

# MASSACHUSETTS Lawyers Weekly

## COVID-19 claims on deck before DIA

*Comp attorneys seek rulings on 'inherent risk,' causation*

👤 By: Pat Murphy 🕒 August 27, 2020

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Workers' compensation attorneys are seeking rulings on what constitutes an inherent risk of employment and the key question of causation as claims alleging injury due to COVID-19 go before the Department of Industrial Accidents.

Boston attorney Angel C. Melendez represents a supermarket worker who alleges he contracted COVID-19 during the course of his employment. At a recent conference before a DIA administrative judge, Melendez argued that his client could meet the statutory requirement that the risk of contracting a contagious disease was an "inherent risk" of his employment as a grocery store worker.

On Aug. 28, the judge issued a conference order awarding to Melendez's client temporary total disability benefits under G.L.c. 152, §34 for a closed period of time. The judge reserved for a future hearing the issue of medical benefits under Section 30.



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*— Angel C. Melendez, Boston*



Melendez said he sees his client's claim as a test case on the issue of causation in COVID-19 comp cases, generally.

"We really don't know how the judges are going to rule, but it's a giant hurdle to prove causation in these cases," Melendez said.

W. Todd Huston, a workers' comp defense attorney in Worcester, said he is seeing COVID-19 comp cases, but mostly in the medical field.

"The inception of some cases [of COVID infection] occurred in March, so as we enter September we're going to see the first cases litigated at the [DIA] conference level," he said.

### **Inherent risk of the job**

Fall River attorney Deborah G. Kohl represents claimants who work in the medical field and are alleging that they developed COVID-19 after being exposed to patients with the virus. She also represents clients who work in non-medical fields and claim their exposure to the virus was work-related.



"In the medical field, I feel the claims are a little bit easier because you can document that they've actually been exposed to patients who have actually been diagnosed with COVID," Kohl said.

Under the Workers' Compensation Act, there is a threshold that employees have to meet in order for the contraction of an infectious disease to be deemed a compensable injury. The act compensates for "personal injury" occurring on the job, defined under G.L.c. 152, §1(7A), as encompassing "infectious or contagious diseases," but only if "the nature of the employment is such that the hazard of contracting such diseases by an employee is inherent in the employment."



*"The burden of proof is much easier in the medical context. Just being exposed to COVID is insufficient."*

*— W. Todd Huston, Worcester*



Huston said there is a valid argument that the nature of work in a medical or nursing home setting exposes you to disease such that it is an inherent risk of employment.

"The burden of proof is much easier in the medical context," Huston said. "Just being exposed to COVID is insufficient."

But according to Melendez, there's a strong argument to be made that, because of the pandemic, the risk of contracting COVID-19 is an inherent part of employment for all essential workers, including supermarket employees.

### **Payment without prejudice**

According to workers' comp defense attorney Austin T. Powell, because the majority of employees who test positive for COVID-19 are able to return to work within a short timeframe without incurring major medical expenses, the insurers he represents often decide to avoid the cost of litigating the claims and, instead, avail themselves of Massachusetts' "payment without prejudice" system.

"In all workers' comp cases, in order to establish a work-related injury, it's the burden of the employee to show it's a disability causally related to work," the Boston lawyer said. "The payment-without-prejudice provision allows that to be sidestepped and put off until a later time so the insured can get paid benefits."

Under G.L.c. 152, §8, an insurer can decide to make weekly benefit payments to a claimant for six months while reserving the right to contest liability. The insurer further has the right to terminate or modify payments and contest the claim at any time within those 180 days after providing written notice.

"If insurers were right and left denying these cases, they'd be deep in litigation," Powell said. "A lot of these cases are being paid because of the nature of the disease. People are out for a few weeks. The insurer can pick up the case without prejudice and pay several weeks of benefits until the employee gets back to work."

According to Powell, pay-without-prejudice has been a common way for insurers to handle cases involving employees who are required to temporarily leave work because they test positive for COVID-19 or because they exhibit symptoms.

Lynnfield workers' compensation attorney Richard H. Schwartz has a COVID-19 case scheduled for a conference before an administrative judge at the beginning of September.

Schwartz said that, in his experience, the Workers' Compensation Trust Fund, which pays claims against uninsured employers, does not pay cases without prejudice.

"They should pay without prejudice just like any insurer would pay without prejudice," Schwartz said. "They defend cases very aggressively. The hardship that is created while the injured worker is waiting many months to come



before a judge is excruciating.”

But sometimes the calculus for insurers in deciding to go the pay-without-prejudice route is not so simple. Powell noted one case in which a client decided to pay benefits to an insured employee who wound up accruing substantial bills after becoming seriously ill with COVID-19 and spending months hospitalized in intensive care.

The insurer now faces the decision of whether to terminate benefits and contest the claim, he said.

“My feeling is that, after having paid six months of benefits to someone who is still in the ICU, it’s tough to shut somebody off,” Powell said. “In that situation, the benefits will probably continue, but those are really the rare cases.”

According to Kohl, there’s no question that an employer should pay wage continuation to an asymptomatic employee who is sent home because he or she tested positive.

However, Kohl said she represents a client who is facing a dispute with her employer even though she “clearly” was exposed to someone with the virus at work. After the employer sent the client home to get tested, the result came back positive for COVID.

Kohl said the client was out of work for a month despite having no symptoms and running into delays for retesting so that she could return to work.

“The employer denied the claim, saying she went home for ‘other reasons,’” Kohl said. “To me, that’s a clear case the employer either needed to do wage continuation or pay her workers’ comp.”

Kohl said another problem group in terms of workers’ compensation are the so-called “long-haulers” — those who suffer from serious COVID-19 symptoms for a month or longer.

“No one really knows what’s going to happen with regard to that,” she said.

### **Causation conundrum**

An emergency measure introduced in the Legislature in March, H. 4749, would have created a presumption under the Workers’ Compensation Act that emergency medical technicians, emergency room and urgent care medical personnel, and emergency room and urgent care non-medical personnel who contracted COVID-19 became infected in the course of employment. The measure stalled in committee.

According to Melendez, new legislation is required to ensure that people receive the workers’ compensation coverage to which they are entitled.

“Right now, I don’t think there’s a lot of support for it,” he said.

Powell said he expects administrative judges to be more likely to find health care employees’ COVID-19 claims to be job-related simply because of the nature of their work. But he added that that doesn’t mean claimants such as supermarket workers won’t be able to convince a judge on the issue of causation.

“For grocery store workers and other people who deal with the public a lot, there’s a perception that there’s more substantial risk of exposure,” he said.

But Kohl said that grocery and other non-medical workers are at a severe disadvantage in proving causation.

“It’s going to be harder for persons who work in grocery stores or retail because you can’t identify an individual who they were exposed to,” she said.

Powell said the focus will turn to the claimant’s treating physician when the nature of the claimant’s work makes it difficult to trace exposure to a particular source.

“If they report to their doctor that they work closely with a bunch of other people and that they think their exposure came from work, the doctor could report that and at least there’s a scintilla of evidence to present to a judge,” Powell said.



Schwartz said his client's case is helped by the fact that the client's treating physician made sure his spouse was tested immediately for COVID. That negative test result helps exclude non-workplace causes of infection.

"I have to have an opinion from a doctor that states the medical-causal relationship," Schwartz said. "It can be in terms of 'likely,' 'highly likely' or 'more likely than not' — it doesn't have to be an absolute statement. In my case, I have a strong opinion from a doctor who has written a very detailed narrative report that explains [the claimant] wasn't exposed to anyone but his wife, who tested negative."

Kohl said she expects insurers and employers to try to place an unfair burden on claimants to exclude any potential sources of infection outside of work to establish a claim.

"Let's say that they weren't exposed at work and got exposed going to the grocery store or to CVS," Kohl said. "No one will ever know."

And because the science regarding COVID-19 is still evolving, one problem facing both the plaintiffs' and defense bars is finding experts who can speak authoritatively on issues such as person-to-person transmission.

"We're in new territory because workers' compensation is driven by expert medical opinion," Powell said. "[Independent medical exam] doctors who are sufficiently conversant in this area are few and far between."

Even assuming counsel can find someone who is qualified, Kohl said such experts would typically be cost-prohibitive except in high-value cases.

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