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Should Workers' Compensation Be Vaccinated Against Bioterrorism?

The current system faces endless medical costs and an expanding perimeter of liability.

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The events of September 11, 2001 and the succeeding months have brought new challenges to every aspect of American life, including the traditional workers' compensation system. Those who wrote the original workers' compensation laws, in both Europe and America, did not contemplate infectious disease inflicted by acts of terrorism. A new class of hazard, not previously anticipated, is now challenging the viability of the entire process.

Knowledge about biological agents such as anthrax, botulism, pneumonic plague, and smallpox existed for generations prior to the enactment of any workers' compensation laws. Anthrax is believed to have been one of the Egyptian plagues at the time of Moses, and ancient Roman texts also reported cases. Recently, scientists in the former Soviet Union and Iraq developed anthrax as a weapon, and there have been prior attempts by the Aum Shinrikyo cult in Japan to make *B. anthracis*, the anthrax bacillus, into a biological weapon of legitimate concern.

The US Centers for Disease Control and Prevention (CDC), until September 11th, considered bio-terrorism to be a back-burner issue, since very few cases had been reported and more pressing diseases were receiving intense publicity (e.g., AIDS). Following the World Trade Center tragedy, the CDC alerted workers throughout the country who were thought to be particularly susceptible. Those alerted included individuals employed in sites where mail was processed or handled.

The CDC has more recently reached out to notify maintenance and custodial workers as well, since they may be required to repair or maintain mail sorting and opening equipment. Additionally, the CDC issued a health advisory to alert both the physician population and the general public of a biological attack.

Infectious Disease Is Compensable

Historically, incidents of infectious disease have been considered to be compensable. In the past, those who worked with wool or hides and exposed themselves to the hazard of contracting anthrax were considered to have a personal injury within the meaning of the workers' compensation act. *Chicago Rawhide Mfg. Co. v. Industrial Commission*, 126 N.E. 616, 291 Ill. 616 (Mass. 1952). Fatal claims as a result of anthrax were held compensable if the widow and children could meet the burden of proof, by a preponderance of evidence, that the deceased employee contracted anthrax arising out of and in the course of his employment of the particular employer. *Tartas' Case*, 105 N.E.2d 380, 328 Mass. 585 (Mass. 1952). The survivor of a foreman in a tannery, who died of anthrax, was unable to establish whether or not the hides that he had handled had been contaminated with anthrax bacteria and the Court dismissed the dependency claim. *Eldridge vs Endicott, Johnson and Co.*, 126 N.E. 254, 228 N.Y. 21 (N.Y.A.D. 3Dept. 1920).

A major element in the proof of a workers' compensation claim is the establishment of a nexus with employment. The injury must be

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sustained while in the course of employment. Traditional, traumatic accidents and/or occupational diseases sustained while handling or processing mail are usually deemed to be within the course of employment and therefore compensable. A slip and fall while picking up and delivering mail has been considered to be an injury or illness occurring within the course of employment. *City of Edmond v. Monday*, 910 P2d 980 (1995 OK).

No Tangible Perimeter of Liability

A major complication arising in claims flowing from the World Trade Center tragedy has been the inability to limit claims by establishing a perimeter of liability. The normal "on premises" or "off premises rules" do not apply. It may be postulated that the perimeter of liability is not tangible, but limited only by the mind of the beholder. This would appear to be the situation if a mental disability, apprehension or anxiety, arose either from a physical or a psychological assault.

Endless numbers of post-traumatic stress disorder (PTSD) claims flow from acts of terrorism. It is well-recognized that individuals throughout the United States become emotionally upset when reminded of the horrible World Trade Center catastrophe and have repeated and disturbing memories, thoughts, and dreams of the tragedy. Millions of people may suffer psychological or psychiatric residuals from merely the fear of contracting a biological illness as a result of a terrorist activity.

People have difficulty concentrating, trouble falling or staying asleep, and outbursts of irritability or anger caused simply by thinking about such events. Approximately, 44% of the US population has reported such symptomatology according to a recent study in the New England Journal of Medicine. MA Schuster, et al, "A National Survey of Stress Reactions after the September 11, 2001, Terrorist Attacks," 345 NEJM 1507 (November 15, 2001).

Based on the study by Schuster et al., it can be concluded that there is not a geographical (i.e., distance from the World Trade Center) perimeter to liability flowing from terrorism, but rather one based upon population density, hours of television viewing, and region of the country. Prior emotional or mental problems have also become factors in triggering symptomatology. This is not at all unusual, since children throughout America suffered such symptoms, recognizable under DMS-IV criteria, in the wake of viewing the Challenger disaster on television. 156 Am.J. Psychiatry 1536 (October 1999).

Endless Medical Costs

In addition to a determination of permanent residuals flowing from PTSD related to geographically distant trauma, issues exist concerning whether or not the system can afford to provide adequate medical benefits to those suffering from bio-terrorism. Unfortunately, there is a lack of experience from which to determine whether or not the medical system can provide appropriate prophylaxis and therapy in the event of a large-scale exposure to pathogenic endospores. In fact, it has been concluded that the efficacy of such efforts is both uncertain and doubtful.

The cost of initial testing for exposure to biological agents such as anthrax has been determined to be $150 per person. Subsequently, there exists a need for administration of a course of prophylactic antibiotics if an individual had worked in a site where mail is processed or handled. It has been recommended that, even if the initial test is negative, the worker should undergo regular follow-up testing.

Specific individuals singled out for testing include maintenance and custodial workers, and workers responsible for handling and processing mail in accordance with the CDC health advisory. In Ohio, 62 claims were made and it was anticipated that medical costs per case would amount to between $350 and $1,200 for testing and prophylactic medication. Needless to say, in order to alleviate the risk, there would be a potential responsibility for environmental testing and clean-up of the building. In some instances, decontamination would require vaporized-formaldehyde fumigation of entire buildings. These activities would require the application of vast economic resources.

Another concern would be the responsibility of the workers' compensation system to provide vaccinations to the workers who may be potentially exposed to biological agents. Anthrax requires two initial inoculations and annual boosters. The use of a live vaccine may precipitate additional medical problems.

If a course of antibiotics, penicillin or doxycycline, are required for those who have been exposed, the compensation carrier would obviously be required to furnish intravenous administration as recommended by the manufacturer. The duration of antibiotic therapy would last at least 14 days after any symptoms abate, and supportive therapy may be required to prevent or treat septic shock or to correct fluid and electrolyte imbalance.

Although the CDC has suggested that protective devices be utilized to avoid contact with biological agents, this advisory may lead to further complications. Even though the CDC has recommended disposable gloves made of lightweight nitrile or vinyl, there is a huge supply of latex gloves still available on the market. Inhalation of aerosolized latex proteins from the use of latex gloves can cause a potentially fatal anaphylactic reaction. While warnings guidelines issued by the Federal and State authorities recommend respirators with a full-face piece and HEPA (high-efficiency-particulate-air filters), there is an issue as to whether or not these protective medical devices are in fact the economic responsibility of the compensation carrier.

The economic consequences of a bio-terrorism attack cannot be

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underestimated. One grain, or one twenty-eighth of an ounce, of biological product can hold one hundred billion spores; the lethal dose of infectious anthrax, previously thought to be 10,000 spores, is currently being revised downward in the light of two anthrax fatalities apparently due to cross-contamination of unrelated mail. There are over two hundred billion pieces of mail processed each year in the United States. The economic drain on the workers' compensation systems could be endless and insurmountable.

The Need To Vaccinate The System

There is no war-risk exclusion to workers' compensation coverage. The insurance market is in a critical stage since there has been no time to negotiate, underwrite, price, and place reinsurance policies, which expire on a semi-annual basis. The reinsurance companies may not be required to cover bioterrorism and therefore issue an exclusion.

As the perimeter of liability expands, and the number of claims and the potential economic challenges facing the system increases, in order to be vaccinated against bioterrorism, the workers' compensation system must receive federal economic guarantees.

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