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Presumptions**

Michael C. Duff

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The Functional Operation of Workers' Compensation COVID  
Presumptions

Michael C. Duff  
*Saint Louis University – School of Law*

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## January 2021 Working Paper

### *The Functional Operation of Workers' Compensation Covid Presumptions*

**Michael C. Duff**  
**Professor of Law**  
**University of Wyoming College of Law**

#### **I. Background on Presumptions**

This informal working paper addresses workers' compensation "Covid presumptions." Lawyers in many legal areas encounter and make use of presumptions in their practices. For example, a common presumption in law is that if a person has not been seen or heard from for a specified number of years the person is presumed dead. If litigants were forced to prove with "concrete" evidence that such persons were dead enormous resources would be consumed making the attempt and many meritorious cases could not be brought. Presumptions allow us to conduct litigation when certain foundational facts have been established. Essentially, we think that when certain foundational facts have been established other facts may reasonably be presumed unless affirmatively disproven.<sup>1</sup> Presumptions are very common in American law.<sup>2</sup>

"Presumptions" have a broadly applicable legal definition, though in the narrow context of Covid-19 their purpose is to make it easier to establish that Covid 19 is an occupational disease and/or that Covid-19 has been caused by work. *Black's Law Dictionary* broadly defines a presumption as,

A legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts. • Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption.<sup>3</sup>

So, given certain factual predicates—in our present context, an eligible employee<sup>4</sup> has received a reliable diagnosis of Covid-19 during a defined period of time (commonly the beginning of the pandemic until an end date set by rule or declared by a state health official)—that "group of facts" creates a legal presumption that contraction of Covid 19 was caused by the employee's working conditions.<sup>5</sup>

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<sup>1</sup> PAVEL WONSOWICZ, EVIDENCE 36-40 (Carolina Academic Press 2017).

<sup>2</sup> See generally 29 Am. Jur. 2d Evidence § 199.

<sup>3</sup> BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>4</sup> As defined by a given state's Covid presumption—usually first responders and health care workers, but it could include other employees. (See the discussion in Professor Burton's webinar paper).

<sup>5</sup> But as the paper will discuss, it is not clear that all the Covid presumptions in fact operate in this manner.

## II. How Presumptions Work: Thayer-Wigmore versus Morgan

The next question is, what happens after a presumption has been created? In other words, how can the party against whom a presumption operates “overcome the presumption”? (In our context, how can the employer/insurance carrier overcome a Covid presumption?). This is really the crux of the matter from a claimant practitioner’s point of view. It should be relatively easy to “set up” the Covid 19 presumption. But if it is easy for the employer-insurance carrier to rebut, or “undo,” the presumption, it may have limited value to claimants at the end of the day. On the other hand, if it is impossible (or nearly impossible) for an employer-insurance carrier to rebut the Covid 19 presumption, a nearly “irrebuttable” presumption opens claimants to the familiar argument that the employer should not be the “absolute” insurer of its employees.<sup>6</sup>

As Judge David B. Torrey has explained,<sup>7</sup> two theories of presumptions exist. The first theory, known as Thayer-Wigmore, treats presumptions as procedural. The procedural theory of presumptions would tend to be hostile to workers’ compensation claimants. Once an employer-insurance carrier has produced some substantial expert medical opinion contrary to the Covid causation presumption—in other words medical evidence showing that the Covid-19 in question was not work-related—the presumption would disappear from the case (a classic shorthand phrase for this type of presumption in evidence law is the “bursting bubble”).<sup>8</sup> The claimant would not lose the case outright at that point, but the “burden of production” would “shift” back to the claimant, who would have to otherwise satisfy the “burden of production” and the overall “burden of proof” of work-relatedness/causation without the benefit of the presumption—in other words, the claimant is essentially back to square one. It should be emphasized that, although “procedural,” the presumption under this Thayer-Wigmore approach must still be met by the party against whom the presumption operates with *some* substantial evidence: the evidence necessary to overcome the presumption must, viewed alone, be *capable* of disproving the nonexistence of the presumed fact.<sup>9</sup> In other words, under “classical”

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<sup>6</sup> Despite this anticipated objection, Alaska’s presumption is fully and actually irrebuttable. It reads: “an employee who contracts the novel coronavirus disease (COVID-19) is conclusively presumed to have contracted an occupational disease arising out of and in the course of employment if, during the public health disaster emergency . . .” and the employee falls within the designated essential employee categorization. See HCS CSSB 241(RLS) am H, Section 15 (a), available at <https://www.akleg.gov/basis/Bill/Text/31?Hsid=SB0241E>.

<sup>7</sup> DAVID B. TORREY, FIREFIGHTER CANCER PRESUMPTION STATUTES IN WORKERS’ COMPENSATION AND RELATED LAWS: AN INTRODUCTION AND A STATUTORY/REGULATORY/CASE LAW TABLE, NATIONAL ASSOCIATION OF WORKERS’ COMPENSATION JUDICIARY at 8-10, available at <http://www.nawcj.org/wp-content/uploads/2019/06/NAWCJ-FIREFIGHTER-PRESUMPTIONS-Essay-Table-2013.pdf>.

<sup>8</sup> Of course, because workers’ compensation hearings do not involve juries it is difficult to parse how all of this shifting plays out in the mind of single administrative law judge. Certainly, under Thayer-Wigmore the judge would not deem herself bound to find for the claimant in absence of positive affirmative evidence of causation. More importantly, because the burden of persuasion does not shift to the counter-party, the claimant is left with the original problem of providing positive evidence of causation and ruling out evidence of alternative causes.

<sup>9</sup> Although courts often express these ideas differently there is broad agreement that, with respect to bursting bubble presumptions, “once the party adversely affected by the presumption offers sufficient evidence rebutting the presumption to avoid a directed verdict as to the presumed fact, the presumption

Thayer-Wigmore analysis, in order to “burst the bubble” the opponent-defendant must do more than submit evidence that would theoretically “tend” to disprove causation.<sup>10</sup> (One might analogize this quantum of evidence to that a plaintiff must provide prima facie in a case to withstand a Motion to Dismiss. Even if the defendant never responds to the allegations of the complaint, the plaintiff still must provide enough evidence which, if believed, would allow the plaintiff to prevail as matter of law).

What does this mean from the claimant-practitioner’s perspective? Under Thayer-Wigmore the employer-insurer carrier’s evidence, if believed, should at least *purport* to establish that the workplace did not cause Covid 19. If the evidence is at all equivocal on this point, claimants can be expected to argue that the presumption has not been rebutted.

Friendlier to claimants’ interests is the second theory of presumption rebuttal, the so-called Morgan theory, which treats a presumption as *evidentiary* and, in effect, creates a substantive rule of law.<sup>11</sup> In the Covid context, if the employer-insurance carrier produces evidence rebutting the presumption of work-relatedness/causation, “the bubble does not burst.” Rather, the presumption remains as positive evidence of causation, and, under the rules of several states,<sup>12</sup> the burden of production *and* of persuasion shift to the employer to prove that work did not cause the disease in question.<sup>13</sup> The presumption places the burden of “proof of non-causation” on the employer as a positive rule of law. Under the claimant-friendly Morgan theory, the presumption created technically remains rebuttable.<sup>14</sup> But the Morgan presumption is friendlier to claimants because the employer-insurance carrier’s causation evidence (that the workplace did not cause Covid 19) must be more than merely “capable” of being credited—this is not simply a *Huddleston* determination<sup>15</sup>—if the fact finder does not credit this evidence, the claimant prevails as a matter of law. Perhaps even more importantly, the claimant’s evidence of causation is forcefully buttressed because the presumption itself is independently considered positive competent evidence of causation. A judge could in principle reject all of the claimant’s medical evidence and positive evidence of causation would still remain. So, in effect, the

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disappears.” 29 Am. Jur. 2d Evidence § 213. The “capable of being believed” requirement is deployed in various evidence admissibility contexts when judges must preliminarily assess whether a reasonable jury *could* find a given fact. See *Huddleston v. United States*, 485 U.S. 681 (1988).

<sup>10</sup> See *generally* Christopher B. Mueller & Laird C. Kirkpatrick, 1 Federal Evidence § 3:10 (4th ed. 2019).

<sup>11</sup> See Torrey, *supra.*, FIREFIGHTER CANCER PRESUMPTION STATUTES at 9-19. But this idea must be treated with care because it is distinguishable from the idea that a rule of law is created in connection with an irrebuttable presumption. A rebuttable presumption (in this context) operates as a rule of law only in the sense that if certain set of facts are established the burden of proof, or persuasion, is shifted as a matter of law.

<sup>12</sup> LARSON’S WORKERS’ COMPENSATION LAW § 52.07 [2] [a] [iii].

<sup>13</sup> Technically, the burden of persuasion stays with the claimant, but in operation it can be nearly impossible for an employer to prove that a workplace did not cause a disease. *Id.*

<sup>14</sup> It might be argued that an irrebuttable presumption is unconstitutional as a matter of state constitutional law (e.g., North Carolina once struck down a Heart Statute as an unconstitutional special law, *Duncan v. Charlotte*, 234 N.C. 86 (1951); see also *In re Ivey*, 85 Cal. App. 4th 793, 102 Cal. Rptr. 2d 447 (2d Dist. 2000) (mandatory presumption is unconstitutional in a criminal contempt proceeding). But one may doubt such analyses apply where broad Covid presumption rules are narrowly tailored to the present emergency, or under federal constitutional law given the current boundaries of the 14th Amendment.

<sup>15</sup> See *supra.* n.9.

presumption, prima facie, establishes causation and shifts the burden to the employer to prove non-causation.

### III. **Rebuttal of Disease Causation Under Covid 19 Workers' Compensation Presumptions**

#### A. *Presumption Rebuttal in Other Workers' Compensation Disease Contexts*

Outside the context of Covid 19, a great deal of variability exists across states as to whether Thayer or Morgan-type presumptions (or a state-specific presumption model not quite consistent with either theory) apply in workers' compensation disease causation contexts. Some presumptions seem to fall in between the two extremes. Obviously, the presumptions are of differing strength. As the *Larson's* treatise notes in connection with firefighter disease presumptions, "[t]he best way to measure this strength is by the negative test of how much it takes to rebut or overcome the presumption," but "[t]he possible grounds for rebutting the presumption vary so widely that the end product varies from a virtually irrebuttable to a virtually worthless presumption."<sup>16</sup>

Judge Torrey has contended that in the context of the firefighter disease presumptions, "[m]ost states seem to treat the firefighter cancer presumption under the Morgan approach," and he identifies Virginia, Maryland, Oregon, North Dakota, Missouri, and Colorado as falling into the Morgan camp.<sup>17</sup> As mentioned, Morgan-type presumptions would tend to be strongest, with the absolute strongest variety in the firefighter cancer context requiring employers to prove not only that the disease was not caused by the work in question, but also that there was some other, specific non-occupational cause.<sup>18</sup> A litigation issue surrounding firefighter cancer (or Heart and Lung-type presumptions) over the years has been whether defendants may attempt to, in effect, argue against the existence of the presumption. For example, an employer confronted with a Morgan rebuttal statute might stubbornly argue that the tobacco usage of a particular plaintiff precludes a finding of workplace causation of cancer – as if the claimant continued to carry the burden of proof on the issue. The nub of such arguments is that the presumptions themselves are scientifically unsound, and it probably goes without saying that these arguments are often poorly received by courts.<sup>19</sup>

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<sup>16</sup> LARSON'S WORKERS' COMPENSATION LAW § 52.07 [2] [a].

<sup>17</sup> See Torrey, *supra.*, FIREFIGHTER CANCER PRESUMPTION STATUTES at 10.

<sup>18</sup> LARSON'S WORKERS' COMPENSATION LAW § 52.07 [2] [a] [i], [ii].

<sup>19</sup> See Torrey, *supra.*, n. 11 *citing, e.g.*, City of Frederick v. Shankle, 367 Md. 5, 785 A.2d 749 (Md. 2001); Linnell v. City of St. Louis Park, 305 N.W.2d 599 (Minn. 1981); Robertson v. North Dakota Workers Compensation Bureau, 616 N.W.2d 844, 855 (N.D. 2000); Medlin v. County of Henrico Police, 542 S.E.2d 33 (Va. 2001).

## *B. A Few Examples of Rebuttal Provisions Under Covid 19 Presumptions*

Close inspection of specific workers' compensation presumptions reveals that while some establish Morgan-type rebuttal (shifting the burden to the employer-insurance carrier to establish non-causation) others are more ambiguous.<sup>20</sup> As an example of a Morgan-type rebuttal provision consider New Jersey's Covid presumption: "This prima facie presumption may be rebutted by a preponderance of the evidence showing that the worker was not exposed to the disease while working in the place of employment other than the individual's own residence."<sup>21</sup> This language suggests a Morgan approach because the burden proof is shifted to the employer to prove non-causation as specified by the statute. Implicitly, if the employer fails to carry its burden of proof on non-causation, the claimant will prevail. Similarly, Minnesota's Covid presumption statute suggests Morgan rebuttal: "the presumption shall only be rebutted if the employer or insurer shows the employment was not a direct cause of the disease."<sup>22</sup> This provision shifts the burden of proof to the employer, though the waters seem muddied somewhat by inclusion of the term "direct cause," somewhat unusually suggesting that the employee must initially prove causation "directly," whatever that may mean.

But consider the murky rebuttal language of the Illinois presumption, which seems at first blush neither Thayer-Wigmore nor Morgan:

The presumption created in this subsection [820 ILCS 310/1 Section 1(g)(3)]<sup>23</sup> may be rebutted by evidence, including, but not limited to, the following:

- (A) the employee was working from his or her home, on leave from his or her employment, or some combination thereof, for a period of 14 or more consecutive days immediately prior to the employee's injury, occupational disease, or period of incapacity resulted from exposure to COVID-19; or
- (B) the employer was engaging in and applying to the fullest extent possible or enforcing to the best of its ability industry-specific workplace sanitation, social distancing, and health and safety practices based on updated guidance issued by the Centers for Disease Control and Prevention or Illinois Department of Public Health . . .
- (C) the employee was exposed to COVID-19 by an alternate source.

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<sup>20</sup> For a list of presumptions up to date as of March 2021 see 2021 STATE ACTIVITY: COVID-19 WC COMPENSABILITY PRESUMPTIONS, NATIONAL COUNCIL ON COMPENSATION INSURANCE available at [https://www.ncci.com/Articles/Documents/IL\\_Covid-19-Presumptions-2021.pdf](https://www.ncci.com/Articles/Documents/IL_Covid-19-Presumptions-2021.pdf)

<sup>21</sup> S.B. 2380 available at [https://www.njleg.state.nj.us/2020/Bills/S2500/2380\\_R1.PDF](https://www.njleg.state.nj.us/2020/Bills/S2500/2380_R1.PDF).

<sup>22</sup> Minnesota Statutes 2018, section 176.011, subdivision 15, as amended available at <https://www.revisor.mn.gov/laws/2020/0/72/>.

<sup>23</sup> See <https://ilga.gov/legislation/101/SB/10100SB0471ham001.htm>

Aside from the general oddity of encountering, in subsection (B), a negligence/fault defense to a causation provision in a no-fault statute, there is no statutory clue as to whether the legislature meant to create Thayer-Wigmore or Morgan rebuttal. From the face of the quoted statutory language one cannot determine the timing of burden-shifting or how the burden shifts when the presumption is met with some competent evidence. Perhaps the answer is buried elsewhere in the presumption's statutory language, or perhaps there are other features of Illinois law that would make the answer obvious to an Illinois practitioner.

The bottom-line moral of the story is that no Covid 19 rebuttal provision should be taken for granted. The provisions differ from one another and should be studied carefully. Even under the Morgan model, employer-insurers can be expected to attempt to prove workplace non-causation by aggressively investigating other potential sources of employee exposure to Covid. Practitioners may already be involved in such cases but this writer is not aware of related disputes that have resulted in reported cases. It is hard to keep up with the developing law in these new areas.

#### IV. Conclusion

The question of whether workers' compensation Covid 19 presumptions are good policy understandably generates debate. But before addressing that question it is important to know how Covid 19 presumptions operate functionally. To understand the operation of a presumption one must know how an employer or insurance carrier will rebut the presumption: is a Thayer-Wigmore or Morgan model at issue? This short paper deliberately avoided discussion of the policy wisdom of workers' compensation Covid 19 presumptions—a broader topic beyond the paper's scope. But it will be much more difficult for claimants to prevail, even with the aid of Covid 19 presumptions, unless policy makers establish Morgan-like rebuttal. It is for the reader to determine the desirability of this outcome. Yet, if Thayer-Wigmore is the selected model, one can legitimately ask whether such a presumption is worth the trouble of enacting, for it may be easily overcome.