

JUSTICE JAMES H. COLEMAN, JR. NEW JERSEY WORKERS' COMPENSATION
AMERICAN INN OF COURT
CURRICULUM FOR FIRST FOUR PUPILAGE MEETINGS

COVID-19 MEETS COMP 20

Our initial upcoming pupil meetings will address COVID-19's impact on the New Jersey Workers' Compensation Law on a substantive, procedural, practical, professional and personal basis. Because of the unpredictable nature of the pandemic, some of these issues may be resolved or otherwise addressed (by statute, mandate or memorandum) by the time they arise at a meeting level. However, hopefully the majority of issues will still generate a meaningful, educational, if not practical dialogue to better recognize, appreciate and potentially help resolve the many new issues which will undoubtedly occur in our practice, either directly or indirectly, even if there have been some intervening action by the legislature, Governor or the Division.

The curriculum is broken down into six main areas, with each area comprising roughly one virtual pupil meeting. The group leaders will pre-assign specific questions to specific members to present and discuss their assigned questions. Some questions will require some level of research to be most effective. Quality preparation will be a key consideration to the educational success of each meeting. The six main areas are:

- I. COVID-19 disease considerations.**
- II. Virtual hearing/scope of judicial authority/discretion.**
- III. Compensability of coronavirus cases generally [substantive and practical considerations].**
- IV. Employment law issues relating to coronavirus risk factors.**
- V. Working at home, the new normal.**
- VI. Long-term economic considerations.**

At the time of this writing there has been no definitive new legislation concerning compensability of the coronavirus notwithstanding that the NJ Assembly passed Senate Bill 2380 on 07/30/2020. At the time of this writing (08/13/2020), it has not been signed by the Governor. The bill creates a presumption of compensability for COVID 19 regarding all "essential workers" "involving interactions with the public" and is retroactive to March 9, 2020. A copy of the bill is attached. Otherwise N.J.S.A. 34:15-31.2 – 31.10 (Thomas Canzanella, First Responder's Act effective 07/18/19) provides a rebuttable presumption of compensability for all first responders and healthcare workers regarding circumstances arguably compatible with the COVID-19 pandemic, although not expressly referenced. If COVID-19-specific legislation is enacted then we can simply amend some of the hypotheticals appropriately .

I. COVID-19 DISEASE CONSIDERATIONS

Before we can optimally discuss substantive procedural and/or practical issues regarding COVID-19 and the New Jersey Workers' Compensation practice, it is useful to at least appreciate prevalence, contagiousness, severity and morbidity of COVID-19.

The disease itself has dictated many, if not all of the scientific, medical, governmental and personal core compulsory actions. Each individual's understanding of the disease and opinion concerning the same has been an equally potent force impacting his/her individual conduct which in the aggregate, has had a potential for significantly increasing and/or decreasing overall known and potential risk factors together with speeding the progression of the disease.

In the two months from January 15, 2020 through March 20, 2020, there were only approximately 2,648 COVID-19 cases reported in the United States. Within the next two months there were an additional 1,338,737 cases reported through approximately May 14, 2020. Within the next two month period there were approximately another 1,924,102 cases reported. The last month from July 15, 2020 through August 13, 2020, there was approximately 1,900,000 additional cases reported for that less than 30 day period, bringing the United States total to approximately 5,415,666 cases or approximately 25.7% of the world total. The present world death toll is 757,471 with the United States death total at 170,415 or approximately 22.5% of the world death total. From the national perspective, daily reported COVID-19 began consistently exceeding 20,000 cases by late March 2020 and then quickly rose to the upper 20,000 to the lower 30,000 range towards the early part of May, 2020. The numbers began moving slowly downward on a gradual progressive basis until approximately June 20, 2020 at which time figures started spiking quickly from mid 20,000 to mid the mid 30,000 range daily to persistent mid 50,000 daily range until mid-July when figures were persistently from the 60,000 to 70,000 range until the beginning of August when figures were reported more consistently in the upper 40,000 to mid 50,000 range.

From a New Jersey perspective, once New York City became the epicenter of the virus in the United States (and the world), New Jersey largely followed New York's incidence curve shape, (although mildly and in much lower numbers, delayed) to the point where as of August 14, 2020, it has "dropped" to the 8th highest incident State (186,594 total cases) with approximately 15,969 deaths of the United States total of approximately 170,775.

New Jersey went from a 5.31 estimate of virus reproduction rate on March 21, 2020 when the first Stay at Home Order was issued to an approximately 1.02 virus reproduction rate as of approximately April 14, 2020. It dropped as low as .70 as of June 15 but then spiked in to 1.49 in the first days of August (highest mark in four months), but the most recent figure (as of August 10) was at .98 meaning that each affected person is spreading the virus to less than one new person on average which in turn signals that a shrinking of the virus has been persistent, but at least relatively stable at least as compared to five months ago.

With all of that mind, consider the following basic questions:

1. What is novel COVID-19 and how is it different from previous occurrences of the COVID virus?

2. What is the current number of documented COVID-19 world infections and deaths?

3. What is the current number of documented COVID-19 New Jersey infections and deaths?

4. Express the above figure in terms of the United States population (331 million); global population (7.8 billion); New Jersey population (9.2 million).

5. What is the current assessment of number of COVID-19 virus cases in the United States including those “undetected.”

6. What are the present CDC COVID-19 suggestions regarding
- social distancing
 - use of masks
 - personal hygiene

7. What are the present New Jersey official mandates regarding
- social distancing
 - use of masks
 - personal hygiene

8. What are the current United States figures of people who have been diagnosed as having COVID-19 but are asymptomatic?

9. Once a person is infected with the COVID virus (asymptomatic or symptomatic), what is the length of time which that person can potentially transmit the virus to someone else.

10. What is the current CDC and New Jersey protocol for an individual who tests positive for COVID-19 in terms of self-quarantining?

11. Can a person be re-infected by COVID-19 if the person has already either been sick with the virus and/or has COVID-19 antibodies? In other words, does the development of antibodies guarantee a person is immune from future infection?

12. What percentage of COVID-19 transmissions are thought to be strictly airborne from one person's respiratory system through the air to another personal respiratory system?
13. What is the consensus percentage of likely reducing transmission of the disease by usage of masks, social distancing and appropriate hygiene protocol?
14. What is the "normal" lag time between infection and development of COVID-19 symptomatology?
15. What percentage of people who are infected with the virus actually become ill?
16. What percentage of issues are considered mild, moderate, severe and/or fatal?
17. What is "typical" COVID-19 symptomatology?
18. To what extent is COVID-19 becoming potentially a disease involving more than merely the respiratory system?
19. Of all new cases reported within the last 30 days in the United States, what percentage are 20 years old and younger; 21-40 years of age; 41-60; 60 and above?
20. What is the present thought on the percentage of transmission of COVID-19 via surface contact? (handles, switches, button, countertops, etc.)
21. How long can COVID-19 remain airborne once expelled from the human lung and therefore capable of infecting another individual?
22. Are enclosed exposures considered higher risk than outdoor exposures, all other factors being equal and if so, to what extent?
23. To what extent is the time period of indoor exposure and enhanced risk factor for transmission of COVID-19?
24. Are COVID-19 hydro-pellets heavier or lighter than cigarette smoke vapors/particulates?
25. Is a visual of smoke being exhaled from a cigarette smoker a reasonable depiction of at least the distance of travel of the COVID-19 airborne, if not the density of the same?
26. To what extent are the eyes considered a potential portal for infection? What percentage of infections are thought to come through the eyes versus the mouth or nose?
27. What is the length of time prescribed for efficacious handwashing? Is soap the preferred substance for handwashing? Is the use of water only for handwashing an efficacious cleanser? Does the temperature of water matter? Is the use of hand sanitizers more effective than soap and water?

28. Regardless of specific mandates/regulations/policies and the like, how if at all has your personal behavior changed regarding interacting with your environment due to COVID-19?

29. Once COVID-19 dissipates, to what extent do you think your personal interactions will change with respect to your environment both at work and in personal/social situations?

30. How “worried” are you about the COVID-19 pandemic in terms of personal and future health regarding both yourself and your loved ones?

31. What improvements or procedures do you feel could be made by the Division of Workers’ Compensation for increasing the safety and efficiency of our Court system in terms of the overall processing of claims within the Division of Workers’ Compensation?

II. VIRTUAL HEARINGS/SCOPE OF JUDICIAL AUTHORITY/DISCRETION

Whatever success has been attributable to the Division's processing of workers' compensation claims, the same is primarily resultant from the use of "virtual" approaches and "virtual telecommunications" in lieu of formal physical appearances in the Workers' Compensation Court. Almost all such success has been the subject of consent and cooperation of the parties together with the relative personal philosophies of each Judge in each vicinage in carrying out the mandates of the Division. Given the present unacceptable active COVID cases, it is not likely that any type of significant unrestricted physical appearances will occur any time in the immediate future. The present process generally has worked well in consensual situations, where everyone has acted professionally to expedite not only the resolutions themselves, but also from preparing quality closing papers necessary to resolve most claims without the need for live testimony from the Petitioner.

However, the same is not necessarily true regarding contested matters, which often involve the most significant and complex and time consuming claims. These cases are often adjourned with recurring regularity, creating a growing backlog of many significant cases with complexities that cannot be resolved unless and until there is the commencement of formal proceedings where there has not been a willingness to reach a common ground for settlement.

This issue will only increase as time passes, with greater practical and economic issues addressed in Section VI. The need for greater efficiencies with the Division’s present trial practice will be of greater importance. Opportunities exist for altering the historical “witness per day” approach to various options including, where appropriate, comprehensive pre-trial memorandums setting forth the detail of each side’s position prior to the start of Trial; reducing the total number of Trial days to the least number practical depending upon the issues presented and the lists in question (i.e., more than one witness per day); consolidating all fact witnesses on the first day of Trial and all medical witnesses on the next day of Trial (or at least to the extent practical to shorten overall trial duration from start to finish). By prioritizing each particular Trial in such a

consolidated fashion, it will help assure that matters which actually need to be tried are given optimal attention for optimal speed of disposition. There is no perfect template that is uniformly applicable and this is where the Court's discretion becomes of utmost importance. As is often the case, once the Trial commences and the Petitioner's testimony is completed, the parties are often in an optimal position of attempting to facilitate a disposition. If the parties cannot reach a reasonable disposition at that point in time, the odds become much higher that the full completion of the Trial is necessary and at that point the same should be expedited where possible. This approach will hopefully facilitate future case resolutions when all the parties know that when the cases come on for Trial, they will receive the highest priority expectation of timely disposition.

While each individual judge has considerable discretion as to how he/she operates his/her particular Court, until there is a full resumption of "business as usual" within the Division in terms of unlimited and unrestricted physical appearances, a meaningful discussion of options to facilitate true contested adversarial proceedings should be explored and implemented to the fullest extent possible, consistent with notions of due process and fundamental fairness. With that in mind, consider the following questions:

1. Assume a contested substantial occupational non-COVID-19 exposure claim has been pending for a considerable period of time, with both sides being ready for at least 6 months with their permanency evaluations, the fact witnesses and causal relationship reports before the COVID-19 pandemic created the closure of the Compensation Courts. The Petitioner is seriously ill with an unrelated cancer and is presently residing in Florida. The Petitioner's treating oncologist concludes that the Petitioner has only a 6-month life expectancy and cannot travel to the State of New Jersey under any circumstance due to his medical issues. The Petitioner is well enough to competently testify on his behalf and has requested his attorney to have his testimony taken while he is still competent to testify. The Petitioner's attorney seeks cooperation from Respondent's counsel to have the Petitioner's testimony taken via Skype, Facetime or Zoom, or any other technologically which would permit reliable video depiction and transcription of the proceedings. Respondent's counsel advises that because there are serious questions concerning the Petitioner's credibility, his client has insisted that the Petitioner's physical presence be mandated, so that optimal cross-examination can occur. An Informal Conference with the Judge does not resolve the issue. Petitioner's attorney then files a formal Application to compel either a virtual hearing before the Court, or in the alternative, a videotaped de bene esse deposition where the Petitioner resides in Florida to preserve testimony "and or whatever other relief the Court deems appropriate." Respondent's attorney opposes the motion on the basis that "due process requires the Petitioner's physical appearance" before the Court and should the Court compel a videotaped de bene esse deposition, the Petitioner's attorney should bear all costs of the same, inclusive of Respondent's travel costs. *How should the Judge rule and why? (referencing all relevant statutes, court rules, administrative codes and legal precedent.)*

2. Assume the same facts as above, except the Petitioner does not have a life-threatening illness, but rather sufficient time has passed, and the parties now believe that there must be Trial or at least the commencement of a Trial with the parties taking the same position. *Should this impact the Judge's ruling? Why or why not?*

ADDITIONAL CONSIDERATIONS REGARDING THE SAME QUESTION

- Should there be a presumptive time limitation beyond which there is an "unreasonable delay" to start an otherwise "ready" compensation Trial? If so, what is that time limitation?
- What is the standard for a Court's "abuse of discretion" such that an Appellate Court would likely reverse a finding or reversal of a particular Compensation Judge? Include in your discussion:
 - a. What are the parameters of "sound Court discretion" specifically in dealing with the conduct of hearings? (virtually or otherwise)

3. Is it a violation of due process to compel a "virtual Trial" where an uncertain COVID pandemic makes it impossible to determine when and if in-person hearings can be safely conducted?

4. Assume the Compensation Courts have resumed physical hearings, but in a particular vicinage, an attorney feels that the Court is still unsafe, because of inadequate social distancing and masking protocol and, as such, declines to make any physical appearance in the Court. The attorney is 58 years of age and is a former heart transplant patient and has severe diabetes. The attorney has a note from his physician, that he should not appear in any closed environment that does not follow the strictest of prevention guidelines. More particularly, the physician has written a prescription that he should not have any appearance in Court where he is coming into any contact "with individuals who do not have current, negative coronavirus testing results". The doctor's prescription imposes these restrictions until there is no longer "enhanced risk" of contracting the COVID 19 virus infection in the attorney's local community. The attorney is seeking an adjournment until there is an "appropriate environment" for him to physically appear in court. Petitioner's attorney objects on the basis that the postponement is potentially "indefinite," and that the solution is that either the defense firm select another attorney to physically try the case in the Courtroom or, alternatively, have the case heard in the Courtroom with the Respondent's attorney in question appearing virtually. Respondent's attorney feels that neither of these options are fair and therefore opposes the same. The claim is a complicated substantial one, and he has been the assigned counsel for the 3 years of its pendency. Secondly, he feels that his "virtual" appearance in Court would be prejudicial to his client, as the Petitioner would have an "unfair advantage" by appearing in person with his potential cross-examination significantly compromised by his "remote" appearance.

a. *How should the Judge discuss the merits of the respective arguments?*

b. *How should the Judge rule on these limited hypothetical facts and why?*

c. *What would be the basis and likelihood of success of an appeal by the Respondent after a Court Ordered virtual Trial where the Judge ruled in favor of the Petitioner based upon an admitted preponderance of the credible evidence?*

5. A longstanding Second Injury Fund case finally has a meaningful virtual pre-Trial conference, and it is determined that the case would likely benefit from an "informal conference". Both the Petitioner and Respondent's attorneys are amenable to having the conference occur by Zoom or other appropriate virtual presentation, but the Deputy Attorney General on behalf of the Second Injury Fund, advises the Court that there can be no informal conference unless the Petitioner can physically appear. It may be assumed that the Courts, for the purpose of this hypothetical, are to remain closed for physical appearance short of "emergencies" and/or Trials in progress. A motion is filed by the Petitioner's attorney to compel an informal conference on a virtual basis. The Deputy Attorney General takes the position that a virtual informal conference must be under oath otherwise the Trial can commence virtually. Neither the Petitioner's attorney nor the Respondent's attorney feel that would be appropriate to start a virtual Trial, and that the issues are such that the parties should be able to make "significant progress" towards a resolution of the claim, if a virtual "informal conference" could occur. Does the Compensation Judge have the authority to compel such an informal conference "virtually", where all the parties agree that an "informal conference" is appropriate, but the Fund requires the same to be "sworn testimony"? *How should the Judge handle the situation?*

6. A particular Second Injury Fund case has been pending for a significant period of time, in large measure due to the pandemic, making it impractical to have a meaningful informal conference and/or commencement of the Trial. There have been two substantial virtual pre-trial conferences where the Petitioner's attorney, the Judge and the Respondent's attorney all feel that the proofs support a finding of permanent total disability with a "modest contribution by the Second Injury Fund". The Deputy Attorney General concedes that the Petitioner is "likely" permanently and totally disabled, but cannot "concede" Fund liability as the "Fund's" position is that the Petitioner is permanently and totally disabled solely because of the residuals of the last accident. There is a potential year and a half of retroactive full rate permanency benefits due to the Petitioner. Petitioner's attorney files an Application with the Court to compel an interim Order where the Respondent and the Petitioner agree that the Petitioner is permanently and totally disabled, with Respondent commencing payment of total disability commencing the day after the last date of temporary disability benefits paid. The Application seeks an Order further compelling an 'appropriate' interim counsel fee with the matter set down for further Trial as to whether or not there is any Second Injury Fund liability and, if so, the apportionment of the same between the Second Injury Fund and the Respondent. Respondent's attorney is amenable to conceding the issue. The Second Injury Fund objects on the basis that the Court has "no authority" to make such an "interim" Award in a permanent and total disability claim where the Fund has been joined as a party. *How should the Judge rule on the Petitioner attorney's motion and why? Are there other options available to the Court under these circumstances?*

7. Does the Compensation Court have the right to order the "virtual" appearance of expert witnesses over objection of an adverse party? What other options are available to obtain testimony when it is either impractical or cost prohibitive for a particular "expert" to appear in the Compensation Court?

8. To what extent does the Court have subpoena power to "compel" a treating physician's appearance and testimony if the witness "refuses" to "voluntarily" appear in court? If

such an appearance is made, how is the charge for testimony determined and who is responsible for payment of the same? Can the appearance be held virtually?

9. Can the treating physician be presented as a "fact witness" and be "compelled" to provide his/her expert opinion on medical causal relationship?

III. COMPENSABILITY OF CORONA VIRUS CLAIMS GENERALLY (SUBSTANTIVE AND PRACTICAL CONSIDERATIONS)

Another major issue with COVID-19 is is this a "novel" virus and as such so much is unknown about it in terms of not only transmission but also long-term prognoses of the disease itself regardless if a patient has "recovered" and is no longer "symptomatic." Even the common cold is a virus not fully understood.

Consequently, many issues which require "reasonable medical probability" become uncertain areas of "grey" rather than clear "black and white." This makes outcome uncertain and subject to proofs for which there may be medical opinions more based upon anecdotal evidence rather than definitive empirical data. These considerations significantly impact causal relationship certainty and even provable exposure. Once exposure and causality are established, there is still potential for disagreement whether there is compensable "permanency" given the two-pronged test also applicable to any compensable disease. The pandemic itself remains unpredictable and its litigated outcome in workers' compensation will also be equally unpredictable in many cases.

1. If there were non-work-related potential COVID-19 exposures occurring in the same timeframe as a proven occupational exposure, would that consideration alone defeat a potential compensable occupational compensability? If so, why? If not, why not? In occupational COVID-19 exposure claims, should the Respondent be entitled to "special interrogatories" which require Petitioner to provide information as to "any and all potential exposures which the Petitioner had for 30 days before Petitioner's COVID-19 was diagnosed."

2. Should Respondent be entitled to even more specific information than the above such as providing his or her complete whereabouts for the aforementioned period of time so that Respondent can conduct whatever discovery it chooses?

3. What is the definition of "circumstantial evidence" as it pertains to "substantive evidence" for admissible evidence in a civil proceeding? To what extent does "circumstantial evidence" have relevancy in a COVID-19 occupational exposure claim in the absence of a legislative presumption?

4. If the Petitioner has conceded multiple employment exposures [such as being an employee within an emergency room or nursing home], can there be concurrent liability between Respondents? If there is "concurrent" exposure, then should the Respondent s share equally in liability for medical, temporary disability and potentially permanency, assuming the manifestation was following such concurrent exposure. Should it be equally shared or should this be considered under a "Bond" analysis where the last exposure would be presumptively solely responsible for the condition, assuming it could be established that the last exposure was

contributory? Assume the exposures are such that it is impossible to apportion liability on an aggravation basis as neither exposure led to a condition that was fixed, measurable or arrested. Assume there were multiple exposures between two hospitals where the Petitioner worked in the emergency room. On the other hand, both exposures contributed, but it was uncertain which of the two [or both] were contributory, would be appropriate for the exposures to share in liability or should only the last time exposure be solely compensable?

5. Similarly, if the Petitioner had employment at two separate nursing homes with two relatively distinct significant COVID-19 exposures resulting in the Petitioner dying from a COVID-19 related illness and further assuming that the Petitioner had worked at each business for 5 years and that during the last week in question, Petitioner worked two shifts for each employer prior to becoming ill, would the Respondents presumptively equally share in one maximum dependency payment; or should only the "last" employer be solely liable; or should the Petitioner be entitled to two separate dependency awards since two full-time income streams was lost from the two separate full-time employments, each of which contributed in a material way to the Petitioner's death?

6. The Petitioner works in a private nursing home for geriatrics and develops COVID-19 virus two days before the nursing home is closed because of rampant infection requiring emergency evacuation to the area's largest hospital's intensive care units. She is married and resides with her husband who was an EMT and developed a compensable exposure to the COVID-19 virus. The manifestation of his disease was two days prior to her diagnosis at which time he was self-quarantined. What does the Petitioner have to establish to determine a compensable exposure in the context of this claim? How would the Respondent establish a potential causal relationship defense to this claim?

7. How would Petitioner's rate be calculated between multiple employers where there were different earnings in different periods of exposure between each employer as to temporary disability and permanent partial disability benefit? In other words, if the Petitioner typically worked 2 days a week for two of the employers and 1 day for the third employer each and every week, how should Petitioner's entitlement to temporary disability benefits and permanency benefits be calculated? Would this depend on whether there was concurrent liability found or whether the "last employment" was "solely" responsible?

8. To what extent can/should a Respondent be responsible for psychiatric disability for either an individual that contracts COVID-19 and symptomatically recovers from the same, develops a significant anxiety for his/her future health and/or his/her family members in part based upon the vast amount that is unknown about the virus?

9. Assume the same fact scenario except the Petitioner never contracted COVID-19 but developed a clinically proven anxiety because of the significance of the exposure and bona fide obsession over future complications morbidity due to the overall exposure in question. In this hypothetical, the Petitioner was a healthcare employee with significant exposures actually left the home healthcare business because of these overriding concerns. The treating physician found that there was a "moderately severe" anxiety, solely associated with this long-term occupational exposure. Should this be a compensable permanent partial disability?

10. What is the definition of anxiety and how is typically manifested?

11. Assume the above, except that the Petitioner has no prior psychiatric history and developed severe anxiety while working in an emergency room of a hospital for which was operating at over-capacity and developed an overwhelming fear of contracting COVID-19 for which the Petitioner had a "nervous breakdown," and required immediate psychiatric treatment. The only source of such overwhelming exposure was in the hospital setting. If the Petitioner can establish these proofs, would he/she be entitled to temporary disability, medical treatment and permanency benefits assuming the condition was severe enough to otherwise result in such residuals?

12. Assume a Petitioner succeeds in establishing a compensable COVID-19 exposure for which Respondent has accepted liability for medical treatment and temporary disability benefits. Assume the Petitioner was 55 years of age and reasonably healthy prior to the exposure but 6 months after having reached maximum medical improvement, the Petitioner still experiences a certain amount of perceived "chronic fatigue" which has not been otherwise specifically diagnosed. The Petitioner feels that there is some "diminution" of his/her ability to taste or smell as compared to pre-exposure. The Petitioner has had post COVID-19 exposure testing and continues to have antibodies and has consistently been advised by his/her treating physician that he/she is probably at minimal risk for further COVID-19 illness. In the Petitioner's daily activities he/she remains "hypervigilant" with respect to consistently wearing a mask in most social settings (even though the masks are no longer mandated) and continues to avoid any type of interaction of any significance with chronic hand cleansing as if the pandemic was still in existence. (This hypothetical assumes that the pandemic is now a contained acceptable situation in our country.) The Petitioner has not treated for any "anxiety" but feels he/she has "deep concerns" about his/her own future prognosis and accordingly has made the coronavirus protocol activities permanent alteration in the Petitioner's lifestyle. Petitioner's evaluating expert finds permanency based on all of the above whereas Respondent's position of its permanency physician finds an absence of it on the basis that the Petitioner's "gross functionality" is perfectly normal without the need for any ongoing medication and that the Petitioner's concerns are essentially "healthy concerns" representing the "new normal" for all Americans whether a compensation exposure or not. The doctor dismisses the Petitioner's "physical" complaints as basically "subjective" and to some extent understandably "psychosomatic" but not "clinically relevant." Recognizing that in any given case there would be much more data presented than this, assume these are the basic permanency considerations. *What, if any permanency would you award and why? What additional information that you would like to have to make your opinion more definite?*

13. Assume Petitioner has COVID-19 exposure and took a leave of absence was then furloughed by the employer to receive unemployment compensation with federal furlough benefits. The Petitioner is to receive a period of state temporary disability benefits and then was furloughed for state unemployment and federal benefits. *If the Petitioner proceeds to prosecute his/her permanency claim, is there any potential lien issue which would need to be addressed if the only claim was for compensable permanency benefits and/or the claim was resolved on a Section 20 basis?*

14. If a Petitioner is out on temporary disability in a compensable orthopedic claim, but cannot obtain surgery in a timely fashion due to COVID-19 issues with the hospital, should Respondent be required to pay temporary disability regardless of the length of the delay assuming the Petitioner cannot otherwise be provided light duty employment?

IV. EMPLOYMENT LAW ISSUES RELATING TO CORONAVIRUS RISK FACTORS

The potential for civil negligence actions against employers who operate businesses with inadequate or noncompliance with COVID protection mandates referable to third-party claims. This represents a potential new type of "negligence" that would be actionable in the civil courts by customers; would such noncompliance be possibly elevated to a "deliberate" action as to pierce the workers' compensation bar?

1. May a law firm, (or any employer for that matter), establish more stringent return-to-work criteria regarding COVID-19 safety measures for employees over the age of 60 versus under the age of 60, assuming they can establish it has a bona fide belief that the employees over 60 are at "higher risk" for contracting the virus and the decision is not pretextual? Does this "per se" violate the American Disabilities Act, law against discrimination, age discrimination and/or any other law notwithstanding that the policy is intended to safeguard both the employee and the workplace in light of known enhanced risk to the aging population.

2. To what extent can an employer make quarantine exceptions for its employees within the workplace. In other words, must the employer's COVID-19 protocol be uniformly applied to all members of the workforce so as to be non-discriminatory.

3. An associate for a law firm tests positive for coronavirus but has virtually no symptoms but fails to self-quarantine for 2 weeks post diagnosis. She does not advise anyone of this condition. She has a deposition scheduled for the biggest case of her career within 5 days after her diagnosis and meets with the client for 3 hours in a small office with poor ventilation. She does not wear a mask. Her client is 75 years of age. He has significant coronary artery disease, chronic obstructive pulmonary disease and severe pulmonary emphysema. He has also been diagnosed as having lung cancer and has started chemotherapy. The deposition is a court-ordered deposition. The client had completely sheltered since the inception of the COVID-19 pandemic, and this was the first time he was out of his house interacting with anyone other than his wife, who also had been housebound for a 3-month period. The deposition occurred the following day. It was a 5-hour deposition. None of the attorneys wore masks. The Petitioner did not wear a mask either, only because he did not have sufficient respiratory functioning to allow him to speak clearly with a mask on. There had been a State mandate to wear masks inside. A few days after the deposition, both the attorney and the client became severely symptomatic. The client required emergency hospitalization, ultimately was placed on a ventilator and succumbed because of the severity of his COVID-19 virus infection. The attorney, while very ill, recovered. Through a number of unusual circumstances, the client's spouse learned that the attorney had been diagnosed as having been infected with the coronavirus a week before the deposition occurred. She had not advised the Petitioner or his spouse or

anyone in her firm about her diagnosis. *Assuming you can establish that the client's terminal infection more likely than not came from the attorney, would there be potential cause of action in the civil courts against the associate and/or her law firm on a negligence/wrongful death basis? What would be needed to establish respondeat superior liability on the law firm if the associate was otherwise negligent or otherwise civilly culpable?*

4. What is the employer's obligation to maintain a safe workplace consistent within state-specific COVID-19 mandates? Does the failure to do so expose the firm to any negligence claims for business invitees who develop COVID-19, assuming a law firm resumes business operations attempting full compliance with state regulations regarding COVID-19 safety protocol?

5. An employer feels that it can comply with all state mandated protocol by having a full workforce resume employment and all employees are directed to resume employment. One of the attorneys was very concerned about **any** level of an enhanced risk environment and did not feel that the state's protocol mandates, even if followed, sufficiently reduced the risk of infection and discussed the same with the appropriate representatives of the employer. The attorney was living with her aged grandmother who was very ill and housebound. The attorney felt that she could perform the essential functions of her job duties completely remotely without having to set foot in the office at all. It was determined by the law firm that this was an impossibility. It felt that in the confines of the firm itself, the peculiar nature of the job duties which needed to be performed had to be done with certain physical meetings that simply couldn't effectively be done virtually or otherwise. The attorney was given an ultimatum to either resume employment or be terminated. She elected to not resume employment and was terminated. *Under what circumstances, if any, would this amount to a unlawful or otherwise actionable termination? If so, what would need to be further established to establish a viable cause of action?*

6. Assume that the Governor of the State of New Jersey directed non-essential businesses to resume unrestricted operations relative to social distancing and masking, as no longer being required because of sustained relatively low infection rates. Out of an abundance of caution, a law firm decides to continue with masking requirements and social distancing on the assumption that at least for an additional short-term period of time, they wanted to err on the side of caution in establishing a safe environment as was possible for its clients and employees. Social distancing was required of all employees, together with the use of masks, on the basis that they "could" be a carrier of the COVID-19 virus, regardless of whether they were asymptomatic and/or previously tested negative. *Would the employer's termination of an employee who refused to comply be violative of the ADA or New Jersey Law Against Discrimination or any other statute?*

V. WORKING AT HOME

Our "new normal" social distancing and self-quarantining has found its way to the "new workplace" for many employees... their homes. The ability to use computer technology has allowed such remote employment to allow so many businesses of all sizes to continue to function with a large portion of its workforce working outside the confines of what normally was the employer's brick and mortar office/building. This alteration of location, where bona fide

employment services occur, gives rise to any number of compensability issues in the “new normal” of “working at home.” The following are a few scenarios which raise a few issues of compensability, when the home is no longer the location where an employee rests after work, but when in reality is the location where work’s most vital functions are performed. In such circumstances, if the “home” is viewed as an “extension” of the office, then is it really a “home” for determining non-compensable commutes and other similar issues under the statutory provisions of the scope of employment.

1. Assume a law firm permits its staff and attorneys to work remotely at their discretion, so long as the specific details of the employment duties are authorized by the office manager for all staff and by the firm’s Executive Committee regarding all attorneys. Each employee/attorney's remote job description with frequency of office appearances is expressly approved. An attorney who lives 2 miles from the office, "routinely" travels to and from home a number of times a day to facilitate certain file work/dictation as dictation cannot be downloaded remotely. The attorney likes to make certain his secretary is busy and often will make stops in the office more than once a day, primarily to make certain his secretary gets his dictation in as timely a manner as is possible following its completion. On one such regular dictation drop off travel, the attorney is killed in a motor vehicle accident while traveling directly from his house to the office. *Simply based on the above facts, is this compensable? What further facts would you want to establish to strengthen the case if you are a Petitioner or weaken the case if you are a Respondent..*

Consider the following brief hypotheticals to whether they establish compensability:

2 Assume the employee is permitted to work remotely [at home primarily, or anywhere by laptop] and is paid an hourly rate to represent anticipated start of employment 9:00 a.m., a half hour for lunch between 12:00 p.m. and 12:30 p.m., work ending at 5:00 p.m. Consider that this is the employee's typical schedule. The employee is not paid for lunch. The employee is a paralegal who basically works off a laptop at a small office in her apartment but can and does take the laptop to many other places to work, especially on nicer days when she likes to get out of the house to the extent possible. The employer is aware of all of this and has never objected to it.

a. Petitioner is walking down her townhome's steps from her bedroom to her office with a cup of coffee in her hand and trips on a step and falls, breaking her leg. She was walking directly from the bedroom to the office and was going to start her day. *Is this is a compensable fall?*

b. Same facts as the above except that the reason why she falls is that she left a hard copy file at the base of the stairs the night before. She forgot about that and didn't notice the file which in turn caused her to fall. *Is this is a compensable fall?*

3. Assume the same facts as (a. above) It is 10:45 a.m. and the Petitioner’s fall occurs when she is coming back down the stairs after having used the bathroom in her bedroom and that is the only reason why she had left her office workstation. *Is this is a compensable fall?*

4. The Petitioner is leaning back on her chair in front of her desk because her back is stiff having been seated continuously for 3 hours. She stretches backwards. Her chair falls over, sustaining a fracture to her right arm. *Is this is a compensable accident?*

5. Petitioner is injured in her kitchen during her unpaid lunch half hour which she religiously takes between 12:00 p.m. and 12:30 p.m. *Is the injury compensable?*

6. Petitioner bakes a birthday cake for her boss who asked her to deliver it to the office because the Supervisor had to leave the office a little early and wouldn't have time to stop and pick it up at the Petitioner's town house. On route to deliver the cake, the Petitioner is injured in a motor vehicle accident. *Is the accident compensable?*

7. The Petitioner decides to start her normal workday at 4:00 a.m. on a particular day because she wanted to have her 8 hours completed by noon so that she could be with her mother in the hospital where a surgery was planned for 2:00 p.m. The employer approved of her change of hours. When she came downstairs to start, she took steps into her office and tripped on the edge of rug causing her to fall and sustain a compressed skull fracture striking the desk that she worked on. *Is this is a compensable accident?*

8. Assume while working at home, Petitioner's spouse contracts COVID-19 and he is the source of Petitioner's infection. This occurs when non-essential businesses were mandated to close to the public and Petitioner was required to work at home when the infection occurred. *Is the exposure compensable?*

VI. LONG-TERM ECONOMIC IMPACT ON THE BUSINESS OF WORKERS' COMPENSATION

As a general proposition, where there is a significant employment decline, there is a concomitant decline with respect to the number of formal Claim Petitions filed within the Division. The COVID-19 pandemic is no exception. There is no doubt that this shrinkage of petitions (no matter how large or long) will have an effect on the business of workers' compensation as we know it, both presently and more significantly in the future. While the size and the specific nature of the same is unknown, it is a useful exercise to at least consider some potential dynamics to hopefully increase the probability of successfully navigating these uncharted waters.

There is a certain level of symbiosis between the Workers' Compensation Judiciary, Petitioner's and Respondent's Bar, Respondent's individually and Petitioners individually. A simple starting point is the number of workers' compensation injuries which occur largely determines the number of Claim Petitions filed which Petitions significantly impact the fiscal performance of both Respondent and Petitioner Law Firms, and workers' compensation insurance carriers/self-insureds.

The impact of the COVID-19 virus is obviously more potentially significant on the healthcare industry in terms of loss experience and in turn impacts the composition of inventory

of Petitioner/Respondent firms depending on the nature of their respective client demographics. The Division's aggregate judicial need is also dependent upon the nature and quality of Claim Petition inventory inclusive of the rate of closures and filings.

These dynamics are not absolute, but they represent a simplistic template for projections. While the initial closure of the Courts temporarily stopped the processing of claims in the short-term, the re-opening of the Courts and the virtual process has allowed the potential to re-cover and in some instances, increased aggregate claim closures of existing inventory. If an average formal Claim Petition has a shelf life of between 12 and 18 months (simply a conjecture), then significant revenue reduction from those Petitions' final awards will not be felt in the immediate short term. With decreased filings and attorney travel eliminated, attorneys have had an opportunity to increase their work on existing inventory to potentially accelerate the timeline towards file closure and increase revenues. Since Petitioner attorney fees are strictly contingent upon outcome and most claims are permanency only, a significant amount of Petitioner attorneys' overall revenue comes from the final closure of files. The same financial incentives may be applicable to Respondent firms with "flat fee" structures but not necessarily "hourly billing" structures. Firms with monthly or quarterly hourly billing are impacted by the number of claims. Increased discovery requirements, contested claims, Motions and Trials all ultimately result in billing events. The mere number of new claims could be reduced whereas the aggregate complexity of those claims increase. Every firm and practice will have a different dynamic depending upon the nature of their inventory and market share.

All of the above referenced dynamics will have greater impact during 2021 especially if the COVID-19 status quo remains. Even if the new incident of claims decreased, there will be long-term prophylactic consequences that ultimately will not only impact our daily practice, but the manner in which all of us practice workers' compensation in the future. The longer the pandemic impact remains, the more firms will have to adapt to address the "new normal" workers' compensation economy by best predicting these upcoming changes. The firms which best predict these changes will have the best chance of not only surviving, but perhaps maybe even flourishing by adeptly adjusting to the opportunities created by an unprecedented pandemic.

Within the above concept, consider the following:

1. Auditing the COVID-19 impact of the last six months on your practice and identify issues/opportunities to address inventory, revenue and expense issues.
2. Determine the need for present number of staffing to process current and future number of staff inclusive of legal assistants/paralegals and attorneys.
3. Optimize efficiencies in processing your firm's work product with increased use of technology in terms of file management/client contact, making sure that you have considered all available options.
4. To what extent should virtual technology be a permanent part of your firm's operation.

5. Consider increasing formal business marketing and selecting the appropriate platforms.
6. Opportunities for reduction of size for brick and mortar operations with potential remote job descriptions with appropriate benefit package considerations.
7. Determine the perspective of employee satisfaction preferences and the extent to which remote employment is a preferred and/or practical option.
8. Merger/acquisition of similarly situated firms to leverage market share.
9. Internal audit to identify and eliminate cost/expense inefficiencies and equally determine expenditures necessary to achieve “new normal” necessities.
10. Conduct formal review of all attorneys/staff and consider alternative/improved ways of improving client/adversary communications with less reliance on present court listing system especially with larger volume practices.
11. Creative alterations concerning current billing structures that are incompatible with current legal environment (Respondent’s only) and may be more consistent with your clients’ needs.
12. Discussing with your adversary, the viability of accelerating the disposition of certain claims regarding certain insureds which are amenable to expediting closures.
13. Considering increased use of Section 20 regarding hybrid disposition where a limited collateral issue has delayed disposition of an entire claim.
14. Get to know your clients better (Respondent and Petitioner) given increased “downtime” which in turn will improve realistic expectations and better define issues presented in any given case and improve ongoing and future relationships.
15. Improve relationships with medical experts/treating physicians to better appreciate and recognize each other’s time issues/problems and develop ways to improve/strengthen efficiencies of relationships.
16. Communicate with Court to determine ways of improving communication/efficiencies in terms of filing processing within each vicinage and/or each specific Judge, understanding that the COVID-19 crisis has resulted in another level of personal concerns for all involved which is a significant factor in optimal/efficient processing of claims.
17. Optimize telecommunications with employees, clients and the Court.
18. Recognizing that decrease of physical contact with the clients and attorneys increases the need for virtual contact.

19. Make certain your client (Petitioners and Respondents) are fully aware of the particular issues within a particular vicinage and that they understand you are doing everything you can within reason to resolve cases optimally and that each file in your inventory is a priority for that client.

20. Be as creative as possible in solving a particular issue that may arise, but also be as informed and sensitive as possible doing a perceived negative action that may need to be taken. Positive firm culture is the result of long term commitments to everyone within the firm. Important firm decisions should be both predicated upon and perceived by most to be based upon the “best interests of the firm.” If that is the standard then most people should understand the tough decisions that need to be made are intended for the benefit of the firm and everyone within it.

21. Consider virtual solutions to physical problems/challenges. The “new normal” has at its very core the elimination or reduction of close physical contact. Adjudication of pending cases need to be selectively prioritized even if it is impractical or impossible to have a completely “physical” trial. Courts have long embraced fluid and relative actions to address “best evidence;” “admissible evidence;” “appearances;” “testimony;” “fundamental fairness” and “sound discretion” Stipulating undisputed facts, avoiding unreasonable “delays;” increasing professionalism consistent with RPC’s with respect to timely administration of justice; intolerance of conduct intended to either obstruct or delay rather than reaching “reasonable” accommodations or solutions to problems presented are all approaches that also can help.

CONCLUSION

The practice of Workers’ Compensation law has always been a “volume” practice which in the aggregate works its best when the most competent and caring of people are involved in the decision making progress to reach the resolution of the claims presented. In that respect, workers’ compensation has often been a practice of honest compromise between the parties and the Court to reach the “sweet spot” of any compensation claim which is presented. Cases always resolve either by way of agreement (in the overwhelming majority of the cases), or by partial or total Trial (by far the minority of the cases) or by dismissal. The Court is Judge and Jury and possesses the ultimate authority in any given case. Our Appellate review (Close v. Kordulak), gives deference to the Court’s findings unless there is abuse of discretion or error in the application of law. These are rare occurrences.

Historically, what our Division has not been as efficient at doing is conducting Trials from start to finish. A significant reason is in part the three week cycle format and because of historic disinclination/impracticality of “special listings” in view of most attorneys having to “be somewhere else on off days.” However, now attorneys and the Court can “virtually” be together almost on a daily basis if necessary. The amount of potential discretionary time is far more available and will continue to be available so long as “physical” appearances are not the norm. It is within this context and this opportunity that many more contested matters can actually be better addressed by the time availability of all relevant parties so long as virtual technology is appreciated and utilized appropriately.

The goal is always to “do justice in every case presented” and to that end, while the COVID-19 has presented challenges for our system, it has also provided major significant opportunities to not only address its specific impact, but potentially to improve overall operations regardless of those caused by COVID-19 itself. All of us have a stake in our chosen profession. Our collective efforts are vital to make certain that we safeguard the fundamental principles on which this practice is predicated but at the same time identify, address and resolve those aspects of the practice which can and/or need to be improved. By taking such an approach, gives ourselves the best chance to have an optimal practice even in an unprecedented pandemic.