

Our firm is aware of issues facing our clients due to the current COVID-19 crisis, including compensability issues and liability for temporary disability benefits with reduction in force and company shutdowns. There have also been procedural changes at the Commission due to the pandemic. Below is a list of topics with our collective opinions. As this is a new and fluid situation, we will keep you posted regarding changes and/or updated opinions over the next few weeks. Please feel free to contact us for additional discussion.

Compensability standard for infectious diseases in Mississippi

An issue of compensability should be addressed in the normal manner as other injuries under the MWCA, which also includes but is not limited to tuberculosis and/or other respiratory illnesses. The issue, and determination to be made, is whether the injury (condition) arose out of and in the course of employment. A portion of the definition of “injury” under the MWCA entails “accidental injury...arising out of and in the course of employment without regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner. Untoward event includes events causing unexpected results.” §71-3-3(b), *Miss. Code Ann.* (2012). Occupational diseases are not included in the definition of “injury”, but are treated the same under the Act, e.g. requiring direct causal connection. *Id.* and §71-3-7(1), *Miss Code Ann.* (2012). The Supreme Court of Mississippi has ruled that a reasonable relation of employment and injury and/or connections between the work environment and claimant’s health provides sufficient causal connection between the injury and employment. (See *Big “2” Engine Rebuilders v. Freeman*, 379 So.2d 888 (Miss. 1980); *Sharpe v. Choctaw Electronics Enterprises*, 767 So.2d 1002 (Miss. 2000).

Would COVID-19 be treated as an injury by accident of occupational disease

In Mississippi, COVID-19 should not be characterized as an occupational disease. A noted authority states the “principal component in the occupational disease definition is the distinction from diseases which might as readily be contracted in everyday life or in other occupations.” *Larson’s Workers’ Compensation Law*, §52.03(3). This is also supported by the fact numerous cases have originated from vacationers on cruise lines. OSHA has set forth an opinion that most workers have a low risk for exposure, while also specifically noting certain vocations with a higher risk of contracting COVID-19.

Does proof of exposure alone meet the compensability threshold or is additional criteria required

A thorough investigation would be conducted, most likely by state and/or federal authorities, if a person is diagnosed with COVID-19, to address the origin of the exposure, and others who may have been exposed. The risk of potential exposure to workers is low, except for limited vocations set forth by OSHA, who have an increased risk. This, in and of itself, promotes the investigative process and determination of whether the employee contracted the virus while in the course and scope of employment. Such would likely require a medical opinion, to a reasonable degree of medical probability, preferably by an expert in the field, that the exposure more likely than not occurred as a result of exposure at the place of employment. If found in the affirmative, COVID-19 could be characterized as a compensable injury under the MWCA, triggering liability for indemnity and medical benefits. For example, a nurse working at a clinic or hospital is exposed to and contracts COVID-19 from a patient, as determined by investigation. There could an argument that the nurse was exposed to the virus somewhere other than the workplace. However, if the evidence reflects there were extremely limited opportunities for potential exposure, but the evidence as a whole points to the exposure occurring at work, and was not purely coincidental, then, in that scenario, the claim would most likely be found compensable. In other words, it could be found that, but for the employment, the nurse would not have been subject to the exposure.

Liability for temporary total or temporary partial disability benefits when claimant has restrictions, is working modified duty for insured, but is sent home during plant-wide reduction in force due to lack of work due to COVID-19

We are unaware of a Mississippi statute or Mississippi case law on point.

Indemnity benefits are payable for certain types of "disability" under the MWCA. "Disability" is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings." Miss. Code Ann. §71-3-3(i) (2012). Essentially, indemnity benefits are only payable when the incapacity is causally related to or the result of a work injury, which differs from a situation where a person is not earning wages due to some other reason.

The claimant would, at a minimum, be entitled to continued temporary partial disability (TPD) benefits. Benefits should continue until claimant is released to full duty or is released at maximum medical improvement. An argument can be made that the claimant reverts back to TTD status because the employer is no longer able to accommodate modified duty. However, we believe there is an arguable basis not to reinstate TTD benefits for the reasons stated above.

An argument can be made that no indemnity benefits are due as the basis for the inability to work does not meet the definition of "disability" as defined by the Act, specifically "incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings." *Miss. Code Ann. Section 71-3-3(I)* (emphasis added). Rather, the inability to earn wages is not "because of injury", but is due to plant-wide reduction in force, which presumably applies to all employees, likely based on seniority.

Other factors to consider include the following:

1. Claimant files for unemployment benefits, effectively representing that he is able and willing to work but is unable to find work; such would support an argument that he is not disabled due to the work injury, thus supporting an argument that temporary total disability benefits are not owed;
2. Employer continues to pay salary even though claimant is not working, thus creating an argument that salary is continuing in lieu of workers' compensation indemnity benefits.

When making a decision regarding whether to pay indemnity benefits, it is important for the Employer to analyze the possibility of increased litigation if benefits are not paid in this scenario.

Liability for temporary total or temporary partial disability benefits when a claimant is off work, is subsequently released to return to work modified duty, which the employer could normally accommodate at a lower wage rate, but the modified duty job is no longer available as a result of COVID-19 outbreak

Claimant remains in TTD status until the employer is able to accommodate the restrictions and claimant returns to modified duty (resulting in TPD status), claimant is released to full duty, or claimant is released at maximum medical improvement. Case law states that temporary disability benefits are owed until claimant reaches maximum medical improvement. In this scenario, the claimant has restrictions and, thus, is disabled, and it is not reasonable that claimant can find work elsewhere due to same.

Commission procedural changes in lieu of the COVID-19 outbreak

Effective March 16, 2020, through April 17, 2020, the Offices of the Commission will not be open to the public.

Settlement documents are to be mailed to the Commission **or** filed through ATOS (attorney filing system), with the documents to have all required signatures (electronic signing is permitted for attorneys). All pro se settlements will be handled via telephone.

Commission hearings will be on the record from March 16, 2020, until April 17, 2020. As much as reasonable, Administrative Judge hearings will be conducted telephonically. In the event that an Administrative Judge hearing requires to be in person, hearings will take place in Hearing Room C at the Commission to provide ample distance between parties and Commission staff. There will be no admittance to the building without an appointment at the request of the Commission or an Administrative Judge.

Mediations are voluntary, not mandated by the Commission. Thus, they can be canceled by agreement between the parties.