



H1N1: IS THAT COMPENSABLE?

Many questions surface with the scare of the H1N1 flu virus. Media accounts of pandemics, disease, destruction and death are similar to the Bird Flu a few years back as well as the Swine Flu in the 70's. The Bird Flu fizzled so some are wondering if this is another Peter crying Wolf scenario. The bottom line here is that H1N1 is the flu. It may be called the Swine Flu and may have some different biological characteristics compared to the seasonal flu, but it is still the flu. What is the saying? You can put lipstick on a pig. . . . but it is still a pig! Influenza is floating around all the time and affects many people (five to twenty percent of the population) every year. It is estimated that of those that contract the seasonal flu, 200,000 require hospitalization and about 36,000.00 die. *111 Penn St. L. Rev 681*. Clearly, most recover but a small percentage do not. Those that get sick can miss work for a few days to a week. Those that recover don't really have any lasting permanent problem as a result of the flu, normally. On the other hand, just like the seasonal flu there have been reports of death caused by H1N1. The data suggests, however, that the number of deaths due to H1N1 is equal to or lower than the number of deaths from the normal seasonal flu. It is also reported that those most at risk for H1N1 are children, because they have not built up immunity to the disease. Whether the hysteria is real or imagined, the flu could impact business' cost in some capacity from longer sick time by employees to disinfectant clean ups. However, each business will be impacted differently and should be ready to set in place some precautions to minimize the risk.

Common ailments are not usually compensable under the Illinois Workers' Compensation Act (IWCA). Remember, a claimant must prove that his condition arises out of the employment and occurs in the course of employment. You must prove both. Under the [Illinois Occupational Disease Act](#) (ODA), 820 ILCS 310/1 et. seq., a parallel statute to the IWCA which was first passed on May 26, 1911 (a few weeks before the IWCA) and amended from time to time, a claimant must prove that the condition arises out of the employment and in the course of employment as well. A disease is deemed to arise out of employment if there is apparent to the rational mind a causal connection between the conditions under which the work is performed and the disease. Therefore, the standard is relaxed under the ODA. Under both Acts, a claimant must show that the risk of disease, exposure or injury was not common to the general public.

The common cold, therefore, is not compensable because it is common to the general public. Influenza (whether H1N1 or merely the seasonal flu) would also seem to be common to the general public and not compensable. However, there are some situations that could increase the likelihood of exposure to H1N1 which may bring the condition back to compensable status. First responders for medical treatment, hospital workers, EMT's, or firefighters enjoy a special provision in the Occupational Disease Act where such conditions are rebuttably presumed to arise out of and in the course of employment and that such condition is rebuttably presumed to be causally related to the employment.

If an employee wants to make a workers' compensation claim for the flu or H1N1, the short answer is that it should not be compensable whether they can prove they got it at work or not because it is a condition that is common to the general public. The question is whether to a rational mind the disease was caused by the work after consideration of all circumstances. The disease need not have been foreseen or expected but after its contraction *it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence.* (See attached portion of the Occupational Disease Act.)

How the employee's request for benefits is handled may determine whether an aggressive employee takes further action like hiring an attorney. The employer should remain empathetic but state that ailments common to the public are generally not compensable. Then, if the employee persists, (after donning a face mask, washing your hands, putting on rubber gloves, safety glasses and a Haz-Mat suit), start asking a few questions. Does the employee have children? How old are the children? What school do they go to? Have they had the flu? When? Who did the employee come in contact with in the last week? Names and addresses? Neighbors, friends, family members? When did the symptoms start? What are the symptoms and when did they occur? What did they do on their time off and who did they come in contact with? Did they visit anyone in the Hospital recently? Travel anywhere? How often do they wash their hands? Etc. This exercise is designed to communicate to the employee that they come in contact with many people outside of the workplace, and there are many ways to come in contact with the flu virus. Additional questions about medical care and diagnosis are also relevant. What test was performed to diagnose the H1N1 virus? Who is the doctor or facility that made the diagnosis? If they claim that a specific employee infected them, get details about the contact with that individual both at work and away from work.

As noted earlier, most who contract influenza recover with no permanent effects. They may have had some lost time from work but generally get back to normal. Medical expense in a normal case would also be minimal and should be paid for by the general health policy rather than workers' compensation. Such a small case most likely would not be filed at the IWCC. Whether they can obtain any collateral benefits from being out sick from a short term disability policy is something that could be considered if available to them. On the other hand, if an employee dies of H1N1 and can somehow relate it to work as an occupational disease, then there is trouble. This case would have the same exposures of death by other means but may have some additional arguments regarding applicability of the IWCA or ODA. (See related Article on Death claims.) The high stakes make it more likely that a case will be attempted. The questions noted above will be important in evaluating compensability if the employer was able to conduct such an investigation. The Supreme Court of Illinois addressed the issue of influenza in 1926. The Madison Coal Corporation v Industrial Commission, 320 Ill. 298 (1926), involved a coal miner who died of either influenza or "bad air" in the workplace. The Arbitrator and Commission found in favor of the deceased, but the Supreme Court reversed indicating that "where the cause of death is equally consistent with an accident and with no accident, compensation will be denied." The law and standard of proof has changed a bit since 1926, but the discussion of influenza is interesting. The court noted, "There is no controversy that there was at the time not only an epidemic of influenza, but also that Tishkan's son was afflicted with the disease and that his wife was recovering from it. From the manifest weight of the evidence, Tishkan's death was

due not to his exposure to the bad air in the mine but to influenza, as Dr. Black, his attending physician, certified.”

There are very few reported cases of influenza in a work related context. I have found no cases in which the only “injury” was influenza resulting in compensation. Influenza is mentioned as a complicating factor in other disease cases but dismissed as the cause of the resulting injury or death. The attorneys bringing claims before the IWCC will most likely attempt to tag another health issue or injury to the influenza for a better chance of a compensable case. Pure influenza as a singular condition is a tough case for a petitioner to prove due to the ease of transfer and widespread nature of the condition.

It would also be a good idea for Human Resource people or others that receive employee complaints or claims to have information available to assist someone who thinks he might have the flu. A policy should be developed consistent with a current employee handbook or policy regarding time off and when an employee diagnosed with H1N1 should return to work. The Center for Disease Control website is a helpful place to start educating everyone to take precautions both at work and away from work to prevent H1N1 exposure.

<http://www.cdc.gov/h1n1flu/qa.htm>

What about vaccines?

If the company requires vaccination against H1N1 and someone gets sick from the vaccine, is that compensable as a work accident? What if the company encourages employees to get the shot or pays for the shot or provides shots on company premises? There are many examples of employers requiring certain employee activities or wearing certain clothing, and the IWCC seems to punish an employer for it. For example, requiring an employee to park in a certain place, requiring a certain type of shoe, requiring employees to enter a certain door, each of these have been found to increase the risk of injury over the general public and, therefore, arises out of the employment. Merely making the vaccine convenient for the employee should not rise to that level so encouraging vaccinations, paying for them, or having them available on site would not automatically trigger an increased risk analysis. However, **requiring** vaccination as a condition of employment very well could result in a compensable case.

It should be noted that in the wake of the bioterrorist attacks some years back, the government was requiring first responders and hospital workers to be vaccinated. Confusion reigned on who is liable for complications from the vaccine itself. A provision clarified the Illinois law on required vaccinations. Section (d) paragraph 4 states:

Any injury to or disease or death of an employee arising from the administration of a vaccine, including without limitation smallpox vaccine, to prepare for, or as a response to, a threatened or potential bioterrorist incident to the employee as part of a voluntary inoculation program in connection with the person's employment or in connection with any governmental program or recommendation for the inoculation of workers in the employee's occupation, geographical area, or other category that includes the employee is deemed to arise out of and in the course of the employment for all purposes under this Act.

The argument is that this provision is not applicable to the H1N1 vaccine because it is not a potential bioterrorist incident.

Back in the 70's during the Swine Flu scare at that time, the United States Government in trying to encourage pharmaceutical companies to produce the vaccine and do it quickly provided immunity to the producers of the vaccine from liability if negative effects from the vaccine were realized. In 2004, the flu vaccine was added to the vaccines covered by the National Vaccine Injury Compensation Program (VICP) 42 U.S.C.A § 300aa-1 et. seq. In July 2009, Secretary of Health and Human Services, Kathleen Sebelius, invoking the [Public Readiness and Emergency Preparedness Act](#) (PREP Act) granted both the vaccine makers and the government immunity from lawsuits that could result from the swine flu vaccine. Complications from a vaccine would require the plaintiff to show willful misconduct that resulted in death and/or serious injury in order to recover under the PREP Act. Therefore, while the Federal Government is protecting itself from vaccine suits, the Illinois State Government is proclaiming that vaccines (at least in response to a bioterrorist incident) arise out of and in the course of employment.

Each organization must evaluate their risk. Some hospitals are requiring their employees to receive a vaccination or face termination. They have obviously determined that the risk of immediate complications from a flu vaccination is small compared to a potential or likely exposure to H1N1 while at work that may result in lost time at a minimum or death in the extreme case. Such organization is also relying on the effectiveness of the vaccine which would be an issue if an employee were vaccinated but still contracted the H1N1 flu.

As with all workers' compensation issues, precautions and a plan of action for immediate investigation are the best weapons to defend any potential claim. If your organization needs to develop a plan or train those charged with the first response to claims, we would be happy to assist in that effort.

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