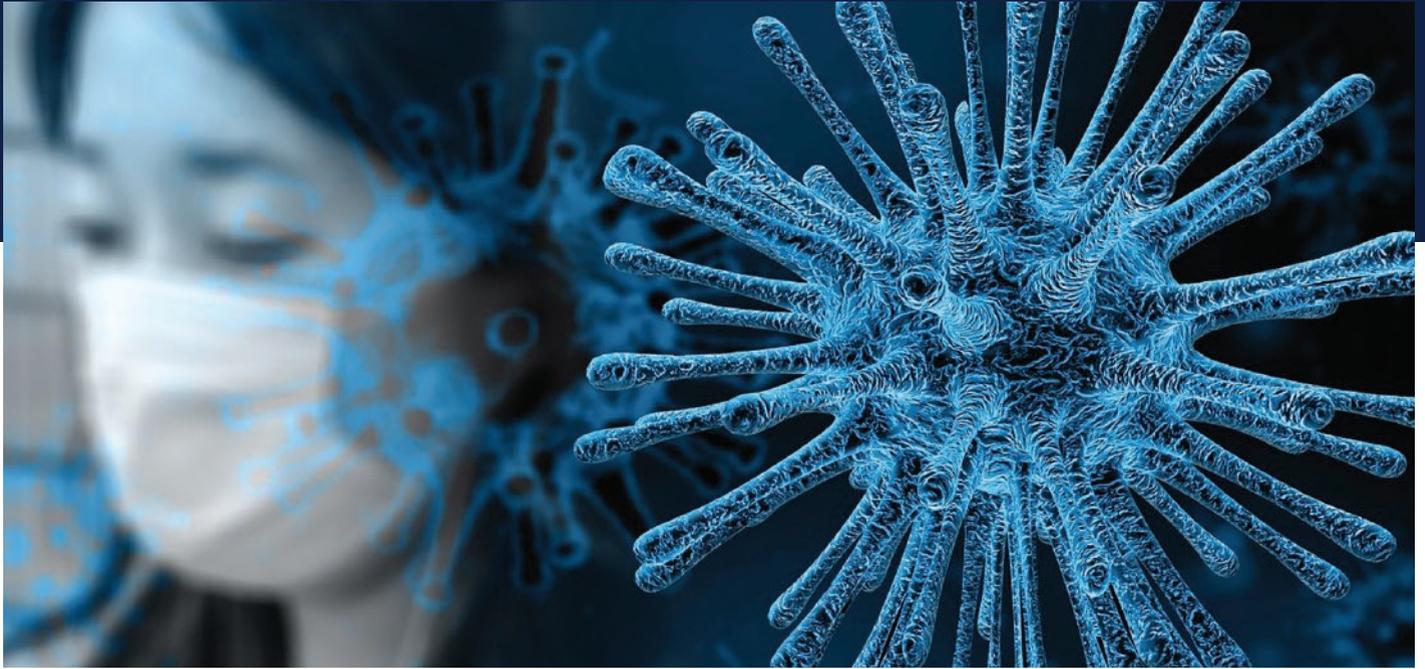


EWC NEWSLETTER

Resources to Help with Your Biggest Challenges, Insights from Industry Experts.



Utilizing Telehealth, COVID-19 and Brain Injury Can Be Treated Simultaneously

**BY KELLY LOPEZ, PUBLIC RELATIONS/COMMUNICATIONS MANAGER
AT CENTRE FOR NEURO SKILLS**

COVID-19 has placed providers and insurers in uncharted waters. Its economic and health impact is profound. COVID-19 related claims have increased exponentially, as payors struggle to manage a tsunami of new cases. Vexing as this is, an added issue has emerged - the spread of COVID-19 while their clients are hospitalized. A patient becoming a vector and infecting others might result in litigation, and there is a risk that a delayed complication may trigger a secondary claim. As well, new revelations indicate that neurological complications may

result from infection. Navigating these waters is the new normal.

Keeping patients safe and preventing permanent disability is paramount. These goals are achievable utilizing telehealth as a rehabilitation platform while adhering to strict safety guidelines in the clinical environment. Pre-admission screening and, when appropriate, testing is another key component, as is tailored rehabilitation focused on neurological symptoms that some patients endure post COVID-19.

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The Impact of the COVID-19 Pandemic on Temporary Disability

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The California Employment Development Department estimated there to be approximately 2.8 million unemployed individuals in California in June 2020. The state unemployment rate significantly increased after Governor Newsom issued Executive Order N-33-20, mandating all individuals to stay at home due to the COVID-19 pandemic unless they are essential critical infrastructure workers. Thousands of non-essential businesses statewide closed or downsized resulting in laying off or furloughing millions of workers.

In consequence, there has been a substantial economic impact on the workers' compensation industry in regards to liability to pay laid off, disabled workers temporary disability benefits. Specifically, a non-essential employer who accommodated a worker's restrictions prior to the stay-at-home order will no longer be able to provide accommodations if the employer closes business and lays off the worker due to the COVID-19 pandemic. Injured workers demand temporary partial disability benefits, the difference between full wages and wages working modified duty, or temporary total disability benefits, total wage loss, based on the inability of closed businesses to offer modified work. In *Manpower Temporary Services v. Workers' Compensation Appeals Board (Rodriguez)*, the Board found that when an injured worker is terminated while on modified duty, the injured worker is entitled to temporary disability benefits post-termination if the employer does not prove that the termination was for "good cause." *Manpower Temporary Services v. Workers' Compensation Appeals Board (Rodriguez)* (2006) 71 Cal. Comp. Cases 1614

(writ denied). Therefore, when an injured worker is terminated for "good cause," he or she is not entitled to receive temporary disability benefits.

Whether or not the injured worker is entitled to temporary partial disability benefits or temporary total disability benefits post-termination depends on the fact pattern. If the defendants do not show modified work within the injured worker's capabilities is available, it is arguable that defendants will be liable for temporary total disability benefits for total wage loss.

When an injured worker on modified duty is laid off, he or she may be entitled to temporary disability indemnity if the non-essential business's closure due to the COVID-19 pandemic is not considered "good cause" for the layoff. The Board in *Rodriguez* found that termination for any reason beyond the injured worker's control is not a termination for "good cause." Injured workers argue that a layoff due to the COVID-19 pandemic is beyond their control and not from an unwillingness to work modified duties. Accordingly, pursuant to the holding in *Rodriguez*, a mass layoff due to the COVID-19 pandemic is arguably not considered "good cause" and injured workers may be entitled to temporary disability benefits.

On the other hand, an employer argues that the laid off worker is not entitled to receive temporary disability benefits on the basis that the injury did not cause the temporary disability pursuant to Labor Code Section 4650. The Board in *Signature Fruit Co. v. Workers' Compensation Appeals Board (Ochoa)* found that "the essential purpose of temporary disability indemnity is to

help replace the wages the employee would have earned, but for the injury, during his or her period(s) of temporary disability." *Signature Fruit Co. v. Workers' Compensation Appeals Board (Ochoa)* (2006) 71 Cal. Comp. Cases 1044. Here, the laid off worker is not losing wages due to the injury but he or she is losing wages as a result of the COVID-19 pandemic.

Pursuant to the reasoning in *Ochoa*, employers argue that they offered modified work prior to the layoff thus the injury was not causing the wage loss. The worker has the capacity to work following the layoff so he or she is not entitled to temporary disability indemnity for wage loss. Many closed businesses believe the remedy for a laid off worker's wage loss is unemployment benefits from the Employment Development Department.

Due to the current novelty of the workers' compensation issues arising from the outbreak of COVID-19, we will have to wait and see how courts rule on the issue of temporary disability following layoff in the absence of any existing case precedent addressing it.



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