Dane P. Gilliam
BENTLEY MORE LLP

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2023

COVID-19 workers' comp claim: Denied

NAVIGATING THE DENIAL OF A COVID-19 WORKERS' COMPENSATION CLAIM; PRESUMPTIVE AND NON-PRESUMPTIVE CASES

Since the Covid-19 pandemic began, it has substantially altered our professional lives as workers' compensation attorneys. As a result, we now embrace hand sanitizer and hand washing in a frequency that would make any nurse proud.

We no longer need to appear in person for a status or mandatory settlement conference. We do not need to wait at the Board all day for a defense attorney to obtain settlement authority or try to rush completion of a pre-trial conference statement before the judge leaves for lunch. Driving to any workers' compensation proceeding other than trial is now a foreign concept. The once packed hallways of the local WCAB district office are now empty. We can Zoom in all depositions from the comfort of our office instead of traveling to the defense attorney's office and subsequently fighting them over what is reasonable travel time for Labor Code section 5710 fees.

Not only has the pandemic changed the way we practice, it also created a brand-new type of injury case to deal with: the Covid-19 case. Practitioners must familiarize themselves with the law and strategies for how to assess this kind of case. This is important because Covid-19 cases are more likely to be denied than the non-Covid-19 variety per *Covid-19's Impacts on California Workers' Compensation System, Rand Corporation, 2022.* In addition, with the presumptions all potentially expiring in 2024, we must develop better strategies on how to prove up a denied Covid-19 case and what type of discovery we need to utilize to prevail.

The first criteria in any Covid-19 case is whether any kind of presumption applies. On September 17, 2020, Senate Bill 1159 was enacted. SB 1159 expanded the Covid-19 presumption created by Executive Order N-62-20, and expanded the Labor Code to provide rebuttable presumptions for injured workers that contracted Covid-19. These presumptions remain in effect until January 1, 2024, per Assembly Bill 1751. The three presumptions are found in Labor Code sections 3212.86, 3212.87, and 3212.88.

Covid-19 presumptions

The first Covid-19 presumption is Labor Code section 3212.86. This presumption has a very limited time frame as it applies to employees that worked from March 19, 2020 to July 5, 2020. The date of injury, which must fall between March 19, 2020 and July 5, 2020, is the last day they performed work or services at the employer's place of business. The employee must have tested positive for Covid-19 within 14 days of the period noted above. If those conditions are met, the claim will be presumed compensable and may be disputed by the employer with other evidence. The employer has 30 days to accept or reject liability. If the employer does not deny the case within 30 days, they can only rebut the presumption with information discovered after the 30-day period.

The second Covid-19 presumption is found in Labor Code section 3212.87. This provision covers firefighters, police officers, fire and rescue service coordinators, employees that provide direct patient care to Covid-19 patients, custodians with contact with Covid-19 patients, nurses, EMTs, paramedics, employees of health facilities, and home health workers. The presumption applies to any of the above workers who can prove they tested positive for Covid-19 within 14 days that they worked.

If the above is met, the rebuttable presumption will be met and the burden shifts to the defendant. Unlike in garden-variety workers' compensation claims, these presumptive claims have only a 30-day period for the defendant to accept or reject the case. Moreover, the defendant can rebut the presumption with other evidence. If the employer misses the 30-day deadline, the claim is presumed compensable unless the Defendant produces evidence discovered after the 30-day deadline. The takeaway here is unless the Defendant produces evidence the employee contracted Covid-19 somewhere else, the presumption will be met.

The more challenging of the Covid-19 presumptions is found in Labor Code section 3212.88. This section provides a presumption to employees that are not covered in Labor Code section 3212.87 and who contracted Covid-19 from an outbreak at work. Just like the other presumption, the employee must prove they tested positive for Covid-19 within 14 days of work.

An employee has three ways to meet the outbreak test. First, an employer of 100 or fewer employees at a specific place of employment must show that four or more employees tested positive for Covid-19 within 14 days. If there are more than 100 employees at the specific place of employment, 4% of them must test positive within 14 days for there to be an outbreak. Lastly, the outbreak presumption will apply if the employee tests positive within 14 days of employment when the employer is ordered to close by the local health department, state department of public health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with Covid-19.

In the outbreak presumptive cases, the employer has 45 days to accept or reject liability. To rebut the presumption, the employer can offer evidence of their measures to reduce transmission of Covid-19 and the worker's non-occupational risks of Covid-19. If the employer untimely rejects the claim, it is

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2023

rebuttable only by evidence discovered after the 45-day decision date.

Evidence

Thankfully, there have been a few cases decided that provide good analysis of what is needed evidence-wise in a presumptive and non-presumptive case. One of the first published cases on the presumptions was *Sofia Sevillano v. State of California, IHSS* 2022 Cal. Wrk. Comp. P.D. Lexis 255. Ms. Sevillano was a home-health attendant for a senior couple and was alleged to have been industrially exposed to Covid-19 on June 26, 2020. The case was denied, but it was unclear as to whether the decision was timely. The applicant tested positive for Covid-19 on June 30, 2020, and was hospitalized for eight days due to complications from Covid-19.

During her hospitalization, the applicant purportedly told the admitting physicians that two of her roommates were Covid-19 positive, but that she had her own room. However, the applicant denied this statement at trial and testified she was not provided with a Spanish interpreter while in the hospital. Moreover, the hospital records also noted the hospital's social worker contacted applicant's landlord, who stated that he and his wife were ill and wanted to quarantine the applicant in a makeshift garage. The applicant purportedly had credibility issues at trial as she admitted she had never asked the senior couple she worked for whether they had tested positive even though her medical records stated she knew they were Covid-19 positive.

Curiously, Defendant did not offer any testimony from the employer or her roommates/landlord as to other sources of exposure. The Defendant prevailed at trial and applicant filed a petition for reconsideration. Despite the credibility issues of applicant at trial, the injured worker prevailed on reconsideration because she met the criteria for the presumption contained in Labor Code section 3212.86.

The burden then shifted to the Defendant, who was unable to meet its burden in this case. The commissioners noted: "[d]efendant offers no substantial evidence that applicant was infected with Covid-19 virus elsewhere. Defendant offers no treatment reports or medical/legal reporting ascribing applicant's illness to nonindustrial factors. Defendant offers no witness testimony addressing collateral sources of Covid exposure. Other than applicant's self-reporting, there is no documentary or testimonial evidence regarding whether applicant's employer or her roommates were Covid positive." (*Sevillano* at 11-12.)

The message from *Sevillano* is a Defendant better have witnesses or medical/legal reports substantiating other sources of Covid-19 if they want to successfully rebut the presumption.

Jackson: Evidence in a non-presumptive case

Jackson v. County of Los Angeles (2022) 87 Cal Comp Cases 1017, is an example of the evidence a court is looking for in a non-presumptive case. *Jackson* involved a probation officer who alleged she was exposed to Covid-19 on March 11, 2020. The case was timely denied and the parties proceeded to a QME in internal medicine to resolve the dispute.

The QME found industrial causation based upon the applicant's self-reporting to the QME that she was around hundreds of people each day at a large office and that she was unsure if any of her peers had Covid-19 around the time she contracted it. The QME found it was more likely than not that applicant's Covid-19 was industrial. It was unclear if her deposition was ever taken prior to trial or was submitted to the QME.

Trial was held and the employer offered evidence that no other employees in applicant's location were diagnosed with or tested positive with Covid-19 in February, March or April of 2020. In addition, the applicant testified that she was not around hundreds of individuals on a daily basis, gave more specific information on her work surroundings, that she met with 10 clients a month, there were 36 employees at her location, and that she worked in a cubicle in an area with four to six probation officers.

Although applicant was successful at the trial level, Defendant filed a successful petition for reconsideration. In granting the reconsideration, the commissioners opined there was insufficient medical evidence and ordered the record be developed further so the QME could review the more specific working conditions and evidence that none of her co-workers had been diagnosed with Covid-19.

The takeaway from the *Jackson* case is when the QME does not have the complete information on the case and merely takes the applicant's word for it, the matter is going to be developed if there is conflicting or additional information presented at trial. This is to ensure that the QME assesses causation with the most complete information and does not issue a report that is based on erroneous or inadequate history. Again, it may not always be prudent to proceed with a QME on a denied case until you obtain all of the facts and the QME can base their findings off of those facts.

Dawson v. Patton State Hospital

Another example of the commissioners returning the matter to the trial level to develop the record further was in *Dawson v. Patton State Hospital* (2023) ADJ13344359. *Dawson* involved a dietician who returned from a New Orleans vacation on March 4, 2020, and worked that day. On March 5, 2020, she was examined by an urgent care facility and complained of a sore throat. She then traveled for work for union-related activities from March 9 through March 14, 2020, and still had issues with a sore throat. She worked a full day in the office on March 16. On March 17, she showed up at her workplace and was sent home based on a raspy voice that was detected in the employer's daily Covid-19 screening. The applicant then developed worsening symptoms on March 23, 2020, and tested positive for Covid-19 on March 28, 2020.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2023

The QME found the Covid-19 was non-industrial based on exposure during applicant's vacation while the PTP found it industrial because the date of the positive test ruled out it being from her vacation. The commissioners returned the matter to the WCAJ to develop the record further because there was not substantial medical evidence that it was reasonably probable that applicant acquired Covid-19 as a result of a workplace exposure. In addition, neither medical report analyzed the latency period. The commissioners requested the record be developed further as to the date applicant developed the Covid-19 infection and the probability that the applicant was exposed to the virus that caused the infection at work.

As the non-presumptive denied cases above demonstrate, the parties should do their best to send the QME the most accurate and comprehensive information they can. Moreover, to avoid speculation, the parties should also have the QMEs further clarify when the injured worker developed the infection and the probability it was industrial. If they do not, the matter is going to delayed and the record will need to be developed. It also appears engaging in factual discovery before a QME evaluates the injured worker in a denied case is a preferred course of action.

Benefits denied: Discovery in a COVID case

When it comes to factual discovery, when I meet with a potential client on a denied Covid-19 case, especially a denied death case, I want to find out what information the family has that may assist with industrial causation. Many times, there are text messages saved on the injured worker's or decedent's phone that implicate a co-worker gave them the virus. Specifically, I have seen text-messages from the co-workers admitting they had Covid-19 first and apologizing for transmitting it to my client.

In addition, the family may also be privy to memorandums from the employer documenting an outbreak at work or that a peer at a conference they attended tested positive. There may also be emails they received directly from the employer documenting this. On a death case, the family member may also recall any conversations they had with their spouse and may be able to assist with any timeline. Lastly, I want to find out where the employee treated for Covid-19 and see if I can obtain those records prior to subpoenaing them so I get a jump start on the defense. These records are also crucial as the employee may have told the doctor prior to hiring me how he contracted the disease. If the medical records are beneficial, I can quickly send them to the Defendant.

The above, mostly free forms of discovery can make a case early on and cause the Defendant to accept the case, obtain settlement commensurate with the case value, or provide me with ample ammunition to forward to the QME.

In addition to obtaining the information from my client, I also like to engage in specific forms of discovery to the employer and insurance carrier. I know this is a little foreign for us workers' compensation attorneys to do anything outside the box of issuing a generic employment records subpoena, proceeding to a QME, and waiting until trial to do any direct examination on a defense witness. But narrowly tailored discovery is crucial in a denied Covid-19 case. This specific discovery includes written demand for witness statements and investigative reports.

Any carrier that purports to have done a good-faith investigation per California Code of Regulations section 10109 will likely have an investigative report and witness statements completed prior to any involvement with a defense attorney if the case is denied. The statements will be helpful for determining the identity of who to depose or can be submitted to the QME if the statement is helpful to my client. If the Defendant does not respond to your request for statements or claims they are privileged, file a Declaration of Readiness to Proceed. More often than not, the Defendant will produce the statements at or before the hearing.

One of the most crucial forms of discovery on a denied Covid-19 case is a narrowly tailored subpoena duces tecum to the employer requesting certain relevant Covid-19 documents. As part of the subpoena, we ask for investigation documents, witness statements, measures the employer took to prevent Covid-19, all reports sent to governmental entities as to employees testing positive for Covid-19, reports sent to their carrier regarding employees that test positive with Covid-19, copies of all claim forms for employees testing positive for Covid-19, documentation substantiating an outbreak, positive Covid-19 tests, Covid-19 policies, compliance documents, personnel file, and other detailed information. We ask for over 50 Covid-19 related documents in our subpoena. If you would like a copy of the document request we use, please e-mail me.

When the employer responds to the subpoena, the documents are generally favorable to the case or will assist me with identifying who I need to depose to connect the dots as to causation. As to the favorable documents I have received with this type of specific subpoena, they include a matrix of the employees that tested positive with notation of whether it was at work, memos circulated to employees as to recent exposures with someone they worked closely with, investigative reports confirming my client was exposed, and reporting sent to OSHA confirming the exposure. A majority of the time, the discovery of these documents causes the case to be settled or to be accepted.

Moreover, I have had some Defendants who accepted the case once they received this subpoena as they knew their denial would be exposed. Lastly, and as odd as this sounds to my personal injury peers, sometimes the employer will have their insurance broker untimely respond to the subpoena by just providing documents to my copy service and without signing the declaration of custodian of records. This leads to an

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2023

interesting deposition of the insurance broker, who learns for the first time what a custodian of records is.

If the case continues to be denied after the subpoena noted above, I will also issue a subpoena duces tecum to the carrier/TPA. What I am seeking in that subpoena are claims notes documenting any investigations, communications to the employer, and communications from the employer. There will be two outcomes with this subpoena. First, you will obtain information helpful to the case. Second, if the employer is relying on an employer-level investigation to substantiate their denial, and the subpoena response does not demonstrate any kind of investigation, let alone one in good faith, it could cause penalty or audit issues for them down the road and show me how weak of a defense they have.

Lastly, if the case remains denied, I would also consider taking depositions of the employer witnesses, employer, and claims adjuster. A QME will likely consider the deposition as greater weight than a witness statement or self-serving reporting because the deposition is done under penalty of perjury. Once the depositions are noticed and completed, the defense attorney will have more ammunition to recommend to his client that the case be accepted. This also eliminates any surprises at trial.

As noted above, it appears the Covid-19 presumptions will likely expire in 2024. Accordingly, we must learn from the *Jackson* and *Dawson* decisions as to what kind of information needs to be obtained prior to a QME evaluation and prior to trial to successfully prove-up a Covid-19 case. The best way to do that is by communicating with your client thoroughly at the intake process as to what documents they have, requesting the Defendant's witness statements and investigative reports, drafting detailed and specific subpoenas to the carrier and employer, and noticing witness depositions. This is the way.

Dane P. Gilliam is a trial attorney at Bentley More LLP *whose practice focuses on catastrophic workers' compensation claims. Dane has been practicing exclusively in workers' compensation law since 2010. Dane is the president of the Orange County chapter of the California Applicants' Attorneys Association ("CAAA") and also serves on the regulations committee for CAAA.*