

# Workers' Compensation Updates



## Louisiana Workers' Compensation Law and COVID-19 as a Potential Compensable Occupational Disease

### Louisiana's Workers' Compensation Occupational Disease Statutes: A History

To understand the potential to employers for possible compensability of COVID-19 infections of its employees under Louisiana Worker's Compensation law, it is important to understand the history of relevant Louisiana law.

In 1952, the Louisiana legislature established express statutory authority for the coverage of occupational diseases under Louisiana's workers' compensation law. The legislature rejected the notion of blanket coverage for all occupational diseases, and instead chose a moderate approach. The early legislation provided compensation for contraction of occupational diseases, which were placed into two categories:

One category included specifically listed diseases, namely conditions caused by exposure to X rays or radioactive substances, asbestosis, silicosis, dermatosis, and pneumoconiosis. The other category identified diseases by causative agents.

In 1975, it was recognized that many employment-related diseases did not fall into the two enumerated categories. Accordingly, the occupational disease statute was amended, setting forth a new definition of "occupational disease." The list of specific diseases for which there was coverage under workers' compensation was removed, and substituted for the following: "[a]n occupational disease shall mean only that disease or illness which is due to causes and conditions characteristic of and peculiar to the particular trade, occupation, process, or employment in which the employee is exposed to such disease." Through this amendment, the legislature was signaling its acceptance of a broader and more expansive definition of "occupational diseases" for which workers could seek compensation. Originally, La. R.S. 23:1031.1 provided as follows:

- Every employee who is disabled because of the contraction of an occupational disease as herein defined, or the dependent of an employee whose death is caused by an occupational disease, as herein defined, shall be entitled to the compensation provided in this Chapter the same as if said employee received personal injury by accident arising out of and in the course of his employment.
- An occupational disease shall mean only that disease or illness which is due to causes and conditions characteristic of and peculiar to the particular trade, occupation, process, or employment in which the employee is exposed to such disease.

In 1989, the legislature again amended the definition of "occupational disease" to exclude certain conditions, including degenerative disc disease, spinal stenosis, arthritis of any type, mental illness, and heart-related or perivascular disease. In 1990, the legislature specifically clarified that carpal tunnel is considered an occupational disease.

Through these amendments, the current and applicable Louisiana Workers' Compensation "Occupational Disease" statute is as follows:

- Every employee who is disabled because of the contraction of an occupational disease as herein defined, or the dependent of an employee whose death is caused by an occupational

disease, as herein defined, shall be entitled to the compensation provided in this Chapter the same as if said employee received personal injury by accident arising out of and in the course of his employment.

- An occupational disease means only that disease or illness which is due to causes and conditions characteristic of and peculiar to the particular trade, occupation, process, or employment in which the employee is exposed to such disease. Occupational disease shall include injuries due to work-related carpal tunnel syndrome. Degenerative disc disease, spinal stenosis, arthritis of any type, mental illness, and heart-related or perivascular disease are specifically excluded from the classification of an occupational disease for the purpose of this Section.
- Notwithstanding the limitations of Subsection B hereof, every laboratory technician who is disabled because of the contraction of any disease, diseased condition, or poisoning which disease, diseased condition, or poisoning is a result, whether directly or indirectly, of the nature of the work performed, or the dependent of a laboratory technician whose death is the result of a disease, diseased condition, or poisoning, whether directly or indirectly, of the nature of the work performed shall be entitled to compensation provided in this Chapter the same as if said laboratory technician received personal injury by accident arising out of and in the course of his employment.
- As used herein, the phrase "laboratory technician" shall mean any person who, because of his skills in the technical details of his work, is employed in a place devoted to experimental study in any branch of the natural or applied sciences; to the application of scientific principles of examination, testing, or analysis by instruments, apparatus, chemical or biological reactions or other scientific processes for the purposes of the natural or applied sciences; to the preparation, usually on a small scale, of drugs, chemicals, explosives, or other products or substances for experimental or analytical purposes; or in any other similar place of employment.
- Except as otherwise provided in this Subsection, any disability or death claim arising under the provisions of this Subsection shall be handled in the same manner and considered the same as disability or death claims arising due to occupational diseases.
- Any occupational disease contracted by an employee while performing work for a particular employer in which he has been engaged for less than twelve months shall be presumed not to have been contracted in the course of and arising out of such employment, provided, however, that any such occupational disease so contracted within the twelve months' limitations as set out herein shall become compensable when the occupational disease shall have been proved to have been contracted during the course of the prior twelve months' employment by a preponderance of evidence.
- All claims for disability arising from an occupational disease are barred unless the employee files a claim as provided in this Chapter within one year of the date of that:
  - The disease manifested itself.
  - The employee is disabled from working as a result of the disease.
  - The employee knows or has reasonable grounds to believe that the disease is occupationally related.
- All claims for death arising from an occupational disease are barred unless the dependent or dependents as set out herein file a claim as provided in this Chapter within one year of the date of death of such employee (or) within one year of the date the claimant has reasonable grounds to believe that the death resulted from an occupational disease.
- Compensation shall not be payable hereunder to an employee or his dependents on account of disability or death arising from disease suffered by an employee who, at the time of entering into the employment from which the disease is claimed to have resulted, shall have willfully and falsely represented himself as not having previously suffered from such disease.
- The rights and remedies herein granted to an employee or his dependent on account of an occupational disease for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents or relatives.
- **Notice** of the time limitation in which claims may be filed for occupational disease or death resulting from occupational disease shall be posted by the employer at some convenient and conspicuous point about the place of business. If the employer fails to post this notice, the time in which a claim may be filed shall be extended for an additional six months.

After recognizing that an “occupational disease” includes repetitive injuries that result in a gradual deterioration or progressive degeneration, such as carpal tunnel syndrome, the legislature also revised the definition of “accident.” Accordingly, “accident” is defined as follows:

*“Accident” means an unexpected or unforeseen actual, identifiable, precipitous event happening suddenly or violently, with or without human fault, and directly producing at the time objective findings of an injury which is more than simply a gradual deterioration or progressive degeneration.*  
La. R.S. 23:1021(1) (2014). (Emphasis added).

Thus, when an employee becomes disabled due to an occupational disease, he or she may be entitled to workers’ compensation benefits as if said employee received personal injury by accident arising out of and in the course of his employment. However, the employee must show, by a preponderance of the evidence, that the disease or illness is due to causes and conditions characteristic of and peculiar to the particular trade, occupation, process, or employment in which the employee is exposed to such disease.

If an employee has been engaged in the particular work for an employer for less than 12 months, the disease is presumed to have not been contracted in the course of scope of employment. However, an employee can overcome this presumption by a preponderance of the evidence.

Moreover, this statute provides a specific time period for the employee or their respective dependent to file a claim for an occupational disease, being one year when three elements are all met:

- that the disease manifested itself;
- that the employee is disabled from working as a result of the disease; and
- the employee knows or has reasonable grounds to believe that the disease is occupationally related.

All three elements must be met for the one year period to begin to run.

Moreover, this statute provides for death benefits to the dependents of the employee who file a claim within one year of the date of the death of the employee or within one year of the date that the claimant has reasonable grounds to believe that the death resulted from an occupational disease. The statute also expressly provides a general defense to such claims where the employee willfully and falsely misrepresented that they did not previously suffer from the specific occupational disease when they were hired.

Moreover, the employer is required to “post at a convenient and conspicuous point about the business,” notification of the time limitation for filing any claim for an occupational disease. If the notice is not properly posted, the time limitation for filing a claim of one (1) year is extended for an additional six (6) months.

In interpreting this statute, the Louisiana Supreme Court has reasoned that the occupational disease section of the workers’ compensation act is essentially concerned with the claimant’s proof that there is a relationship between the employment and the disease, such that the employer should bear the cost of the resulting disease or disability. Thus, the Louisiana Supreme Court has found that **causation is the central determinant** in assessing which risks are properly institutionalized as risks of employment and which risks properly remain in the tort system. *Arrant v. Graphic Packaging Inter., Inc.*, 2013-2878 (La. 5/5/15), 169 So.3d 296, *citing O’Regan v. Preferred Enterprises, Inc.*, 98-1602 (La. 3/17/00), 758 So.2d 124.

### **Proving Causation: Disease or Illness Due to Causes and Conditions Characteristic of and Peculiar to Employment**

As stated above, an “occupational disease” for purposes of Louisiana Workers’ Compensation law shall mean only that disease or illness which is due to causes and conditions characteristic of and peculiar to the particular trade, occupation, process or employment in which the employee is exposed to such disease.

The **causal link** between an employee’s occupational disease and work-related duties must be established by a **reasonable probability**. The claimant will fail if there is only a possibility that the

employment caused the disease, or if other causes not related to the employment are just as likely to have caused the disease. *Atkins v. DG Foods*, 48,490 (La. App. 2 Cir. 9/25/13), 125 So.3d 530.

There are several possible interpretations of this language. A condition not normally found in the employment (although present on the occasion in which it was contracted) or one shared by a number of employments (thus not particular to the claimants' employment) may not be sufficient to permit the resultant disease to be covered. See *Geist v. Martin Decker Corp.*, 313 So. 2d 1 (La. Ct. App. 1st Cir. 1975).

A broader interpretation would simply require that the claimant identify his disease as resulting from conditions and causes present in his employment and not by other causes to which the employee, and the general population, might have been exposed. See *Page v. Prestressed Concrete Co.*, 399 So. 2d 657 (La. Ct. App. 1st Cir. 1981). See also *Creekmore v. Elco Maintenance*, 659 So. 2d 815 (La. Ct. App. 1st Cir. 1995) (claimant did not recover because he could not prove that contraction of histoplasmosis came from removal of pigeon nests during employment rather than from the general prevalence of the disease in his geographical region).

Further, in *Hymes v. Monroe Mack Sales*, 28,768 (La. App. 2 Cir. 10/30/96), 682 So.2d 871, the court explained:

*The expression "characteristic of and peculiar to," as used in § 1031.1 B, does not mean that the disease occurs only in persons engaged in the particular employment and not otherwise found among the general public. Rather, it means that the disease must result from the conditions and causes present in the employment and not from other causes to which the claimant and everyone else might have been exposed. Stated otherwise, it means that the disease must originate from conditions in the employment that result in a hazard that distinguishes the employment in character from the general run of occupations.* (Internal citations omitted.)

Our country and state are certainly in very unfamiliar times with the global spread of COVID-19 infections. No Louisiana court has had to address such a mass calamity under Louisiana Workers' Compensation system for causation purposes. However, we do have some guidance from prior court decisions for analogous airborne disease claims.

In *Creekmore v. Elco Maintenance*, 94-1571 (La. App. 1 Cir. 6/30/95), 659 So.2d 815, the claimant alleged that he contracted histoplasmosis, an airborne illness, while removing pigeon nests from a building, as part of his employment. The court rejected his claim for compensation for this occupational illness, reasoning that the "very endemic nature of histoplasmosis" in the area, with the causative spores transmitted by the wind, made it a very common disease in the area. The Court of Appeal accepted the lower court's interpretation, also noting that histoplasmosis spore are ubiquitous in the Mississippi valley and the histoplasmosis disease is very endemic. Further, the court noted that it was an airborne disease. The court stated that the evidence on bird dropping may possibly permit an inference that the claimant contracted histoplasmosis while clearing the nests; however, that evidence did not invalidate the clearly permissible contrary inference that claimant's histoplasmosis was more probably contracted from elsewhere in the area. Accordingly, the court held that claimant did not show his occupational disease was due to causes and conditions characteristics of and peculiar to his employment, for the evidence was that histoplasmosis was a widespread, airborne disease in the area. See also *Johnson v. Marrero-Estelle Vol. Fire Co. No. 1*, 2004-2124 (La. 4/12/05), 898 So. 2d 351 (wherein the Court opined, while discussing sick leave, that "for every other type of sickness, such as the flu, while [an employee] may suffer from it while he is at work, the sickness would generally not arise in the course and scope of his employment").

In *Hymes v. Monroe Mack Sales*, 28,768 (La. App. 2 Cir. 10/30/96), 682 So.2d 871, the court considered an appeal from a ruling that a claimant's perirectal abscess was an occupational disease characteristic to and peculiar to the claimant's employment as a truck driver. Therein, the claimant worked as a truck driver, and, during one of his trips, he experienced a sudden onset of pain in his lower abdomen and groin. Ultimately, he was diagnosed with a large perirectal abscess resulting in necrotizing fasciitis. The trial court found that the abscess was an occupational disease, resulting from his work as a long distance truck driver, as it required that he sit for long periods of time.

On appeal, his employer asserted that he did not prove perirectal abscesses were "characteristic of and peculiar to the occupation of truck driving." The court agreed, finding that the trial court's

characterization of the claimant's work was plainly wrong. The court noted that claimant's expert witness testified that these abscesses were more likely to present in occupations where sedentary work is primary, and jobs where workers sit frequently and for long periods. The expert further opined that while long-term sitting in truck driving could be a contributing factor, it is not a causative one.

The court expressly stated that:

The expression "characteristic of and peculiar to," as used in § 1031.1 B, does not mean that the disease occurs only in persons engaged in the particular employment and not otherwise found among the general public. Rather, it means that the disease must result from conditions and causes present in the employment and not from other causes to which the claimant and everyone else might have been exposed. Stated otherwise, it means that the disease must originate from conditions in the employment that result in a hazard that distinguishes the employment in character from the general run of occupations.

(Emphasis added and internal citations omitted).

It was held that the expert testimony did not provide a reasonable factual basis to isolate any special hazard in truck driving that distinguishes it from the general run of occupations. Namely, the testimony showed that any employee who sits frequently may be susceptible to perirectal abscesses. The court held that this did not satisfy the requirement of conditions characteristic of and peculiar to the claimant's employment. The court further noted that an employment hazard was not any more likely to cause the abscesses than a non-work factor. Accordingly, the court ruled that the abscesses were not characteristic of employment.

The cases cited above could be used to support a reasonable position and basis that COVID-19 in general is not "characteristic of and peculiar to" any type of employment. As in *Creekmore*, COVID-19 has been documented to be airborne and extremely contagious. As a new pandemic virus, researchers cannot state with certainty every conceivable manner how COVID-19 can be contracted. It has been documented that it lingers in the air for long periods of time. It is also documented to live on surfaces for long periods. It is rampant in the United States, and currently Louisiana is becoming a "hotspot" for the virus.

Further, as in *Hymes*, and due to the pandemic nature of COVID-19, it is generally not more likely that a person would contract it due to a work condition than a non-work condition. With few specific occupational exceptions (emergency healthcare providers, lab technicians, etc.), there is nothing overwhelming clear about COVID-19 that would generally make it peculiar to a type of employment when it could theoretically be contracted at any workplace, as in *Hymes*.

However, there is truly no case law in Louisiana factually directly on point, and Louisiana law, unlike some states, does not expressly exclude from its occupational disease statutes, pandemic infections. Accordingly, with the practical liberal application of the Louisiana Workers' Compensation scheme and the massive employment layoffs and practical considerations, it is possible that some of these potential claims could succeed, particularly in certain occupations where a higher rate of exposure to infected people, whether the exposure came from infected co-workers or other persons on the job.

### **Global Pandemic: Other States' Office of Workers' Compensation Responses to COVID-19**

On March 11, 2020, the World Health Organization (WHO) declared the COVID-19 coronavirus outbreak as a pandemic. Certainly, COVID-19 will result, and has already resulted, in asserted workers' compensation claims. However, the state where such claims were made and the law dictating those claims will control the ultimate success.

The United States Department of Labor has published that all federal employees who develop COVID-19 while in the performance of their federal duties are entitled to workers' compensation coverage pursuant to the Federal Employees' Compensation Act (FECA). Indeed, the US Department of Labor has developed new procedures for addressing such claims, thereby dividing employees into "high risk" and non-high risk" employment groups. Employees considered high risk employees need not provide evidence of exposure.

Pennsylvania's Secretary of Labor and Industry, Jerry Oleksiak, announced in a statement that workers "who believe" they have been exposed to COVID-19 in the workplace to notify employers to file a typical "disease-as-injury" workers' compensation claim or an "occupational disease compensation claim.

Michigan Governor Gretchen Whitmer signed an executive order to expand unemployment and workers' compensation benefits to workers who contract or are exposed to COVID-19 at the workplace.

New Jersey created a "question and answer" section for workers, which, among other topics, provides information on filing a workers' compensation claim if the worker contradicted COVID-19 in the workplace. Moreover, New Jersey also stated on this site that workers' quarantined due to COVID-19 exposure during the course and scope of their employment may be eligible for workers' compensation.

The Washington State Department of Labor and Industries has further posted information on its website relating to COVID-19 and workers' compensation claims, stating that under certain circumstances, claims from health care providers and first responders involving COVID-19 may be allowed, and other claims that meet certain criteria for exposure will be considered on a case-by-case basis. However, significantly, the information further provides that, in most cases, COVID-19 is not a compensable work-related condition.

As COVID-19 continues to develop and infect more people, states will continue to issue formal responses to such. As of now, the Louisiana Workforce Commission has not formally or specifically addressed the right of employees to file such claims. However, COVID-19 could be conceivably deemed a compensable "Occupational Disease" under the Louisiana Workers' Compensation Act, as discussed above, if COVID-19 is found to be contracted while arising out of and in the course of employment, and peculiar to or characteristic of a specific employment.

In Louisiana, certain jobs do present more clear opportunities for COVID-19 to be found peculiar to or characteristic of that employment. Although all employers should be prepared should an employee file a workers' compensation claim for the contraction of COVID-19.

### **A Somber Reality: When Coronavirus Results in Death of an Employee**

As of April 8, 2020, Louisiana has surpassed over 17,000 cases of COVID-19. An unfortunate reality is that Louisiana has also reported 652 deaths as a result of COVID-19. The death toll will continue to rise, and employers must be aware of their rights, remedies and obligations should the dependents of an employee allege that the contraction of COVID-19 caused the employee's death.

If COVID-19 is found to be a compensable occupational disease by one or more relevant Louisiana courts, and an employee dies as a result of the virus, an employer may be obligated to pay death benefits.

Proof of dependency is essential to recovery of death benefits, as only those considered dependents are able to recover. However, certain persons are entitled to a conclusive presumption of total dependency. The surviving spouse living with the deceased at the time of the accident or death is presumed to be actually and wholly dependent, as is a child under 18 (or over 18, if physically or mentally incapacitated from earning) who lives with the parent at the time of the injury, and a child up to the age of 23 if that child is enrolled and attending as a full-time student in any accredited educational institution. All other claimants, however, must prove dependency as a matter of fact. They must establish a need for the financial contributions of the deceased and also that such contributions were made by him during the year preceding the fatal accident.

Though the amount of death benefits is based upon a percentage of the pre-disease wages of the employee subject to the maximum payout, which is currently \$688.00 per week, the indemnity death benefits owed are determined based upon the number of dependents and the level of dependency.

### **Other Possible Claims Resulting from COVID-19: Mental Injuries**

As the effects of COVID-19 continue to spread, more people will end up seeking medical and related care, thus, placing an incredible burden on certain employees. It is already apparent that some types of employment are under an extreme amount of stress responding to the outbreak of COVID-19. As such, employers, particularly in certain fields, need to be aware than employees could seek workers' compensation, mental disability indemnity and medical claims as a result of this "extraordinary stress."

In Louisiana, as well as in other jurisdictions, workers' compensation cases involving mental injury or trauma are grouped by courts into two main categories: (1) cases in which physical trauma results in the development of mental injury (physical/mental injuries); and (2) cases in which mental stress or stimulus causes "purely mental" injuries, or injuries that are not accompanied by any physical trauma (mental/mental injuries). Mental/mental injuries could become commonplace claims following COVID-19.

These claims are not compensable unless the result of a "sudden, unexpected, and extraordinary stress" related to the employment. Though mental, the claimant is required to prove by clear and convincing evidence that the condition was precipitated by an unexpected and unforeseen event that occurs suddenly or violently. La. R.S. 23:1021(8)(b). It is not enough for a claimant to show that the mental injury was related to general conditions of employment or to incidents occurring over an extended period of time. Without the identifiable "extraordinary stress", general allegations of an inability to work due to stress or tension in the workplace cannot form the basis of a compensable claim.

## **Conclusion**

Although the burden of proof in establishing causation for COVID-19 as a covered employment occupational disease will be difficult for claimants to meet, COVID-19 may provide the ideal unique disease to allow employees to meet this significant burden. COVID-19 has certainly placed a strain on certain occupations, and the extraordinary exposure possibilities and stress employees are currently experiencing may not be considered "typical" of normal workplace stress. With this in consideration, the question becomes what should employers currently do?

## **Proper Measures to Implement in Anticipation of Potential Claims**

In order to diminish and reduce any reasonable probability that any claim of COVID-19 was contracted "on the job", through any employment related activity or from an infected co-employee, it is highly advised that all proper safety measures be immediately taken to shield and protect your workforce from contraction of the disease, including but not limited to the following:

- Posting throughout the place(s) of employment, company vehicles, emails, etc., and with continuous written updates to all employees, managers, supervisors, and all persons on the business premises, the requirement for following all reasonable safety measures, including all CDC hygiene guidelines for handwashing, sanitation, personal protective gear, social distancing, quarantine measures, and all proper measures;
- Removing employees who test positive (or who have any family member or other relevant person who has tested positive), or who have any symptoms of COVID-19, from the workforce immediately;
- Follow all federal and state proclamations on business shutdown of operations and allowed essential business functions; and
- Notify on a continuous basis in writing all employees and all persons on the business premises, of the requirement to follow all aforementioned measures to protect them from contraction of COVID-19.

## **Defense Measures Upon Notification of an Alleged Occupational Disease Contractation of COVID-19**

Upon notification of any potential claim by an employee and/or dependent of a deceased employee, alleging any potential for occupationally contracted COVID-19 claim, it is imperative that the employer conduct immediate investigatory measures, including:

- Obtaining all relevant personnel and employment file documentation, clarifying the specific job duties and requirements outlining the specific nature of the employee's particular job duties for evaluation of any possible unique causal exposure connection basis for COVID-19 contractions;
- Obtaining all pertinent information regarding all recent habits, company cell phone and dispatch records verifying all locations, points of travel and activities of the employee, both on the job and off the job;
- Obtaining all pertinent medical records, death certificate records, and obituary information, through a medical release if needed, to expedite receipt of such information for evaluation of the claim and issuing the relevant Louisiana Workforce Commission Forms; and
- Obtaining any and all pertinent social media public posts, recent travel information, other jobs held, family or friend health conditions and interactions, and other information which may provide probative evidence that the contraction of the COVID-19 virus was not occupationally related nor unique to the peculiar job duties of the employee.

We are faced with a very challenging employment related development in our state which has the potential for creating a multitude of workers' compensation COVID-19 related claims. Each case will be evaluated and decided on a case-by-case basis, specific to the facts of each case.

A proactive and thorough approach is recommended on an expedited basis in anticipation of such claims. We are here to assist you throughout this process!



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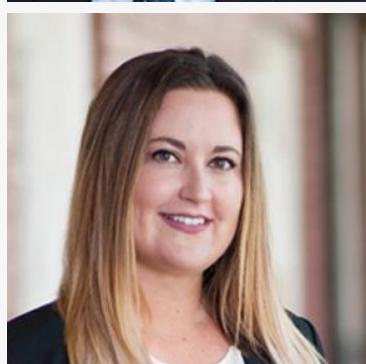


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