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Workers' Compensation Report

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Rebutting the Presumption: Covid-19 Exposure Claims

On March 21, 2020, Governor Pritzker issued an Executive Order that required all businesses, with the exception of "essential businesses," to shut down operations due to the Covid-19 pandemic. On October 21, 2021, and November 19, 2021, the Illinois Workers' Compensation Commission issued its first arbitration decisions on Covid-19 exposure claims. *See Edgar Lucero v. Focal Point, LLC*, WC 018985 (Oct. 19, 2001) (Amarilio, Arb.); *see also Tonia M. Dalton v. Saline Care Nursing & Rehabilitation Center*, 21 WC 008010, 13 (Nov. 2, 2021) (Cantrell, Arb.). The recent Covid-19 decisions have been highly anticipated as the IWCC received 8,229 First Reports of Injury for Covid-19 claims between March 15, 2020 and September 20, 2021. "*IWCC Chairman Brennan Provides Illinois Covid Data*," EMPLOYMENT LAW NEWSLETTER, October 15, 2021. Notably, the Health Care and Social Assistance sector has 68.5 percent of the total Covid-19 claims. *Id.* Next is the Transportation and Warehousing sector at 8.4 percent, Public Administration at 6.3 percent, and Retail Trade at 6.1%. *Id.*

The Covid-19 Rebuttable Presumption

On June 5, 2020, the Illinois Legislature amended the Occupational Disease Act ("ODA") to provide benefits for certain classes of workers who may have contracted Covid-19 at the workplace. *Lucero*, 20 WC 018985 at 26; *see* 820 ILCS 310(1)(g). The amendment enacted on June 5, 2020, applied retroactively to cases filed by workers who were diagnosed with Covid-19 between March 9, 2020, and June 30, 2021. *Id.* at 27. For cases occurring on or before June 15, 2020, a worker must provide either confirmation by a licensed medical practitioner or a positive laboratory test. *Id.* For cases occurring on or after June 15, 2020, a positive laboratory test is required.

The ODA creates an ordinary presumption similar to the rebuttable presumption that already exists within the ODA. *Id.*; 820 ILCS 310(1)(g). The amendment contained in paragraph (1)(g) creates a rebuttable presumption in favor of compensability for certain "first responders and frontline workers" who contract Covid-19. *Lucero*, 20 WC 018985 at 26. Front line workers include those employed by "essential businesses and operations. . . whose work requires them to encounter members of the general public or to work in locations with more than 15 employees." *Id.* Specifically, the Covid-19 presumption provides that exposure and contraction are presumed to have arisen from the work environment, and the occupational disease is presumed to be causally connected to the hazards or exposures of employment. *Id*. Thus, the presumption creates a *prima facie* case that the injury arose out of and in the course of employment. If not rebutted, the worker wins and is entitled to benefits afforded under the ODA. If rebutted, the employee loses the benefits of the presumption and must prove her case in the same manner as required under the ODA. *Id.*

To rebut the presumption, the employer need only introduce "some evidence" that the employee's occupation was not the cause of the injury or disease. *Dalton*, 21 WC 008010 at 14. An employer may rebut the presumption by satisfying any one of the following three factors: (1) by showing that the employer was "engaging in and applying to the fullest

extent possible or enforcing to the best of its ability industry-specific workplace sanitation, social distancing, and health and safety practices" based on guidance from the Centers for Disease Control and Prevention or the Illinois Department of Public Health, or that the employer was using "a combination of administrative controls, engineering controls, or personal protective equipment to reduce the transmission of Covid-19 to all employees for at least 14 consecutive days" prior to the injury; (2) by presenting some evidence that the claimant contracted the virus somewhere else; or (3) by showing that the claimant worked from home or was off of work in the 14 days prior to diagnosis. *Id.* at 28. Once rebutted, the employee will have to establish, by a preponderance of the evidence, the Covid-19 disease was contracted at work. *Id.*

Analysis of the Covid-19 Claims

Pursuant to *Lucero* and *Dalton,* the proper avenue for bringing a Covid-19 claim is under the ODA. *Lucero*, 20 WC 018985 at 2; *Dalton*, 21 WC 008010 at 14. In both cases, the employees' claimed injury was Covid-19 exposure. *Id.* The employers based their defenses on rebutting the Covid-19 presumption and by disputing and negating the employee's claimed exposure on the employer's premises. *Id.* The arbitrators decided these cases by assessing (1) whether the employee's alleged exposure "arose out of and in the course of his employment," and (2) whether the employee's condition of ill-being was "causally related" to the alleged exposure. *Id.*

The *Lucero* and *Dalton* Decisions

The ODA provides benefits for employees who establish that they have contracted an occupational disease while working. *Id.*; *see* 820 ILCS 310. An "occupational disease" is a disease arising out of and in the course of employment which has become aggravated and rendered disabling as a result of the exposure during employment. *Id.* Such aggravation must arise out of a risk "peculiar to or increased by employment and not common to the general public." *Id.* The arbitrators in *Lucero* and *Dalton* focused on the actions the employer took to curb the spread of Covid-19 in its facilities. *Lucero*, 20 WC 018985 at 29; *Dalton*, 21 WC 008010 at 13. The arbitrators also assessed whether the employer could show best efforts were made to curb the spread and whether the employee contracted the virus from an outside source. *Id*. at 32, 34.

In *Dalton*, the employee was a Certified Nursing Assistant working at a long-term care nursing home facility. *Dalton*, 21 WC 008010 at 13. As such, she met the definition of "first responder or front-line worker" as outlined by the ODA. *Id.* The arbitrator held that the nursing home failed to produce sufficient evidence to rebut her claim. *Id*. First, the employee had not spent any time working from home. *Id.* at 15. Second, she had not seen any of her friends or family because she had been working the midnight shift and slept during the day. *Id.* She only visited the gas station and grocery store for short periods of time, all while wearing a mask. *Id*. Additionally, she lived with her fiancé, who tested negative for the virus. *Id.*

Fifty percent of the nursing home residents where the claimant worked tested positive for Covid-19. *Id.* Even more decisive was the fact that the employee had worked the same midnight shift as a co-worker who tested positive for Covid-19 three days before the employee tested positive. *Id*.

The final proverbial nail in the coffin for the employer was that it failed to present any evidence that the nursing home "was engaged in or applied to the fullest extent possible or enforced to the best of its ability industry-specific workplace sanitation, social distancing, and health and safety practices to reduce the transmission of Covid-19 to all employees for at least 14 consecutive days prior to [November 6, 2020]." *Id*. at 15. The nursing home called the Director

of Operations (the "Director") as its only testifying witness. *Id*. While the Director coordinated COVID policies and procedures for all of the employer's facilities, she could not testify as to whether the policies were actually routinely applied in the nursing home where the employee was working. *Id*. at 15-16. The Director admitted she mostly worked from home and that when she did visit the facility, she only met with the Administrator and managerial staff. *Id*. at 16. Additionally, she had no knowledge of whether she visited the nursing home between March and November 2020. *Id*. The arbitrator also found no evidence to show that the policies and procedures were compatible with CDC and IDPH guidance. *Id*. Nonetheless, the employee's testimony about PPE, health, safety, and sanitation was unrebutted. *Id.* at 17. As such, the presumption stood, and the Arbitrator further found the employee's Covid-19 diagnosis was, more probable than not, traceable to the employer's nursing home. *Id*. at 18.

The presumption was overcome in *Lucero*, 20 WC 018985 at 36. The petitioner was a 10-year employee of a lighting manufacturer who operated a laser saw. *Id.* at 4. He continued to work after Governor Pritzker's Executive Order of March 21, 2020, shutting down all businesses, except for those considered "essential". *Id.* He lived at home in a two-flat with his wife. *Id*. His adult children lived in another part of the two-flat with their own door. *Id.* None of them contracted Covid during the relevant time period. *Id.* at 5. The petitioner testified that his activities were limited to sleeping at home, driving to and from work, and getting gas. *Id*. His wife did the grocery shopping. *Id*.

The evidence at trial revealed the petitioner's workstation was located two and a half to three feet from the door of the facility which led to a large employee parking lot; time clocks were located even closer to his workstation. *Id.* The respondent operated two shifts, with the first shift ending and the second shift beginning at 2:30 p.m. *Id.* at 6. There were no modifications to the shift schedules so as to allow for decontamination or deep cleaning. *Id.* A co-worker contracted Covid-19 after March 21, 2020, but prior to the petitioner's diagnosis. *Id*. The respondent presented extensive evidence through its Director of Human Resources with respect to the policies implemented to comply with CDC and IDPH Covid guidelines. *Id.* at 9–18 The petitioner's testimony contradicted much of the respondent's evidence. *Id.* at 18–24. The arbitrator found the petitioner's testimony more credible than that provided by the respondent. *Id*. at 25.

The arbitrator determined that while "some" evidence existed sufficient to rebut the Covid-19 presumption, the preponderance of evidence confirmed the petitioner contracted Covid in the course and scope of his employment and awarded benefits. *Id*. at 36.

Causation

Neither *Lucero* nor *Dalton* contained medical testimony causally connecting the petitioner's Covid-19 diagnosis to the workplace. The arbitrator concluded that the petitioner's contraction of Covid-19 arose out of the course and scope of his employment, and "there being no medical evidence submitted to show that petitioner's current condition of ill-being is from any source other than his original Covid-19-related illness, the arbitrator finds the petitioner's current condition of ill-being to be causally related to the work-related Covid-19 virus exposure." *Lucero*, 20 WC 018985 at 38. The *Lucero* decision concluded there was no medical evidence to show that the condition of ill-being was from any source other than his original Covid-19 related illness, simply placing the burden of proof on the respondent.

In *Dalton*, the arbitrator found causation based on circumstantial evidence, which the arbitrator noted is sufficient to prove causal nexus between an accident and resulting injury, such as a chain of events showing the claimant's ability to perform duties before an accident and a decreased ability to perform them afterward. *Pulliam Masonry v. Industrial Comm'n*, 77 Ill. 2d 469, 397 N.E. 2d 834 (1979).

Damages

In *Dalton*, the arbitrator awarded temporary total disability benefits of $370.88 per week for 39-5/7th weeks and $3,964.97 in subrogation interests. *Dalton*, 21 WC 008010 at 19. The employee was also awarded any ongoing medical treatment until she reached MMI, including, but not limited to, a sleep study recommended by her doctor. *Id.* Additionally, in *Lucero,* the arbitrator awarded the employee temporary total disability benefits for the period of April 17, 2020, through March 16, 2021. *Lucero*, 20 WC 018985 at 39.

The nature and extent of the injuries were not addressed in either *Lucero* or *Dalton* as neither employee had reached MMI. Experience to date shows that routine cases of Covid-19 in EMTs with quick recoveries and no evidence of permanency have resulted in *pro se* settlements of 2% and 3% of a person, which have been approved by the Commission.

Take-Aways

These two arbitration decisions are not controlling precedent. They would not customarily warrant detailed analysis. The *Lucero* case is on review, and it remains to be seen how the Commission will address these issues. However, the issues raised in both cases and the manner in which they were addressed are instructive.

The primary difficulty in rebutting the Covid-19 presumption showing best efforts in compliance with CDC and IDPH guidelines is that those guidelines are extensive and ever changing. As the arbitrator in *Lucero* noted, "There is no precedent as to what exactly qualifies as an employer engaging in safety protocols to the best of their ability or what that might look like at any given time throughout the pandemic as guidance from the government health officials was fluid throughout." *Lucero*, 20 WC 018985 at 29. No checklist exists with which the employer can comply in order to ensure it was engaging in and applying to the fullest extent possible its policies and procedures with guidance from the CDC and the IDPH. The cases are both fact-specific and fact-intensive.

Second, not only should the employer show that they had general policies and procedures in place which complied with the CDC and IDPH guidelines, but the employer must also show that those procedures were implemented and followed to the letter during the 14 days prior to any injured worker's diagnosis of Covid-19.

Finally, it appears medical testimony will not be required to establish causation. It is likely that in many Covid cases, causation will be based on circumstantial evidence such as a chain of events showing the claimant's ability to perform duties before an accident and a decreased ability to perform them afterward. *Pulliam Masonry v. Industrial Comm'n*, 77 Ill. 2d 469, 397 N.E. 2d 834 (1979).

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Bruce L. Bonds is a shareholder in *Heyl, Royster, Voelker & Allen, P.C.*'s Champaign office and is the past Chair of the firm's state-wide workers' compensation practice. Mr. Bonds concentrates his practice in the areas of workers' compensation and third-party defense of employers. He is an Adjunct Professor of Law at the University of Illinois College of Law where he has taught workers' compensation law to upper level and graduate students since 1998. Mr. Bonds co-authored a book with Kevin Luther of the firm's Rockford office, entitled *Illinois Workers' Compensation Law 2020-2021*, which is published by Tomson Reuters. The book provides a comprehensive up-to-date assessment of workers' compensation law in Illinois. Mr. Bonds has been named to the Illinois Super Lawyers List for many years. He is a Leading Lawyer in Illinois, a Fellow in the College of Workers' Compensation Lawyers, and was named as one of the "50 Most Influential People in Workers' Compensation" by SEAK, Inc. in 2014.

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