

2023 Legislative Update

By John Kamin, Esq.

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COVID Questions?

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What we'll cover



PRESUMPTIONS:

- Covid-19 presumptions all expire on 1/1/24
 - What it means for employers and adjusters
 - What it means for all claims after 1/1/24
- Presumption bills vetoed by Gov. Newsom
- Holdover presumption bills for 2024

ALSO COVERING:

- Approved bills
- Preview of 2024 legislative session
- Reforms we would like to see
- Three big cases of 2023



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Covid Presumptions Expire



- Which Covid presumptions expire on 1/1/24? All three of them, including:
 - LC 3212.86: Governor's presumption (applies to DOIs pre-7/6/20) (LC 3212.86)
 - LC 3212.87: First responder presumption (nurses, doctors, EMTs, firefighters, etc)
 - LC 3212.88: Outbreak presumption (4 positive tests in 14 days, or 4% of worksite employees having positive tests in 14 days if more than 100 employees)



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Q: But wait...weren't these extended by a prior bill?

Yes, in 2022 the presumptions were supposed to expire on 1/1/23 actually. But the 2022 Legislature opted to extend them to 1/1/24. Time flies!

Q: But won't they do that again?

The deadline to send bills to Gov Newsom's desk ended in September. If CA experiences a catastrophic outbreak this winter, then possible that he could call for an emergency extension of the presumptions, or new presumptions.

Odds of that happening are: Doubtful, 10% or less.



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Covid Presumptions Expire



So what does this mean for defendants?

- Tell your employers no more Covid outbreak reporting after 1/1/24. No more need to report to your adjusters every single positive test (regardless of being work-related or non-industrial).
- Adjusters and attorneys: No more need to calculate 14-day outbreak periods for DOIs after 1/1/24.
- No more need to ponder the question of “which presumption applies” after 1/1/24.
- No more shortened decision timeframes for Covid claims.



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Expiration Date is Interesting

For most laws, expiration date of 1/1/24 is standard boilerplate. But here, it may matter because:

- Covid rates tend to spike/increase during the holiday season. Ex: Outbreaks that ran through December 2021/January 2022
- So a number of cases could be “wobblers”
 - Wobbler: Crim Law term of art to describe charges that could either be prosecuted as a misdemeanor or a felony.
 - Covid wobbler: A claim that could fall under a presumption depending on the date of injury.



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What to do with Wobblers



So, you'll probably have some wobblers where it may be unclear if the presumption applies. Here's what you do:

- If symptoms started on/before 1/1/24, treat it as if the presumptions apply.
- If positive test on/before 1/1/24, treat it as if the presumptions apply.
- If symptoms start after 1/1/24 (and logically it follows that positive test would be after that date), then arguably presumptions do not apply.



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What to do with Wobblers



More wobbler precautionary measures:

- General advice: If unclear, treat the claim as if the presumptions still apply. What does that mean? Use the shortened 30-45 day decision timeframes under the presumption statutes, and still calculate the first responder/outbreak analysis.
- If still unclear, or crazy facts, ask us at Covid@bradfordbarthel.com



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Looking Forward

Legal standard for Covid claims after 1/1/24 will be the same standard for when a presumption did not apply.

- Burden of proof is on the applicant to show
- Work put them at greater risk of contracting Covid than their nonindustrial life
- 90-day decision timeframe



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Looking Forward

Practically speaking, this means that the way adjusters and attorneys defend Covid claims will largely be the same as before – focus on sources of nonindustrial exposure, which include:

- Family members, concurrent employment, public transportation (busses, airports), carpools, holiday parties and get togethers, concerts, vacations, etc. (Covid that happens in Vegas unfortunately doesn't always stay in Vegas)



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Looking Forward: Testing

What about testing on post-1/1/24 claims?

- The first responder/outbreak presumptions required PCR tests
- So for post-1/1/24, a PCR test would be nice, but not always required. The problem with at-home tests is that one can fabricate one – so some form of authentication is needed.
- Ex: If my kid has Covid and I want to pretend I have it, I could have them take the test for me, take a photo, and call it mine. Who would know?



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Looking Forward: Testing



What about testing on post-1/1/24 claims?

- So PCR testing is preferred because it has automatic authentication. Unless one goes through elaborate measures (sending Bob to pretend he is Jack, and take Jack's test for him), PCR test results generally only apply to one person.



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Looking Forward: Testing

Question: But wait, everyone uses rapid tests! This is going to be a problem, isn't it?

Answer: Not necessarily. Circumstantial evidence can corroborate a claim, such as:

- Coworkers: Jack was coughing
- Doctor's visit: Jack has Covid
- Rapid test next to a newspaper (or today, smartwatch) with a date: Says Jack has Covid
- Adjuster calls Jack: He didn't sound good at all



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Other Presumption Bills from 2023

There were other presumptions that were approved by the Assembly/Senate this year, but **vetoed** by Gov. Newsom:

- AB 1145: Create a new PTSD presumption for state nurses, psyche techs, and other providers at state prisons and psyche facilities
- SB 391: Would have made more officers from Fish & Wildlife, Parks and Rec eligible for skin cancer presumption



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Other Presumption Bills from 2023

There were other presumptions that were approved by the Assembly/Senate this year, but **vetoed** by Gov. Newsom:

- AB 699: Would have expanded existing presumptions for the City of San Diego Fire-Rescue Department's Boating Safety Unit, added biochemical substances, PTSD.



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Presumption Bills Held Over to 2024

There were even more presumption bills that ran into significant opposition before they could get to a floor vote in the Assembly or the Senate.

- What's a holdover? CA has a two-year legislative session. A bill that was proposed in 2023 can be "held over" and revisited (and potentially-approved) in 2024.
- Takeaway: These may be up for approval in 2024.



Presumption Bills Held Over to 2024

The biggest holdover that we got the most questions about was:

- AB 1156: This proposal would create a presumption for employees at acute care hospitals who provide direct patient care. This presumption would presume that infectious diseases, **orthopedic injuries**, PTSD, cancer, and various respiratory diseases are work-related.
- You read that correctly – a back injury could be presumed compensable if this passes.



Presumption Bills Held Over to 2024

A frequent question we got about AB 1156 was:

- If AB 1156's proposed presumption covers acute care hospitals, who does that apply to?
- Answer in simple terms: Really big hospitals where people stay overnight.
- Does not include urgent care clinics, small-to-medium size medical providers.
- Does apply to hospitals where inpatient care occurs (people stay overnight, often for long periods of time)



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Presumption Bills Held Over to 2024

Another holdover: AB 1107

- This bill would add more employees from the Department of Corrections and Rehabilitation and California State University Police Departments to the PTSD presumption. This bill would primarily impact employees who are responsible for law enforcement activities, such as transporting inmates.



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From These Slides

It appears that:

- Labor-friendly lawmakers saw Gov. Newsom's admin support the Covid presumptions
- "Maybe he'll support more presumptions for my preferred group"
- Try to get new presumptions passed, gets support in Assembly/House and...



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From These Slides

And they get ...

- Vetoed by Newsom who in his veto messages says we need to be careful with presumptions.
- (Medical condition goes here) is compensable under the workers' compensation system. However, altering the burden of proof through a presumption should be provided sparingly and based upon the unique hazards or proven difficulty of establishing a direct relationship between a disease or injury and the employee's work. Although well-intentioned, the need for the presumption envisioned by this bill must be supported by clear and compelling evidence."



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From These Slides

The bottom line is:

- Expect some new presumption bills next year.
- Have reason to believe Newsom will veto them unless it's a really prevalent issue supported by strong reasoning.



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Approved Bills

What bills were signed into law this year?

- SB 623: PTSD, first responders
- AB 621: limits on death benefits for state EEs
- AB 336: contractors, misclassification



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Approved Bills

What bills were signed into law this year?



- SB 623 postponed the expiration of the statutory presumption which states that PTSD is an occupational condition for first responders. The presumption was set to expire on 1/1/25. Now that the bill is approved, that presumption will not expire until 1/1/29.



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Approved Bills

What bills were signed into law this year?



- AB 621 removed limitations for death benefits for specific workers in the Department of Forestry and Fire. Now that the bill has become law, families of state firefighters can now collect both work comp and PERS death benefits.



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Approved Bills



What bills were signed into law this year?

- AB 336 requires contractors to submit their work comp coverage application and classification codes to the state's Contractor State License Board. This is intended to prevent contractors from intentionally misclassifying their workers.
- Flaw: This bill does not appear to do much to deter the contractor who has a license, claims they have no EEs, but in reality does indeed have EEs who may get injured.



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Approved Bills



AB 336

- The intent is good, but more needs to be done to deter unethical contractors from claiming no work comp coverage needed when in reality, they do need it.
- Besides the UEF and coverage problems it creates, allowing this problem to continue is unfair to the many honest contractors who pay their premiums and do everything by the book.



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Preview of the 2024 Legislative Session

- Will this year be the year of the omnibus reforms? We are overdue for a new reform bill. Last reform bill proposed, but never fixed interpreter fee schedule.



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Preview of the 2024 Legislative Session

Potential bills include:

- Bills attacking apportionment to nonindustrial conditions
- Presumptions (of course)
- Bills attacking MPNs
- Bills trying to undo the UR/IMR process



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Reform Topics We'd Like to See in 2024

Reform topics we'd like to see are:

- Cumulative trauma and post-term CT reform.
- Could be achieved by placing a statute of limitations on a CT filed two years after applicant was terminated.
Could create exceptions for cancer and other long-term diseases that take a while to manifest.



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Reform Topics We'd Like to See in 2024

Reform topics we'd like to see are: Additional panels

- There is a movement at the WCAB to award additional panels, in any specialty, in any case, for almost any reason.
- We want reform on: Additional panels reform when clearly unwarranted (ie no history of treating for that body part, making “every claim a oncology claim because anyone/everyone can plead cancer on every claim with no repercussions”)



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Reform Topics We'd Like to See in 2024

Reform on additional panels:

- Could be easily resolved by specifying factors on when an additional panel is warranted.
- Unfair to plead psyche when I take the applicant's deposition, ask him if he's got depression/anxiety, and he says "Naw man, I have a strong mental outlook on life." Why should we have to pay a QME \$5,000-\$10,000 for a psyche evaluation?
- Should deter the firm – who I will not name – that literally pleads "hostile work environment" on every single claim, regardless of the facts.



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Reform Topics We'd Like to See in 2024

Standards for DME:

- If a medical provider is going to bill for a DME, then they have to identify:
 - What materials it is made out of
 - What machines it used to be made
 - How long it took to make it
 - Who made it
 - How many other DMEs were made that day/month/year at the same facility
 - Under penalty of perjury



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Reform Topics We'd Like to See in 2024

Reform on Patterson case law:

- Patterson case: bars carriers from sending a RFA to UR when a) they've already authorized that treatment in the past and b) there hasn't been a change in condition since then.



Reform Topics We'd Like to See in 2024

Reform on Patterson case law:

- The problem: PTPs in work comp don't get more money to say someone is well. They do get more money by providing neverending treatment. Some providers will never, ever, find a change in condition. Why would they? It would literally cost them, and their AA friends, money.



Reform Topics We'd Like to See in 2024

Reform on Patterson case law:

- Some AAs argue Patterson, but then simultaneously object to any attempt to do discovery on a change in condition.



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Reform Topics We'd Like to See in 2024

Proposed solutions to the Patterson problem:

- Specifying that QMEs can comment on whether there has been a change in condition. This is not a comment on future medical care, it is a comment on medical status.
- Setting forth discovery rights for defendants to find changes in condition, such as:
 - Additional depositions,
 - Independent medical exams,
 - Mandatory consideration of MTUS guidelines
 - Consideration of ADLs



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Reform Topics We'd Like to See in 2024

LC 5710 fee reform:

- Despite a WCAB ruling that AAs cannot bill for administrative tasks (scheduling the depo, calling applicant to tell them to go to the depo), AAs still bill for those.
- Some AAs hold up settlements for LC 5710 fee requests that are intentionally set 25% to 50% above market rate. Some even include administrative tasks.
- Solution: “Teeth” to punish unethical behavior in this regard.



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Reform Topics We'd Like to See in 2024

More clarity on electronic service:

- At B&B, we have a clearinghouse address for service – service@bradfordbarthel.com
- Right now, the rules and regs do not require every firm to have a clearinghouse email account to accept service at
- Rather than leaving that ambiguous and leaving it open to “I never got it” defense by AA firms when we send them stuff, a clearinghouse email address should be required for all law firms who practice WC in California



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The Three Big Cases of 2023

2023 saw three big cases you need to know about.
They are:

- Grant and study decision (*Earley* decision)
- Take-home Covid decision (*Kuciemba*)
- Voc rehab apportionment (*Nunes v. DMV*)



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The Three Big Cases of 2023

Grant and study decision (Earley decision)

- Who said it? 2nd DCA of Calif.
- What was the topic? Grant and study decisions. Ex: We grant your recon, but need a lot more time (aka years) to decide it.
- What you need to know: The decision still allows room for the WCAB to do this. Results in more detailed decisions that vaguely grant reconsideration within 60 days of a petition for reconsideration, which permit the board to take additional time to make a final decision on the merits.



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The Three Big Cases of 2023

Take-home Covid decision (Kuciemba)

- Who said it? Calif. Supreme Court
- Topic: Take-home Covid. (Ex: EE allegedly gets Covid at work. Takes it home, gives it to spouse. Spouse dies. Is ER liable for wrongful death?)
- What you need to know: ERs owe no duty of care to an employee's household members to prevent spread of Covid.



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Bonus round: One last case to know about...

LC 5710 fees (*Cowens v. ABC Unified School District*)

- Who said it? WCAB panel decision (persuasive authority)
- Topic: LC 5710 fees
- What you need to know: “Services deemed inflated and purely clerical in nature,” such as the scheduling of a deposition, notification of applicant about the deposition, are not reimbursable as LC 5710 fees.



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The Three Big Cases of 2023

Voc rehab apportionment (Nunes v. DMV)

- Who said it? WCAB En Banc Decision (Controlling, Citeable Authority)
- Topic: When an AA's voc rehab expert intentionally ignores the apportionment given by medical experts in the case.
- What you need to know: Voc rehab experts cannot ignore physicians' apportionment findings and substitute it with their own "vocational apportionment" or lack thereof.



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