

State: Calif.

Curvey: All Injured Workers Getting the Shaft Because of Newsom's COVID-19 Executive Order: [2020-05-13]

There has been a lot of discussion in the media regarding Gov. Gavin Newsom's COVID-19 executive order that creates a rebuttable presumption for all employees who contract coronavirus and claim it is due to work.



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Labor interests would have you believe that this is an important and needed measure taken by the governor. And, it may be.

Insurance companies, employers, the California Chamber of Commerce and other business interests would have you believe that it is an outrageous measure that will cost the workers' compensation system millions of dollars.

The truth of the matter is that all of the flak regarding Newsom's measure only stands to further denigrate the rights and entitlements under the Labor Code that are, in theory, available to all non-COVID-19-related injured workers, some of whom have been suffering for many years after being injured on the job.

Most people can't see through why some in the media and the money interests are making such a fuss about this rebuttable presumption. Yet, what everyone should be made aware of is that it is part of a pattern of intentional actions that are specifically designed to create the illusion that costs in workers' compensation are exorbitant and need to be curtailed, all at the expense of legitimately injured workers.

No one who really understands the current situation with COVID-19 and work injuries believes that this rebuttable presumption will have any impact on the overall costs and premiums for workers' compensation benefits.

In a WorkCompCentral [article](#) dated May 8, there is a quote from an attorney saying that, "And, as far as carriers go, more likely than not your premiums will go up because there's a cost they didn't anticipate."

This concept is not based in reality but is simply part of the intent of the employers and insurance carriers to distract attention from what is really happening with injured workers in this state. And, they have an attentive

audience. Indeed, it is a rare occasion when the public is interested in a workers' compensation issue because it realistically might affect them.

Yet, there is rarely any media attention given to situations like the one that occurred recently in my office, when we received a call from our client's spouse crying into the phone that the love of his life died due to an overdose of pain medication, after utilization review and independent medical review denied surgery that her treating doctor had implored the insurance company to authorize.

Reading how the carriers and employers were outraged by Newsom's order made all of this presumption hogwash about increasing costs seem nothing but fallacious. So, I decided to look into the COVID-19 realities in workers' compensation more closely. Let's take a look at this with an eye toward understanding the realities.

First, anyone who thinks that they can estimate the costs to the system for a COVID-19 rebuttable presumption is clearly a speculator without any credibility or substance. Being in the trenches every day representing injured workers, I have some basis to comment.

As the managing partner of a well-known, long-established applicants' law firm, I can honestly say, to date, we have not had one single call requesting that a claim be filed for COVID-19 exposure. Assuming for the sake of argument that our firm is the anomaly, I have spoken to many applicants' attorneys and, in total, I have probably heard of a handful of people filing claims, at least at this juncture.

Why are people not filing claims even if they were working when they contracted the virus? The answer is simple: The great majority of people have recovered without any disability and received either continued salary or state benefits while they were off work.

This, if you believe the statistics thus far with COVID-19, will continue to be the case. Now, if it isn't the case and masses of people will be contracting the virus in the coming months after going back to work, and, assuming long-term disability becomes severe for these people, I would suggest to you that people are not going to continue going to work and further governmental "stay at home orders" will be enforced. But so far that isn't the case. And, besides, with a limited duration presumptive order, why are we even talking about long-term astronomical costs to the system?

Moreover, as an applicant attorney, at the present time, we are so busy fighting utilization review, independent medical review and trying to secure treatment for injured workers who were not injured because of COVID-19, as well as trying to settle cases and get cases to trial, whether in person or from afar, we scarcely have time to battle a "rebuttable presumption" for AOE/COE for COVID-19 cases.

This is especially true if there is no impairment or limited damages associated with the claim. I don't know any applicants' attorneys who, of course, do not get paid by the hour, who are going to spend their valuable time fighting for someone who contracted the virus and has recovered.

For those who have impairment after contracting COVID-19, then, yes, there will be some costs to the system. But these costs are minuscule compared to the savings that the carriers and employers are enjoying because of utilization review and independent medical review routinely denying necessary medical treatment, as well as other limitations on injured workers' benefits.

Furthermore, as we know, the percentage of deaths as a result of COVID-19 illnesses is rather small, notwithstanding a tragedy in and of itself. But, for those people who understand the workers' compensation system and how death cases are treated under the law, even if a COVID case is determined to be AOE/COE after litigation, there needs to be a finding of dependency for there to be a chance to recover any benefits.

And, in our system, the dependency rules are terribly antiquated, outdated and limited, meaning many cases in which a family member who files a claim for a death on the job has no means to recover any benefits whatsoever.

While there will be some people who die from COVID-19 who have dependents, there is also a great number of them who will not have dependents as defined by the Labor Code. Therefore, the costs to the system for these death cases will be nothing close to what the estimates we're hearing about with respect to the governor's order. Changes in the system are far more important for death cases overall than the limitations presented on cases related to the COVID-19 rebuttable presumption.

So, why would I make such a derogatory statement about such an important workers' injury presumption? Well, anyone who claims injury on the job is supposedly protected by the laws of workers' compensation. This is no different than for COVID-19 victims. They have the existing law to pursue their claim.

Yes, a presumption is important to help get a case accepted, but a rebuttable one still means that the defendant can put up a fight, a fight they will, as we see so much nowadays with the delay-and-deny techniques available to defendants on all workers' compensation claims. This opposition, even on presumption cases, does not address nature and extent of disability, potentially opening the floodgates for litigation for drooling defense attorneys. As has often been said, the friction costs can be more expensive to the system than the payout of benefits in any given case.

And, what about the friction costs? If the presumption would have been conclusive, there would be very little in the way of friction costs involved with the causation issue related to COVID-19 claims. But, with a rebuttable presumption, what does the defendant have to lose but to argue that the virus was contracted outside of work or that the condition claimed is not COVID-related?

Now, clearly, the governor's executive order will weigh heavily with the judges, and the applicant will be in a better position to ignore or put little weight on a defendant's argument, but the point is that the defendant still will have arguments and can delay a decision on the provision of benefits for a period of time while discovery takes place. Again, during that period the applicant may recover without impairments.

So where does that leave us? The more we sit back and listen to the whining about this presumption, the more harmful it is on injured workers' lives throughout our state. It is just another slap in the face to injured workers at the hands of selfish and unsympathetic money interests that are focused only on cost-cutting strategies and public relations lies to color the thinking of those who are not suffering from work injuries.

These organizations want to make everyone believe that the governor's executive order will be so costly to the workers' compensation system that the real problems will be pushed aside for as long as they can complain about the order, distracting the legislators from the underlying truth.

We can't let the damage that COVID-19 has already done to so many people's lives also impact injured workers who have not contracted the virus but are good, hard-working Americans who deserve quick and efficient medical treatment and the proper delivery of disability benefits without having the COVID-19 crisis and correlative propaganda eviscerate that which has already destroyed so much of our world as we knew it.

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