Contagious Diseases or Compensable Injuries? The “Ordinary Diseases of Life” and the Workers’ Compensation Act

September 23, 2013

Media Contact
Erica Gianetti
Marketing & Communications Supervisor
erica.gianetti@mgclaw.com

In South Carolina, “ordinary diseases of life” are expressly excluded from the definition of an “occupational disease.” Such an exclusion is sensible, as it does not allow for a windfall of claims from employees who contract illnesses and diseases which are common in everyday life and are not distinctively “occupational.”

Therefore, to be covered under South Carolina's Workers’ Compensation Act, sick employees must demonstrate that their current illness results directly from conditions of their employment, and such exposure is in excess of those found in the general public.

This potentially creates an interesting scenario for employers in the medical profession. Doctors, nurses and other medical professionals throughout the state are certainly at an increased risk for exposure to the “ordinary diseases of life.” Employees in the medical field are exposed to a wide variety of illnesses and diseases ranging from fevers, influenza and the common cold, to much more serious diseases like tuberculosis, hepatitis, herpes, staph and other infections.

For workers’ compensation purposes, South Carolina defines “injury” only as an “injury by accident arising out of and in the course of employment and shall not include a disease in any form, except when it results naturally and unavoidably from the accident and except such diseases as are compensable under the provisions of Chapter 11 of this title.” S.C. Code §42-1-160 (A). Chapter 11, specifically S.C. Code §42-11-10, defines “occupational disease” as a disease arising out of the course of employment that is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged. However, 42-11-10(B) excludes certain diseases from the definition. Specifically:

No disease shall be deemed an occupational disease when it:

1. Is a contagious disease resulting from exposure to fellow employees from a hazard to which the workman would have been equally exposed outside his employment.
2. Is one of the ordinary diseases of life to which the general public is equally exposed, unless such disease follows as a complication a natural incident of an occupational disease or unless there is continuous exposure peculiar to the occupation itself which makes such disease a hazard inherent in such occupation.
   S.C. Code §42-11-10(B).

Larson's Workers' Compensation Law briefly touches on the issue of ordinary contagious diseases as compensable injuries. Larson's explains that exposure to contagious diseases, in principle, "resembles exposure to heat, cold and elements generally." Therefore, courts will typically demand a showing of increased exposure to the contagious disease before compensation is awarded. *Larson's Workers' Compensation Law § 5.05(1)*.

While increased exposure remains a key element to compensability, the most important component to the equation could be what type and how stringent of a risk analysis the court decides to use. Two theories have prevailed as the prominent methods of analyzing risk for the compensability of contagious diseases. The peculiar-risk approach requires a showing of added risk that is inherent to the employment itself. Alternatively, the actual-risk approach does not require that the increased risk be at all related to the employment- only that there be an actual increased risk. Case law noted in Larson's indicates that more and more courts are transferring from a peculiar risk approach to an actual risk approach in evaluating infectious diseases. *Id*.

Theoretically, the peculiar-risk approach is a tougher standard to meet; however, it makes the more compelling case for compensability. For example, a nurse who contracts smallpox in a smallpox-infested hospital wing can more easily claim her disease was peculiar to her employment and be entitled to compensation in jurisdictions that have a "peculiar to the employment" clause. Yet in that same jurisdiction, an engineer who contracts smallpox would be denied compensation on the theory that she could have contracted smallpox anywhere, regardless of whether or not she actually contracted the disease on the job.

The actual-risk approach, which only takes into account whether or not the claimant was at an increased risk to an infectious disease regardless of whether or not it was peculiar to the employment, would theoretically lower the bar for compensable claims by eliminating the "peculiar" requirement. In the above example, while the nurse's diseases would still be compensable, the engineer would also have her diseases found to be compensable if she could prove that her employment placed her in a position where she was at an increased risk of exposure to smallpox, even if smallpox is not in any way peculiar to her business.

Methicillin-resistant Staphylococcus aureus (MRSA) is an antibiotic resistant type of staph infection. Studies have shown that medical professionals are at an increased risk of a contracting MRSA. At Driscoll Children's Hospital, Corpus Christi, TX, thirty of 257 healthcare workers were colonized with MRSA, representing 12% of the medical staff.[1] In Advocate Christ Medical Center, Oak Lawn, IL, 16 of 105 members of the emergency room staff were MRSA positive.[2] However, medical professionals are not the only group at an increased risk to contract this disease. Those with weak immune systems, young children, the elderly, prison inmates and athletes in contact sports have also shown an increased risk to the disease. MSRA is just one example of a disease that medical professionals are potentially at a greater risk of contracting than the general public. It may be speculative to say whether or not a South Carolina court would find such a disease compensable under the current workers compensation statute, but certainly the argument could be made.

Obviously, healthcare employers in South Carolina will strive to keep their employee's safety a top priority. However, if hospitals and other health care employers see a rising number of claims for workers compensation coverage for "everyday illnesses," concerns over rising workers compensation costs would follow. For example, if influenza was found to be compensable, workers compensation costs for such a claim would be nominal. However, the *cumulative effect* of a "compensable influenza" would place a heavy financial burden on insurers. In contrast, if MRSA is found to be compensable as an occupational disease for health care professionals, financial exposure for a single claim could be significant.

There is limited South Carolina case law to shed light on how the courts would rule on the issue. In fact, there is only one case that is directly on point. In *Carlene Fox v. Newberry County Memorial Hospital*, the South Carolina Court of Appeals found that a nurse who had allegedly contracted herpetic whitlow during her employment with a hospital had suffered a compensable occupational disease, noting that contagious diseases commonly found in the public can be compensable if they meet statutory requirements outlined in the occupational disease statute. From that language, it appears that the courts will rely on the statutory language, and the question of whether or not an "ordinary disease of life" is compensable will become a question of fact specific to the disease and circumstances. The court did not indicate which theory of risk analysis it preferred, but its deferral to the workers' compensation statute indicates that South Carolina would tend to follow a peculiar risk analysis for infectious diseases.

The law on compensability for contagious diseases in South Carolina remains unclear. The Fox case seems to indicate that such diseases would be compensable for medical professionals; however, there is still a lot of uncertainty surrounding the issue. Medical and health care employers and their insurers would be wise to keep a watchful eye on the development of such claims. Compensable "ordinary diseases of life," whether influenza, hepatitis or MRSA, could open the door to a flood of new claims to the Commission.

ABOUT THE AUTHOR

Barrett Burley is an attorney with McAngus Goudelock & Courie. Mr. Burley may be reached at 843.227.4953 or at barrett.burley@mgclaw.com.

This article originally appeared on September 23, 2013 on the Workers' Compensation Institute's website, and is republished here with permission.

---

[1] *Ibarra M, Flatt T, Van Maele D, Ahmed A, Fergie J, Purcell K (December 2008). "Prevalence of methicillin-resistant Staphylococcus aureus nasal carriage in healthcare workers". Pediatr. Infect. Dis. J. 27 (12): 1109–11.*

[2] *Bisaga A, Paquette K, Sabatini L, Lovell EO (November 2008). "A prevalence study of methicillin-resistant Staphylococcus aureus colonization in emergency department health care workers". Ann Emerg Med 52 (5): 525–8.*