

# DOES WORKERS COMPENSATION COVER COVID-19?

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# WORKERS COMPENSATION CLAIMS

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Basic Requirements

What is generally covered

What is generally not covered



# WORKERS COMPENSATION CLAIMS

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Texas Labor Code § 401.011

- “Compensable Injury” means an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle.
- “Arise out of” means that the work or working conditions were a substantial factor, without which the injury would not have occurred

*Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 221 (Tex. 2010)

# Course and Scope of Employment

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means **an activity** of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is **performed by an employee while engaged in** or about the furtherance of **the affairs or business of the employer**

# Not Course and Scope of Employment

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(A) transportation to and from the place of employment unless:

- (i) the transportation is furnished as a part of the contract of employment or is paid for by the employer;
- (ii) the means of the transportation are under the control of the employer;  
or
- (iii) the employee is directed in the employee's employment to proceed from one place to another place; or

# Not Course and Scope of Employment

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(B) travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless:

- (i) the travel to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the travel; and
- (ii) the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel

# Workers Compensation Benefits

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Health care that cures, promotes recovery, or makes employee able to work (§ 408.021)

Temporary income benefits (§ 408.101)

Impairment income benefits (§ 408.121)

Supplemental income benefits (§ 408.141)

Lifetime income benefits (§ 408.161)

Death and Burial benefits (§ 408.181, 408.186)

# Exclusive Remedy and Gross Negligence

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Tex. Labor Code § 408.001

(a) Recovery of workers' compensation benefits is the **exclusive remedy** of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.

(b) This section does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the **employer's gross negligence**.



# What is generally covered?

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Accidental injuries

Aggravation of pre-existing illness or injury if caused by work

Occupational diseases

- (34) “Occupational disease” means a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. The term includes a disease or infection that naturally results from the work-related disease.

# What is generally not covered?

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## Ordinary diseases of life

- “The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease.”

Tex. Labor Code § 401.011

The claimant bears the burden of proving that an injury or illness is compensable

# Precedents to Consider

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*Schaefer v. Tex. Emp. Ins. Ass'n*, 612 S.W.2d 199, 205 (Tex. 1980)

- Plumber argued that his tuberculosis was an occupational disease acquired from the soil in which he worked
- Judgment for claimant, reversed on appeal, affirmed by SCOTX

# Causation Considerations in *Schaefer*

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Can the strain of this disease be identified?

Can the transmission be traced to work?

Is the general public exposed to the disease outside of work?

Has the disease been previously found to be occupational in other circumstances?

Is the disease more prevalent in that line of work?

“Ordinary diseases of life are compensable only when incident to an occupational disease or injury.”

# Precedents to Consider

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*Bewley v. Tex. Employers Ins. Ass'n*, 568 S.W.2d 208 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.)

- Cold, sore throat, and pneumonia resulted from exposure to water and inclement weather at work
- Not compensable claims unless it “follows as an incident to a compensable occupational disease or accidental injury”

# Precedents to Consider

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*Godinet v. Thomas*, 824 S.W.2d 632 (Tex. App.—Houston [14th Dist.] 1991, writ denied)

- Workers' compensation benefits accrued to, and were the only remedy for, health care provider who was stuck with a dirty needle and infected by Hepatitis B

# Precedents to Consider

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City of Austin v. Smith, 579 S.W.2d 84, 85 (Tex. Civ. App.—Fort Worth 1979, no writ)

- Firefighter had compensable claim for an adverse reaction to Swine Flu inoculation
- There was no doubt that the inoculation cause his disability
- City prioritized his inoculation because of his job, encouraged him to get the shot, and he received the shot while on duty

# COVID-19 GENERALLY

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What do we know for sure?

- How it is transmitted
  - Touching infected surfaces,
  - Airborne droplets,
  - Possibly aerosolized
- Community and asymptomatic spread occurs
- Impact and time of infection varies widely



# COVID-19 GENERALLY

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What is still questioned (rightfully or not)?

- Effectiveness of preventative measures (6 feet distancing, different face coverings, ventilation systems, Vitamin D, etc.)
- Effectiveness of treatments (Possible Vaccines, Intubation, Remdesvir, Zinc, Hydroxychloroquine, Regeneron Antibodies, Vitamin D, Famotidine)
- How long is a person contagious and thus required to be absent from work?

# COVID-19 and Workers Compensation

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Accidentally Injury → Not likely

Occupational Disease → Possibly

Ordinary Disease of Life → Likely

# Factors to Consider

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## Tying the infection to the workplace

- Contact tracing
- Strain identification and tracing
- Multiple employees infected
- Ability to take preventative measures
- Ability to limit exposure and contact with people
- Higher risk work (nurses, doctors)
- Preventative measures and testing

# Travel and Coverage

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## Impact of Work Travel

- Traveling increases risk of exposure
- Exposure while traveling generally would not be covered
- If travel was tied to work, claim may be covered

# Comorbidities and Coverage

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Comorbidities increase risk of bad outcomes from COVID-19 infections

If COVID-19 is an occupational disease, the aggravation of pre-existing conditions may be covered

Death Benefits → Fact issue as to causation between COVID-19 and the pre-existing comorbidity

# Changes to Watch For

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## Legislative or Executive Action

- Many states have made COVID-19 a “presumed work-related illness”
- Some limit the presumption to essential workers
- Policies have come from both legislative and executive branches

# Texas Changes

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None so far

Efforts are underway to lobby for change

- Combined Law Enforcement Agencies of Texas seeking presumed status for first responders

# Gross Negligence and COVID-19

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Workers Compensation does not preclude claims for intentional acts or gross negligence

- (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
  - (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.
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