



LONG COVID / LONG HAULERS

By Scott A. O'Mara

SUMMARY

“LONG COVID” is a new medical term used to characterize continuation of the illnesses which many individuals have developed since their first COVID-19 diagnosis. Many COVID-19 patients are still experiencing effects of the disease despite the optimism that they have achieved a substantial recovery.

Some of the subjective complaints which treating doctors hear are head-aches, dizziness, poor memory, poor concentration and loss of taste and/or smell. Additional subjective complaints include breathing problems, shortness of breath, tiredness, muscle pain and weakness. Some patients even develop chest pain, palpitations, erratic (racing) heart rates, tachycardia, blood pressure problems (either highly-elevated or very low blood pressure). These subjective complaints can be indicative of harm to the brain, heart, lungs, kidneys, and/or abdominal area. Moreover, this list is not all-inclusive.

The complexity of COVID-19 has led to creation of the term “LONG COVID”, which is a reflection of the fact that while the illness itself may cause immediate problems from which injured workers over time may believe they have recovered, those symptoms may return later on, possibly along with various and numerous new ones.

Studies done by the University of Oxford and the National Institutes of Health indicate that COVID-19 does have long-term symptoms and long-term disability in many situations because these symptoms and disability manifest at a later date.

Documentation of patients' subjective complaints — such as pulmonary problems, chronic coughing, breathing problems, muscular weakness, cardiovascular problems, etc. — is a significant vehicle for identification of problems so patients can receive appropriate treatment.

Additional studies reinforce that concern, thereby strongly directing injured workers affected by the COVID-19 virus NOT to settle their cases by Compromise & Release, which would terminate their right to any further treatment under the umbrella of Workers' Compensation should they have a COVID-19 recurrence. Instead, injured workers should resolve their cases by Stipulations with Request for Award, or Findings and Award by the Court, so they potentially can receive lifetime medical care and the right to reopen their cases for new and further disability if their residual impairment increases within five years from their date of injury. (Law1199.com - 2020 Issue #14.)

THE LATEST COVID THREAT: COMORBIDITY

The continuation of COVID has resulted in a greater understanding of the medical phraseology which defines developments which result from the impact of COVID-19 on prior existing medical problems, as well as problems which develop subsequent to the finding of COVID-19. Comorbidity, defined as “the simultaneous presence of two chronic diseases or conditions in a patient” comes into play when COVID impacts either an underlying medical condition, or another medical condition which develops after the COVID finding. When comorbidity exists in COVID-19 cases, affected workers are placed at greater risk as to the eventual outcome of their health because of the impact of COVID on their other medical condition. In either scenario, the second medical condition - whether it develops before or after the onset of COVID-19 – makes the situation more severe and problematic.

Many COVID-19 sufferers develop comorbidity if they have high blood pressure/ hypertension, chronic pulmonary disease, diabetes, liver problems, kidney problems, cancer or even obesity. These factors, along with other medical conditions which are combined with COVID-19 to create comorbidity, place the affected workers at a higher risk of suffering a more severe disability because of the combined impact of the two medical conditions, substantially delaying their ability to return to work, and/or increasing their level of residual impairment.

Research regarding comorbidity has shown that it increases the likelihood of death when two medical conditions – one being COVID-19 – interact.

Case law states that if a worker has a condition which is work-related, the employer has the absolute responsibility to cure or relieve the effects of that condition. *And it is not necessary just that condition.* If any ancillary medical conditions develop as a result of the work-related injury – in this case, COVID-19 – those conditions also become the responsibility of the employer’s Workers’ Compensation carrier.

In addition, if a pre-existing, current or subsequent medical condition which is non-work-related delays or makes worse the work-related medical condition, this disease or condition must be treated under the Workers’ Compensation system.

As stated previously, no matter what form the comorbidity takes – whether the COVID-19 impacts a previously-existing medical condition, or whether another medical condition develops after the COVID finding – the employer has the responsibility to cure or relieve both medical conditions. (Law1199.com – 2021 Issue #8.)

COVID/LONG HAULERS/LONG COVID/STUDIES

In two of my previous Law1199.com Newsletters – 2020 Issues [8](#) and [14](#) – I discussed the long-term impact of COVID and the fact that conditions associated with the virus may continue even after a change in symptomatology to the point where individuals who have been infected believe they are once again functioning at a higher level.

On March 23, 2021, New York State Senator Brad Hoylman proposed legislation (effective only in the state of New York [S 5927 A]) which would create a COVID-19 Health Registry. The registry drafted is modeled after the World Trade Center Health Registry and would be for the purpose of obtaining information regarding the impact of COVID-19 on people who have been exposed and their current state of health.

The information currently available regarding COVID-19 infections — particularly with regard to LONG COVID and the people referred to as “long haulers” — is very narrow and does not provide a complete picture as to the cure rate and the impact of the disease in view of the latest manifestation of impairments or limitations.

It is important to note that participation by COVID patients in the proposed registry designed to monitor the long-term health impact of COVID-19 would be on a voluntary basis. The information garnered will be for both the physical and mental impacts of COVID-19, and it will provide some empirical data for the medical community to identify and provide appropriate care to cure or relieve the impact of COVID on affected individuals.

The thought is that consideration should be given to the creation of a voluntary COVID registry. The language used in the proposed legislation may meet the threshold of acceptability for California legislation as well. This legislation will help to protect ALL California workers and demonstrate the continued movement to protect all workers in California. ([Law1199.com – 2021 Issue #7.](#))

LONG COVID IS HERE

Workers *must* identify subjective complaints, even if their doctor has returned them to full duty. If workers fail to identify their subjective complaints, the employer can use this lack of documentation to deny their responsibility for care related to LONG COVID. ([See Law1199.com – 2020 Issue #14.](#))

Management and employees must work together to create and implement the Prevention Program, and workers with COVID based on the new studies and the discovery of LONG COVID must inform their doctor of all their subjective complaints so their doctor is fully aware of any remnants of LONG COVID. Therefore, prior to meeting with their doctor, workers need to write down all their subjective complaints, even if there has been improvement, as their condition could worsen as set forth in the LONG COVID findings. ([Law1199.com – 2021 Issue #1.](#))

Workers’ Compensation cases are typically resolved through a trial with a Findings and Award by the Court; a Stipulations with Request for Award agreed to by the parties with an Award by the Court; and/or a Compromise and Release with an Award by the Court. In the case of both the first two procedures (a trial with a Findings and Award; and Stipulations with an Award), a section in the Labor Code grants the Workers’ Compensation Appeals Board continuing jurisdiction over the Orders, Decisions and/or Awards, and also grants the power to allow a case to be reopened if the injured worker has an increase or decrease in permanent impairment if a petition to reopen is timely filed within five years of the worker’s date of injury.

The section of the Labor Code which allows a case to be reopened due to a change in impairment is used at times by injured workers, but many workers unfortunately are unaware of their ability to reopen their case for this reason within the five-year window. The reason for this is that when an injured worker does not have representation, the employer, third-party administrator or adjuster handling the worker's case usually does not advise the worker of his/her entitlement to the five-year reopening right for a change in medical condition. It therefore becomes imperative for all workers who have a finding from the Court – either by a trial or a stipulated agreement between the parties – to be made aware of their reopening right for an increase in disability.

An example where this right would apply would be if a worker has a back injury which originally is settled, but then the back becomes more symptomatic over time because of that injury. Another example would occur when a worker has an injury case which has been settled, but the worker is taking medication prescribed for that injury, and ancillary problems – such as kidney problems, gastroesophageal reflux disease (GERD), or various other conditions – develop as a result of taking the medication. Thus, the five-year reopening right allows injured workers to receive increased compensation for any additional disability related solely or largely to their work injuries.

FIVE-YEAR OR GREATER BY INSIDIOUS & PROGRESSIVE

Another factor associated with some cases is the finding that a disease – such as cancer – is *insidious and progressive*, meaning that the disease may exist initially without marked symptoms, but over time it is likely to progress gradually to a much more serious condition which may even be life-threatening. When a case involves a disease which has been found by a doctor to be insidious and progressive, the Workers' Compensation Appeals Board has the power to reserve jurisdiction over the case, in which event the worker's reopening rights are not limited to the five-year window which normally applies.

The Courts, in looking at cases which involve insidious and progressive diseases, have focused on cancer and exposure to various carcinogenic substances (such as asbestos) which can lead to the development of cancer. What has not been recognized by the Courts is the fact that orthopedic conditions in certain cases could also qualify as being "insidious and progressive".

However, a current case which came onto the scene in October 2018 involves a worker with an orthopedic injury. He underwent a knee revision in 2001, and then a total knee replacement in 2013, followed by a third surgical process in 2014. As a result of this latest surgery, the worker developed an infectious disease process which has required multiple treatments, and his doctor eventually determined that the worker needed to be placed on long-term antibiotic therapy to control and manage the infection which has continued to be present.

The judge reviewed the decision again and indicated that the facts were such that the long-term antibiotic treatment reflected an insidious and progressive disease, and that reservation of jurisdiction beyond five years from the permanent disability award should therefore be granted. The Workers' Compensation Appeals Board subsequently found the chronic infection to be insidious and progressive, and granted the reservation of jurisdiction accordingly. This marked a significant departure from the Courts' traditional approach of distinguishing between diseases like cancer and hepatitis C (which are almost certain to progress) on the one hand, and orthopedic injuries on the other.

Two elements are significant for injured workers: (1) that they have five years from their date of injury to reopen their case for new and further disability; and (2) that certain medical conditions may be considered to be “insidious and progressive” – such as cancer and hepatitis C, as well as other conditions involving the long-term use of antibiotics – and allow workers extended reopening rights to access greater protection for their loss of earning capacity resulting from a work injury.

California workers need to be aware of the five-year window to reopen their cases if their medical condition has changed to potentially receive compensation for new and further disability. Furthermore, workers need to know that if they have a condition which may be deemed “insidious and progressive”, that determination would allow them extended reopening rights beyond the normal five-year limitation. (Law1199.com – 2019 Issue #1.)

The Workers’ Compensation system generally allows five years from a worker’s date of injury to reopen a case for new and further disability, but the five-year limitation on reopening can be set aside for diseases which are determined to be insidious and progressive. The COVID-19 pandemic presents many unknown factors at this point, but it could prove to be insidious and progressive, much like exposure to asbestos. Workers suffering from asbestos exposure can obtain a tentative level of impairment determination, but with the recognition that the condition will likely be progressive. In such cases, the Court in most situations can reserve jurisdiction for making a final impairment determination until the worker’s condition becomes permanent and stationary or there is a total level of impairment. This concept goes beyond the five-year limitation on reopening a case for new and further disability.

In the COVID-19 studies which have been done, there are some strong findings which indicate that this virus causes lasting damage to the lungs in some patients to the extent that they may need a lung transplant to deal with the problem.

While discussions originally were focused on the pulmonary aspects of COVID-19, more recent studies also indicate that changes in the immune system caused by the disease can create blood clots, thereby limiting blood flow to the lungs which is essential to purify the lungs from further disease. Also, when the virus causes inflammation of the lungs, clotting can result which again affects blood flow to that area of the body, eventually even causing portions of the lungs to die out because of not being able to receive the fresh blood which is needed.

Another impact of the coronavirus is the more imminent finding of pneumonia, which, according to many doctors, can be connected to COVID-19 exposure. Pulmonary fibrosis, which can develop subsequent to a chronic inflammation, is also a factor causing dysfunction of the pulmonary system. In addition, some patients who believe their pneumonia is under control or is no longer diagnostic can nonetheless sometimes be experiencing further development of pulmonary problems which ultimately could be irreversible.

The enthusiastic desire of patients to get well can sometimes mask some of their subjective complaints. When they speak with the doctor, they are so focused on the belief that they are feeling better that they don't mention some of the important symptoms they may have, such as coughing, shortness of breath and fatigue – all of which can be indicators of pulmonary problems, as well as medical problems involving other systems. A high level of candidness is needed by all patients so their doctor can document *all* of their subjective complaints and perform additional testing, if needed, to determine whether the lungs have sustained any damage or other changes, or if damage has occurred to any other systems, such as your heart/stroke and memory.

Overall, with continuation of the COVID-19 crisis, we will have more knowledge as to what care and treatment is available, the level of impairment, and the changes and impact on other systems which may occur. Also, the five-year window from the date of injury to reopen a case for new and further disability potentially – depending upon the medical opinions rendered – could be extended indefinitely beyond five years if a condition is found to be insidious and progressive.

Current studies now show that some people with so-called “Full Recovery” are at higher risk for long-term problems related to COVID-19. *Protect yourself* and report your subjective complaints to your doctor. This protects your right to obtain additional care and reopen your case. *Do not settle your case by a Compromise and Release.* Doing so would amount to selling your rights for medical care and reopening. (Law1199.com – 2020 Issue #8.)



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