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### Workers' Comp and Contagious Disease: History and Future

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# Workers' Comp and Contagious Disease: History and Future

By Kate E. Britt

**M**odern workers' compensation schemes set out to provide financial relief to employees who contract an occupational disease during employment, like miners contracting black lung or contractors exposed to asbestos. Certain professions are understood to stand a particular risk of exposure to contagious diseases. Health-care workers interact with persons carrying contagious disease as a matter of course. What workers' compensation does not cover are diseases which are so prevalent they are considered an "ordinary disease of life." These diseases, like the common cold, influenza, or pneumonia, could be contracted by persons regardless of their profession, and workers' compensation acts generally limit employers' liability for such diseases.

With millions of Americans deemed essential workers during the COVID-19 pandemic, the line between occupational disease and ordinary disease of life is blurred. While many employees are obligated to work from home in order to reduce the risk of exposure to SARS-CoV-2, many businesses remain open, with employees dependent on the protections provided by employers.

This article briefly reviews how various contagious diseases have been handled by workers' compensation and compares the current pandemic to its predecessors.

## Historical outlook

Historically, workers' compensation acts only covered "personal injury or death by accident arising out of and in the course of employment."<sup>1</sup> Claimants would need to establish that they contracted a disease via a workplace "accident" (e.g., a scratch that exposed them to bacteria) to receive benefits.<sup>2</sup>

Even in the early days of workers' compensation, judicial interpretation of statutes provided workers with coverage for certain diseases. A 1921 article by Carl Hookstadt on workers' compensation for occupational diseases discusses "non-occupational" diseases "for which compensation is usually granted."<sup>3</sup> This article lists typhoid fever and pneumonia as diseases for which employees may receive compensation but makes no mention of the H1N1 influenza that ravaged the world in the preceding three years and is estimated to have taken 675,000 lives in the United States alone.<sup>4</sup>

Now states explicitly address occupational diseases, which are generally defined as "a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment, and shall exclude all ordinary diseases of life to which the general public are exposed."<sup>5</sup> Some occupational diseases are explicitly listed in statutes, which may create a presumption of coverage in certain circumstances.<sup>6</sup> For example, several states specify that certain occupations like firefighters, paramedics, police officers, and others are eligible for compensation if workers contract HIV in the scope of their employment.<sup>7</sup> This ex-

pands coverage beyond the medical field to those who may be called upon to be in close contact with individuals carrying infectious diseases.

If their disease and occupation are not explicit in the statute, other claimants must prove certain elements to obtain workers' compensation benefits. First, the plaintiff must prove a causal connection between the disease and the occupation, including a "peculiarity" requirement such that "the claimant's occupation...substantially contributed to the progression of the disease or put the claimant at an increased risk of contracting the disease" (e.g., construction workers exposed to asbestos during a demolition).<sup>8</sup> If the disease is not peculiar to the occupation, the claimant must establish a substantial connection between the disease and their work.<sup>9</sup> This is often a high bar for employees, requiring claimants to prove a negative in showing that their non-work activities did not also put them at risk. Additional difficulties for employees in this situation include the factors that diseases often lay dormant before symptoms emerge, employees may not report disease-transmitting incidents to their employers in a timely manner, and claims may be barred by statutes of limitations.

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The 1979 North Carolina Supreme Court case *Booker v. Duke Medical Center* was among the first to find that hepatitis qualified as an “occupational disease,” as the decedent came into contact with hepatitis-infected blood as a laboratory technician.<sup>10</sup> The court held that in such situations, “proof of a causal connection between the disease and the employee’s occupation must of necessity be based on circumstantial evidence.”<sup>11</sup> The court described three circumstances to be considered in making this decision: “(1) the extent of exposure to the disease or disease-causing agents during employment, (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee’s medical history.” The evidence in *Booker* explicitly described the decedent’s history with drugs, alcohol, and needles; presumably any blemish on his record would amount to disqualifying “exposure outside employment.”<sup>12</sup>

In the mid-2000s, workers’ compensation experts considered the specter of avian flu and determined that “[s]imply catching the avian flu at the workplace—for example, from a coworker or a customer—would not be sufficient to receive workers’ compensation insurance coverage.” Rather, the employee would need to demonstrate either that there was a proximate link between the disease and [their] employment or that [they were] subjected to some “special exposure in excess of that of the commonality.”<sup>13</sup>

Michigan’s Workers’ Compensation Appellate Commission (WCAC) addresses cases where employees venture to meet the burden of proof showing occupational contraction of contagious diseases. For example, in 1999 the WCAC affirmed an open award

of benefits for the occupational contraction of AIDS.<sup>14</sup> In contrast, in 2005 the WCAC held that a plaintiff did not meet the burden of proof to show she contracted herpes simplex virus at work.<sup>15</sup>

## COVID-19

Employers must balance a variety of factors when considering how to deal with communicable diseases in the workplace including the mode of transmission, rates of infectivity, severity of the illness, which workers would be at risk, effectiveness of screening, and the risk posed to the public.<sup>16</sup> If workplace sick-leave policies are overly restrictive, employees are encouraged “to file workers’ compensation claims for their illnesses. These are valid claims and will be more expensive to resolve under the workers’ compensation system than as a group health problem.”<sup>17</sup> Needless to say, COVID-19 would be considered on the worst end of each factor and, without a governmental response, each workplace has (or hasn’t) modified its policies however the employer has seen fit.

One would think that it would not be permissible for a workplace to operate under the threat of a communicable disease with such high risk factors. Somehow, COVID-19 is so far past the line of impermissibility that it circled back to permissible. This virus is so widespread, it appears it is being treated as “an ordinary disease of life, to which the general public is equally exposed outside of employment.”<sup>18</sup>

This leaves many employees at the mercy of their employers, who are responsible for providing personal protection equipment, enforcing safety measures, and otherwise

creating a workplace that minimizes the risk of spreading SARS-CoV-2. Unfortunately for many employees, if they cannot meet the burden of proof for a workers’ compensation claim, they probably will not be able to sue their employer for negligence under tort law. According to a September Congressional Research Service report, “employer-defendants have invoked the workers’ compensation bar as a defense in several cases in which employees allege that their employers negligently caused them to contract COVID-19.”<sup>19</sup> It remains to be seen how COVID-19 litigation will play out in the courts.

While it took years to specifically recognize HIV in statutory language, COVID-19 is being addressed quickly in states across the nation, including Michigan. Under the Workers’ Disability Compensation Agency Emergency Rules of October 16, 2020, employees who contract COVID-19 can receive workers’ compensation benefits under very specific circumstances that vary depending on the type of employment. Any “first-response employee” (a group that includes most health-care workers, law enforcement officers, firefighters, and correctional officers) who is confirmed as COVID-19 positive on or after March 18, 2020, is presumed to have suffered a “personal injury.”<sup>20</sup>

Michiganders in any other line of work who contract COVID-19 (regardless of whether they are deemed essential workers) bear a greater burden of proof to receive benefits. They must both prove a positive COVID-19 diagnosis and identify a specific date and/or location of a specific exposure.<sup>21</sup> While it remains to be seen how litigation will shake out in this arena, positively connecting the employee’s exposure to a workplace incident would be very difficult in practice, since individuals can be exposed to SARS-CoV-2 while participating in external, non-work activities (e.g., spending time with family or friends, shopping). As contact tracers all over the world have found, COVID-19 is an elusive disease; symptoms may take days to emerge or may never emerge at all. What is more, unlike HIV, simply being exposed to SARS-CoV-2 is unlikely to trigger workers’ compensation benefits.<sup>22</sup>

Last year in Michigan, state Sen. Dale Zorn tried to limit employee recovery even further, introducing 2020 SB 1019 under which employers who follow federal and state guidelines for coronavirus epidemic re-opening and safety protocols are not liable for employee claims under an injured workers' compensation law.<sup>23</sup> On the other side of the aisle, several pending bills aim to expand workers' compensation protections to more "essential workers." These bills are linked from the National Conference of State Legislatures' page on COVID-19 and workers' compensation.<sup>24</sup> This site is an excellent resource for information on how various states are handling this crisis.

There is a lot of scattered information online regarding executive orders, emergency rules, and changing laws. To find the current rules for Michigan Workers' Disability Compensation, go directly to the Michigan Department of Labor and Economic Opportunity website at [https://www.michigan.gov/leo/0,5863,7-336-94422\\_95508---,00.html](https://www.michigan.gov/leo/0,5863,7-336-94422_95508---,00.html) [https://perma.cc/83GG-RZS3]. ■



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8. *Id.* at 945.
9. *Id.*
10. *Booker v Duke Medical Ctr*, 297 NC 458; 256 SE 2d 189 (1979).
11. *Id.* at 476.
12. *Id.* at 476-477.
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## ENDNOTES

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