IN THE CIRCUIT COURT
FOR THE SEVENTH JUDICIAL CIRCUIT OF ILLINOIS
SANGAMON COUNTY, ILLINOIS

ILLINOIS MANUFACTURERS' ASSOCIATION and ILLINOIS RETAIL MERCHANTS ASSOCIATION, Plaintiffs, vs. ILLINOIS WORKERS' COMPENSATION COMMISSION and MICHAEL J. BRENNAN, COMMISSIONER, IN HIS OFFICIAL CAPACITY, Defendants.	)	Case No.: 2020CH000098 The Honorable John M. Madonia

Interests of the Amici

The American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, Illinois Chambers of Commerce, Independent Insurance Agents of Illinois, and DRI (collectively, "Amici") submit this brief in support of Plaintiff's motion.

The American Property Casualty Insurance Association ("APCIA") is the largest national trade association for home, auto, and business insurers, including those writing workers' compensation insurance. APCIA was formed at the beginning of 2019 through a merger of two longstanding trade associations, the Chicago-based Property Casualty Insurance Association of America and the Washington, D.C.-based American Insurance Association. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies write nearly 60 percent of the entire U.S. property-casualty insurance market, 70 percent of the countrywide workers' compensation insurance market, and over 80 percent of the workers' compensation insurance market in Illinois. On issues of importance to the insurance industry and marketplace, APCIA advocates sound

public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits amicus curiae briefs in significant cases before federal and state courts, including in this State.

The National Association of Mutual Insurance Companies (“NAMIC”) is a national trade association consisting of more than 1,400 companies. The association supports regional and local mutual insurance companies on main streets across America and many of the country’s largest national insurers. NAMIC member companies write $268 billion in annual premiums, including writing 29 percent of the business insurance market. Through its advocacy programs, NAMIC promotes public policy solutions that benefit NAMIC member companies and the policyholders they serve.

The Illinois Chamber of Commerce ("Chamber") was created in 1919 as one of the first statewide business organizations in the nation. The Chamber is an association that advocates on behalf of Illinois businesses to achieve a competitive business environment. The Chamber membership broadly covers employers from across the State of Illinois and virtually every industry. Just as the Chamber provides its members with benefits, these organizations, in turn, provide the State of Illinois with jobs, income, profits, and taxes that allow the State of Illinois and its residents to flourish.

The Independent Insurance Agents of Illinois (“IIA of Illinois”) represents over one thousand insurance agencies and over 15,000 licensed insurance producers in the state of Illinois. IIA of Illinois members represent hundreds of different insurance companies writing all lines of insurance in Illinois, including commercial insurance and workers' compensation insurance. The vast majority of workers' compensation insurance is written through IIA of Illinois members, and

employers look to independent agents as their advisors on workers' compensation coverage and risk management issues.

DRI is the leading organization of defense attorneys and in-house counsel. DRI has served the defense bar for more than 60 years, and strives for improvement of the civil justice system through a number of means including engagement in matters of public policy that affect the administration of justice.

Amici have a unique national and Illinois-specific perspective on the workers' compensation system, which affects the vast majority of Illinois' workers and employers and Amici's members. Amici submit this amici curiae brief to provide the Court with additional background, context and analysis of the Amendment being challenged in this action. In this brief, Amici explain the role of workers' compensation insurance in our economy, the consequences of the enforcement of the Amendment at issue, and the reasons enforcement is neither permissible nor prudent.

Factual Background

Workers' compensation laws balance competing interests: Employers give up their common law defenses to negligence claims asserted by workers suffering injuries or occupational disease in exchange for limits on their liabilities; while employees give up their right to sue in civil court in exchange for prompt and certain benefits. Workers who are injured or contract occupational diseases arising out of or within the course and scope of their employment are provided with reasonable and necessary medical treatment and statutorily defined income replacement payments during any period of disability, and their survivors are entitled to benefits in the event their condition is fatal.

Workers' compensation was established as a no-fault system. The theory behind the system is that the cost of work-related injuries or illnesses should be part of the cost of an employer's product or service. State of Illinois Workers' Compensation Commission Fiscal Year 2018 Annual Report at p. 2.[1] As a consequence, any expenses injected into the system are ultimately borne by employers, who then incorporate those expenses into the price of their product or service.

Most Illinois employers insure their obligations under the Workers' Compensation Act, 820 ILCS 305/1 *et seq.*, and the Workers' Occupational Diseases Act 820 ILCS 310/1 *et seq.*, through the purchase of Workers' Compensation insurance. 820 ILCS 305/4. The Illinois Workers' Compensation Commission ("IWCC") was established by the Act. 820 ILCS 305/13. The IWCC is the State agency that resolves claims made by injured workers for injuries arising out of and in the course of employment. The IWCC administers the judicial process that adjudicates disputed workers' compensation claims between employees and employers, acting as an administrative court system for these claims.

Purporting to act under authority granted in the Act, the IWCC enacted a modification to the law on April 15, 2020, effective the following day (the "Amendment"). The Amendment adds the following language to Section 9030.70 of the Illinois Administrative Code at 50 Ill. Adm. Code 9030:

> 1) In any proceeding before the Commission in which the petitioner is a COVID-19 First Responder or Front-Line Worker as defined in Section (a)(2), if the petitioner's injury, occupational disease, or period of incapacity resulted from exposure to the COVID-19 virus during the Gubernatorial Disaster Proclamation 2020-38 and any subsequent COVID-19 disaster proclamations, the exposure will be rebuttably presumed to have arisen out of and in the course of the petitioner's COVID-19 First Responder or Front-Line Worker employment and, further, will

[1] Accessed on April 20, 2020 at https://www2.illinois.gov/sites/iwcc/about/Documents/FY2018AnnualReport.pdf.

be rebuttably presumed to be causally connected to the hazards or exposures of the petitioner's COVID-19 First Responder or Front-Line Worker employment.

2) The term "COVID-19 First Responder or Front-Line Worker" means any individuals employed as police, fire personnel, emergency medical technicians, or paramedics and all individuals employed and considered as first responders, health care providers engaged in patient care, corrections officers, and the crucial personnel identified under Section 1 Parts 7, 8, 9, 10, 11, and 12 of Executive Order 2020-10 dated March 20, 2020.

44 Ill. Reg. ___, effective April 16, 2020.

While this Amendment purports to be merely a procedural rule under the heading "Evidence," it deviates from current substantive law in important ways. While an employee is deemed to have the burden of proving the work-relatedness of any injury or illness unless otherwise specified in the Workers' Compensation Act, the Amendment violates this cardinal rule by creating rebuttable presumptions that (1) certain workers exposed to or diagnosed with COVID-19 during the current state of emergency contracted the virus in the course and scope of their employment and (2) the exposure or contraction of the virus is causally connected to the hazards or exposures of the claimant's employment. As a practical matter, these presumptions inappropriately shift a burden of proof by requiring employers to show that incapacitated employees did not contract, or were not exposed to, COVID-19 in the course of employment. The Amendment's presumptions contrast with the usual statutory requirement for compensability determinations, which is a showing *by the employee* of a "causal connection between the conditions under which the work is performed and the occupational disease . . . [that] had its origin or aggravation in a risk connected with the employment …." 820 ILCS 310/1(d). The Act also contains several analogous presumptions enacted by the General Assembly, none of which are characterized as being merely evidentiary or procedural, including:

- Certain first responders including firefighters and EMTs with five years of experience are rebuttably presumed to have a condition or impairment arising out of in in the course of their employment if they have a lung or respiratory disease or condition. 820 ILCS 310/1(d);

- Certain deceased miners are rebuttably presumed to have died as a result of pneumoconiosis. 820 ILCS 310/1(d); and

- Any injury arising from the administration of a vaccine, including smallpox vaccine, to prepare for or in response to a potential bioterrorist incident as part of an inoculation program in connection with one's employment is deemed to have arisen out of and in the course of the worker's employment. 820 ILCS 310/1(d).

Except in the case of these statutory presumptions, the usual rule is that "a claimant must prove both that he or she suffers from an occupational disease and that a causal connection exists between the disease and his or her employment." *Durbin v. Illinois Workers' Comp. Comm'n*, 2016 IL App (4th) 150088WC, ¶ 41, 56 N.E.3d 605. In order for a disease to be occupational, "it must not be an ordinary disease of life to which the public is exposed outside the employment, unless such ordinary disease follows as an incident of an occupational disease." *Allis-Chalmers Mfg. Co. v. Indus. Comm'n*, 33 Ill. 2d 268, 270, 211 N.E.2d 276, 278 (1965). The rationale for excluding "community diseases" is that if the public in general is exposed to the disease, then it is unlikely that a person's employment caused or aggravated the disease. *Downs v. Indus. Comm'n*, 143 Ill. App. 3d 383, 389, 493 N.E.2d 595, 599 (5th Dist. 1986). The Act is only designed to cover specific, work-related diseases. *See id*. This Act was never intended to compensate workers for injuries caused by widespread public diseases that may be wholly unconnected to work conditions.

Another way the Amendment deviates from existing law is by creating a pathway to benefits for a worker with an "injury, occupational disease, *or period of incapacity* result[ing] from exposure to COVID-19 . . . ." Amendment at 1. "Period of incapacity" is not a phrase

found in the Act, and suggests that someone without an injury or disease would potentially have a compensable claim if they were merely quarantined as a result of exposure to COVID-19. In contrast, the Act only contemplates coverage for employees who, if they meet the statutory criteria, contract an occupational disease or "[a]ny condition or impairment of health." 820 ILCS 310/1(d). Moreover, the incapacity need only arise from "exposure," meaning a person who is exposed to but never tests positive for COVID-19 or demonstrates any symptoms may have a compensable claim for the period of incapacity.

The Amendment will have significant financial implications for the workers' compensation system. The daily deaths from COVID-19 have exceeded the daily average death rates for heart disease and cancer since April 7, 2020. The Coronavirus in America: The Year Ahead, *New York Times* April 19, 2020 ("April 19 Article"). According to *The New York Times*, there are medical experts who predict 48 percent to 65 percent of all Americans will contract COVID-19, and death rates appear to be around 1 percent but may reach 5 percent. *See* April 19 Article. While there is not yet a computation of the cost of adding COVID-19 to the Illinois workers' compensation system, a study attached as Exhibit 1 on the New York workers' compensation system found that creating similar COVID-19 presumptions of coverage would add approximately $31,000,000,000 in losses to a system expected to have about $8,700,000,000 in losses. ("New York Study").

Another study, attached as Exhibit 2, of the California system reached the following conclusion:

> [T]he WCIRB estimates that the annual cost of COVID-19 claims on ECI [Essential Critical Infrastructure] workers under a conclusive presumption ranges from $2.2 billion to $33.6 billion with an approximate mid-range estimate of $11.2 billion, or 61% of the annual estimated cost of the total workers' compensation system prior to the impact of the pandemic.

Cost Evaluation of Potential Conclusive COVID-19 Presumption in California Workers' Compensation Research Brief, Workers' Compensation Insurance Rating Bureau of California, p. 1 (April 2020) ("California Study"). The cost in Illinois may be higher or lower than the cost estimates in New York or California, but data from those two states and some preliminary modeling indicate the costs in Illinois from the Amendment will exceed one billion dollars. While such quarantine measures are necessary and appropriate from a public health standpoint, the workers' compensation system was not designed to bear the massive costs associated with such a fundamental change in public policy—and certainly not based on an Emergency Amendment to the Rules of Evidence completely devoid of any public debate.

As previously noted, the Act imposes obligations on employers, many of whom shoulder this burden in whole or in part through either self-insurance authorized by the IWCC or through insurance policies with large deductibles that essentially render employers self-funded for all but catastrophic losses. Even those employers that fully insure their obligations under the Act through guaranteed-cost policies will bear the costs of those risks because workers' compensation insurers charge premiums based on loss costs. Indeed, the IWCC administers a system that is expressly designed to internalize the costs of the Act's obligations on employers on the theory that employers will incorporate the costs of the system into their goods and services. The injection of potentially billions of dollars in uncontemplated losses related to the COVID-19 pandemic will have a material impact on the carefully balanced Illinois workers' compensation system that aligns the interests of employers and employees in the fair and efficient resolution of workplace injury claims. Amici respectfully submit that the IWCC should not be permitted to unilaterally alter substantive law in this crucial area, under the guise of making merely "procedural" changes.

Argument

I. The Amendment Should Not Be Enforced.

The Amendment should not be enforced for two independent reasons. First, the IWCC lacks authority to enact the Amendment and second, the Amendment is arbitrary and capricious.

a. The Rule is Substantive Law Enacted by an Agency without Authority to Enact Such a Law.

The IWCC is an administrative agency that lacks general or common law powers. *Alvarado v. Indus. Comm'n*, 216 Ill. 2d 547, 553, 837 N.E.2d 909 (2005). Consequently, all of its actions must be specifically authorized by statute. *Id.* To the extent the IWCC acts outside of its statutory authority, it acts without jurisdiction and its action is void. *Id.*; *Arnold v. Mt. Carmel Pub. Util.*, 369 Ill. App. 3d 1029, 1032, 861 N.E.2d 1015, 1018–19 (5th Dist. 2006). A void action is a complete nullity from its inception and may be attacked at any time. *Arnold*, 369 Ill. App. 3d at 1032. The Illinois Supreme Court has repeatedly found that the IWCC does not have the authority to create substantive rules or otherwise extend the substantive provisions of the Act. *Madsen v. Indus. Comm'n*, 383 Ill. 590, 597, 50 N.E.2d 707, 710 (1943); *Hamilton Eng'g Co. v. Indus. Comm'n*, 399 Ill. 30, 41, 76 N.E.2d 506, 511 (1947); *Alvarado*, 216 Ill. 2d at 553–54.

The Act, and decades of common law interpreting it, reflects a number of substantive provisions establishing that compensability for a disease is a matter of substantive law. As an initial matter, there is a general substantive rule that community diseases to which an employee may also be exposed outside of work are not compensable unless they are proven to have followed as an incident of occupational disease. *See, e.g., Allis-Chalmers Mfg. Co.*, 33 Ill. 2d at 211; *Downs*, 143 Ill. App. 3d at 389. The Amendment contradicts this long-standing substantive law. "While the Industrial Commission is vested with the power to make rules for carrying out

its statutory duties it is without power to make rules creating substantive rights." *Madsen*, 383 Ill. at 597 (finding that the commission could not create a rule that gave it the power to review a settlement).

Similarly, the Act contains a number of rebuttable or conclusive compensability presumptions for certain workers and certain disease conditions, including fire fighters and EMTs with more than five years of experience who contract a lung or respiratory condition in the course of their employment. 820 ILCS 310/1(d). The very existence of legislatively-created presumptions similar to those the Amendment purports to create clearly demonstrates that the IWCC has impermissibly invaded the substantive lawmaking province of the Legislature, as further explained below. If this issue were joined in the Legislature, stakeholders would have been given the opportunity to participate in the lawmaking process, and potentially more appropriate alternatives to workers' compensation benefits (such as paid leave, unemployment benefits, or specifically dedicated governmental funds) would have been considered.

The Amendment also conflicts with this substantive law by, among other things, not requiring a five-year employment history as a fire fighter. This expansion of rights to less experienced fire fighters exceeds the IWCC's ability to make "only such rules as will aid in carrying out the duties imposed upon the commission by the statute." *Madsen*, 383 Ill. at 597; *see also Siddens v. Indus. Comm'n,* 304 Ill. App. 3d 506, 711 N.E.2d 18 (4th Dist. 1999) (finding the IWCC exceeded its powers when it inappropriately granted attorneys' fees); *see also Fahey v. Cook County Police Dept. Merit Bd.,* 21 Ill. App. 3d 579, 586, 315 N.E.2d 573, 578 (1st Dist. 1974) (finding an agency exceeded its powers when it issued a rule governing mandatory retirement age for certain police officers when the topic of mandatory retirement age was the subject of numerous legislative acts). *Zurich Gen. Acc. & Liab. Ins. Co. v. Indus. Comm'n*, 325

Ill. 452, 156 N.E. 307 (1927) ("The rule is not confined to a matter of procedure, but exceeds the authority conferred upon the commission and creates a liability on the part of the insurer where none may exist in fact.").

This Court should not hesitate to find that the Amendment is a nullity and is unenforceable. That is precisely what other courts have done when Illinois agencies improperly issued regulations that affected substantive rights. *See, e.g., Bd. of Trustees of Chicago Heights Police Pension Fund v. Dep't of Ins*., 323 Ill. App. 3d 913, 753 N.E.2d 343 (1st Dist. 2001) (finding that a well-intentioned rule was invalid where the statute did not clearly give the agency authority); *Fahey*, 21 Ill. App. 3d at 586 (invalidating an agency's rule where enactment was outside of the agency's authority). Amici respectfully submit that it would be more efficient and just to nullify the Amendment before reliance interests inappropriately develop. No stakeholders are served by lingering legal uncertainty.

b. The Amendment Is Unenforceable Because It Is Arbitrary, Unreasonable, and Capricious.

Even where an agency has authority to enact a particular rule, the rule will be unenforceable if a court finds that the agency action was arbitrary, capricious or unreasonable. *U. S. Steel Corp. v. Pollution Control Bd.*, 64 Ill. App. 3d 34, 40, 380 N.E.2d 909, 913 (1st Dist. 1978). The Illinois Supreme Court has found that "courts should not hesitate to intervene" where an agency "has acted arbitrarily or capriciously and thereby abused the discretion vested in it." *Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 497, 524 N.E.2d 561, 577 (1988). An agency action is arbitrary and capricious if the agency:

> (1) relies on factors which the legislature did not intend for the agency to consider; (2) entirely fails to consider an important aspect of the problem; or (3) offers an explanation for its decision which runs counter to the evidence before

> the agency, or which is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 505–06 (finding that an agency failed to consider economic factors, failed to use reasonable procedures in assessing the economic factors, and arbitrarily abandoned a prior policy); *See also Fahey*, 21 Ill. App. 3d at 586, 315 N.E.2d at 578 (finding that the Cook County Police Department Merit Board improperly enacted a rule requiring mandatory retirement at age 60 in violation of a statute that authorized the Board to issue neutral rules to encourage competence in civil servants).

Sudden and unexplained changes by agencies are often considered arbitrary. *Id*.; *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126, 195 L. Ed. 2d 382 (2016). Additionally, agencies must be "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Encino Motorcars, LLC*, 136 S. Ct. at 2126 (invalidating an agency regulation for arbitrariness where there was "decades of industry reliance on the Department's prior policy" and the agency only provided a summary discussion that "fell short of the agency's duty to explain why it deemed it necessary" to change its policy).

Here, the IWCC Rule is arbitrary and capricious because it fails to meet any of the factors set forth in *Greer*.

- The IWCC's Notice expressly states that it was motivated by a desire to "ensure first responders and essential front-line workers . . . are afforded the full protections of the Workers' Compensation Act . . . ." The IWCC's own words demonstrate it is intending to benefit certain claimants. The prioritization of the interests of a particularly sympathetic group of people is noble, but nothing in the legislature's grant of authority to the IWCC gives it the authority to "ensure" certain claimants are successful. Indeed, the IWCC's Handbook states: "As the administrative court system, the Commission must be impartial." IWCC Handbook at p. 3. There is simply no question that the Amendment relies on factors that the General Assembly did not intend for its neutral administrator to consider. This violates the first *Greer* factor.

- The Amendment fails to consider the massive difference between the historical practice of providing Workers' Compensation benefits to injured or ill workers pursuant to statutorily delineated criteria and providing benefits to those merely unable to work due to the current pandemic. Specifically, the Act provides benefits for those who actually contract an occupational disease, whereas the Amendment presumptively offers benefits during a "period of incapacity" resulting from COVID-19 "exposure." Such incapacity could arise when a covered employee is directed to self-quarantine after being exposed to someone, such as a family member, with COVID-19. As a result, the Amendment presumptively requires the payments of benefits to someone who may never contract the virus or never be symptomatic. Furthermore, the costs of providing benefits to those unable to work due to COVID-19 exposure are impossible to predict with precision, but may exceed the $1,220,000,000 paid in indemnity and medical costs in 2018 by workers' compensation insurers affiliated with the National Council on Compensation of Insurance (NCCI), which the Illinois Department of Insurance has designated as the state's licensed rating and statistical organization. Workers Comp Insurance Oversight Report p. 6 (Feb 6, 2020, Illinois DOI);[2] The Coronavirus in America: The Year Ahead, New York Times April 19, 2020 ("April 19 Article") (noting that the daily deaths from Coronavirus from April 7, 2020 to April 18, 2020 exceed the average rate of daily deaths for heart disease and cancer). As a result of all these reasons, it is clear that the IWCC failed to consider an important aspect of the problem in violation of the second *Greer* factor.

- The IWCC's explanation for its decision focuses on a desire to protect the interests of certain front-line workers and first responders, but the scope of the Amendment is far broader. The Amendment incorporates as its definition of "COVID-19 First Responder or Front-Line Worker" *all* of the "Essential Businesses and Operations" defined in Section I, Part 12 of Executive Order 2020-10. This classification of "Essential Businesses and Operations" was drawn to identify workers who are essential to the continuing functioning of critical businesses and operations, and not to define the much narrower class of persons whose COVID-19 exposure was substantially increased by their work function, such as a nurse in an ICU unit treating patients that tested positive for COVID-19. The disconnect between the narrow explanation for the Amendment and the expansive reach of the Amendment reveals that the IWCC's explanation for its decision is implausible and certainly does not arise from the IWCC's expertise in violation of *Greer's* third factor.

In addition to its inability to meet the *Greer* test, the Amendment violates serious reliance interests that have developed around the Act and related common law. Illinois employers and the insurers that underwrote the workers' compensation obligations of those employers structured their affairs around a system that regarded contagious diseases present in the

[2] Accessed on April 20, 2020, at https://insurance.illinois.gov/wcfu/2019PWorkCompReportOversightPartA.pdf.

community as not compensable under the Act. *See, e.g., Allis-Chalmers Mfg. Co. v. Indus. Comm'n*, 33 Ill. 2d 268, 270, 211 N.E.2d 276, 278 (1965) (noting the difference between occupational diseases and community diseases). The Amendment upends decades of settled law regarding occupational diseases under the guise of a mere change in process. The Amendment should not be enforced because it is arbitrary and capricious.

II. The Public Interest in a Viable Workers' Compensation System Would Be Undermined by Enforcement of the Amendment.

As noted by the IWCC in its most recent Annual Report, "[t]he theory behind the law is that the cost of work-related injuries or illnesses should be part of the cost of the product or service." State of Illinois Workers' Compensation Commission Fiscal Year 2018 Annual Report p. 2. This process of internalizing the costs of occupational injury and disease means that the new costs injected by the Amendment would fall directly on Illinois employers, and ultimately Illinois consumers, through the two primary mechanisms used to internalize the obligations of the Act.

In the first instance, this internalization of costs arises from employers bearing exclusive or primary liability under the Act. Approximately 25% of the losses arising from exposures created by the Act are entirely self-insured, IL WC Commission 2017 report, p. 12, and another large portion are insured through policies with large deductibles that render most claims effectively self-insured. Thus, the losses arising from the Amendment's expansion of coverage will fall on many Illinois employers immediately. These employers surely did not plan on this, and their decisions to be self-insured did not include assessment of this risk. No one knows whether the large number of solely or primarily self-insured employers would be able to manage this additional risk, and insolvencies driven by these new costs cannot be ruled out. No one

would be served by Essential Businesses becoming insolvent due to massive and completely uncontemplated workers' compensation costs.

Second, insurers tailor the cost of workers' compensation insurance to the characteristics of an employer as a means of differentiating between those with different risk profiles and incentivizing employers to protect the safety of workers. *See generally ABC's of Experience Rating*, National Council on Compensation Insurance.[3] This tailoring arises primarily from manual rating, which groups employers according to their business operations, and employer-specific "experience rating modifications," which are pricing factors that are based on individual employer experience. *Id.* These mechanisms ensure that the benefits of a safe workplace and the costs of a less safe workplace are appropriately allocated among employers.

This cost tailoring, which was carefully developed over decades, may be rendered useless if Essential Businesses are subjected to substantial new losses. The manual rates do not group employers by whether they are Essential Businesses or have front-line workers. Similarly, the experience rating modification factors have not historically captured exposure to diseases for Essential Businesses with no connection to health care or public protection, such as law firms, gun manufacturers, liquor stores, and construction firms. The new expenses injected into the system from the Amendment will introduce all manner of randomness into manual rates and experience modification factors. The interests of employers, insurers and consumers are all aligned in maintaining the integrity of the mechanisms used to efficiently allocate the costs of the workers' compensation system.

[3] Accessed on April 20, 2020 at https://www.ncci.com/Articles/Documents/UW_ABC_Exp_Rating.pdf.

Moreover, the size of the expenses injected into the system by the Amendment cannot be identified with precision. The unexpected addition of potentially several billion dollars in expenses (as suggested by the New York and California Studies), for which no premium was collected could result in insolvency for some insurers and individual decisions by others over time to leave Illinois' workers' compensation market.

The Amendment does not simply move medical costs from the health care system to the workers' compensation system. Once a claim is found to be compensable, it results in payment of statutory benefits that serve as wage replacement and/or survivorship benefits. Simply put, the costs of creating a broad presumption of compensability for exposure to COVID-19 are unexpected and potentially disastrous to employers and insurers that fund a system that must remain viable beyond the current pandemic for the benefit of future injured workers.

Conclusion

Amici respectfully urge the Court to declare the Amendment to be unenforceable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 22, 2020, Plaintiff's counsel and Defendants' Executive Director and General Counsel were served via email within 30 minutes of filing through the following email addresses:

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EXHIBIT 1

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Potential Cost Impact of the COVID-19 Virus Exposure Compensability Proposal

Given the current rate of transmission of the COVID-19 virus, the Rating Board estimates that the proposal to establish COVID-19 virus exposure as an occupational disease could exceed $31B in costs to the workers' compensation system.

I. Legal Background

The New York State workers' compensation law covers "accidents" and "occupational diseases." An "accident" is generally considered to be an illness or injury that arises from a specific work-related event or exposure over a reasonably defined period of time, whereas an "occupational disease" is an injury or illness that is associated with the nature of the occupation – a condition that many people in a particular line of work are prone to develop. Claims for occupational diseases are afforded longer filing time frames than accident claims. Further, given the nature of occupational diseases, claimants are generally not required to trace their illness to a single specific exposure as they may be required to do for accident claims.

Current case law has developed a reasonably clear set of legal rules for communicable diseases. Those rules generally divide workers into two categories: health care workers, and all other workers. In general, health care workers who contract illnesses may be covered under either an "accident theory" or an "occupational disease" theory whereas all other workers are covered only for "accidental" exposure.

II. Proposal to Establish COVID-19 Virus Exposure as an Occupational Disease

The proposal creates a presumption in law that exposure to the COVID-19 virus is an occupational disease and as such is compensable under New York State Workers' Compensation Law. The categories of workers identified in the proposal that are eligible to make a claim based upon exposure is broad and encompasses much, if not all, of the State's public and private sector workforce. Further, by predicating compensability upon exposure instead of illness, the proposal makes most, if not all workers, eligible for benefits without testing positive for the illness.

III. Rating Board Analysis[1]

The Rating Board's cost impact analysis of the above-described proposal includes the following general assumptions:

(a) According to the New York State Department of Labor's Quarterly Census of Employment and Wages, 3rd Quarter 2019, there are 9.5M private and public sector workers in New York State, of which approximately 1.6M are health care sector workers. Since the COVID-19 virus would likely qualify as an occupational disease for health care sector workers under current law, we have excluded them from this analysis. As such, analysis applies only to the remaining 7.9M non-health care sector workers in New York State.

(b) Governor Cuomo estimated that between 40% and 80% of New York State residents will contract the COVID-19 virus. For the purpose of this analysis, we assumed that 60% of New York State workers – the midpoint of Governor Cuomo's range – will contract the COVID-19 virus.

A. *Temporary Indemnity Benefits*[2]

The table below provides potential temporary indemnity costs resulting from the proposal. Several scenarios are presented with varying percentages of workers receiving benefits and with varying average number of weeks of benefits awarded.

The Rating Board's estimate of the cost of temporary indemnity benefits is predicated on the following assumptions: (i) the State's average temporary indemnity benefit is approximately $600 per week; (ii) Governor Cuomo stated that approximately 15% of those infected will require hospitalization, and the Rating Board estimates that those hospitalized will be out of work for at least 6 weeks; (iii) the remaining 85% of infected workers claiming benefits will be out of work for approximately 2 weeks. Under these assumptions, the estimated total cost of temporary indemnity benefits is $7.4B (= [60% x 7.9M x $600 x 15% x 6] + [60% x 7.9M x $600 x 85% x 2]).

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[1] At present, it is unknown whether benefits created by this proposal will be offset by any other federal or state benefit. In addition, the cost impact estimates contained herein reflect systemwide estimates (*i.e.*, the insured marketplace and self-insureds).

[2] The long-term health impact of the COVID-19 virus is presently unknown. Accordingly, this cost impact analysis focuses only on temporary indemnity benefits, hospitalization costs, and fatality claims. However, claims may also involve payments for long-term health treatment and wage loss related thereto and those losses are not estimated herein.

Estimated Cost of
Temporary Total Indemnity Benefits
($ Billions)

		Average Number of Weeks of Temporary Benefits				
		2	4	6	8	10
Percentage of Workers Receiving Benefits	10%	1.02	2.04	3.06	4.08	5.10
	20%	2.04	4.08	6.12	8.16	10.20
	30%	3.06	6.12	9.18	12.24	15.30
	40%	4.08	8.16	12.24	16.32	20.40
	50%	5.10	10.20	15.30	20.40	25.50
	60%	6.12	12.24	18.36	24.48	30.60
	70%	7.14	14.28	21.42	28.56	35.70
	80%	8.16	16.32	24.48	32.64	40.80
	90%	9.18	18.36	27.54	36.72	45.90
	100%	10.20	20.40	30.60	40.80	51.00

(Shaded region represents Governor Cuomo's predicted infection rate in New York State)

B. *Hospitalization Costs*

The Rating Board's estimate of short-term hospitalization costs are predicated on the following reported statistics: (i) Governor Cuomo stated that approximately 15% of those infected will require hospitalization; (ii) the average hospital stay cost for pneumonia with major complications is approximately $23,000 whereas the average non-ICU hospital stay cost is approximately $11,000; and (iii) 25% of COVID-19 hospitalizations involve ICU stays. Accordingly, the estimated average hospitalization cost for COVID-19 patients is $14,000 (=25% x $23,000 + 75% x $11,000). Under these assumptions, the estimated total cost of hospitalizations is $10.0B (=60% x 7.9M x 15% x $14,000). It bears mention that other medical costs, such as primary care physician visits, have not been included in this analysis.

C. *Fatalities*

The Rating Board's cost estimate of fatality claims related to the COVID-19 virus is predicated on the following assumptions: (i) the average indemnity cost for a fatality claim in New York State is approximately $575,000; and (ii) a mortality rate of .5% for workers identified with the virus, which is less than New York State's current mortality rate of 1% because mortalities have been driven by older individuals. Applying these assumptions together with Governor Cuomo's estimate that 40% to 80% of the State's residents will be infected with the virus, the Rating Board estimates that the cost of fatalities could exceed $13.6B (=60% x 7.9M x .005 x $575,000).

D. *Total Impact*

Combining the estimated costs for temporary indemnity benefits, hospitalizations, and fatalities, the potential cost impact of this proposal could exceed $31B (=$7.4B + $10.0B + $13.6B + other unknown costs, such as the long-term health impact). By way of comparison, current annual losses in the State's workers' compensation system, including both the insured market and self-insureds, is approximately $8.7B.

EXHIBIT 2

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COVID-19

Research Brief | Released April 2020

Cost Evaluation of Potential Conclusive COVID-19 Presumption in California Workers' Compensation

By the WCIRB Actuarial and Research Teams

Summary

The COVID-19 pandemic and resultant stay-at-home orders are significantly impacting California's economic, health care and workers' compensation systems. Some COVID-19 workers' compensation claims have already been filed. However, at this time, it is unclear what proportion of the illnesses and deaths directly resulting from the virus will ultimately be determined to be work-related. Some states have enacted presumptions of COVID-19 claims being work-related for certain front line workers and similar proposals are under discussion in California.

On April 8, 2020, Assemblyman Tom Daly, Chair of the Assembly Insurance Committee, requested the WCIRB to provide an estimate of the potential cost impact of presumptions provided to front line workers in California. Specifically, the WCIRB was requested to provide the cost impact of a conclusive presumption for health care workers, firefighters, EMS and rescue employees, front line law enforcement officers and other essential critical infrastructure (ECI) employees. In response and to provide insight on the potential cost impact of COVID-19 claims on the California workers' compensation system, the WCIRB has completed an initial analysis of these costs.

For purposes of this analysis, the WCIRB assumed that the ECI workers were those identified as "Essential Critical Infrastructure Workers" in Governor Newsom's March 19, 2020 Executive Order N-33-20. The WCIRB segregated these workers into ECI Group 1, which includes health care workers, firefighters, EMS and rescue employees, and front line law enforcement officers and ECI Group 2, which includes all other workers on the Governor's ECI list. In evaluating the impact of a conclusive presumption, we assumed all symptomatic ECI workers with COVID-19 would file a compensable workers' compensation claim. While some ECI workers would file a compensable workers' compensation claim in the absence of a conclusive presumption, we had no basis to estimate this proportion and, as a result, made no estimate of the incremental impact of a conclusive presumption. Also, while it is likely that some non-ECI workers will file compensable workers' compensation claims, estimating the cost impact of such claims was outside the scope of this analysis. Finally, our cost estimates exclude any potential costs for workers who are being quarantined but have not been diagnosed with COVID-19.

The cost estimates in this report are based on WCIRB data including unit statistical reports, aggregate financial data calls and medical transaction data. We also relied upon external data from the American Community Survey[1] (ACS), the Division of Workers' Compensation (DWC) Official Medical Fee Schedule, and a number of published studies on COVID-19 incidence rates and medical treatment patterns and costs. At times, we relied upon judgmental assumptions based on published research or feedback from workers' compensation experts that may or may not materialize. In general, the cost impact of COVID-19 claims will vary significantly based on the number of workers covered by a presumption, the proportion of these workers that have COVID-19 and the number of workers' compensation claims that are filed as a result. Given the current level of uncertainty surrounding these factors, the cost estimates in this Research Brief are presented as a range of potential impacts based on varying assumptions of the number of COVID-19 claims filed. **On this basis, the WCIRB estimates that the annual cost of COVID-19 claims on ECI workers under a conclusive presumption ranges from $2.2 billion to $33.6 billion with an approximate mid-range estimate of $11.2 billion, or 61% of the annual estimated cost of the total workers' compensation system prior to the impact of the pandemic.**

[1] The WCIRB sourced the ACS data from IPUMS-USA, University of Minnesota, www.ipums.org.

Key Findings

Table 1 summarizes the overall potential annual total cost of medical and indemnity benefits and loss adjustment expenses (LAE) on COVID-19 claims arising during 2020 segregated between the WCIRB's two categories of ECI workers. In evaluating the impact of a conclusive presumption, estimates shown in Table 1 reflect the assumption that all ECI workers in the state[2] who have the novel coronavirus and are symptomatic will file a compensable workers' compensation claim for COVID-19.

The total cost estimates shown in Table 1 reflect a high-end illness/claim rate[3] for health care workers and first responders of 60% based on the illness rate of health care workers from Wuhan, China, the initial epicenter of the outbreak.[4] The low-end estimates are based on an illness/claim rate for health care workers and first responders of 4%, which is approximately based on estimates of COVID-19 cases for the first year for the population with commercial health insurance[5] and estimates of infection rates for the working age population in China.[6] Given the greater concentration of exposure to the novel coronavirus for health care workers and first responders and published data on the relative rate of health care workers in China contracting the novel coronavirus,[7] the WCIRB assumed that the rate of COVID-19 claims for ECI Group 1 workers is five times as high as those for ECI Group 2 workers. The estimates in Table 1 range from $1.2 to $18.1 billion in total annualized costs for ECI Group 1 workers and $1.0 to $15.6 billion for ECI Group 2 workers. The approximate mid-range cost estimate for the total system is $11.2 billion ($6.0 billion for ECI Group 1 workers and $5.2 billion for ECI Group 2 workers). This is based on an illness/claim rate of 20% of ECI Group 1 workers and 4% of ECI Group 2 workers.

Table 1: Estimated System Cost of COVID-19 Claims

Health Care Workers and First Responders – ECI Group 1		Other ECI Workers – ECI Group 2		Total System Cost in Billions
Percent of Workers with COVID-19 Claims	Cost in Billions	Percent of Workers with COVID-19 Claims	Cost in Billions	
4%	$1.2	0.8%	$1.0	$2.2
5%	$1.5	1%	$1.3	$2.8
10%	$3.0	2%	$2.6	$5.6
15%	$4.5	3%	$3.9	$8.4
20%	$6.0	4%	$5.2	$11.2
30%	$9.0	6%	$7.8	$16.8
40%	$12.0	8%	$10.4	$22.4
50%	$15.1	10%	$13.0	$28.0
60%	$18.1	12%	$15.6	$33.6

Table 2 summarizes the distribution of the approximate mid-range estimate of $11.2 billion into temporary disability benefits, permanent disability benefits, death benefits, medical costs and loss adjustment expenses. Comparatively, the WCIRB estimates that the total cost of losses and LAE in the California workers' compensation system in 2020, prior to the impact of COVID-19 claims, is $18.3 billion.[8]

[2] This includes all workers in the state including those who are employed by insured, legally self-insured or legally non-insured employers, but excludes those employed by the Federal Government or those who are self-employed. In California, the insured system is approximately two-thirds of the size of the total system.
[3] The high-end estimate is not intended as a "worst case" scenario. Nor is the low-end estimate intended to reflect the "best case" scenario. Instead they reflect the high and low ends of a range of reasonable assumptions based on available published research.
[4] "Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19) Outbreak in China—Summary of a Report of 72 314 Cases From the Chinese Center for Disease Control and Prevention." JAMA. 2020;323(13):1239-1242.
[5] "The Potential National Health Cost Impacts to Consumers, Employers and Insurers Due to the Coronavirus (COVID-19)." Covered California, March 2020.
[6] "Estimates of the severity of coronavirus disease 2019: a model-based analysis." The Lancet Infectious Diseases (2020).
[7] "Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19) Outbreak in China—Summary of a Report of 72 314 Cases From the Chinese Center for Disease Control and Prevention." JAMA. 2020;323(13):1239-1242.
[8] This includes $6.1 billion in indemnity benefits, $7.3 billion in medical benefits and $4.9 billion in LAE.

Table 2: WCIRB Mid-Range Estimate[9] by Cost (in Billions) and Claim Type							
Type of COVID-19 Claim	Number of Claims	Temporary Disability	Permanent Disability	Death	Medical	LAE	Total Cost
Mild (No Hospitalization)	378,300	$0.4	N/A	N/A	$0.1	$0.2	$0.7
Severe (Hospitalization w/o ICU)	70,900	$0.2	N/A	N/A	$3.6	$1.4	$5.2
Critical (Hospitalization w/ ICU, no Death)	20,300	$0.1	$0.1	N/A	$2.6	$1.0	$3.8
Death	3,300	$0.0	N/A	$0.7	$0.4	$0.4	$1.5
All Claim Types	472,900	$0.7	$0.1	$0.7	$6.7	$3.0	$11.2

Methodology and Assumptions

ECI Workers

The WCIRB mapped the occupations and industries exempted in Governor Newsom's March 19, 2020 Executive Order N-33-20 to WCIRB classifications as well as to employment, wage and age of worker information obtained from ACS data. Table 3 summarizes the industries and estimated number of workers included.

Table 3: ECI Worker Estimates		
Worker Type	Category	Affected Workers (in Thousands)
Health Care Workers	ECI Group 1	1,071
Firefighters	ECI Group 1	38
EMS and Rescue Employees	ECI Group 1	22
Law Enforcement Officers	ECI Group 1	132
ECI Group 1 Total		1,262
Other ECI Employees – ECI Group 2		5,510
Total Estimated ECI Workers		6,772

The ACS data suggests approximately 18.8 million workers were employed in California sometime within the last year.[10] Unemployment has increased dramatically during the COVID-19 crisis. For purposes of this study, the WCIRB has not tried to adjust employment counts for this sharp drop in employment, which most likely is greatest in non-ECI industries. The WCIRB estimates that ECI Group 1 consists of approximately 1.3 million workers, or 7% of statewide employment. The WCIRB also estimates that ECI Group 2 consists of approximately 5.5 million workers, or 29% of statewide employment.

The likelihood of hospitalization or death as a result of COVID-19 significantly depends on the age of the individual and their prior health history. The estimates included in this analysis are based on a combined rate of illness and claim filing with the assumption that, in valuing the cost impact of a conclusive presumption for ECI workers, all symptomatic employees with COVID-19 will file a compensable workers' compensation claim. Given the greater concentration of exposure to the novel coronavirus for health care workers and first responders and published data on the relative rate of health care workers in China contracting COVID-19, the WCIRB assumed that the rate of COVID-19 claims for these workers (ECI Group 1) is approximately five times as high as those for other ECI workers (ECI Group 2). Conversely, while some workers' compensation claims will be filed by workers who are not ECI workers, any estimate of this impact was outside the scope of this study. Finally, the WCIRB has based these estimates on an annualized period rather than the Governor's stay-at-home period, which assumes that exposure to the novel coronavirus for the ECI workers and a presumption of compensability will be in effect for the entire year.

[9] The mid-range estimate assumes an illness/claim rate of 20% for ECI Group 1 workers and 4% for ECI Group 2 workers.
[10] Based on 2017 ACS data trended to 2020 using employment growth from the March 2020 UCLA Anderson Forecast for the Nation and California.
[11] "Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19) Outbreak in China—Summary of a Report of 72 314 Cases From the Chinese Center for Disease Control and Prevention." JAMA. 2020;323(13):1239-1242.

Proportion of Illness/Claim Types

Studies of the virus show that a significant proportion of individuals with COVID-19 are completely asymptomatic (ranging from 5% to 80%).[12] Although the asymptomatic cases would be carriers of the virus, the WCIRB assumed that they would not have a workers' compensation claim.

Of those having mild or more severe COVID-19, data from a number of published studies of COVID-19 suggests that the vast majority (approximately 80%) will have mild COVID-19 and fully recover at home without any significant medical treatment.[13] These studies also suggest that approximately 15% of COVID-19 cases are severe and result in some hospitalization but do not require a stay in an intensive care unit (ICU), while 5% are critical and require advanced care including an ICU stay. Of the critical cases of COVID-19, the Chinese CDC estimated approximately 50% result in death, suggesting a death rate of approximately 2.5% of all cases.[14] This figure is generally consistent with the midpoint of death rate estimates from the United States CDC (1.8% to 3.4%).

The information described above is based on the general population. The likelihood of having severe or critical COVID-19 depends heavily on the age and prior health of the individual. The vast majority of people with severe or critical COVID-19 are over the age of 50 and/or have underlying health conditions including hypertension, obesity, chronic lung disease, diabetes and cardiovascular disease.[15] The California worker population is generally younger and likely with fewer underlying health conditions compared to the general population. The proportion of California workers with underlying health conditions is not clear. However, the WCIRB used the distribution of worker ages in the categories of ECI workers based on ACS data to adjust the rates of severe and critical cases of COVID-19 for the worker population.

Table 4 shows the proportion of COVID-19 severity categories and average cost of medical and indemnity benefits estimated by the WCIRB for the ECI workers. The percentage estimates for ECI workers are based on the distribution of ages of these workers from ACS data and the midpoint of hospitalization, ICU and death rate estimates by age interval from the United States CDC.[16] Other than the proportion of death claims, which is significantly lower for affected workers, the age-weighted proportions are generally consistent with those published in other studies. The average loss shown in Table 4 by type of claim is based on the assumptions and estimates discussed below.

Table 4: Estimated Proportion of COVID-19 Claims by Type

Type of COVID-19 Claim	Percent of Claims	Cost of Indemnity and Medical Benefits
Mild (No Hospitalization)	80%	$1,400
Severe (Hospitalization w/o ICU)	15%	$53,400
Critical (Hospitalization w/ ICU, no Death)	4.3%	$137,800
Death	0.7%	$333,300
All Claims	100%	$17,400

[12] The Centre for Evidence-Based Medicine published a list of studies that showed asymptomatic individuals testing positive for COVID-19 ranged from 5% to 80% with the most credible estimates around 20%.
[13] "Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19) Outbreak in China—Summary of a Report of 72 314 Cases From the Chinese Center for Disease Control and Prevention." JAMA. 2020;323(13):1239-1242. As well as estimates from the United States CDC on COVID-19 cases in March.
[14] "Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19) Outbreak in China—Summary of a Report of 72 314 Cases From the Chinese Center for Disease Control and Prevention." JAMA. 2020;323(13):1239-1242.
[15] "Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) — United States, February 12–March 16, 2020." CDC Mortality and Morbidity Weekly Report. March 27, 2020 / 69(12);343-346
[16] "Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) — United States, February 12–March 16, 2020." CDC Mortality and Morbidity Weekly Report. March 27, 2020 / 69(12);343-346

Mild COVID-19 Claims

As shown in Table 4, the WCIRB estimates that 80% of all ECI workers with COVID-19 will not require hospitalization or significant medical treatment. It is unclear whether these workers will file workers' compensation claims to receive temporary disability (TD) benefits or whether they will utilize other benefits for paid sick leave made available by their employer or the Federal Government. However, for purposes of this study, the WCIRB assumed all ECI workers with mild COVID-19 will file a compensable claim for worker's compensation benefits. The CDC recommends that people with mild illnesses who do not require hospitalization stay home for 2 weeks after exposure.[17] Based on the estimated distribution of weekly wages of ECI workers, the WCIRB estimates the average TD benefit to be $620 per week for ECI Group 1 workers and $540 per week for ECI Group 2 workers. This results in an average TD cost for mild COVID-19 claims of $1,200 for ECI Group 1 workers and $1,100 for ECI Group 2 workers.

Although the WCIRB believes the overall medical cost of mild COVID-19 claims to be small, there may be some medical costs related to a test of COVID-19, physician costs (telemedicine) and some medication. In total, the WCIRB estimates an average medical cost of approximately $300 for mild COVID-19 claims based on the DWC Official Medical Fee Schedule and average payments in WCIRB medical transaction data for these types of services.

Severe COVID-19 Claims

As shown in Table 4, the WCIRB estimates that 15% of all ECI workers with COVID-19 will be severe and require some hospitalization but not a stay in an ICU. The diagnosis related groups (DRGs) for treating respiratory infections and inflammations (similar to severe COVID-19) suggest an average hospital stay of approximately 1 week.[18] The WCIRB assumes an average of 1 week from onset of the symptoms to hospital admission. Based on feedback from a number of workers' compensation medical experts, the WCIRB assumed an additional 2-week period for recovery after hospitalization, including approximately 1 week of follow-up medical care. In total, the WCIRB estimates these workers will receive TD benefits for 4 weeks on average. As discussed above, the WCIRB estimates the average TD benefit for the types of workers affected to be $620 per week for ECI Group 1 workers and $540 per week for ECI Group 2 workers. This results in an average TD cost for severe COVID-19 illness claims of $2,500 for ECI Group 1 workers and $2,200 for ECI Group 2 workers.

The WCIRB medical transaction data and the DWC's medical fee schedule for the DRGs for respiratory infections and inflammations suggest approximately $300 for initial physician services, $47,400 for inpatient care and $3,500 for follow-up care. This results in an average $51,200 of medical costs for a severe COVID-19 claim.

Critical COVID-19 Claims

As shown in Table 4, the WCIRB estimates that 4.3% of the ECI workers who have COVID-19 will have critical illnesses that require an ICU stay. The WCIRB assumed the majority of the ICU patients will need ventilator support. The DWC's medical fee schedule for the DRGs for hospitalization that includes ventilator support suggest an average hospital stay of approximately 2 weeks.[19] The WCIRB assumes an average of 1 week from the time symptoms first appear to a hospital admission. Based on feedback from a number of workers' compensation medical experts who suggested that recovery from critical COVID-19 will be significantly longer for critical cases compared to mild or severe cases, the WCIRB assumed an average of an 8-week period for recovery after ICU care, during which these workers are likely to receive 4 to 6 weeks of rehabilitation and follow-up medical care. In total, the WCIRB estimates these workers will receive TD benefits for 11 weeks on average. As discussed above, the WCIRB estimates the average TD benefit for ECI workers to be $620 per week for ECI Group 1 workers and $540 per week for ECI Group 2 workers. This results in an average TD cost for severe COVID-19 claims of $6,800 for ECI Group 1 workers and $5,900 for ECI Group 2 workers.

[17] See CDC guidelines for COVID-19 patients.
[18] DRGs 177, 178 and 179. See CMS's guidance on the DRGs.
[19] DRGs 207 and 208.

The WCIRB consulted a number of workers' compensation claims experts to assess the potential for COVID-19 claims leading to permanent disability (PD) in California's workers' compensation system. Although there was a general consensus among experts that there is potential for PD arising from COVID-19, the likelihood and extent of PD was not clear. In any case, the number of COVID-19 claims with PD are expected to be small. To reflect the potential for PD and the level of uncertainty, based in part on information on PD from similar claims, the WCIRB assumed that 20% of the critical COVID-19 claims will have some form of PD. Based on WCIRB medical transaction data, unit statistical data and anecdotal information from workers' compensation claims experts, the average PD rating for a claim with respiratory issues similar to COVID-19 is estimated to be approximately 20%. Based on this projected rating, the WCIRB estimates an average PD benefit of $22,000 for the critical COVID-19 claims that involve PD.

Similar to the methodology used for estimating the medical cost of a severe COVID-19 claim, the WCIRB used the WCIRB medical transaction data and the DWC's medical fee schedule for severe respiratory infections and inflammations and ventilator support (DRGs 177, 207 and 208) and estimated approximately $300 of initial physician costs, $92,000 of inpatient costs, and $35,000 for rehabilitation and follow-up care for critical cases of COVID-19. This results in an estimated average of $127,300 in medical costs for a critical COVID-19 claim.

Death Claims Arising from COVID-19

As shown in Table 4, the WCIRB assumed a death rate of 0.7% of COVID-19 claims for ECI workers. Based on the historical average cost of death claims in California, the WCIRB estimates the average death benefit in 2020 to be approximately $220,000. The WCIRB assumed an average of 3 weeks of TD benefits on death claims based on the average length of hospitalization for critical COVID-19 claims (approximately 2 weeks) and an average of 1 week from onset of the symptoms to hospitalization. This results in an average TD cost for COVID-19 death claims of $1,900 for ECI Group 1 workers and $1,600 for ECI Group 2 workers. The WCIRB also estimated medical costs for COVID-19 death claims to be $111,600, which is based on the DRGs for ventilator support assumed for the critical COVID-19 claims but using the higher case severity estimate given the advanced stage of these cases.

Loss Adjustment Expenses

Claims arising from COVID-19 will incur claim handling and defense costs as do other workers' compensation claims. At this time, there is no data available to suggest that COVID-19 claims will incur more or less claims administrative costs (unallocated loss adjustment expenses or ULAE) than the typical workers' compensation claim. Similarly, the WCIRB believes that COVID-19 claims will incur medical cost containment program (MCCP) costs similar to the typical workers' compensation claim. The WCIRB's projected ratio of these costs to losses based on insurer experience as of December 31, 2019 is 15.0% for ULAE and 4.3% for MCCP costs.

The WCIRB consulted several workers' compensation claims experts to assess the potential litigation costs for COVID-19 claims. There was a general consensus among experts that there would be some litigation arising from COVID-19 claims, particularly as to whether there was any PD. However, it was not clear whether allocated loss adjustment expense (ALAE) costs related to litigation on COVID-19 claims would be higher or lower on average than the typical workers' compensation claim. As a result, the WCIRB assumed ALAE on COVID-19 claims to be similar to the typical workers' compensation claim. The WCIRB's projected ratio of ALAE to losses based on insurer experience as of December 31, 2019 is 16.8%.

Conditions and Limitations

1. The WCIRB's system cost estimate presumed that all of the ECI workers with symptomatic COVID-19 will file compensable workers' compensation claims. We did not project what proportion of those workers would have filed compensable workers' compensation claims without a legal presumption of compensability. Nor did we try to estimate what proportion of non-ECI workers will file a compensable COVID-19 workers' compensation claim as that estimate was beyond the scope of this evaluation.

2. Some of the data used in the analysis was based on the experience of insured employers only. When needed to estimate the impact for the California workers' compensation system as a whole, the WCIRB assumed the patterns evident in the insured employer experience data were applicable to the entire state.

3. The high-end estimate reflected in this study is not intended as a "worst case" scenario. Nor is the low-end estimate intended to reflect the "best case" scenario. Instead, these estimates reflect the high and low ends of a range of reasonable assumptions based on available published research.

4. The COVID-19 pandemic is a rapidly evolving crisis. WCIRB estimates were based on information available at the time of this study. If subsequent information becomes available that changes the basis of our assumptions, these estimates would of course be affected.

5. This analysis is based on a broad-based presumption of COVID-19 claims being work-related for ECI workers. No specific presumption bill is currently before the California Legislature. If and when a presumption bill is under consideration by the Legislature, the WCIRB will update the estimates in the analysis based on the specific language contained in the bill.

6. Whenever possible, the WCIRB based its system cost estimates on WCIRB and other publicly available data as well as COVID-19 impact estimates by credible research and public health institutes. At times, judgmental assumptions were needed. Actual system cost results could differ significantly from those projected.

7. As discussed in this report, the WCIRB relied upon many publicly available sources of information to determine our assumptions. While we deemed the sources credible for the purposes we used the information, we did not independently validate the underlying information.

This *Research Brief – Cost Evaluation of Potential Conclusive COVID-19 Presumption in California Workers' Compensation* was developed by the Workers' Compensation Insurance Rating Bureau of California (WCIRB) and contains information for a specific period of time and may not reflect long-term trends before or after the specific period addressed in the Research Brief. This Research Brief contains data from a variety of sources, both public and private. The WCIRB has made reasonable efforts to ensure the accuracy of this Research Brief but cannot guarantee the accuracy of all the data or data sources. You must make an independent assessment regarding the use of this Research Brief based upon your particular needs and circumstances