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SPECIAL REPORT

COVID AS AN OCCUPATIONAL DISEASE
HOW DO VARIOUS STATES HANDLE THESE CLAIMS?

IN THIS ISSUE...

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Professor Duff is widely considered a national expert on workers' compensation law and on the National Labor Relations Act. He has written extensively on various complex labor and employment matters and has been quoted frequently on such matters in various national publications including the Associated Press, the Guardian, Bloomberg Law, the Huffington Post, the Nation, ThinkProgress, In These Times, WorkCompCentral, Law 360, Moyers on Democracy, and Politico. Professor Duff is the author of a workers' compensation textbook and the co-author of a labor law textbook, each published by Carolina Academic Press. He is also the author of the only treatise on Wyoming Workers' Compensation Law (published by CALI eLangdell Press). Professor Duff is founder and co-editor of the highly-regarded Workers' Compensation Law Professors' Blog, which was cited in a 2018 Rand Corporation study on workers' compensation.

Professor Duff teaches the College of Law's courses in Torts, Labor Law, Workers' Compensation Law, and Evidence. He has also taught Bankruptcy, Employee Benefits Law, Administrative Law, Alternative Dispute Resolution in the Workplace, and Introduction to Law. In 2020, students selected Professor Duff "Most Outstanding Faculty."

An experienced legal practitioner, Professor Duff spent nearly a decade working as an attorney, adjudicative official, and investigator in various National Labor Relations Board offices immediately prior to joining the College of Law's faculty. Before engaging in federal government law practice, Professor Duff worked for two years as an associate attorney in a high-volume, progressive law firm in Maine—McTeague, Higbee & MacAdam—where he represented injured workers and labor unions. In his work life preceding the study of the law, Professor Duff was for eleven years a Teamsters shop steward and blue-collar ramp service worker in the airline industry, leaving that occupation in 1992 to study labor law at the Harvard Law School.

Professor Duff enjoys playing his Martin and Gretsch guitars but should have listened more closely to his late dad (a jazz guitarist) about the virtues of maintaining technically precise hand positions.

WORKERS' **F1RST** WATCH
SPECIAL REPORT

WILG® is the National Non-Profit Membership Organization dedicated to representing the interests of millions of workers and their families who, each year, suffer the consequences of work-related injuries or occupational illnesses and who need expert assistance to obtain medical care and other relief under Workers' Compensation programs. WILG® is a network of like-minded advocates for Workers' Rights, sharing information and knowledge, a sense of commitment and kinship, and networking to help each other and our clients.

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TABLE OF CONTENTS

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COVID-19 AS AN OCCUPATIONAL DISEASE: THE CHALLENGE FOR WORKERS' COMPENSATION

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Professor Emeritus
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PART A:

OCCUPATIONAL DISEASES PRIOR TO COVID-19

I. Introduction to Workers' Compensation

Workers' compensation programs provide cash benefits and medical care to workers who are disabled or killed by work-related injuries and diseases. The programs emerged in the U.S. in the early 1900s because of concerns over the increasing numbers of industrial accidents and deaths and dissatisfaction with the reliance on tort suits to compensate injured workers.[1] Workers seldom won these suits because they could not demonstrate their employers were negligent and employers were unhappy when they lost because the damage awards could be substantial. Workers' compensation statutes relied on a Grand Bargain between the parties: a worker could receive benefits even when the employer was not negligent, while limited statutory benefits became the worker's exclusive remedy against the employer for workplace injuries and diseases.[2]

While a workers' compensation program for Federal workers was enacted in 1908, the interpretation of the U.S. Constitution in the early 20th Century precluded a federal program for private sector or state and local government employees, and so of necessity state laws provided the source of protection for most disabled workers. Between 1911 and 1920, most states enacted workers' compensation statutes and all states had programs by 1948.

Although a federal statute covering all workers would have been constitutional since the 1930s, the states have continued to provide the protection for most workers without federal standards or oversight. One consequence is that there are differences among states in which workers and employers are covered, in which injuries and diseases are compensable, in the amounts of cash and medical benefits provided to disabled workers, and in the insurance arrangements relied on to deliver the benefits.

The COVID-19 pandemic highlights the challenge of determining whether employees who contract a highly contagious disease qualify for coverage under workers' compensation. As discussed in Section II, not all workers are covered by workers' compensation programs. And, as discussed in Section III, while workers no longer have to prevail in tort suits to received awards from employers for their work injuries, there are legal tests for injuries and diseases that workers must meet for their conditions to be compensable.

II. Which Workers Are Covered by Workers' Compensation?

The National Academy of Social Insurance is the prime source of national data on the benefits, coverage, and costs of state and federal workers' compensation programs. The latest report (Murphy, Patel, Weiss, and Boden 2020) provides estimates of the extent of the U.S. jobs covered by workers' compensation in 2018 in a two-stage process.

In stage one the number of jobs for which employers are required by law to provide workers' compensation benefits is compared to the number of jobs covered by the states' unemployment insurance (UI) programs. In 2018, there were 143.338 million jobs covered by the state UI. Programs. Of these UI covered jobs, there were 139.823 million jobs covered by state workers' compensation programs, which means that state workers' compensation programs covered 97.5 percent of the jobs covered by state UI programs. (The shortfall of workers' compensation covered was explained by 899,672 workers who worked for small firms, by 391,011 agricultural workers, and by 46,325 Texas workers whose employers had not elected to provide workers' compensation coverage. [3])

In stage two, the total number of all jobs covered by state and federal workers' compensation programs (142.618 million) was divided by the total number of jobs in the U.S. (164.417 million), which indicated that 86.7 of all jobs in the U.S. were covered by state or federal workers' compensation programs. The differences between stages one and two are (1) the inclusion of federal workers in stage two; (2) the inclusion of self-employer persons in stage two; (3) the inclusion of independent contractors, including Gig workers, in stage two.

Two recent developments have threatened the extent of coverage of both the workers' compensation and UI programs. First is the increased classification by employers of workers as independent contractors rather than employees, thereby avoiding

the requirement to provide workers' compensation and UI, coverage (Weil 2014). Second, and related to the first development, is the emergence of the Gig economy, where Uber, Lyft, and other companies treat workers as independent contractors even though the normal legal tests indicate the workers are employees and thus entitled to UI, workers' compensation, and other benefits.

The most recent development involving Gig employees involves California. A 2019 state law classified Gig workers as employees, thereby entitling the workers to workers' compensation, UI, overtime pay, and other employee benefits. The law was upheld in the California courts, but was nullified by a November 2020 ballot proposition that exempts companies like Uber and Lyft from having to treat their workers as employees (Schelber and Conger 2020). The success of Uber and Lyft in California raises concerns about whether similar efforts to consider Gig workers as employees in Illinois, Massachusetts, New Jersey, and New York will succeed (Gerstein 2020).

The significance of this discussion of the lack of universal coverage of all employees by workers' compensation (or other social insurance or protective laws, such as UI) is that efforts to confront a pandemic such as the spread of COVID-19 are to some extent limited by the coverage shortfalls of these programs. More than ten percent of all jobs will be missed if workers' compensation is used as a key component of the defense against a pandemic. I return to this point in Section VII.

III. Which Injuries and Diseases Were Compensable by Workers' Compensation Before the COVID-19 Pandemic?

Most workers' compensation programs use different legal rules to determine which injuries are compensable and which diseases are compensable.[4] This first subsection discusses the traditional approaches to determining compensability of injuries and the second subsection discusses the traditional approaches to determining compensability of diseases. The National Commission (1972,137) provided definitions of these concepts: an injury is "damage to the body resulting from an acute traumatic episode," such as an explosion that results in a fracture of the arm, and a disease is "damage to the body from a cause other than an injury," such as exposure to asbestos over an extended period that eventually results in mesothelioma. But the distinction between injuries and diseases in workers' compensation is not so simple: for example, bodily harm from repetitive motion or cumulative trauma, including carpal tunnel syndrome, is classified as an injury in some states (Virginia and Indiana) but as a disease in other states (Missouri and Washington). Moreover, some back disorders, such as discal herniation, are considered diseases by the medical profession but are treated as injuries in many workers' compensation programs (Burton 1985)

A. Compensable Injuries: The Traditional Approaches

A worker must provide evidence that establishes medical causation for a workers' compensation claim based on an injury. Larson (2018, §128.01) indicates the worker must establish the existence, causation, and consequences of the injury. For example, the worker must prove that he has a broken arm, that the injury occurred during his work shift at Euphoria Axel Incorporated (EAI), and that the broken arm affects his ability to work. The claim will be denied if EAI provides evidence that X-Rays provide no indication that the worker had a broken arm, or that the broken arm occurred while the employee was on a vacation in a distant location where she was injured while shooting the rapids on a raft, or in a claim for Permanent Total Disability (PTD) Benefits that the broken arm was completely healed by the Date of Maximum Medical Improvement.

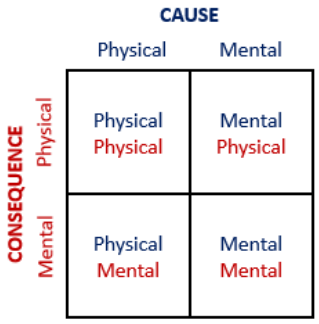
Even if a worker can establish medical causation for the claim, the workers must also meet four legal tests in order to receive workers' compensation benefits in most states: (1) there must be a personal injury (2) resulting from an accident that (3) arose out of employment (4) and in the course of employment. In order for the injury to be compensable, all four legal tests must be met. Most work-related inju¬ries can meet these four tests, although there are thousands of cases testing the exact meaning of each of these four steps, and numerous cases where the workers could not the legal tests for compensability.

The Personal Injury Test

The personal injury test examines whether the causes and the consequences of an injury are physical or mental. The two dimensions of the injury test are shown in Figure III.1

Figure III.1

The Injury Test Matrix



The injury test will clearly be met when both the cause and the effect of the personal injury are physical: the "physical-physical" case. (The worker loses a finger when the chain saw slips from his grasp.) Likewise, the injury test will be satisfied in almost all jurisdictions when the cause is physical and the result is both physical and mental: the "physical-mental" case. (The model experiences a disfiguring facial injury when he falls off the runway and suffers a mental breakdown when he realizes his career is over.) Similarly, most states hold the injury test to be satisfied when the mental cause leads to a physical injury: the "mental-physical case." (The softball pitcher is humiliated by the team manager and slashes off her fingers in a rage.) The most problematic cases are those that involve both a mental cause and a mental consequence: the "mental-mental" case. (The HRM Director suffers a mental breakdown after being ridiculed at the company's annual meeting for not aligning the human resource practices with the firm's overall strategies.) Some states deal with mental-mental cases as injuries and some as diseases. Some states do not provide workers' compensation benefits for mental-mental claims.

The Accident Test

Larson (2018, §42.01) indicates "the requirement that the injury be accidental in character has been adopted either legislatively or judicially in the overwhelming majority of states." The phrase "by accident" occurs in 25 states, and another nine states use the phrase "accidental injury" in their statutes. There are, however, variations among these states in their interpretation of the accident test.

The accident test consists of four components: (1) unexpectedness of cause; (2) unexpectedness of result; (3) definite time of cause; and (4) definite time of result. If a state interprets the accident requirement to require the unexpectedness to apply to the cause of the injury, then a worker who is injured because a machine falls on him can receive compensation, while compensation will be denied to a worker who is performing her normal duties of carrying heavy wheat sacks and experiences an unanticipated herniated disc, even though the medical evidence confirms the back disorder was caused by the heavy lifting. However, if the state interprets the accident requirement to mean that the unexpected aspect of the accident requirement can be met by the nature of the result, then the herniated disc caused by the normal but strenuous lifting would be compensable. Most states now find the accident test met if the result of the injury is unexpected.

A similar two-way distinction applies to the requirement of a definite time or event. The cause may be gradual and the result precisely distinguishable, such as dust poisoning that causes a sudden collapse of a lung. Or the etiology may be precisely specified, such as a fall into the river, while the pathology may intermittently progress to pneumonia. Again, the compensability of the lung collapse or the pneumonia depends on whether the court is looking for a definite time that can be assigned to the cause, the result, or both.

The accident test is most readily met when the cause is unexpected and the definite time requirements are met, such as might occur in an explosion. The opposite extreme occurs in some occupational disease cases, where all the elements are lacking. Occupational diseases are discussed in more detail in the next subsection.

A decision by the Supreme Judicial Court of Maine, Matthews v. R.T. Allen & Sons, 262 A.2d 240 (ME 1970) Is an example of the changes in the interpretation of the accident requirement that have occurred in most states over time. Mathews was employed to load pulpwood onto trucks by hand. On November 13, 1967, he began work at 7:00 A.M; he felt pain in his back about 10:30 or 11: 00 A.M. but continued to work; he felt greater pain during the lunch break, but went back to work for about an hour and half after lunch; at that time, the pain was so great that he was unable to continue work. In December a herniated disc was removed and he returned to work in May 1968. During testimony before the Industrial Commission, Matthews testified that the pain began gradually and was not associated with any "specific lifting, slipping, or tripping." The Commission denied his claim for workers' compensation benefits because "We cannot conclude from the testimony that the disc condition which disabled him on November 13, 1967 resulted from any single episode or traumatic incident" and therefore Matthews did not meet the accident test. On Appeal, the Supreme Judicial Court reversed and held that Matthews was entitled to benefits. The opinion included this analysis:

While the early cases usually concerned accidental injuries where an external force was applied to an external portion of the body, our own Court declared early in the development of our law that the term "injury by accident" includes incidents where internal parts of the physical structure break down under external forces, including the stress of labor. While this may more dramatically occur as a result of a slip, a fall or a single unusual strained effort, we have found other such

internal breakdowns to have resulted from the usual work which the workman was performing in his usual, normal way. In short, we construed the term "accident" to include not only injuries which the results of accidents but also injuries which are themselves accidents. . . .

This position is in agreement with that taken by the great majority of America jurisdiction and follows the rule recognized in England which in many respects furnished the model for our own Act. . . . . .

This is not to say, however, that the internal accident must have demonstrated itself by a sudden, dramatic effect upon the victim. . .

We concur in the statement found in 58 Am. Jur, Workmen's Compensation §196:

While the concept of accident is ordinarily understood as embodying a certain degree of element of suddenness in the occurrence of the event, and is frequently so defined, it is not always required that the occurrence be instantaneous.

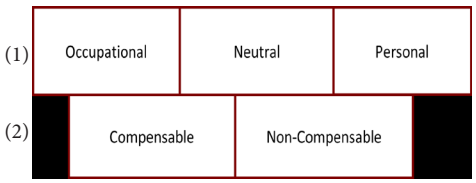
While most states have adopted a "modern" interpretation of the accident test, there are exceptions. Larson (2018 §42.02) discusses Shay v. Rowan Salisbury Schools, 205 N.C. App. 621, 696 S.E2d 763 (2010). Shay was a teacher who normally took the elevator to her classroom on the second floor because "it was difficult for her to walk up the stairs." On November 3, the elevator stopped working for six weeks and so she had to climb the stairs to her classroom. On December 4, her knee "gave out" as she climbed the stairs. An MRI revealed a meniscus tear in her left knee. A majority of the Workers' Compensation Commission held the injury was compensable because climbing the stairs, as opposed to using the elevator, was a sufficient interruption of her routine to supply the "accidental' requirement. The North Carolina Court of Appeals, in a spilt decision, reversed the Commission and indicated that "once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not an interruption of the work routine or otherwise an "injury by accident" under the Workers' Compensation Act." The Court of Appels stressed that the teacher did not stumble, fall, or trip, and therefore she had not suffered an accident.

The Arising Out of Employment Test.

Three Types of Risk. The arising out of employment (AOE) test is used to distinguish among three types of risk that can occur in any workplace, which are shown in Figure III.2: (1) occupational risks, such as machinery breaking, which are universally compensable because they are associated with the employment; (2) personal risks, which are universally non-compensable since they are personal to the claimant, such as a cardiac episode resulting from a drug overdose or a husband shot at work by his wife when she reads his e-mails on his home computer, discovers his betrayal, and rushes to the workplace to express her displeasure, and (3) neutral risks, which may or may not be compensable since the cause of the injury is neither distinctly occupational nor distinctly personal in character or the cause is unknown. The first step in deciding whether a particular case meets the arising out of employment (AOE) test is to decide the category of risk involved in the case.

Figure III.2

Three Categories of Risk



The AOE Test and Personal Risks. The legal inquiry is simple: the worker does not meet the arising out of employment test and does not qualify for workers' compensation benefits.

. **The AOE Test and Neutral Risks.** Most cases will involve either occupational or personal risks, and therefore whether the AOE test is met is easily resolved. If, however, the case is one of the unusual variety that involves a neutral risk, the legal inquiry is complicated because two more steps are necessary. The compensability of neutral risks depends on the type of neutral risk and on the legal doctrine used in the state where the injury occurred.

Among the types of neutral risks are (1) an "Act of God" (or, depending on your philosophical bent, an "Act of Nature"), such as a worker injured by lightning, a wild animal bite, an earthquake, or a similar calamity; (2) an assault by a stranger; (3) "street risks," which are harms such as dog bites, bullets, or other maladies associated with being on a public street; and (4) unexplained death.

There are three legal doctrines currently used to decide the compensability of neutral risks: the choice depending on the state and the type of neutral risk. The increased risk doctrine requires that the job increase the quantity of risk compared to other persons in the area, although the risk does not have to be peculiar to the occupation. A park ranger mauled by a bear would satisfy this test. The actual risk (or normal risk) doctrine allows compensation even if the risk that caused the injury was not common to the public, so long as the risk was an actual or normal risk of this job. A worker in a 24-hour convenience store in a dangerous neighborhood may not face a greater risk of assault by a stranger than anyone else in the neighborhood (which means the increased risk test would not be met), but such an assault is an actual (or normal) risk of being a clerk in such a store, and thus would meet the actual risk test. The positional risk doctrine allows compensation for all injuries that would not have occurred but for the fact the employment placed the claimant in the position where he or she was injured. A worker in a 24-hour store who was in the back room sorting bottles and who is killed by a freak lightning bolt that ricochets through the store could meet the positional risk test, but not the increased risk or actual risk tests.

The AOE Test and Occupational Risks. Larson (2018, §4.01) provides this guidance for Risks Distinctly Associated with the Employment (equivalent to occupational risks in our analysis):

As far as the "arising" test is concerned, this group causes no trouble, since all these risks fall readily within the increased-risk test and are considered work-connected in all jurisdictions.

This statement is questionable for two reasons: (1) surely some risks that injure a worker while he is performing his normal occupation are not risks for which the workplace increases the risk. For example. a delivery driver involved in an auto accident may not face an increased risk compared

to other persons in the general area, and (2) use of the increased risk doctrine for occupational risks in a state that uses the actual risk test or the positional risk doctrine for neutral risks means that a state that follows the Larson analysis would use a more liberal legal doctrine for neutral risks than for occupational risks, which seems anomalous. A better approach for the arising out of employment test is to use the positional risk doctrine for all occupational risks in every state.

The In the Course of Employment Test

The In the course of employment (COE) test is used to decide if the injury is compensable based on the activities the worker is engaged in at the time of the injury. Sometimes the worker is injured while involved in activities that mix social and business functions, such as a softball game sponsored by the employer as a method of promoting loyalty and teamwork. Whether the injury meets the COE test depends on factors such as the statutory language in the state and the degree to which the supervisor encourages the injured worker to participate in the sport.

The COE test is also used to decide if an injury is compensable based on the location and time of the injury. An overly simplistic generalization is that the COE test requires the injury to occur on the employer's premises during working hours. A specific application of the COE test is the "going and coming rule," which generally denies compensability for injuries suffered by employees while commuting to and from work. There are, however, numerous exceptions to this rule. Injuries to workers while commuting have been held compensable when the worker is injured in the parking lot provided by the employer, or while traveling between job sites, or while running an errand for the employer on the way home, or while commuting in a vehicle provided by the employer.

B. Compensability of Diseases: The Traditional Approaches

A worker must provide evidence that establishes medical causation for a workers' compensation claim based on a disease. Larson (2018, §128.01) indicates the worker must establish the existence, causation, and consequences of the disease. For example, the worker must prove that he has a respiratory disease, that the disease resulted from his job as a perfume quality control expert at Induced Euphoria Incorporated (IEI), and that the lung disease affects his ability to distinguish between licentious and lousy fragrances. The claim will be denied if IEI provides evidence from expert testimony that provides no indication that the worker had a respiratory disease, or that the respiratory disease was probably caused by his addition to snuff, or that his job consisted of monitoring fragrance-evaluation machines that required no human sniffing.

The requirements to establish medical causation are nominally the same for injuries and diseases, However, Larson (2018, §128.02) discusses several categories of awards that indicate the elements of medical causation are usually easier to establishes for injuries than for diseases.[5] Moreover, even if the worker can establish medial causation, the worker must also meet the legal tests for compensability of diseases, which in many states are more of an obstacle for workers than the legal tests for injuries. The accident test included in most of the original workers' compensation statutes served to bar compensation for many work-related diseases. Although some diseases contracted as a result of sudden unexpected exposure were held to be compensable, e.g., pneumonia contracted while working in a sudden storm, compensation often was denied for diseases associated with chronic exposure to adverse agents at the workplace, such as coal miners exposed to coal dust who developed coal workers' pneumoconiosis (black lung disease) because the injury did result from an accident.

While some states have eliminated the accident test for occupational diseases, the requirement survives in many jurisdictions. An example where benefits were denied because the worker did not meet the accident test is Combes v. Industrial Special Indemnity, 20 P.3d 689 (Idaho 2000). Combes aggravated a preexisting but non-disabling condition of asthma by gradual exposure to dust, pollen, and animal dander over a three- to six-month period. As result, Combes was permanently and totally disabled. The court ruled (at 692) that because there was no single traumatic event that led to his disability, Combes did not meet the statutory requirement that "one who suffers from an aggravation of an occupational disease must also establish that an accident caused the aggravation."

In addition to the accident test, there are other legal tests that must be met to establish compensability of diseases. Larson (2018: §52.01) summarizes the current variety of approaches which "cover all such diseases": (1) states that include a general definition of occupational diseases, such as Alabama, Florida, and Oregon, (2) states that rely on a broad use of the term "injury," such as California and Massachusetts, (3) states that provide an unrestricted coverage of diseases, such as Wisconsin, (4) states that have an entirely separate act for occupational diseases, such as Montana and Pennsylvania, and (5) states that use a scheduled list of diseases, followed by a catch-all provision for other diseases, such as New York. While Larson indicates these approaches to occupational diseases "cover all such diseases," this statement must be used with caution. Some states require the disease to be peculiar to or characteristic of the occupations of the claimant. Many states preclude compensation for "ordinary diseases of life."

The current North Carolina statute is an example of current laws that include multiple obstacles to establishing a disease is compensable. In Rutledge v. Tultex Corp., 308 N.C. 65 (1983), the North Carolina Supreme Court held that for a disease to be compensable, the workers must meet these tests:

- the disease is characteristic of and peculiar to a particular trade, occupation, or employment
- the disease is not an ordinary disease of life to which the general public is equally exposed outside of the employment
- a causal relationship exists between the disease and the employment.

The Workers' Compensation Reference Guide on COVID-19 Compensability published by Sedgwick (2020) contains this analysis of the North Carolina requirements that need to be met to establish compensability of diseases: "The first two elements of the Rutledge test are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally. The third element is satisfied if the employment significantly contributed to, or was a significant causal factor in, the disease's development." The Sedgwick Reference Guide also provided these assessments of compensability for COVID-19 claims under the current North Carolina law:

- Is COVID-19 generally compensable?

Possibly

- Is COVID-19 compensable with high-risk workplace exposure exceptions? Likely

Caution is also needed concerning the assertion by Larson that states using a scheduled list of diseases, followed by a catch-all provision for other diseases "cover all such diseases." The experience with Section 3(2) of the New York workers' compensation law provides an example of the need for care. The section lists 29 specific diseases with associated processes, ranging from Anthrax resulting from handling of wool, hair, bristles, hides, or skins to Silicosis or other dust diseases resulting from any process involving exposure to silica or other harmful dust. Section 3(2) of the New York workers' compensation statute also provides as a 30th category of coverage: ``Any and all occupational diseases." In addition, Section 48 of the New York statute in effect provides that a disease not covered by Section 3(2) is compensable if the disease meets the statutory definition of an accidental personal injury.

Among the 29 diseases specifically enumerated in the statute, the residual category covering "any and all occupational diseases," and the Section 48 safeguard for other diseases, universal coverage of work-related diseases might be expected in New York. However, the New York Court of Appeals provided this interpretation of "any and all occupational diseases" in Goldberg v. 954 March Corp., 276 N.Y. 313, 318-319 (1938):

> [A]n occupational disease is one which results from the nature of employment, and by nature is meant, not those conditions brought about by the failure of the employer to provide a safe place to work, but conditions to which all employees of a class are subject, and which produce the disease as a natural incident of a particular occupations, and attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of the hazard attending employment in general.

Applying this meaning of "any and all occupational diseases" the Court held in Goldberg that a claim for workers' compensation benefits for splotches on the legs of a theatre ticket seller that were caused by a moderate amount of temperature change was not compensable because this amount of temperature change was commonly found outside work or in other jobs and because such temperature fluctuations were not considered normal for the job as a ticket seller.

This interpretation of "any and all occupational diseases" is still used in New York. An interesting example involved New York City Deputy Mayor Rudy Washington, who developed severe respiratory ailments as a result of exposure to toxic substances in the aftermath of The September 11, 2001 attack on the World Trade Center. Washington did not meet the tests for occupational diseases because his medical problem was not one of the 29 enumerated diseases and because he did not meet the requirement of the catch-all category of "any and all occupational diseases" because a respiratory disease is not a natural consequence of being a Deputy Mayor. Washington was only able to receive workers' compensation benefits as a result of a special law passed by the New York legislature in 2006 (Burton 2007).

C. Compensability Injuries and Diseases: Recent Developments

Many states have amended their laws in recent decades to limit compensability of workplace injuries and diseases (Spieler and Burton 2012). One of the constraints involved statutory or regulatory changes that explicitly limit the compensability of claims involving particular medical diagnoses. For example, many states, including Arkansas, California, and Oregon have substantially restricted the right of workers to make claims for psychological injuries resulting from a mental stimulus in the absence of a physical injury ("mental-mental" injuries). Other states, such as Massachusetts and New York have excluded stress claims related to personnel decisions or limited them to situations involving unusual or extraordinary circumstances. In a similar fashion, some states, such as Virginia, have reduced or even eliminated compensability for injuries caused by repetitive trauma, such as carpal tunnel syndrome, and for noise-induced hearing losses.

A number of states, such as Oregon, have also attempted to limit coverage when the injury involves aggravation of a pre-existing condition. Traditionally, employers were required to "take workers as they found them." This meant that workers with preexisting conditions were not barred from coverage when they experienced workplace injuries, even if the underlying condition contributed to the occurrence of the injury or to the extent of the resulting disability. While states have restricted compensation of preexisting conditions in a variety of ways, the most significant change has been to deny compensation unless the current workplace injury is the "major contributing" cause of the disability. States have also tried to prohibit workers' who are not eligible for workers' compensation benefits because of the major contributing cause requirement from brining tort suits against their employers, in effect creating a "dual denial doctrine." This doctrine and its history are discussed in Burton (2017, 58-59).

Several states, including Texas, Florida, and Tennessee have amended their statutes and replaced the "course of employment" test with a requirement that the injury occur in the "scope of employment," which is considered narrower that the traditional test.

In addition, there have been procedural and evidentiary changes in claims processing that have restricted compensability. For example, some statutes now require that the medical condition caused by a workplace injury be documented by "objective medical" evidence. This requirement excludes claims based on subjective reports of patients that cannot be substantiated by objective evidence, including musculoskeletal injuries that involve soft tissue damage and reports of pain and psychological impairment.

In addition, some workers' compensation programs have imposed on workers a stricter burden of proof or a greater quantum of proof. Amendments to some statutes now require, either in all claims or for designated categories of conditions, that claimants must prove their case by a "preponderance of the evidence" or, for some injuries or diseases, the even more difficult standard of "clear and convincing evidence." Because many workers' compensation programs gave claimants the benefit of the doubt in close cases in the past, these changes are significant.

D. Actual Compensability of Injuries and Diseases Prior to COVID-19

Spieler and Burton (2012) reviewed the data and the previous studies of persons with disabilities and concluded that many workers with disabilities caused by work-

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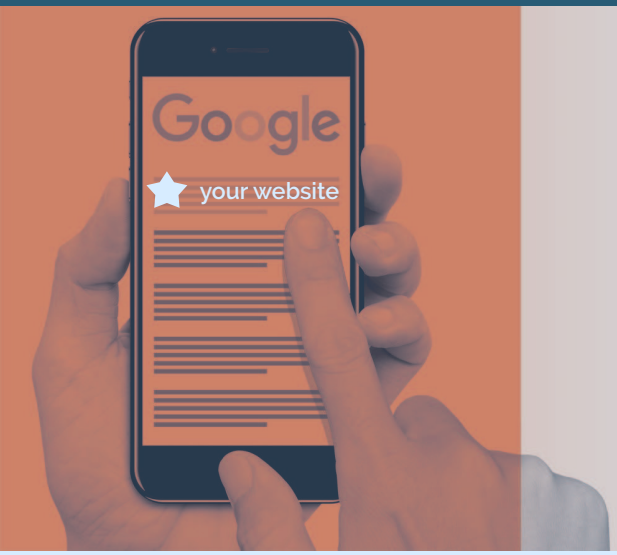

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related injuries or diseases do not receive workers' compensation benefits. Several studies they discussed looked at both injuries and diseases as sources of disability. Two examples indicate the range of results in these studies. Reville and Schoeni (2003/2004) examined people aged 51-61 who should have qualified for workers' compensation benefits because they reported they had work disability caused by work-related injuries or diseases and found that only 12.3 percent had ever received workers' compensation benefits. Boden and Ozonoff (2008: table 4) relied on a methodology called capture-recapture, which uses the number of workers who received workers' compensation benefits and the number of workers identified in the Survey of Occupational Injuries (SOI) conducted by the Bureau of Labor Statistics (BLS) to estimate the universe of workers with work-related injuries and diseases. The estimated that workers' compensation only compensated from 65 percent to 93 percent of all lost-time injuries and diseases in the six states in their study.

Other studies reviewed by Spieler and Burton (2012) only examined disabilities resulting from work-related injuries. An example is Bonauto et al. (2010) who studied the proportion of workers who reported work-related injuries for which they received medical benefits from workers' compensation. The lowest proportion (47 percent) was in Texas, the only state other than Wyoming where workers' compensation is elective. Among the other nine states, the proportion of injured workers who received workers' compensation medical benefits ranged from 50 percent in New York to 77 percent in Kentucky; the median for all states was 61 percent. Subsequent to Spieler and Burton (2012) is a study of work-related skull fractures in Michigan by Kia and Rosenman (2014), which identified 318 work-related skull fractures (excluding facial fractures) that occurred in Michigan between 2010 and 2012 using data from three sources: hospital emergency department reports, death certificates, and Workers' Compensation Agency (WCA) records. Of the 318 work-related skull fractures, only 165 (or 52 percent) were included in the WCA records.

Still other studies examine workers disabled by work-related diseases. These uniformly find that most of these workers are not compensated by workers' compensation programs. The classic study by Barth and Hunt (1980, 272) concluded that "many states give lip service to the notion of broad coverage of occupational diseases, but there is little evidence that this exists." A more recent study by Leigh and Robbins (2004) used epidemiological data to estimate there were 67,121 deaths in the United States resulting from all types of occupational diseases in 1999. The authors used state workers' compensation agency data to estimate that only 736 deaths due to occupational diseases were compensated by workers' compensation programs in that year. Their comparison indicated that in 1999 workers' compensation programs did not compensate 98.9 percent of deaths due to occupational diseases (with a range of estimates from 91.9 percent to 99.9 percent).

Spieler and Burton (2012, 495-500) discuss several reasons why many workers with work-related disabilities do not receive workers' compensation benefits. First, some workers' compensation statutes exclude certain categories of workers or employees. As discussed in Section II, these include workers in Texas whose employers do not elect workers' compensation coverage, workers in small firms in states with numerical exemptions to coverage, farm workers in some states, and workers improperly classified

as independent contractors. Second, many workers who might be eligible for benefits do not file claims because they are not aware they are covered or because they fear retaliation from their employers or are subjected to pressure from co-workers. Third, there are barriers to the award of benefits in claims that are filed. These barriers are especially formidable for diseases with long latency periods between exposure and onset of the diseases, which makes causation difficult to determine or which eliminates the possibility of benefits in those states with time limits on filing of claims that run from the date of exposure rather than from the date of diagnosis of the source of the disability. Fourth, there are the series of recent changes in the compensability rules discussed earlier in this section, such as restrictions on eligibility involving injuries that aggravate preexisting conditions and the requirement that the medical condition caused by a workplace injury must be documented by "objective" evidence.

E. Assessment of Compensability of Injuries and Diseases Prior to COVID-19

One of the objectives for a modern workers' compensation program is inclusion of all work-related injuries and diseases. How successful is workers' compensation in meeting this objective?

The Workmen's Compensation and Rehabilitation Law (Model Act) published by the Council of State Governments (1965) provides guidance about the meaning of the phrase: "all work-related injuries and diseases." The *Model Act* was prepared by an Advisory Committee on Workmen's Compensation (CSG Advisory Committee), which was chaired by Arthur Larson, the leading legal scholar on workers' compensation in the 20th century, and which included 20 other distinguished members representing a wide range of organizations involved in the program. There are three salient features of the compensability rules included in the Model Act: (1) injury is defined as "any harmful change in the human organism rising out of and in the course of employment, including the damage to or loss of a prosthetic appliance . . ." (2) the Commentary prepared by Larson indicates that "the basic coverage formula does not contain the words 'by accident' or 'accidental' in characterizing the injury. This is a deliberate omission as a result of extended analysis and discussion." (3) the definition of injury is broad enough to include disease, for which the only exception in the Model Act is that injury "does not include any communicable disease unless the risk of contracting such diseases is increased by the nature or employment."

The essential features of the Model Act's rules for compensability were implicitly endorsed by the National Commission of State Workmen's Compensation Laws (National Commission 1972), whose recommendations included: R2.14 "We recommend that the 'arising out of and in the course of the employment test' be used to determine coverage of injuries and diseases, and R2.12 "We recommend that the 'accident' requirement be dropped as a test for compensability."

With all due respect to the admonitions from the CSG Advisory Committee and the National Commission, these compensability rules are admirable but probably unrealistic for many jurisdictions, especially given the economic and political environment in recent decades.

PART B:

HOW HAS COMPENSABILITY IN WORKERS' COMPENSATION CHANGED IN RESPONSE TO THE COVID-19 PANDEMIC?

IV. An Introduction to COVID-19

This section provides a rudimentary discussion of several aspects of COVID-19 that are relevant for the analysis in subsequent sections about the effects of the disease on workers' compensation.

A. Current Status of COVID-19[6]

Symptoms. COVID-19 (Coronavirus disease 2019) is a disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). The COVID-19 symptoms include fever, coughing, fatigue, breathing difficulties, and loss of smell or taste. Symptoms begin from one to fourteen days after a person is infected by the virus (the incubation period).

Transmission. COVID-19 is mainly spread through the air, primarily via small droplets or aerosols emitted when an infected person breathes, coughs, sneezes, or speaks. The original variant of COVID-19 is more contagious than influenza, but less so than measles. However, a highly contagious variant of COVID-19 has emerged in England and has spread to other countries, including the United States. An infected person can spread COVID-19 to other persons as early as two days before the infected person shows symptoms (presymptomatic). A person may have COVID-19 without having symptoms (asymptomatic) and still transmit the disease to other persons.

Consequences. The consequences of COVID-19 range from mild symptoms for most persons to some persons who experience acute respiratory distress syndrome (ARDs), which can be fatal. Long term damage to organs (such as the lungs and heart) may occur, and there are also patients who recover from the acute phase of the disease but who experience a range of effects – known as long COVID – for months including severe fatigue, memory loss and other cognitive issues, and muscle weaknesses. Several categories of patients are more susceptible to more severe adverse consequences and deaths, including older persons, members of minority groups, and persons with preexisting conditions, such as heart disorders, asthma, obesity, and diabetes.

Treatment. Supportive care includes fluid therapy and oxygen support, including in critical cases use of a ventilator. The problem of a shortage of ventilators that was a concern in the Spring of 2020 appears to have been largely solved. However, as of January 2021 there is a shortage of ICUs and staff to deal with serious cases of COVID-19 in many states, including California. There is also uncertainty about the status of antiviral drugs. On October 22, the Food and Drug Administration (FDA) approved the use of remdesivir for treatment of COVID-19 that requires hospitalization[7], while the World Health Organization (WHO) issued a statement on November 19 recommending against use of the drug because "an expert panel 'concluded that remdesivir has no meaningful effect on mortality or other important outcomes for patients, such as the need for mechanical ventilation or time to clinical improvement" (Carey 2020). On the same day, the FDA issued an emergency

authorization for the use of remdesivir in combination with the drug baricitinib for hospitalized adults and pediatric patients two years or older. [8]

Prevention. Preventive measures include physical separation (including working at home), social distancing, masks, washing of hands, mandatory closure of business and other activities, limitations on the number of persons in social or recreational activities, and tracing persons who have been in contact with persons with COVID-19 to warn or quarantine them. Compliance with these preventive strategies has been far from universal, especially in states where the pandemic has been politicized.

Two vaccines designed to protect again COVID-19 were approved by the Centers for Disease Control and Prevention (CDC) in December. (These vaccines were produced by Pfizer-BioNTech and by Moderna.) While their approval in a relatively short time after the emergence of COVID-19 is a tribute to Operation Warp-Speed, the number of persons vaccinated to date has been disappointing and the projected supply of these vaccines means that most Americans will not be protected for six or more months. In order to deal with the imbalance and demand for vaccines during this period, the CDC published recommendations in December and revised them in January 2021 for prioritizing who should receive vaccinations: (States are not required to accept the CDC recommendations, and some have adopted alternative priorities.)

Phase 1a
- Healthcare Personnel
- Long-Term Care Facility Residents

Phase 1b
- Frontline Essential Workers, such as fire fighters, police officers, correction officers, food and agricultural workers, United States Postal Service workers, manufacturing workers, grocery store workers, public transit workers, and those who work in the educational sector (teachers, support staff, and daycare workers)
- People aged 75 years and older
    - Expanded to 65 years and older in January

Phase 1c
- People aged 65-74 years
    - Moved to Phase 1b in January
- People aged 16-64 years with underlying medical conditions which increase the risk of serious, life threatening complications from COVID-19
- Other Essential Workers, such as people who work in transportation and logistics, food service, housing, construction and finance, information technology, communications, energy, law, media, public safety, and public health

Medium-Term Prognosis for COVID-19. There will be a profound struggle in 2021 in the U.S. between the transmission of COVID-19 to millions of previously uninfected persons and the prevention of new cases through separation, masks, and vaccinations. Fewer vaccinations have been completed by now than predicted. Moreover, although the manufacturers of the Pfizer-BioNTech and Moderna vaccines are increasing their output and other vaccines may soon be approved by the CDC, the demand for vaccinations will far exceed the supply for months. The two approved vaccines required two shots separate by several weeks to be fully effective. The Biden Administration has decided that during the period of inadequate supplies, each person will receive a single shot, although some scientists have expressed reservations about that approach. As a result of this controversy and a variety of other confounding factors, the next six months will be tumultuous in the quest to conquer COVID-19.

B. Challenges to Workers' Compensation from COVID-19

As of late January 2021, the numbers of COVID-19 infections and deaths appear to be declining nationally. Nonetheless, the recent high number of diagnosed cases of COVID-19 is likely to translate into more disabled workers or their survivors filing for workers' compensation benefits in 2021 than have already reached the program.

Two limitations of workers' compensation in dealing with COVID-19 were mentioned in Part A. One limitation is that not all workers are covered by the program because of statutory language, court decisions, or other legal restrictions. This topic was examined in Section II. Another limitation faced by workers' compensation in dealing with COVID-19 is that workers' compensation programs require disabled workers to prove that their injuries or diseases are work-related. This topic was examined at length in Section III. Prior to COVID-19, only a small percentage of workers with occupational diseases could meet the work-related tests to qualify for workers' compensation benefits. Determining that the cause of a worker's COVID-19 disease is work-related is a serious challenge in almost states unless they ease compensability tests for work-related COVID-19 cases. The response in several states has been to promulgate regulatory action or enact legislation that facilitates the compensability of cases involving COVID-19. This details of these state actions are examined in Section V.

C. Preliminary Evidence on State Experience with COVID-19 Claims

Frequency of COVID-19 Claims. A recent study by Fomenko and Ruser (2021) provides some early data on state workers' compensation responses to the COVID-19 pandemic. The study relies on data from 27 states on the frequency of COVID-19 claims during the first two quarters of 2020. Information is provided on several important performance dimensions, such as variations among industries in the frequency of claims and the differences in claims in each of the two quarters in 2020 compared with the corresponding quarters in 2019.

Table 1f of the study is relevant for one of the main themes of this article, namely the role of state regulatory action or legislation in facilitating workers' claims for workers' compensation benefits based on their infection by COVID-19. The 27 states are ranked by the "Percentage of COVID-19 Claims out of All Workers' Compensation Claims." The ten states with the lowest percentage range from South Carolina (1%) to Wisconsin (4%), Of these ten states the only one with a Presumption Law or Executive Order facilitating compensability was Pennsylvania. The ten states with the highest percentage range from California (8%) to New Jersey (34%) and Massachusetts (42%). Of these ten states, six had a Presumption Law or Executive Order facilitating compensability. Alas, for those seeking compelling evidence that an executive order or presumption law is a prerequisite for high compensability of COVID-19 claims, neither New Jersey or Massachusetts had an executive order or presumption law in effect during the second quarter of 2020. The authors offer explanations for why these two states had a high percentage of all claims involving COVID-19. Overall, the study is reasonably persuasive that Executive Orders or Legislation matter in determining compensability. As more data are collected over time by the Workers Compensation

Research Institute or other sources, we can expect additional studies, articles, and theses to elucidate our understand of the impact of state laws on compensability.

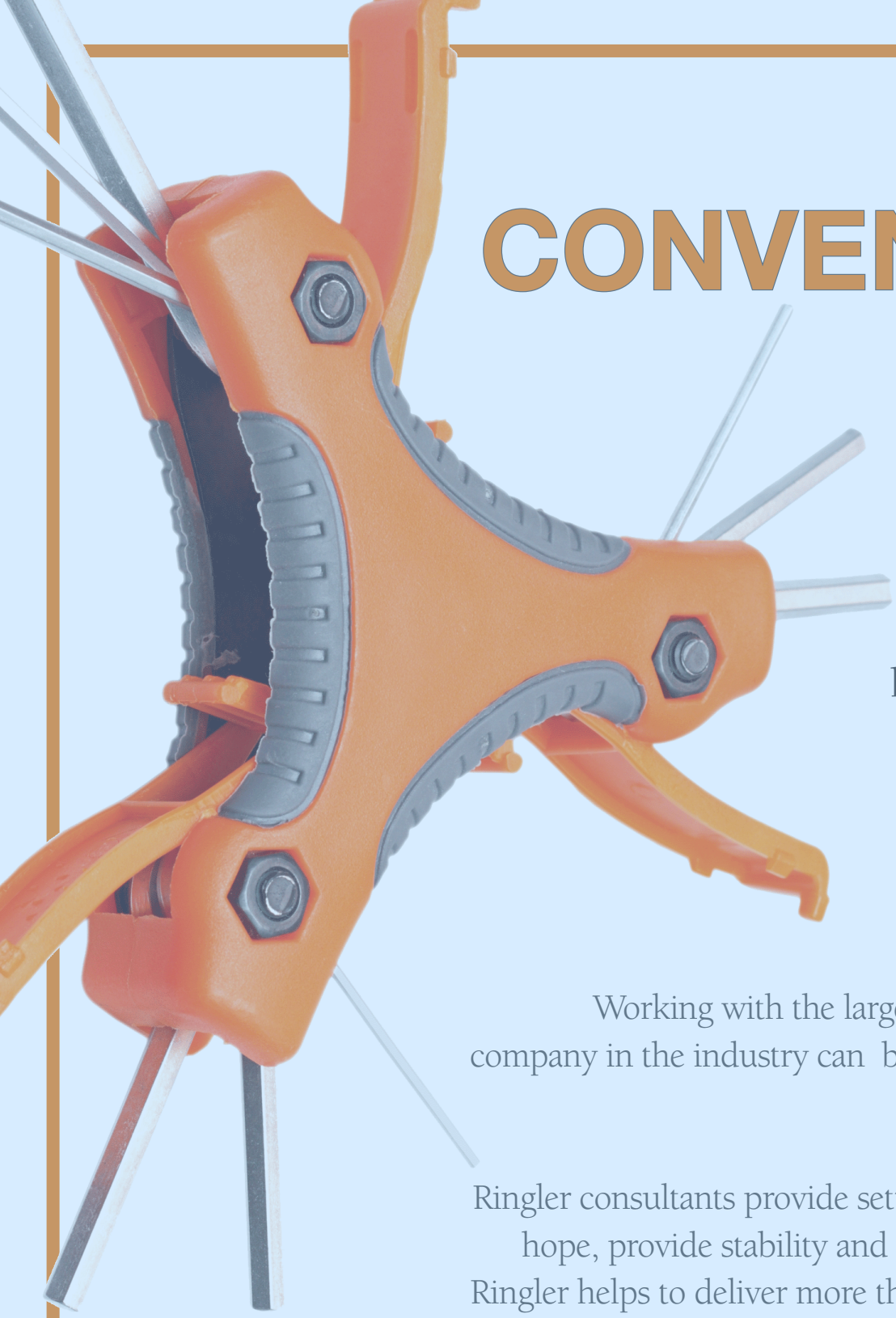
The Costs of COVID-19 Claims.

The costs to the workers' compensation programs of COVID-19 cases are unclear, including the costs of medical benefits. Hackett (2020) reports that for patients affected by COVID-19 presumably contracted outside the workplace who are covered by private insurance carriers the highest average amount paid to medical care providers was $24,012 for patients aged 51-60 and the lowest average was $17,094 for patients above age 70. [10] But these figures may be low for workers with COVID-19 who qualify for workers' compensation. Childers (2020,6) reports that for those workers who have serious breathing problems and are in ICU's and placed on ventilators, one estimate is that the medical bills "could easily be in the millions of dollars." Given the number of workers who have been or may yet be hospitalized with COVID-19, the medical costs for patients covered by workers' compensation could be substantial.

The costs of cash benefits for workers with COVID-19 who qualify for workers' compensation is also unclear. The most expansive type of cash benefit is for permanent partial disability (PPD). PPD benefits are paid to workers when their injury or disease has reached the Date of Maximum Medical Improvement (MMI) and the worker has a permanent impairment (PI) that is partial but not totally disabling. Given the rapid evolution of the understanding of the permanent consequences of a COVID-19[9] infection, there are likely to be serious challenges to deciding if the worker has reached the Date of MMI and, if so, to determining the PI rating the worker's condition and the resulting costs of benefits.

Court Cases Involving COVID-19.

The National Council on Compensation Insurance (NCCI 2020b) maintains a list of Federal and State Court Cases involving COVID-19. The compilation as of December 8, 2020 includes 12 cases, of which 10 were pending, the status of one was unknown, and one had been closed. The closed case, *Lanzo v. Generations Behavioral Health – Youngstown, LLC*, in a trial court in Ohio, involved a tort suit by the estate of an employee who died of COVID19 that claimed inter alia the employer had willfully created a situation that exposed the employee to the illness and caused his death. The employer countered that the



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allegations did not meet the threshold for the intentional tort exemption to the workers' compensation exclusive remedy and were therefore preempted. The estate voluntarily dismissed the case. It seems likely that a dozen cases are not the end of the story.

V. How Has Compensability in Workers' Compensation Changed in Response to the COVID-19 Pandemic?

A. Sources of Information

The primary sources of the information used in this Section:

• Ogletree Deakins (2021). *Orders and Other Activities or Guidance to Provide Workers' Compensation (WC) Coverage for COVID-19* (1/15/2021 Edition)

• National Council on Compensation Insurance (NCCI 2021a), *COVID-19 Regulatory and Legislative Activity.* (1/22/21 Edition). Provides links to full text of proposed or enacted rules and legislation.

• National Council on Compensation Insurance (NCCI 2021b) *State Activity: COVID-19 WC Compensability Presumptions* (1/26/21 Edition).

Other Sources of Information on Reponses to the COVID-19 Pandemic:

• Shor (2021) *Workers' Compensation, Occupational Infectious Disease and Covid-19* (1/12/2021 Edition

• International Association of Industrial Accident Boards and Commissions (IAIABC). *Compensability for COVID-19 Under Workers' Compensation Systems* (As of November 2, 2020).

• National Academy of Social Insurance (NASI). The *Fact Sheet* (Patel 2020) contains information on responses to COVID-19 by fourteen states as of May 18, 2020.

• *Sedgwick (2020). Workers' Compensation Reference Guide on COVID-19 Compensability* (10/18/2020 Edition)

B. Overview of Responses

States adopted presumptions of compensability for COVID-19 cases by two approaches - regulatory action or legislation - according to the National Council on Compensation Insurance (NCCI). Kersey (2020) reported that by December 2020, there were seven states that had adopted presumptions by regulatory action and nine states that had adopted presumptions by legislation. The NCCI (2021a and 2021b)) subsequently reported that Missouri had adopted a presumption by regulatory action, which apparently supplements or extends the previous order in the state. In addition, Vermont passed a law in both Chambers that presumably modifies the law described in Section V.C and Wisconsin passed a law in both Chambers. Vermont and Wisconsin apparently need each state's Governor to sign or veto the legislation and accordingly the provisions are not discussed in Section V.C.

States Adopting Presumptions by Regulatory Action (Administrative Actions or Executive Orders)

Connecticut
Florida
Kentucky
Michigan
Missouri
New Hampshire
North Dakota

States Adopting Presumptions by Legislation

Alaska
California
Illinois
Minnesota
New Jersey
Utah
Vermont
Wisconsin (now expired)
Wyoming

C. Responses by Various Jurisdictions

States Adopting Presumptions by Administrative Action

Florida. The Florida Chief Financial Officer ordered the Division of Risk Management (DRM) to cover workers' compensation claims submitted state workers who contracted COVID-19 after interacting with potentially infected individuals. Covered workers include law enforcement, firefighters, EMTS, paramedics, correctional offices, health-care workers, child safety investigators, and Florida National Guardsmen. The Florida League of Cities also announced that the Florida Municipal Insurance Trust will cover COVID-19 claims from municipal first responders.

States Adopting Presumptions by Executive Order

Connecticut. The Governor issued an executive order on July 24, 2020 that establishes a rebuttable presumption that an employee who initiated a claim for benefits and who missed a day of work between March 10 and May 20, 2020 due to a diagnosis of COVID-19 or due to symptoms that were diagnosed as COVID-19 contracted a compensable occupational disease. The presumption can be rebutted only if the employer or insurer can demonstrate by a preponderance of the evidence that the employment of the claimant was not the cause of his or her contracting COVID-19. The presumption is applicable to "health care professionals, grocery store clerks, first responders, and other essential workers."

Kentucky. The Governor issued an executive order on April 9, 2020 that inter alia creates a rebuttable presumption that removal from work by a physician due to a diagnosis of COVID-19 is compensable if the worker is a member of a specified occupation. These occupations include inter alia employees of healthcare facilities, first responders, correction officers, activated National Guard members, domestic violence shelter workers, and grocery workers. The employer can rebut the presumption only if it has a good faith basis to do so. The executive order is in effect for the duration of the emergency of until rescinded.

Michigan. The Governor signed emergency rules on October 16, 2020 that establish a presumption that certain workers have compensable injuries if they are diagnosed with COVID-19 either by a physician or as the result of a positive test. The rebuttable presumption is available to essential workers in the medical industry, law enforcement, fire safety, and others.

Missouri. The Department of Industrial and Labor Relations filed an emergency rule effective April 22, 2020 that created a rebuttable presumption that first responders who contract COVID-19 have a compensable occupational disease. A first responder is defined as a law enforcement officer, firefighter, or an EMT. The presumption arises when the first responder is quarantined at the direction of the employer due to suspected COVID-19 exposure, or the worker displays any COVID-19 symptom, or receives a positive test, or receives a COVID-19 diagnosis by a physician. The rule

ceases to be in effect at the expiration of the state of emergency.

New Hampshire. The Governor issued an Executive Order on April 20, 2020 applicable to Emergency response/ public safety workers, which includes inter alia regular and volunteer firefighters, law enforcement fighters, rescue or ambulance workers, and emergency medical personnel. Any covered person who tests positive for COVID-19 shall have a prima facie presumption that the exposure and infection were occupationally related. The Executive Order remains in effect for the duration of the state of emergency.

North Dakota. The Governor issued an Executive Order on March 25, 2020 extending workers' compensation coverage to first responders and front-line health care workers who are exposed to COVID-19. Additional Executive Orders extended coverage to funeral directors and funeral home workers and to workers who provide care to individuals intellectual or developmental disabilities who are exposed to COVID-19. A worker exposed to COVID-19 in the course of employment can receive up to 14 days of cash and medical benefits. If the employee tests positive for COVID-19 and can demonstrate that the infection resulted from a work-related exposure, he or she is entitled to the regular cash and medical benefits provided by the workers' compensation program. The Executive Orders remain in effect for the duration of the emergency.

States Adopting Presumptions by Legislation

Alaska. The Governor signed a law on April 9, 2020 that applies to a worker employed as a firefighter, EMT, paramedic, peace officer, or health care provider (included in CDC categories 1a and portions of 1b). For a covered worker (1) who is exposed to COVID-19 in the course of employment and (2) receive (a) a COVI-19 diagnosis by a physician, or (b) a positive COVID-19 test result, or (c) a laboratory-confirmed COVID-19 diagnosis, the law stablishes a conclusive presumption that the worker has contracted an occupational disease.

California. The Governor signed a law on September 17, 2020 that established a rebuttable presumption of a compensable injury if the employee tested positive for COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment. The presumption is available for (but is not limited to) peace officers, certain health care employees, and specified front-line employees. Evidence relevant to controverting the presumption may include, but is not limited to, evidence that the employer had measures in place to reduce transmission of COVID-19 and evidence of an employee's non-occupational risks of COVID-19 infection. The law also establishes a presumption that a worker's COVID-19 infection was compensable if the employee worked at a particular work location that had experienced an "outbreak" of COVID-19 infections. The law remains in effect until January 1, 2023. (The law includes workers in CDC categories 1a, 1b plus other workers).

Illinois. The law effective June 5, 2020 created a rebuttable presumption of compensable injury or disease for first responders or front-line workers who are diagnosed with COVID-19. These categories of workers include inter alia police, firefighters, EMTs, paramedics, health care providers, including nursing home and rehabilitation facilities, and individuals employed by essential businesses. (The law includes workers in CDC categories 1a, 1b, and 1c.) Two ways for an employer to rebut the presumption is to show compliance to the fullest extent practicable with applicable health and safety practices and guidance or to show that the employee was working solely at home or was on leave for at least 14 days immediately prior to the onset of the disease or period of incapacity.

Minnesota. The law enacted April 8, 2020 stated that certain employees who contract COVID-19 are presumed to have a compensable occupational disease. The covered employees include inter alia firefighters, paramedics, EMTs, licensed peace officers, and health care providers (included in CDC categories 1a and 1b). An employee's contraction of the COVID-19 virus must be confirmed by a positive laboratory test or by a licensed medical provider. The presumption is rebuttable if the employer or insurer shows the employment was not a direct cause of the disease.

New Jersey. The law signed by the Governor on September 14, 2020 creates a rebuttable presumption of a compensable injury or disease for a worker who contracts COVID-19 during a time period when the individual is working at a place of employment other than the individual's own residence as a health care worker, public sector worker, or other essential employee. (A state employee offered the option of working from home who refuses that option is not regarded as an essential employee.) The COVID-19 must be contracted during a public health emergency declared by the Governor. An essential employee is defined (in more detail in the statute) as (1) a public safety worker or first responder; (2) a worker providing medical and other health care services, emergency transportation, social services, and other care services; (3) a worker who performs functions that involve close proximity to the public and are essential to the public's health, safety, and welfare, including transportation services, hotel and motel services, and the production and distribution of essential goods such as food, beverages, and fuel; and (4) any other employee deemed essential by a public authority. (The law includes workers in CDC categories 1a, 1b, and 1c plus other workers.) The prima facie presumption may be rebutted by the employer by the preponderance of evidence showing that the worker was not exposed to the disease while working at the place of employment.

Utah. The law enacted April 22, 2020 established a rebuttable presumption of compensability for first responders and health care providers who are diagnosed with COVID-19 by a physician or who provide a positive laboratory test of the disease. A subsequent law enacted June 25, 2020 modified the definition of first responder and moved the coverage of first responders from the Workers' Compensation Act to the Occupational Disease Act. The expanded definition of first responder includes inter alia an individual employed by (a) a health care facility, (b) an office of a physician, chiropractor, or dentist, (c) a nursing home, and (d) a retirement facility. (The law includes workers in CDC categories 1a, and 1b),

Vermont. The law signed by the Governor on April 22, 2020 provides a rebuttable presumption of compensability for any front-line worker whose death or disability results from COVID-19. The presumption is applicable if the worker receives a positive laboratory test or a diagnosis by a licensed health care provider between March 1, 2020 and January 15, 2021. The definition of front-line worker is expansive, including inter alia firefighters; law enforcement officers; EMTs; and workers in health care facilities, long-term care facilities, childcare facilities, and funeral facilities. In addition, workers who do not meet the definition of front-line workers

nonetheless receive a rebuttable presumption of compensability if they receive a positive COVID-19 test result and they meet other statutory tests for compensability, such as a documented exposure in the course of employment to an individual who develops COVID-18. The presumption of compensability for both front-line and non-front-line workers is rebuttable upon showing by a preponderance of the evidence that the disease was caused by non-employment connected risk factors or non-employment connected exposure. (The law includes workers in CDC categories 1a, 1b, and other workers who meet the more stringent requirements).

Wyoming. The law signed by the Governor on May 20, 2020 provided that for 2020 any employee in an employment sector covered by the Workers' Compensation Act who is affected by COVID-19, "it shall be presumed that the risk of contracting the illness or disease was increased by the nature of the employment." (The law includes workers in CDC categories 1a, 1b, 1c, and all remaining workers covered by the workers' compensation law.)

D. Evaluation of State Responses and Recommendations

There are several requirements for a state law that facilitates the compensability of COVID-19. This Subsection is based on a review of the nine statutes enacted in 2020 that established presumptions of compensability for workers infected by COVID-19.

Establishing the Worker is Infected by COVID-19

Synopsis of State Approaches. A common approach (found for example in Alaska, Minnesota, and Vermont) requires the worker to establish the presence of the disease by (1) a COVID-19 diagnosis by a physician [or licensed health care provider], or (2) a laboratory-confirmed COVID-19 diagnostic or, in some states (3) a positive test COVID-19 test result .

Recommendation: The worker must establish the presence of COVID-19 by (1) a diagnosis of a licensed health care provider or (2) a laboratory-confirmed diagnosis. The worker must have worked on the employer's premises within 21 day of the diagnosis of COVID-19.

Determining the Scope of Eligible Industries and Occupations that Qualify for Special Consideration for Compensability

Synopsis of State Approaches. The narrow scope (found for example in Alaska, Minnesota, and Utah) limits the occupations to "first-line" workers such as firefighters, EMTs, peace officers, or health care providers. (The narrow scope roughly corresponds to CDC categories 1a and portions of 1b.) A middle scope (found in Illinois) adds individuals employed by essential industries so long as they are required to encounter the general public or to work in employment locations with more than 15 employees. (The middle scope roughly corresponds to CDC categories 1a, 1b, and 1c.) A wider scope (found in New Jersey) adds individuals employed in essential industries, which by statue includes a plethora of occupations, including hotels and other residential services, financial services, and the preparation of food, beverages, and fuel. (The wider scope roughly corresponds to CDC categories 1a, 1b, 2b plus other workers.) The full scope (found in Wyoming) covers all employees covered by the Workers' Compensation Act.

Recommendation: The scope of eligible occupations should be narrow (CDC category 1a and portions of 1b, but not all manufacturing workers) with some limited additions, such as employees of manufacturing and other firms who have been fined by OSHA for COVID-related violations (as discussed in Section VI). Rationale for the Recommendation. The pandemic is so gigantic in 2021 that the workers' compensation system can be overwhelmed with claims and costs unless the scope of eligible occupations is limited. After the crisis subsides the ability of state workers' compensation programs to establish a broader scope of industries and occupations for which there is a presumption of compensability should be reassessed.

Establishing and Rebutting a Presumption

Synopsis of State Approaches. After a worker establishes that he or she is infected by COVID-19 and a determination is made that the worker is employed in an eligible occupation or industry, the law will establish a presumption that the worker has a disease (or injury) compensable by the state's workers' compensation program. States vary on whether or how the presumption is rebuttable. At one extreme is Alaska, where the presumption is conclusive. At the other extreme is Kentucky, where the employer can rebut the resumption if it has a good faith basis to do so.[11] In the middle is Vermont , which provides that the presumption can be

rebutted by showing by a preponderance of the evidence that the disease was caused by non-employment connected risk factors or non-employment connected exposure. New Jersey has a similar provision for rebutting a presumption.

Professor Michael Duff has prepared a useful analysis of the operation of workers' compensation COVID-19 presumptions (Duff 2021a). Under the Thayer-Wigmore theory, it is easier for the employer or carrier to introduce evidence that overcomes the presumption. Under the Morgan theory, it is more difficult for the employer or carrier to introduce evidence that overcomes the presumption. Duff concludes that the Morgan-style rebuttal theory is used in the COVID-19 presumptions in the Minnesota and New Jersey statues, while "the murky rebuttal language of the Illinois resumption . . .seems at first blush neither Thayer-Wigmore nor Morgan."

***Recommendation*:** The presumption that the worker has a compensable disease (or injury) can be rebutted by a preponderance of the evidence relying on the Morgan Theory showing the worker's COVID-19 disease was caused by a non-work-related exposure.

VI. Use of the Occupational Safety and Health Act to Establish a Presumption of Compensability for Workers' Compensation Benefits for Workers with COVID-19

A. An Overview of the OSHAct

Provisions of the Act [1 2]

The Occupational Safety and Health Act (OSHAct) was enacted by Congress in 1970 to establish mandatory health and safety standards for most private sector workers. In addition, if a state has an approved plan (as described below), the standards apply to the state and local government employees in the state. The OSHAct is enforced in most states by the Occupational Safety and Health Administration (OSHA) a Federal agency. However, as of 2016 there were 26 approved state plans (including Puerto Rico) that covered private sector workers as well as state and local government employees. In addition, New York, New Jersey, Connecticut, and the Virgin Islands had approved plans for state employees only, with private sector employees enforced by OSHA. (Willborn et al. 2017, 1062).

The OSHAct does not directly prohibit or require specific actions by employers. Instead, §5(a)(1) subjects the employer to a genera duty to "furnish each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm. . ." In addition, §5(a)(2) requires each employer "to comply with health and safety standards promulgated under this Act." The Act requires the Secretary of Labor (acting through OSHA) to promulgate standards under the administrative procedure specified in the Act, and the Secretary has issued several thousand such occupational and health standards. There are three types of standards:

• **Interim Standards.** Section 6(a) of the Act authorizes the Secretary to issue interim standards during the first two years of the Act without adhering to the normal rule- making procedure. The Act became effective in April 1971 and in the next month the Secretary issued 4,400 interim standards based on existing federal standards or on national consensus standards. The Secretary subsequently deleted approximately 760 of the interim standards because they were obsolete or for other reasons. Despite these deletions, the remaining interim standards issued in 1971 constitute the bulk of the OSHA standards currently in effect.

• **Emergency Temporary Standards.** Section 6(c) of the Act authorizes the Secretary to issue emergency temporary standards (ETS) after a relatively simple procedure. The ETS can only remain in effect for six months unless replaced earlier by a permanent standard. OSHA has issued only nine emergency standards in the history of the Act. Of these, only three were not challenged in court and went into effect. As a practical matter, the ETS provision of the OSHAct is moribund.

• **Permanent Standards.** Section 6(b) of the Act deals with permanent standards and involves a ten-step process beginning with (i) the proposal of a standard by the Secretary of Labor or any interested party, and culminating in (x) The Supreme Court, at its discretion, reviewing the decision on the legality of the proposed standard by the federal court of appeals. The development and promulgation of new standards

was meant to be the heart of the OSHAct. After almost 50 years, however, OSHA has successfully promulgated fewer than 100 permanent safety and health standards.

Inspection Activity

One metric that can be used to assess the performance of OSHA in enforcing the OSHAct is the number of inspections conducted by the agency. The number of citations averaged about 38,000 per year in Fiscal Years (FYs) 2001-09 and about 39,000 in FYs 2010-16 (Willborn et al. 2017,1041). The number of inspections were 32,023 in FY 2018 and 33,393 in FY 2019 (OSHA 2019 Enforcement Summary).

B. Activities of OHHA in Response to COVID-19

Complaints, Citations, and Proposed Penalties

Between February 1, 2020 and January 15, 2021, there were 12,642 complaints of COVID-19 violations filed with the Federal Program and 42,083 complaints filed with state agencies (OSHA January 15, 2021).

By December 31, 2020, OSHA had cited 300 establishments for violations relating to COVID-19 and had proposed penalties totaling $3,930,381. (OSHA Press Release January 8, 2021). The average penalty per violation is thus $13,101.

Reasons for OSHA Citations Involving COVID-19

The COVID-19 related violations include failures to:

• Implement a written respiratory protection policy

• Provide a medical evaluation, respirator fit test, training on the proper use of a respirator and personal protection equipment

• Report injury, illness, or fatality

• Report an injury or illness on OSHA recordkeeping forms, and

• Comply with the General Duty clause of the OSHAct.

C. The Proposed Link Between COVID-19 OSHA Citations and Workers' Compensation

My recommendations in Section VD contain several elements:

A worker is presumed to have a compensable workers' compensation claim if (1) the worker has been diagnosed with COVID-19, (2) the worker has worked on the premises of his or her employer within 21 days of the diagnosis, and (3) the employer has been fined by OSHA for a COVID-19 violation.

The starting date and ending date for the period when the presumption that the worker with COVID-19 has a disease compensable in the state's workers' compensation program will be determined by state law.

The presumption shall be applicable to the employees in the establishment or establishments of the employer that resulted in the OSHA fine for a COVID-19 violation beginning with the date of the inspection that resulted in the fine.

The presumption of compensability can be rebutted by a preponderance of evidence presented by the employer that establishes the worker's COVID-19 was not caused by the employer.

D. Analysis of the Proposed Presumption of Compensability

Several comments may help explain the scope and rationale of the prosed Presumption of Compensability for Workers' Compensation Benefits for Workers with COVID-19.

• States that establish presumptions of compensability for workers compensation benefits for workers with COVID-19 have some relatively obvious categories of workers for which the presumption is applicable, namely health care workers and first responders. Beyond these categories, the rationale for which workers to include is not as evident or compelling.

• An additional category of workers for whom the presumption of compensability appears worthy is employees of employers who have not provided adequate protection to their workers from the COVID-19 epidemic.

• One way to identify employers who have not provided adequate protection of their workers from the COVID-19 epidemic is to rely on the data indicating which employers have been fined by OSHA for "violations relating to coronavirus," the components of which are spelled out above.

• There is no permanent standard dealing with COVID-19 that has been adopted by OSHA under §6(b) of the OSHAct. The process to adopt a permanent standard is likely to take years, by which time COVID-19 should be a part of history.

• There is no emergency temporary standard (ETS) dealing with COVID-19 that has been adopted under §6(c) of the OSHAct. This section of the Act has proven to be virtually useless and is not worth pursuing.

• In the absence or a permanent standard or an emergency temporary standard to deal with the COVID-19 crises, OSHA has relied on §5(a)(1) of the Act, which subjects the employer to a genera duty to "furnish each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm. . . "

• In the "long run" OSHA should adopt a permanent standard that deals with pandemics generically since COVID-19 is unlikely to the be the last disease that poses a threat to workers. In the meantime, OSHA will have to rely on the general duty clause in addition to the series of clauses dealing with matters such as record-keeping to penalize employers not adequately responding to the pandemic.

• There is a beneficial incentives built into this proposal to link OSHA penalties and fines to the workers' compensation program. Although the level of potential fines for OSHA violations has increased in recent years, the amounts of the fines are often modest. Some employers may be more diligent in avoiding violations of the OSHAct if those violations result in liability for workers' compensation benefits. The citations for employers for COVID-19 related violations issued by OSHA through December 31, 2020 averaged less than $15,000 of proposed penalties per violation. If the presumption of compensability for COVID-19 adds even a few additional workers' compensation cases to an employer, this amount could be dwarfed. In North Carolina, for example the average total costs (cash plus medical benefits) of permanent partial cases were more than $69,000 and the

average total costs for death cases were more than $267,000 (NCCI 2020, Exhibit 11, First Report), Since a single COVID-19 violation can result in multiple workers' compensation awards, the financial effect of the OSHA penalty could be swamped by the costs of the resulting workers' compensation awards.

E. Analysis of the Executive Order

On January 21 subsequent to the completion of the preceding portion of Section VI, President Joseph R. Biden Jr. issued an Executive Order on Protecting Worker Heath and Safety (Biden 2021). The Order directed the Secretary of Labor, acting through the Assistant Secretary of Labor, to inter alia:

(a) "issue, within 2 weeks . . . revised guidance to employers on workplace safety during the COVID-19 pandemic;"

(b) "consider whether any emergency temporary standards on COVID-19 . . . are necessary, and if such standards are determined necessary issue them by March 15, 2021;"

(c) review the enforcement activities of the Occupational Safety and Health Administration

(d) "launch a national program to focus OSHA enforcement efforts related to COVID-19 on violations that put the largest number of at serious risk or are contrary to anti-retaliation principles" . . . .

I have mixed reactions to the Executive Order. I commend (a) and look forward to reading the revised guidance by the first week in February. I also endorse (d) which proposes concentrating on the most significant violations. However, the proposal to consider issuing an emergency temporary standard by March 15 if necessary ignores the poor experience with the ETS approach I previously discussed, but which I will discuss in somewhat more detail here based on Willborn et al. (2017, 994). There are some advantages with reliance on an ETS, such as the ability of the Secretary to issue a ETS without holding a hearing or use of an advisory committee. The FTS becomes effective immediately upon publication in the Federal Register. However, the ETS can remain in effect for only six months unless replaced earlier by a permanent standard. And the ETS can be challenged by an affected employer in the federal courts. Of the nine ETSs that have been issued, only three were not challenged and went into effect. One ETS was challenged but into effect when the Sixth Circuit denied a stay. The other five ETSs were vacated or stayed by the courts. Given the current array of Judges in the Federal Courts, the use of a ETS to deal with the COVID-19 pandemic appears likely to be a futile policy.

The main reason I am disappointed with the Executive Order is that it is an example of Thinking Inside the Box. There is no recognition of other approaches to achieving the goal of workplace safety and health. I examined three approaches to achieve this goal in Burton (2015b): government regulations (including OSHA standards); tort law; and workers' compensation.

The OSHA approach involves the promulgation of safety and health standards, the inspection of employers to determine if they comply with the standards, and the assessment of fines against employers for lack of compliance. I reviewed some of the literature on the effective of the OSHA approach and concluded (Burton 2015b, 868):

Overall, the evidence suggest that the Occupational Safety and Health Act (OSHAct) has done little to improve workplace safety . . . OSHA's ineffectiveness in part may be due to the lack of inspection activity, since Weil and Pyles (2005) note that the annual probability a US workplace will be inspected is well below 0.001. But the evidence [discussed in the study] also suggests that allocating additional resources to plant inspections may be imprudent, given the mixed results of inspections on safety.

The tort law approach to promoting safety has been extensively studied including the impact on workplace safety when tort suits were replaced by workers' compensation statutes in the early 20th century and more recent studies in areas such as automobile accidents and medical practice. Based on a review of the theory and empirical evidence, Burton (2015b, 867-68) concluded that -- based on both the historical experience of the impact of tort suits on workplace safety and the current controversy over the deterrence effects in other areas of tort law -- "reliance on tort law does not provide much assistance in designing an optimal policy for workplace safety and health."

The workers' compensation approach to promoting safety and health relies on economic incentives to employers resulting from the method that workers' compensation programs use to finance benefits. Most employers purchase workers' compensation insurance. The premiums vary among industries depending on previous benefit payments by employers in each industry. Industries with higher premiums to some extent charge higher prices, which over time shifts consumption to safer industries. For medium and large firms, the premiums are further modified by the experience of each firm relative to other firms in the industry based on their history of benefit payments. (Some large firms self-insure and the costs for each firm largely depend on benefits paid to its workers.) One theory for all these forms of experience rating -- an employer's workers' compensation costs depend in part on the workers' compensation benefits paid to its workers -- is that this arrangement encourages employers to improve workplace safety in order to reduce their workers' compensation premiums. To be sure, as discussed by Burton (2015), there are skeptics to this beneficial view of experience rating, including those who argue a major effect of experience rating is to encourage some employers to resist legitimate workers' compensation claims in order to reduce their premiums. I nonetheless concluded that to improve workplace safety, experience rating matters.

After reviewing the various theories and evidence concerning the various approaches to achieving the goal of workplace safety and health, I concluded (Burton 2015b, 868-89) that no single theory or approach provides an adequate understanding of the causes and prevention of workplace injuries and diseases. Rather, a combination of the theories and approaches, though untidy, is needed. My concern with President Biden's Executive Order is that the only approach to safety and health is through the OSHAct. I hope that my proposed link between OSHA fines and workers' compensation compensability will encourage policy makers to Think Outside the Box.

VII. The Role of Workers' Compensation in Dealing with the COVID-19 Epidemic

Workers' compensation can contribute to the national effort to deal with the medical and economic consequences of the COVID-19 epidemic by providing assistance to workers who qualify for cash and medical benefits. The program has the advantage of already being in existence in all states, which have long-established procedures and administrative structures. Moreover, unlike other existing social insurance programs, as Social Security Disability Insurance, workers are eligible for workers' compensation benefits from the first day of their employment rather than after an extended work record.

There are, however, serious limitations on the role that workers' compensation can play in dealing with a national pandemic such as the current COVID-19 crisis.

• Many if not most victims of COVID-19 are not currently workers but have already retired or never had a work experience or are students or children. As such, workers' compensation is irrelevant for them.

• Some currently employed workers are not covered by workers' compensation. As discussed in Section II, these uncovered workers include over ten percent of all workers.

• As is evident in the discussion of the current state of COVID-19 in Section IV, because the disease is highly contagious, because there is a lag between exposure and onset of the symptoms, and because asymptomatic but infected persons can spread the disease. the cause or source of a person's COVID-19 infection is often difficult or even impossible to determine.

• In sharp contrast to the often-unidentifiable cause of a person's COVID-19, a fundamental attribute of workers' compensation is that the program is confined to workers who can demonstrate that the source of their injury or diseases is work-related. As discussed in Section IV, prior to the emergence of COVID-19, many injuries and most diseases could not meet the work-related test for compensability. An important qualifier to this assertion is that in some cases, the worker can demonstrate the injury or disease is work-related by relying on presumptions.

• A few states have attempted to modify the normal compensability rules for diseases (or injuries) in order to allow the provision of workers' compensation benefits to workers disabled by COVID-19. As discussed in Section V, these efforts have some common elements, but there is no universally adopted formula for these statutes. The various state approaches are summarized in Section V and I offer recommendations for (1) establishing when a workers is infected by COViD-19, (2) determining which workers should receive a presumption that there COVID-19 is compensable, and (3) determining when the presumption of compensability can be rebutted by the employer.

VIII. The Role of Other Programs in Dealing with the COVID-19 Epidemic

My general reaction is that the responses by the states, federal government, and the private sector have been woefully inadequate in dealing with the COVID-19 pandemic. In part the inadequate response has been driven by politics, both in the prevention and amelioration of the disastrous consequences of the pandemic. But there are design flaws in many current programs and policies in mounting an effective response to the medical and economic consequences of COVID-19. The widespread reliance in the U.S. on employment-based health insurance is inadequate when many employers have either laid off most of the workers or have ceased operation or both. And the state unemployment insurance program made a substantial contribution to helping workers

through the crisis, but now due to experience rating, employers are facing substantial increases in their UI taxes just as economy may be entering a critical phase in improving the labor market.

Professor Duff (2021b, 23) apply presents the view that both workers' compensation programs and other current programs may be inadequate to deal with pandemics:

The Covid-19 experiment reveals that state workers' compensation systems may be poor remedial vehicles for large-scale mega-risks to which employees and the public are equally exposed. Further pandemics and climate-change events may generate similar problems. . . .

Maybe the mega-risks presented by COVID-19 are simply outside the Grand Bargain. Under that view, a new hybrid remedial structure may be required in which causation plays a limited role or no role at all – something like Social Security Disability for shorter-term work incapacity.

Perhaps we need a National Commission on Dealing with Panepidemics that should be given an 18-month deadline to produce a report that would include recommendations for a standby national program that is triggered by an objective measure (such as an infection rate), that provides medical and cash benefits that supplant or even replace our normal social insurance programs and sources of health care, and that is funded from general revenues using a preordained formula. Or perhaps some other such modest solution.

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[Version 2]

Endnotes

*This article in based on presentations made to the *North Carolina Workplace Torts & Workers' Comp Seminar* on December 4, 2019, with assistance from Veronica McKoy and Hank Patterson, and to the COVID as an Occupational Disease Webinar sponsored by the Workers' Injury Law & Advocacy Group® on January 22, 2021, with assistance from Alan S. Pierce, Jennifer L, Comer , and Caitlin Shields. I received very helpful comments on these presentations from Michael C. Duff, Emily A. Spieler, and David Torrey. Others who provided assistance include Jim Gallen, Timothy Schmidle, Glenn Shor, and Brian Zaidman. I express thanks to all these persons and absolve them of any remaining errors.

[1] Williams and Barth (1973, 61-62) discuss two ground-breaking laws – the German law of 1884, which provided benefits for injured workers through a government insurance fund, and the 1897 British law. which relied on employers to provide benefits. The early U.S. workers' compensation laws relied in part on the British approach.

[2] For additional information on Grand Bargain that established workers' compensation as a no-fault limited liability program, see Murphy, Panel, Weiss, and Boden (2020, Note 11); Burton (2017, 53-54); and Spieler (2017, 900-20)

[3]Wyoming also has substantial gaps in coverage or employers and employees, as discussed in Murphy, Panel, Weiss, and Boden (2020, Note 13).

[4]Section III is based in part on Burton (2015a, 10-20)

[5]David B. Torrey, a Pennsylvania Workers' Compensation Judge (in personal correspondence on 11/1/2020) provided this discussion of the importance of medical causation:

> In PA, we interpret the term "injury" liberally. COVID-19 is plainly covered. The worker must show medical causation. The effort constitutes a very heavy burden. Caveat: We do have a long-time rebuttable presumption of causation for diseases with a substantially greater incidence in the worker's occupation than in the general populations, but the sickened worker first must prove the same with some sort of epidemiological or other expert evidence. Even then, the presumption drops out upon employer's showing of some other conceivable cause. In other words, it is a flimsy presumption.

[6]Subsection IV.A is largely based on Wikipedia (2020).

[7]Food and Drug Administration (FDA). FDA Approves First Treatment for COVID-19.

[8]FDA News Release, October 22, 2022 Food and Drug Administration (FDA). *Coronavirus (COVID-19) Update: FDA Authorizes Drug Combination for Treatment of COVID-19*. FDA News Release, November 19, 2020.

[9]Among the factors discussed by Fomenko and Ruser (2021,15) are that "prior to the COVID-19 pandemic, New Jersey had legislation in place that established a rebuttable resumption of workers' compensation coverage in the event that a public safety officer contracted a serious communicable disease during an epidemic." In addition, "Massachusetts has another WC system feature, 'pay without prejudice,' during the initial 180-day period, which likely contributed to the state's high frequency of COVID-19 claims with payments.

[10]The title of the Hackett article refers to hospital care for COVID-19 ranging from $51,000 to $78,000, but those figures refer to patients without insurance or who receive out-of-network care. The numbers I quote in the text are for patients with private insurance claims, which seems to be more comparable to patients receiving health care through workers' compensation.

[11]Kentucky is not one of the nine states analyzed in Section V.D. because the Kentucky response to the COVID-19 epidemic was established by Executive Order. However, the state is included in this comparison of state presumptions because of the apparent ease for employers to rebut the presumption of compensability for COVID-19 cases.

[12]This description of the Occupational Health and Safety Act is based on *An Overview of the Act* in Willborn et al. 2017, 992-999.

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THE FUNCTIONAL OPERATION OF WORKERS' COMPENSATION COVID-19 PRESUMPTIONS

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I. Background on Presumptions

Our discussion concerns, in part, so-called "COVID-19 presumptions." Lawyers in many legal areas encounter and make use of presumptions in their practices. For example, a common presumption in law is that if a person has not been seen or heard from for a specified number of years the person is presumed dead. If litigants were forced to prove with "concrete" evidence that such persons were actually dead, enormous resources would be consumed making the attempt, and many meritorious cases could not be brought. Presumptions allow us to conduct litigation when certain foundational facts have been established. Essentially, we think that when certain foundational facts have been established other facts may reasonably be presumed unless affirmatively disproven. Presumptions are very common in American law.

"Presumptions" have a broadly applicable legal definition, though in the narrow context of COVID-19 their purpose is to make it easier to establish that COVID-19 is an occupational disease or that COVID-19 has been caused by work (where the presumption does not formally classify COVID-19 as an occupational disease but nevertheless covers it). Black's Law Dictionary broadly defines a presumption as,

A legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts. • Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption.

So, given certain factual predicates—in our present context, an eligible employee has received a reliable diagnosis of COVID-19 during a defined period of time (commonly the beginning of the pandemic until an end date set by rule or declared by a state health official)—that "group of facts" creates a legal presumption that contraction of COVID-19 was caused by the employee's working conditions.

II. How Presumptions Work: Thayer-Wigmore versus Morgan

The next question is, what happens after a presumption has been created? In other words, how can the party against whom a presumption operates "overcome the presumption"? (In our context, how can the employer-insurance carrier overcome a COVID-19 presumption?). This is really the crux of the matter from a claimant practitioner's point of view. It should be relatively easy to "set up" the COVID-19 presumption. But if it is easy for the employer-insurance carrier to rebut, or "undo," the presumption, it may have limited value to claimants at the end of the day. On the other hand, if it is impossible (or nearly impossible) for an employer-insurance carrier to rebut the COVID-19 presumption, a nearly "irrebuttable" presumption opens claimants to the familiar argument that the employer should not be the "absolute" insurer of its employees.

As Judge David B. Torrey has explained, two theories of presumptions exist. The first theory treats a presumption as procedural. The procedural theory of presumptions would tend to be hostile to workers' compensation claimants. Once an employer-insurance carrier has produced some substantial expert medical opinion contrary to the COVID-19 causation presumption—in other words medical evidence showing that the COVID-19 contraction in question was not work-related—the presumption would disappear from the case (a classic shorthand phrase for this type of presumption in evidence law is the "bursting bubble"). The claimant would not lose the case outright at that point, but the "burden of production" would shift back to the claimant, who would have to otherwise satisfy the "burden of production" and the overall "burden of proof" of work-relatedness/causation without the benefit of the presumption—in other words, the claimant is essentially back to square one on the causation question. It should be emphasized that, although "procedural," the presumption under this Thayer-Wigmore approach must still be met by the party against whom the presumption operates (here, the employer-insurance carrier) with some substantial evidence: the evidence necessary to overcome the presumption must, viewed alone, "be capable of" disproving the nonexistence of the presumed fact. In other words, under "classical" Thayer-Wigmore analysis, in order to "burst the bubble" the opponent-defendant must do more than submit evidence that "tends" to disprove causation. (One can think of this as being analogous to the amount of evidence a plaintiff must prima facie provide in a case to prevail. Even if the defendant never responds to the allegations of the complaint, the plaintiff still must provide enough evidence which, if believed, would allow the fact finder to rule for the plaintiff as a matter of law).

What does this mean from the claimant practitioner's perspective? Under Thayer-Wigmore the employer-insurer carrier's evidence, if believed, should at least purport to establish that the workplace did not cause COVID-19. If the evidence is at all equivocal on this point, practitioners should be quick to argue that it simply has not met the presumption.

Friendlier to claimants' interests is the second theory of presumption rebuttal, the so-called Morgan theory, which treats a presumption as "evidentiary" and, in effect, creates a substantive rule of law. In the COVID-19 context, if the employer-insurance carrier produces evidence rebutting the presumption of work-relatedness/causation, "the bubble does not burst." Rather, the presumption remains as positive evidence of causation, and, under the rules of several states, both the burden of production and of persuasion (as a practical matter) shift to the employer to prove that work did not cause the disease in question. The presumption places the burden of "proof of non-causation" on the employer as a matter of law. Under the claimant-friendly Morgan theory, the presumption created technically remains rebuttable. But the Morgan presumption is

friendlier to claimants because the employer-insurance carrier's causation evidence (that the workplace did not cause COVID-19) must be more than merely "capable of" being credited—if the fact finder does not in fact credit this evidence, the claimant prevails as a matter of law. Perhaps even more importantly, the claimant's underlying evidence of causation is forcefully buttressed because the presumption itself is independently considered positive competent evidence of causation. A judge could in theory reject all of the claimant's medical evidence and positive evidence of causation would still remain. So, in effect, the presumption, prima facie, establishes causation and shifts the burden to the employer to establish non-causation.

III. Rebuttal of Disease Causation Under COVID-19 Workers' Compensation Presumptions

A. Presumption Rebuttal in Other Workers' Compensation Disease Contexts

Outside the context of COVID-19, a great deal of variability exists across states as to whether Thayer or Morgan-type presumptions (or a state-specific presumption model not quite consistent with either theory) apply in workers' compensation disease causation contexts. Some presumptions seem to fall in between the two extremes. Obviously, the presumptions are of differing strength. As the Larson's treatise notes in connection with firefighter disease presumptions, "[t]he best way to measure this strength is by the negative test of how much it takes to rebut or overcome the presumption," but "[t]he possible grounds for rebutting the presumption vary so widely that the end product varies from a virtually irrebuttable to a virtually worthless presumption."

Judge Torrey has contended that in the context of the firefighter disease presumptions, "[m]ost states seem to treat the firefighter cancer presumption under the Morgan approach," and he identifies Virginia, Maryland, Oregon, North Dakota, Missouri, and Colorado as falling into the Morgan camp. As mentioned, Morgan-type presumptions would tend to be strongest, with the absolute strongest variety in the firefighter cancer context requiring employers to prove not only that the disease was not caused by the work in question, but also that there was some other, specific non-occupational cause. A litigation issue surrounding firefighter cancer (or Heart and Lung-type presumptions) over the years has been whether defendants may attempt to, in effect, argue against the existence of the presumption. For example, an employer confronted with a Morgan rebuttal statute might stubbornly argue that the tobacco usage of a particular plaintiff precludes a finding of workplace causation of cancer – as if the claimant continued to carry the burden of proof on the issue. The nub of such arguments is that the presumptions themselves are scientifically unsound, and it probably goes without saying that these arguments are often poorly received by courts.

B. A Few Examples of Rebuttal Provisions Under COVID-19 Presumptions

In his paper accompanying this webinar, Professor Burton identifies a number of the current COVID-19 workers' compensation causation presumptions. Close inspection of the presumptions reveals that while some establish Morgan-type rebuttal (shifting the burden to the employer-insurance carrier to establish non-causation) others are more ambiguous. As an example of a Morgan-type rebuttal provision consider New Jersey's COVID-19 presumption: "This prima facie presumption may be rebutted by a preponderance of the evidence showing that the worker was not exposed to the disease while working in the place of employment other than the individual's own residence." This language suggests a Morgan approach because the burden proof is shifted to the employer to prove non-causation as specified by the statute. Implicitly, if the employer fails to carry its burden of proof on non-causation, the claimant will prevail. Similarly, Minnesota's COVID-19 presumption statute suggests Morgan rebuttal: "the presumption shall only be rebutted if the employer or insurer shows the employment was not a direct cause of the disease." This provision shifts the burden of proof to the employer, though the waters seem muddied somewhat by inclusion of the term "direct cause," oddly (and one imagines unintentionally) suggesting that the employee must initially prove causation "directly," whatever that may mean.

But consider the murky rebuttal language of the Illinois presumption, which seems at first blush neither Thayer-Wigmore nor Morgan:

> The presumption created in this subsection [820 ILCS 310/1 Section 1(g)(3)] may be rebutted by evidence, including, but not limited to, the following:
>
> (A) the employee was working from his or her home, on leave from his or her employment, or some combination thereof, for a period of 14 or more consecutive days immediately prior to the employee's injury, occupational disease, or period of incapacity resulted from exposure to COVID-19; or
>
> (B) the employer was engaging in and applying to the fullest extent possible or enforcing to the best of its ability industry-specific workplace sanitation, social distancing, and health and safety practices based on updated guidance issued by the Centers for Disease Control and Prevention or Illinois Department of Public Health . . .
>
> (C) the employee was exposed to COVID-19 by an alternate source.

Aside from the general oddity of encountering, in subsection (B), a negligence/fault defense to a causation provision in a no-fault statute, there is no statutory clue as to whether the legislature meant to create Thayer-Wigmore or Morgan rebuttal. From the face of the quoted statutory language one cannot determine the timing of burden-shifting or how the burden shifts when the presumption is met by the employer-insurance carrier with some competent evidence. Perhaps the answer is buried elsewhere in the presumption's statutory language, or perhaps there are other features of Illinois law that would make the answer obvious to an Illinois practitioner.

The bottom-line moral of the story is that no COVID-19 presumption should be taken for granted with respect to the kind of rebuttal mechanism it is creating. The provisions differ from one another and should be studied carefully. Even under the Morgan model, employer-insurance carriers can be expected to attempt to prove workplace non-causation by aggressively investigating other potential sources of employee exposure to COVID-19. Practitioners may already be involved in such cases but I am not aware of related disputes that have thus far resulted in reported cases. It is hard to keep up with the developing law in these new areas.

IV. Conclusion

Whether workers' compensation COVID-19 presumptions are good policy understandably generates debate. But before even addressing that question it is important to know how COVID-19 presumptions operate functionally. To understand the functional operation of a presumption one must know how an employer or insurance carrier may rebut the presumption: is a Thayer-Wigmore or Morgan model at issue? This short paper deliberately avoids discussion of the policy wisdom of workers' compensation COVID-19 presumptions—a broader topic that may be discussed in this webinar. But it will be much more difficult for claimants to prevail, even with the aid of COVID-19 presumptions, unless policy makers establish Morgan-like rebuttal. It is for the reader to determine the desirability of this outcome. Yet, if Thayer-Wigmore is the selected model, one can legitimately ask whether such a presumption is worth the trouble of enacting, for it may be easily overcome.

Endnotes

[1]PAVEL WONSOWICZ, EVIDENCE 36-40 (Carolina Academic Press 2017).

[2]See generally 29 Am. Jur. 2d Evidence § 199.

[3]BLACK'S LAW DICTIONARY (11th ed. 2019).

[4]As defined by a given state's COVID-19 presumption—usually first responders and health care workers, but it could include other employees. (See the discussion in Professor Burton's webinar paper).

[5]But as the paper will discuss, it is not clear that all the COVID-19 presumptions in fact operate in this manner.

[6]Despite this anticipated objection, Alaska's presumption is fully and actually irrebuttable. It reads: "an employee who contracts the novel coronavirus disease (COVID-19-19) is conclusively presumed to have contracted an occupational disease arising out of and in the course of employment if, during the public health disaster emergency . . ." and the employee falls within the designated essential employee categorization. See HCS CSSB 241(RLS) am H, Section 15 (a), available at https://www.akleg.gov/basis/Bill/Text/31?Hsid=SB0241E.

[7]DAVID B. TORREY, FIREFIGHTER CANCER PRESUMPTION STATUTES IN WORKERS' COMPENSATION AND RELATED LAWS: AN INTRODUCTION AND A STATUTORY/REGULATORY/CASE LAW TABLE, NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY at 8-10, available at http://www.nawcj.org/wp-content/uploads/2019/06/NAWCJ-FIREFIGHTER-PRESUMPTIONS-Essay-Table-2013.pdf.

[8]Although courts often express these ideas differently there is broad agreement that, with respect to bursting bubble presumptions, "once the party adversely affected by the presumption offers sufficient evidence rebutting the presumption to avoid a directed verdict as to the presumed fact, the presumption disappears." 29 Am. Jur. 2d Evidence § 213.

[9]See generally Christopher B. Mueller & Laird C. Kirkpatrick, 1 Federal Evidence § 3:10 (4th ed. 2019).

[10]See Torrey, supra., FIREFIGHTER CANCER PRESUMPTION STATUTES at 9-19. But this idea must be treated with care because it is distinguishable from the idea that a rule of law is created in connection with an irrebuttable presumption. A rebuttable presumption (in this context) operates as a rule of law only in the sense that if a certain set of facts is established the burden of proof, or persuasion, is shifted as a matter of law.

[11]LARSON'S WORKERS' COMPENSATION LAW §52.07 [2] [a][iii].

[12]Technically, the burden of persuasion stays with the claimant, but in operation it can be nearly impossible for an employer to prove that a workplace did not cause a disease. Id.

[13]It might be argued that an irrebuttable presumption is unconstitutional as a matter of state constitutional law (e.g., North Carolina once struck down a Heart Statute as an unconstitutional special law, Duncan v. Charlotte, 234 N.C. 86 (1951); see also In re Ivey, 85 Cal. App. 4th 793, 102 Cal. Rptr. 2d 447 (2d Dist. 2000) mandatory presumption is unconstitutional in a criminal contempt proceeding). But one may doubt such analyses apply where broad COVID-19 presumption rules are narrowly tailored to the present emergency, or under federal constitutional law given the current boundaries of the 14th Amendment.

[14]LARSON'S WORKERS' COMPENSATION LAW § 52.07 [2] [a].

[15]See Torrey, supra., FIREFIGHTER CANCER PRESUMPTION STATUTES at 10.

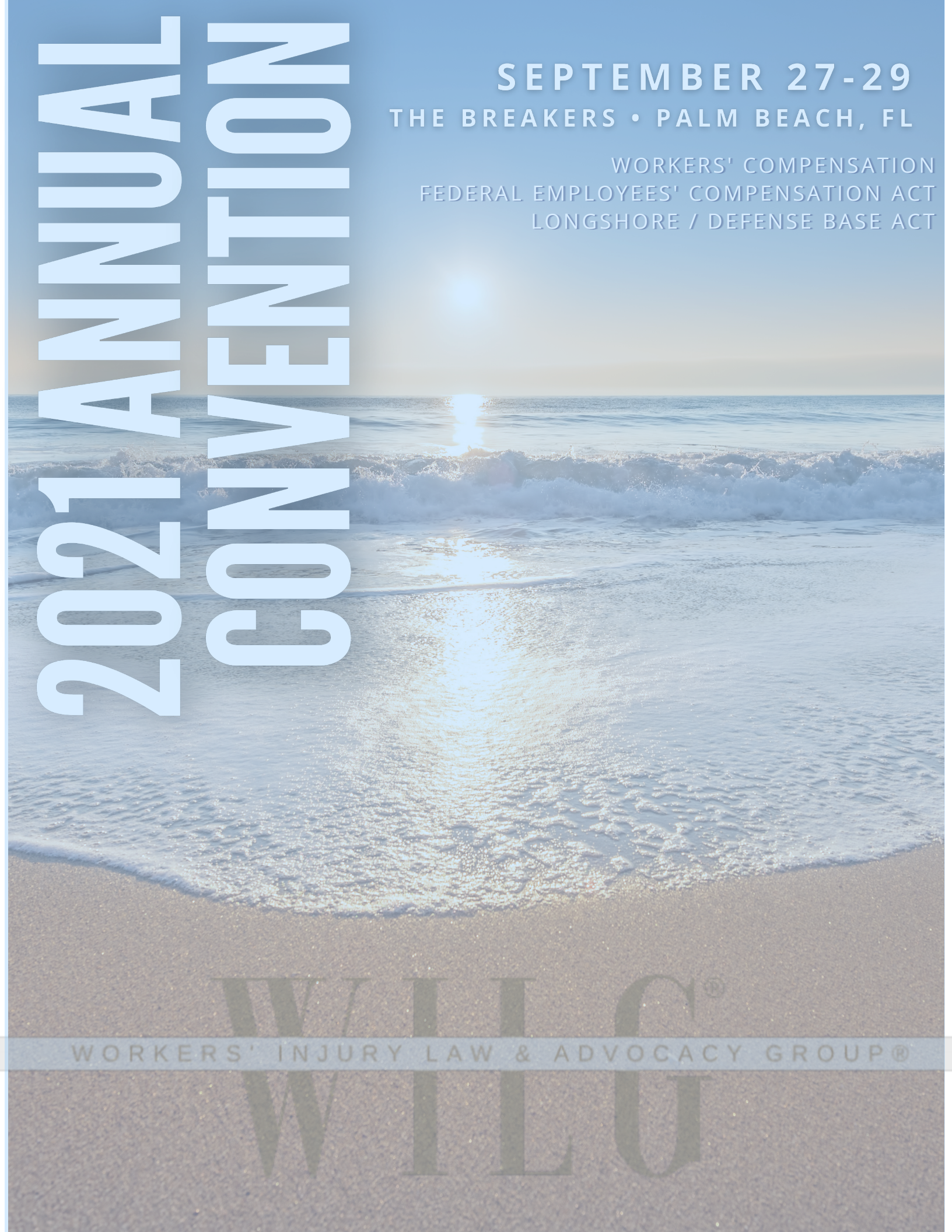
[16]LARSON'S WORKERS' COMPENSATION LAW § 52.07 [2] [a] [i], [ii].

[17]See Torrey, supra., n. 11 citing, e.g., City of Frederick v. Shankle, 367 Md. 5, 785 A.2d 749 (Md. 2001); Linnell v. City of St. Louis Park, 305 N.W.2d 599 (Minn. 1981); Robertson v. North Dakota Workers Compensation Bureau, 616 N.W.2d 844, 855 (N.D. 2000); Medlin v. County of Henrico Police, 542 S.E.2d 33 (Va. 2001).

[18]S.B. 2380 available at https://www.njleg.state.nj.us/2020/Bills/S2500/2380_R1.PDF.

[19]Minnesota Statutes 2018, section 176.011, subdivision 15, as amended available at https://www.revisor.mn.gov/laws/2020/0/72/.

[20]See https://ilga.gov/legislation/101/SB/10100SB0471ham001.htm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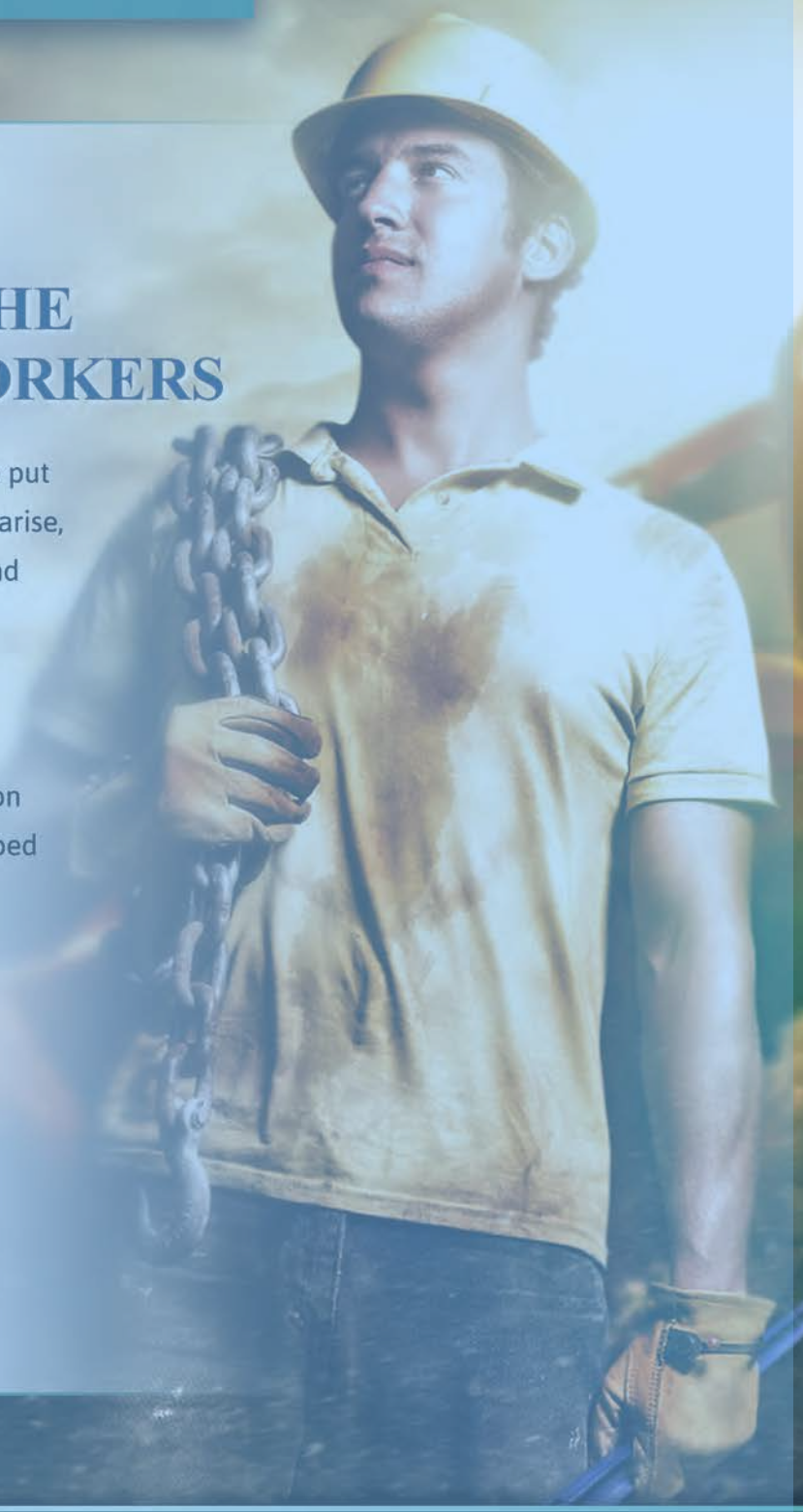

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