

COVID-19 and Worker's Compensation: *An Informed Opinion*



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"You are not entitled to your opinion. You are entitled to your informed opinion. No one is entitled to be ignorant."

So said American writer and Cleveland native Harlan Ellison. In the legal profession, we cannot afford to be ignorant. We cannot simply convey an opinion. We must provide our clients, the courts and our colleagues an informed opinion. With COVID-19 rapidly changing the world and, of course, the legal landscape, informed opinions are not always easy to muster. We must constantly review our opinions to ensure that they remain informed in light of evolving facts and scientific developments.

When COVID-19 and coronavirus became part of the lexicon, we at Poling researched the law on communicable diseases and swiftly advised

our clients that COVID-19 is not a compensable condition under Ohio's Workers' Compensation Act.¹ We advised our clients that as a matter of law, workers' compensation claims for COVID-19 should be denied as a matter of law. How did we reach that conclusion, and roughly six months later, does our opinion remain "informed?"

We began by considering previous workers' compensation claims involving allegations that the flu, the common cold, pneumonia and other airborne diseases had been contracted in the course of, and arising out of, one's employment. In one case, an employee who developed pneumococcal pneumonia filed an industrial claim alleging that he had contracted an occupational disease. The Court of Appeals of Ohio, Fourth District, found that the workers' compensation laws did not extend to "ordinary illnesses" such as colds or influenza.² The Ingram Court explained that "colds, influenza, and pneumonia are the result of bacteria – in common parlance germs – attacking the

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body. These germs appear and cause epidemics in cities, towns, and counties. It is also a matter of rather common knowledge that such germs appear to be in the very atmosphere surrounding us, at all times. Any and every person is 'exposed' to them without being conscious of the fact." Ingram informed our recommendation that COVID-19 should not simply be accepted as a workplace injury or disease.

Another decision that informed our opinion came from Ohio's Twelfth Appellate District. In *Kellogg v. Mayfield*, an injured worker alleged that her pulmonary infection resulted due to cold drafts and cigarette smoke in her workplace.³ The Court of Appeals upheld a trial court's determination that no workplace injury/disease had been established, holding, "the medical evidence indicates that the [injured worker's] condition was just as likely to result from conditions outside the workplace..."

With the holdings from Ingram and Kellogg, among others, in mind, we felt confident in advising our clients that COVID-19 claims should be denied. Almost simultaneously with our recommendation, Ohio's legislature busied itself with a number of bills that sought to codify COVID-19 as an occupational disease and provide employees who were required to work outside of their home any time after Ohio's declaration of a state of emergency with a presumption that if they contracted COVID-19 it had occurred in the workplace.⁴ Within one month of the state of emergency, three bills were introduced in the Ohio House of Representatives, each of which aimed to create a presumption that certain groups of workers who contracted COVID-19 would have a presumption that the condition occurred as a result of their work activity outside the home.⁵ One piece of legislation, H.B. 606, which initially aimed to provide immunity to certain businesses when COVID-19 was transmitted, was amended prior to passage by the House of Representatives to create a COVID-19 presumption for



first responders, corrections officers and food service workers. The Ohio Senate, upon passing its version of H.B. 606, stripped the COVID-19 presumption. To date, the Ohio legislature has not passed any legislation creating a COVID-19 workers' compensation presumption.

By June 23, 2020, the Ohio Bureau of Workers' Compensation reported that it had received more than 456 claims for COVID-19, and an additional 208 claims were filed with self-insured employers.⁶ The BWC created a special team to review and evaluate COVID-19 claims with an aim of providing "consistency throughout the state," in approving or denying claims, according to Stephanie McCloud, CEO of the BWC.⁷ Approximately 37.5 percent of the claims filed with BWC were allowed, while roughly 26 percent of claims filed with self-insured employers were approved. According to the BWC, more than 80 percent of the COVID-19 claim applications came from first responders and healthcare workers.⁸

Reviewing the data from BWC – 664 claim applications filed as of June 23, and 80 percent of those involving first-responders and healthcare workers, we believe that this is another piece of information that supports our original opinion that, as a rule, COVID-19 claims should be denied. We recognize the information that suggests that the great majority of COVID-19 claims involve employees in a very specific sec-

tor – first responders and healthcare workers. Our informed opinion to clients and the general public whose employees are within this labor market would be to closely scrutinize an application for COVID-19 workers' compensation benefits.

¹ R.C. 4123.01(C) defines an injury as "any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment." R.C. 4123.01(F) defines an occupational disease as "a disease contracted in the course of employment, which by its causes and the characteristics of its manifestation or the condition of the employment results in a hazard which distinguishes the employment in character from employment generally, and the employment creates a risk of contracting the disease in greater degree and in a different manner from the public in general."

² *Ingram v. Conrad*, 2001 Ohio App. LEXIS 6017.

³ (1991) 72 Ohio App.3d 490

⁴ Executive Order 2020-01D declared a state of emergency as of March 9, 2020.

⁵ HB 571 would apply a COVID-19 presumption to peace officers, firefighters, or emergency medical workers. HB 573 would apply a COVID-19 presumption to any worker. HB 605 would apply a COVID-19 presumption to employees of a retail food establishment or food processing establishment.

⁶ <https://www.governing.com/work/Ohio-Workers-Contract-COVID-19-File-for-Workers-Comp.html>

⁷ *Id.*

⁸ *Id.*

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