

NYS Workers' Compensation and COVID-19 Update

Oryx Insurance has partnered with the law firm of Gitto & Niefer, LLP to bring you this important update.

Recent Board Panel decisions have emphasized that an explicit medical opinion causally relating the contracting of COVID-19 to an exposure on the job is required in order to deem a claim compensable.

In a Gitto & Niefer, LLP newsletter post published earlier this year, they discussed the 1975 Court of Appeals ruling of *Middleton v Coxsackie Correctional Facility*, 38 N.Y.2d 130 addressing how the Workers' Compensation Board will analyze COVID-19 related diagnoses and exposures. In *Middleton*, the court permitted the establishment of a tuberculosis claim by a correctional facility employee as an "accident" given the relatively "definite" time related exposure in combination with expert evidence that the condition was contracted while on the job.

The WCB has now issued two Board Panel decisions in *DOCCS Edgecombe Cor Facility*, WCB G2718395 (10/21/20) and *New York Black Car Operators*, WCB G2810382 (10/21/20). In each decision, the Board Panel cited to both *Middleton*, supra, and *Johannessen v New York City Dep't of Hous. Pres. & Dev.*, 84 N.Y.2d (1994) for the proposition that apparent occupational disease related claims can be established as "accidental" claims if there is sufficient evidence of the "time-definiteness" of the exposure in combination with "seriously adverse environmental conditions" to which the worker is exposed. The Board Panel decisions in *Edgecombe* and *Black Car Operators* have clarified two points for purposes of analyzing COVID-19 claims.

First, while evidence of a positive COVID-19 test result is sufficient for purposes of prima facie medical evidence permitting the record to be developed, a claim cannot ultimately be established unless an explicit medical opinion is produced causally relating the diagnosis to an on-the-job exposure. On this point the recent decisions have made clear that "the claimant is still required to show that an accident occurred in the course of employment (i.e. the claimant needs to show that the exposure was at such a level of elevated risk as to constitute an extraordinary event) and to produce medical evidence showing a link between his employment and his illness with a reasonable probability." A medical opinion causally relating the diagnosis to work can be based upon a "theory of prevalence" (see below) and must be set forth within a "reasonable probability." See, *Edgecombe*, supra.

Second, the Board has developed a "prevalence" test which is seemingly unique to COVID-19 related claims. As explained in *Edgecombe*, "when alleging that COVID-19 was contracted at work, the claimant may show that an accident occurred in the course of employment by demonstrating prevalence. Prevalence is evidence of significantly elevated hazards of environmental exposure that are endemic to or in a workplace which demonstrates that the level of exposure is extraordinary. A claimant may demonstrate prevalence through evidence of the nature and extent of work activities, which must include significant contact with the public and/or

co-workers in an area where COVID-19 is prevalent. Public-facing workers and workers in a highly prevalent COVID-19 environments [sic] are the workers who can show that the exposure was at such a level of elevated risk as to constitute an extraordinary event.” The “prevalence test” appears to be intended to favor certain occupations such as healthcare workers and/or corrections officers who may have worked in environments where COVID-19 is likely to have spread.

The recent Board Panel decisions are creating fact specific analyses for trial level judges to apply to each case. We anticipate additional refinement to the analyses as Board Panels and appellate level courts have an opportunity to review multiple claims. There also remains the possibility that the legislature might fashion a statutory provision addressing compensability in the context of a COVID-19 workers’ compensation claim.



If you have any questions about COVID-19 claims or any other issue, contact David Niefer at dniefer@gittolaw.com or (607) 723-0600. If you would like a training session on this or any area of the Workers’ Compensation Law, please do not hesitate to contact **Gitto & Niefer, LLP**.

This information is provided for general guidance only. This information should not be used as a substitute for consultation with legal counsel. Each case presents unique facts requiring individual analysis.