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Infectious Disease Experts Are Hard to Find and Expensive for COVID Claims: Top [2020-08-05]

Workers who litigate comp claims over COVID-19 infections are finding themselves between a virus and a hard place, experts and attorneys say.



Kristy Weinschel

Claimants might need to find epidemiologists, infectious disease doctors and industrial hygienists who can serve as expert witnesses and identify connections between work and the illness. But because this particular strain is new — hence the name, novel coronavirus — scientists and attorneys say there are few studies that can back them up on how the virus spreads in workplaces.

The few preliminary studies that have been done tend to show that infection rates are actually higher outside of some of the high-risk occupations, such as health care, said Kristy Weinschel, executive director of the Society for Healthcare Epidemiology of America.

And many experts now are so busy consulting on how to keep schools and workplaces safe from the virus, they have little time to provide testimony or independent medical exams in comp claims, experts and attorneys said.

Expert witnesses also don't work for free.

Some claimants' attorneys are finding that a virus expert's report or an IME can cost more than \$1,500. Robert Sheriff, an industrial hygienist and epidemiologist in New Jersey, said his company typically charges \$375 to \$450 an hour for expert witness work, and another \$150 an hour for work in the field, plus lab expenses.

In Florida, which has had some of the highest infection rates in the country in recent weeks, claimants' firms often front the expense for their clients. In most cases, if the claimant prevails, a judge will require the employer or carrier to cover the cost. In others, the expense must be paid by the claimant, attorneys said.

"Unfortunately, claimants have to pay for their own experts, and it won't be cheap," said Geoff Bichler, an Orlando attorney who represents first responders.

It's a new world for comp lawyers on both sides, many of whom are more accustomed to dealing with orthopedic doctors and broken bones, not the realm of community spread and probabilities.

"As with many non-orthopedic medical specialties, it's been challenging for employers, carriers and TPAs to secure experts," said Adam Cox, executive secretary and attorney for the Illinois Self-Insurers' Association. "I suspect securing experts to address causation in COVID cases is going to be quite challenging at this point for all jurisdictions."

And things could be just as complicated as the pandemic progresses.

While infectious disease experts now seem like the logical choice in COVID claims, evidence is emerging that the disease can cause long-term damage to the heart, lungs, liver and other organs. It's highly likely that experts in those specialties will have to be utilized in the evaluation and defense of virus claims, Cox said.

At this point, five months into the pandemic, some 14 states now have COVID presumption laws or rules that are intended to make it easier for at least some first responders or essential workers to obtain comp benefits.

But most of those are rebuttable presumptions. Insurance attorneys are likely to raise court challenges, known as Daubert challenges, about an expert's knowledge in what is still a new and evolving disease, said Alan Pierce, a claimants' attorney in Boston.

"Like most cases, the higher the potential financial exposure (huge hospital bills/ permanent disability/death claims), the more vigorous the defense and the more money in expert witness fees will result," Pierce wrote in an email.

Claims are being handled differently in different states.

In Florida, which has no statewide presumption law, the Division of Workers' Compensation reports a denial rate of about 46% on the 5,693 COVID claims that have been filed. Attorneys say some municipal jurisdictions have aggressively defended claims made by first responders.

In Massachusetts, which also does not have a COVID presumption law, the more "obvious cases," such as those brought by hospital and nursing home workers, are mostly being paid by insurers and employers, Pierce said.

But other professions with no obvious exposure are seeing claims denied and litigated. Those will require experts who can give little more than their opinion about whether an infection at work was more likely than not, he said.

That's due in part to the dearth of scientific reports as yet available, attorneys and epidemiologists said. And some of the studies that have taken early looks at the pandemic may not help claimants' causes.

"The studies we've seen show a greater exposure in community settings" as opposed to health care facilities, said the epidemiology society's Weinshel.

A study in China, for example, found the infection rate among health workers in COVID clinics was one-third that of other frontline workers who weren't treating COVID patients. Another found a low rate of infection in health care workers in Netherlands, spread across 52 hospital departments. That suggests a hospital-spread outbreak was unlikely.

Sheriff, the industrial hygienist who has worked in many workers' comp cases, said it could be awhile before any definitive studies are available.

"As slow as science moves sometimes, that can take years," he said.

Even when more studies are published that can give stakeholders some guideposts in handling claims, that doesn't mean epidemiologists and other experts will have the bandwidth to get involved.

"There aren't very many of us doing this type of work," said Dr. Harry Hull, an infectious disease expert and epidemiologist based in Nevada.