A REPORT TO THE INDUSTRY

Integrating COVID-19 Presumptions into the California Workers' Compensation System

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INTRODUCTION

With a recent Executive Order (Order), the COVID-19 societal pandemic has entered the California workers' compensation system with a rebuttable presumption of compensability for much of the workforce. The scope of the presumption is also the topic of debate for pending legislation (Senate Bill 1159, Hill and Daly).

The following report discusses aspects and challenges of integrating the competing COVID-19 presumptions. The report also presents results on 1,077 COVID-19 claims reported in March and April 2020, prior to the Executive Order.

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BACKGROUND

As public policymakers struggle to deal with the issues and repercussions associated with the COVID-19 societal pandemic, efforts are also underway to formally integrate the response to the virus into the workers' compensation system in California and elsewhere. On May 6, California Governor Gavin Newsom issued an Executive Order[1] creating a disputable presumption of compensability for COVID-19 as it relates to California workers directed by their employers to work outside the home.[2] The order applies to work performed on or after March 19, 2020 and unless extended, will remain in place until July 5, 2020. Beyond that, a legislative approach has been proposed in SB 1159 which would create a disputable presumption with an extended timeframe for first responders and "critical" workers, a group that has yet to be specifically defined, but would include public or private sector employees who are working to combat the spread of COVID-19.[3]

The presumption shifts the burden of proof - employees are no longer required to prove the illness is work-related. Instead, the employer must accept the claim unless they can overwhelmingly prove it is not work-related. Although COVID-19 is new to workers' compensation, there are precedents and policies regarding presumptions that should be taken into consideration as we evaluate the likely impacts of modifying the existing legal architecture that addresses compensability and coverage.

This following paper has three objectives:

1. Review the historic role of presumptions in California workers' compensation,
2. Review current and proposed COVID-19 presumptions, and
3. Provide results on early outcomes of pre-presumption COVID-19 compensability decisions.

[1] Executive Order N-62-20: https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf
[2] CWCI's analysis of the Executive Order: https://www.cwci.org/technical_issue.html?id=757
[3] SB 1159: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB1159

Presumptions in California Workers' Compensation

The California workers' compensation system is based on a 100+-year old grand bargain which covers injured workers for illnesses and injuries that are established to be work-related. Over time, workplaces have become demonstrably safer and claim frequency has significantly declined.[4] Nonetheless, specific events, and shifts in public policy have selectively altered the basic framework used to evaluate the compensability of workplace injuries.

One of the shifts in policy has focused on first responders and others who put themselves at extreme risk, over long and sustained periods for society as a whole. Over the decades, the Legislature has enacted targeted presumptions of compensability for public safety workers employed by State and Local governments. In 1975, the Court of Appeal noted in Saal v. Workers' Comp. Appeals Bd.: "Beyond question, these statutes show a purpose of the Legislature to provide additional benefits for certain public employees whose services are both vital to the public interest and hazardous."[5]

COVID-19 is a societal pandemic. The virus can exist almost anywhere and there can be different levels of risk for contracting the virus, particularly in the case of workplace exposures. For the first time, the presumptions in the Order and proposed in SB 1159 and other legislation[6] go well beyond the small cadre of public safety workers at extreme risk for sustained periods, covering a wide range of employees in both the public and private sectors. In the case of the Order, all employees directed to work outside the home by their employer are included, even if their work is technically not authorized under the stay home order.[7] SB 1159 refers to critical employees "in the service of an essential critical infrastructure employer." See Appendix A for a side-by-side comparison of the Order and SB 1159.

As of this writing, there exist several issues to be considered when evaluating the basis for and likely impact of this novel expansion of workers' compensation compensability structures.

[4] https://www.wcirb.com/sites/default/files/documents/2019_state_of_the_system_report.pdf

[5] Saal v. Workers' Comp. Appeals. Bd. (1975) 50 Cal.App.3d 291, 297.

[6] Given the timing of this analysis, we have limited the discussion to the Governor's Executive Order, currently in force, and Senate Bill 1159 (Hill), which passed out of the Senate Labor, Public Employment, and Retirement Committee on May 14. Assembly Bill 196 (Gonzalez) and Assembly Bill 664 (Cooper), as amended, remain in the Senate Labor, Public Employment, and Retirement Committee and no hearing has been scheduled for the Committee to hear those bills.

[7] Executive Order N-33-20: https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf

The Scope of the Presumption

When analyzing the disputable presumptions currently in effect with the Order and as proposed in SB 1159, one of the threshold issues is which classifications of employment are allowed to claim that a COVID-19 related illness is presumptively compensable.

The language of both the Order and SB 1159 imply a greater degree of risk working outside the home, in all instances, than if the workers were subject to the stay home order. However, neither the "place of employment" language used in the Order nor the "critical infrastructure" employer designation included in SB 1159 is a considered examination of the risk as defined by greater exposure to the public, whether in a health care setting or in a retail or other business context.

Guidance for assessing workplace risk can be found in *Preparing Workplaces for COVID-19*,[8] a document distributed by the Occupational Safety and Health Administration (OSHA). As might be expected, various health care workers are at very high or high risk of exposure. However, many other roles covered by the Order and potential legislation are not at high risk:

- **Very High Risk**: Health care workers are at very high risk of exposure to known or expected sources of COVID-19.
- **Medium Risk**: "In areas where there is ongoing community transmission, workers in this category may have contact with the general public (e.g., schools, high-population-density work environments, some high-volume retail settings)."
- **Low Risk**: Includes jobs "that do not require contact with people known to be, or suspected of being, infected with SARS-CoV-2 nor frequent close contact with (*i.e.,* within 6 feet of) the general public. Workers in this category have minimal occupational contact with the public and other coworkers."[9]

All of these risk levels are included in the classes of workers covered by the presumptions in both the Order and SB 1159. By including all types of employment without regard to the level of risk actually posed, the presumptions greatly expand the nature and scope traditionally encompassed by presumptions of compensability in California.

[8] Cal/OSHA Guidance on Requirements to Protect Workers from Coronavirus (https://www.osha.gov/Publications/OSHA3990.pdf)
[9] *Id*., at 19-20.

Emerging from the Stay Home Order

Under the Order, any COVID-19 infection that is verified by testing is assumed to be work-related unless the employer can produce sufficient evidence to the contrary. The difference in the endpoint between the Order (currently effective through July 5) and SB 1159 (currently without an end date) creates a conflict in that the risk of infection outside the workplace will increase after the stay home restrictions are lifted. OSHA provides a process to assess whether the risk is higher in a particular workplace than in other workplaces or generally within the community. A presumption disrupts these processes and effectively places a significant proportion of the societal costs of the pandemic on the workers' compensation system rather than sharing them with group health coverage, Medi-Cal, and other payors.

The effect of a presumption of compensability without regard to classification of employment is to assign a level of occupational hazard that does not necessarily exist for all employments. It also fails to take into account the ongoing efforts to mitigate hazards of working outside the home as California seeks to emerge from the stay home order issued March 19. In the *Resilience Roadmap*[10] developed by the State and announced by Governor Newsom on April 28, when key milestones are reached, more components of the economy will emerge from the stay home order:

- **Stage 1** – March 19th – essential services
- **Stage 2** – Early – add curbside retail and the infrastructure to support it
- **Stage 2** – May 12th – for offices with employees who cannot work from home, limited services, outdoor museums[11]
- **Stage 3** – Additional businesses such as movie theaters, religious services
- **Stage 4** – End of the stay home Order

As the Roadmap progresses, the underlying policy rationale behind a disputable presumption of compensability in all cases for all workers not subject to the stay home order diminishes with the safe re-opening requirements that are part of the Roadmap.[12] In other words, for many employees currently covered by the Order, the additional hazard associated with employment is expected to decline and continue to do so during the life of the Order.

[10] https://www.gov.ca.gov/wp-content/uploads/2020/05/5.4-Report-Card-on-California-Resilience-Roadmap.pdf

[11] https://covid19.ca.gov/stay-home-except-for-essential-needs/#top

[12] See: https://covid19.ca.gov/roadmap/#top The purpose of the Roadmap is to reopen retail, manufacturing, service, and other businesses by modifying the stay home order as certain health metrics are achieved. As of this writing, we are in Stage 2. Stage 4 is the end of the Order. Note the businesses referenced – none of which are in the healthcare sector. This indicates that the Order is already in some respects inconsistent with the Roadmap because of its lack of sensitivity to the risk/mitigation elements for various sectors.

The dual challenge to policymakers addressing the issue of a presumption of compensability of COVID-19 related illnesses is: (1) taking into consideration the specific purpose of presumptions in the California workers' compensation system; and (2) acknowledging that immediate and future actions taken by the State are reducing and will continue to reduce the hazards of work outside the home during these extraordinary times.

Preliminary Outcomes in Claims Adjudication

Before the Order, and while the various legislative proposals were being drafted, claims adjusters began to process COVID-19 claims into the California workers' compensation system as early as January. As of May 1, 2020, the Division of Workers' Compensation (DWC) indicated that approximately 3,000 COVID-19 claims had been reported. There are limited details about how these claims were being reviewed for compensability. In an effort to better understand more about the early stages of claim adjudication, especially as it pertains to AOE/COE issues, the authors developed a survey which was distributed to insurers and self-insured members of the California Workers' Compensation Institute (CWCI).[13] The survey gathered summary information on reported COVID-19 claims filed as of April 30, 2020. The authors processed summary data submitted by 28 organizations, comprised of 16 insurance companies and 12 self-insured organizations that submitted information on a total of 1,077 reported claims.[14] Tables 1 and 2 provide the results showing the status of the COVID-19 claims and the reasons for the compensability decisions.

Table 1. Status of Reported Claims

Accepted	27.7%
Under Investigation	36.9%
Denied	35.5%
Total:	100%

Table 2. Reasons for Denials

Negative results on COVID-19 Test	69.7%
Lack of Exposure at Work	14.5%
Other	15.8%
Total:	100%

[13] CWCI members include insurers that collectively write 81 percent of California workers' compensation direct written premium, as well as many of the largest public and private self-insured employers in the state that together had a combined annual payroll of $72.1B (approximately 31.7% of the state's total annual self-insured payroll.).

[14] The 16 insurance companies responding to the survey represent approximately 55 percent of all California workers' compensation written premium. Payroll associated with the self-insured survey participants totaled approximately $41 billion, or approximately 17 percent of the state's self-insured payroll.

Table 1 shows that 28 percent of the 1,077 claims in the sample had been accepted by the claims administrators. As of May 1, 2020, nearly 37 percent of the sample were under investigation, indicating that the claims administrators were still gathering test information and other documents prior to accepting or denying the claims. Survey respondents reported that in many of these cases, medical treatment had been provided as California employers are liable for up to $10,000 in medical care until a claim is either accepted or denied.[15] The balance of the claims in the sample (35.5 percent) were denied.

The survey also revealed some confusion over when and whether to report a suspected COVID-19 illness, as some respondents reported instances where claims were filed for groups of workers without symptoms or positive tests because a co-worker had reported symptoms. This is also reflected in the reasons cited for the claim denials in the sample. In nearly 70 percent of the denied cases, the claimant had tested negative for COVID-19, indicating that they were not infected with the virus. Lack of exposure to the virus at work was the basis for 14.5 percent of the COVID-19 claim denials, while nearly 16 percent of the denials were based on "other" reasons, including no diagnosis, lack of symptoms, working from home, and the worker's refusal to take a COVID-19 test.

The full survey and summarized results are available in Appendix B.

DISCUSSION

A central tenet of the workers' compensation system is that the cause of an injury or illness must be work-related. Inserting presumptions disrupts the normal process of determining whether the injury is related to employment. Governor Newsom's May 6 Executive Order covers a limited period when there is a disparity of risk between those sheltered in place versus those who have more public contact. However, legislation such as SB 1159 that would extend the presumptions beyond this period increases the burden of proof to employers to the extent that much of the societal pandemic of COVID-19 would be placed on the California workers' compensation system rather than shared among traditional payors such as group health, Medi-Cal, and federal programs.

That said, even before the Order was signed, and while the ongoing debate over additional presumptions of coverage continues, the California workers' compensation system was already evaluating and adjudicating compensability consistent with the Order. Time will tell whether the EO helps injured

[15] Lab. C. §5402 (c).

workers, or simply adds complication and the potential for litigation by creating exceptions to existing regulations and the Labor Code. The survey found that 35 percent of the claims in the study sample were denied, but 7 out of 10 workers whose claims were denied tested negative for the virus, with the balance of the denials made after it was found that the employee had not been exposed at work, or for other reasons including the lack of a diagnosis, lack of symptoms, or that the employee had been working at home or refused to take a COVID-19 test. The survey also revealed some confusion among employers over when and whether to report a suspected COVID-19 illness, as some respondents reported instances where claims were filed for groups of workers without symptoms or positive tests because a co-worker had reported symptoms. Before the Order, claims adjusters had up to 90 days to review compensability while still providing up to $10,000 in medical care treatment and evaluation. Although the Order shortened that 90-day determination period to 30 days, on average, claims reported in the survey had been open less than 30 days, so more than one-third of the claims were still under investigation – a process made all the more challenging by the scarcity of available COVID-19 tests during this period.

There is much more to learn about the COVID-19 virus. Public policy must be carefully crafted to balance the need to protect and indemnify the workforce without compromising those aspects of the system that already fairly determine compensability and timely delivery of benefits to all of California's injured workforce.

Appendix A: Comparison of SB 1159 and Executive Order N-62-20

Subject	SB 1159 (Hill)	Executive Order N-62-20
Nature of Presumption	Disputable **[Proposed Labor Code § 3212.86(d)]**	Disputable **(Order, Paragraph 2.)**
Employments Covered	"Critical Worker" is one who directly interacts with or previously directly interacted with the public during the COVID-19 pandemic. **[Proposed Labor Code § 3212.86(a)]**, *and* The injury develops or occurs during a period in which a critical worker is in the service of an essential critical infrastructure employer **[Proposed Labor Code § 3212.86(b)(1)]** "Critical Worker" is also defined as a public sector or private sector employee who is employed to combat the spread of COVID-19. It is the intent of the Legislature that this group of workers be explicitly identified in order to ensure that they receive all necessary health care through the workers' compensation system. **[Proposed Labor Code § 3212.86 (e)(2)]**	The presumption applies to an "employee" who tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction. **(Order, Paragraph 1.a.)**
Commencement Date	Not specified.	Labor performed at the place of employment and at the employer's direction as referenced in the definition of an employee who tested positive or is diagnosed with COVID-19 must be on or after March 19, 2020. This is the date of the stay home Executive Order No. N-33-20. **(Order, Paragraph 1.b.)**[16]
Ending Date (Sunset)	Unspecified but a sunset is considered in **proposed Labor Code § 3212.86(f)**	"This presumption shall only apply to DOI occurring through 60 days following the date of this Order." **(Order, Paragraph 2.)**[17]

[16] The March 19 retroactive date applies to exposure and not to the test/diagnosis.

[17] The Executive Order says the presumption only applies for 60 days. What about the rest of the Order? If everything is linked to those who fall into Paragraph 1 then the entire Order would expire on July 5. But the Order only specifically mentions the presumption. It is unclear if the rest of the infrastructure of the Order remains in place indefinitely as claims falling with the presumptions are run off – such as the TD offsets and who certifies TD.

Subject	SB 1159 (Hill)	Executive Order N-62-20
Conditions Covered by Presumption	COVID-19 **[Proposed Labor Code § 3212.86(b)]**	COVID-19-related illness - extending to psychiatric injuries or conditions affecting other body systems **(Order, Paragraph 1.)**
Medical Evidence Required for Presumption to Apply	Positive Lab Test[18] *or* Diagnosis by critical worker's physician based on the employee's symptoms.[19] **[Proposed Labor Code § 3212.86(b)(2)]**	Positive Lab Test *or* Diagnosis by a physician who holds a physician and surgeon license issued by the California Medical Board *and* that diagnosis is confirmed by further testing within 30 days of the date of the diagnosis. **(Order, Paragraph 1.d.)**[20]
Investigation Time	Not Addressed	Changes the investigation time from 90 days (Labor Code § 5402) to 30 days. If not denied within 30 days, injury is presumed compensable unless rebutted by evidence only discovered subsequent to the 30-day period. **(Order, Paragraph 3.)**
Temporary Disability Rules for Employees Subject to the Presumption	Not specifically addressed, but **proposed Labor Code § 3212.86(b)(3)** states that the "injury" (COVID-19) must result in hospitalization or significant lost time beyond the critical worker's work shift at the time of injury of at least ____ days due to the illness."	Before entitlement to TD indemnity (or §4850 time) kicks in, injured workers must first exhaust all eligibility for paid sick leave benefits specifically available in response to COVID-19[21]; however, there is no waiting period applicable once entitlement to TD begins. **(Order, Paragraph 5 and 6.)**
Applicability of Other Labor Code Provisions	**Proposed Labor Code § 3212.86(c)** states: "The compensation that is awarded for injury pursuant to this section shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division."	Eligible for all benefits applicable under the workers' compensation laws of this state, including full hospital, surgical, medical treatment, disability indemnity, and death benefits, and shall be subject to those laws including Labor Code sections 4663 and 4664[22], except as otherwise provided in this Order. **(Order, Paragraph 4.)** Suspends the collection of death benefits by the DIR where there are no dependents, as set forth in Labor Code § 4706.5, for claims covered by the Order. **(Order, Paragraph 9.)**

[18] Requirements for viral and/or antibody tests will require clarification (https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/testing.html)

[19] Will require clarification as to the type of COVID-19 test and who can administer the test.

[20] Bypasses MPN and other rules relating to medical control under workers' compensation.

[21] This tracks with similar language in the FFCRA (https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave) and implementing regulations from the United States Department of Labor. See: 29 CFR § 826.160.

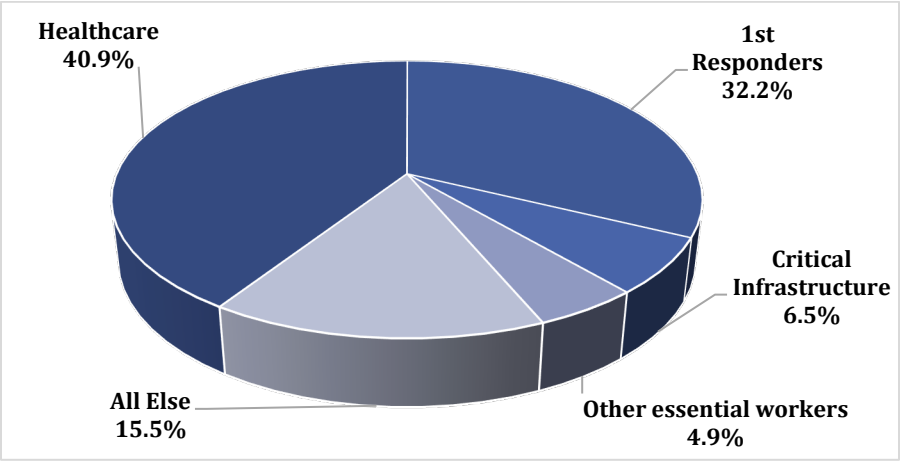
[22] Labor Code Sections 4663 and 4664 relate to apportionment.

Subject	SB 1159 (Hill)	Executive Order N-62-20
Rule Making Authority	Not Addressed	Gives the Division of Workers' Compensation authority to adopt regulations to implement the Order generally without following the rule making process. **(Order, Paragraph 7.)**
Applicability to All Payors	Not Addressed	The Order applies to all payors, but also states, "Nothing in this Order shall be construed to limit the existing authority of insurance carriers to adjust the costs of their policies." **(Order, Paragraph 8.)**
General Applicability Provisions	Not Addressed	The Order ends by stating: Nothing in this Order shall be construed to modify or suspend any workers' compensation statute or regulation not in conflict with this Order, or to reduce or eliminate any other right or benefit to which an employee is otherwise entitled under law, including the Families First Coronavirus Recovery Act, collective bargaining agreement, or Employee Benefit Plan, including group health insurance, that is in effect prior to March 19, 2020. **(Order, following Paragraph 9)**

Appendix B: Claims Adjudication Survey Questions and Findings

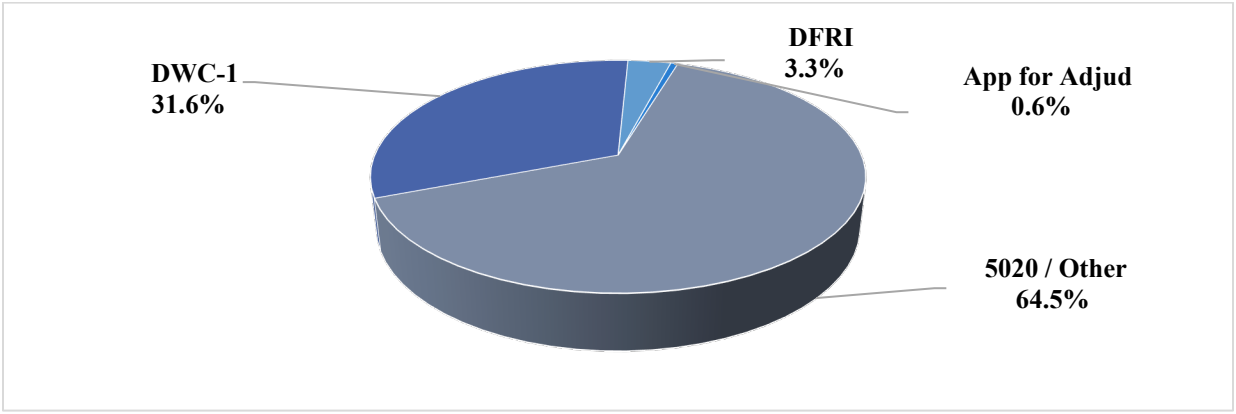
1. Employee Occupation[23]

Almost 41 percent of the of the COVID-19 claim sample originated from the health care provider sector, while first responders accounted for nearly one-third of the claims. Critical infrastructure workers (*e.g.,* grocery and transportation workers) and other essential workers (*e.g.*, individuals employed in banking and auto repair) comprised 11.4 percent of the sample, with the other 15.5 percent coming from other employment sectors.



2. Method of First Knowledge

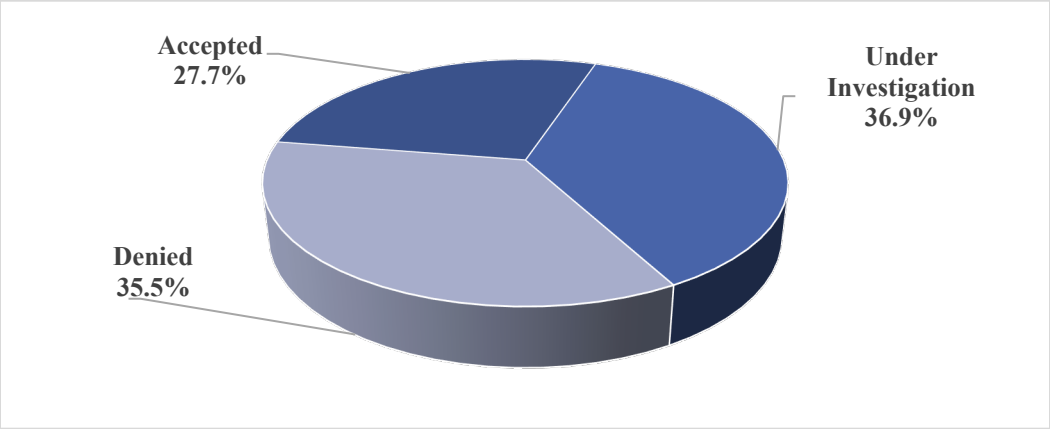
Survey respondents noted that in just under ⅔ of the COVID-19 claims their first knowledge of the claim came from an Employer's First Report of Injury (Form 5020), which California law requires be filed within 5 days of every occupational injury or illness that either results in lost time beyond the date of the incident or requires medical treatment beyond first aid. A DWC-1 claim form, which employers must file within one working day of receipt from the injured worker, provided the claims administrator's first knowledge in nearly 32 percent of the COVID-19 cases. A Doctor's First Report of Injury served as the method of first knowledge in 3 percent of the COVID-19 claims, and in less than 1 percent of the COVID-19 cases the claims administrator first became aware of the claim through an Application for Adjudication of Injury.



[23] Employee occupations were consistent with Governor Newsom's March 19, 2020 Executive Order.

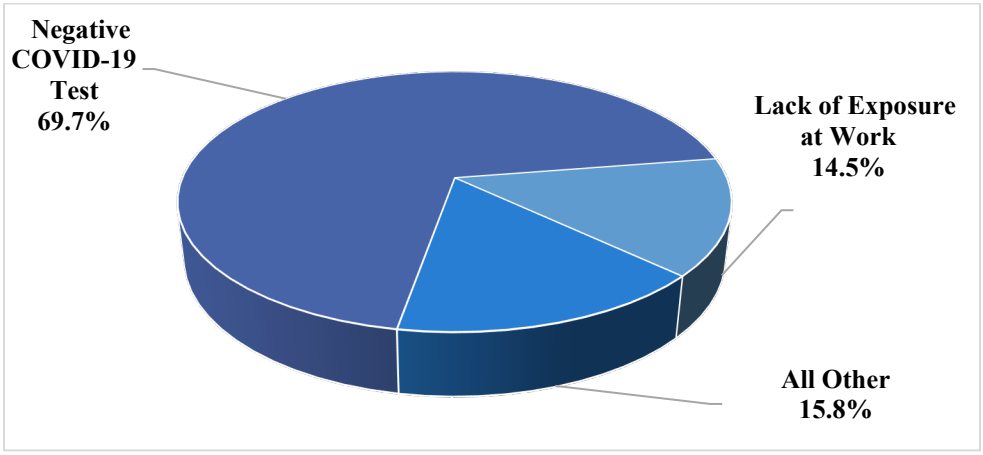
3. Status of Reported Claims

Approximately 28 percent of the claim sample had been accepted by the claims administrator. Nearly 37 percent were under investigation, indicating that the claims administrator was still gathering test information and other documents prior to accepting or denying the reported claim. Survey respondents reported that in many of these cases, medical treatment had been provided as California employers are liable for up to $10,000 in medical care until a claim is either accepted or denied. The balance of the claims in the sample (35.5 percent) were denied.



4. Reasons for Denial

In nearly 70 percent of the denied cases, the claims administrator denied the claim because the worker tested negative for COVID-19, indicating that they were not infected with the virus. Lack of exposure to the virus at work was given as the rationale in 14.5 percent of the COVID-19 claim denials, while almost 16 percent of the denials were based on "other" reasons, which included no diagnosis, lack of symptoms, working from home, and refusal to take a COVID-19 test.



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California Workers' Compensation Institute

The California Workers' Compensation Institute (CWCI), incorporated in 1964, is a private, nonprofit membership organization of insurers and self-insured employers. CWCI conducts and communicates research and analyses to improve California's workers' compensation system. CWCI members include insurers that collectively write 81 percent of California's workers' compensation direct written premium, as well as many of the largest public and private self-insured employers in the state. Additional information about CWCI research and activities is available on the Institute's website, www.cwci.org.