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Expanded use of presumption and the implications for the "Grand Bargain"

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This is the second paper in a series produced by the Sedgwick Institute on the concept of presumptions in workers' compensation. The first, written by Judge David Langham and Chris Mandel, focused on the impact of presumptions of compensability for COVID-19 and its attendant consequences. This paper will review the impact of presumptions in general for the workers' compensation systems.

Background of workers' compensation

Workers' compensation began as a system for injured workers in the early 1900s. The first comprehensive law was passed in Wisconsin in 1911. Nine other states passed regulations that year, followed by thirty-six others before the decade was out. The final state to pass legislation was Mississippi in 1948. Today, all states have compensation statutes following a similar underlying design that codified the rules for industrial injury and occupational disease.

As to the purpose of workers' compensation, Larson's Workers' Compensation Law (Larson's), considered the premier treatise on workers' compensation, states:

...it is a mechanism for providing cash – wage benefits and medical care to victims of work-connected injuries and for placing the cost of these injuries ultimately on the consumer, through the mediation of insurance, whose premiums are passed on in the cost of the product.[1]

As to the unique character of American workers' compensation systems, Larson's states:

The sum total of these ingredients is a unique system which is neither a branch of tort law nor social insurance..., but which has some characteristics of each. Like tort, but unlike social insurance, its operation mechanism is unilateral employer liability, with no contribution by the employee or the state; like social insurance, but unlike tort, the right to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution...[2]

The objective is to create an equitable balance between the interests and accountability of both the employee and the employer; in essence, the "Grand Bargain."

Workers' compensation is considered the best of both worlds, with caps on liability for the employer with guaranteed benefits for the employee. In order to receive workers' compensation benefits, an injured employee must only establish that their injury arose out of and in the course of their employment; i.e. occurred as part of their required job and at a time when the job was being performed.

Inclusion of occupational diseases

Since its inception, workers' compensation has, in general, maintained this original construct. There have been variations as to the definition of disease and injury coverage, types of benefits and to what extent they apply, and the value of the benefits. This basic construct has remained consistent through each workforce generation, societal and cultural shifts, development and overall workplace advancements.

The primary exception to that original construct involved occupational diseases. In general, an occupational disease is a disease contracted primarily as a result of risk factors arising from work activity. Occupational diseases were not initially covered as part of the workers' compensation system. Their inclusion began through expanding what constituted an injury at work. In 1918 California expressly covered disease in general terms. In 1920, New York adopted a list of covered diseases. Many states replicated this action throughout the next 20 or so years, establishing the broad inclusion of occupational diseases under which states operate today.[3]

The Arkansas statute provides a typical approach for coverage of occupational diseases:

"...any diseases that results in disability or death and arises out of the occupation or employment of

the employee or naturally follows or unavoidably results from an injury as that term is defined…

Arkansas statute further excludes compensation for "any disease of life to which the general public is exposed." [4]

Claims under occupational disease statutes are challenging to prove for infectious diseases. Some argue that this is reasonable, as it prevents an onslaught of claims from employees who contract illnesses that are common in everyday life and are not connected to employment. Larson's explains that exposure to contagious diseases, in principle, "resembles exposure to heat, cold and elements generally." They have been compensated when an employee can prove a much higher level of exposure as a result of their employment.[5]

Presumptions in workers' compensation

Today, we operate in a world where the COVID-19 pandemic is center stage. We have watched, — some with fascination, some with fear and some with ambivalence, — the spread of this virus across the world. A litany of adjectives has been used to describe the current environment as a result of COVID-19: unprecedented, disruptive, overwhelming, upsetting and disturbing to name a few. Life as it was, is not how it will be, at least in the near future.

There are those who argue that the current "construct" of workers' compensation is neither sufficient nor adequate for the current employment or cultural environment. Several states, either by Governor's executive powers or Legislative authority, have acted upon their opinion as to the insufficiency of their current workers' compensation system by enacting "coverage presumptions" for COVID-19. Setting aside any constitutional, due process and or legality arguments as to the enactment of the "coverage presumptions", the focus for the remainder of this paper will be on the overall concept of presumptions in workers' compensation.

A presumption, simply stated, is an inference as to the existence of one fact from the proof of another. This concept is not new to workers' compensation. Thomas A. Robinson, in his article entitled "The Role of Presumptions within the Workers' Compensation Arena", noted that the concept initially began in the less than obvious aspect of states mandating that workers' compensation laws follow liberal construction to effectuate the remedial purpose of the act. Robinson's premise was that "the doctrine (of liberal construction) operates in the same fashion as a presumption, tilting the scales in favor of the injured employee if certain criteria are met." [6]

Aside from the doctrine of liberal construction, presumption laws typically involve occupational diseases and once enacted replace the "arose out of employment" requirement. Upon establishing that the presumption applies to them as an employee, the employee must then demonstrate that the condition exhibited itself or developed during the time they were employed (or in certain jurisdictions within a certain time frame after retirement) with their employer. Upon proving these facts, the disease is presumed to be compensable. Since these occupational disease presumptions are historically classified as "rebuttable", the employer has the opportunity to argue that the disease is the result of an event outside of the work environment and thus, not compensable.

Prior to COVID-19, presumption laws applied primarily to certain public entity employees, such as first responders — police officers, emergency medical technicians and firefighters. For example:

- 33 states have enacted workers' compensation presumption statutes that cover firefighters for one or more cancers[7]
- 10 states have enacted workers' compensation presumption statutes that include post-traumatic stress disorder (PTSD)[8] and
- 19 states have enacted workers' compensation presumption statutes that include respiratory and heart diseases.[9]

Many industry participants denote compensability presumptions for cancer, PTSD, respiratory conditions, cardiovascular disease and other noted conditions as diseases that are part of our everyday life and therefore, public health issues not directly related to employment risks.

Observations on presumption statutes

To begin with, presumption statutes alter the burden of proof. As previously noted, for coverage under workers' compensation, when an employee is diagnosed with a disease or injury, the employee must prove that the disease or injury arose out of and in the course of their employment. With presumptions, half of the required equation is met by statute. Since presumption statutes assume a causal connection between the injury/disease and the employment, some question whether that "connection" is dubious in that the exposure or injury covered is no greater than what is experienced by the general population and therefore unrelated to their work activities.

In its research brief entitled Presumptive Coverage for Firefighters and Other First Responders, the National Council on Compensation Insurance (NCCI) noted the following studies as to the relationship

between first responder's job duties, exposure to certain toxins and contraction of specific occupational diseases:

- National League of Cities (NLC), April 2009 Assessing State Firefighter Cancer Presumption Laws and Current Firefighter Cancer Research. — "...lack of substantive scientific evidence currently available to confirm or deny linkages between firefighting and an elevated incidence of cancer."
- National Institute for Occupational Safety and Health (NIOSH), October 2013 Mortality and Cancer Incidence in a Pooled Cohort of US Firefighters from San Francisco, Chicago and Philadelphia (1950-2009) — "...there is a small to moderate risk for several cancer sites and for all cancers combined."
- FIRESCIENCE.GOV. June 2017 Wildland Fire Smoke Health Effects on Wildland Firefighters and the Public — "increased mortality for lung cancer, ischemic heart disease and cardiovascular disease."

NCCI additionally noted the following as key considerations applicable to cancer presumptions:

- The prevalence of cancer varies widely depending on the type of cancer, but in general, cancer is relatively common. According to the American Cancer Society, the risks of developing and dying from cancer are 40% and 22%, respectively, for males and 38% and 19%, respectively, for females.
- Cancer is ranked as one of the most expensive medical conditions per person according to the US Department of Health and Human Services, although the cost of a cancer claim varies widely depending on the type of cancer and the stage of diagnosis. In addition to medical costs, a workers' compensation claim may include lost-wage benefits, litigation expenses, and possible survivor and burial benefits.[10]

Considering PTSD, the Substance Abuse and Mental Health Services Administration (SAMHSA), estimated 30% of first responders develop behavioral health conditions such as depression or PTSD.[11] Whereas, the National Institute of Mental Health estimates that 8 out of every 100 people will experience PTSD in their lifetime.

Clearly there are differing opinions as to the relationship between an employee's job duties, PTSD and cancer.

Communicable diseases, such as COVID-19, historically have not been covered by workers' compensation because it is difficult to establish that the illness was contracted in the workplace, a primary premise for workers' compensation coverage. The Centers for Disease Control (CDC) in its press release on June 25, 2020 noted the following as to COVID-19:

- Warns that among adults, the risk of infection increases steadily as you age;
- That the older people are the higher the risk of severe illness from COVID-19;
- Underlying medical conditions increase the risk of infection and severe illness from COVID-19; and
- Risks are associated with daily activity of living.[12]

The National Academy of Social Insurance (NASI) stated the following with regard to occupational disease statutes and ordinary diseases of life:

The novel coronavirus (Covid-19) reflects aspects of this complexity. It is highly contagious and considered an ordinary disease of life but disproportionately exposes workers in specific occupations (not only health care providers and other hospital staff, but also bus drivers, grocery stockers, and workers in warehouses and meatpacking plants).[13]

Nineteen states have issued some form of guidance or directive on coverage of COVID-19 under workers' compensation through executive order or legislation.[14] Fifteen of those states have created compensability presumptions with a focus on two categories of employees: first responders and healthcare workers; and all essential workers.[15] Many reasons have been stated as to why a workers' compensation presumption is needed for COVID-19 including:

- California Governor Newsome stated "This workers' comp presumption is so important because we want people to feel confident, comfortable, they'll have their benefits. The whole idea is, as we move into this second phase, we want to keep workers healthy and keep them safe." [16]
- North Dakota Governor Burgum's executive order stated, "...But due to the possibility of asymptomatic transfer of COVID-19, requiring a COVID-19 response employee to affirmatively demonstrate that they contracted COVID-19 in the course of

their employment unduly shifts risk to the worker and may therefore hinder emergency response…" [17]

- Michigan Governor Whitmer's executive order stated, "…should be able to report to work knowing they will be covered under Michigan's Workers' Disability Compensation Act if they are injured or disabled as a result of COVID 19…" [18]
- Vermont Governor Scott, among other points, stated, "I am signing this bill because:
  - S.342 provides additional piece of mind for workers…
  - The financial impacts of the bill are likely to be relatively small, especially because the current system is already covering COVID-19 claims.
  - An increasing number of states have passed similar legislation…" [19]

Additionally, presumption statutes are typically applicable to only certain employee classifications. Compensability presumptions, including those for COVID-19, typically apply to specific employment genres: PTSD presumptions for police officers; cancer presumptions for firefighters; and COVID-19 for healthcare workers and first responders, expanding to essential workers or in some states, to anyone working outside the home during the duration of an executive order. These distinctions create different classifications of injured workers that have a lower threshold to prove compensability than the general employee. Consider the situation where police officers respond to a workplace event involving an active shooter. The presumption for PTSD would apply only to the police officers not the employees at the business where the shooting occurred.

Lastly, presumption statutes can be very diverse in their application. Consider the broad nature of cancer definitions within the varying states with this presumption:

- CA – Cancer that develops when a person was exposed, while in the course of employment, to a known carcinogen…[20];
- LA – Cancer that is caused by exposure to heat, radiation, or a known or suspected carcinogen…[21]; and
- ID – Diagnosis of a specific list of cancers.[22]

There are a wide variety of definitions and their application.

Presumptions as a new era of workers' compensation

The United States Supreme Court established constitutionality for the workers' compensation system in the case of New York Cent. R. Co. v. White, 243 U.S. 188 (1917). The phrase "Grand Bargain" was coined as the moniker for the balancing of forfeiture and gain of rights between the employer and employees. Three aspects as to workers' compensation resulted: a cap on damages for employers; a guaranteed benefit structure for employees; and the commitment of responsibility and the attendant expectation placed on the employer to promote a safe work environment and control the risks associated with workplace injuries.

There have been countless articles written since the inception of workers' compensation as to whether the premise of the Grand Bargain has lived up to its "moniker" or is meeting the needs of all parties within the workers' compensation environment.[23] Every state has its own unique workers' compensation landscape and therefore its own nuances and idiosyncrasies applicable to its regulations and statutes. Each state, as the author of its respective workers' compensation program, routinely attempts to address opportunities and or inadequacies vocalized by their constituents to maintain their variation of the Grand Bargain.

The COVID-19 environment has generated a renewed effort for utilization of compensability presumptions. As outlined earlier, historically, ordinary diseases of life, such as COVID-19, were not included in any list of occupational diseases in any jurisdiction. The hesitation for inclusion of such ordinary diseases of life seems to focus on the generalized aspect of the disease — one that has widespread exposure in the public and can easily be contracted outside the workplace, manifesting a questionable link to the work environment.

The common element to explore rests on the relationship between the ordinary communicable disease to the nature of the employment in contrast to the exposure present in everyday life. With compensability presumptions around occupational diseases, legislators and Governors (with regard to COVID-19) have determined that the employment relationship exists to the exclusion of everyday life exposure. This could be interpreted as a significant shift or new "era" in workers' compensation coverage similar to what was experienced in the 1940s and 1950s when workers' compensation statutes were expanded to include selected occupational diseases.

Daniel E. Walker in his 2019 article for the Western New England Law Review outlined the following "eras" that have been observed through the development of the workers' compensation system:

- 1st – Reform and the Grand Bargain;
- 2nd – Involvement of the Federal Government (National

Commission on State Workers' Compensation Laws – 1972 Report);

- 3rd – Addressing Rising Employer Costs; and
- 4th – Opt-Out Movement.[24]

The 4th era noted by Mr. Walker has yet to completely play out, as "opt-out" (aka Non-subscription) remains primarily a Texas alternative to worker's compensation. However, if you consider the current expansion of the use of presumption, the question may be: is this a 5th Era or simply a part of the 4th Era, supplanting the Opt-Out movement as the dominant focus?

Without oversimplifying, as mentioned at the outset of this paper workers' compensation was established to provide benefits in the form of medical treatment and wage loss to those injured while working. The primary parties to this agreement are the employer and the employee. Aside from providing benefits through workers' compensation insurance, employers recognized the need to place extensive focus on ensuring a safe, healthy and productive work environment for their employees and have largely been successful with this focus. As noted by the U.S. Bureau of Labor Statistics incidence rates for non-fatal occupational injury and illnesses have declined over 40% since 2003.[25] The Maine Department of Labor stated the following on the relationship between safety and costs: "A safe and healthy workplace not only protects workers from injury and illness, it can also lower injury/illness costs, reduce absenteeism and turnover, increase productivity and quality, and raise employee morale. In other words, safety is good for business." [26]

Socialization of risks

Some argue that broadening workers' compensation coverage beyond what are employment related risks for which employers have no ability to control or prevent, would seem not only counter-productive but counter intuitive as well. Such broadening could generate the perception that we are entering a new era through presumptions where the focus is moving towards "socialization of risks" and less on the distinctions of work-related risk and its attendant focus on a safe and productive work environment.

As to the "socialization of risk", It has been proposed that society is a third interested party to this Grand Bargain, with the role of balancing protections for the employee with the critical role of business to a well-functioning economy. With all losses, whether work-related or not, someone must pay the cost. With the current pandemic, state governments began evaluating what the balance should be between the interest of business/employers, employees and society as to the cost of the losses associated with COVID-19. As a result of those evaluations, 15 states determined the need for presumptions, effectively "socializing the risk", shifting it to employers.

The workers' compensation industry operates best in an environment of forthrightness and transparency. Clear delineation of what workers' compensation covers allows employers to promote and ensure a safe work environment, employees to know what conditions, injuries and diseases for which they can attain workers' compensation benefits, and carriers to determine in a fair manner what insurance coverage is needed at an appropriate rate. For workers' compensation risks and costs both the insurance industry and employers are looking for predictability, while injured workers see fairness and equity as they recover from their accidents and diseases.

Long term, states, employers, employees and carriers will continue to confront the challenge of what the Grand Bargain represents in the current employment, cultural and political environment. Questions all stakeholders may want to consider:

- Have we entered a new era of workers' compensation as a result of the expanded use of presumptions and evolving expectations regarding openly infectious diseases?
- Where should the line be drawn as to the relationship between employment and any communicable disease?
- Have the intentions for workers' compensation been modified in a permanent fashion?
- Do we sufficiently understand the full implications of presumption expansion?

It remains to be seen if this is a true shift representing a new era moving to a greater degree towards socialization of risks.

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