Trovillion, Inveiss & Demakis

Trovillion, Inveiss & Demakis, APC has grown in reputation as one of Southern California's premier law firms specializing in representation of employers, insurance carriers and third party administrators in workers' compensation litigation.

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COVID-19 PANDEMIC AND WORKERS' COMPENSATION - WHAT YOU NEED TO KNOW - PART 1

Due to the current COVID-19 pandemic, to keep up with reality on the ground, legislative changes are proposed and made to our workers' compensation system in real time. This article discusses some changes that have already been implemented; and discusses some of the proposed legislation in direct response to the current health crisis.

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Here at Trovillion, Inveiss & Demakis we have employed a team of our attorneys to review the latest draft of implemented and proposed bills and believe our perspective on the state of the current workers' compensation system will be helpful to share with you, our trusted clients, in an effort to guide you through this challenging and confusing time for insurers and employers. Notwithstanding the substantive and procedural changes outlined below, our Firm remains committed to servicing our clients. We continue to strive to achieve the most advantageous and cost-effective results possible.

GOVERNOR NEWSOM'S EXECUTIVE ORDER

On May 6, 2020, Governor Gavin Newsom issued Executive Order N-62-20, which directly addressed COVID-19 and its effect on workers' compensation claims in the State of California. Most importantly, the Order created a rebuttable presumption that any worker who had returned to their place of employment and was subsequently diagnosed with COVID-19, is presumed to have contracted the disease

on an industrial basis. The Order goes on to specifically state:

Any COVID-19 related illness of an employee is presumed to arise out of and in the course of employment for purposes of awarding workers' compensation benefits if ALL of the following are satisfied:

- The employee tested positive or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or employment services at the place of employment at the employer's direction;
- That the date the employee performed the labor or services at the place of employment was on or after March 19, 2020;
- The place of employment was not the employee's home or residence; and
- The diagnosis was done by a physician who holds a physician and surgeon's license issued by the California Medical Board and that diagnosis is confirmed by further testing within 30 days from

the date of the diagnosis.

This presumption is rebuttable and may be controverted by other evidence. If left unchallenged, the Workers' Compensation Appeals Board is bound to find industrial injury and award benefits accordingly.

The presumption of compensability only applies to dates of injury through July 6, 2020; while in reality claims can be reported until July 20, 2020, 14 days after the date that the Order is set to expire.

Procedurally, once a claim is presented for a COVID-19 presumptive injury, the claims administrator has 30 days to reject liability. Failure to reject liability within 30 days deems the claim compensable and may only be rebutted with evidence discovered after the 30 day period that couldn't have been discovered within the 30 day period, similar to the limitations of Labor Code Section 5402.

Any accepted claim of COVID-19 related illness renders the injured worker eligible for all benefits available under the

workers' compensation system. These claims are still subject to apportionment statutes of Labor Code sections 4663 and 4664 as to any permanent impairment.

For a COVID-19 claim, where an employee has paid sick leave benefits available, those benefits must first be exhausted before temporary disability or Labor Code 4850 benefits are due and payable. Where the employee does not have the specific sick leave benefits available to them, temporary disability or Labor Code 4850 benefits shall be provided from the date of the disability. Unlike normal claims, there is no waiting period for temporary disability benefits.

To qualify for temporary disability or Labor Code 4850 benefits, the employee must satisfy either of the following:

- If the employee tests positive or is diagnosed with COVID-19 on or after May 6, 2020, the employee must be certified for temporary disability benefits within the first 15 days after the initial diagnosis and must re-certify every

15 days thereafter for the first 45 days following the diagnosis; or

- If the employee tests positive or is diagnosed with COVID-19 prior to May 6, 2020, the employee must obtain a certification within 15 days of May 6, 2020, documenting the period for which they are claiming they were temporarily disabled and unable to work, and must re-certify every 15 days for the first 45 days following the diagnosis.

The certifying doctor must hold a physician and surgeon's license issued by the California Medical Board and does not need to be a workers' compensation specific doctor.

The Administrative Director has the authority to adopt, amend, or repeal any regulations deemed necessary to implement this Order. This Order applies to all workers' compensation carriers writing policies in California, self-insured employers, and any other employer carrying its own risk.

The Department of Industrial Relations waives collection on any death benefit payments pursuant to Labor Code section 4706.5 arising out of claims covered by the Order.

WHAT DOES THAT MEAN FOR COVID-19 CLAIMS?

Does this change how we would normally investigate a presented claim for benefits? Technically, it does not. However, due to the significantly shortened period of time within which a claim must be investigated, it is important to perform your investigation as expeditiously as possible.

Examine what evidence may be available to rebut the applicant's contention that the virus was contracted at the worksite. Question the injured worker's outside of work activities such as vacations in the weeks leading up to the alleged exposure including cruise activity. It may also be imperative to question workers about their spouses/significant other's work activities; if they have children, their potential exposure through daycare. Keep detailed records of the

steps taken to protect workers as well as detailed records of when the employee worked.

The jury is still out as to whether it is prudent to test other employees who may have been exposed to a worker who has tested positive for the virus without those employees demonstrating specific symptoms of COVID-19. Should there be further guidance from health-care professionals on this issue, we will update this Newsletter accordingly.

NEW REGULATIONS FOR MED-LEGAL EXAMS

The DIR published Regulation section 46.2 directly in response to COVID-19. The Regulation states as follows:

- A QME or AME may reschedule any in-person examinations currently calendared. If the evaluation is rescheduled, it must be set within 90 days from the date that the stay-at-home order is lifted.
- The QME or AME may instead provide a record review and

injured worker electronic interview summary report. The physician can interview the applicant by telephone or video conference. Once the stay at home order is lifted, the QME may schedule the face to face evaluation.

- A complete evaluation can be done through telehealth where all the following are met:
    - The applicant is not required to travel outside their home to accomplish the telehealth evaluation; and
    - There is a medical issue in dispute which involves whether or not the injury is AOE/COE, or the physician is asked to address the termination of an injured worker's indemnity benefits payments or address a dispute

regarding work restrictions; and

- There is an agreement in writing to the telehealth evaluation by the applicant, carrier or employer, and the QME. Agreement to the telehealth evaluation cannot be unreasonably denied. If a party believes the other has unreasonably denied consent to the telehealth evaluation, they may request a hearing at the WCAB by filing a Declaration of Readiness to Proceed; and
- The telehealth visit under the circumstances is consistent with appropriate and ethical medical practice, as determined

by the QME, and
    - The QME attests in writing that the evaluation does not require a physical exam.
- As far as time limits for scheduling A evaluation is concerned, the following is now in effect:
    - If the party with the legal right to schedule the evaluation is unable to obtain a date within 90 days from the date of the appointment request, that party may waive the right to a replacement QME in order to accept an appointment that is no more than 120 days after the date of the party's initial request. When the selected QME is unable to

schedule within 120 days, either party may report the unavailability of the QME and the Medical Unit shall grant a replacement panel unless both parties agree in writing to waive the 120 day requirement.

- All time periods with regards to service of medical-legal reports are extended by 15 days.
- Once the stay at home order is lifted by the governor in the jurisdiction in which the evaluation will occur, the rules governing evaluations will return to normal.

CURRENT STATUS OF PROCEEDINGS BEFORE THE WCAB

The Board is currently holding hearings except lien conferences via telephone conference. Trials are currently being conducted by telephone. As a practical matter, unless a case is ready to submit with no witness

testimony, it will likely be continued until the WCAB installs video conferencing, which we understand is currently in the works but with no firm implementation date. Current telephone technology makes it very difficult to hear witness testimony. Issues such as the location of the parties (most, including judges, are working from home), the location of the court reporters, the need for interpreters, the inability to judge credibility of witnesses over the phone, and the inability for the opposing party to make real-time necessary objections, make trials via telephone unworkable. The parties are advised to wait until receiving instruction from the trial judge before filing their exhibits. The prudent practitioner should obtain an agreement at the Mandatory Settlement Conference as to how the exhibits should be filed and served on the opposing parties. This helps to create less delay on the day of trial.

While trials are difficult, the manner in which Mandatory Settlement Conferences are handled has been streamlined in a very positive way. The parties are now forced to meet and confer to discuss

the case well before the hearing and either be prepared to settle the matter or set it for trial. Applicant attorneys in particular are now forced to review their files BEFORE the hearing rather than reviewing their files the day of or at the hearing, creating less delay and more meaningful case resolution discussions.

With that in mind, we believe this is an opportunity for the defense bar to use our leverage of being on top of our files to push settlement, especially where an applicant would be looking at considerable delay before seeing any kind of resolution of their matter and an award of impairment.

All of our attorneys enjoy amicable relationships with most applicant attorneys and judges in the Southern California venues and have been successfully negotiating favorable settlements in a very timely manner under these most difficult of circumstances. We remain aggressive in pushing any matter forward with a keen understanding of the costs associated with delays to the litigation process.

For now, this is the "new normal" for the foreseeable future of worker's compensation claims handling in the State of California. We here at Trovillion, Inveiss & Demakis are ready to adapt to the changes procedurally and substantively and are here to assist all of our clients with their ever-changing needs as well. Please feel free to contact us at each of our office locations should you need further assistance.

Stay tuned for Part 2 of this newsletter, which will detail some significant proposed legislation being debated in Sacramento in response to workers' compensation and the COVID-19 crisis.

consulting with a qualified, licensed attorney.