

Workers' Compensation and Avian Flu— Adding Insult to Injury

By Diana Shafter Gliedman

Recent reports of a potential avian flu outbreak had much of the country in a panic—and employers wondering what would happen if a flu pandemic swept through their employees. When illness affects a workforce, the result can range from inconvenient to unimaginable. Protecting workers' safety is obviously every employer's chief concern. But in the event an illness strikes the workplace, companies must also know whether their workers will be entitled to benefits under state workers' compensation statutes—and whether they may be required to pay potentially crippling self-insured retentions under their workers' compensation insurance policies.

In The Event Of Outbreak: Will Afflicted Workers Be Covered Under State Workers' Compensation Laws?

Assuming one or more of a company's workers become ill, will those afflicted workers be entitled to workers' compensation benefits? That depends on how the workers became ill and the nature of the illness. Virtually every state workers' compensation statute provides that an employee will be enti-

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“Energy companies spend millions of dollars on workers' compensation programs. But when illness strikes the workplace, employees and the company's bottom line may suffer!”
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Don't Get Soaked By The “Pollution Exclusion”: Remember The “Hostile Fire” Exception

By Nicholas M. Insua and Jennifer D. Katz

The “hostile fire” exception to the “pollution exclusion” is a common, but not-often litigated, provision. Just because it does not appear in many reported decisions does not mean that it is not a crucial part of insurance policies; indeed, it is one that needs to be understood. This article briefly summarizes some of the key aspects of this provision.

What is a “Hostile Fire”?

Pursuant to the “hostile fire” exception, coverage is afforded for incidents that might otherwise fall within the so-called “pollution exclusion.” The exception provides coverage for damage “arising out of the heat, smoke or fumes from a ‘hostile fire’ . . . at or from any premises, site or location which is or was at any time owned or

occupied by, or rented or loaned to, any insured.” The exception then defines “hostile fire” as a fire that “becomes uncontrollable or breaks out from where it was intended to be.”

This definition is not drawn from thin air: A “friendly fire” generally is defined as one lit and contained “in a usual place for fire, such as a furnace, stove, incinerator . . . and used for the purposes of heating, cooking, manufacturing, or other common and usual everyday purposes.” *Youse v. Employers Fire Ins. Co.*, 238 P.2d 472, 476 (Kan. 1951). In contrast,

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 tled to benefits for what is known as an “occupational disease.” To constitute an “occupational disease,” two conditions must be met:

(1) the disease must be proven to be due to causes and conditions that are *characteristic of and peculiar to a particular trade, occupation or employment*; and (2) the disease cannot be an ordinary disease of life, to which the general public is equally exposed outside of employment. *AMJUR Workers* § 316 (emphasis added).

The distinction between an occupational and an infectious disease, however, is not always easy to make. According to Donna J. Popow, *Principles of Workers’ Compensation Claims*, American Institute for Chartered Property Casualty Underwriters/Insurance Institute of America (Canada 2004):

Unlike traumatic injuries, the causes of diseases are not always clear. Determining that a disease is work-related can be difficult. Proof of a condition is not proof of causation. . . . Occupational disease statutes serve mainly to distinguish between diseases that are caused by and are peculiar to the industrial setting and the ordinary diseases of life. Occupational diseases are covered; ordinary diseases are not unless a direct causal connection to the workplace and the activities of the worker can be established.

How Would A Court Determine Whether A Disease Constituted An “Occupational Disease”?

In the event a business faces one or more claims for workers’ compensation coverage arising out of an alleged illness, the business will have to determine whether or not to challenge that claim. Whether or not a given illness would constitute an “occupational disease,” and thus be covered under state workers’ compensation law, is an issue of fact. Limited case law dealing with the spread of contagions in the workplace, however, provides insight into the factors a court would examine to determine whether a given outbreak would be sufficiently connected to the workplace to constitute an “occupational disease.”

For example, in California, a breakout of kerato conjunctivitis —a contagious eye disorder

—among employees at a steel company was found to be “proximately caused by and to have arisen out of the employment” and “constituted a special exposure in excess of that of the commonality.” *Bethlehem Steel Co. v. Industrial Accident Comm.*, 135 P.2d 153, 157 (Sup. Ct. Cal. 1943). The court based its holding upon the fact that conjunctivitis was apparently “epidemic” in the shipyards of the defendant, and that “although there were many cases of the disease among the public, there [was] nothing in the record to show that the same proportion as in the shipyards was affected.” *Id.* at 154.

Washington, too, requires a direct link between the occupational injury or disease and the employee’s scope of employment. In affirming an award of workers’ compensation to an employee who contracted asthma from exposure to dust, smoke and fumes at his workplace, the court found a correlative link between the affliction and the nature of the employment. The court held that:

Under the present act no disease can be held not to be an occupational disease as a matter of law where it has been proved that the conditions of the extra-hazardous employment in which the claimant was employed naturally and proximately produced the disease and that but for the exposure to such conditions the disease would not have been contracted.

Simpson Logging Co. v. Department of Labor and Industries, 202 P.2d 448, 452 (Sup. Ct. Wash. 1949).

Thus, if a worker contracted an illness in the workplace, it is conceivable that his or her illness would be covered under state workers’ compensation laws. It is clear, however, that an employee would need to demonstrate either that there was a proximate link between the disease and the employee’s employment or that he or she was subjected to some special exposure *in excess of that of the commonality*.

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“Disease” Versus “Injury”: How Many Self-Insured Retentions Will Apply In The Event Of An Outbreak?

If workers are able to demonstrate that they have contracted an illness through their employment and are therefore entitled to workers' compensation benefits, their employers will need to consult their worker's compensation insurance policies to determine how these claims will be paid, and at what cost. One question that is likely to arise is the number of self-insured retentions that will apply for a given outbreak.

Many workers' compensation insurance policies, particularly policies providing excess coverage, provide insurance coverage beyond an initial self-insured retention (essentially, a deductible) for each accident and/or each employee for disease, after which unlimited coverage is provided for workers' compensation coverage up until the applicable statutory caps. Thus, if an illness is deemed to constitute a “disease,” most policies would apply a *separate retention for each individual employee* asserting a “disease claim.” This is the likely outcome if workers contract a disease such as the avian flu—pandemic outbreaks typically constitute “diseases” and not “accidents” for purposes of determining the number of applicable retentions under workers' compensation policies. 99 C.J.S. Workers' Compensation § 317 (2006) (emphasis added) (“In general, *an occupational disease is not compensable as an injury by accident.*”) Therefore, depending on the number of claims made, employers facing multiple claims could face extremely high exposure.

If, however, an illness outbreak is triggered by a causal event at the workplace and directly flows from the work being performed, it may be arguable that the resulting disease has been produced *by an accident*, thus reducing the number of applicable self-insured retentions:

[I]f the cause of an infectious disease is traceable to a specific incident(s) at or related to work, then contracting the disease meets the definition of accident and qualifies as a covered injury. For example, if contracting typhoid fever could be traced to polluted water in a factory, then the illness is a covered injury. See Popow, 2.2.

Whether a given outbreak infecting multiple workers would be regarded as an “accidental

event” or an “occupational disease”—and, as a result, how many retentions would be implicated—depends on the specific circumstances leading to the initial exposure to the disease. If, however, a specific event led to the spread of the contagion, an outbreak could be considered an “accident” causing bodily injury as opposed to a disease. Thus, a business would only be required to pay one self-insured retention, no matter how many employees were actually exposed to contagion or contaminant.

Conclusion

To be covered under state workers' compensation laws, ill employees would have to demonstrate that they contracted an “occupational disease”—that is, a disease that results directly from conditions under which work was performed, or that subjects employees to a special exposure in excess of that of the commonality.

In the event an employee *could* demonstrate a causal nexus between his or her illness and his or her employment, a court would then have to determine whether the avian flu constituted a “disease” or an “injury” under the terms of the policies at issue. If the avian flu were deemed to constitute a “disease,” under most insurance policies, a separate self-insured retention would apply for each individual employee asserting a “disease claim.” However, if contracting avian flu were deemed to constitute “an accident,” it is conceivable that a single retention could apply to multiple employee claims. To support this position, an employer would need to demonstrate that multiple cases of an illness arose from *one single underlying cause*, and that only one “accident” had occurred. ▲



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a "hostile fire" is "unexpected, unintended, not anticipated, in a place not intended for it to be and where fire is not ordinarily maintained ..." or one that has "escaped." *Id.*

Importantly, unintended fires that result in explosions could be deemed "hostile fires." In *Maffei v. Northern Insurance Co. of New York*, 12 F.3d 892 (9th Cir. 1993), the court broadly interpreted the term "hostile fire" to include "any unintended fire in an unintended location." In *Maffei*, a vapor cloud of smoke emanating from a chemical drum at a dry-cleaning plant was sprayed with water by the fire department. That spraying caused an explosion and "a much larger thick dense cloud of whitish-yellow smoke"—allegedly sulfur dioxide. Subsequent lawsuits alleged injuries as a result of exposure to the sulfur dioxide smoke. The issue was whether the original smoke was the result of a "hostile fire." The court concluded that if a fire occurred in the drum, it was hostile because it was unintended and uncontrollable, and remanded for further proceedings. *Id.* at 894, 898, 900.

How Does the "Hostile Fire" Exception Apply?

Like any insurance policy terminology, the "hostile fire" exception must be applied to facts. One issue that often comes up is the distinction between "smoke" versus "irritants" contained in the smoke. Because the former would be covered while the latter might not, this can be a critical distinction.

In *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 934 P.2d 65 (Kan. 1997), the court rejected this distinction. There, fire in an underground facility in a former limestone quarry released toxic smoke, allegedly causing contamination of food products stored at the facility. The court explained that "[n]o one disputes that the contam-

ination of plaintiffs' products came from anything other than the smoke. [The insurance company's] attempt to draw a distinction between smoke and the toxic materials contained in the smoke is not persuasive." *Id.* at 825.

Another consideration is that insurance policies should be read reasonably, and all terms should be given effect if possible. Most policies define "pollutants" to include "smoke" and "soot" and "fumes." But, if all smoke, without regard to its origin, were included in the "pollution exclusion," the "hostile fire" exception would be rendered meaningless. Thus, the release of "irritants" in the form of "soot" or "fumes" from a "hostile fire" should fall within the "hostile fire" exception.

Conclusion

The "hostile fire" exception is an important provision in insurance policies. It reinstates coverage for pollution incidents that are not uncommon in the energy and petroleum-products trade. Policyholders should be aware of this clause, and aggressively pursue their coverage rights, even in the face of denials based on the "pollution exclusion." ▲



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