Vecchione, Vecchione, Connors & Cano LLP

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BULLETIN RE DEFENSE OF COVID-19 CASES

One of the first Board Panel decisions has been issued in a COVID-19 case. The Board Panel reversed the Law Judge and established the claim brought in this matter. New York State has existing case law on the transmission of similarly spread diseases. We believe that the decision from the Board Panel creates a pathway to have claims disallowed based on deviations from the established case law.

In the instant case, the prevalence of the COVID-19 virus in the claimant's workplace was addressed; however, we believe it is a flaw in the opinion. The Board Panel decision states that a claimant can show that the COVID-19 virus was contracted at work by showing a prevalence of the condition in the workplace. The decision fails to indicate any evidence to support that conclusion. The decision points to the fact that 7 people in the workplace had contact with COVID-19 patients; however, the co-workers did not have COVID-19. There is no mention of the total number of COVID-19 patients, nor the total number of employees at the workplace. We would argue that 7 people who were exposed to patients with COVID-19 is not enough to show that COVID-19 was prevalent in the facility.

Questions about prevalence should be left to the claimant's counsel as they serve to bolster the claim. If no questions are

asked on this issue, and the record is silent, we believe that a Board Panel cannot establish a finding of prevalence as there would be no evidence in the record to support such a finding of fact. If questions are asked on the issue, we would want the witness to explain what, if any, contact they had with the public within the context of their job duties. It should be noted that the Board Panel could restore a claim to develop the record on the issue. If this happens, evidence on the issue would have to be produced.

The Board Panel decision is very weak on its interpretation of the Workers' Compensation Law on contracting communicable diseases and finding them to be compensable. The Board Panel refers to three major cases on workplace contraction or aggravation of conditions. It claims that the two more recent decisions of the Court of Appeals have rendered the first decision no longer controlling and inapplicable to COVID-19 cases. We believe this is an incorrect interpretation of the case law.

If a worker contracts a disease such as COVID-19, or as in the past, tuberculosis, it is important to know from whom they caught the disease. Contracting a disease from a co-worker is NOT compensable. That is the holding in the Court of Appeals in *Paider v. Park East Movers*, 19 N.Y. 2d 373 (1967). *Paider* is still good law as the Court of Appeals has not overruled or even questioned its holding in over 50 years. The Court of Appeals has only cited the case once, and that cite involved an issue unrelated to how the condition was transmitted to the claimant.

The Board Panel decision claims that the holding in *Paider* has been modified by two more recent decisions. The two more recent cases are *Middleton v. Coxsackie Correction Facility*, 38 N.Y. 2d 130 (1975) and *Johannesen v. New York City Department of Housing Preservation & Development*, 84 N.Y. 2d 129 (1994). The Board Panel made a conclusory statement about a modification without any basis for it. If these two cases had either modified or overruled *Paider,* you would expect that the Court of Appeals would have at least cited *Paider*; however, the court did not cite *Paider* in either decision.

The issues, in all three cases, were very distinct and different for the court to decide, namely:

Paider: If you contract a disease from a co-worker, is it compensable? No, because the hazard was the co-worker and not the job.

Middleton: The claimant, a corrections officer, was exposed to one specific inmate who had a tubercular cough. He developed tuberculosis shortly after a lengthy exposure to the inmate and died within a few days of contracting tuberculosis. The hazard was the person who he was exposed to as part of his job. That is what made the claim and death compensable. As opposed to *Paider,* here the hazard was the job and not a co-worker.

Johannesen: The claimant in this case filed a claim for an aggravation of a preexisting pulmonary condition following exposure at work to second-hand smoke in a poorly ventilated workspace. Although the second-hand smoke was created by co-workers, the hazard was the work environment that was poorly ventilated, not the coworkers.

As can be seen from the synopses above, the three Court of Appeals' cases had three different, and we believe unrelated, issues. There is nothing in either *Middleton* or *Johannesen* that would indicate any basis that the Court of Appeals was limiting or overruling *Paider*.

The question of where the claimant physically was when the virus entered their system is another question to explore. This is not raised in the Board Panel decision at issue. The answer to the question is another way to secure a finding that a claimant's COVID-19 is not related to work. Unless a claimant can show that the virus entered their system at work, and not from a coworker, the claim should be disallowed. In *Spoerl v. Armstrong Pumps*, 251 A.D. 2d 915 (1988) the decedent died from a bacterial infection. He became ill while on a business trip to England. The bacterium that killed him was common in both the United States and England. No one with any certainty could identify where the claimant was, the United States or on the business trip in England, when the bacterium entered his system. This resulted in the claim being disallowed. If no one in testimony can identify where the claimant physically was when the virus entered their system, the claim should be disallowed.

Establishing a good record before the Law Judge is key in winning these cases. Once the record has been made before the Law Judge, on appeal or in rebuttal, these arguments can be used to reverse a Law Judge and have a claim disallowed by a Board Panel or the record can serve to have a disallowance of the claim affirmed on claimant's appeal.

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