COVID 19 AND WORKERS' COMPENSATION IN NORTH CAROLINA

Edward Pauley
Wallace & Graham
525 N. Main St.
Salisbury, NC 28144
704-633-5244
epauley@wallacegraham.com

LEARNING OBJECTIVES

- WHAT IS COVID-19?
- IS COVID-19 COMPENSABLE IN THE NORTH CAROLINA WORKERS' COMPENSATION SYSTEM?
- WHAT ARE THE ELEMENTS OF A WORKERS' COMPENSATION CLAIM FOR COVID-19?

I. WHAT IS COVID 19?

Coronavirus disease 2019 (COVID-19) is a novel coronavirus. It is "novel" in the sense that it is a new coronavirus that has not been previously identified. There are many types of human coronaviruses including some that commonly cause mild upper-respiratory tract illnesses. COVID-19 is a new disease, caused by a novel (or

new) coronavirus that has not previously been seen in humans. The virus causing COVID-19, is not the same as the coronaviruses that commonly circulate among humans and cause mild illness, like the common cold.

On February 11, 2020 the World Health Organization announced an official name for the disease that is causing the 2019 novel coronavirus outbreak, first identified in Wuhan China. The new name of this disease is coronavirus disease 2019, abbreviated as COVID-19. In COVID-19, 'CO' stands for 'corona,' 'VI' for 'virus,' and 'D' for disease.

The virus that causes COVID-19 is thought to spread mainly from person to person, mainly through respiratory droplets produced when an infected person coughs, sneezes, or talks. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs. Spread is more likely when people are in close contact with one another (within about 6 feet).

II. COVID 19 IN THE UNITED STATES AND NORTH CAROLINA

The first confirmed case of COVID 19 in the United States occurred in January of 2020. By the end of March of 2020, confirmed cases were found in every U.S. state. On March 5, 329 cases were reported across the United States.

On March 3, Governor Roy Cooper identified the first case of COVID-19 as a person who had traveled to Washington state and was exposed at a long-term care facility. On March 6, the second case was announced in a man in Chatham County who had traveled to Italy in late February. On March 7, North Carolina had five

new positive cases reported in Wake County — all five had traveled to Boston in late February to attend a conference by the pharmaceutical company Biogen. After five more presumptive confirmed positive cases were reported on March 9, North Carolina governor Roy Cooper issued an executive order declaring a state of emergency on March 10.

As of August 3, the number of confirmed cases of COVID 19 across the US was 4,832,861. Approximately 158,574 had died from the illness. In North Carolina, as of August 3, 126,532 people had been diagnosed with the disease. 1,999 residents had died from the disease.

The number of people who have contracted from the disease and died from the disease includes many individuals who contracted the disease through their employment.

III. WORKERS' COMPENSATION - IS COVID 19 A COMPENSABLE DISEASE?

The question that we are faced with is whether COVID-19 can be a compensable disease. In discussing COVID-19, it should not be surprising to learn that indeed it can be a compensable disease. The mistake that people make is to envision COVID-19 as a new area of law. It is not. While it is a new disease, it is a disease like any other disease including viral and bacterial diseases. North Carolina law and cases before the Industrial Commission have long recognized disease claims as compensable.

Spruill v. N.C. Dep't of Agric., 700 S.E.2d 248 (2010)- Lyme disease caused by occupational exposure to ticks.

MacRae v. Unemployment Compensation Com., 217 N.C. 769, 5 S.E.2d 595 (1940)- tuberculosis caused by a coworker accidentally coughing sputum into the claimant's mouth.

Norton v. Waste Mgmt., 146 N.C. App. 409, 552 S.E.2d 702, (2001)— Employee contracted chronic fatigue syndrome, fibromyalgia and other ailments as a result of his job collecting raw sewage for the waste company. Employee was accidentally sprayed with raw sewage.

In addition, N.C.G.S. §97-53 lists various diseases as occupational diseases. One of those is "undulant fever". Undulant fever is also known as brucellosis which is a highly contagious bacterial infection caused by ingestion of unpasteurized milk or undercooked meat from infected animals, or close contact with their secretions.

Also listed is "anthrax" which is a bacterial infection. In addition, the statute lists "psittacosis" which is a bacterial infection contracted from birds which can be transmitted by mouth-to-beak contact, or through the airborne inhalation of feather dust, dried feces, or the respiratory secretions of infected birds.

So, the thought that a virus could be a compensable claim is not cutting edge or novel. The virus may be novel, but the compensability of such an illness would not be. COVID-19 is a disease like any other disease. If it was caused by the occupation, it could be compensable.

Therefore, the appropriate approach would be to utilize existing North Carolina law on occupational diseases to see if a particular COVID-19 claim is compensable.

A. Occupational Diseases In North Carolina

North Carolina General Statute §97-53(13) defines an occupational disease as:

> Any disease which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

It would be difficult to argue that COVID-19 is peculiar to a particular trade or occupation. It is also an ordinary disease of life. But it can still be compensable if it meets the statutory standards.

There have been a few hepatitis cases before the Commission and I believe that is the closest thing to a COVID-19 claim in terms of analysis. The best way to discuss the various aspects of a COVID-19 case is through the lens of a hepatitis case, *Booker vs. Duke Medical Center*, 297 N.C. 458; 256 S.E.2d 189 (1979).

B. Booker vs. Duke Medical Center

In *Booker,* the claimant worked for Duke Medical Center for about five years, where he performed diagnostic procedures on blood and other body fluids. In the process he manually tested blood samples and, despite precautions, he routinely

spilled blood on his fingers. Each day one or more of the blood samples he tested was infected with serum hepatitis. These samples bore no diagnostic label and the lab technicians never knew whether the patient's blood was diseased.

One day, Booker became ill and tests revealed that he had contracted serum hepatitis. Booker battled with the disease until it took his life two and a half years later. A workers' compensation claim was filed by Booker and then, following his death, by his family.

Serum hepatitis is a virus disease of the liver which is transmitted when any amount of blood from one infected with the disease is introduced into the blood of another. It is usually transmitted by transfusions, injections, or contact with blood or blood products through some point of entry such as nicks, cuts, and scratches on the skin. It is a microscopic virus that can be contracted in the employment setting.

However, as the court in Booker noted, serum hepatitis is not a disease limited to persons who handle blood. Members of the general public are from time to time afflicted with this disease. The issue became the virus of serum hepatitis could be an occupational disease. The Court held that it was.

The *Booker* Court held that for an occupational disease to be compensable under N.C.G.S. § 97-53(13) it must be:

> (1) characteristic of persons engaged in the particular trade or occupation in which the [plaintiff] is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [plaintiff's] employment."

This step by step analysis has become the defining test for occupational diseases. See *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983).

C. Is COVID-19 Characteristic Of And Peculiar To A Particular Trade, Occupation Or Employment

The first prong of the test is whether the disease is characteristic of and peculiar to a particular trade, occupation or employment. COVID-19 is a virus that has afflicted millions in this country and abroad. It is a pandemic. Intuitively, it would not seem that COVID-19 could be characteristic of and peculiar to a particular trade, occupation or employment. However, that is not necessarily true.

In *Booker,* the Court held that a disease is "characteristic" of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question. The employer argued that hepatitis is not "peculiar to" the occupation of laboratory technicians since employees in other occupations and members of the general public may also contract the disease.

The Court held, though, that the phrase, 'peculiar to the occupation,' is "not used in the sense that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations."

So the Court looked at whether the contraction of hepatitis was peculiar to and characteristic of the claimant's employment. As mentioned, the claimant manually tested blood samples in the laboratory at Duke Medical Center. He would often spill blood on his fingers. At least once a day, he would come into contact with blood that was infected with hepatitis. There was testimony that Booker was at a much higher risk to contract hepatitis than other employees in the hospital and people who are not employed in the hospital.

It is clear from this evidence that a "distinctive relation exists between Mr. Booker's occupation and the disease serum hepatitis. The evidence amply supports the Commission's determination that Booker's job exposed him to a greater risk of contracting the disease than members of the public or employees in general. This finding of fact supports its legal conclusion that serum hepatitis is a disease "characteristic of and peculiar to his occupation of lab technician." "

Interestingly, the Court also noted that "many other states have similarly recognized that hospital employees may face an increased risk of contracting communicable diseases."

So how does this impact COVID-19 cases? It really makes the claims very case specific. If a claimant works retail and was exposed to the virus from a sick customer, that probably does not establish that COVID-19 is peculiar to the occupation of a retail employee. If someone works in a hospital without any COVID-19 patients but a visitor that is infected enters the facility and infects the

worker, that probably does not establish that COVID-19 is peculiar to the occupation.

However, if you have a nurse that is working in a hospital and they have COVID patients and the nurse works with those patients, there is a strong argument that the disease is peculiar to and characteristic of that occupation.

So it really depends on what type of employment the claimant is engaged in and how they interact with people who have or might have COVID-19.

Even if the disease is not peculiar to or characteristic of the employment, the claim may still be compensable. The second prong concerns ordinary diseases of life. If a disease is an ordinary disease of life, it is compensable if the employment placed the employee at a greater risk of contracting the disease than the general public.

In *Booker,* the Court acknowledged that hepatitis is an ordinary disease of life. Anyone may contract hepatitis. But the Court found that the evidence in the case supported the Commission's conclusion that the public is exposed to the risk of contracting serum hepatitis to a far lesser extent than was Mr. Booker. The Court held that "the greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workman's compensation."

So the question in a COVID-19 case is whether the employment created a greater risk of developing the disease than the general public. Again, this is a case specific determination. Certainly health care workers would be at an increased

risk. Nursing home workers could fit in that category as well as employees at a meat packing facility.

There are already COVID-19 cases pending before the Commission and it is my understanding that most would fall within those three categories. But there could be others. If someone works at a fast food restaurant and is in the drive thru window, that could qualify as increased risk merely due to the sheer number of people to whom they would be exposed. The same analysis could be used for retail workers. So there are a myriad of different possibilities.

It is important to note from the Booker case that the Court mentioned a hypothetical situation that would not constitute increased risk. The Court quoted a decision of the Supreme Court of Maine which held:

> For example, it is clear that the Law was not intended to extend to an employee in a shoe factory who contracts pneumonia simply by standing next to an infected co-worker. In that example, the employee's exposure to the disease would have occurred regardless of the nature of the occupation in which he was employed.
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> (*Booker* at 473 (quoting *Russell v. Camden Community Hospital*, 359 A.2d 607, 611-12 (Me. 1976))

Thus, there is a distinction between jobs where there is no real increased risk. You can contract COVID-19 standing next to a person at work just as easily as you can contract the disease standing next to a person at the grocery store or in the park or at the beach. But if the job creates more opportunities for contraction of the disease than the general public, then the case could be an occupational disease.

The above quote is interesting when considering workers at meat packing facilities. If an employees contracts COVID-19 from a coworker, there is a question as to whether that constitutes an increased risk. It could possibly increase the risk since the employees are generally working in close proximity. The fact that the workers are in close proximity with one another is perhaps the reason that there have been outbreaks among those types of workers. I think the fact that certain industries have been prone to outbreaks of COVID-19 would be some proof of increased risk and that information could come from the CDC, the WHO, the North Carolina Department of Health or even the filings at the North Carolina Industrial Commission. Again, this illustrates how the specific facts of the claim become very important.

This raises another issue in terms of numerosity. If there is one employee with COVID-19 and he infects someone else, is that increased risk? Perhaps not. But what if a facility has an outbreak and there are 25 cases of COVID-19? Is that an increased risk? I would argue that a specific employment could be considered to increase the risk if there is more risk in the environment, to wit: a large number of employees who are infected. More cases equals more risk. That logically seems to track with the notion that if a job requires contact with a large number of people who are infected, then the job increases the risk.

In other words, it seems clear that a nurse who works around a lot of people infected with COVID-19 would be at an increased risk for the development of COVID-19. But would the analysis change if the employee was around a lot of

people who are infected, but those people are coworkers and not patients? It shouldn't. Increased risk is increased risk. Although I could see an argument that any employment could have an outbreak.

This is where the tough decisions come into play.

D. What Are The Elements Of A COVID-19 Claim?

Now that we know there is a potential for COVID-19 to be compensable, the next step is to determine what the burden of proof will be. What elements must be met to make that individual case compensable. There will be several hurdles for most claims- exposure, disease, causation and increased risk would be the basic elements that will certainly be at issue in a claim.

The first issue is whether the person was exposed to the disease at the employment. The difficulty in COVID-19 cases, as well as many occupational disease claims is that we have a microscopic virus and there is no way, with absolute certainty, to trace that virus to the place of infection. There is no absolute proof as to how or where an individual contracted the disease. We can eliminate most possibilities and even find the most likely cause, but there is no way to prove the source of infection with 100% certainty. Does that mean that it would be impossible to prove a compensable case of COVID-19? No.

In *Booker*, the Court discussed the difficulty in proving causation in occupational disease claims. The Court said:

> In the case of occupational diseases proof of a causal connection between the disease and the employee's occupation must of necessity be based on circumstantial evidence. Among the circumstances which may be considered are the following: (1) the extent of exposure to the disease or disease-causing agents during employment, (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee's medical history.

The Court found that the evidence before the Commission substantially excluded the possibility that Booker contracted hepatitis outside of his employment. The Court concluded:

> It is also perfectly obvious that his occupation exposed him to a greatly increased risk of contracting serum hepatitis for each day he handled unmarked vials of blood infected with the disease. These findings are sufficient to sustain the Commission's conclusion that Booker's disease was caused by his employment.

It must be kept in mind that the burden of proof before the Commission is a standard of “more likely than not”. Thus, there is no requirement that a claimant prove the origin of the exposure to a 100% certainty. Rather, the facts of the particular case will enable the Commission to make a determination as to causation based upon what caused the disease, more likely than not.

There will be a number of causation factors that will be important in any claim for COVID-19. The exposures in the employment would, of course be first and foremost in terms of establishing causation. A nurse who treated 15 COVID-19 patients would be a much different situation than a nurse who worked in a nursing

home with one resident testing positive. For some cases it will be fairly easy to establish a causal link. For others it will be more tenuous.

The frequency of exposures would also be key. While COVID-19 is not dose dependent like asbestos, silica and other toxins, the frequency of exposure could be relevant to a causation determination. A nurse who walks by the room of a patient infected with COVID-19 is much different than a nurse who treats infected patients.

The use of protection will invariably be argued in some COVID-19 cases. If a worker is wearing protection but contracts the disease, there will certainly be a causation argument.

Perhaps the most likely ground for argument on causation would be exposures outside the employment. Even a worker who is exposed to COVID-19 at work may be exposed elsewhere. This could include at home, at the grocery store, and interactions with family and friends. The claimant's activities outside of work would also be scrutinized. Someone who socially distances and wears face masks would be safer than someone who spends time with friends, hangs out at nightclubs and visits Myrtle Beach.

One issue that could come about in a COVID-19 claim is proving that the exposure occurred to someone who actually has COVID-19. To merely claim that the employee was around someone who has or had COVID-19 could lead to a challenge. The only way to definitively prove that the source of the infection actually had COVID-19 would be from medical records of that person. Obviously this could impinge upon privacy issues. If the source of the infection is willing to

testify, then that becomes a matter of hearsay as to their diagnosis. This aspect of a COVID-19 claim could become rather problematic.

When originally thinking about COVID-19 claims, I didn't really consider causation to be a major issue. But for both employees and employers, causation could be a real issue and would probably be the most litigated aspect of many claims.

As mentioned earlier, probably the most important aspect of a COVID-19 claim will be proof that the employment increased the risk for someone not so exposed. In a pandemic, it is hard to establish that one situation is more risky than another. Certainly resolution of this issue will depend heavily on the facts of each specific case.

Nurses who treat COVID-19 patients would certainly be at an increased risk for the development of the disease. This coincides with the *Booker* case quite nicely. But a person who works at a grocery store or a fast food restaurant is a different story. I believe the vast majority of COVID-19 claims will turn on increased risk and causation.

As an aside, what happens if the claimant cannot show increased risk? From a legal standpoint, if there is no increased risk in the employment, then the claim is not covered by workers' compensation. In such a case, the next issue would be whether a civil claim could be filed. While an employer may win the battle in the workers' compensation realm, they could then face civil liability for the same illness.

SPEAKER BIOGRAPHY

Ed Pauley has been in private practice since 1991. He left his home state of West Virginia to begin practicing at the Salisbury, NC firm of Wallace & Graham in 1999. He handles workers' compensation and toxic tort civil litigation. Ed has handled hundreds of cases before the North Carolina Industrial Commission and appears frequently in appeals before the Full Commission of the NCIC and the North Carolina Court of Appeals.

Ed's specialty is occupational disease claims. He has handled cases involving asbestosis, silicosis, occupational asthma, occupational cancer, and other ailments.

Ed is admitted to practice in North Carolina and West Virginia and before the United States Supreme Court.