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Commentary

Workers' Compensation Coverage for Essential Workers With COVID-19

There is no need for our COVID-19 heroes to await federal action which may or may not occur, and the timing and nature of which are unknowable.

By **Robert E. Grey** | May 14, 2020 at 10:15 AM

On April 10, 2020, Gov. Andrew Cuomo announced that he was "working with New York's Congressional delegation to create a COVID-19 Heroes Compensation Fund to support health care and other frontline workers and their families who contracted COVID-19." This announcement followed the Governor's previous Executive Orders directing all "non-essential" workers to telecommute and identifying "essential businesses" that would remain operational, and whose workers were therefore required to physically report to work in order to remain employed. Executive Orders 202.6, 202.7 and 202.8.

There is no question about the urgent need to provide compensation and medical treatment for "essential workers" who have fallen ill and died from COVID-19. Unlike many professionals and white-collar workers, their essential work cannot be done remotely, and instead they are exposed daily to a high risk of infection, often without adequate protective equipment. As a result, thousands of essential workers across a range of occupations—health care, transit, delivery services, police, utilities, grocery workers and more—have fallen ill; hundreds have died.

Fortunately, New York has an existing mechanism that provides coverage for workers who fall ill as a result of workplace exposures: its Workers' Compensation Law. Enacted in 1914 "for socioeconomic remediation purposes 'as a means of protecting work[ers] and their dependents from want in case of injury' on the job … [a]n employee is entitled to receive compensation on a "no-fault" basis for all injuries 'arising out of and in the course of the employment.' Under Workers' Compensation Law §2(7), "injury" and "personal injury" means only 'accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.' To effectuate the statutory objectives, Workers' Compensation Law §21(1) creates a presumption that injuries 'arising out of and in the course of' employment are compensable under section 10(1) as 'accidents.' Moreover, given the remedial nature of the Workers' Compensation Law, the Court has construed the statute and given the Board, as 'trier[] of the facts', a very wide latitude in determining whether a disabling condition is an accident. In particular, the Court has noted also that an accidental injury must be gauged by the 'common-sense viewpoint of the average [person].'" *Matter of Johannesen v. New York City Dept. of Hous. Pres. & Dev.*, 84 N.Y.2d 129, 134 (1994) (cit. omit.).

Accidental Injuries Under the Workers' Compensation Law

In *Heidemann v. American Dist. Tel. Co.*, 230 N.Y. 305, 306 (1921), the decedent was a night watchman who was accidentally shot and killed by a police officer who was pursuing burglars. The employer appealed the Board's award to the widow, contending that his death was not due to any condition of his employment, but instead "the ordinary perils of the street." Rejecting this argument, Judge Cardozo wrote that "[h]is employment put him upon the street at night, and put him there in search of trouble. … That was the very reason why Heidemann was there to guard. … Casual and irregular is the risk of the belated traveler, hurrying to his home. Constant, through long hours, was the risk for Heidemann, charged with a duty to seek where others were free to shun. The difference is no less real because a difference of degree. The tourist on his first voyage may go down with the ship if evil winds arise. None the less, in measuring his risk, we do not class him with the sailor for whom the sea becomes a home. The night too has its own hazards, for watchman and for wayfarer. Death came to Heidemann in the performance of his duty, face to face with a peril to which the summons of that duty called him."

The Court of Appeals reaffirmed this principle the following year in *Roberts v. J.F. Newcomb & Co.*, 201 A.D.759 (3d Dept. 1922), aff'd, 234 N.Y.553 (1922), upholding an award of compensation to a worker whose job required travel to different locations and while doing so was injured by a Wall Street bomb explosion: "The danger must result from the place to make it a street risk, but that is enough if the workman is in the place by reason of his employment, and in the discharge of his duty to his employer."

The rule is no different where the injury is an illness, or where it cannot be traced to a specific event but instead a series of events over a defined time period. In *Middleton v. Coxsackie Corr. Facility*, 38 N.Y.2d 130, 132 (1975), a correction officer "came into close contact with … an inmate who coughed persistently and was later found to be tubercular." He later developed tuberculosis himself. The Court of Appeals first rejected the employer's claim that illness could only be compensated under the "occupational disease" provisions of the statute, holding that the Legislature's provision of coverage for occupational diseases did not diminish coverage for accidental injuries. Observing that "[n]umerous awards based on diseases found to be the result of industrial accidents, including those caused by germs, have been sustained," the court then held that exposure to an infected person was "an industrial accident … by the commonsense viewpoint of the average man." Notably, the *Middleton* court specifically rejected an earlier Appellate Division decision holding that being sneezed upon could not be an accident, instead writing that "[i]t seems to us, however, that as to persons nearby who receive the effect of such a sneeze it fits within the classic definition of an 'accident' which causes a disease."

These fundamental workers' compensation principles plainly provide coverage for essential workers who fall victim to COVID-19 as the result of a specific exposure or series of exposures. Like *Roberts*, essential workers have been placed in harm's way "by reason of [their] employment, and in the discharge of [their] duty to [their] employer." Like *Heidemann*, they have been "charged with a duty … others were free to shun." Although COVID-19 illness is not limited to essential workers, Judge Cardozo's analogy remains apt: "The tourist on his first voyage may go down with the ship if evil winds arise. None the less, in measuring his risk, we do not class him with the sailor for whom the sea becomes a home."

Occupational Diseases Under the Workers' Compensation Law

Health care workers are afforded even broader coverage for COVID-19 under the "occupational disease" provisions of the Workers' Compensation Law. Early court decisions required healthcare workers to demonstrate "exposure to an active case" of a patient with a communicable disease, in addition to medical proof. *Matter of Williams v. Buffalo Gen. Hosp.*, 28 A.D.2d 777 (3d Dept. 1967). Of course, the claim of a health care worker who could meet that burden of proof would be equally compensable as an accident, rendering occupational disease coverage for exposure to communicable disease superfluous for workers in the very field in which it is an inescapable feature of the employment.

Thus, by 1978 the Appellate Division had recognized that "there is sufficient evidence in the record to establish that, despite whatever precautions may be taken to prevent exposure, the danger of exposure is ever present to all nurses. The work exposure to which all nurses are subjected is sufficient to meet the essential tests of occupational disease." *Matter of Nathan v. Presbyterian Hosp. in New York*, 66 A.D.933 (3d Dept. 1978). That test is that there be a "recognizable link" between the disease and a distinctive feature of the employment: "[A]n occupational disease derives from the very nature of the employment, not a specific condition peculiar to the employee's place of work." *Matter of Bryant v. City of New York*, 252 A.D.2d 777 (3d Dept. 1998).

The fact that exposure to communicable disease is an inherent feature of work in the health care field has been thoroughly proven by the COVID-19 pandemic, in which the system and those who work in it have been overwhelmed by a flood of infected and contagious patients. It is truly a situation in which "despite whatever precautions may be taken to prevent exposure," these workers will be exposed to the virus and have and will fall ill as a direct result of the nature of their work.

Benefits Under the Workers' Compensation Law

We therefore see that interpreted properly, the Workers' Compensation Law already covers workers who contract COVID-19 because the government's designation of their employers as "essential business" necessitated that they report to work during the pandemic. The law provides even broader coverage to health care workers, for whom COVID-19 should be treated as an occupational disease. Only one question remains: Why is workers' compensation a superior remedy to the proposed "COVID-19 Heroes Compensation Fund"?

One answer is immediately evident: The Workers' Compensation Law is already in place and is administered by an existing agency, whereas the proposed federal Fund does not exist and will not come into being absent an act of Congress. Workers who are ill now would clearly be better served by immediate access to an existing system, rather than waiting an indeterminate period of time for the uncertain prospect of a federal remedy that will provide unknown benefits.

In terms of benefits, one proposition that has been advanced is that the proposed federal fund would be modeled after the September 11th Victim Compensation Fund, with maximum awards of $250,000. There has been no mention of what medical coverage, if any, would be provided by this Fund.

These hypothetical awards stand in stark contrast to existing workers' compensation benefits, which cover the injured worker's causally related medical treatment for life, provide weekly benefits for periods of total disability of two-thirds of the worker's pre-accident wage up to a maximum benefit rate of $934.11 and include permanent disability benefits for workers who are unable to return to work. In the event of a work-related death, benefits are payable to a surviving spouse for life, and for minor children until the age of twenty-three as long as they remain enrolled in school. In short, in most if not all cases, workers' compensation benefits are a far superior remedy for our COVID-19 heroes.

Moreover, the Workers' Compensation Law provides ongoing coverage and protection to injured workers. Unlike the type of one-time award apparently envisioned by the proposed Fund, a worker with an established workers' compensation claim may reopen a claim for monetary benefits for eighteen years from the date of the injury and for medical treatment without any time limitation. With the long-term impact of COVID-19 unknown and unknowable at this point in time, the expansive coverage of the existing statute would seem far superior to the type of one-time award apparently envisioned by the proposed Fund.

Conclusion

We therefore see that there is no need for our COVID-19 heroes to await federal action which may or may not occur, and the timing and nature of which are unknowable. New York's current Workers' Compensation Law, interpreted in a manner consistent with its "socioeconomic remediation purposes 'as a means of protecting work[ers] and their dependents from want in case of injury' on the job," provides significant protection for healthcare and other essential workers. The existing system can provide benefits right now, when they are needed to support ill workers and their families, as well as providing ongoing and long-term benefits as needed. These benefits include wage loss, medical treatment and death benefits—the full range of what is necessary, for as long as it is needed.

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