HANNA BROPHY

OVERCOMING THE COVID-19 PRESUMPTION: LATENCY, AOE/COE, AND PROXIMATE CAUSE DEFENSES

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California has a long history of legislation and case law dealing with AOE/COE presumptions, the newest of which is the Governor's Executive Order N-62-20 (the COVID-19 Presumption), which established a rebuttable presumption in favor of finding that COVID-19was contracted in the workplace. While this presumption is rebuttable, there is not yet any case law addressing how this presumption can be rebutted. Nevertheless, we know from experience that there are defenses to rebuttable presumptions, such as those based upon the latency period of the disease. Some of these defenses may have significant relevance to the defense of COVID-19 cases.

The Executive Order 5/06/2020: "The COVID-19 Presumption"

The COVID-19 Presumption extends a temporary, rebuttable presumption of AOE/COE for employees who worked on their employer's premises at the direction of the employer between March 19, 2020 and July 5, 2020. The presumption shifts the burden to employers to show that it was more likely the employee sustained COVID-19 outside of work, otherwise the employer is liable for COVID-19 related indemnity and medical treatment.

As the medical community develops a better understanding of COVID-19, the workers' compensation community will be sorting out how to apply existing legal principles, and perhaps creating a few new ones. Until there is specific case law addressing this new legislation, parties will need to argue by analogy to existing cases regarding other presumptions. There is good reason to believe that the legal principals in those cases will govern and be applied regarding whether the COVID-19 presumption has been rebutted.

Rebuttable Presumptions – The Blais Decision

There is a general notion that rebuttable presumptions (like some of those found in Labor Code section 3212) cannot ever be defeated. However, as with the COVID-19 Presumption, the defense community must be prepared to develop and litigate the appropriate evidence. While rebutting the presumption may not be easy, and may not always be successful, it is certainly worth the fight where the circumstances support a valid defense.

The Board issued a panel decision in one such case on May 13, 2020 in Robert Blais, Jr. v. State of California (PSI) ("Blais") ADJ10840422, 2020 Cal. Wrk. Comp. P.D. LEXIS ____. In this decision, the Board found the defendant rebutted the seemingly insurmountable cancer presumption in Labor Code Section 3212.1 through the reporting and deposition testimony of the panel qualified medical evaluator (PQME). What can the defense community learn from this case to use in its defense of the COVID-19 cases? As it turns out, quite a bit.

DEFENDANT SHOULD SHOW THAT SUCH A LINK WAS NOT REASONABLE

Blais involves a safety officer cancer presumption in which the officer had a preexisting cancer award with a prior employer, but the cancer manifested during the defendant's employment and is subject to anti-attribution clause of Labor Code section 4663(e) if held to be presumptive. The case hinged on medical evidence from the PQME, who found on a medical basis that the cancer should not be attributed to the current employer.

The Blais decision noted that the defendant successfully rebutted the cancer presumption through PQME reports and testimony because this evidence demonstrated there was no reasonable link between the exposure to the claimed carcinogen and the cancer. One factor the Board relied upon in reaching its decision was the latency period between exposure and manifestation. As the Board explained, if the medical evidence shows that the latency period is long enough to preclude exposure at the employer's workplace, then there is no reasonable link between the cancer and the industrial exposure. In Blais, the presumption was held to be rebutted on medical grounds, which may have interesting implications in our post-COVID-19 environment, particularly if the Legislature were to adopt (as it appears) a permanent rebuttable presumption. (Note: the current Executive Order extends through 7/05/2020).

The medical evidence was key in the Blais verdict for the defense in finding that the current employer was not responsible for the employee's cancer, despite the presumption. The Blais decision also held that rebuttal of the presumption does not require showing the absence of a possible link between the cancer and the industrial exposure, but that defendant should show that such a link was not reasonable. There is a crucial distinction between proving there is no reasonable link versus showing clearly that there is no link to exposure in the workplace at all. But what does it mean for there to be "no reasonable link" in these cases? As the Blais court explained in quoting Garcia: "A link that is merely remote, hypothetical, statistically improbable, or the like, is not a reasonable link." (Id., at p. 316, citing City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia) (2005) 126 Cal.App.4th 298.)

Thus, while courts will no doubt hold defendants to as strict a standard as possible, Blais and Garcia show that it may be possible to rebut a presumption by showing there is no reasonable link without necessarily having to prove that the exposure happened only outside of the workplace.

"A LINK THAT IS MERELY REMOTE, HYPOTHETICAL, STATISTICALLY IMPROBABLE, OR THE LIKE, IS NOT A REASONABLE LINK."

Analyzing COVID-19 cases in light of Blais and Garcia

In finding for Defendant in the Blais case, the Board looked to prior cases including City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia) (2005) 126 Cal.App.4th 298. In the Garcia case, the Court of Appeal set up two alternative standards under which a cancer presumption can be rebutted:

It could be demonstrated that it is highly unlikely that the cancer was industrially caused because the period between the exposure and the manifestation of the cancer is not within the cancer's latency period; or

The nature of the manifestation, or other medical evidence, may be sufficient to show the lack of connection. (Id., p. 317)

As applied to COVID-19, either standard would require development of the medical evidence. In the first case, latency, the evidence must show when COVID-19 manifested and provide a reasonable chronological history to identify the latency period based on current scientific understandings of COVID-19.

This would show that the injured worker's exposure to COVID-19 could not have occurred while at work because exposure was either too soon or too late compared to when they worked. In the second case, lack of connection, a more traditional AOE/COE medical opinion is required to demonstrate that the COVID-19 exposure, diagnosis, and manifestation are not reasonably connected to work.

First – Does the COVID-19 Presumption Apply?

To argue for the applicability of other presumption cases, the wise practitioner must first discern whether the COVID-19 Presumption applies because this will determine whether the injured worker or defendant carries the burden of proof. Remember, the COVID-19 Presumption creates a temporary, rebuttable presumption of industrial injury for employees who claim to have contracted COVID-19 at work between 3/19/2020 and 7/5/2020. The presumption itself became effective 5/06/2020, but applies to dates of injury as early as 3/19/2020.

14 DAYS

A POSITIVE TEST OR DIAGNOSIS WITHIN 14 DAYS AFTER THE EMPLOYEE PERFORMED LABOR OR SERVICES AT THEIR PLACE OF EMPLOYMENT

For the COVID-19 Presumption to apply, the employee must meet all four of the following factors:

1. A positive test or diagnosis within 14 days after the employee performed labor or services at their place of employment.
2. The labor or services were performed after 3/19/20.
3. The location where the labor or services were performed was not also the employee's home or residence.
4. If the presumption was based on a diagnosis (as opposed to a positive test), the diagnosis must have been done by a physician who holds a physician and surgeon license issued by the California Medical Board, and confirmed by further testing within 30 days of the diagnosis.

If the defendant can demonstrate that any of the above four factors do not apply, then they might prove that the presumption does not apply and the employee retains the burden of proof to demonstrate industrial causation.

Second – Once It is Determined That Defendant Has the Burden of Proof, Identify Evidence to Rebut the Presumption.

Once it has been determined that all four factors have been met, the COVID-19 Presumption applies and the burden shifts to the defendant to rebut it. Defendant could look to presumption cases like Blais and Garcia for a defense. Applying the defenses below will require a detailed factual inquiry and consultation with a workers' compensation attorney is highly recommended before denying any such cases.

97.5% OF PEOPLE INFECTED WITH COVID-19 WILL EXHIBIT SYMPTOMS BY 11.5 DAYS

Employees may argue that COVID-19 does not have an established latency period, but the defense can argue by analogy that the incubation or "pre-symptomatic" period should be used, similar to those used to establish latency period in cancer claims. The "incubation period" is the time between exposure to the virus (becoming infected) and symptom onset.

Note: Medical evidence may support a shorter latency period of 5-11.5 days, but the executive order states 14 days so that will be the legal standard unless rebutted by competent medical evidence in a particular case. According to the World Health Organization (WHO), the incubation period for COVID-19, is on average 5-6 days, however can be up to 14 days.[1] According to the American College of Cardiology, the median incubation period from infection with COVID-19 to onset of symptoms is approximately 5 days and 97.5% of people infected with COVID-19 will exhibit symptoms by 11.5 days.[2]

Time of Exposure at Work Was Not Within the Latency Period (Too Soon or Too Late)

One way to defend a COVID-19 presumption would be to demonstrate that it is highly unlikely that the employee's COVID-19 was industrially caused because the period between the claimed exposure and the manifestation of the COVID-19 (symptoms or positive test or diagnosis) is not within the known "latency period." This defense requires the defendant to (A) obtain medical evidence of the COVID-19 latency period and then (B) show that the period during which the employee worked was not within a reasonable latency period.

[1] - WHO Coronavirus disease 2019 (COVID-19), Situation Report – 73, April 2, 2020

https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_4#:~:text=The%20incubation%20period%20for%20COVID,occur%20before%20symptom%20onset.

[2] - American College of Cardiology, Estimated Incubation Period of COVID 19, 5/11/2020

https://www.acc.org/latest-in-cardiology/journal-scans/2020/05/11/15/18/the-incubation-period-of-coronavirus-disease

The employee's symptoms manifested too soon before any work exposure: "Too early."

An employer could alternatively seek evidence that the employee was displaying COVID-19 symptoms or was exposed to / lived with a COVID-19 positive individual 5 – 11.5 days (even up to 14 days) before their alleged workplace exposure. The argument would be that they were still in the incubation or pre-symptomatic period when they were allegedly exposed at work, while the testing merely happened after being at work. Again, the defendant's position would be that there was no workplace "injury" because the exposure occurred somewhere other than at work. Medical and factual evidence supporting this defense needs to be developed through timely investigation and diligent pursuit of a medical opinion based on that investigation.

5 DAYS

COVID-19 TAKES AT LEAST 5 DAYS TO MANIFEST, MEANING THE SYMPTOMS ARE THE RESULT OF EXPOSURE BEFORE THE EMPLOYEE STARTED WORKING

Even if the employee was back to work for up to 5 days before demonstrating symptoms, a medical opinion should be developed to show that COVID-19 takes at least 5 days to manifest, meaning the symptoms are the result of exposure before the employee started working. The argument would be that the period between the exposure and the manifestation of COVID-19 is not within COVID-19's incubation or "pre-symptomatic" period. Given this, the onset of symptoms (aka manifestation) was too soon following any potential work-related exposure. In short, the injury (the exposure) occurred prior to coming to work. A medical opinion confirming the period between the exposure and the manifestation would likely be required. It would also be helpful to establish that the employee was not exposed to any known COVID-19 cases while working and that no other employee was positive at that time.

Let's apply this defense to a hypothetical case. Employee Isabel had her first symptoms of COVID-19 on May 10, 2020. The employer records show she worked from May 8, 2020 through May 10, 2020. She was sent home immediately when the symptoms started, having worked a total of three days on May 8th, May 9th, and May 10th. If the defendant proves her symptoms manifested on May 10th, and obtains medical evidence that the reasonable latency / incubation is at least 5 days, the defendant may be able to rebut the presumption because Isabel's work from May 8-10 was too close in time to her symptoms starting.

In sum, if medical evidence showed that Isabel had not worked after April 26th (i.e.: during the fourteen day period before symptoms started) and that the latency period is at most 14 days, then the defendant could argue that the presumption should not apply because, from a medical perspective, she must have been exposed before working for this employer.

The employee's symptoms manifested too long after any work exposure, i.e.: "Too late."

An employer could seek to rebut the COVID-19 Presumption by developing factual evidence that the employee did not become symptomatic or receive a positive test / diagnosis within 14 days after last performing labor or services for the employer and thus the exposure is outside the normal incubation or asymptomatic period.

Let's apply this defense to our hypothetical case: employee Isabel had her first symptoms of COVID-19 on May 10, 2020. However, this time factual investigation at the employer level demonstrates Isabel had not worked for this employer for some time, as her employment there ended April 15th, far more than 14 days before her symptoms arose. On these facts, it is more likely the defendant will be able to obtain a medical opinion that her COVID-19 was not related to her work that ended April 15th because the symptoms arose too late in relation to any alleged work exposure and are thus outside of the latency period.

Notably, if the defense tries to argue lack of industrial exposure when the employee last worked less than 14 days after the development of symptoms, this argument might be a tougher sell given that the COVID-19 Presumption allows for positive testing / diagnosis within 14 days and the WHO currently allows for up to 14 days. However, the law is still catching up to the science in this unprecedented pandemic. Further scientific refinement of the incubation period may allow employers to make this argument, so close calls should be carefully documented and considered.

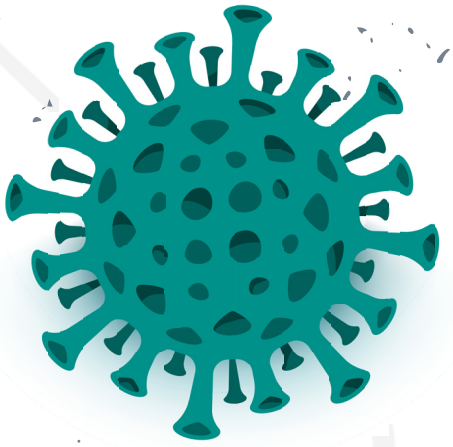
Lack of Connection to the Workplace

An alternative defense is to prove exposure occurred outside of the workplace. As noted by the court in Blais and Garcia "A link that is merely remote, hypothetical, statistically improbable, or the like, is not a reasonable link." This might allow the COVID-19 presumption to be rebutted without clearly establishing causation elsewhere.

The argument in any of the latency scenarios above is that the workplace was not the source of the exposure, but the affirmative defenses asserted in Labor Code sections 3600(a)(2) [injury did not arise out of nor in the course of work] and 3600(a)(3) [injury not proximately caused by work] are implicated, should be plead in an Answer, and remain the defendant's burden to prove.

If the presumption is applicable, it is not sufficient to merely assert that the employer does not believe it to be work-related. The substantial evidence standard applies to evidence submitted by either party.

Strategic discovery should be undertaken to prove there is no reasonable link to work-related activities. An employer who could develop the evidence to show a link of COVID-19 to the workplace is not reasonable would have an even stronger case if they could additionally demonstrate a more likely link between COVID-19 in a particular employee and a non-work-related source. Per Garcia, the nature of this manifestation may also "be sufficient to show the lack of a connection" to a workplace exposure. This is particularly true if there are no other known cases at the workplace and evidence could point towards outside exposure. Thus, the inquiry is both factual and medical in nature.



Conclusion

While it is relatively easy for an applicant to claim the benefits of the presumption in Executive Order N-62-20, there are several key factors that we can take away from the Blais panel decision and its predecessor, Garcia. Do not think rebutting the COVID-19 presumption is an insurmountable task. Defendants can and do rebut AOE\COE presumptions, as the panel decision in Blais illustrates. There is no reason that COVID-19 presumption cannot be rebutted as well. Analogizing to standards established in earlier presumption cases is a good place to start. The next step is working strategically to develop factual and medical evidence to support the development of appropriate case law to serve as precedent in COVID-19 presumption cases for the workers' compensation community moving forward.

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