



DIETZ, GILMOR & CHAZEN
a professional corporation

Presents:

COVID-19 Webinar: Impact on California Workers' Compensation

Friday, June 12, 2020

11:00 a.m. to 12:00 p.m.

Presented By:

Robert Lance, Esq. (Partner, DGC Santa Monica)
Ryan Greer, Esq. (Partner, DGC Orange County)
Beth Blue, Esq. (Senior Associate, DGC San Diego)

SAN DIEGO ♦ 9665 Granite Ridge Drive., Ste 110, San Diego, CA 92111 ♦ 619-236-8550

ONTARIO/INLAND EMPIRE ♦ 3333 Concourse Street., BLDG 7, 2ND Floor, Ontario, CA 91764 ♦ 909-579-0009

ENCINO/GREATER LOS ANGELES ♦ 6345 Balboa Blvd., BLDG 2, Suite 225, Encino, CA 91316 ♦ 818-654-9911

SAN FRANCISCO/BAY AREA ♦ 233 Sansome St., 6TH Floor, San Francisco, CA 94104 ♦ 415-392-1650

LONG BEACH ♦ 249 E. Ocean Blvd., Suite 1000, Long Beach, CA 90802 ♦ 562-498-9020

SACRAMENTO ♦ 2377 Gold Meadow Way, Suite 100, Sacramento, CA 95670 ♦ 916-504-2646

SANTA MONICA ♦ 2001 Wilshire Blvd., Suite 515, Santa Monica, CA 90403 ♦ 310-828-6028

ORANGE ♦ 2230 W. Chapman Avenue, Orange, CA 92868 ♦ 562-498-9020

COVID-19: Impact on California Workers' Compensation

PRESENTATION AGENDA

PART 1: EXECUTIVE ORDER N-62-20, ISSUED AND EFFECTIVE 05/06/2020

PART 2: PROVIDING CLAIM FORMS TO EMPLOYEES NOT COVERED BY THE ORDER

PART 3: COMPENSABILITY OF COVID-19 CLAIMS FILED BY EMPLOYEES NOT COVERED BY THE EXECUTIVE ORDER

PART 4: NON-COVID-19 INJURIES TO EMPLOYEES WORKING FROM HOME WHILE STAY-AT-HOME ORDER IS EFFECTIVE

PART 5: PSYCHIATRIC INJURIES

PART 6: TELEHEALTH aka TELEMEDICINE

PART 7: MOST RECENT CALIFORNIA LEGISLATIVE and WCAB NEWS

PART 1:

EXECUTIVE ORDER N-62-20, ISSUED AND EFFECTIVE 05/06/2020

- Covered dates of potential exposure – 03/19/2020 – 07/05/2020.
- Temporary rebuttable presumption of injury AOE/COE for an employee's COVID-19-related illness if:
 - The work was performed on or after 03/19/20.
 - The employee was **directed** by the employer to perform work at a location other than the employee's home.
 - The employee tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee worked at the employer's direction.
 - A California-licensed physician made the initial diagnosis, and that diagnosis is confirmed by further testing within 30 days of the date of the diagnosis.

EXECUTIVE ORDER N-62-20, ISSUED AND EFFECTIVE 05/06/2020

- Period to reject claim is shortened to **30 days** from date of filing of claim form.
- If not rejected within the 30-day period, the claim is presumed compensable, unless rebutted by evidence only discovered after the 30-day period.
- All workers' compensation benefits, including death benefits, available.
- Permanent disability is subject to apportionment.
- If employee has paid sick leave (PSL) benefits *specifically available in response to COVID-19*, those benefits must be exhausted before any TD or LC 4850 benefits will be due and payable.
- No waiting period for TD.

EXECUTIVE ORDER N-62-20, ISSUED AND EFFECTIVE 05/06/2020

- For TD before 05/06/2020 – If the employee tested positive or was diagnosed with COVID-19 before 05/06/2020, then by 05/21/2020, employee must obtain a certification documenting the period for which the employee was TD and unable to work, and must be re-certified every 15 days thereafter, for the first 45 days after the diagnosis.
- For TD after 05/06/2020 – If the employee tests positive or is diagnosed with COVID-19 on or after 05/06/2020, the employee must be certified for TD within the first 15 days after the initial diagnosis, and must be re-certified every 15 days thereafter, for the first 45 days after the diagnosis.

EXECUTIVE ORDER N-62-20, ISSUED AND EFFECTIVE 05/06/2020

- The physician certifying TD must hold a California physician and surgeon license.
- The Department of Industrial Relations is precluded from collecting any death benefit payment arising out of claims covered by the Order.
- The Order applies to workers' compensation insurers writing policies that provide coverage in California, self-insured employers, and any other employer carrying its own risk, including the State of California.

EXECUTIVE ORDER N-62-20, ISSUED AND EFFECTIVE 05/06/2020

Tips for Employers:

- If an employee tested positive or was diagnosed with COVID-19 between 03/19/2020 to the present, after working at the employer's direction at a location other than the employee's residence, provide a claim form to the employee as soon as possible, if not done previously.
- Going forward up to and including 07/19/2020 (14 days after the last date of the Order's specified exposure period), provide a claim form within 24 hours of obtaining knowledge, from any source, that employee tested positive for or was diagnosed with COVID-19 after working at the employer's direction at a job site that is not the employee's residence.

PART 2:

PROVIDING CLAIM FORMS TO EMPLOYEES NOT COVERED BY THE ORDER

A blanket approach to providing claims forms during the pandemic is **not** recommended. An employee is likely to think the form must be completed and filed, even if he or she has not been exposed to the coronavirus. Once the claim form is filed, a claim is created, which triggers rights and obligations. The resulting flood of claims would be highly burdensome.

The guidelines that follow on the next slide should be helpful:

PROVIDING CLAIM FORMS TO EMPLOYEES NOT COVERED BY THE ORDER

- A claim form must be provided if an employee asks for one.
- A claim form must be provided if an employer receives knowledge, from any source, that (1) the employee was diagnosed with COVID-19 and (2) either it is work-related, or the employee is claiming it is work-related.
- If a claim form is not required to be provided, consider the nature of the employee's work, the work environment (working remotely?), whether the employee has actually tested positive for the novel coronavirus or been diagnosed with COVID-19, whether the employee has health insurance, and any factors unique to the situation. The facts may weigh in favor of providing a claim form.

Reminder for Employers:

- Providing a claim form does not mean acceptance of the claim.

PART 3:

COMPENSABILITY OF COVID-19 CLAIMS FILED BY EMPLOYEES NOT COVERED BY THE EXECUTIVE ORDER

- If the new presumption of injury AOE/COE does not apply to a claim, an employee can litigate injury AOE/COE.
- Normally, no exposure for WC benefits for non-occupational diseases, which is what COVID-19 is, since the novel coronavirus is found throughout the world and can affect anyone, not just employees.
- The employee will prevail if there is substantial evidence that his or her **risk of exposure** to coronavirus was probably higher than the general public's risk. (Note: scientific certainty is not required to be proven.)
- Compensability can extend to injuries from the side effects of medications or procedures used to treat COVID-19, not just injuries from the direct damage wrought by the novel coronavirus.

PART 4:

NON-COVID-19 INJURIES TO EMPLOYEES WORKING FROM HOME WHILE STAY-AT-HOME ORDER IS EFFECTIVE

- If employer has directed employee to work from home, *or* given permission, then the employee's home becomes a second job site, and employer benefits from employee's services, so injury at home will probably be compensable.
- The personal comfort doctrine is another theory that will support compensability of an injury such as slipping and falling in the bathroom.

PART 5:

PSYCHIATRIC INJURIES

- Efforts to control the spread of the novel coronavirus do not change the law on liability for work-related injuries.
- LC 3208.3 still applies.
- Contracting work-related COVID-19 would be an “actual event of employment” that would support a claim for psychiatric injury.
- Greater stress at work during pandemic could be the basis for a psych claim.
 - Not just front-line health care workers – employees at essential businesses like grocery stores having to deal with more customers who are complaining, angry, rude, and even threatening.
 - PTSD is likely to be found industrial when the claimant is an essential worker – some public safety workers will benefit from the PTSD presumption that was effective on 01/01/2020.

PSYCHIATRIC INJURIES

- Other actual events of employment that could support a claim for psychiatric injury are a change of job assignment, changes in duties, changes in working conditions (including having to work at home), and implementation of new technology.
- Stress from having to work at home could be compensable because being sent home to work is an actual event of employment.
 - An argument could be made that the stay-at-home order is a governmental action, not an employer's, so teleworking is not covered, but there is case law supporting employer liability when actions were mandated by the government.
 - Also, the employer is benefiting from the employee's services, even when rendered in the home setting.
- General concerns about the future in difficult economic times would not support a claim for psychiatric injury.

PSYCHIATRIC INJURIES

- A claimant may try to rely on the “violent act” exception to the predominant cause requirement, so that only “substantial cause” needs to be proven.
 - Unlikely that contracting the virus would be found to be a “violent act.”
 - The severity of an injury does not define a “violent act” [*Wilson* case, 2019 *en banc* WCAB decision.]
- Good faith personnel action defense.
 - Sending an employee home to work due to COVID-19 is probably not a personnel action, since it changes only where and how the work is performed.
 - Layoffs and terminations are personnel actions - employer will have to show action was taken in good faith and in a lawful and nondiscriminatory way.

PSYCHIATRIC INJURIES

- Six-month rule.
 - Exception for “sudden and extraordinary employment condition,” but does COVID-19 meet both criteria? It would probably not be considered “sudden.” It might be found “extraordinary.” We are likely to see some case law in future.
- Labor Code sec. 4660.1(c).
 - Does not apply to directly-caused psychiatric injuries, so employee can get psych PD.
 - COVID-19 is a disease, not an injury, and the statute refers only to “injury,” so arguably, the statute does not preclude psych PD.

PART 6:

TELEHEALTH aka TELEMEDICINE

- The pandemic and stay-at-home order have really boosted the provision of medical services by remote means.
- Real time, two-way, audio-visual communication required, i.e. not just a phone call.
- Employee must show ID, confidentiality is preserved.
- Can save employee a lot of time – no traveling, no sitting in waiting room.
- Some limitations - not good for acute trauma injuries, acute eye injuries or situations where measurements need to be taken for a P&S report, or doctor, such as an orthopedist, needs to use sense of touch to examine.
- Reports are generated. Find out if sessions are recorded and stored (could be useful evidence.)

TELEHEALTH aka TELEMEDICINE

- DWC has been encouraging use of telehealth “when in-person physical examination is not necessary.”
- It is not yet clear if attendance at a telehealth appointment can be compelled, but nothing precludes petitioning for an order.
- Telehealth and med-legal evaluations – be sure to reserve right to in-person examination.
- A report based on a telehealth visit with the PTP, an AME, or a PQME can probably support a settlement.

PART 7:

MOST RECENT CALIFORNIA LEGISLATIVE and WCAB NEWS

Legislative News:

- SB 1159 regarding a rebuttable presumption for “critical” employees has moved to the California Senate Appropriations Committee as of 05/18/20.
- AB 664 and AB 196 are awaiting further legislative action as of 05/18/20.
 - Each of these bills proposes a conclusive presumption.

WCAB News:

- The Boards remain closed to the public as of 05/18/20.
- Hearings, now including case-in-chief trials, are being conducted telephonically by calling the WCJs’ telephone conference lines.
- Documents to be filed electronically via EAMS or JET File or paper filing by U.S. Mail.
 - If none of those filing procedures will work, email filing is a last resort.
- To learn the latest changes in WCAB policies and procedures, you can check for news releases at <https://www.dir.ca.gov/dirnews>



DIETZ, GILMOR & CHAZEN
a professional corporation

DIETZ, GILMOR & CHAZEN

*Workers' Compensation Defense
and Subrogation Legal Services*

San Diego / Ontario-Inland Empire / Encino-Greater Los Angeles

San Francisco-Bay Area / Long Beach / Sacramento / Santa Monica / Orange County