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COVID-19: FAQs for Wisconsin Worker's Compensation

The scale of COVID-19 and its impact in the United States is uncertain. Employers, insurers and third party administrators need to be proactive and prepared. What steps should employers and insurers take to minimize the legal risks and reduce the loss to business? What types of claims can employers and insurers expect to have increase as a result of the COVID-19 situation? How does the current situation impact other types of claims which are already pending? At Arthur Chapman, our practice groups have teamed up to develop an action plan for clients to help protect their businesses on several fronts, including worker's compensation claims, employment issues, insurance coverage, and construction. Businesses must continually monitor developments and update their action plans accordingly. Below are some general FAQs to offer a starting point.

1. How do we determine compensability in the Wisconsin worker's compensation arena; what factors are considered when someone claims contraction of COVID-19 in the workplace?

Many employers and insurers are concerned about potential compensable claims for contracting COVID-19. Pursuant to the Wisconsin Worker's Compensation Act, and as with any claim, an individual has the burden of demonstrating that contracting COVID-19 arose out of and in the course of employment. The more widespread the virus is, the more difficult it will be to demonstrate that contracting the virus arose out of and in the course of employment. There are some industries, mainly healthcare, where the Employee may be able to more easily meet the necessary burden. If an individual worker is directly taking care of and caring for a person/people who have tested positive for COVID-19 and then that worker is diagnosed and tests positive for COVID-19, the worker may be able to more easily meet his or her burden of proof. The employee will always have the burden of proof in demonstrating the necessary causation standard. Because of the prevalence in many communities, most employers and insurers in non-health care related industries are denying primary liability for COVID-19 claims. Initial investigation of these types of claims can include inquiries into whether anyone in the employee's household has been exposed or tested, whether anyone in the household is working outside of the home, if the employee or anyone else in the household is still going to stores, family or friend's homes, etc. This could provide information about potential alternative sources for the exposure, other than the employee's job location. Investigation would also include discussions with the employer regarding any reports of exposure, testing, etc., by other employees and/or family members, in order to determine whether it would even be a feasible opportunity for the employee to alleged causation at work. This type of investigation is similar to any other assertions of claims for respiratory claims, dermatological claims, or other types of exposure situations where a source outside of work could be the reason for the condition.

2. Are Wisconsin Worker's Compensation wage loss benefits during layoff/shut downs?

This is a key area of concern being discussed by many employers. Specifically, are benefits due to individuals who are still within the healing period, who were working at no or minimal wage loss, but cannot continue to work because of the State of Wisconsin Safer at Home policy or other associated state mandated shut down or business closure. The answer is, generally, if an employee is still within the healing period, has restrictions, and the layoff is not part of a union collective bargaining agreement shut down, the employee is going to be entitled to temporary total disability benefits. In *Wittmann v. Consolidated Lumber Co.*, Claim No. 2007-035429 (LIRC September 30, 2014), the Commission affirmed a denial of temporary disability benefits after a layoff because it determined that the employee was no longer in the healing period and no restrictions had been imposed during the period of time after the layoff. The case does note, however, that, had a physician actually imposed temporary work restrictions and the employee had not reached the end of healing, he would have been eligible to claim temporary total disability under Wis. Stat. 102.43(9) unless suitable employment within such restrictions was furnished by the date of injury employer or another company.

If an employee has restrictions that expire during the time the business is shut down, then technically that employee will no longer be entitled to ongoing wage loss benefits. If the reason the restrictions expire is because the medical appointment to re-evaluate the restrictions is canceled due to the COVID-19 situation, some employers are opting to assume the restrictions would continue in place until the next rescheduled visit. This is not required but is being done by a number of companies for "optics" and compassion purposes. However, there may be options. Often times a telemedicine appointment can be scheduled instead. Nurse case managers have been working diligently to try and get those scheduled to facilitate addressing ongoing restrictions and work ability, along with ongoing medical care.

Similarly, if an employee is on restrictions "until next office visit" and the appointment cannot occur because of the COVID-19 situation, pushing for a telemedicine appointment might be an opportunity and potential way to secure updated or adjusted restrictions. This is particularly important for those companies who are considered an essential business and could accommodate restrictions if they are adjusted, etc. While a telemedicine visit is not possible in all cases, this is being done more and more often. An employee who refuses an offer of work within his or her restrictions has, arguably, refused a suitable job offer. This could be subject to a judge's discretion and benefits would be owed if a judge were to determine that the refusal was in fact reasonable given the circumstances.

If the layoff is, unfortunately, permanent in nature because the company cannot resume business efforts and rehire the employee as a result of COVID-19 economic considerations, an employee could have a claim for vocational permanent partial disability/ loss of earning capacity benefits, if the healing period had ended and the employee remains within the statute of limitations for his or her injury.

3. How are claims for injuries alleged to occur while working at home treated

An employee can, potentially, sustain a compensable work related injury while working at home, just as if the employee were at an employer's facility. The injury must still arise out of and in the course of employment. Claims and defenses will focus, primarily, on personal comfort situations versus deviation of employment considerations. In *Augustine v. Kenosha Vising Nurse*, WC Claim No. 1998-064631 (LIRC September 13, 2000), the court awarded benefits to an employee who was injured while walking to her car, from her house, to retrieve more paperwork. In this case, her employer had given her permission to do paperwork at home. When employees are required to work at home because of COVID-19 situations, a similar analysis will apply. Under Wis. Stat. 102.03(1)(c)(4), an employer's premises includes the premises of any other person on whose premise the employee performed services. Each situation will be very fact dependent. We can also anticipate that there may be ergonomic-related injury claims, as many employees are not set up to work long term at home. As in all cases, the initial investigation by the employer and the adjuster will be very important. Finding out as much information as possible about the specific facts will be imperative. For example, the investigation likely needs to include inquiries about what an employee was doing at the time of the injury, where he or she was located, what task was being performed, whether there is the potential for a deviation to be asserted (i.e. the employee was going down the stairs to get laundry as compared to going back up the stairs to resume him or herself into the course of employment), if there is the possibility for the very expansive comfort doctrine to be applicable, etc. A check list for investigation of these injuries is attached.

4. Are we still able to complete Independent Medical Examinations?

There are some independent medical examiners who are unwilling to conduct examinations because of the COVID-19 situations. Likewise, some of the IME scheduling companies have canceled currently scheduled evaluations, for a period of time. In these situations, there is no ability to discontinue ongoing wage loss benefits because of the inability to have an examination performed. In these situations, many employers and insurers are turning to medical record reviews as an alternative. A supportive medical record review report from an independent medical examiner regarding causation, restrictions, etc. is sufficient to allow a decision to be made by an adjuster on a claim and/or temporary benefits to be suspended. If a medical records review is not supportive of a denial, it does not need to be disclosed. Further, an in person independent medical examination could still be performed in the future, regardless of whether the records review is disclosed. While having an in person examination is always preferred to a medical records review prior to a hearing, the records review is a nice option in this uncertain time in order to potentially be able to not pay or stop paying benefits.

Other doctors, however, are willing to conduct the examinations. If an employee is unwilling to attend the examination because of concerns over COVID-19, that will likely be considered a reasonable basis and benefits are unlikely able to be suspended. Generally, the Department policy is that one failure to attend/ no show examinations affords an adjuster or counsel the ability to request that the Department require an employee to attend an examination. A subsequent failure to attend the examination is considered failure to comply with a Department order and allows for benefits to be terminated. An employee would not be entitled to benefits during the period of time he or she is not complying with benefits. We may well find that a judge will not issue this type

of Order until after the COVID-19 concerns are reduced. If an employee is a “repeat offender” then there may be more of an argument. However, a judge does need to issue an order, and then have an employee fail to attend, in order for benefits to be suspended pursuant to policy.

5. Are Worker’s Compensation Hearings going forward in Wisconsin?
The Division of Hearings and Appeals has suspended all in person mediations, pre-hearings and hearings. These are all converted to telephone proceedings or video conferences (for mediations). The hearings are further converted into settlement conferences. The initial tentative date for resumption of in person appearances was April 20, 2020. However, the subsequent Safer at Home Order will likely push this tentative date out at least another one week, and likely longer. The Division of Hearings and Appeals is sending out formal revised notices as applicable. The date and time of each proceedings remains the same.

6. Resources available on the Department of Workforce Development website.

The Department of Workforce Development, Worker’s Compensation Division, has provided the following public information about COVID-19 in the context of worker’s compensation.
https://dwd.wisconsin.gov/covid19/public/wc.htm

There is also a separate link on the Department website for employers with questions about unemployment benefits.
https://dwd.wisconsin.gov/covid19/public/ui.htm

Finally, the overall Department link with reference points to the CDC website and Wisconsin Department of Health Services, for any additional inquires is at:
https://dwd.wisconsin.gov/covid19/public/

Click here for other COVID-19 FAQs for Employment, Coverage, and Worker's Compensation.

Do you have questions? Reach out. We would be happy to help.

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