

# What COVID-19 Laid Bare: Adventures in Workers' Compensation Causation

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## ABSTRACT

*This Article performs a close analysis of workers' compensation coverage of COVID-19 and arrives at the conclusion that it should not be "impossible" to prove in a legal sense that an employee's COVID-19 was caused by work. Scientific proof is not the same as legal proof: Workers' compensation law has never required that claims must be supported by irrefutable scientific proof of workplace causation. Yet repeatedly one heard this suggestion during public discussion on workers' compensation coverage of employees.*

*Still, there is good evidence that even when workers' compensation undisputedly covers work-related disease, employers seldom pay benefits and states do not compel them to do so. This is one reality that COVID-19 laid bare: The workers' compensation system rigidly resists paying occupational disease claims. This Article also explores a news account from Minnesota stating that 935 of 935 workers' compensation COVID-19-related claims from meatpacking employees had not been paid as of February 2021. There was no shortage of other stories during the pandemic of mass denial of workers' compensation claims in the meatpacking industry, a development having a disparate impact on communities of color, where more than half of all meatpacking employees are Latinx. These unpaid claim numbers suggest that something was "wrong" with causation analyses at the lower levels of the administrative system.*

*Another truth COVID-19 laid bare is that, aside from workers' compensation, there is no nationwide short-term disability program in the United States. This leads to the conclusion that, if workers' compensation insists upon super-strict versions of causation to cover claims, a different method of compensating short-term disability during pandemics or other "environmental" crises may become necessary. The conclusion seems almost inescapable because public health experts like Dr. Anthony Fauci are warning that we remain at risk for "new disease emergences" for the "foreseeable future."<sup>1</sup>*

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1. Rob Stein, *Fauci Warns Dangerous Delta Variant Is the Greatest Threat to U.S. COVID Efforts*, NPR (June 22, 2021, 4:25 PM), <https://www.npr.org/sections/health-shots/2021/06/22/1008859705/delta-variant-coronavirus-unvaccinated-u-s-COVID-surge> [<https://perma.cc/NCR8-3UPQ>].

## I. INTRODUCTION

During the COVID-19 crisis, many observers expected workers' compensation<sup>2</sup> to broadly cover workers who became sick with the virus.<sup>3</sup> Not only did this not occur, some employers appeared presumptively to deny COVID-related workers' compensation claims,<sup>4</sup> perhaps applying a heightened, but unarticulated, standard of causation that workers' compensation does not demand.<sup>5</sup> News stories of mass denials of claims, including an especially notorious situation in Minnesota,<sup>6</sup> heightened the suspicion that something like this was going on.<sup>7</sup> The Minnesota story reported that, as of February 2021, all 935 COVID-related workers' compensation claims filed by Minnesota meatpacking workers during the pandemic had been denied.<sup>8</sup> This is a shocking statistic because the workers had been employed in crowded working conditions likely to have increased the risk of becoming infected with COVID-19,<sup>9</sup> a factor normally

2. Workers' compensation is a century old state-based benefits system that pays cash to workers injured at work in an amount that is customarily set at about two-thirds of the pre-injury wage and capped at no more than the state average wage. SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R44580, *WORKER'S COMPENSATION: OVERVIEW AND ISSUES* 1, 19 (2020). Workers' compensation also pays for injured workers' injury-related medical care and pays weekly cash benefits to the survivors of workers killed by work in an amount related to the deceased worker's wage at the time of death. See NAT'L ACAD. SOC. INS., *WORKERS' COMPENSATION: BENEFITS, COVERAGE, AND COSTS* 2–7 (2020).

3. See Ricardo Alonso-Zaldivar, *COVID-19 Heroes Must Jump Through Hoops for Workers' Comp*, AP NEWS (July 10, 2020), <https://apnews.com/article/virus-outbreak-health-ap-top-news-politics-workers-compensation-3d1a65d4d69adfe464b435c86730dfdf> [https://perma.cc/5DQY-JWWJ].

4. Tom Hals & Tom Polansek, *Meatpackers Deny Workers Benefits for COVID-19 Deaths, Illnesses*, REUTERS (Sept. 29, 2020, 10:00 AM), <https://www.reuters.com/article/health-coronavirus-jbs-colorado-idUSKBN26K334> [https://perma.cc/3C9K-7R7J].

5. See *infra* Parts III–IV.

6. Joe Carlson, *No Workers' Comp Paid So Far at Minnesota Meatpacking Plants*, STAR TRIB. (Feb. 21, 2021, 5:22 PM), <https://www.startribune.com/no-workers-comp-paid-so-far-at-minnesota-meatpacking-plants/600025831/> [https://perma.cc/6RGG-K67A]. A Reuters story that may have been referencing the same statistics—though it is unclear—reported that “[i]n Minnesota, where JBS had a major outbreak, meatpacking employees filed 930 workers' compensation claims involving COVID-19 as of Sept. 11, according to the Minnesota Department of Labor and Industry. None were accepted, 717 were rejected and 213 were under review. The agency did not identify the employers.” Hals & Polansek, *supra* note 4.

7. See Hals & Polansek, *supra* note 4.

8. Carlson, *supra* note 6.

9. Michelle A. Waltenburg et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities — United States, April–May 2020*, 69 *MORBIDITY &*

militating in favor of workers' compensation coverage.<sup>10</sup> Furthermore, meatpackers were not covered as "essential employees" under Minnesota's COVID-19 workers' compensation causation presumption.<sup>11</sup> According to the article, "[f]or Minnesota jobs that had the presumption, 19% of COVID-related workers' compensation claims were denied, state data show. In jobs without the presumption, 68% were denied."<sup>12</sup> Authorized essential workers included medical providers, police, firefighters, corrections officers and child care workers.<sup>13</sup> Many employees obviously do not fit into these classifications and, as this statistic demonstrates, were at much higher risk of claim denial.<sup>14</sup> The story was following up original reports of similar rates of claim denial throughout the meatpacking industry.<sup>15</sup> These types of mass denials hit communities of color especially hard: "Latino workers at meat and chicken processing plants have been the hardest hit by coronavirus, accounting for 56 percent of cases reported in plants in 21 states, the Centers for Disease Control and Prevention reported."<sup>16</sup>

High rates of workers' compensation claim denial should more generally sound an alarm since workers' compensation is the only benefit system in the United States covering the lost wages of partially or short-term totally disabled workers.<sup>17</sup> While there are legal and historical reasons that workers'

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MORTALITY WKLY. REP. 887, 887 (2020) ("Distinctive factors that increase meat and poultry processing workers' risk for exposure to SARS-CoV-2, the virus that causes COVID-19, include prolonged close workplace contact with coworkers (within 6 feet for ≥15 minutes) for long time periods (8–12 hour shifts), shared workspaces, shared transportation to and from the workplace, congregate housing, and frequent community contact with fellow workers.").

10. See *infra* Parts III.A–III.B.

11. See Carlson, *supra* note 6. Presumptions are a kind of legal procedure making it easier to find that COVID-19 has been caused by work. See *id.* About seventeen states enacted presumptions during the pandemic. See *infra* note 43 and accompanying text.

12. See Carlson, *supra* note 6.

13. *Id.*; H.F. 4537, 2020 Leg., 91st Sess. (Minn. 2020) ("[A]n employee who contracts COVID-19 is presumed to have an occupational disease arising out of an in the course of employment if the employee" was a "peace officer . . . firefighter; paramedic; nurse or health care worker, correctional officer, or security counselor employed by the state or a political subdivision at a corrections, detention, or secure treatment facility . . .").

14. See Carlson, *supra* note 6.

15. See Chris Walker, *Meatpacking Plants Deny Workers Comp to Thousands Who Contracted COVID-19*, TRUTHOUT (Sept. 29, 2020), <https://truthout.org/articles/meatpacking-plants-deny-workers-comp-to-thousands-who-contracted-covid-19/> [<https://perma.cc/RY25-BLZU>].

16. Suzanne Gamboa, *Coronavirus Reported in Over Half of Latino Meat, Poultry Workers in 21 States, CDC Says*, NBC NEWS (July 8, 2020, 1:50 PM), <https://www.nbcnews.com/news/latino/coronavirus-reported-over-half-latino-meat-poultry-workers-21-states-n1233192?icid=related> [<https://perma.cc/FN8Y-YV4Z>].

17. Only a handful of states provide short-term disability benefits: California, New York, New Jersey, Rhode Island, and Hawaii. See CATHERINE STAMM & KATHARINE

compensation does not operate as a general disability or health insurance system,<sup>18</sup> this Article argues that workers' compensation doctrine could more broadly have allowed for COVID-19 coverage if states had made appropriate doctrinal adjustments under well-recognized and existing rules of law. Although the early denials of claims were by employers and insurance carriers, not states,<sup>19</sup> murmurings throughout the workers' compensation community suggested uncritical acceptance of the idea that workers would "never be able to prove" what caused their COVID-19 condition.<sup>20</sup> However, workers' compensation law has never demanded irrefutable scientific proof of workplace causation, whether of diseases or traumatic physical injuries, as a precondition of coverage.<sup>21</sup> Employers reflexively denying COVID-19 workers' compensation claims on causation grounds, or more precisely states rolling over in the face of the denials, made a policy choice not to cover workers during the pandemic, for legal doctrine simply did not compel such a result.<sup>22</sup>

The issue of COVID-19 coverage by workers' compensation is one of causation. Accordingly, this Article delves into causation, a sometimes dry, but always important topic in both workers' compensation and tort law. The Article is organized in the following manner. Part II lays out background COVID-19 context and introduces the idea of how causation

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MARSHALL, MERCER L. & POL'Y GRP., 2019 STATE-MANDATED SHORT-TERM DISABILITY CONTRIBUTIONS AND BENEFITS 1–10, 13–14 (2019).

18. See Joan T.A. Gabel, Nancy R. Mansfield & Robert W. Klein, *The New Relationship Between Injured Worker and Employer: An Opportunity for Restructuring the System*, 35 AM. BUS. L.J. 403, 406–08 (1998); Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 RUTGERS L. REV. 657, 789 (1998) ("[I]nsuring for general disability and health through workers' compensation might appear to lead to greater administrative costs than would first-party and disability insurance purchased directly by workers.").

19. See Lauren Weber, *Why So Many Covid-19 Workers' Comp Claims Are Being Rejected*, WALL ST. J. (Feb. 14, 2021, 10:25 AM), <https://www.wsj.com/articles/why-so-many-covid-19-workers-comp-claims-are-being-rejected-11613316304> [<https://perma.cc/56GJ-U92E>].

20. As an example, in a recent story on an especially deadly coronavirus outbreak at a JBS meatpacking plant in Greeley, Colorado, a claimant side attorney was quoted as saying, "That is the ultimate question: How can you prove it?" See Hals & Polansek, *supra* note 4. The tone of the comment, and the story, suggested that causation "superpowers" were required to prove that, in a workplace in which COVID-19 was spiraling out of control, the illness of any particular employee was *probably* contributed to by work. See *id.* This Article fundamentally rejects that view as a matter of legal doctrine. See *infra* Part IV.A.

21. See *infra* Parts III.A–III.C.

22. See *infra* Parts III.A–III.C.

can create coverage problems in workers' compensation. Fleshing out the causation issues introduced in Part II, Part III discusses traditional workers' compensation causation principles in greater detail. Then, in Part IV, the Article discusses how these principles could be applied in COVID-19, or future, pandemic contexts in a manner that is not calculated to lead to claim denials. Part V concludes that the policy decision not to apply traditional workers' compensation doctrine to cover COVID-19 may lead to long term resentment of the system—precisely at a time when new risks of workplace injury or illness are emerging that will broadly challenge cramped readings of workers' compensation causation doctrine. One way or the other, workers' compensation will have to change, whether by adaptation or transformation.

## II. COVID-19 EMPLOYMENT BACKDROP

It is unsurprising that the COVID-19 pandemic had unique impacts across American labor and employment law. Given the dire straits in which workers found themselves in Spring 2020, it was also unsurprising that workplace benefits systems were challenged in new ways.<sup>23</sup> For example, with upwards of forty million workers losing their jobs in the early days of the pandemic,<sup>24</sup> it was obvious the unemployment benefits system would suffer “shock.”<sup>25</sup> But for those not suffering unemployment, different kinds of challenges were presented—especially the immense problem of becoming sick with COVID-19 while still employed. The Family and Medical Leave Act<sup>26</sup> may operate to hold a worker's job in place for a period of illness, but it does not itself provide paid sick leave or medical benefits not already possessed by the employee.<sup>27</sup> Federal Social Security Disability Insurance provides qualifying workers cash benefits, and accompanying Medicare benefits, but not until two years after initial eligibility has been established, only when disability is “total,”<sup>28</sup> and where

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23. See generally Michael C. Duff, *Causation for Workers' Compensation*, in *WORK LAW UNDER COVID-19* (Sachin S. Pandya & Jeffrey M. Hirsch eds., 2021) (ebook).

24. See Lucy Bayly, *New Weekly Figures Show Almost 40 Million People Lost Their Job Since the Pandemic*, NBC NEWS (May 21, 2020, 5:31 AM), <https://www.nbcnews.com/business/economy/new-weekly-figures-show-almost-40-million-people-lost-their-1211886> [<https://perma.cc/4ZSL-8EJZ>].

25. Andrew Soergel, *More Than 33 Million Americans Have Filed for Unemployment During Coronavirus Pandemic*, U.S. NEWS & WORLD REP. (May 7, 2020), <https://www.usnews.com/news/economy/articles/2020-05-07/more-than-33-million-americans-have-filed-for-unemployment-during-coronavirus-pandemic> [<https://perma.cc/SF6W-84HW>].

26. Family and Medical Leave Act, 29 U.S.C. §§ 2601, 2611–19, 2631–36, 2651–54.

27. *FMLA Frequently Asked Questions*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/fmla/faq> [<https://perma.cc/S6U8-57FB>].

28. See 42 U.S.C. § 423(d)(2); *Disability Benefits: How You Qualify*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/disability/qualify.html> [<https://perma.cc/N7ME-ERHF>] (“Social Security pays for only total disability. . . . We consider you disabled under

disability is expected to last longer than a year.<sup>29</sup> The federal Families First Coronavirus Response Act<sup>30</sup> helped employees by providing about two weeks of sick leave;<sup>31</sup> however, two weeks is not much in terms of financial support and medical benefits were not covered.<sup>32</sup>

As the economy began to reopen, even as the coronavirus seemed to be spiking,<sup>33</sup> a different concern began to arise. Financially desperate workers—especially workers of color<sup>34</sup>—forced to return to “physical” workplaces because their jobs could not be performed remotely, feared they might contract COVID-19.<sup>35</sup> As state legislatures began to pass civil liability immunity laws, promoted by groups like the American Legislative Exchange Council,<sup>36</sup> it became clear that even if employers negligently failed to provide safe, virus-free workplaces, they would not be held liable for legal damages to their sickened employees, or to their customers, for the negligence.<sup>37</sup> But,

Social Security rules if all of the following are true: You cannot do work that you did before the cause of your medical condition; You cannot adjust to other work because of your medical condition; Your disability has lasted or is expected to last for at least one year or to result in death.”).

29. SOC. SEC. ADMIN., *supra* note 28.

30. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 3102, 134 Stat. 189 (2020).

31. *Families First Coronavirus Response Act: Employee Paid Leave Rights*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/whd/pandemic/ffcr-employee-paid-leave> [<https://perma.cc/SM38-MRGJ>].

32. *See id.*

33. Julie Bosman & Mitch Smith, *Coronavirus Cases Spike Across Sun Belt as Economy Lurches into Motion*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/14/us/coronavirus-united-states.html> [<https://perma.cc/5EZ6-G6TR>].

34. Laura Morgan Roberts et al., *How U.S. Companies Can Support Employees of Color Through the Pandemic*, HARV. BUS. REV. (May 22, 2020), <https://hbr.org/2020/05/how-u-s-companies-can-support-employees-of-color-through-the-pandemic> [<https://perma.cc/5QQK-ZY74>] (discussing the disproportionate workplace anxiety of workers of color during the pandemic).

35. Abbott Koloff & Monsy Alvarado, *‘This is Worse than War’: Minorities Hard-Hit by COVID Likely To Be Affected Again as NJ Reopens*, NORTHJERSEY.COM (May 20, 2020, 5:00 AM), <https://www.northjersey.com/story/news/coronavirus/2020/05/20/nj-coronavirus-hard-hit-minorities-fear-returning-to-work-as-state-reopens/5178102002/> [<https://perma.cc/BYW9-U95E>].

36. Don Wiener, *ALEC Works to Pass Industry-Backed COVID Liability Shields at the State Level*, TRUTHOUT (Aug. 10, 2020), <https://truthout.org/articles/alec-works-to-pass-industry-backed-covid-liability-shields-at-the-state-level/> [<https://perma.cc/79J6-S5G2>] (“[ALEC] has long fought for restrictions on individuals’ right to sue in civil court because of unsafe workplaces or products.”).

37. *See* Debbie Cenziper et al., *As Nursing Home Residents Died, New COVID-19 Protections Shielded Companies from Lawsuits. Families Say That Hides the Truth*, WASH.

most employees were already unable to file lawsuits against their employers for negligently-caused COVID-19 because workers' compensation is the "exclusive remedy" for physical injury or disease caused by work.<sup>38</sup> Hence, the real question for many workers sickened by COVID-19 was whether workers' compensation, an entirely state-based system, would cover work disability and medical bills<sup>39</sup> caused by the disease.<sup>40</sup>

Why might workers sickened by COVID-19 not be covered by workers' compensation? Because workers' compensation covers only illness, disease, or injury "caused" by work, and many argued that COVID-19 was flatly and categorically not caused by work.<sup>41</sup> This claim was, and is, an oversimplification. This Article will discuss why proving causation of any disease can be difficult under workers' compensation,<sup>42</sup> but is achievable. Underscoring the difficulty, a number of states substantially modified workers' compensation causation principles during the pandemic by creating causation "presumptions."<sup>43</sup> A full discussion of the presumptions is beyond

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POST (June 8, 2020), <https://www.washingtonpost.com/business/2020/06/08/nursing-home-immunity-laws/> [<https://perma.cc/G6MT-DW6C>].

38. 9 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 100.01 (2021). In the early part of the 20th Century, states implemented workers' compensation systems because workers were frequently unable to prevail in tort suits and employers were concerned about the potential for burgeoning tort liability in the context of a dangerous industrial economy. PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION 88–89, 99, 101–02, 112–13 (2000). The solution, or "grand bargain," was to provide employees lesser but certain statutory benefits, both saving them from destitution and insulating employers from large damage awards. See Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900–2017*, 69 RUTGERS U. L. REV. 891, 904–05 (2017). Whether this is still a good deal for the original parties to the Bargain is an open question.

39. Workers' compensation provides cash payments and payments of medical expenses in connection with injury and illness *caused by work*. See *supra* note 2; see also *infra* note 54.

40. It is worth noting that gig workers who are actually adjudicated independent contractors could not be covered by workers' compensation and would not therefore be impacted by the workers' compensation principles about to be discussed. THOMAS O. MCGARITY, MICHAEL C. DUFF & SIDNEY SHAPIRO, CTR. PROGRESSIVE REFORM, PROTECTING WORKERS IN A PANDEMIC: WHAT THE FEDERAL GOVERNMENT SHOULD BE DOING 13 (2020); see also, e.g., *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071 (N.D. Cal. 2018) (holding that gig workers are independent contractors, not employees), *rev'd on other grounds*, 13 F.4th 908 (9th Cir. 2021). Those workers would also not be able to bring negligence suits against their putative employers in states where civil immunities have been enacted. See generally MCGARITY, DUFF & SHAPIRO, *supra*, at 34–36. Tort suits would, in any event, be of limited short-term benefit because court cases take time many victims do not have.

41. See *infra* Part III.

42. See *infra* Part III.

43. As of December 2020, seventeen states had enacted workers' compensation COVID presumptions through legislative, executive, or other administrative action. See Josh Cunningham, *Covid-19: Workers' Compensation*, NAT'L CONF. STATE LEGISLATORS (Dec. 9, 2020), <https://www.ncsl.org/research/labor-and-employment/COVID-19-workers->



the scope of this Article,<sup>44</sup> which is aimed at analyzing COVID causation under traditional principles of workers' compensation without the aid of presumptions. It is still worth mentioning, however, that some states seemed to decide that COVID-19 causation was so hard to prove that the law necessarily had to be altered, or no workers' compensation coverage would be possible.<sup>45</sup> Accordingly, causation presumptions shifted the "burden of proof" to employers to prove non-causation, making it more likely that employees would be awarded workers' compensation benefits.<sup>46</sup> Eventually, only about seventeen states followed this approach; however,<sup>47</sup> only small

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compensation.aspx [https://perma.cc/UDP3-9SZR]. Both houses of the Virginia legislature passed a presumption bill in February 2021. Louise Esola, *Virginia Lawmakers Pass COVID-19 Presumption Measure*, BUS. INS. (Feb. 17, 2021), <https://www.businessinsurance.com/article/20210217/NEWS08/912339870/Virginia-lawmakers-pass-COVID-19-presumption-measure-governor-coronavirus-pandem> [https://perma.cc/W7VP-W9PR].

44. Work causation of COVID-19 is presumed for various categories of "essential workers" and the employer has the burden of showing that an employee's COVID-19 was not caused by the workplace. See John F. Burton, Jr., *COVID-19 as an Occupational Disease: The Challenge for Workers' Compensation*, WORKERS' FIRST WATCH MAG., Special Edition 2021, at 5, 19.

45. Although some read into this extraordinary coverage policy illegitimacy, it is consistent with the creation of workers' compensation in the early twentieth century made necessary by the failure of negligence cases through operation of affirmative defenses. See FISHBACK & KANTOR, *supra* note 38, at 4. Then, as now in the "presumption states," a policy decision was made not to allow the entire loss of a harm fall on the victims of injury. See *id.*

46. Usually, in the American legal system, persons seeking some kind of legal remedy (in the civil system typically money) have the burden of proving certain preliminary, threshold facts as a prerequisite to obtaining the remedy. See, e.g., 2 STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, *AMERICAN LAW OF TORTS* § 7:13 (Monique C.M. Leahy ed., 2021) (explaining elements of negligence prima facie case). A presumption is "a legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts . . . [and] shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." *Presumption*, BLACK'S LAW DICTIONARY (11th ed. 2019). The presumption assists those seeking remedies by creating factual shortcuts for obtaining the remedies. James J. Vedder & Brittney M. Miller, *Presumptions in Paternity Cases: Who Is the Father in the Eyes of the Law?*, AM. BAR (Apr. 1, 2018), [https://www.americanbar.org/groups/family\\_law/publications/family-advocate/2018/spring/4spring2018-vedder/](https://www.americanbar.org/groups/family_law/publications/family-advocate/2018/spring/4spring2018-vedder/) [https://perma.cc/9BVX-QSAS]. For an explanation of how such presumptions operate in workers' compensation in the context of certain cancer cases, see DAVID B. TORREY, NAT'L ASS'N WORKERS' COMP. JUDICIARY, *FIREFIGHTER CANCER PRESUMPTION STATUTES IN WORKERS' COMPENSATION AND RELATED LAWS: AN INTRODUCTION AND A STATUTORY/REGULATORY/CASE LAW TABLE* 1, 8–10 (2013).

47. The number was somewhat fluid during the pandemic and some applications of presumptions were difficult to detect. Compare SAIF, *COVID-19 WORKERS' COMPENSATION PRESUMPTION BY STATE* (2020), with Cunningham, *supra* note 43.

numbers of employees in presumption states were covered as the presumptions generally only applied to narrowly defined “essential employees.”<sup>48</sup> Some states’ workers’ compensation laws have also historically excluded from coverage disability caused by “infectious diseases” or “ordinary diseases of life.”<sup>49</sup> In effect, both the pro-coverage slant of presumptions, and the anti-coverage tilt of categorical exclusions of certain classes of diseases, betray a shared assumption in many states that proving or disproving workplace causation of disease is unacceptably complex, or even impossible.<sup>50</sup> This Article aims to rectify that oversimplification. Coverage of COVID-19 is not, as is sometimes claimed,<sup>51</sup> wildly contrary or repugnant to workers’ compensation doctrine, a limiting view likely to lead to cramped policy decisions when other choices are possible.

Despite inherent disease causation complexities, very early on in workers’ compensation history, the system began to cover “occupational diseases.”<sup>52</sup> Courts and legislatures recognized that, in the absence of workers’ compensation coverage, civil tort actions could be brought by employees for harms caused by wrongful exposure to occupational diseases;<sup>53</sup> “exclusivity”<sup>54</sup> in such circumstances could likely not be constitutionally maintained.<sup>55</sup> Before the process of American coverage of occupational

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48. See *WCRI Estimates Number of Workers Covered by State COVID-19 Presumptions*, WORKERS’ COMP. RSCH. INST. (Dec. 1, 2020), <https://www.wcrinet.org/news/press-releases/wcri-estimates-number-of-workers-covered-by-state-COVID-19-presumptions> [<https://perma.cc/6E5C-E7YB>]. The data was incomplete as this Article was being composed, but probably fewer than five percent of employees were covered by presumptions in most states where they were enacted. See *id.*

49. 4 LARSON, *supra* note 38, § 53.01.

50. See generally *id.* § 52.02.

51. See, e.g., Christopher J. Boggs, *Coronavirus, Pandemics and Workers’ Compensation*, INS. J. (Feb. 19, 2020), <https://www.insurancejournal.com/blogs/academy-journal/2020/02/19/558705.htm> [<https://perma.cc/9R7E-S8LB>].

52. See *infra* Part III.B.

53. See WALTER F. DODD, ADMINISTRATION OF WORKMEN’S COMPENSATION 757–60 (1936).

54. Exclusivity is the principle that workers’ compensation is an employee’s exclusive remedy against his or her employer for injury or disease caused by work. LARSON, *supra* note 38.

55. See DODD, *supra* note 53, at 757–60. Dodd’s discussion of occupational disease coverage presumes that constitutional problems would arise if an employee were left with no remedy. See *id.* at 758; see also *Barrencotto v. Cocker Saw Co.*, 194 N.E. 61, 64 (N.Y. 1934) (“There still is a field [i.e., disease,] in which the statute fails to impose liability, on the part of an employer, to provide compensation for injury or death, regardless of fault; and in which an injured person may seek damages by action at law, where there has been fault. Whether the Legislature should provide a more effective and comprehensive remedy in such cases, or whether the employer should in such cases be relieved of liability even in case of fault, is a matter which concerns the Legislature and not the courts.” (emphasis added)). The same assumption appears to have been made in a relatively recent Pennsylvania case. See *Tooley v. AK Steel Corp.*, 81 A.3d 851, 865 (Pa. 2013) (holding that injuries

disease had even begun, the English Workmen’s Compensation Act of 1906—a progenitor of early American workers’ compensation statutes—covered certain occupational diseases.<sup>56</sup> It actually went further by presuming coverage of diseases listed in “schedules” whenever employees incapacitated by those diseases engaged in designated categories of work.<sup>57</sup> Massachusetts, from the inception of its workers’ compensation statute, covered occupational diseases, and by 1917 California and Wisconsin had done the same.<sup>58</sup> By 1954, all but two states, Wyoming and Mississippi, had formally covered occupational diseases.<sup>59</sup>

During periods of “contagion,” workers’ compensation has also at times covered employees incapacitated by the relevant contagious disease,<sup>60</sup> and there is no inherent doctrinal obstacle to covering disability caused by pandemic diseases.<sup>61</sup> The customary “increased risk” requirement for establishing workers’ compensation coverage<sup>62</sup> may generally be satisfied with respect to essential workers during pandemic lockdowns if sensible risk comparisons are made.<sup>63</sup> On workplace premises during a lockdown,

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suffered by employees as a result of their contraction of work-related mesothelioma fell outside the relevant statute of limitations and were therefore not covered by the workers’ compensation act necessarily allowing the employees a common law action in tort). The implication in *Tooley* appears to be that workers may not constitutionally be left without a remedy. *Id.* at 865.

56. The Act covered anthrax, lead poisoning, mercury poisoning, phosphorous poisoning, arsenic poisoning, and Ancylostomiasis, also known as hookworm disease. DEP’T. OF COM. & LAB., BULLETIN OF THE BUREAU OF LABOR NO. 70, at 652 (1907) (citing Workmens’ Compensation Act 1906, 6 Edw. 7, ch. 58 (Gr. Brit.)). Early New York and Minnesota workers’ compensation acts modelled the same approach. DODD, *supra* note 53, at 768.

57. When the employee worked in the employer’s work “processes,” causation of the listed diseases was presumed. DODD, *supra* note 53, at 768. The processes included handling wool, using lead, mercury, phosphorous, or arsenic, and mining. DEP’T. OF COM. & LABOR., *supra* note 56, at 652; *see, e.g.*, 94 ELIZABETH M. BOSEK ET AL., OHIO JURIS. WORKERS’ COMP. § 170 (3d ed. 2021). These were known as “two-column” schedules. DODD, *supra* note 53, at 768.

58. HERMAN MILES SOMERS & ANNE RAMSAY SOMERS, WORKMEN’S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY 49 (1954).

59. *Id.* at 49–50. Eventually states covered occupational diseases either through their workers’ compensation statutes or under standalone occupational disease statutes. *Id.* at 50.

60. *See infra* Part III.B. Tuberculosis is an especially well-known example. *See* 4 LARSON, *supra* note 38, § 52.04.

61. *See infra* Part III.B.

62. *See infra* Part III.A.

63. *See infra* Part IV.A.

for example, essential employees' risk of contracting contagious diseases is, by definition, elevated above that of the general public,<sup>64</sup> which is in this context unable to serve as a point of comparison, as it does in other contexts.<sup>65</sup> Even in non-lockdown contexts, essential employees required to work in high population density, "conjugate" workplaces—or among the general public—should be able to establish causation under traditional workers' compensation rules: Either conjugate workplaces will possess risk for employees on-premises in excess of that encountered by the general public given the perpetual close physical contact with other high-risk persons;<sup>66</sup> or, in the case of traveling employees, employees may be covered under the street-risk doctrine given their continual exposure to the elevated contagion risks of the street, their de facto workplace.<sup>67</sup>

### III. WORKERS' COMPENSATION: CORE CAUSATION PRINCIPLES

To have a sensible discussion about COVID-19 causation in workers' compensation, certain first principles of workers' compensation causation must be considered. One argument for not covering COVID under workers' compensation is that the general public is at the same risk of contracting the disease as employees in the workplace, with the resulting inference that the illness is not work-related.<sup>68</sup> This Part analyzes whether this "equal risk" argument is true and universally warrants denying workers' compensation coverage to employees contracting COVID-19.

#### *A. Workers' Compensation Does Not Absolutely Bar Coverage of "Neutral Risk" Injury*

Workers' compensation causation terminology is arcane. Instead of analyzing whether conduct was the "actual" and "proximate" cause of an injury, as in negligence law,<sup>69</sup> workers' compensation asks whether an injury or disease "arises out of employment;" a conceptually related question,<sup>70</sup>

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64. See *infra* Part IV.A.

65. See *infra* Part III.A.

66. See *infra* Part III.A. Hence the unacceptability of the meatpacking cases mentioned in the Introduction is obvious.

67. See *infra* Part III.A.

68. See *infra* Part III.A.

69. GEORGE C. CHRISTIE, JOSEPH SANDERS & W. JONATHAN CARDI, *CASES & MATERIALS ON THE LAW OF TORTS* 359 (5th ed. 2012).

70. Some balk at any comparison between tort and workers' compensation law for fear that key distinctions between the two bodies of law will be underemphasized. See, e.g., 1 LARSON, *supra* note 38, § 4.01 (emphatically drawing distinctions between the two systems). But the law of causation necessarily straddles multiple liability regimes. See, e.g., *id.* § 1.03. Even where liability may be imposed without fault, for example, it can never be imposed without demonstrating the liable actor was the "cause" of the complaining

but one that turns explicitly on notions of “risk” and does not involve considerations of fault.<sup>71</sup> As the leading workers’ compensation treatise, *Larson’s*, puts it, workers’ compensation law “require[s] a showing that the injury was caused by an increased risk . . . .”<sup>72</sup> This idea may seem muddy to laypersons unfamiliar with the law, or to lawyers unfamiliar with causation terminology—an injury “arises out of” employment if it is “caused” by a certain kind of risk?<sup>73</sup> In a sense causation does not seem directly addressed by the formulation.<sup>74</sup> The causation-risk analysis might be clarified by breaking it down into a series of practical steps. First, there is disability risk: The probability that engaging in a particular work activity may lead to disability for work; then there is actual resulting disability for work; if that actual disability was in fact produced by work activity likely to have produced it, the disability may be said to “arise out of” employment, and it is traditionally compensable under workers’ compensation.<sup>75</sup> So, for example, imagine that an employee has an “increased risk” of being struck in the head at work by a kind of falling object. The employee is then actually struck in the head by the falling object, and the event results in the employee’s disability. The disability should be compensable under the increased risk workers’ compensation causation rule.<sup>76</sup> The increased risk limitation is effectively a cognate of the negligence phrases “proximate cause” or “legal cause,” for it defines the scope of liability, even assuming an injury or disease has been factually caused by workplace activity.<sup>77</sup>

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party’s harm. 74 AM. JUR. 2D *Torts* § 26 (2021). Furthermore, such an inquiry will often pit notions of “scientific” causation against the question of how far the scope of liability should travel. *See generally* RESTATEMENT (SECOND) OF TORTS § 431 (AM. L. INST. 1965).

71. 1 LARSON, *supra* note 38, § 4.01.

72. *Id.* § 3 Synopsis.

73. *See id.*

74. The structure is similar to the excess risk/background risk terminology that is common in the toxic tort literature. *See, e.g.,* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849, 856–57 (1984) (discussing these terms).

75. This causation definition has been elusive for decades. *See* SOMERS & SOMERS, *supra* note 58, at 54–55 (“Inescapably, the line of demarcation between occupational and non-occupational disability is becoming increasingly blurred . . .”).

76. 1 LARSON, *supra* note 38, § 3 Synopsis.

77. RESTATEMENT (THIRD) OF TORTS § 30 (AM. L. INST. 2010) (“An actor is not liable for harm when the tortious aspect of the actor’s conduct was of a type that does not generally increase the risk of that harm.”). Further, under comment *a* of the same section, “An actor’s tortious conduct may be a factual cause of harm under § 26 but not be of a type such as to affect the probability of such harm occurring, for “greater care by the actor would not reduce the frequency of such accidents.” *Id.* § 30 cmt. a.

Thus, as is often true in negligence law, in workers' compensation, under the increased risk test, not all harms that are factually caused by an actor's—the employer's—conduct create liability in the actor.<sup>78</sup>

But how can one definitively say, in advance, that an employee's chance of being disabled in any particular way is increased by a specific work activity? Formally, cases have designated certain risks of injury as “incident to employment” or, expressed somewhat differently, as obvious “employment risks.”<sup>79</sup> This idea works reasonably well in, for example, a shipyard replete with cranes winching freight throughout the workplace. The risk of an employee being struck by such freight has obviously been increased by the workplace, and one might be willing to concede that the “winch risk” is an “employment risk.” Yet, even in such intuitively high-risk workplaces as shipyards, cases requiring deliberation may develop: An employee is not, for example, struck in the head by winched freight at the shipyard but instead trips and falls on level ground, and is injured when she strikes the ground. Some courts have said that in such contexts the injury was not the product of an “employment” risk.<sup>80</sup> The risk of falling on level ground is arguably in such a situation shared equally with the general public's risks of falling anywhere, and it is not unique to our hypothetical shipyard: As a risk shared with the public it may be deemed, under workers' compensation law, as “neutral,” and not distinctly employment-related.<sup>81</sup> The neutral risk designation may, in turn, be overly simplistic. The shipyard may regularly, or occasionally operate at a harried pace, making various, arguably neutral-risk mishaps more likely. Thus, one swiftly realizes that, while certain risks of injury leading to disability may be inherently related to a given type of employment—and hence “employment” risks—other risks may look like neutral risks; for example, falling on level ground in the shipyard for no apparent work-related reason. Accordingly, the

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78. *Cf. id.* § 29 cmt. a (“No serious question exists that some limit on the scope of liability for tortious conduct that causes harm is required.”).

79. *See supra* note 71 (describing “Risks Distinctly Associated with the Employment”).

80. Typically, injuries that result from unexplained falls and not the product of an “idiopathic” medical condition are compensable, but courts have found to the contrary. *See, e.g.,* *Maradiaga v. Specialty Finishing*, 884 N.W.2d 153, 153, 162 (Neb. Ct. App. 2016) (holding that a worker twisting her ankle after exiting a vehicle in the employer's parking lot did not sustain a compensable injury). The issue is intertwined with the problem of whether an “accident” has occurred, an additional predicate for coverage under the workers' compensation statutes of several states. *See* 3 LARSON, *supra* note 38, § 42.01 (“The requirement that the injury be accidental in character has been adopted either legislatively or judicially by the overwhelming majority of states.”).

81. A neutral risk of injury or disease leading to disability is “of neither distinctly employment nor distinctly personal character.” 1 LARSON, *supra* note 38, § 4.03. In our hypothetical winching workplace mishap, for example, the injury has arguably been caused neither by the winched freight nor by a purely preexisting physical condition “personal” to the injured employee.

workers' compensation scope of liability is extremely fact-sensitive and may at times depend on the intensity of importation of otherwise neutral risks into a workplace.<sup>82</sup>

Workers' compensation laws presumptively cover disability caused by risks the workplace has increased,<sup>83</sup> and presumptively do not cover disability caused by neutral risks<sup>84</sup>—but these presumptions are often broadly rebuttable.<sup>85</sup> Furthermore, as John Burton has remarked,<sup>86</sup> even the treatises are at times imprecise about whether the “increased risk” test applies both to employment risks and neutral risks, or only to risks that are usually deemed neutral, but have been elevated in a workplace above that experienced by the general public.<sup>87</sup> One way to resolve the problem is to assume that when states deem particular risks “employment risks” they have implicitly recognized that those risks emerge with sufficient frequency in particular types of work to be conclusively presumed “increased” in those contexts.<sup>88</sup> In such cases, the designated risks in effect achieve “presumptive” increased risk status, because they are risks to which the general public is seldom, if ever, exposed.<sup>89</sup>

Thus, the increased risk/neutral risk coverage dichotomy is insufficiently precise because injuries resulting from apparently neutral risks are sometimes covered by workers' compensation.<sup>90</sup> First, and probably most intuitively, “an employee may recover for an injury caused by a neutral risk if she

82. *See id.* §§ 3.03, 4.01.

83. The increased-risk test is the majority rule in the United States. *Id.* § 3.03.

84. Usually coverage of neutral risks “is approved and used in very particular situations.” *Id.* § 3.05.

85. *Id.* § 4 Synopsis.

86. Burton, *supra* note 44, at 8 (“As far as the ‘arising’ test is concerned, this group causes no trouble, since all these risks fall readily within the increased-risk test and are considered work-connected in all jurisdictions.” (quoting 1 LARSON, *supra* note 38, § 4.01)).

87. *See supra* note 71. For example, the *Larson*'s treatise, within the space of two chapters, describes the increased risk test as both applying to neutral risks and applying to risks “distinctly associated with employment”—that is, as employment risks. *Compare* 1 LARSON, *supra* note 38, § 3.03, *with id.* § 4.01.

88. The New Hampshire Supreme Court, for example, follows the treatise definition that “[e]mployment-related risks include ‘all the obvious kinds of injur[ies] that one thinks of at once as industrial injur[ies]’ . . .” *In re Margeson*, 27 A.3d 663, 667 (N.H. 2011) (quoting 1 LARSON, *supra* note 38, § 4.01). This definition seems tautological, and it may be more precise to say that an injury *has become over time* “obviously” associated with “industry.”

89. *See id.*

90. *See generally* 1 LARSON, *supra* note 38, § 4.03.

demonstrates that her injury resulted from ‘a risk greater than that to which the general public is exposed.’”<sup>91</sup> This principle may be thought of in contrast to “presumptive” employment risks of the type just discussed: A normally neutral risk—of walking, for example—becomes elevated because of a specific situation in a workplace. One might object that in this instance the neutral risk is no longer neutral. The work function, however, may be so similar to what is routine that it is difficult to conceive of as other than a neutral risk that “just so happened” to become increased.

In other circumstances, workers’ compensation has covered injuries produced by neutral risks that were not in any respect increased by the nature of employment.<sup>92</sup> The “positional risk test” functions in these instances as a minority rule of “but for” causation covering neutral risks: Were it not for the employee’s “position” or presence in the workplace, the injury would not have occurred.<sup>93</sup> Some states have, in related neutral circumstances, applied the “actual risk” test, which affords coverage to neutral risks “as long as the employment subjected claimant to the actual risk that caused the injury.”<sup>94</sup> States may use the positional risk and actual risk test formulations somewhat loosely. Under Virginia law, for example, the difference between the two tests seems to be that the actual risk test, unlike the positional risk test, would deny coverage when an employee is exposed to a neutral risk to the same degree as a member of the general public, but grant coverage where an employee is exposed to a neutral risk to a degree exceeding that of the general public.<sup>95</sup> Expressed in this way, however, the test seems difficult to distinguish from mere application of the increased risk test to neutral risks, which may explain why this articulation of the actual risk test is limited to Virginia.<sup>96</sup> But the customary understanding of “actual

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91. *In re Doody*, 235 A.3d 1000, 1004 (N.H. 2020) (quoting *Margeson*, 27 A.3d at 672).

92. 1 LARSON, *supra* note 38, § 3.05.

93. *Id.* More precisely, “but for” causation is normally a rule of actual (or factual) causation, not proximate causation, or scope of liability; so one might conceptualize positional risk as a rule authorizing liability to the limits of establishment of actual causation, roughly equivalent to the “direct cause” test in negligence as exemplified by *In re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560 (C.A.).

94. 1 LARSON, *supra* note 38, § 3.04.

95. *Baggett Transp. Co. of Birmingham v. Dillon*, 248 S.E.2d 819, 822–23 (Va. 1978) (denying compensation where there was no causal connection between truck driver’s employment and his death from a gunshot wound inflicted by an unknown assailant).

96. The *Larson*’s treatise appears to have borrowed the phrase from Virginia, which uses the test inconsistently, but, as *Larson*’s acknowledges, the test is a specialized application allowing for “recoveries in most street-risk cases and in a much greater proportion of act-of-God cases.” See 1 LARSON, *supra* note 38, § 3.04. Oklahoma’s risk tests have varied over the last two decades but appear now to have re-embraced the actual risk test in certain circumstances, “[t]he actual risk test allows recovery when the employer subjects the



risk” seems much closer to a specialized application of the positional risk test, affording coverage to injuries that are the product of neutral risks.<sup>97</sup>

The actual risk test allows recovery when the employer subjects the worker to the very risk that injures him or her. The actual-risk test ignores whether the risk faced by the employee was also common to the public, and a claimant may recover so long as the employment subjects him or her to the actual risk that causes the injury.<sup>98</sup>

Both the positional and actual risk doctrines, however styled, reflect relatively relaxed rules of proximate causation. This commonly encountered relaxation reveals a deliberate policy retreat from coverage only of harms resulting from increased risks, whether they be “employment” risks or unusually elevated neutral risks. Why? Traditional pockets of expansion of coverage seem to serve the dual function of insulating employers from isolated instances of tort liability, and plugging recurring gaps in employee disability coverage.<sup>99</sup> Unexplained falls at work, for example, are very commonly covered under the positional risk rule.<sup>100</sup> The alternative would be to deny coverage to a significant swath of injuries; although, unexplained falls could probably not form the basis of a tort suit and the rule is likely the product of an employee coverage rationale.

The logic of increased risk relaxation applies with particular cogency when an employee could not have been injured unless acting in the interests of an employer.<sup>101</sup> An employee stocking shelves at a supermarket falls and cannot explain precisely how.<sup>102</sup> A delivery driver is injured when

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worker to the very risk that injures him.” *K-Mart Corp. v. Herring*, 188 P.3d 140, 146–47 (Okla. 2008).

97. See 1 LARSON, *supra* note 38, § 3.04.

98. 82 AM. JUR. 2D *Workers’ Compensation* § 226 (2021).

99. See *Insuring Your Business: Small Business Owners’ Guide to Insurance*, INS. INFO. INST., <https://www.iii.org/publications/insuring-your-business-small-business-owners-guide-to-insurance/specific-coverages/workers-compensation-insurance> [<https://perma.cc/4FGC-S4EK>].

100. *Logsdon v. Isco Co.*, 618 N.W.2d 667, 673–74 (Neb. 2000) (holding that unexplained head injuries suffered at work were produced by a neutral risk and therefore presumed to have arisen out of employment).

101. *Id.* at 673 (noting that some injuries at work “would not have happened if the employee had not been engaged upon an employment errand” at the time of the injury).

102. *Id.* The test—or something very close to it—has been applied in cases of “street risks,” unexplained falls, and “acts of God.” See Arthur Larson, *The Positional-Risk Doctrine in Workmen’s Compensation*, 1973 DUKE L.J. 761, 764–65. It is not surprising that Nebraska adopted coverage of positional risks given the prevalence of “neutral risk” tornados striking workplaces in that state. *Nippert v. Shinn Farm Constr. Co.*, 388 N.W.2d

her delivery truck runs into a pothole to which members of the general public were also exposed—a neutral risk—yet is covered under the “street risk doctrine,” a well-known exception to the increased risk requirement that allows for workers’ compensation coverage of neutral risks to employees who routinely work in “the street” as delivery persons, cab drivers, and the like.<sup>103</sup> In cases of this type, employees systematically excluded from workers’ compensation coverage might suffer destitution or have a colorable claim for access to negligence actions—though they would be put to the trouble inherent in bringing a negligence case, one of the motivating factors for establishment of workers’ compensation in the first place.<sup>104</sup>

Neutral risk exceptions arise with sufficient frequency that the workers’ compensation system had to develop isolated, fact-sensitive rules to help categorize them,<sup>105</sup> and it is not unusual for states to apply the increased risk rule to most injuries but some version of positional risk to more

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820, 822 (Neb. 1986); *see also* 1 LARSON, *supra* note 38, § 5.01 (describing the positional risk coverage of neutral risks trend and speculating as to whether it will subsume “Act of God” cases).

103. 1 LARSON, *supra* note 38, § 6 Synopsis.

All courts now agree that street or highway injuries to employees such as traveling salespeople, delivery persons, and solicitors, whose duties increase their exposure to the hazards of the street, arise out of the employment, although the nature of the risk, as distinguished from the degree, is not peculiar to the employment. A large number of courts have gone one step further by holding that injury from such risks is compensable regardless of whether such exposure is continuous or only occasional, so long as the exposure is in fact occasioned by the employment. At the same time, the concept of street risks has been broadened far beyond the original idea of traffic perils, and has been applied to almost any mishap whose locale is the street, including simple falls, stray bullets, falling trees, and foul balls.

*Id.*

104. *See id.* § 1.03 (contrasting workers’ compensation with tort).

105. *See, e.g.*, *K-Mart Corp. v. Herring*, 188 P.3d 140, 146–47 (Okla. 2008) (finding that employee shot in fast food drive thru line off the employer’s premises was entitled to workers’ compensation benefits under the actual risk test); *Schwan Food Co. v. Frederick*, 211 A.3d 659, 670–82 (Md. Ct. Spec. App. 2019) (describing the “constellation of factual determinations” required to analyze whether a claimant’s injury from slipping on black ice on the sidewalk by his car in front of his home as he was dropping off his child at daycare on the way to work occurred in the course of his employment and is thus compensable under the positional risk test); *Clark v. D.C. Dep’t Emp. Servs.*, 743 A.2d 722, 727, 730–31 (D.C. 2000) (applying positional risk test to find compensable an injury suffered by an employee when an unknown assailant shot her for unknown reasons in the parking lot of her employer); *Milledge v. The Oaks*, 784 N.E.2d 926, 932–34 (Ind. 2003) (applying positional risk test to case of unexplained fall but implying more broadly that positional risk test applied to all cases of injuries produced by neutral risks). The *Larson*’s treatise discusses additional cases involving lightning, windstorms, tornadoes, insects and birds, unexplained falls, and assaults by lunatics. 1 LARSON, *supra* note 38, § 7.03.

specialized cases.<sup>106</sup> The overriding theme of neutral risk exceptions is that states have created doctrinal authority to carve out exceptions to the default rule of increased risk on public policy grounds, especially when employees are injured while serving the interests of the employer.<sup>107</sup> Disability produced by neutral risks has been covered by workers' compensation on policy grounds throughout the system's history.<sup>108</sup> The claim that disability produced by contraction of COVID-19 could not be covered and is absolutely barred under workers' compensation *doctrine* simply because it arises from a neutral risk, where that is actually the case, is not supportable. Coverage of neutral risks is a policy decision.

*B. Workers' Compensation Does Not Absolutely Bar Neutral  
Risk Coverage of Disease*

Disease does not, of course, fit comfortably within the "winching workplace" sketched above.<sup>109</sup> First, before launching into causation, it is necessary to mention that some workers' compensation statutes by their terms cover only disability that is produced by "accident."<sup>110</sup> The definition of accident differs from state to state,<sup>111</sup> but it is enough for the purposes of this Article to acknowledge that if work injuries are defined solely in terms of disability caused by a discrete, one-time, unexpected event, disease is not likely to be covered by workers' compensation.<sup>112</sup> In that event, however, persons should be able to bring tort suits for negligent exposure to a disease.<sup>113</sup>

Moving beyond accident provisions, certain diseases seem clearly occupational and related to specific kinds of work and have always seemed

106. 1 LARSON, *supra* note 38, § 3.05; 82 AM. JUR. 2D *Workers' Compensation* § 256 (2021).

107. 1 LARSON, *supra* note 38, § 3.05.

108. *Id.* § 4.03 (noting in the past an employee had the burden of proof to establish "affirmatively a clear causal connection between the conditions under which the employee worked and the occurrence of the injury").

109. *Id.* § 52.02 ("Occupational disease coverage historically lagged far behind 'accident' coverage in the United States.").

110. *Id.* § 42.01 ("The requirement that the injury be accidental in character has been adopted either legislatively or judicially by the overwhelming majority of states.").

111. *Id.*

112. *Id.* § 42.03. Further discussion is unnecessary and beyond the scope of this Article.

113. *See supra* note 55.

so.<sup>114</sup> Members of the general public do not, for example, develop black lung.<sup>115</sup> Certain signature diseases can only develop upon exposure to a substance that is usually, but not exclusively, encountered in workplaces.<sup>116</sup> Mesothelioma, for example, may be causally connectable to the workplace, but often only laboriously.<sup>117</sup> It is often said that “[u]nder most state workers’ compensation statutes, there are two types of compensable diseases: (1) diseases naturally resulting from a compensable accidental injury or following as an incident of an occupational disease, and (2) occupational diseases.”<sup>118</sup> The conventional doctrinal follow-on is that “legislature[s] did not intend to impose on the employer liability for diseases contracted outside the workplace, or to transform the workers’ compensation act into a general health and benefit insurance program that would compensate an employee for all contagious diseases.”<sup>119</sup> States balance competing policy considerations in this area either through enactment of a standalone occupational disease statute or through occupational disease provisions located within their general workers’ compensation statutes.<sup>120</sup> But all states now formally cover occupational disease.<sup>121</sup>

In the end, an occupational disease is what a legislature defines it to be, and that definition is subject to change.<sup>122</sup> Furthermore, unless a legislature has explicitly excluded coverage of particular diseases, it remains open to claimants to attempt to prove that contraction of a disease arose out of employment—either under the shelter of a statutory occupational disease designation, or through ordinary principles of workers’ compensation causation.<sup>123</sup> If, for whatever policy reason, a legislature categorically

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114. See SOMERS & SOMERS, *supra* note 58, at 49 n.14 (describing historical discussions of occupational disease dating to the Roman Empire).

115. See Maya Wei-Haas, *Why Black Lung Disease Is Deadlier Than Ever Before*, SMITHSONIAN MAG. (May 15, 2017), <https://www.smithsonianmag.com/science-nature/black-lung-disease-deadlier-than-ever-before-180963303/> [<https://perma.cc/5Q3D-QKVM>] (noting that black lung is caused by breathing coal mine dust). Background environmental factors like smoking “can lead to further lung damage and can make symptoms worse.” Angela Nelson, *What Is Black Lung Disease?*, WEBMD, <https://www.webmd.com/lung/black-lung-disease> [<https://perma.cc/8D85-YE8D>].

116. See Daniel A. Farber, *Toxic Causation*, 71 MINN. L. REV. 1219, 1251–52 (1987) (“The odds of contracting mesothelioma are roughly seventy times greater for asbestos workers than for members of the general population. This means that when an asbestos worker gets mesothelioma, it is almost certainly caused by asbestos.”).

117. See, e.g., *Indus. Indem. Co. v. Workers’ Comp. Appeals Bd.*, 193 Cal. Rptr. 471, 473–75 (1983).

118. 2 JON L. GELMAN, MODERN WORKERS COMPENSATION § 109:1 (2021).

119. *Id.* § 109:11.

120. 4 LARSON, *supra* note 38, § 52.01.

121. *Id.*

122. See generally 82 AM. JUR. 2D *Workers’ Compensation* § 291 (2021).

123. *Id.* § 290.

excludes workers' compensation coverage of a disease, dual denial of a civil tort action to an employee against her employer for alleged wrongful exposure to that disease—as seemed to be occurring during the pandemic<sup>124</sup>—raises serious constitutional issues.<sup>125</sup> Employees should, accordingly, always be permitted the default of attempting to show that the workplace increased the risk of contracting any disease, even if the risk of contraction is neutral. Furthermore, as the *Larson's* treatise observes in connection with infectious diseases:

In . . . contagious-disease cases, it is impossible to divorce the increased-risk issue from the evidentiary question whether the claimant in fact contracted the disease in the particular place to which the employment took claimant. Several cases have allowed recovery on the “preponderance of probabilities,” when the place of work was attended with a much higher proportionate risk of infection; and by the same showing, of course, the requirement of increased risk for purposes of the “arising” test was satisfied.<sup>126</sup>

Legislatures may not have intended for workers' compensation to cover diseases contracted outside of the workplace,<sup>127</sup> but the factual question of whether a disease has actually been contracted outside of the workplace, as an employer might allege, should not be cavalierly ignored, operating as a form of presumption against causation, and courts have been loath to do so.<sup>128</sup> In other words, employees should not be prevented from arguing that they contracted a disease, that is often encountered outside of the workplace, within the workplace. Many courts permit this showing if the workers' compensation disease provisions in a given state are sufficiently broad.<sup>129</sup> As discussed earlier in the Article,<sup>130</sup> an increased neutral risk may become an employment risk over time; today's neutral risk disease

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124. As of July of 2021, approximately twenty states were continuing with the broad COVID-19 civil immunity provisions on the books from earlier in the pandemic. See CHUBB, *COVID-19 CIVIL LIABILITY IMMUNITY – STATE ACTIVITY 2021* (2021). Thirty-five states in all considered continuation. See *id.*

125. See *Tooley v. AK Steel Corp.*, 81 A.3d 851, 864 (Pa. 2013); *supra* note 55 and accompanying text.

126. 1 LARSON, *supra* note 38, § 5.05.

127. See *supra* note 119 and accompanying text.

128. 4 LARSON, *supra* note 38, § 52.04 (discussing tendency of courts to interpret occupational disease broadly when a statute does not explicitly compel a narrow definition).

129. See *id.*

130. See *supra* notes 88–90 and accompanying text.

may become tomorrow's occupational disease as the state of science advances.<sup>131</sup>

Still, infectious diseases,<sup>132</sup> or "ordinary diseases of life,"<sup>133</sup> are at times explicitly and categorically excluded from coverage by states, on the apparent theory that they could not have been caused by work.<sup>134</sup> Yet, categorical noncoverage of these diseases—or of any diseases—under workers' compensation ought to release claimants from exclusivity, and revive their ability to file tort actions as a matter of both workers' compensation theory and constitutional law.<sup>135</sup> This seems a fair result given the quid pro quo nature of workers' compensation, and hardly represents an illegitimate expansion of liability. After all, if a claimant's contraction of a disease really cannot be proven causally related to work, as an immunizing legislature apparently presumes, even if the employer was negligent in exposing the employee to the disease, no liability could result—such a case should not survive summary judgment.<sup>136</sup> Although proof of causation in workers' compensation is impacted significantly by explicit statutory disease language, nothing in general workers' compensation doctrine absolutely bars coverage of disability produced by neutral risks of contracting disease. If it did, tort actions would probably be broadly available,<sup>137</sup> a fact legislatures have no doubt considered carefully over the years.

### *C. Workers' Compensation Rules of Medical Causation Are Based on Reasonable Certainty, Not Absolute Certainty*

In workers' compensation cases involving non-obvious causation, claimants must satisfy both legal and medical causation tests.<sup>138</sup> Legal causation involves the risk classification scheme discussed above—an injury or disease may be the product of an increased risk, a neutral risk, or a purely personal risk that is not covered under workers' compensation.<sup>139</sup> If work-

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131. 4 LARSON, *supra* note 38, § 52.04 (discussing historical tendency of courts to expand the concept of occupational disease in borderline cases).

132. *Cf. id.* § 4.01 (discussing workplace risks although notably excluding discussion of "infectious diseases").

133. *Id.* § 52.033 (acknowledging that the "ordinary disease of life" distinction is made under many statutes but observing there is no "measuring stick" to distinguish such ordinary diseases from occupational diseases).

134. *Id.*

135. *See supra* note 55 and accompanying text.

136. 1 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 183 (2d ed. 2011).

137. *See supra* note 55 and accompanying text.

138. 3 LARSON, *supra* note 38, § 46.03 (explaining that causation test has "two parts: the legal and the medical").

139. *See supra* Part III.B.

related disability is covered as a matter of law under this classificatory scheme—essentially a proximate cause inquiry—the employee is eligible for workers’ compensation if the disability was caused, in a medical sense, by the legally “eligible” injury or illness, which is essentially a factual causation question.<sup>140</sup> The employee receives a blow to the head from a winched piece of freight. The workplace increased the risk of the incident occurring—the blow to the head. But the blow to the head must also be medically—factually—linked to the subsequent work disability experienced by the employee, and that link normally must be established by expert testimony.<sup>141</sup> According to the *Larson’s* treatise,

Under the legal test, the law must define what kind of exertion satisfies the test of “arising out of the employment.” Under the medical test, the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused this collapse. All too often these two tests are scrambled together. When this happens, the effect is usually that one is lost sight of.<sup>142</sup>

Under this dual medical-legal causation test, medical causation is irrelevant until legal causation has been established.<sup>143</sup> This can be somewhat jarring to those accustomed to negligence causation analyses, where for reasons of efficiency, the factual causation inquiry will tend to precede that of legal causation.<sup>144</sup> In some workers’ compensation situations, no expert medical testimony is required to establish factual causation because a natural inference based on human experience is sufficient to demonstrate causal connection.<sup>145</sup> The *Larson’s* treatise discusses a case in which an employee developed a pathological condition after being injured by a direct blow in the workplace that required surgical intervention.<sup>146</sup> Following an appeal by the involved employer/insurer carrier on the grounds that no

140. 3 LARSON, *supra* note 38, § 46.03.

141. *Id.*

142. *Id.* Although Larson’s was discussing this causation principle as applied to work-related heart attacks, the analysis is not limited to that context.

143. *See id.* § 46.03 n.29.

144. *See* DOBBS, HAYDEN & BUBLICK, *supra* note 136, § 200 (carefully delineating the two steps of the causation analysis and stating that “[i]t is quite correct to say that the plaintiff must normally prove factual cause and that if the plaintiff fails to do so, she will lose.”); *see also id.* § 183.

145. 3 LARSON, *supra* note 38, § 46.03; 12 *id.* § 128.02 (“In appropriate circumstances, awards may be made when medical evidence on . . . the relation of the employment to the injury, or relation of the injury to the disability . . . medical terms [or] what the injury or disease is . . . is inconclusive, indecisive, fragmentary, inconsistent, or even nonexistent.”).

146. *See id.* § 128.02 (discussing *Valente v. Bourne Mills*, 75 A.2d 191 (R.I. 1950)).

medical evidence connected the physical blow to development of the pathological condition, the Rhode Island Supreme Court said:

The . . . contention, as stated, if literally followed would turn a compensation case into a clinic where doctors seek to determine the ‘diagnosis’ of a patient’s ailment and the ‘pathological nature’ of that condition according to the more exacting norms of medical science. The application of so strict a rule to establish the required causal relationship in the field of law, where the ultimate objective is the attainment of substantial justice according to the remedial purposes and provisions of the act, would cast an unfair burden upon a person injured by accident.<sup>147</sup>

A physical blow is of course distinguishable from the contraction of a disease. It is nonetheless well-established that medical testimony is not always necessary to support a workers’ compensation award for occupational disease if surrounding circumstances create a sufficiently strong basis for lay causation inferences.<sup>148</sup> Yet, it is also settled that medical testimony is required “when the medical question is no longer an uncomplicated one and carries the factfinders into realms that are properly within the province of medical experts.”<sup>149</sup> This principle has frequently been applied in the context of disease causation.<sup>150</sup> When medical evidence is required to establish causation, a common formulation of the standard is that an award is supportable when a medical expert finds “to a reasonable medical certainty” that disability has been caused—in a medical sense—by working conditions.<sup>151</sup> It is also important to note, however, that when a claimant has shown that a disease was probably caused by her working conditions—in a manner that seems natural to a lay judge—an award will not be reversed “merely because the medical profession does not fully understand the etiology of the disease.”<sup>152</sup>

Concern that workers’ compensation factfinders may apply higher proof standards of causation *sub silentio* is likely what prompted firefighters’ labor organizations in recent years to lobby legislatures—and win—various disease presumptions.<sup>153</sup> Similar proof standard problems surface in toxic

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147. *Id.* (citing *Valente*, 75 A.2d at 194).

148. 12 LARSON, *supra* note 38, §128.02 (collecting cases for this proposition in the digest to the same section).

149. *Id.* § 128.05.

150. *See id.*

151. 12 LARSON, *supra* note 38, § 130.06D n.4. Medical causation standards vary a great deal from state to state but the thrust of the authority holds that medical opinion, where required, must be expressed in terms of reasonable probabilities and not possibilities. *Id.*

152. *Id.* §130.06.

153. *Id.* § 52.07 (“An interesting recent phenomenon has been the burgeoning in all parts of the country of statutes granting special compensation coverage to firemen or policemen or both, for respiratory and heart diseases connected with the exertions of the employment.”).



tort law, where civil courts must often analyze factual causation questions in terms of general and specific causation: A toxin must be both capable of causing a disease—general causation—and the substance must have caused the plaintiff’s disease—specific causation.<sup>154</sup> Although tort causation analysis differs from that of workers’ compensation, cautionary commentary from the Restatement Third of Torts seems relevant to both bodies of law:

[C]ourts may be relying on a view that “science” presents an “objective” method of establishing that, in all cases, reasonable minds cannot differ on the issue of factual causation. Such a view is incorrect. First, scientific standards for the sufficiency of evidence to establish a proposition may be inappropriate for the law, which itself must decide the minimum amount of evidence permitting a reasonable (and, therefore, permissible) inference, as opposed to speculation that is not permitted. . . . [S]cientists report that an evaluation of data and scientific evidence to determine whether an inference of causation is appropriate requires judgment and interpretation. Scientists are subject to their own value judgments and preexisting biases that may affect their view of a body of evidence. There are instances in which although one scientist or group of scientists comes to one conclusion about factual causation, they recognize that another group that comes to a contrary conclusion might still be “reasonable.” These scientists’ views reflect their scientific experience outside the courtroom. They may have different views about specific instances of conflicting scientific testimony in a courtroom.<sup>155</sup>

Clearly, when science can say with certainty that a condition has not been factually caused by a workplace, a workers’ compensation claimant will probably not be able to successfully argue to the contrary. In the absence of such certainty, however, where science does not clearly understand the etiology of a disease, a workers’ compensation adjudicator possesses authority to make reasonable inferences of causation.<sup>156</sup> The relevance of this proposition to COVID-19 is further discussed in the next Part; but to conclude this Part, it is simply not true that workers’ compensation requires medical proof of disease causation exceeding what is reasonable.

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154. RESTATEMENT (THIRD) OF TORTS § 28 cmt. c (AM. L. INST. 2010).

155. *Id.*

156. *See supra* notes 145–47 and accompanying text.

#### IV. COVID-19 CAUSATION UNDER TRADITIONAL CAUSATION PRINCIPLES

##### A. Analysis

It was evident that during the pandemic the medical profession did not fully understand the etiology of the disease.<sup>157</sup> Experts initially instructed people not to wear masks,<sup>158</sup> and then changed their minds.<sup>159</sup> During this initial “no mask period” essential workers must have been exposed to elevated risks of contracting the virus.<sup>160</sup> Experts also initially believed that groceries should be disinfected,<sup>161</sup> but then changed their minds.<sup>162</sup> The initial reaction of some workers’ compensation commentators was somewhat predictably that in the absence of definitive scientific proof of causation, workers’ compensation awards were likely unavailable.<sup>163</sup> But, as explained above, this level of certainty is unlikely to be obtainable in legal proceedings—particularly in the initial chaos surrounding a pandemic—and it is not necessary.<sup>164</sup> In light of the early inability to establish definitively that COVID-19 disability was not work related, administrative factfinders

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157. See Michelle A. Jorden et al., *Evidence for Limited Early Spread of COVID-19 Within the United States, January–February 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 680, 682–83 (2020).

158. Darragh Roche, *Fauci Said Masks ‘Not Really Effective in Keeping Out Virus,’ Email Reveals*, NEWSWEEK (June 2, 2021, 4:59 AM), <https://www.newsweek.com/fauci-said-masks-not-really-effective-keeping-out-virus-email-reveals-1596703> [<https://perma.cc/6YH2-SLFK>] (chronicling history of vacillating advice on mask wearing).

159. *CDC Calls on Americans to Wear Masks to Prevent COVID-19 Spread*, CTR. DISEASE CONTROL & PREVENTION (July 14, 2020), <https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html> [<https://perma.cc/LH4U-TMUB>].

160. This is based on the assertion that COVID-19 is transmitted by, among other ways, “inhalation of very fine respiratory droplets and aerosol particles,” and the lack of a universal mask mandate at the beginning of the pandemic in early 2020 would have exposed essential workers to higher risk of exposure. See generally *SARS-CoV-2 Is Transmitted by Exposure to Infectious Respiratory Fluids*, CTR. DISEASE CONTROL & PREVENTION (May 7, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html> [<https://perma.cc/K4PB-HHVB>].

161. Leah Groth, *Do You Have to Disinfect Groceries? Here’s What You Need to Know About Shopping and Coronavirus*, HEALTH (Apr. 1, 2020), <https://www.health.com/condition/infectious-diseases/coronavirus/do-you-have-to-disinfect-groceries> [<https://perma.cc/A5NN-XYCQ>].

162. *Coronavirus Disease (COVID-19): Cleaning and Disinfecting Surfaces in Non-Health Care Settings*, WORLD HEALTH ORG. (May 16, 2020), <https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-cleaning-and-disinfecting-surfaces-in-non-health-care-settings> [<https://perma.cc/DKU6-9RCF>].

163. See, e.g., Allen Smith, *Workers’ Compensation Won’t Cover Many Coronavirus Claims*, SOC. HUM. RES. MGMT. (Mar. 10, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/workers-compensation-coronavirus-claims.aspx> [<https://perma.cc/4E2X-85EE>].

164. See *supra* note 55 and accompanying text.

would necessarily be forced to make reasonable inferences from case-specific medical opinions on factual causation.<sup>165</sup> Certainty would be nearly impossible. With respect to legal causation, the *Larson*'s treatise provides an illuminating passage providing insight as to why COVID-19 is at least classifiable as an occupational disease:

A disease which might otherwise be thought clearly nonoccupational may become occupational because the employment facilitates its transmission. . . . Ordinarily one would not think of tuberculosis as an occupational disease of telephone operators; but if the enforced use of a close-fitting mouthpiece is an inherent part of the job, and if it enhances the probability of transmission of the disease from one operator to another, then apparently the distinctiveness of the mechanism of transmission supplies all that is needed of occupational character. Although practically all of the reported cases in this category have involved tuberculosis, it might seem to follow that any disease, however unindustrial, could become an occupational disease if there could be shown some method of transmission peculiar to the employment. Thus, mumps might become an occupational disease of a deep-sea diver whose diving helmet had been used by others, and gonorrhea might become an occupational disease of lathe operators if they shared the use of protective goggles.<sup>166</sup>

Or, one might easily add that COVID-19 could become an occupational disease when meatpacking or nursing home employees are working at close quarters with many other persons who likely have been infected with COVID-19.<sup>167</sup> Under this reasoning, COVID-19 should at a minimum not have been conclusively presumed excluded from coverage unless a state explicitly excludes all infectious diseases, or defines occupational diseases narrowly and explicitly excludes any other disease from coverage.<sup>168</sup> If nurses or other front-line employees were regularly in contact with persons infected with the coronavirus, a “method of transmission peculiar to the employment” is demonstrated.<sup>169</sup> The same showing should be possible with respect to any category of worker necessarily exposed to COVID-19,

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165. See Timothy Zix et al., *COVID-19 and Workers' Compensation: Questions of Causation and Compensability*, TAFT L. (Mar. 12, 2020), <https://www.taftlaw.com/news-events/law-bulletins/covid-19-and-workers-compensation-questions-of-causation-and-compensability> [<https://perma.cc/6BNG-82Y9>].

166. 4 LARSON, *supra* note 38, § 52.04.

167. See *supra* note 16 (discussing the vast spread of COVID-19 amongst meat and poultry workers).

168. 4 LARSON, *supra* note 38, § 52.04 (“Under occupational disease schedules, there is relatively little occasion for judicial interpretation of the extent of coverage . . .”).

169. See *id.*

whether or not designated as “essential” by state authorities.<sup>170</sup> Of course, even if COVID-19 were designated an occupational disease, employees would still have to make out their individual cases under applicable workers’ compensation causation standards, and that showing might have been difficult unless states applied the positional risk test.

As discussed in the introduction of this Article, employees in some states appeared to be experiencing blanket workers’ compensation case denials during the pandemic.<sup>171</sup> The Minnesota news story discussed at the outset<sup>172</sup> will benefit from some additional context. An abstract of a study of contemporary Minnesota-specific COVID-19 occupational data reads:

Coronavirus disease has disproportionately affected persons in congregate settings and high-density workplaces. To determine more about the transmission patterns of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in these settings, we performed whole-genome sequencing and phylogenetic analysis on 319 (14.4%) samples from 2,222 SARS-CoV-2-positive persons associated with 8 outbreaks in Minnesota, USA, during March-June 2020. Sequencing indicated that virus spread in 3 long-term care facilities and 2 correctional facilities was associated with a single genetic sequence and that in a fourth long-term care facility, outbreak cases were associated with 2 distinct sequences. In contrast, cases associated with outbreaks in 2 meat-processing plants were associated with multiple SARS-CoV-2 sequences. These results suggest that a single introduction of SARS-CoV-2 into a facility can result in a widespread outbreak. Early identification and cohorting (segregating) of virus-positive persons in these settings, along with continued vigilance with infection prevention and control measures, is imperative.<sup>173</sup>

Given this hyper-infectious environment and the resulting high-risk nature of meatpacking work, a zero percent “win” rate for workers’ compensation claims involving hundreds of meatpacking employees—in comparison to the thirty-two percent win rate for other claims not covered in Minnesota by a presumption<sup>174</sup>—strongly suggests that appropriate causation standards were not being applied in good faith.<sup>175</sup> Regardless of

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170. See generally Ruqaiyah Yearby & Seema Mohapatra, *Structural Discrimination in COVID-19 Workplace Protections*, HEALTH AFFS.: HEALTH AFFS. BLOG (May 29, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200522.280105/full/> [<https://perma.cc/4SLT-X29F>] (“Workers, who are being asked to risk their health by working outside their homes during the COVID-19 pandemic, need adequate hazard compensation, safe workplace conditions, and personal protective equipment (PPE).”).

171. Weber, *supra* note 19.

172. See *supra* note 6.

173. Nicholas B. Lehnertz et al., *Transmission Dynamics of Severe Acute Respiratory Syndrome Coronavirus 2 in High-Density Settings, Minnesota, USA, March–June 2020*, 27 EMERGING INFECTIOUS DISEASES 2052, 2052 (2021).

174. See *supra* note 6.

175. Public commentary often fails to distinguish between an employer’s preliminary refusal to “accept” a claim and an administrative or governmental unit’s “denial” of a claim. Few COVID-related workers’ compensation cases have been reported at this early date, making a meta-analysis of ultimate win rates of COVID-related claims unfeasible.

the precise mechanism of disease transmission, it seems extremely unlikely that the risk of persons employed in meatpacking plants contracting COVID-19 did not exceed the risk of persons in the general public of contracting the disease. In other words, while workers' compensation may cover neutral risks in certain circumstances, it has historically covered *increased* risks in most cases.<sup>176</sup>

In tort, courts have frequently adopted probabilistic theories of liability where "some group of plaintiffs very likely have been injured by a defendant's activity but cannot prove which individuals were harmed because of lack of specific causal proof."<sup>177</sup> In workers' compensation, on the other hand, elevated risk coupled with probabilistic medical opinion in a particular case obviates the need for such exacting proof determinations.<sup>178</sup> As already discussed, however,<sup>179</sup> a threshold problem is to determine whether COVID-19 is an occupational or "other" disease and, if the latter, whether the other disease is excluded under a state statute.<sup>180</sup> Occupational diseases are compensable if the governing risk standard has been satisfied.<sup>181</sup>

Aside from this general analysis, it must also be noted that with respect to prior cases addressing coverage of "contagion," "the majority of cases demand[] a showing of increased exposure to contagion."<sup>182</sup> Yet, as *Larson's* explains, in such cases "[t]he comparison is evidently made with a selected group, a community that already is in the grip of the epidemic, and that claimant visited only because of the employment."<sup>183</sup> This observation is relevant to situations surrounding COVID-19. While the general public

It is conceivable that employers denied every COVID-19 claim but that the claims were awarded later in the administrative process but there is no evidence to suggest it. To a sick employee of limited financial means, such a delay would in any event amount to painful "justice denied."

176. While Minnesota law provides broad, increased-risk coverage of occupational disease without a limiting schedule, it excludes "ordinary diseases of life." MINN. STAT. § 176.011(15) (2021). However, the exclusion is vague because it does not apply "where the diseases follow as an incident of an occupational disease, or where the exposure peculiar to the occupation makes the disease an occupational disease hazard." *Id.* In any event, COVID could hardly be regarded as "ordinary."

177. Betsy J. Grey, *Causal Proof in the Pandemic*, 10 WAKE FOREST L. REV. ONLINE 124, 138 (2020).

178. *See supra* Part III.C.

179. *See supra* Part IV.A.

180. *See supra* Part IV.A.

181. *See* MINN. STAT. § 176.011(15)(a) (2021).

182. 1 LARSON, *supra* note 38, § 5.05 (*citing* LaTourette v. Workers' Comp. Appeals Bd., 63 Cal. Rptr. 2d 680, 682 (1997), *aff'd*, 941 P.2d 751 (Cal. 1997)).

183. *Id.*

might be exposed to COVID-19 in the same manner as an employee in the workplace, there are at least two already mentioned ways in which employees' risks of contracting COVID-19 were increased. First, during widespread lockdowns an employee required to report to work in-person experiences risk of contracting COVID-19 exceeding that of the general public. Second, certain high-density workplaces obviously would seem to increase an employee's risk of contracting COVID-19 above that of the general public. In the words of the *Larson's* treatise, "[s]everal cases have allowed recovery on the 'preponderance of probabilities,' when the place of work was attended with a much higher proportionate risk of infection; and by the same showing, of course, the requirement of increased risk for purposes of the 'arising' test was satisfied."<sup>184</sup> Of course, as has been developed, a state might decide to cover the neutral risks of contracting COVID-19. But increased risk scenarios during a lockdown should not even have been questionable. Once reasonable factual causation was established these employees should have been covered.

### B. Implications

Getting coverage of COVID-19 "right" as a nation matters. Workers' compensation was, itself, an innovation made necessary by the national emergency of industrial death and injury.<sup>185</sup> It would not do then, as it does not suffice now, to argue that the legal system cannot be modified because that is just not the way things are supposed to be. But in this instance the system was flexible enough to have accommodated COVID-19, popular din to the contrary notwithstanding. Ongoing thinking about

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184. *Id.* This treatise lists several cases that discuss recovery on the preponderance of probabilities when a plaintiff's increased risk of infection arises out of work-related duties. *See, e.g.,* *Roe v. Boise Grocery Co.*, 21 P.2d 910, 911–14 (Idaho 1933) (finding that plaintiff could recover after showing a probability that he contracted Rocky Mountain spotted fever when he was completing work-related activities); *Fidelity & Cas. Co. v. Indus. Accident Comm'n*, 258 P. 698, 699 (Cal. Dist. Ct. App. 1927) (finding plaintiff provided sufficient evidence that his work-related duties caused his typhoid fever); *Lothrop v. Hamilton Wright Orgs., Inc.*, 356 N.Y.S.2d 730, 732 (1974) (finding substantial support that the deceased's viral hepatitis infection arose from his working conditions); *Engels Copper Mining Co. v. Indus. Accident Comm'n*, 192 P. 845, 845 (Cal. 1920) (finding plaintiff provided sufficient evidence showing his work-related duties caused his influenza); *Sacred Heart Med. Ctr. v. Carrado*, 600 P.2d 1015, 1017 (Wash. 1979), *rev'g* 579 P.2d 412 (1978) (finding petitioner showed a greater probability that he contracted hepatitis through his employment); *Smith v. Cap. Region Med. Ctr.*, 412 S.W.3d 252 (Mo. Ct. App. 2013) (finding claimant established a probability that his working conditions caused his influenza).

185. *See* JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 2–3 (2004) (describing the unprecedented frequency and intensity of work injuries and death in the years leading up to the enactment of workers' compensation statutes).

the coverage limitations of workers' compensation during a pandemic may well be required, for experts have cautioned:

Evidence suggests that SARS, MERS, and COVID-19 are only the latest examples of a deadly barrage of coming coronavirus and other emergences. The COVID-19 pandemic is yet another reminder, added to the rapidly growing archive of historical reminders, that in a human-dominated world, in which our human activities represent aggressive, damaging, and unbalanced interactions with nature, we will increasingly provoke new disease emergences. We remain at risk for the foreseeable future. COVID-19 is among the most vivid wake-up calls in over a century. It should force us to begin to think in earnest and collectively about living in more thoughtful and creative harmony with nature, even as we plan for nature's inevitable, and always unexpected, surprises.<sup>186</sup>

Despite what has been said above, it must be acknowledged that, even where occupational disease claims are formally *covered* by workers' compensation, they are very rarely paid.<sup>187</sup> In a 2004 article, J. Paul Leigh and John A. Robbins showed that it is probable that between ninety-one and ninety-nine percent of valid workers' compensation disease claims are never paid.<sup>188</sup> It is simple: States do not want to pay for disease claims.<sup>189</sup> Through aggressive litigation this may be adjustable, but it also may be unrealistic to assume that the elderly and sick victims of long-latency diseases could relentlessly pursue workers' compensation claims, or even more creative legal actions.<sup>190</sup> State claim nullification, whether in the form of disease exclusions, claim denials, or erection of legal and administrative barriers to claim processing,<sup>191</sup> suggests the need for long term reform of

186. David M. Morens & Anthony S. Fauci, *Emerging Pandemic Diseases: How We Got to COVID-19*, 182 CELL 1077, 1089 (2020).

187. See Spieler, *supra* note 38, at 996 (“[O]ccupational disease claims are rarely filed and often not compensated once they are filed.”).

188. J. Paul Leigh & John A. Robbins, *Occupational Disease and Workers' Compensation: Coverage, Costs, and Consequences*, 82 MILBANK Q. 689, 709 (2004).

189. See Spieler, *supra* note 38, at 991–98 (describing various state statutory provisions that act as barriers to payment of occupational disease claims).

190. See Jamie Smith Hopkins, *Worked to Death: How Victims Are Shut Out of the Workers' Comp System by Big Bills, Bad Laws, and Companies That Will Do Anything but Pay*, SLATE (Nov. 5, 2015, 1:06 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2015/11/workers\\_comp\\_is\\_failing\\_to\\_pay\\_victims\\_of\\_occupational\\_disease\\_center\\_for.html](http://www.slate.com/articles/news_and_politics/politics/2015/11/workers_comp_is_failing_to_pay_victims_of_occupational_disease_center_for.html) [https://perma.cc/P8ZV-FU62] (describing the financial burden incurred by a workers' compensation claimant while awaiting reimbursement of medical expenses post litigation).

191. See generally Emily A. Spieler & John F. Burton Jr., *The Lack of Correspondence Between Work-Related Disability and Receipt of Workers' Compensation Benefits*, 55 AM. J. INDUS. MED. 487, 488, 495 (2012).

disease coverage. Perhaps expanded federal, social insurance coverage of disease disability, as in the black lung programs, is warranted.<sup>192</sup> More ambitiously, perhaps it is time to create a general federal short-term disability program. Disease coverage problems will likely exit the public radar once the furor surrounding COVID has abated, hampering continued policy debate of the issue; but as a matter of constitutional law, nullification of workers' compensation claims should allow for the availability of tort actions.<sup>193</sup> Perhaps an intermediate solution is possible. Negligence actions could perhaps be allowed for workplace disease claims, with employee damages being tethered to proportional causation: Thus, an employer who could be proven twenty-percent responsible for an employee's disease disability would be responsible for twenty-percent of the employee's damages.<sup>194</sup> Such a model could potentially put some compensation in the hands of victims who may otherwise be abandoned.

## V. CONCLUSION

COVID-19 first laid bare that even where disease could be covered by workers' compensation, without offending its existing doctrine or theory, early reports revealed that it often was not covered.<sup>195</sup> This may be felicitous news to employers and their insurance carriers prompting celebration of much lower than expected workers' compensations costs during the pandemic.<sup>196</sup> Many states seemed simply to have declined to cover workers in the midst of a national emergency.<sup>197</sup> That is certainly one way to lower costs. But that leads to a second matter that COVID-19 laid bare. The United States simply does not have a national short-term disability safety net to protect people during periods of unavoidable misfortune.<sup>198</sup> This is scandalous, and the gap was on full display for at least eighteen months.<sup>199</sup>

Furthermore, the workers' compensation system made few friends among the victims of this calamity. Normally, work-related diseases transpire over time, in slow motion, and their waxing is hard to detect from day to

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192. See Grey, *supra* note 177, at 146 (noting that workers facing "prolonged periods of exposure in risky environments" should be permitted to use a federal compensation system).

193. See *supra* note 55 and accompanying text.

194. See Rosenberg, *supra* note 74, at 881–87 (proposing that courts determine causation under a proportionality rule).

195. See *supra* Part I.

196. Angela Childers, *COVID-19 Comp Claims Far Less than Anticipated*, BUS. INS. (Feb. 3, 2021), <https://www.businessinsurance.com/article/20210203/NEWS06/912339532/COVID-19-comp-claims-far-less-than-anticipated> [<https://perma.cc/3RJF-M9VQ>].

197. See *supra* Part I.

198. See *supra* note 28 and accompanying text.

199. See *supra* note 24 and accompanying text.



day.<sup>200</sup> Workers may remain unaware of what is happening to their bodies as a result of work. When the system denies them compensation for this type of disease, employees may not agree but at least understand the problem of passage of time. Contraction of disease during a pandemic is quite different. Every worker sees the emergence of both disease and disability. Every worker knows, as a matter of common sense, that working in the pandemic's midst increased the risk of being infected. "But for" the work, workers might believe, they would not have contracted the disease—despite what an "expert" might say. A benefit system frustrating coverage in such a situation can anticipate future bad feelings from the affected public. On top of all of this, when some states simultaneously cloaked employers with blanket tort immunity, all avenues to legal recourse for workers were cut off as a practical matter.<sup>201</sup> For those thinking that the mean streets have recently become meaner, the very next thought might be that it could have something to do with abandoning people during a pandemic.

Workers' compensation under coverage is unnecessary. In future pandemics— or in unforeseeable futuristic events—workers' compensation stakeholders can ensure principled workers' compensation coverage of disability by applying the positional risk rule of legal causation,<sup>202</sup> and by upholding common sense, probabilistic medical causation standards even if not dressed in the garb of "certainty."<sup>203</sup> It is unclear whether COVID-19 is "over."<sup>204</sup> But whether it is over or not, the issue of coverage of short-term disability produced by environmentally-heightened, but neutral risks is likely to be a continuing feature of the modern workplace. Workers' compensation writ large will have to determine whether it wishes in this context to pave a road to transformation or irrelevance.<sup>205</sup>

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200. See 4 LARSON, *supra* note 38, § 53.03 (discussing legal problems created by the long latency periods of certain diseases).

201. See *supra* note 36 and accompanying text.

202. See *supra* Part III.A.

203. See *supra* Part III.B.

204. See Stein, *supra* note 1.

205. See Mark Powell, *Study: Higher Temperatures Lead to More Workplace Injuries, Inside and Outside*, WORKCOMP CENTRAL (July 10, 2021), <https://ww3.workcompcentral.com/news/story/id/c56f5ec49531964c732e82e73b7b3a7ab90ab151> [<https://perma.cc/FN2F-JEU4>]; see also Michael C. Duff, *Can Workers' Compensation "Work" in a Mega-Risk World?: The COVID-19 Experiment*, 35 ABA J. LAB. & EMP. L. 17, 21 (2021).

