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MEMORANDUM TO ALL CLIENTS OF STEWART GREENBLATT MANNING & BAEZ

RE: GUIDE FOR HANDLING WORKERS COMPENSATION CLAIMS ARISING OUT OF THE CORONAVIRUS (COVID-19) PANDEMIC

Coronavirus (COVID-19) (hereinafter referred to as "COVID-19") - has been declared a pandemic by the World Health Organization, The Federal Government has declared a National Emergency, and New York State and New York City have each declared a State of Emergency. It is anticipated, that as the rate of testing increases, the number of confirmed cases will increase significantly and many employees will allege that exposure/infection occurred in the workplace. The issue here is whether exposure to or contraction of the COVID -19 virus is compensable. As will be demonstrated below, the claimant bears the burden to credibly identify the source of the exposure and provide sufficient medical evidence to support the allegation. In short, it is our recommendation that claims for exposure to or contraction of COVID-19 be denied in their entirety on the basis of no accident arising out of and in the course of the employment and no causal relationship.

In addition, we wish to note that while throughout this document we reference the term "disease", the nature of the claim should not be confused with an occupational disease.

THE WORKERS COMPENSATION STATUTES

Workers Compensation Law Section 2(7) states in pertinent part:

"Injury" or "personal injury" mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.

To effectuate statutory objectives, WCL 21(1) creates a statutory presumption that injuries arising "out of and in the course of the employment" are compensable as accidents. It is axiomatic that a claimant must establish, through sufficient credible evidence, that there is a causal nexus between the accident and/or injury and the employment. The Board, as the "trier of fact" has wide latitude in determining whether a disabling condition is an accident.

The threshold determination is whether exposure to or contraction of COVID-19 will be considered an "injury" under the statute. The New York Workers' Compensation Board, as well as the Courts in New York, have previously addressed similar issues regarding viral infections and compensability. The following provides a detailed analysis of the circumstances under which a viral infection can be established as a work-related injury or accident.

THERE MUST BE A DETERMINABLE EVENT - For example - a co-worker coughs or sneezes in close proximity to claimant -it is not enough that a co-worker or co-workers contracted a disease. The claimant must show that same was the cause of the claimant contracting same.

The contraction of polio, a previously contagious and uncontrolled disease, was found to be a compensable accident when a co-worker sneezed in the face of a claimant. (Gardner v. New York Medical College, 280 A.D. 844, 113, NYS 2d 394 (3rd Dept. 1952)). The claimant there, was a nurse and while in the course of her duties a fellow nurse sneezed into her face while both were riding in an elevator. The claimant testified when this occurred, she felt sputum on her cheek

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which she brushed off with her hand. There was proof from which the Board can find that at the time of this occurrence, the nurse who sneezed was suffering from poliomyelitis. The claimant became ill within a short time thereafter with poliomyelitis, the effects of which left her totally paralyzed in both arms and legs and suffering from other physical disabilities. The employer argued, on appeal, that sneezing into a claimant's face could not be found to be an "accident" because people normally sneeze. The Court rejected this argument stating, "It seems to us, however, that as to persons nearby who receive the effect of such a sneeze, fits within the classic definition of an "accident" which causes a disease stated by Pound, J. in Lerner v. Rump Bros., 241 NY 153, 155, 149, NE 334, 335, 41 ALR 1122."

The Court in Gardner continued, "inception of the disease can be a determinable event assignable to something extraordinary. The adjective "catastrophic" used in an alternative sense in that definition does not imply that an accident which brings on a disease need also be a disaster." The Court concluded that the Board was authorized to find this occurrence to be an accident within a well-established decisional pattern. (Matter of Connelly v. Hunt Furniture Co., 240 NY 83, 147 NE 366, 39 ALR 867, (blood poisoning contracted through gangrenous corpse in course of employment deemed compensable accident). Justice Cardozo opined "We have little doubt that common understanding would envisage this mishap as an accident, and that common speech would so describe it. Germs may indeed be inhaled through the nose or mouth or absorbed into the system through normal channels of entry. In such cases their inroads will seldom, if ever, be assignable to a determinate or single act identified in space or time. (Matter of Jeffreyes v. Sager Co., 198 App. Div. 446, 233 NY 535, 153 NE 307. For this, as well as for the reason that the absorption is incidental to a bodily process both natural and normal, their action presents itself to the mind as a disease and not an accident. Our mental attitude is different when the channel of infection is abnormal or traumatic. If these become dangerous or deadly by contact with infected matter, we think and speak of what has happened as something catastrophic or extraordinary, a mishap or an accident (see Lewis v. Ocean A.G. Corp., 224 NY 18, 21, 120 NE 56, 7 ALR 1129, though very likely a disease also.). "A commonsense appraisement of everyday forms of speech and modes of thought must tell us when to stop." (Bird v. St. Paul F.M. Insurance Company, 224 NY 47, 51, 120, NE 86 87, 13 ALR 875."

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Justice Cardozo continued, “We make little progress when, viewing infection as an isolated concept and ignoring its channels of attack or the manner of its coming, we say upon the authority of science, that infection is a disease. It may be this, and yet an accident too.

Judge Cardozo’s commonsense approach has long been applied by New York Courts, and while New York Courts have broadly construed the term “accident” they have not endorsed the proposition that “any unexpected event is an accident.” New York Courts have “focused on whether the causality, although unexpected, was “catastrophic or extraordinary.” See Lerner v. Rump Bros. supra. See Michaels, (recognizing distinction between diseases contracted through normal means and those that are the result of abnormal means; Bacon v. US Mut. Accident Association, 123 NY 304, 25 NE 399, 400 [1890]”

In Middleton v. Coxsackie Correctional Facility, 38 NY 2d 130, 379 NYS 2d 3, 341, NE 2d 527 (1975), a death claim was found compensable where a correctional officer developed tuberculosis and eventually died after being exposed to a tubercular inmate who coughed persistently in his presence. The Courts found that under the New York Workers’ Compensation Law, plaintiff’s tuberculosis constituted a “disease or infection as may naturally unavoidably result from an accidental injury.” 379 NYS 2d 3, 341, NE 2d @ 530 (quoting New York Comp. Law Section 2(7)), the Court noted that “numerous awards given out by the Workers’ Compensation Board, “based on diseases found to be the result of industrial accidents, including those caused by germs have been sustained. These include, “malignant tertian malaria caused by a sting of a certain species of mosquito, cranio-orbital mucormycosis, contracted after inhalation of dust with musty odor, the mumps contracted by a teacher after exposure to pupils during epidemic, poliomyelitis contracted after sneezed in face by fellow nurse suffering from said disease, and scarlet fever contracted a by matron in direct contact with children suffering therefrom. Id. 379 NYS 2d 3, 341, NE 2d @ 530-531 (citations omitted). The common thread is that a specific, definable event led to contraction of the disease. As will be discussed below, an allegation that a disease was contracted as a result of community or ubiquitous spread will not be found sufficient.

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COMPENSABILITY FOR CERTAIN DISEASES

Instruction can be found in how the Board and Courts have determined compensability of certain diseases which are transmitted by airborne particles or through blood, saliva or mucus.

a. **Tuberculosis**: The Third Department has determined that "a claim for compensable tuberculosis requires the claimant show proof of exposure to the disease." Williams v. Buffalo General Hospital, 28 A.D.2d 777, 280 NYS 2d 699 (3rd Dept. 1967). "While the standard does not require the claimant to identify a specific patient diagnosed with tuberculosis with whom the claimant had contact, the standard does require proof of contact with patients who have been diagnosed with tuberculosis." (In re: Sisters of Charity Hospital, 99 NY WCLR 1116 (decided 6/22/1999)). Thus, in Matter of Port Jefferson Volunteer Ambulance, Case Number A403 0021 decided 8/29/2006, the unanimous Board Panel disallowed a claim for tuberculosis where a volunteer ambulance worker alleged that a positive tuberculosis test was caused by exposure to tuberculosis in her work as a volunteer ambulance worker. The claimant testified that members of her family were tested after her positive test and that the results were negative, and that to her knowledge, she had not been exposed to anyone with tuberculosis outside of her work as a volunteer ambulance worker. The claimant also testified that she had never been informed any of the patients she transported or tended to had tuberculosis. Claimant's treating physician based his finding of causal relationship on the history provided by the claimant that she worked as an EMT and that tuberculosis is spread via the respiratory tract and exposure occurs when someone coughs or sneezes on you, but it generally takes repeated exposure of a period of time to become infected and that it is not usually acquired in just one episode. The doctor did not think that tuberculosis would have been acquired from one being coughed on once in a supermarket or some such place and that it was acquired over time from numerous exposures. The carrier produced a witness and documentation that indicated that the volunteer ambulance company searched its records for all patients transported by the claimant, contacted those hospitals about the claimant's tuberculosis exposure and that there were no records of any

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patients transported by the claimant as having tuberculosis. Dr. Sividas, claimant's other treating physician with a specialty in internal medicine and infectious diseases, testified that an individual exposed to tuberculosis onetime can trigger a positive test for exposure to tuberculosis. In disallowing the claim, the Board Panel found that the claimant did not present sufficient proof that she was exposed to tuberculosis while working as a volunteer ambulance worker. The records reflect that the claimant was unaware of specific exposure to tuberculosis while working and did not present proof that any patient she attended to or transported suffered from the disease. As the claimant was unable to identify the source of her exposure, the Board Panel found that there was insufficient evidence for the WCLJ to find accident, notice and causal relationship for tuberculosis exposure. See also : Matter of North Area Volunteer, Case Number A600 0009 (decided 3/30/2001), where the claim was disallowed where the record showed no indication that the claimant was exposed to tuberculosis at work and such a presumption will not be made without competent proof of causal relationship between the claimant's disease and his employment. There was no evidence in the record that the claimant had contact with any co-worker or patient subsequently diagnosed with tuberculosis. The record is void of medical evidence that the claimant had contracted tuberculosis while in the course of his employment, and as such she did not sustain a compensable injury.

In order for a claim for tuberculosis to be compensable, the claimant must substantiate a specific exposure to tuberculosis while working in the job in which he or she was employed and prove that someone at the place of employment, whether a coworker, a customer, a patient, an inmate etc., at the facility suffered from tuberculosis. If a claimant cannot identify the source of his or her exposure, then the claim cannot be found compensable.

b. **Pneumonia**: In Katonah-Lewisboro Central, Case Number 5080 6009 (decided 5/25/12), the decedent's spouse alleged that the decedent was exposed to Group A streptococcus bacteria while at work, which resulted in her contracting a pneumococcal infection, which led to her death. The facts were as follows: Decedent was admitted to the hospital and her treating physicians stated she had contracted a community acquired pneumonia. The culture tested positive for exposure to Group A streptococcus bacteria.

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Decedent worked in an elementary school and the treating physician stated this was an environment that results in frequent exposure to respiratory illnesses. The claimant testified with regard to the temporal events leading up to decedent's hospitalization and stated that the decedent had no and/or limited social contact outside of their family over the weekend that preceded her illness. Decedent went to work at her elementary school on a Monday and then again on Tuesday and on Tuesday afternoon, became ill with flu like symptoms. She again went to work on Wednesday continuing with flu like symptoms. The decedent's symptoms became progressively worse to the point that she sought treatment at the Emergency Room of the hospital on the following Saturday. The decedent's treating physician appeared and testified before the Board citing medical studies that demonstrated that 30% to 35% of school age children are colonized with Group A streptococcus bacteria, whereas the presence of these bacteria in the general population as less than 10%. The witness further stated that the most likely method of transition for this bacterial infection was through respiratory contact and that with a reasonable degree of medical certainty he found that the decedent's contraction of the pathogen occurred in her work environment. On cross-examination the doctor conceded that he had no information regarding whether the decedent had contact with a specific individual at the elementary school who was a carrier of the pathogen. He further conceded that Group A streptococci infections could be acquired from surfaces, but this method of infection was more uncommon. He further acknowledged that he had limited information regarding the claimant's other social contacts aside from her work activity for the incubation period preceding her illness. The WCLJ found that the claimant established, by sufficient evidence, the decedent's exposure to Group A streptococcus bacterial pathogen while working at an elementary school and concluded that the decedent sustained a causally related death. By a Memorandum of Board Panel Decision the Board Panel held in abeyance the WCLJ's establishment of the claim for decedent's causally related death and referred the case record to an Impartial Specialist in Infectious Diseases to render an opinion as to whether decedent's death was causally related to her work at an elementary school. The Impartial Specialist completed a medical narrative with regard to his review of the relevant medical records and contents of the case file. The Impartial Specialist found that decedent contracted pneumonia and died as a result of this contracted illness and indicated that assuming the decedent had Group A

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streptococcus pneumonia it would necessary to ascertain where she acquired the infection to determine the causal relationship for her death. He noted that the potential sources of this infection include the elementary school where she worked, the gym where she worked out, her husband or the meals she ate. In addressing the issue of causal relationship for the decedent's death, the Impartial Specialist found that the decedent probably had Group A streptococcus pneumonia and that she probably acquired the bacteria at the elementary school where she worked since children are often sick with this pathogen and can be carriers and transmitters of the infection. However, he conceded that the case record did not allow him to definitively say that the decedent had Group A streptococcus pneumonia or that she acquired it at her elementary school.

The Board Panel in Matter of Katonah-Lewisboro Central found that the claimant failed to proffer sufficient evidence to establish the claim for causally related death of decedent. The Board Panel noted that the medical narrative report completed by the Impartial Specialist is instructive in highlighting the deficiencies of the evidence presented on the question of causal relationship for the death claim. The Impartial Specialist observed that the claimant did not submit medical evidence demonstrating that a confirmatory culture was taken from a sterile body fluid showing the presence of Group A streptococcus bacteria in the decedent and further observed that the record contained no evidence to confirm that the decedent was exposed to any children sick with Group A streptococcus bacteria at the elementary school where she worked within four days of the onset of her symptoms. Since the claimant did not produce sufficient medical evidence to confirm the decedent's infection with Group A streptococcus bacteria, upon her hospitalization and since the claimant has produced no evidence to indicate that the decedent was potentially exposed to an individual infected with Group A streptococcus bacteria at her elementary school within four days of the onset of her symptoms, the claimant has failed to meet his burden of proof on the question of causal relationship for the decedent's death.

Compare Matter of Nassau County Police Department, Case Number G033 7646 (decided 3/26/14). This was a contested claim for the death of the decedent in which it was alleged the decedent expired as a result of

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contracting a viral infection at his place of employment. The claimant testified that the decedent worked in the hospital as an emergency medical technician and for approximately the last five years of his tenure decedent worked in an office position of the Nassau University Medical Center. Testimony from both the claimant and the private investigator demonstrated that the decedent would have to pass by an enclosed area of the hospital where patients with infectious diseases were treated on an out-patient basis in order to get from the elevator to his office. In addition, ten of the decedent's co-workers who were required to pass through the Infectious Disease Unit also became sick and one eventually died. Claimant asserted there was a presumed exposure to pneumonia in the Infectious Disease Unit which compromised the decedent and caused his death. Claimant's medical expert admitted that pneumonia was not confined to a hospital setting and was a highly contagious condition. He acknowledged that the claimant may have contracted the condition outside of the workplace. The carrier's consultant prepared a report in which he concluded that the acute cause of the decedent's death was exposure to pneumonia. He indicated that pneumonia was a "ubiquitous organism found in the community" and that in this case was a community acquired infection. He concluded that there was no evidence in this case of an occupational exposure and there was no evidence of causally related death. In disallowing the claim, the WCLJ found there was no dispute that the decedent had contracted a highly contagious form of pneumonia which contributed to his death. The Law Judge concluded that the claimant did not have to walk through an area at the medical center where patients were being treated in order to access his office and noted there was no evidence presented that the decedent's co-workers had contracted the same condition or were treated for exposure to pneumonia. The Board Panel affirmed and found that although there was no dispute that pneumonia was a factor that contributed to the decedent's demise and there was also no proof that the decedent contracted the organism during the course of his employment. The mere fact that the decedent was required to walk past an enclosed area in which patients with infectious diseases were treated was insufficient to establish occupational exposure to pneumonia. Further, although the claimant alleged that co-employees had contracted the condition at the same time as the decedent, no admissible evidence in the form of medical records or testimony from physicians was presented to confirm the allegations. Moreover, the carrier's

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consultant credibly reported that the organism was ubiquitous in the community and the decedent may have been exposed almost anywhere.

c. **MRSA**: In Matter of Manor Oak Skilled Nursing Facility, Case Number 8991 6374, (decided 12/4/02) the claimant, a healthcare worker, alleged that she had causally related lost time based upon her MRSA illness. The case was established for MRSA and the decision was appealed by the carrier. Claimant's treating physician testified regarding causally related disability and stated that MRSA, the claimant's bacterial infection, was rare in the general population, and that without knowing specifically that the claimant had no exposure other than at work, he could not say that it was definite that she contracted the disease at work. The claimant testified that she worked with many patients with MRSA, and that some of them spit in her face on occasion. The claimant was able to note the names and locations of many of her patients who have the disease and with whom she had come into contact. Claimant's co-workers also testified regarding the claimant's exposure noting that she had contact with the bodily fluids of some patients who had the infection. The claimant noted that some of those patients had been in isolation with MRSA and some had died of it. The Board, in affirming the decision establishing the claim, found it was uncontroverted and that the claimant came into contact with patients with MRSA and claimant's treating physician with a reasonable degree of medical certainty testified that it was contracted at work. Although the doctor was unaware as to whether or not the claimant had any other exposures, the Board found the claimant's testimony, that her only exposure was at work to be credible. The burden of establishing a causal relationship between employment and disability rests with the claimant who must do so by competent medical evidence. (Michell v. New York City Transit, 664, NYS 2d 485 (3rd Dept. 1997). The medical opinion need not be expressed with absolute or reasonable certainty. It must, however, be an indication of sufficient probability as to the cause and the medical opinion must be supported by a rational basis. (Van Patten v. Quandt's Wholesale Distributors, 198 A.D. 2d 539, 603 NYS 2d 195 (3rd Dept. 1995).

Compare Matter of Catholic Charities, Case Number G006 7469 (3/3/11) where the Board disallowed a claim for MRSA. The claimant was a resident counselor at an eight bed facility housing people with mental disabilities

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and/or drug dependencies. The claimant was diagnosed with MRSA and alleged that his MRSA was the result of an exposure to this bacteria at the group home in which he was employed. Claimant's testimony included his concerns regarding the cleanliness of the bathrooms, that some of the residents were on antibiotics for various issues but, he was unaware of any of the residents having been diagnosed with MRSA. Claimant's treating physician found the MRSA infection to be work-related because group homes tend to have "this type of bacteria" present, but admitted he had no history of any resident at the facility suffering from a MRSA infection. The Board held that the developed record showed no credible evidence that MRSA was present in the facility much less that the claimant was exposed to this bacteria at work. The Board Panel further found that claimant's treating physician's testimony was based upon speculation and was insufficient to support a finding of causal relationship.

COVID-19

With regard to COVID-19, the foregoing cases are instructive. In order to establish occupational exposure to an infectious disease, a claimant will have to establish, through credible evidence, that there was a specific direct exposure to the disease. It will not be enough to show that co-workers had also contracted the condition at the same time as a claimant. It will be necessary to provide medical records or testimony from physicians to confirm allegations of exposure. Importantly, with regard to COVID-19, this is a highly contagious virus and we are now subject to ubiquitous community spread. This will likely make it more difficult for a claimant to prove causation without specific proof of causation because one is at risk of exposure almost anywhere.

IS EXPOSURE TO POTENTIALLY HARMFUL BODY FLUIDS WITHOUT FULL BLOWN DISEASE COMPENSABLE?

An issue can arise whether under WCL Section 2(7) regarding whether exposure to disease through bodily fluid will be considered a compensable injury. This scenario contemplates exposure only, not full-blown disease. This issue has been addressed in cases where a claimant may have been exposed to HIV positive body fluid. The Board has held that the proper procedure for such cases in which a claimant may have been exposed to harmful body fluids is to establish accidental

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contact with the body fluid and close the case until such time as the claimant produces medical evidence of positive testing or symptoms that could be attributed to contact with harmful bodily fluid. (Matter of New York State Department of Corrections, Case Number 5981 0088 (decided 9/18/00); Matter of Eckerd, Case Number 3030 6669 (decided 8/16/04)).

Pursuant to WCL 10(3)(a), the situation is somewhat different with regard to a public safety worker, including but not limited to, a firefighter, emergency medical technician, police officer, correction officer, civilian employee of the Department of Corrections and Community Supervision or other persons employed by the State to work within a correction facility maintained by the Department of Corrections and Community Supervision, driver and medical observer, in the course of performing his or her duties, is exposed to the blood or other bodily fluids of another individual or individuals, the executive officer of the appropriate ambulance, fire or police district may authorize such public safety worker to obtain the care and treatment, including diagnosis, recommended medicine and other medical care needed to ascertain whether such individual was exposed to, or contracted any communicable disease and such care and treatment shall be the responsibility of the insurance carrier of the appropriate ambulance, fire or police district or, if a public safety worker was not so exposed in the course of performing his or her duties with the district, then such person shall be covered for the treatment provided for in this subdivision by the carrier of his or he employer when such person is acting int the scope of his or her employment. For the purposes of this subdivision, the term "public safety worker" shall include persons who act for payment or who act as volunteers in an organized group such as a rescue squad, police department, correctional facility, ambulance corp., fire department or fire company.

This section was proposed in response to concerns for corrections officers and other public safety officers, who in the line of duty, are exposed to blood or other bodily fluids because under the prior law when the exposure did not result in an infection, the treatment the worker received was not covered by the insurance carrier (Senate introducers Mem in Support, Bill Jacket, L2000 CH559).

Thus, where a corrections officer was subject to saliva exposure in Matter of Westchester Department of Corrections, Case Number G126 4973 (decided 1/2/19), the Board held that pursuant to WCL Section 10(3)(a), the care and

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treatment, including diagnosis, recommended medicine and other medical care received, to determine whether the claimant had contracted any communicable disease from the saliva was covered by WCL 10 (3)(a).

CLAIM FOR PSYCHIC TRAUMA

It is axiomatic that a mental injury precipitated solely by psychic trauma may be compensable in Workers' Compensation. (Matter of Guess v. Finger Lakes Ambulance, 28 A.D. 3d 996, [2006] lv. den. 7 NY 3d 707 [2006]). A claim for work related stress cannot be sustained absent a showing that the stress experienced by the affected claimant was greater than that which other similarly situated workers experienced in the normal work environment. (Matter of Spencer v. Time Warner Cable, 278 A.D. 2d 622 [2000] lv. den. 96 NY 2d 706 [2001]). This inquiry presents a factual issue for the Board to resolve and its determination, if supported by substantial evidence in the record, as a whole, will not be disturbed. (Matter of Kopec v. Dormitory Authority of the State of New York, 44 A.D. 3d 1230 [2007]).

Matter of Healthcare Services Group, Case Number G026 7613, (decided 10/30/12) is instructive. This was a controverted claim for anxiety, stress, and post-traumatic stress disorder. The claimant alleged "exposure to infectious disease from bodily waste from a resident", during her job as a housekeeper in a nursing home. The claimant came in contact with fecal matter, but did not contract any bloodborne pathogen as evidenced by test results undertaken during the year subsequent to the incident. The WCLJ established the claim and the Board Panel affirmed. On the appeal to the Board, the carrier contended that exposure to bloodborne pathogen does not constitute an accident or occupational disease within the meaning of Workers' Compensation Law Section 2(7). The Board noted that psychological symptoms triggered by the claimant's work environment can constitute an accident arising out of and in the course of the employment (See Ottomanelli v. Ottomanelli Brothers et al., 80 A.D. 2d 688 (1981) but only if the stress is greater than that which usually occurs in the normal work environment (See Matter of Charlotten v. New York Police, 730 N.Y.S.2d 377 (2001) and not if the mental injury is a direct consequence of a lawful personnel decision, made in good faith, including those involving disciplinary action or work evaluation.

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In Matter of Elmira Corr. Rec. Center, 2001 NY Wrk Comp 99707141 (12/6/01), a case in which the claimant was exposed to a bloodborne pathogen during the course of his activities, the Board found that:

> "The claimant is not arguing consequential stress, but rather is arguing that he experienced stress as the result of a situation at work. The stress case analysis is applicable in this circumstance as the focus of the argument is the stress itself, not the underlying exposure.
>
> The work situation encountered by the claimant was exposure to potential bloodborne pathogens coupled with the employer's failure to timely respond with prophylactic medication and counseling . . . [and] the claimant was forced to worry about contracting any number of diseases. Such a situation constitutes stress greater than that which occurs in the normal work environment and is more than the usual irritations to which all workers are occasionally subjected. The claimant has suffered compensable stress injury of anxiety and depression."

In Matter of Healthcare Services Group, the Board found that the record showed that the claimant was denied "release for immediate baseline testing and delayed information about the nature of her exposure" which was not reasonable and resulted in stress greater than that which occurs in the normal wok environment. The Board therefore found sufficient, credible evidence of a work-related exposure to a potential communicable disease resulting in a psychic injury of anxiety and depression requiring ongoing testing.

A claimant may allege a stress or psychological injury related to exposure to COVID-19, but the claimant must show that the stress was greater than in the usual work environment. Additionally, the employer's response will be considered on the issue of whether the response was reasonable under the circumstances.

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CONSEQUENTIAL INJURIES

Claims may arise where a claimant has an established injury which requires medical treatment, hospital visits, therapies or surgery, etc., and alleges exposure to or contraction of COVID-19 as a result. The Courts have long recognized that a consequential injury is compensable, provided there is a sufficient causal nexus between the initial work injury for which a claim is established and the subsequent injury (See Matter of Barre v. Roofing & Flooring, 83 A.D.2d 681 (1981); Matter of Pellerin v. New York State Department of Corrections, 215 A.D.2d 943 [1995] lv. den. 87 N.Y.2d 806 1996; Matter of Scoffield v. City of Beacon Police Department, 290 A.D.2d 845 (2002)). It is the claimant's burden to establish causality in a consequential injury and not the carrier's burden to disprove it. (Matter of Sale v. Helmsley-Spear, Inc., 6 A.D.3d 999 (2004); Matter of Keeley v. Jamestown City School District, 295 A.D. 2d 876 (2002)). To this end, a medical opinion on the causation must signify a "probability as to the underlying cause" of the claimant's injury which is supported by a rational basis. (Matter of Paradise v. Goulds Pump, 13 A.D.3d 764 (2004)). Mere surmise or general expressions of possibility are not enough to support a finding of causal relationship. (Matter of Ayala v. DRE Maintenance Corp., 238 A.D.2d 674 [1997], affirmed 90 N.Y.2d 914 (1997). See Matter of Zehr v. Jefferson Rehab Center, 17 A.D.3d 811 [2005]. Matter of Mayette v. Village of Massena Fire Department, 49 A.D.3d 920 [2008]).

In Matter of Boston Market, Case Number 4050 9768, (decided 4/22/13) the issue presented for Administrative Review is whether there was sufficient credible medical evidence to support expanding the case to include consequential MRSA infection. The case was established for a work-related injury to claimant's back resulting from an accident on January 14, 2004. The claimant was a diabetic. The claimant underwent a laminectomy on July 3, 2008 and was hospitalized on August 25, 2009 with MRSA. The carrier's consultant testified and opined that the operation of July 3, 2008 could not be responsible for the infection since it took place a year before and there was nothing in the records to indicate that the surgery was the cause of MRSA. He did not know if the claimant, a diabetic, had his diabetes under control, and speculated that the claimant could have picked up an infection anyplace. The doctor indicated that MRSA is "becoming ubiquitous, especially in diabetes" and is "very easily picked up from skin contact." Since the MRSA developed originally on the claimant's scalp, it was unlikely that the MRSA resulted from trigger point injections prior to the surgery because they were administered to the low back. If a doctor explicitly noted that the claimant developed MRSA after giving the claimant trigger point injections and then found

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evidence of infection in the area, then his opinion with regard to causation could change. Based upon this evidence, the WCLJ found insufficient credible medical evidence for consequential MRSA.

On appeal the Board Panel unanimously affirmed finding that there was no competent medical evidence linking the claimant's MRSA infection to the treatment of his causally related back injury. The Board specifically noted that the claimant's treating physician did not offer an opinion on the issue of causation or indicate a probability as to the underlying cause of the MRSA infection and failed to make himself available for cross-examination. See also Matter of Avi Food Systems Inc., Case Number G093 4596, (decided 8/15/16) where the Board modified WCLJ Decision involving a claim for consequential injury involving a MRSA infection. The Board Panel found that the medical evidence on causal relationship was speculative and a general expression of mere possibility without the actual review of the claimant's hospital medical records concerning the MRSA infection was insufficient to demonstrate that the claimant's MRSA infection was a consequential injury.

Compare Matter of Brian D. Howard DBMPC, Case Number G023 4032, (decided 12/17/12) where the Board found sufficient credible medical evidence to support amending the case to include consequential MRSA. The established injury was to claimant's right hand. The claimant, a kennel supervisor in an animal hospital, was bitten by a cat on September 25, 2009. On November 10, 2010 the claimant's treating physician diagnosed claimant with a MRSA infection. In a narrative medical report dated May 5, 2011 claimant's treating physician indicated that claimant had MRSA and that the precipitating factor was the cat bite that occurred on September 26, 2009. In an IME report dated August 4, 2011 carrier's consultant diagnosed the claimant as status post cat bite to the right hand, carpal tunnel syndrome, status respiratory failure post hospitalization, MRSA and polyarteritis. The consultant could not discuss the issue of causal relationship without a full review of all the medical records. The WCLJ amended the case to include consequential MRSA and on appeal the carrier asserted there was no competent medical evidence supporting that claim. The Board Panel found that there was sufficient credible medical evidence to support amending the case to include consequential MRSA. The Board particularly found that the medical narrative of claimant's treating physician dated November 11, 2010 which diagnosed the claimant with MRSA and a further medical report dated December 2, 2010 and May 5, 2011 that the claimant had recurrent furunculosis secondary to MRSA and that the precipitating factor was the cat bite sustained at work to be

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credible and sufficient to support amending the case to include consequential MRSA.

Likewise, in Matter of NYS OCA, Case Number 0080 4705, (decided 5/10/11) the claimant was injured at her job as a Court officer when she was accidentally sprayed with pesticide. She suffered a severe allergic reaction sustaining injuries to her face and hands as a result of the exposure. The case was established for work related injury involving the right ear, right thumb and eyes as a result of the pesticide exposure on December 5, 2007. In October 2009 the claimant was hospitalized when she began to notice shortness of breath and a foul odor emanating from her lungs when she breathed. She was diagnosed with a lung condition that developed into an abscess. Claimant's treating physician diagnosed her with obstructive pulmonary disease and reactive airway disease which was a known sequelae of exposure to irritating chemicals. The carrier's consultant stated that the claimant's shortness of breath was related to the chemical exposure, however, he did not believe the lung abscess was causally related to the exposure and recommended further long-term treatment with a bronchodilator to treat claimant's injury. The case was amended for an additional work-related injury involving reactive airway disease and obstructive pulmonary disease. The Board Panel found credible medical evidence on the record to support a finding of a causal nexus between the claimant's October 2007 exposure and her lung condition. The opinion of the carrier's physician conceded that the claimant's lung disorder was causally related to the chemical exposure. The claimant's physician provided a handwritten note which identified her lung condition as causally related to the chemical exposure. Both physicians recommended identical treatment for an indeterminate period of time. The Board Panel found there was sufficient evidence to support a finding of a causal nexus between the initial work-related injury for which the claim was established and the subsequent injury.

INJURIES SUSTAINED WHILE ON A BUSINESS TRIP

Traditionally, injuries sustained by an employee while traveling in the business of his employer are compensable if they occurred while the employee was actually acting in furtherance of his employer's business. This theory of compensability has been expanded in recognition of the fact that a change in environment creates a greater risk of injury to the employee. (Capizzi v. Southern District Reporters Inc. et al., 61 N.Y.2d 50, 471 N.Y.S.2d 554, 459 N.E.2d 847 (1984)). In addition, it is well settled that when an employee is required to travel to a distant place on

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business for his employer and is directed to remain at that place for a specified length of time, his status as an employee continues during the entire trip, and any injury occurring during such period is compensable, so long as the employee at that time of injury had been engaged in a reasonable activity. (Schneider v. United Whelan Drug Stores, 284 A.D. 1072 135 N.Y.S.2d 875 (3rd Dept. 1954); Osterberg v. Columbia University, et al., 56 A.D.2d 675, 371, N.Y.S.2d 477 (3rd Dept. 1997)). While activities that are purely personal are not within the scope of employment, deviations from routine employment for appropriate and accepted purposes have been found to be compensable under Workers' Compensation Board. Whether the deviation from employment is a reasonable activity, imposing liability for injury to the employee while engaged therein is a matter of fact. (Grady v. Dunn & Bradstreet et al., 265 A.D.2d 643, 696 N.Y.S. 2d 258 (3rd Dept. 1999)). The Court of Appeals addressed the issue of prolonged overseas trips in Matter of Lewis v. Knappen Tippetts Abbett Eng. Co., 304 N.Y. 461 (1952). There, the employee was hired to work in Israel and had completed his work there, went off on a sightseeing trip without any particular permission from his employer during the course of which he was shot and killed by an Arab soldier. The Court of Appeals rejected the argument that the decedent was on a voluntary side trip unrelated to his employment and stated, "the Courts have been most reluctant to come to such conclusion (if indeed, they have ever so come in any reported case) in situations where the employment is far from home, the employee has no fixed hours, excursions to nearby places of interest are available and expected, and where the employment itself exposes claimant generally to the risk. (See Matter of Markoholz v. General Electric Co., 13 N.Y.2d 163 [decedent attending international conference at employee's request killed in airplane accident at end of weeks' vacation following the conference; Matter of McKay v. Republic VanGuard Insurance Company, 27 A.D.2d 607 affirmed 20 N.Y.2d 884 [district manager killed in hotel fire]; Matter of Regan v. Food Store Demonstrators, 12 A.D.2d 852 [claimant slipped and fell on a waxy motel floor after she arose from a chair when she was reading a magazine]; Matter of Shreiber v. Revlon Products Corp., 5 A.D.2d 207 [claimant slipped and fell on icy sidewalk while returning to hotel after dinner]. In cases where an employee is injured while traveling on behalf of his employer, the general principle compensability also applies. The rule applied is simply that the employee is not expected to wait immobile but may indulge in any reasonable activity at that place, and if he does so the risk inherent in such activity is an incident of his employment. (Matter of Davis v. Newsweek Magazine, 305 N.Y.20, Kaplan v. Zodiac Watch Co. 20 N.Y.2d 537). The determination of what is a reasonable activity and what is unreasonable and thus a deviation, is factual and the Board is afforded wide latitude in deciding whether the

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employee's conduct is disqualifying. (Matter of Richardson v. Fiedler Roofing, 67 N.Y.2d 246 [1986]).

With regard to COVID-19 and business travel, the claimant would in the first instance have to establish causal relation between the business travel and the exposure. If the exposure occurred during a deviation from the employment, for example, while sightseeing or going out to dinner, it would be up to the Board to determine whether this activity was reasonable. These claims will be handled on a case by case basis depending on the facts and circumstances of each claim.

INJURIES SUSTAINED WHILE WORKING FROM HOME

Many employees are now being directed by their employers to telecommute or work from home. When an employee works from home, the distinction between what is work related and what is personal is not always as apparent as when an employee works at the employer's premises. The scope of compensable injuries to employees working from home should be limited in recognition of the distinctive nature of their work environment. Employees who work from home outside the direct physical control of their employers are potentially able to alternate between work related and personal activities when they choose. For this reason, injuries sustained by employees working from home should only be found to be compensable when they occur during the employees regular work hours and while the employee is "actually performing her employment duties" (Matter of McRae v. Eagan Real Estate, 170 A.D.2d 900 [1991]). It has been held that injuries which occur while claimant is not actively performing his or her work duties, such as taking a short break, getting something to eat, exercising or using the bathroom for example should be found to have arisen from "purely personal activities that are outside of the scope of the employment and not compensable (Matter of McFarland v. Lindy's Taxi, Inc, 49 A.D.3d 111 [2008]). As always, an affected employee must demonstrate a nexus between the injury and the work. An employee who is directed to work from home might be considered to have been placed "in a new environment" for work and are "susceptible to a greater risk of injury while engaged in a reasonable activity" (Matter of Wilson v. Detroit Hockey Club, 104 A.D.2d 168 [1984] affirmed 66 N.Y.2d 848 [1985]). The Courts have found that any injuries that had occurred during a work related trip while the employee was "engaged in a reasonable activity attendant to although not directly

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related to the employment duties, are compensable (see: Matter of Capizzi v. Southern District Reporters, 61 N.Y.2d 15 [1984]). Where an employee is directed to work at home, it is not inconceivable that he or she will be in an environment populated by family members or roommate(s) who may have been exposed to or have contracted COVID-19. In these cases, the issue may arise whether claimant who then contracts the virus has a compensable injury. Again, the claimant must prove causation. Factors to consider as well are whether work at home was discretionary or mandatory, whether a claimant was required to have a designated work area, and whether any alleged exposure occurred during the work or during a deviation, and the nature and duration of the deviation.

CONCLUSION

As the foregoing demonstrates, the Board and the Courts have under certain specific circumstances, found the contraction of certain airborne viral diseases in the workplace to be compensable under WCL 2(7). The claimant must prove a causal relationship between the workplace and the disease by the introduction of credible evidence. Claimant must show a specific exposure to the disease, community spread is not sufficient. Sufficient, credible evidence must support the claimant's allegations. The absence of same will result in disallowance. At this time, it is our recommendation that all claims for exposure to or contraction of COVID-19 should be denied as not an accident arising out of and in the course of the employment and no causal relationship.

The matter should be investigated thoroughly with statements from the claimant and all available witnesses as well as review of medical documentation from the attending physicians and IME consultants. Each claim will be considered on its own based upon the results of the investigation, statements, medical records/IME opinions and identification of evidence of exposure and source of the exposure at the workplace. We will be able to provide you with an opinion on compensability and percentage of success. Our review will also determine whether we would be able to certify all the applicable denial codes.

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Should you have any questions, please contact our office at your convenience.

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