1. Would a claim for COVID-19 be considered a compensable occupational disease injury under the Workers’ Compensation Act?

No court in New Mexico has addressed whether Covid-19 is compensable under either the occupational disease or workers compensation statutes. There are two statutes in play: Occupational Disease Disablement, 52-3-1 through 52-3-60 and Workers Compensation 52-1-1 through 52-1-70.

A. Occupational Disease Disablement

In my opinion, workers infected with Covid-19 face a difficult time establishing an occupational disease disablement. The three critical provisions are set forth below:

52-3-8. Right to compensation; exclusive when.

The right to the compensation provided for in this act, in lieu of any other liability whatsoever, to any and all persons whomsoever, for any disablement from occupational disease or death resulting therefrom, shall obtain in all cases where the following conditions occur:

A. where at the time of disablement both employer and employee are subject to the provisions of this act; and where the employer has complied with the provisions hereof regarding insurance;

B. where at the time of disablement the employee is performing service arising out of and in the course of his employment;

C. where the disablement or death is proximately caused by an occupational disease arising out of and in the course of his employment, and is not intentionally self-inflicted.

52-3-33. Occupational diseases; definition.

As used in the New Mexico Occupational Disease Disablement Law [52-3-1 NMSA 1978], "occupational disease" includes any disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of
employment as such and includes any disease due to, or attributable to, exposure to or contact with any radioactive material by an employee in the course of his employment.

52-3-32. Occupational diseases; proximate causation.

The occupational diseases defined in Section 52-3-33 NMSA 1978 shall be deemed to arise out of the employment only if there is a direct causal connection between the conditions under which the work is performed and the occupational disease and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence. In all cases where the defendant denies that an alleged occupational disease is the material and direct result of the conditions under which work was performed, the worker must establish that causal connection as a medical probability by medical expert testimony. No award of compensation benefits shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists.

The Covid 19 virus is not peculiar to the occupation in which the employee was engaged. It is wide ranging virus affecting all occupations. Similarly, it will be nearly impossible for workers to prove proximate cause as defined above as the virus is not a natural incident of work. The virus is not incidental to the character of the work. It does not have its origins in a risk connected with employment.

B. Workers Compensation

Next we must examine if Covid 19 might qualify for compensation under New Mexico Workers Compensation law. The critical provisions are:

52-1-19. Injury by accident; course of employment.

As used in the Workers’ Compensation Act, unless the context otherwise requires, "injury by accident arising out of and in the course of employment" shall include accidental injuries to workers and death resulting from accidental injury as a result of their employment and while at work in any place where their employer's business requires their presence but shall not include injuries to any worker occurring while on his way to assume the duties of his employment or after leaving such duties, the proximate cause of which is not the employer's negligence.

52-1-28. Compensable claims; proof.
A. Claims for workers' compensation shall be allowed only:
(1) when the worker has sustained an accidental injury arising out of and in the course of his employment;
(2) when the accident was reasonably incident to his employment; and
(3) when the disability is a natural and direct result of the accident.
B. In all cases where the employer or his insurance carrier deny that an alleged disability is a natural and direct result of the accident, the worker must establish that causal connection as a probability by expert testimony of a health care provider, as defined in Section 52-4-1 NMSA 1978, testifying within the area of his expertise.

Our opinion is that these cases should generally be treated like cases involving regular flu and colds at this time. However, we are in New Mexico, which is a very Worker friendly state. Our inclination is to deny any of these types of claims, unless they present under special circumstances, facts, etc. that would indicate otherwise.

The legal issue is whether the Worker sustained an accidental injury arising from his employment while in the course and scope of his employment and is unable to perform the duties of his employment as a result of the injury. NMSA 1978, § 52-1-25.1. The term “injury by accident arising out of and in the course of employment” means any accidental injury to a worker that arises from an accidental injury due to the worker’s employment while the worker is at work. NMSA 1978, § 52-1-19.

For an injury to be compensable under the Act, a Worker’s injury must arise out of, or in the course and scope of, his employment. Claims for workers' compensation shall be allowed only:

(1) when the worker has sustained an accidental injury arising out of and in the course of his employment;

(2) when the accident was reasonably incident to his employment; and

(3) when the disability is a natural and direct result of the accident

Currently, absent specific factual circumstances, we don’t believe contracting Covid-19 is an accidental injury contemplated by the workers compensation statute.

2. What is the jurisdictional rationale that makes the claim compensable? Provide all rules that would apply to make the claim compensable.

52-3-8. Right to compensation; exclusive when.

The right to the compensation provided for in this act, in lieu of any other liability whatsoever, to any and all persons whomsoever, for any disablement from occupational
disease or death resulting therefrom, shall obtain in all cases where the following conditions occur:

A. where at the time of disablement both employer and employee are subject to the provisions of this act; and where the employer has complied with the provisions hereof regarding insurance;

B. where at the time of disablement the employee is performing service arising out of and in the course of his employment;

C. where the disablement or death is proximately caused by an occupational disease arising out of and in the course of his employment, and is not intentionally self-inflicted.

52-3-33. Occupational diseases; definition.

As used in the New Mexico Occupational Disease Disablement Law [52-3-1 NMSA 1978], "occupational disease" includes any disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such and includes any disease due to, or attributable to, exposure to or contact with any radioactive material by an employee in the course of his employment.

52-3-32. Occupational diseases; proximate causation.

The occupational diseases defined in Section 52-3-33 NMSA 1978 shall be deemed to arise out of the employment only if there is a direct causal connection between the conditions under which the work is performed and the occupational disease and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence. In all cases where the defendant denies that an alleged occupational disease is the material and direct result of the conditions under which work was performed, the worker must establish that causal connection as a medical probability by medical expert testimony. No award of compensation benefits shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists.

3. If the employee is directed by the employer to quarantine due to possible exposure at work (and the employer is continuing full salary for 14 days), does the employer’s direction make the claim compensable under the Workers’ Compensation Act?

The payment of full salary would negate the need for a claim under the WCA.
4. Are “first responders” considered at greater risk than the general public under the Workers’ Compensation Act?

No. First responders are not generally considered in their own class under the New Mexico WCA.

5. Is “Pharmacy” considered a first responder under the Workers’ Compensation Act?

Not based upon the current language of the Act.

6. Is the state calling for legislation that would eliminate the burden of proof for workers making a COVID-19 occupational disease claim? If so, please provide summary of what is being proposed.

Not at this time.

7. Has the state governor issued an executive order allowing for COVID-19 cases compensable under the Workers’ Compensation Act? If so, please provide copy of the executive order.

Not at this time.

8. If COVID-19 claims are compensable under the Workers’ Compensation Act, is the waiting period waived?

No.

52-1-40 Waiting Period

No compensation benefits shall be allowed under the provisions of the Workers’ Compensation Act for any accidental injury which does not result in the workers’ death or in a disability which lasts for more than seven days; provided, however, if the period of the workers’ disability lasts for more than four weeks from the date of his accidental injury, compensation benefits shall be allowed from the date of disability.

9. If the claim is compensable under the Workers’ Compensations Act and the Employer pays the employee their full salary for the first two weeks during quarantine, how does this affect the TTD benefits?

TTD benefits are connected to the date of disability, not payment of salary. However, if full salary is being paid, TTD benefits are not likely owed.
10. Can the TTD benefits start be delayed if the employee’s disability extends beyond 14 days if the employee receives their full salary for the first two weeks?
Yes. TTD benefits would not be generally available if Worker is receiving their full salary.

11. Can the TTD benefits be offset by the full salary paid to the employee?
Yes benefits could be offset by the pay if full salaries were paid.