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HIV as an Occupational Disease: Expanding Traditional Workers' Compensation Coverage

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I. INTRODUCTION: THE AIDS EPIDEMIC

Since the acquired immunodeficiency syndrome ("AIDS") was first identified in 1981,[1] this disease has had far-reaching social and economic consequences across the country. One of the most profound effects of the AIDS epidemic can be seen in the public health care system. While infection control measures have long been in place to reduce transmission of the disease in the health care setting, in the years following the initial discovery of AIDS, health care workers ("HCWs") were particularly concerned about the possibility of contracting the lethal disease from their patients. Furthermore, although the risk of transmission of the human immunodeficiency virus ("HIV")—the retrovirus that causes AIDS[2]—from a patient to a HCW proved exceptionally low,[3] HCWs questioned how those workers who *had* contracted the disease in a health care setting would be compensated for their injuries. Over time, HIV has come to be recognized as an occupational disease under workers' compensation statutes when contracted in the health care setting.[4] However, it remains difficult for infected workers to prove that their contraction of the disease resulted from the performance of their jobs. Moreover, even when these employees do successfully prove causation, workers' compensation coverage has generally proved to be inadequate.[5]

In addition to the problems encountered when HIV is contracted by those employees within the health care system, the dilemma of providing benefits to workers with occupationally transmitted HIV seems to be reemerging in new employment settings. Questions have now surfaced as to whether the scope of workers' compensation laws should be extended to employees outside the health care field who have contracted HIV in the workplace. A Connecticut court recently held in *Doe v. Department of Corrections* that a corrections officer who contracted the disease as a result of his work with a prison's emergency response unit was entitled to workers'

1. *Prevention of Acquired Immune Deficiency Syndrome (AIDS): Report of Inter-Agency Recommendations*, 32 MORBIDITY & MORTALITY WEEKLY REP. 101 (Mar. 4, 1983).

2. *See* GERALD J. STINE, ACQUIRED IMMUNE DEFICIENCY SYNDROME 35 (1993). The terms are generally used interchangeably throughout this Note.

3. CENTERS FOR DISEASE CONTROL AND PREVENTION, HIV/AIDS SURVEILLANCE REPORT, 14 CASES OF HIV INFECTION AND AIDS IN THE UNITED STATES 30 (2002), *available at* http://www.cdc.gov/hiv/stats/hasr1402.htm.

4. Larry Gostin, *Hospitals, Health Care Professionals, and AIDS: The "Right to Know" the Health Status of Professionals and Patients*, 48 MD. L. REV. 12, 12 (1989).

5. Patti M. Tereskerz & Janine Jagger, *Occupationally Acquired HIV: The Vulnerability of Health Care Workers under Workers' Compensation Laws*, 87 AM. J. PUB. HEALTH 1558, 1559–60 (1997).

compensation benefits.[6] The court reached this decision even though, statistically, a worker's risk of being infected with HIV as a member of the emergency response unit was found to be minimal.[7] The court's holding seems reasonable given that the facts of this case closely resemble the circumstances surrounding many of the occurrences of HIV transmission in health care settings. Nonetheless, the court narrowly tailored its decision to confer occupational disease status only in those cases where specific criteria are met.[8]

The *Department of Corrections* decision sheds light not only on the current state of workers' compensation coverage for HIV-infected workers outside the health care field, but also on the need for greater state legislative action to define the scope of occupationally transmitted HIV coverage. In response to lawsuits seeking workers' compensation benefits for occupationally transmitted HIV, some states have enacted statutes that specifically address the conferral of benefits to workers who contract HIV within the scope of their employment.[9] However, these statutes are generally limited to employees in certain professions and fail to provide an overarching rule concerning the transmission of HIV in the workplace.[10] Thus, it may be important for state legislatures to consider ways to modify their statutes to explicitly expand or contract the rights of workers who have contracted HIV in the workplace.

In modifying their workers' compensation statutes, states should consider providing more extensive coverage to workers with HIV. Currently, due to limitations in state compensation systems, such as statutory time hars within which an employee must discover the illness, many HIV-infected employees are not able to recover workers' compensation coverage.[11] Even in cases where benefits are recovered, the amount of compensation is usually insufficient to cover the large expenses associated with occupational diseases. Furthermore, "coverage is especially weak for diseases that result in

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6. Estate of Doe v. Dep't of Corr., 848 A.2d 378, 380 (Conn. 2004).

7. *Id.* at 393–94.

8. The court held that HIV was an occupational disease in this case because the contraction of HIV was a "distinct" and "peculiar" incident of the decedent's position with the emergency response unit, such that "there [was] a direct causal connection between the duties of the employment and the disease contracted." *Id.* at 381–82.

9. *See* Paul Barron, *State Statutes Dealing with HIV and AIDS: A Comprehensive State-by-State Summary*, 13 LAW & SEXUALITY 1 (2004) (summarizing HIV and AIDS related legislation in the 50 states).

10. *Id.* The survey describes changes in state laws relating to HIV/AIDS and includes information regarding employment law. For example, Alabama changed its law to allow firefighters exposed to HIV on the job to receive workers' compensation. *Id.* at 6.

11. *See infra* Part II.B (discussing statute of limitations).

death."[12] For example, it is estimated that between "nine and forty-two health care workers per million die annually from occupational infection"[13] due, in part, to these gaps in workers' compensation coverage. Thus, the workers' compensation system must be altered to allow for increased coverage in light of the unique circumstances that accompany infectious diseases, such as HIV.

The *Doe* decision and certain newly-enacted state statutes bring to surface both old and new issues regarding workers' compensation coverage for HIV-infected HCWs and the expansion of this coverage to workers in other professions. How will the *Doe* criteria affect occupational disease coverage for workers in other professions with health risks? Will state guidelines help or hinder the broadening of the scope of recovery for occupational diseases under workers' compensation? This Note offers guidance for interpreting the term "occupational disease" and argues that states should expand the scope of workers' compensation statutes to provide greater coverage to those employees who have contracted HIV in the workplace. Part II of this Note explores the history of the workers' compensation system as it relates to occupational diseases, as well as the development of state guidelines explicitly addressing occupationally transmitted HIV. Part III surveys the difficulties inherent in applying workers' compensation standards to HIV cases. Part IV offers direction to states in formulating new workers' compensation statutes to encompass the needs of workers with occupationally transmitted HIV, while also avoiding compensation claims where the disease is highly unlikely to have derived from an occupational risk. For example, states should lengthen statutes of limitations requirements which put a strict time limit on occupational disease claims, while also conferring a statutory presumption of causation to the narrow set of workers who are regularly exposed to HIV. States could limit additional occupational disease claims by requiring employees outside of this subset to adhere to rigorous reporting and testing requirements. Part IV further provides alternative methods of compensation for workers with occupationally transmitted HIV and suggests steps that employers and employees should take to limit occupational hazards and compensation claims in light of several recent cases and new state occupational disease guidelines.

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

13. Kent A. Sepkowitz & Leon Eisenberg, *Occupational Deaths among Healthcare Workers*, 11 EMERGING INFECTIOUS DISEASES 1003, 1005 (July 2005), *available at* http://www.cdc.gov/ncidod/EID/vol11no07/04-1038.htm.

II. THE WORKERS' COMPENSATION SYSTEM

A. The "Injury by Accident" Requirement Under Workers' Compensation

Workers' compensation is a state statutory system designed to offer medical and financial benefits to workers who are injured in the scope of their employment. The authority to create and operate the workers' compensation system lies at the state level;[14] there is no analogous federal system of compensation.[15] Although each state has its own compensation laws, most state statutory provisions are substantially similar and can be discussed in terms of general principles.[16]

All state compensation statutes set forth coverage formulas which provide that workers are automatically entitled to benefits in cases of "personal injury or death *by accident* arising out of and in the course of employment."[17] An employee whose injury falls within this definition is assured compensation regardless of who is at fault for the injury.[18] This feature sets workers' compensation apart from the tort liability scheme in which plaintiffs must prove fault.[19] Thus, workers' compensation provides a faster and easier method for injured workers to recover costs as compared to the rigors of proving tort liability. Consequently, the system also provides advantages for the employer. In exchange for a no-fault liability system, the injured employee is awarded only enough compensation to prevent destitution.[20] Furthermore, for injuries covered by workers' compensation statutes, benefits are the exclusive remedy against the employer,[21] and the employer obtains immunity from future litigation once the workers' compensation requirements are met.[22] Though there are several judicially-created exceptions to the exclusive remedy doctrine, such as

14. JEFFREY V. NACKLEY, PRIMER ON WORKERS' COMPENSATION 1 (2d ed. 1989).

15. *Id.* However, the federal government does provide coverage for maritime workers on United States waters and to employees of the United States government. *Id.*

16. *Id.* at 2.

17. JACK B. HOOD ET AL., WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS 59 (3d ed. 1999) (emphasis added).

18. Joan T.A. Gabel et al., *The New Relationship Between Injured Worker and Employer: An Opportunity for Restructuring the System*, 35 AM. BUS. L.J. 403, 407 (1998).

19. 1 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION § 1 (1995).

20. *Id.* § 1.03(5).

21. *Id.* § 1.01.

22. Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 407 (1988).

case law which permits workers to also sue in tort,[23] workers' compensation generally operates as a system of *quid pro quo*.

The "accidental injury" requirement under workers' compensation schemes is one of the most important factors in determining whether an injury is compensable. An accident is generally described as "a tangible happening of a traumatic nature from an unexpected cause resulting in either external or internal physical harm."[24] States originally construed the term "accident" to exclude non-traditional occupational injuries.[25] However, most courts now interpret the term "accident" to encompass a wider range of injuries, and a number of states have even eliminated the accidental injury requirement altogether.[26]

In those states that still retain the accidental injury requirement, several elements must be established to prove that an accidental injury is compensable. The most basic element of any "accidental" injury is the unexpectedness or unusualness of the injury.[27] The injury must be "an unlooked for and untoward event which is not expected or designed by the injured employee."[28] The unexpectedness or unusualness of the injury can refer to the cause of the injury or an unusual result of an employment practice, depending on the state's laws.[29] For instance, something as simple as a butcher lifting a particularly heavy piece of meat which leads to a back injury could be considered an unusual cause of injury.[30] An unusual result

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23. *See* Gabel et al., *supra* note 18, at 409–14 (discussing judicially created exceptions for intentional torts, employers acting as third parties, and bad faith).

24. Kelly Corbett, *Multiple Chemical Sensitivity Syndrome: Occupational Disease or Work-Related Accident?*, 24 B.C. ENVTL. AFF. L. REV. 395, 404 (1997). Many states include a specific definition of the phrase "by accident" in their workers' compensation statutes. These statutory definitions vary to some extent, but generally confer a similar meaning. For instance, Nebraska defines an "accident" as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of injury." NEB. REV. STAT. §§ 48-151 (2006). Some states do not explicitly define "accidental," but incorporate the accident concept into their definitions of "injury." For example, the Montana statute defines "injury" as "an unexpected traumatic incident or unusual strain resulting in either external or internal physical harm." MONT. CODE ANN. § 39-71-119 (2006). Nevada defines "injury" as "a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result." NEV. REV. STAT. § 616A.265 (2006). Whether defining "accident" or "injury," these definitions all include the elements of unexpectedness and production of a tangible harm.

25. HOOD, *supra* note 17, at 81–82.

26. *See* 2 LARSON & LARSON, *supra* note 19, § 42.01 n.1 (noting that California, Colorado, Iowa, Maine, Massachusetts, Michigan, Minnesota, Pennsylvania, Rhode Island, and South Dakota omit the accidental injury requirement).

27. *Id.* § 42.02.

28. Daniels v. Swofford, 286 S.E.2d 582, 584 (N.C. App. 1982) (quoting Harding v. Thomas & Howard Co., 124 S.E.2d 109, 110–11 (N.C. 1962)).

29. 2 LARSON & LARSON, *supra* note 19, § 44.01.

30. *Id.* § 44.03.

could be a bookkeeper having a heart attack after walking up the stairs to his office.[31] Additionally, many jurisdictions require that the accident be sudden and attributable to a definite time and place.[32] Though the unexpectedness and definiteness elements provide a basic framework by which to identify the traditional industrial accident, problems arise when attempting to apply these elements to instances of disease transmission in the workplace.

B. Occupational Diseases

The inclusion of "diseases," as opposed to injuries, within the framework of workers' compensation has long been a complicated matter for state legislatures. Similarly, courts have been hesitant to award compensation for occupational diseases. Early compensation statutes did not contain provisions for occupational disease coverage.[33] Since diseases were not generally conceived of as health conditions that could be acquired via occupational "accidents," states justified this exclusion of diseases by narrowly interpreting the definition of "injury by accident" in state coverage formulas.[34] Furthermore, states believed that private health insurance companies should exclusively cover the treatment of diseases.[35]

States have only recently accepted the inclusion of occupational diseases in the definition of compensable injuries under workers' compensation. This delayed acceptance is due in part to the two-element accidental injury test adopted by many states. Though the definitions of "unusual" and "definite" vary depending on each state's guidelines, occupational diseases traditionally did not satisfy either element.[36]

In the 1920s, states began to integrate occupational diseases into workers' compensation law by viewing the contraction of a disease as an "accident" that involved the transmission of bacteria through scratches.[37] For diseases contracted this way, states considered the skin abrasion itself as the accidental occurrence. By interpreting disease as an accident that involved physical injury, occupational diseases could more easily satisfy the two tests of unusualness and

31. *Id.* § 44.01.
32. *Id.* § 42.02.
33. HOOD, *supra* note 17, at 81–82.
34. *Id.*
35. *Id.* at 78.
36. 2 LARSON & LARSON, *supra* note 19, § 42.02.
37. *Id.* § 51.02.

definiteness.[38] Under this view, courts were finally able to apply the two-element inquiry to find workers' compensation coverage for disease. "Unusualness could be based on the 'abnormality' of the method of entry," and definiteness of time was based on when the scratch was obtained. "This notion of 'definite' was easier to grasp than when illness was the result of gradual absorption or inhalation of germs over an extended period."[39]

Eventually, states eliminated the requirement of an actual physical scratch and began to view the "germ invasion itself" as the traumatic episode.[40] By thus classifying the transmission of disease as an accident, states enabled diseased workers to fulfill the "injury by accident" requirement of workers' compensation statutes. States characterized the "injury" as the progression of the disease resulting from the accident.[41] Even though the "injury" may have taken time to develop, diseased workers still satisfied the statutory mandate,[42] and the accidental character of infectious diseases could not be "lost [simply] by calling the consequential results a disease."[43]

Each state has now addressed the issue of occupational diseases explicitly in its workers' compensation statutes. Unlike statutory provisions defining accidents, modern occupational disease provisions no longer require that a disease be unexpected, unintended or sudden.[44] A common statutory definition of occupational disease is the following: "a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment, and shall exclude all ordinary diseases of life to which the general public are exposed."[45] With legislative recognition of occupational diseases came the elimination of the

38. *Id.*

39. *Id.*

40. *Id.* § 51.03.

41. *Id.*

42. *Id.*

43. Victory Sparkler & Specialty Co. v. Francks, 128 A. 635, 639 (Md. 1925). However, it is important to note that by grouping diseases under the definition of "accident," states did not take into account the unique characteristics of diseases, such as latency periods. *See* Estate of Doe v. Dep't of Corr., 848 A.2d 378, 380 (Conn. 2004) (debating whether HIV should be considered an accidental injury with a one-year statute of limitations or an occupational disease with a three-year statute of limitations).

44. 2 LARSON & LARSON, *supra* note 19, § 44.01. *See* WARREN FREEDMAN, THE LAW AND OCCUPATIONAL INJURY, DISEASE, AND DEATH 3 (1990) (distinguishing between statutory definitions of "accident" and "occupational disease").

45. 3 LARSON & LARSON, *supra* note 19, § 52.03(2) (quoting NEB. REV. STAT. § 48.151(3) (1995)).

barrier to recovery that separated occupational diseases and accidents into two distinct categories.[46]

An essential element of contemporary occupational disease provisions is the requirement that a plaintiff prove a causal connection between the injury and employment.[47] Most statutes require that the disease be "due to causes and conditions which are characteristic of and peculiar to" the worker's occupation.[48] This generally means that "the disease must be so distinctively associated with the employee's occupation that there is a direct causal connection between the duties of the employment and the disease contracted."[49] Furthermore, to meet the "peculiarity" requirement, the claimant's occupation must have substantially contributed to the progression of the disease[50] or put the claimant at an increased risk of contracting the disease.[51]

Where there is no concrete evidence of causation, courts must rely on circumstantial evidence to determine whether there was exposure to the disease sufficient to satisfy the causation requirement.[52] The exact standards for causation differ from state to state, but all courts require a substantial connection between the worker's occupation and the transmission of disease. This strict causation requirement means that employees who suffer from occupational diseases will generally have a more difficult time establishing a successful workers' compensation claim than those who suffer accidents in the workplace.[53]

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46. *See Estate of Doe*, 848 A.2d at 385 (noting that the national trend is to define "occupational disease" broadly to include "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased decree by comparison with employment generally" (internal quotations omitted)).

47. 3 LARSON & LARSON, *supra* note 19, § 51.06.

48. *Id.* § 52.03[1].

49. Russell v. Camden Cmty. Hosp., 359 A.2d 607, 612 (Me. 1976).

50. *See* Matthews v. City of Raleigh, 586 S.E.2d 829, 834 (N.C. Ct. App. 2003).

51. *See* Biasetti v. City of Stamford, 735 A.2d 321, 325–26 (Conn. 1999). The disease, however, does not have to be unique to the employee's occupation. *Id.* at 326.

52. *See* Esposito v. N.Y.S. Willowbrook State Sch., 362 N.Y.S.2d 54, 55 (N.Y. App. Div. 1974) (holding that there was substantial evidence of a causal connection based on a doctor's testimony that the claimant likely contracted hepatitis during his employment at a school for retarded children because several children carried the infection in their stool and it was transmitted in this manner . . . [and] the children dirtied themselves with vomit and stool which claimant had to clean off the dishes and the chairs on which they sat"); Booker v. Duke Med. Ctr., 256 S.E.2d 189, 200 (N.C. 1979) ("In the case of occupational diseases proof of a causal connection between the disease and the employee's occupation must of necessity be based on circumstantial evidence.").

53. *See* Troyen A. Brennan, *Ensuring Adequate Health Care for the Sick: The Challenge of the Acquired Immunodeficiency Syndrome as an Occupational Disease*, 1988 DUKE L.J. 29, 58–59

The requirement that the claimant's disease be peculiar to his or her occupation may be hard to satisfy because the exact causes of occupational diseases are often difficult to diagnose.[54] For example, an employee's activities outside the workplace may place her at as great a risk for transmission of certain diseases as do her occupational activities. Furthermore, it may be difficult to find evidence proving that the employee acquired the disease in the course of employment given the latency periods associated with many occupational diseases.[55] Failure to file an incident report with the employer after each occurrence that could potentially cause transmission of disease to the employee may exacerbate the difficulty of proving causation. Claimants may also find it hard to comply with their state's statute of limitations when filing a disability claim due to the length of time over which a disease might develop.[56] Each of these factors creates a substantial obstacle for injured claimants trying to meet the statutory requirements for occupational disease recovery.

C. A Comparable Illness: Hepatitis as an Occupational Disease

Occupational disease provisions and judicial interpretation of these provisions pre-date the discovery of HIV. Thus, previous lawsuits involving the contraction of hepatitis, a disease transmitted in the same way as HIV, may help determine the future of occupationally transmitted HIV in workers' compensation cases.[57] Decisions regarding whether the hepatitis virus satisfies the definition of an occupational disease have varied depending on the exact statutory language used in various jurisdictions. However, *Booker v. Duke Medical Center*, a North Carolina Supreme Court case, presents a starting point for judicial interpretation of the term "occupational disease" in the hepatitis context.[58] In *Booker*, the court held that a decedent's illness, caused by regular occupational exposure to hepatitis, qualified as an occupational disease under workers'

(discussing how occupational disease causation is more difficult for workers' compensation boards to process).

54. W. Kip Viscusi, *Structuring an Effective Occupational Disease Policy: Victim Compensation and Risk Regulation*, 2 YALE J. ON REG. 53, 63 (1984).

55. *Id.*

56. *See id.* ("In a few states, the period during which claims must be filed starts at the time of the 'accident.' In cases involving latent injuries, some courts have interpreted 'accident' to mean the initiating incident . . . rather than the onset of the disability. In such states, the statute of limitations may run before the worker realizes that he is the victim of a compensable injury.").

57. *See* Brennan, *supra* note 53, at 61 ("Hepatitis is an especially good analogy to AIDS because the transmission of this disease is biologically similar to HIV transmission.").

58. 256 S.E.2d 189 (N.C. 1979).

compensation.[59] The decedent worked as a laboratory technician and came into contact with hepatitis-infected blood daily while testing blood samples.[60] He eventually contracted the disease and died from it.[61] In a workers' compensation suit brought by his survivors, the court reasoned that diseases contracted in the scope of employment should be considered occupational diseases so long as they are due to causes which are peculiar to employment and are not simply ordinary diseases of life.[62] Additionally, the court found that the decedent's illness could be classified as an occupational disease regardless of the fact that it might also be considered an "injury by accident."[63] As a result of the classification of the decedent's illness as an occupational disease, the court did not require proof of a causal relationship between a *specific* exposure to the disease and the resulting illness.[64]

The *Booker* court did, however, list several key factors for courts to consider in determining whether a causal relationship exists between the disease and the worker's occupation.[65] These factors included: "(1) the extent of exposure to the disease or disease-causing agents during employment; (2) the extent of exposure outside employment; and (3) the absence of the disease prior to the work-related exposure as shown by the employee's medical history."[66] Using this list of factors, the *Booker* court ultimately reinstated the decedent's workers' compensation award, finding that his contraction of hepatitis satisfied the definition of occupational disease,[67] and that a causal link was established between his employment and transmission of the disease.[68]

In some states, a claimant may be entitled to a rebuttable presumption as to the causation element if her occupation presents a

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59. *Id.* at 201–03.

60. *Id.* at 199.

61. *Id.* at 205.

62. *Id.* at 198. The requirement that the disease is not an "ordinary disease of life" does not mean that the disease must originate "exclusively from the employment. [It] means that the conditions of the employment must result in a hazard which distinguishes it in character from employment generally." *Id.* at 199–200 (quoting Ritter v. Hawkeye-Security Ins. Co., 135 N.W.2d 470, 472 (Neb. 1965)).

63. *Booker*, 256 S.E.2d at 198. The court rejected the appellate court's reasoning that "[b]ecause serum hepatitis is not a disease which develops gradually through prolonged exposure to harmful conditions but instead is an illness caused by a single exposure to a virus, . . . it [is] not compensable as an occupational disease." *Id.* at 197.

64. *Id.* at 197–98.

65. *Id.* at 200.

66. *Id.* These factors indicate courts are willing to consider circumstantial evidence in determining whether a disease is contracted in the scope of employment.

67. *Id.*

68. *Id.* at 201.

hazard of contracting the specific occupational disease in question.[69] For example, in *City of Wilkes-Barre v. Workmen's Compensation Appeal Board*, the Pennsylvania Supreme Court found that a firefighter who died of heart disease was in an occupation where heart disease was a hazard inherent to his employment.[70] Thus, the decedent was entitled to the presumption of causation available under Pennsylvania's Workers' Compensation Act due to the increased risk for exposure to the disease as a result of his occupation.[71]

Other states, however, are not as permissive in granting occupational disease claimants a presumption as to causation. For example, in *Carroll v. Town of Ayden* a North Carolina court of appeals implied that if an employee's occupation itself does not present an increased risk, there can be no such presumption.[72] Moreover, in North Carolina, the presumption may be overcome, or the claimant may fail to sustain the burden of proof, if the claimant is exposed to outside risk factors for the disease prior to or concurrent with employment.[73] In the case of hepatitis, for example, previous blood transfusions, needle-sticks, or tattoos may raise questions regarding causation.[74] Consequently, if there is an outside risk of contracting a disease, a plaintiff must provide sufficient medical evidence to prove causation.[75]

D. HIV Coverage Under Workers' Compensation Statutes

The manner in which HIV is transmitted presents unique problems in determining whether to classify the virus as an accidental injury or an occupational disease under workers' compensation schemes.[76] Although HIV is unquestionably a "disease," the

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69. *E.g.*, City of Wilkes-Barre v. Workmen's Comp. Appeal Bd., 664 A.2d 90, 92 (Pa. 1995) (discussing Pennsylvania's statutory presumption).

70. *Id.*

71. *Id.*

72. *See* Carroll v. Town of Ayden, 586 S.E.2d 822, 826 (N.C. Ct. App. 2003) (finding that contact with raw sewage did not put employee at greater risk for contracting hepatitis).

73. *See* Crabb v. Bishop Clarkson Mem'l Hosp., No. A-95-029, 1995 Neb. App. LEXIS 272, at *13 (Neb. Ct. App. Aug. 22, 1995) (denying compensation on grounds that the plaintiff "had risk factors for hepatitis C exposure and infection that predated her employment with" the defendant).

74. *Id.* at *13.

75. *See id.* at *12 (requiring plaintiff to provide expert medical testimony to prove the causal connection between her needle-stick and her contraction of hepatitis C because "the nature and effect of [her] injury [were] not plainly apparent").

76. *See* Booker v. Duke Med. Ctr., 256 S.E.2d 189, 198 (N.C. 1979) (holding that decedent's illness could be classified as an occupational disease regardless of the fact that it might also be considered an "injury by accident").

transmission of HIV may also be considered an "accidental injury" if there is a definite place and time of exposure.[77] A claimant will have no problem pursuing workers' compensation benefits for HIV transmission as an accidental injury if the worker knows exactly when and where the infectious transmission occurred.[78] However, difficulties may arise when there is a long latency period between the initial contraction of the disease and the appearance of symptoms,[79] or when the worker is constantly exposed to the disease and is unable to determine the exact moment of transmission.[80] Under these circumstances, the claimant will likely not have enough evidence to prove that the disease was the result of a single accidental injury; thus she will be forced to rely on occupational disease coverage. Moreover, even if the claimant is able to identify a specific moment of transmission, her claim may be barred by the state's statute of limitations on accidental injury claims, but not by the statute of limitations on occupational disease claims.[81] Thus, it is essential to understand how accidental injury and occupational disease claims interact in the HIV context, and what types of evidence courts look for in determining occupational disease coverage in HIV cases.

When an employee is exposed to HIV in the workplace, but does not actually contract the disease, the incident is considered an accidental injury under workers' compensation. The employee may recover limited benefits for the exposure, such as the costs of testing for the disease, but it is unlikely that extended benefits will be recovered since there was no actual transmission. In *Doe v. City of Stamford*, the Connecticut Supreme Court considered the limits of compensation for HIV exposure when there was no actual transmission of the disease in a non-health care setting.[82] The court held in this case that a police officer who was exposed to HIV after indirect contact with a criminal suspect's bodily fluids[83] was entitled

77. Barren River Dist. Health Dep't v. Hussey, No. 1998-CA-001387-WC, 2000 Ky. App. LEXIS 39, at *7 (Ky. Ct. App. Apr. 14, 2000).

78. *See* 2 LARSON & LARSON, *supra* note 19, § 42.02 (holding that to qualify as "accidental," an injury "must be traceable, within reasonable limits, to a definite time, place, and occasion or cause").

79. Given that an AIDS screening will not immediately test positive, the worker may encounter problems *proving* a definite time and place of exposure for accidental injury compensation even when he seeks immediate medical attention after possible exposure to the disease.

80. *See, e.g.*, *Booker*, 256 S.E.2d at 201 (noting that decedent was exposed to hepatitis-infected blood on a daily basis).

81. *See, e.g.*, Estate of Doe v. Dep't of Corr., 848 A.2d at 380 (Conn. 2004) (discussing the expiration of the statute of limitations for accidental injuries, but not for occupational diseases).

82. 699 A.2d 52, 53 (Conn. 1997).

83. *Id.*

to limited workers' compensation after testing negative for the disease.[84] The court found that *exposure* to HIV could, in itself, be a compensable "accidental injury" under the state's workers' compensation statute if the contact resulted in the need for medical treatment.[85] As a result, the officer was awarded compensation based on the costs of pursuing medical treatment and monitoring following his exposure to the disease.[86]

Several other state courts have agreed that the risk of infection of HIV is an injury under workers' compensation. For example, the Oregon Court of Appeals in *K-Mart v. Evenson* stated that a showing of actual harm was "not necessarily required to prove the existence of a 'compensable injury'" in a case where a store manager was exposed to, but did not contract, HIV.[87] The Oregon statute defined a compensable injury as one requiring medical attention or resulting in disability.[88] Thus, if an employee is exposed to a disease such as HIV and requires medical services simply because of the exposure, the injury is likely to be found compensable as a traditional accidental injury.[89]

When an employee actually contracts HIV after exposure to the disease in an occupational setting, courts have relied on the reasoning employed in the hepatitis cases (especially with respect to causation) to determine whether the claimant is entitled to occupational disease coverage.[90] In *Barren River District Health Department v. Hussey*, for example, a Kentucky appellate court ruled that, under the facts of the case, HIV was an occupational disease because the nature of the decedent's job put her at a greater risk for transmission than a "member of the general public."[91] The decedent worked as a registered nurse, and her family believed that she had acquired the disease from

84. *Id.* at 53–54.

85. *Id.* at 56–57.

86. *Id.* at 57.

87. 1 P.3d 477, 478–79 (Ore. App. 2000).

88. *Id.*

89. *See id.* at 480; *see also* Arkansas Dept. of Correction v. Holybee, 878 S.W.2d 420, 420 (1994) (finding that the injury is the bite and risk of infection where a correction officer was bitten by an HIV positive prisoner); Jackson Twp. Volunteer Fire Co. v. Workman's Comp. Appeals Bd. (Wallet), 594 A.2d 826, 827–28 (holding that a fireman's occupational exposure to AIDS was an "injury").

90. *See, e.g., Booker v. Duke Medical Center*, 256 S.E.2d 189, 200 (N.C. 1979) (listing factors, such as the extent of exposure to the disease at work, that should be considered in determining whether a causal connection exists between the disease and the claimant's occupation when there is an absence of specific evidence of a occupational transmission).

91. No. 1998-CA-001387-WC, 2000 Ky. App. LEXIS 39, at *12–13 (Ky. Ct. App. Apr. 14, 2000).

a needle-stick after drawing blood from an infected patient.[92] However, there was no evidence of a specific episode of transmission, such as a reported needle-stick injury in the employer's records, which could be used to recover benefits under an accidental injury standard.[93] Nonetheless, the decedent did work predominantly with HIV patients as part of her occupation.[94] The court held that the decedent's estate had satisfied the causation requirement for occupational disease compensation because the decedent's job as a nurse required interaction with HIV patients, putting her at an increased risk of transmission of the disease.[95] In making its decision, the court distinguished between "mere exposure to a general health care work environment and a work environment known to have within it patients who are HIV infected."[96] Thus, the court did not extend its reasoning to HCWs in general because it found no conclusive evidence that all HCWs were at a greater risk for contraction of HIV than the general population.[97]

In *Artiste v. Kingsbrook Jewish Medical Center,* a New York court supported the *Barren River* court's rejection of presumptive occupational disease coverage for HCWs.[98] In *Artiste*, the court denied a nurse's aide's occupational disease claim for the transmission of HIV because there was no evidence that exposure to blood or blood products was a "generally recognized risk" of her occupation.[99] The evidence presented to the court explained that nurse's aides are primarily responsible for changing linens and attending to patients' personal needs; they are not, like nurses, responsible for injecting patients with medications.[100] Accordingly, the court came to its ruling by examining the hazards inherent in being a nurse's aide,[101] concluding that the risk of transmission of HIV is not a "natural incident" of being a nurse's aide, nor is it a hazard unique to the occupation.[102] Thus, the *Artiste* court set limits on occupational

92. *Id.* at *1-3.

93. The exact occurrence of transmission of the disease was unknown because there was "no report in [the decedent's] file regarding an incident that exposed her to the disease, and statements made to witnesses [were] vague and inconsistent as to when the needle stick occurred." *Id.* at *8.

94. *Id.* at *2.

95. *Id.* at *13.

96. *Id.* at *19.

97. *Id.* at *13.

98. Artiste v. Kingsbrook Jewish Med. Ctr., 221 A.D.2d 81, 84 (N.Y. App. Div. 1996).

99. *Id.*

100. *Id.* at 83–84.

101. *Id.* at 84.

102. *Id.* at 83–84.

disease coverage for HCWs based on a claimant's general employment status in the medical setting and the worker's corresponding job responsibilities.[103] The court's reasoning would tend to deny workers' compensation benefits for any nurse's aide who contracted HIV, even if there was strong, but indefinite, evidence of occupational transmission.[104]

Not all courts are as limited in the extension of the "generally recognized risk" test for causation in occupationally transmitted HIV cases as precedent might suggest. For example, the Connecticut Supreme Court recently employed a more lenient definition of "occupational disease" to extend occupational disease coverage to an HIV-infected prison employee. In *Estate of Doe v. Department of Corrections*, a correction officer contracted HIV as a result of his contact with an inmate's bodily fluids in the course of his employment with the facility's emergency response unit.[105] Because the one-year statute of limitations for accidental injuries had expired, the decedent's estate argued that HIV transmission was an occupational disease as opposed to an accidental injury.[106] The court agreed, holding that the transmission of HIV was an occupational disease because the decedent's job position entailed a greater risk of transmission of the disease than did other kinds of employment.[107] While corrections officers in general may not be considered at greater risk for transmission than the general population, the decedent's position on the emergency response team put him in "physical contact with the inmates, often in situations where blood and other bodily fluids that transmit[ted] HIV [were] present."[108] The court found the risk increased because HIV is "unusually prevalent" in the United States prison population.[109] Thus, the court determined that there was proximate causation between the decedent's employment and the transmission of HIV, concluding that compensation was warranted.[110]

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103. *Id.*

104. The transmission may be compensated as an "accidental injury" if there is a *definite* place and time of exposure. However, if the evidence of transmission is strong, but indefinite, and the infectious transmission is not a "generally recognized risk" of the claimant's occupation, the claimant may not be able to recover under either an accidental injury or an occupational disease theory.

105. 848 A.2d 378, 380 (2004).

106. *Id.* at 380.

107. *Id.* at 384.

108. *Id.* at 385.

109. *Id.* at 384.

110. *Id.* at 382. It should be noted, however, that the court's decision is limited to other employees whose occupational duties put them at a similarly increased risk for infection. *Id.* at 384–85.

E. State Legislative Responses

The line of case law dealing with occupationally transmitted HIV prompted several state legislatures to enact specific provisions under their workers' compensation statutes regarding HIV. Many of these provisions give presumptive compensation only to workers in the specific occupations listed in the state's statute. For example, the Alabama statute unambiguously states that firefighters who contract HIV in the scope of employment are entitled to disability benefits.[111] New York has very precise statutes which provide that emergency medical technicians and correctional officers who contract HIV in the scope of employment "will be presumed to have contracted such disease as a natural and proximate result of an accidental injury" at work.[112] The Virginia statute's list of qualified occupations similarly includes firefighters, paramedics, emergency medical technicians, police officers, and sheriffs.[113] Members of these occupations who are exposed to HIV on the job and contract the disease are presumed to have contracted HIV as a result of employment and automatically qualify for occupational disease coverage under workers' compensation.[114]

Other states have chosen a different approach and look to the date on which the injury is reported to determine whether the workers' compensation scheme applies. The Kentucky statute, for instance, notes that compensation stemming from occupational exposure to HIV is barred unless notice of injurious exposure is given as soon as practicable after the exposure.[115] The Texas statute requires employees claiming occupationally transmitted HIV to provide the employer with a sworn affidavit of the date and circumstances of the exposure and to document that, not later than ten days after the date of exposure, the employee had a test result that indicated an absence of HIV infection.[116]

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111. ALA. CODE § 11-43-144 (2006).

112. N.Y. GEN MUN. LAW §§ 207-o, 207-n (2006).

113. VA. CODE ANN. § 65.2-402.1 (2006). However, Virginia also requires that these employees file for workers' compensation "within two years after a positive HIV test." VA. CODE ANN. § 65.2-406.

114. VA. CODE ANN. § 65.2-402.1 (2006).

115. *See* KY. REV. STAT. ANN. § 342.185 (2006):

> The right to compensation under this chapter resulting from work-related exposure to the human immunodeficiency virus shall be barred unless notice of the injurious exposure is given in accordance with subsection (1) of this section and unless an application for adjustment of claim for compensation shall have been made with the executive director within five (5) years after the injurious exposure to the virus.

116. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.050 (2006) (stating that "not later than the 10th day after the date of the exposure, the employee had a test result that indicated an absence

Another statutory device for determining when a worker with HIV has a compensable occupational disease is to impose time prohibitions on reporting incidents of exposure in conjunction with mandatory testing for the disease. Nevada considers HIV to be a compensable occupational disease if: (1) the worker was exposed to HIV or AIDS during the course and scope of his employment; (2) the employee reported the exposure to his employer in compliance with reporting requirements;[117] and (3) the employee is screened for HIV and tests positive within a certain timeframe.[118] The employee is barred from collecting benefits if he refuses to undergo the required tests or if the employer proves that the contraction of HIV did not occur in the occupational setting.[119]

The various state statutes mentioned above illustrate that some state legislatures have given careful consideration to the scope of HIV as an occupational disease. However, there are many more states that need guidance in the development of occupationally transmitted HIV statutes in order to prevent frivolous claims as well as to provide protection to workers in hazardous occupations. States may choose to give presumptive coverage to a certain class of workers, impose time limits and procedural requirements on reporting, employ mandatory testing, or utilize some combination of these methods. Regardless of the method chosen, the adoption of new state compensation restrictions in the HIV context will lessen confusion as to the distribution of workers' compensation rights and put certain employees on notice about the procedural steps that they must take in order to secure these rights.

III. THE DIFFICULTY OF APPLYING WORKERS' COMPENSATION AND TORTS STANDARDS TO OCCUPATIONALLY TRANSMITTED HIV CASES

A. Limitations on Obtaining Occupational Disease Coverage

A significant portion of the costs associated with occupational diseases are not covered by most state workers' compensation statutes. Approximately 269,500 new cases of occupational illness

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of the reportable disease, including HIV infection"). A negative test result within 10 days indicates that the employee was HIV negative at the time of the occupational exposure.

117. NEV. REV. STAT. ANN § 617.481 (2006).

118. *Id.*

119. *Id.*

were reported in the private sector in 2003.[120] However, the actual incidence of occupational disease is even greater because this figure excludes the largely underreported occurrences of illnesses that develop over long periods of time, such as HIV.[121] Thus, some victims of latent occupational diseases may never recover for their injuries. Moreover, even when workers do prove their occupational disease claims, occupational disease awards account for a surprisingly small part of the funds paid out under workers' compensation. Some estimate that workers' compensation pays, at most, 20 percent of the costs associated with occupational diseases.[122] The effect of this low payout is that most of the costs not covered by workers' compensation are shifted to the employee, his family, Medicaid, Medicare, and private insurers.[123] These facts raise the question: why does the incidence of occupational illness remain high, while the amount that victims are compensated decreases?

In an efficient world, market forces would prevent low payouts to occupational disease claimants by dictating "efficient levels of health hazards and equitable compensation for diseased workers."[124] Health hazards are at an "efficient level" when the cost of implementing new safety measures is offset by the "social value of [the] precaution."[125] Employers would be prompted to take extra precautions when the cost of the measure is less than the resulting reduction in risk premiums.[126] Maximum efficiency also hinges on the ability of workers to demand appropriate wage premiums and insurance coverage depending on the risk involved in the occupation.[127]

In reality, however, we do not live in an efficient world, and workplace conditions almost never lead to the most efficient result for occupational disease prevention and compensation. A majority of workers do not fully understand the risks associated with their occupation and do not have the financial freedom to shop around for

120. Press Release, Bureau of Labor Statistics, Workplace Injuries and Illnesses in 2003 (Dec. 14, 2004).

121. *Id.*

122. Leigh & Robbins, *supra* note 12, at 709.

123. *Id.* at 710.

124. Viscusi, *supra* note 54, at 56.

125. *Id.*

126. *Id.* at 57.

127. *Id.*; Thomas O. McGarity & Sidney A. Shapiro, *OSHA's Critics and Regulatory Reform*, 31 WAKE FOREST L. REV. 587, 605 (1996) ("A wage premium is the extra compensation that an employer must pay for hazardous work to keep an employee from taking less risky alternative employment.").

optimal employment.[128] This leads workers to demand lower premiums and coverage than they otherwise would.[129] As a result, employers have less economic "incentive to reduce workplace health hazards" than they would if employees were "fully cognizant of the risks of occupational disease."[130] Thus, workplace injuries become more frequent. The ensuing market failure creates a need for government intervention to achieve the most socially desirable result.

In the early 1970s, the failure of the market-driven system forced the federal government to take affirmative steps in dealing with the occupational disease dilemma. The federal government passed the Occupational Safety and Health Act of 1970 ("OSHA") which was aimed at ensuring that the nation's workers had "safe and healthful working conditions."[131] This statute and the rules promulgated under OSHA, however, have failed to meet the expectations of many regarding safety and cost-effectiveness. As of 1995, OSHA's mandatory safety standards cost approximately $11 billion per year, but resulted in only $3.6 billion worth of benefits each year from the prevention of deaths and injuries.[132] Likewise, studies show that OSHA's inspection and deterrence efforts have had only minimal effects on the reduction of workplace injuries.[133]

The dual failure of the market-force paradigm and OSHA's policies to improve workplace safety and decrease the number of occupational injuries has left the workers' compensation system overwhelmed with injury and illness claims. The aggregate financial impact of these claims could pose problems for the states and employers who pay the claims. Thus, states employ a number of mechanisms, such as statute of limitations restrictions, in their workers' compensation systems to limit the number of claimants who actually receive compensation.

States use the causation requirement in the definition of occupational disease and the statute of limitations restrictions to limit the number of occupational disease claims that may be filed.[134] A causal link between the disease and the claimant's employment may be difficult to prove if the disease is not traditionally associated with

128. *See* Thomas A. Lambert, *Avoiding Regulatory Mismatch in the Workplace: An Informal Approach to Workplace Safety Regulation*, 82 NEB. L. REV. 1006, 1025 (2004) ("[P]rospective employees are not privy to, and cannot easily obtain, the accident and injury data necessary to determine the relative safety risks presented at a workplace.").

129. Viscusi, *supra* note 54, at 59.

130. *Id.*

131. Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (2006).

132. Lambert, *supra* note 128, at 1010.

133. *Id.* at 1011.

134. *See supra* Part II.B.

the claimant's occupation or if the claimant has engaged in outside behavior that also puts him at risk for the disease. Moreover, the purpose of a statute of limitations is to put a time restriction on occupational disease recovery, so that claimants who do not file before a certain deadline lose their compensation recovery rights. The lengthiness of workers' compensation proceedings also operates to reduce individual compensation awards. In fact, employees often settle injury and illness claims for less than they are worth because they cannot afford to wait for the outcome of these proceedings.[135] Further compounding the problem is the fact that most employers are not held liable for occupational illness coverage under workers' compensation.[136] "Employers are six times more likely to contest a disease claim than an accident claim."[137] Additionally, some state statutes limit the scope of occupational disease coverage to specified occupations or illnesses,[138] and a number of courts have narrowly interpreted the definition of "occupational disease" so as to exclude coverage.[139]

As a result of these factors, occupational disease awards account for a mere 2 to 3 percent of workers' compensation payments,[140] and only around 5 percent of occupational disease claimants receive compensation.[141] Furthermore, the workers' compensation system does not provide any benefits for between 91 and 99 percent of all the deaths that epidemiological estimates attribute to occupational disease.[142] These statistics are staggering and provide a clear picture of the crisis faced by victims of occupational diseases. A significant majority of sick workers will never obtain the assistance

135. McGarity & Shapiro, *supra* note 127, at 607.

136. *Id.* at 599.

137. Viscusi, *supra* note 54, at 64.

138. *See supra* Part II.E. For example, Ohio lists numerous diseases, from anthrax to silicosis, that are presumed to be compensable occupational diseases. OHIO REV. CODE ANN. § 4123.68 (2006). Michigan makes it easier for police officers, conservation officers, and motor carrier inspectors to obtain occupational disease coverage when suffering from respiratory and heart diseases. MICH. COMP. LAWS § 418.405 (2006).

139. *See supra* Part II.D; Carroll v. Town of Ayden, 586 S.E.2d 822, 826 (N.C. Ct. App. 2003) (interpreting occupational disease narrowly to determine that claimant was not at increased risk for contraction of hepatitis); Artiste v. Kingsbrook Med. Ctr., 645 N.Y.S. 593, 595 (N.Y. App. Div. 1996) (interpreting occupational disease statute to deny benefits to nurse's aide because HIV transmission was not a generally recognized risk of her occupation).

140. McGarity & Shapiro, *supra* note 127, at 599–600 (citing Elinor P. Schroeder & Sidney A. Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO. L.J. 1231, 1245 (1984)).

141. NICHOLAS A. ASHFORD & CHARLES C. CALDART, TECHNOLOGY, LAW, AND THE WORKING ENVIRONMENT 237 (1991).

142. Leigh & Robbins, *supra* note 12, at 709.

they need, and the problem of occupational illness continues to be undeterred by OSHA or market forces.

B. The Current Workers' Compensation System Is Inadequate to Handle HIV

Even if an employee receives benefits, the compensation dispensed to injured employees under the current workers' compensation system often leaves employees insufficiently compensated for their injuries.[143] This is especially the case for victims of occupational diseases because, on average, they receive lower benefits than victims of occupational accidents.[144] Furthermore, "the average disabled worker must wait 1 year before receiving the first benefits payment."[145]

HIV infected workers are disproportionately affected by these shortcomings due to both the tremendous cost of HIV medications and treatment and the urgency with which HIV infected workers must receive treatment. HIV care in the United States costs an average of $20,000 per patient, per year.[146] Although each patient will react differently to various antiretroviral drugs, these medications "help suppress HIV and can stave off illness for years."[147] However, if a patient stops taking medication, the potency of the virus can return in an even more aggressive fashion.[148] Thus, victims of occupationally transmitted AIDS will suffer if not given adequate funds to cover part of their life-prolonging medications.

Because workers' compensation is merely an income supplement,[149] payment under workers' compensation poses an acute problem for employees who contract HIV in the workplace. Even with modern medicine, employees infected with HIV will probably require more time away from work than victims of other occupational diseases. Furthermore, some infected workers may discover their

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143. Compensation is generally calculated to be two-thirds of pre-accident wages, subject to a state maximum. *See* PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 52 (1998) (citing UNITED STATES CHAMBER OF COMMERCE, 1997 ANALYSIS OF WORKERS' COMPENSATION LAWS 26–31 (1997)).

144. Viscusi, *supra* note 54, at 64.

145. Tereskerz & Jagger, *supra* note 5, at 1560.

146. Samuel A. Bozzette et al., *The Care of HIV-Infected Adults in the United States*, 339 NEW ENG. J. MED. 1897 (1998).

147. Rebecca Deuser, *Cutting-Edge Research Yields Better HIV Drugs*, SENTINEL & ENTERPRISE (Fitchburg, Mass.), Nov. 22, 2004.

148. *Id.*

149. ARTHUR LARSON, WORKERS' COMPENSATION LAW: CASES, MATERIALS AND TEXT § 5.20 (2d ed. 1992).

status too late to ever be healthy enough to return to work. HIV-infected workers may also be dependent on workers' compensation funds for a longer period of time than other ill workers given the ways that new drugs are able to extend a patient's lifespan.

In addition the problem of inadequate coverage for occupational disease claimants, the current workers' compensation system distributes far more generous death benefits to accident victims than to occupational disease victims. For example, in past years, the average death benefit provided to families of accident victims has been more than sixteen times greater than the compensation provided to families of occupational disease victims.[150] The substantial differences between occupational disease and occupational injury coverage demonstrate that states should revamp current workers' compensation systems in order to address the special needs of occupational disease claimants, especially HIV-infected employees. One such way to standardize occupational disease recovery may be for courts and state legislatures to clarify the requirements necessary to prove causation under the definition of "occupational disease."

C. The "Increased Risk" Test

To be compensable, an occupational disease must be caused by conditions which are "characteristic of and peculiar to a particular occupation." Although this causation element is essential to proving that there has been a compensable harm, the specific meaning of the statutory definition[151] may be hard for workers' compensation claimants to discern. Fortunately, a number of courts have provided guidance in interpreting the causation element. Courts will presume that an occupational disease was caused by workplace conditions "characteristic of and peculiar to employment" if the employee can demonstrate that his occupation exposed him to an increased risk of disease transmission.[152] However, courts in different jurisdictions have used slightly different standards when applying the "increased risk" test in occupationally transmitted HIV cases. The varying interpretations are exemplified by the *Barren River*, *Artiste*, and *Estate of Doe* decisions.

In *Barren River*, for instance, the court found that there was an increased risk of transmission of HIV where the employee worked

150. Brennan, *supra* note 53, at 63.

151. *See supra* Part II.B.

152. *Id.*

primarily with HIV positive patients.[153] The court seemed to imply that a greater risk of transmission only exists when the employee knows that HIV-infected persons or HIV-contaminated substances are located in the workplace.[154] According to this court's interpretation, the "increased risk" test is not merely a function of the type of workplace, but also of the employee's knowledge of characteristics in the workplace.[155] At first glance, this holding appears logical, but the court's knowledge requirement may disregard the purpose and spirit of workers' compensation coverage. The requirement would preclude employees from receiving coverage when they are actually infected in the scope of employment, but are unable to pinpoint a discrete episode of transmission and were personally unaware of the heightened risks in the workplace. As a practical matter, it may also be hard to prove that an individual employee subjectively did or did not possess knowledge of the risks in the workplace.

The *Artiste* decision differs somewhat from *Barren River* in that it offers a "generally recognized risk" test.[156] Whereas *Barren River* examines the risk of transmission for each individual claimant based on that claimant's knowledge, *Artiste* focuses on the general risks inherent in the claimant's profession.[157] According to the *Artiste* court, if a claimant's occupation does not generally entail performing duties that would increase the risk of occupational infection, then it will be exceedingly difficult to prove occupational transmission. It is unlikely that a causal connection between contraction of the disease and the employee's occupation exists if members of that occupation have no responsibilities which would place them in contact with disease-transmitting persons or items. Thus, the *Artiste* court's objective "generally recognized risk" test appears to effectively compensate the majority of workers who are infected with occupational diseases, while also presumptively denying compensation where the nature of the worker's occupation makes transmission of the disease unlikely.

The court in *Estate of Doe* also judged the risk of transmission by examining the hazards inherent in the employee's occupation.[158] However, this court seemed more willing than the *Artiste* court to

153. *See supra* Part II.D.

154. *Id.*

155. For example, an employee is not at an increased risk solely because she works in a hospital. The employee must be aware of the presence of HIV positive persons or things in the hospital to be considered at an increased risk.

156. *See supra* Part II.D.

157. *Id.*

158. *See supra* Part II.D (discussing *Estate of Doe* in detail).

consider specific factors that might put an individual worker at greater risk for transmission than someone else in her general occupation. The court considered both the risks generally associated with the claimant's occupation as a corrections officer and the specific circumstances which led to his occupational infection to determine whether the job placed the employee at an increased risk of transmission of the disease.[159] Thus, the *Estate of Doe* court employs a test that examines both individual risk factors and occupationally-based risk factors. The decision seems to create a variant of the "generally recognized risk" test whereby the risks associated with an individual employee's job duties may be considered in granting compensation, even when the employee's profession is not universally recognized as being at an increased risk for contraction of the disease.

It may be difficult for a claimant with occupationally transmitted HIV to prove that her condition is an occupational disease caused by conditions which are "characteristic of and peculiar to her particular occupation," especially if the claimant is employed outside the health care industry. However, judicial interpretations of this statutory requirement, embodied in the increased risk test, have made it easier for some claimants to prove that their injury was work-related. Currently, the extent to which the boundaries of occupational disease coverage can be stretched in order to include unconventional occupations will be determined by the variation of the increased risk test adopted by the court. Thus, states should adopt a standardized test for determining occupational disease causation in order to enhance uniformity and predictability of workers' compensation claims.

D. The Viability of Tort Action

If the workers' compensation scheme fails to adequately compensate an occupational disease victim, the victim may wish to sue in tort. However, the nature of the benefit makes it difficult to act against an employer outside the workers' compensation scheme. Employees who are eligible for workers' compensation have exchanged their common law right to sue their employer for scheduled payments in case of injury.[160] Thus, workers' compensation is deemed the exclusive remedy against the employer and insurance carrier for

159. *Id.*

160. Brennan, *supra* note 53, at 51–52.

occupational injuries.[161] The most frequently touted exception to the exclusivity doctrine is the intentional tort exception, which allows an employee to bring a common law action for damages when the employer intentionally inflicts injury on the employee.[162]

At first glance, this exception seems impractical in the case of occupationally transmitted HIV since it is unlikely that an employer would intentionally cause the employee's HIV infection.[163] However, an employee could argue that an employer falls within this exception if he allows an HIV-infected worker to return to the workplace with the knowledge that his actions are substantially certain to result in injury, such as transmission of HIV, to another employee.[164] Though this argument may seem promising, in practice, it is unlikely to apply since very few workplaces present so great a risk of transmission that the employer would be substantially certain that another employee would become infected. Thus, a court would likely find a tort suit against the employer frivolous where the employer merely allows an infected employee to return to work.

Employees who are infected in the workplace by another person may attempt to gain compensation by suing the person who infected them ("infector"). Employees could try to sue their infectors under a theory of negligence for failure to disclose HIV status.[165] Under this theory, an employee's primary challenge will be to demonstrate that the infector had a duty to disclose her status, but failed to do so.[166] The employee will also have to show breach of duty, a causal connection between the breach and harm, and a resulting injury. For the initial duty inquiry, the court must ask whether it is reasonable under the circumstances for the infector to disclose her HIV status to the employee.[167] This inquiry may be realistic when dealing with infections acquired in the health care setting, but becomes more complicated when considering occupational transmissions outside such an environment. An HIV-positive patient in the medical setting is usually able to weigh the risks and benefits of disclosure before interacting with the health care worker. However, in cases where policemen, firemen, or emergency medical technicians are

161. 6 LARSON, *supra* note 19, § 100.01.

162. Brennan, *supra* note 53, at 52.

163. *Id.*

164. *Id.* at 52 n.121.

165. Richard DeNatale & Shawn D. Parrish, *Health Care Workers' Ability to Recover in Tort for Transmission or Fear of Transmission of HIV from a Patient*, 36 SANTA CLARA L. REV. 751, 756 (1996).

166. *Id.*

167. *Id.*

infected, the infector may not have time to perform a cost-benefit analysis before coming into contact with the employee. In these emergency situations, it is unreasonable to expect infectors to disclose their status before interacting with the employee. Thus, it would be irrational for a court to impose a duty of disclosure on the infector.

Creating a duty of disclosure could also cause psychological and physical harm for HIV-infected persons who would be forced to broadcast their status. Considering the minute risk of transmission, disclosure would likely also generate a disproportionate amount of fear in those persons who come into contact with the infected. This fear, in turn, might prevent the HIV-infected person from receiving the assistance he needs from employees, and it could lead to others stigmatizing the infected. Although a very small number of HIV transmissions might be prevented, the harms seem to outweigh the benefits of disclosure. Thus, a negligence action against the infector is probably not an adequate solution to providing additional compensation to an infected employee. Given the failures of the present workers' compensation system and tort law to compensate employees with occupational diseases, states should reform workers' compensation schemes to provide a more adequate method of coverage for these employees.

IV. PROVIDING CLARITY AND EFFICIENCY IN HANDLING OCCUPATIONAL HIV CLAIMS

A. Rethinking State Workers' Compensation Schemes

State legislatures should adopt clear statutory guidelines regarding HIV transmission as the first step toward eliminating confusion in occupational disease cases. Specifically, states should act to broaden the definition of occupational disease under their workers' compensation statutes.[168] In order to provide effective occupational disease coverage, states should revise the causation requirement in the statutory definition of occupational disease and also set forth specific occupations and corresponding diseases that are presumptively, but not exclusively, covered under workers' compensation. Moreover, states should extend statutes of limitations

168. *See* Tereskerz & Jagger, *supra* note 5, at 1561 ("[T]he definition of occupational disease should be broadened where necessary so that every jurisdiction will allow compensation for employees who can reasonably demonstrate that they did not acquire the disease from another source and that their occupation put them at increased risk of the disease.").

where they impede reasonable disease claims and address disparities between accidental injury and occupational disease benefits. These measures will result in more adequate workers' compensation coverage for many HIV-infected workers and other underrepresented occupational disease victims.

Most statutes currently condition eligibility for workers' compensation for occupational diseases on proof that the disease is "due to causes and conditions which are characteristic of and peculiar to" the worker's occupation.[169] States should change this strict causation requirement by replacing it with a rebuttable presumption that the claimant obtained the disease at work. In order to obtain this presumption, the claimant would need only to show that her occupation exposed her to an increased risk for contracting a particular disease.[170] Specifically, states should adopt the *Estate of Doe* increased risk test which takes into account both the risks generally associated with the worker's occupation and the specific circumstances which led to the employee's occupational infection.[171] Thus, an employee in an occupation not traditionally associated with transmission of a certain disease may still gain workers' compensation if she can demonstrate that her specific job duties regularly put her at risk for exposure to the disease. However, if an employee is not in an occupation generally associated with an increased risk of disease, and the employee does not generally face risk of transmission in performing her individual job duties, there should be no presumption of occupational disease compensation.

States should elucidate the causation requirement found within most definitions of occupational disease by incorporating a provision that sets forth the increased risk test and the rebuttable presumption utilized in *Estate of Doe*. The presumption created by satisfying the increased risk test significantly lessens the evidentiary burden on occupational disease claimants. After the claimant demonstrates that the occupation exposed her to an increased risk for the disease, the burden of proof shifts to the state to show that outside factors, rather than the workplace environment, contributed to the transmission. This reduced burden will facilitate compensation for those infected workers who may not be able to produce clear evidence that they contracted the disease from work. Given the problematic

169. 2 LARSON, *supra* note 19, § 51.06.

170. Estate of Doe v. Dep't of Corr., 848 A.2d 378, 384 (Conn. 2004); *see also* discussion *supra* Part III.C (discussing the increased risk test).

171. *Id.* at 383–84.

nature of obtaining benefits for occupational illnesses, this change in the causation requirement should apply to all occupational diseases.[172]

When amending their statutes, states should not limit coverage for occupationally transmitted HIV to a specific list of occupations. Granting compensation exclusively to workers in designated occupations will result in the automatic denial of coverage to employees in other occupations, even if these employees have valid claims.[173] Thus, it is in a state's best interest to set forth a list of diseases and corresponding occupations that are *presumptively* covered. This will enable the state to reduce some of the administrative burden of determining coverage and to deter persons outside of those specified occupations from bringing claims that are not likely to have arisen in the scope of employment. The statute should then stipulate that while infected members of the listed occupations automatically qualify for compensation, workers in other professions are not excluded from bringing a claim.[174] Furthermore, the law should explicitly state that employers of workers in the presumptive coverage categories are always able to rebut the presumption by introducing evidence of outside activities that also put the worker at risk for the disease. This statutory scheme would shift the burden of proving occupational disease status away from those workers in the statutorily designated occupations, but would still allow members of other occupations to receive compensation if they can satisfy a more rigorous causation requirement.

Employing strict timetables for reporting or insisting on extensive documentation may exclude certain legitimate claimants from recovery. Therefore, states should not adopt this approach. For example, statutes in Texas and Nevada require documentation of a negative HIV test within a short time period after exposure in order to qualify for occupational disease coverage.[175] These states presume that a negative test result within a short period of time indicates that the employee was free of the disease before the occupational incident. However, these provisions could exclude people who are continually exposed to HIV in the workplace and thus cannot identify any single event of exposure. In addition, employees who are not familiar with

172. *See* Tereskerz & Jagger, *supra* note 5, at 1561.

173. This is similar to the reasoning employed in *Artiste*. *See supra* Part III.C (discussing, among other interpretations, the *Artiste* court's reasoning in employing an objective "generally recognized risk" test).

174. New York and Virginia utilize this occupational disease compensation scheme. *See supra* Part II.E.

175. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.050 (2006); NEV. REV. STAT. ANN § 617.481 (2006).

the statutory procedure may also be excluded if they delay HIV testing after exposure. Although timing mechanisms such as those employed in Texas and Nevada make it easy to determine which employees are entitled to compensation, the provisions also require infected workers to have intimate knowledge of the statutory requirements.

States should instead expand the statute of limitations under workers' compensation to cover those workers who may initially be asymptomatic.[176] They should adopt provisions stating that the statute of limitations for occupational diseases does not commence until the employee has "knowledge, or a reasonable belief, or through ordinary diligence could have discovered, that the occupational disease or death was work related."[177] This ensures that a claimant will have adequate opportunity to file a workers' compensation claim after initial discovery of the disease. The adoption of a more expansive statute of limitations for occupational disease claims is an additional statutory modification that will enable employees to successfully obtain coverage that might otherwise be prohibited because of the dormant nature of many infectious diseases.

In re-thinking their workers' compensation schemes, states should also consider expanding compensation to provide more coverage to employees with fatal diseases. Although an increase in the amount of coverage would cause some increase in insurance premiums, infectious diseases represent only a small percentage of all occupational diseases. Thus, implementing measures which seek to expand occupational disease coverage for a smaller class of infectious diseases such as HIV will have a much lighter economic impact on the workers' compensation system than providing increased coverage for every existing occurrence of occupational disease. As a result, a slight increase in workers' compensation insurance premiums may be sufficient to cover increased infectious disease compensation. Furthermore, an efficient compromise may be reached by making trade-offs between increasing compensation benefits for infected workers under the current system and implementing new statutory criteria to increase the number of employees who will qualify for coverage. For example, instead of implementing the above suggestions regarding the lessening of statutory requirements for occupational disease coverage, the state may instead choose to provide more coverage for those who are able to meet the more stringent requirements. Thus, a reasonable increase in benefits for claimants with infectious diseases may be possible if the state deems such a

176. *See* Tereskerz & Jagger, *supra* note 5, at 1561.

177. MICH. COMP. LAWS § 418.441 (2006).

result more socially desirable than other proposed amendments to the workers compensation system.

B. Alternative Compensation Schemes for HIV Victims

In addition to statutory and legal remedies, the problem of providing adequate occupational disease coverage may also be resolved by focusing on the inefficiencies in the market system that cause workers to receive lower wage premiums for the occupational risks they undertake. For example, information on the risks of contracting occupational diseases in various workplaces should be more efficiently distributed. This information should be directed at both employees and employers who, respectively, would be able to more accurately weigh the risks of accepting employment and design better safety mechanisms to prevent the problem. Workers could bargain for higher wage premiums with the risks of the occupation in mind if more information is distributed about the risks of employment. With higher wage premiums, workers' compensation recovery would also increase since compensation is generally formulated as a percentage of income. Greater compensation would allow those workers who have been infected with HIV to receive the treatment and medication they require. OSHA penalties for noncompliance with health and safety standards could also be increased to make it inefficient for employers to avoid implementing safety standards.[178] Thus, employers would have an independent incentive for initiating higher safety standards.

In addition to the above suggestions, workers' compensation statutes could also be amended to include HIV as a type of occupational disease. This would eliminate some of the burden normally put on claimants to collect evidence of an increased risk of transmission in the workplace. Furthermore, the statute of limitations in many states could be extended for occupational disease claims to put less restrictions on workers with latent illnesses or workers who need more time to collect evidence.

States could also update or revise the workers' compensation formulas to ensure that occupational disease claimants receive awards on par with those of accident victims. The formulas would have to consider the special costs involved in caring for an HIV-positive person and adjust compensation levels accordingly. However, the workers' compensation system should not be expected to compensate a worker fully for the costs associated with HIV treatment. Paying the

178. Viscusi, *supra* note 54, at 80.

exorbitant amount required to adequately care for someone with HIV would conflict with the no-fault theory of workers' compensation.[179] While an employer should not pay the total costs for HIV treatment, HIV-infected workers should at least receive an equitable amount of compensation, adjusting for the severity of the HIV virus. Implementation of these measures will help ensure that the interests of workers with occupationally transmitted HIV are protected and advanced.

C. Employer Response to Recent Judicial and Legislative Activities

Employers are significantly affected by occurrences of occupational illness in the workplace. Occupational exposure can lead to significant workers' compensation liability[180] and, on the rare occasion, liability for intentional torts. Moreover, if employer noncompliance with health and safety standards actually caused the injury, the employer could face OSHA penalties. Knowledge of workplace hazards could also influence bargaining power when hiring new employees. Thus, employers must take affirmative steps to keep abreast of new occupational hazard standards and changing legislation.

Employers and injured employees should closely examine the causation standard utilized for awarding occupational disease claims in the state. The *Doe v. Department of Corrections*[181] increased risk test could serve as a model for predicting the employment standards that future courts will apply. An employer could use the "increased risk" test to evaluate which employees are at greater risk for contracting occupational diseases based on their work-related duties. Employers could then take extra precautions to protect these workers from exposure to disease.[182] The employer could also emphasize the importance of filling out an injury report after each exposure to a potentially hazardous substance or infected person. These measures would both augment current safety standards and potentially prevent future workers' compensation liability.

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179. *See* Gabel, *supra* note 18, at 407 (discussing compensation that injured workers receive).

180. However, most employers are not beld liable for occupational illness coverage under workers' compensation. *See supra* Part III.A (discussing the limitations on occupational disease coverage and compensation).

181. Estate of Doe v. Dep't of Corr., 848 A.2d 378, 384 (2004).

182. The cost of the precaution must be balanced against its potential social value to determine whether it is worth implementing. *See supra* Part III.A (discussing the limitations on occupational disease coverage and compensation).

Employees and employers should also become familiar with state statute of limitations restrictions on occupational disease claims. Moreover, the employer must be aware of state statutory provisions that presumptively grant occupational disease coverage for HIV transmissions that occur in certain employment settings. If this type of statute exists in the employer's state, and the employer does not fall within one of the designated occupations, it will generally not be liable under the workers' compensation statutes for employees with occupationally transmitted HIV. Employers and employees should also be aware of whether a state statute requires HIV testing after each exposure to potentially hazardous materials in the workplace and subsequent testing after the incubation period of the disease has lapsed.[183] Even in states without mandatory HIV testing, employers might encourage their workers to voluntarily undergo a series of HIV tests after exposure to hazardous materials to simplify future causation concerns.

As discussed above, there are a variety of options available to remedy or modify the present deficiency of occupational disease coverage for HIV-infected workers. Most importantly, employers can avoid occupational disease claims altogether by providing safe work environments and becoming familiar with state occupational disease standards.

V. CONCLUSION

Occupationally transmitted HIV outside the health care industry is a surfacing problem that presents new challenges in determining the scope of occupational disease coverage under state workers' compensation schemes. Although several court decisions addressing this problem have granted coverage by narrowly interpreting the definition of "occupational disease," the scope of workers' compensation benefits should be broadened to handle the burden of additional incidents of infectious diseases.

The *Estate of Doe v. Department of Corrections* decision provides insight into the future of occupationally-transmitted AIDS claims and may offer a viable framework for evaluating these claims. However, the *Doe* decision also has a long way to go. Courts should strive to formulate a clearer occupational disease standard that can be employed even-handedly to every case. Moreover, additional non-

183. *See* NEV. REV. STAT. § 617.481 (2006) (requiring an AIDS test with a negative result within 72 hours after the time of initial exposure, and a follow-up test after the incubation period of the disease has lapsed, but not later than 12 months after the date of exposure, that reads positive for the disease).

judicial methods must be utilized to assure that workers have comprehensive and adequate coverage. Authoritative action must be taken from within the workers' compensation system to ensure that AIDS-infected employees have sufficient coverage.

The findings of this Note extend not only to occupationally transmitted HIV cases, but also to other infectious diseases, such as hepatitis and tuberculosis. There are many employees with occupational diseases who are not receiving adequate workers' compensation coverage under existing state laws. Consequently, it is imperative that employers, state legislatures, state and federal agencies, and courts come together to shape and develop effective occupational disease policies and standards in order to provide reasonable compensation to those who suffer from a severe lack of coverage.

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