* at n.1. "The employer did not argue that the employee had contracted a noncompensable ordinary disease of life."

¹⁸ *Id.* On appeal, the employer argued that the lack of further explanation from the treating doctor, it was just as likely the employee contracted the infection at some time prior to the trip or from his clothing of some other personal item. However, at oral argument the employer admitted the employee was in the course of employment when he contracted the infection. The employer also did not have a medical expert.

The Minnesota Supreme Court determined that a tuberculosis infection was actually an occupational disease and awarded compensation. In *Gray v. City of St. Paul*, the employee, a police officer, contracted tuberculosis.¹⁹ The claim was that he was in close proximity to a fellow police officer who actually had tuberculosis and as such contracted the disease. The court noted that tuberculosis is normally a disease of ordinary life. However, the employee's exposure to tuberculosis was contracted because of the peculiar nature of the occupation. The Employee was forced to be in close proximity to his partner. The court determined that the disease was a natural incident of the occupation.²⁰ The occupation presented a hazard which distinguished it from other occupations. Essentially, the court determined that the criteria set forth in the occupational disease statute were satisfied.²¹

2. *Parle v. Henry Boos Dental Laboratories*

The Minnesota Supreme Court was faced with another tuberculosis claim several years later in *Parle v. Henry Boos Dental Laboratories*.²² In *Parle*, the employee worked in a dental laboratory with three other employees. The employees were subsequently found to be infected with tuberculosis.²³ The employee had contacts with these employees during coffee breaks, lunch, and in the elevator. The contacts were casual and sporadic. They generally worked in the same area although they were separated by distances of 10 or 20 feet.

Initially, the compensation judge found that the employee contracted an occupational disease of tuberculosis as a result of exposure which was peculiar to her occupation. The compensation judge distinguished this exposure from diseases of ordinary life.

The Supreme Court reversed. The court noted that the employee's disability resulted entirely from an exposure to an infected employee and was in no way connected with the hazards inherent in the employment. There was no evidence that the nature of her duties or the conditions under which she was required to work had any connection with her contracting tuberculosis.²⁴ Her disability resulted from exposure which could have occurred outside of her employment. The court further noted that there was no evidence presented that the co-workers' tuberculosis was a "natural incident" of their occupation.²⁵ As such, the claim was denied as not being an occupational disease.

¹⁹ 84 N.W.2d 606 (Minn. 1957).

²⁰ *Id.* at 615.

²¹ *Id.* at 616.

²² 153 N.W.2d 344 (Minn. 1967).

²³ *Id.* at 344.

²⁴ *Id.* at 345.

²⁵ *Id.* at 346.

3. Gray and Parle as Personal Injury Claims?

In both *Gray* and *Parle* cases, Plaintiffs sought benefits pursuant to the occupational disease section of the statute. They did not plead that the infection or illness was due to a personal injury. However, in evaluating *Gray* and *Parle* as personal injuries, it is submitted that undoubtedly *Gray* would be found to be compensable and *Parle* would undoubtedly be denied. In personal injury cases, the employee has the burden of establishing that the job placed them at an increased risk. In *Gray*, the employee was placed at an increased risk. In *Parle*, she was not. In *Parle*, contraction of tuberculosis as a direct result of employment was speculative at best. The employee would have failed in her burden of proof to establish that her injury arose out of and in the course of employment.

C. Possibility of COVID-19 as a Consequential Injury

As COVID-19 is prevalent in hospitals and nursing homes, it is very possible injured workers hospitalized for other conditions could contract COVID-19 while hospitalized, leading to greater illness and disability. In Minnesota, injury caused by medical treatment is compensable, even when injury is to different body part. *Calkins v. United Parcel Service*, slip. op. (WCCA Nov. 5, 2003).

IV. Conclusion

There is yet to be any reported decisions regarding COVID-19, though past decisions regarding infectious disease certainly give guidance.

Obtaining information and data from the employer regarding the prevalence of COVID-19 infected patients and co-workers will be critical. Possible personal avenues of contraction will also need to be explored in compensation inquires. The burden of proof is always with the employee. The employee has the burden of establishing when, where and how the infection arose.

There is no universal rule on the compensability of COVID-19 claims. Just as in the tuberculosis claims, some COVID-19 claims will be compensable and others will not. Each COVID-19 claim will be determined on its on facts. An early, exhaustive and thorough investigation is needed in order to determine compensability. As an ordinary disease of life, an COVID-19 illness can be contracted through any number of different methods, including at work and away from work. The key is simply good investigation and common sense.