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# COVID-19 WEBINAR OUTLINE (Workers' Compensation)

# ILLINOIS

## I. Amendment to the Illinois Workers' Occupational Diseases Act.

i. Illinois House Bill 2455

On June 5, 2020, Governor Pritzker signed Illinois House Bill 2455 into law which amended the Illinois Workers' Occupational Diseases Act (820 ILCS 310/1) by adding Section 1(g) which creates an ordinary rebuttable presumption for first-responders, front-line workers, and employees of essential businesses who contracted COVID-19. The Illinois Workers' Compensation Act was not amended.

The Illinois Workers' Compensation Act is designed to address injuries that are caused or aggravated by accidental injuries or traumas. However, the Illinois Workers' Occupational Diseases Act is designed to create remedies for employees that are caused or aggravated by a gradual insidious process.

ii. Amended Statutory Provisions.

The rebuttable presumption applies to all cases tried after the effective date of the amendment, and in which the diagnosis of COVID-19 was made on or after March 9, 2020 and on or before December 31, 2020.

If the employee's injury or occupational disease resulted from exposure to and contraction of the COVID-19 virus, the exposure and the contraction shall be rebuttably presumed to have arisen out of and in the course of the

employee's first-responder or front-line worker employment, and further that the injury or disease shall be rebuttably presumed to be causally connected to the hazards or the exposure of that employment. (Section 1(g)1).

To establish a COVID-19 diagnosis on or before June 15, 2020, a medical diagnosis by a licensed medical practitioner or a positive laboratory test is sufficient. If you are diagnosed after June 15, 2020, the employee must provide a positive laboratory test for COVID-19 or COVID-19 antibodies. (Section1(g)6).

COVID-19 first-responders and front-line workers are more fully defined in Section 1(g)(2) and include not only police and fire personnel, emergency medical technicians, paramedics and healthcare providers, but also corrections officers and any other employees of essential businesses as outlined in the Governor's Executive Order 2020-10, dated March 20, 2020. However, if the employee was employed by an essential business (i.e. not a first-responder) as outlined in the Executive Order, they must also be required by their employment to encounter members of the general public or must be required to work in an employment location with more than 15 employees. This Section also specifically states that an employee's home or place of residence is not a place of employment except for homecare workers.

Section 1(g)(7) further limits the presumption by indicating that it does not apply if the employee's place of employment was solely his home or residence for a period of 14 or more consecutive days immediately prior to his injury, disease, or period of incapacity related to the COVID-19 virus.

Section 1(g)(3) indicates that the presumption created by Section 1(g)(1) may be rebutted by the employer by presenting evidence including but not limited to the following:

> (a) The employee was working from home, on leave, or some combination thereof, for a period of 14 or more consecutive days immediately prior to the employee's injury, disease or period of incapacity relating to COVID-19 virus; or
>
> (b) the employer was engaging and applying to the fullest extent possible or enforcing to the best of its ability industry-specific workplace sanitation, social distancing and help and safety practices based upon updated guidance issued by the CDC or Illinois Department of Public Health, or was using a combination of administrative controls, engineering controls, or personal protective equipment to reduce the transmission of COVID-19 to all employees for a period of at least 14 days prior to the employee's injury, disease, or period of incapacity. For the purposes of this subsection, "updated" means the guidance in effect at least 14 days prior to the diagnosis. This section also defines personal protective equipment more specifically; or

(c) the employer can introduce evidence that the employee was exposed to the COVID-19 virus by an alternate source.

The legislative history and intent makes clear that the presumption is an "ordinary rebuttable presumption." It therefore creates a *prima facie* case as to the issues of arising out of and in the course of employment and causation. However, the employer must introduce only "some evidence" that the employer's occupation was not the cause of the injury or disease and the presumption will cease to operate and the issue will be determined on the basis of evidence admitted at trial as if the presumption never existed.

Section 1(g)(10) outlines that to qualify for temporary total disability benefits under the presumption, the employee must be certified for or recertified for temporary total disability.

Section 1(g)(11) outlines that the employer is entitled to a credit against its liability for TTD benefits for any sick leave benefits or extended salary benefits paid to the employee by the employer under the Emergency Family Medical Leave Expansion Act, the Emergency Paid Sick Leave Act, or the Families First Coronavirus Response Act, or any other federal law. In addition, the employer is entitled to any other credit that it would be entitled to under the Illinois Workers' Compensation Act.

iii. Can an Employee still pursue benefits if they are not entitled to the presumption?

Section 1(g)(9) outlines that an employee who has contracted COVID-19 but fails to establish entitlement to the rebuttable presumption outlined in Section 1(g)(1), is not precluded from filing for Workers' Compensation or Workers' Occupational Diseases benefits.

When evaluating COVID-19 claims, you do not want to solely focus on the rebuttal presumption but you want to evaluate the compensability of these cases based upon the anticipated evidence at trial as if no presumption ever existed.

In other words, rebutting the presumption outlined in Section 1(g)(1) of the Illinois Workers' Compensation Disease Act does not guarantee a victory for the employer as the employee can still pursue the claim and seek to establish by a preponderance of the evidence that the claim is compensable.

## II. Pursuing benefits under the Illinois Occupational Diseases' Act (assuming no presumption).

a) What qualifies as a compensable occupational disease?

i. Definition of occupational disease as stated by 820 ILCS 310/1(d) of the Act – "a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public." 820 ILCS 310/1(d)

ii. What does it mean for a disease to arise out of employment? Pursuant to 820 ILCS 310/1(d), the Act provides:
   1. "A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease."

   2. "The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence."

iii. Causation:
   1. The occupational disease needs only to be *a* causal factor in the development of the disability. The employee need not prove that it was the sole causative factor. *Old Ben Coal Co. v. Indus. Comm'n*, 217 Ill. App. 3d 70, 84 (5th Dist. 1991).

   2. Employee having pre-existing issues is not fatal to compensability.

b) COVID-19 claims

When evaluating the compensability of your COVID-19 claims, we believe there are generally 1 out of 4 categories your employees will fall into when assessing your claims:

i. Healthcare workers and first responders.
ii. Essential employees (non-healthcare workers).
iii. Traveling employees.
iv. Non-essential employees.

There are various arguments that can be made in support of and against the compensability of COVID-19 claim. Which group your employees falls under will have impact your compensability analysis.

## III. Impact of Work Restrictions on Payment of TTD and Maintenance Benefits

a. Employer is closed due to COVID-19

i. If the employee has not reached maximum medical improvement, is TTD owed?

If an employee has not reached maximum medical improvement, pursuant to *Interstate Scaffolding v. Illinois Workers' Compensation Commission,* 236 Ill.2d 132, (2010), unless light duty work is being accommodated, TTD benefits are owed.

If an employee has light duty restrictions which were being accommodated but light duty is no longer available due to a COVID-19 shut down or furlough, the employee would be owed TTD benefits until they reach MMI or until the employer reopens and light duty is again being accommodated.

However, if an employee is working full duty without any restrictions, regardless of whether they have reached MMI and the location closes due to COVID-19, TTD would not be owed.

ii. If the employee has reached maximum medical improvement, are TTD or maintenance benefits owed?

1. TTD:
Under *Interstate Scaffolding,* once an employee has reached MMI they are no longer temporarily and totally disabled and not entitled to TTD benefits. Therefore, if the employer had to close due to COVID-19 the employee would not be entitled to TTD.

2. Maintenance Benefits:

If the employee has reached maximum medical improvement and permanent restrictions were being accommodated at the time of the shutdown due to COVID-19, there is potential exposure for maintenance.

Employees will argue that maintenance benefits are owed if they have permanent restrictions that cannot be accommodated and they are engaged in a vocational rehabilitation program or producing evidence of a diligent self-directed job search per *Roper Contracting v. Industrial Commission*, 349 Ill. App. 3d 500, 812 N.E.2d 65, 285 Ill. Dec. 476 (2004).

The defense to maintenance is that the employee has a job to return to once the business is allowed to re-open. There is no basis for the employee to be provided vocational services or search for new

employment as such an employee is in the same position as all other employees and could apply for unemployment until the reopening of the employer, at which point the employee would return to work with all other employees.

b. Will TTD be owed if an employer is open during the pandemic but an employee chooses not to work due to COVID-19.

If an employee has light duty restrictions due to a work injury which are being accommodated by the employer and the employer remains open during COVID-19, the employer can dispute TTD if the employee elects not to work.

The Illinois Appellate Court has outlined three circumstances in which TTD can be suspended or terminated prior to an employee reaching MMI. These include: **(1) an employee refusing to submit to medical, surgical, or hospital treatment essential to their recovery; (2) a refusal to cooperate in good faith with rehabilitation efforts; or (3) a refusal of work falling within the physical restrictions prescribed by his doctor**. *Sharwarko v. Illinois Workers' Compensation Commission,* 28 N.E.3d 946.

When the employer remains open and employees choose not to go to work, they are refusing light duty and therefore, TTD benefits can be disputed

## IV. What are the Employee's obligations in terms of medical treatment during the COVID-19 pandemic?

a. Are doctor's still keeping in-person appointments?

If an employee is still engaged in treatment for a work-related condition and the treating doctor is offering in person appointments, the employee will be expected to continue that course of treatment. If the employee refuses citing COVID-19 as the reason, then an argument can be made to suspend benefits until treatment is resumed.

b. Is tele-medicine being offered as an alternative option?

If tele-medicine is being offered as an option, an employee will be expected to continue with regularly scheduled appointments and provide medical updates and work status reports. If the employee fails to do so, an argument can be made that benefits should be suspended.

c. Is the physical therapy facility open?

If the therapy facility is open, the employee will be expected to continue their prescribed course of treatment and attend therapy sessions. Failure to do so

allows offers the employer an argument for non-compliance in an effort to dispute payment of TTD.

Caveat: Some therapy facilities remain open but are also offering telehealth therapy or virtual therapy. If an employee is refusing to attend in-person sessions but willing to perform at home virtual therapy, TTD benefits would likely be awarded if the case was heard by an arbitrator.

While the argument could be made that the virtual therapy is not as beneficial as in-person sessions which are available, this would not be a strong argument as the employee is choosing the manner in which he is completing his treatment rather than refusing altogether.

d. Is the treating physician ordering the employee to suspend therapy due to COVID-19?

In a situation where employee's doctor suspends prescribed therapy due to COVID-19, TTD would continue to be owed. However, it should also be determined if telehealth therapy or virtual therapy is offered and if so, an employer could argue that the employee would be expected to engage in this type of therapy.

## V. Exposure once employees reaches MMI.

There are no precedential cases involving COVID-19 at this point. Based on what we know about this virus, in the vast majority of the cases, the employee will get diagnosed, stay home for approximately two weeks with one or two doctor's visits, and then return to work.

In these situations, the exposure would likely be for a few weeks of TTD, one or wo office visits and potentially permanency apportioned to the loss of a person as a whole. In most COVID-19 cases, based on what we currently know, there are no permanent effects and arguably it is much like contracting the flu. The argument could be made that there is no exposure for permanency as in most cases, there will be no treatment and no long-lasting effects. Our office does anticipate a "doctor fight" on the issue of permanent impairment and we will continue to update you on potential PPD values as these cases start to work their way through the system.

There will be cases were the employee gets hospitalized in which the recovery time is somewhere between 3 to 6 weeks resulting in TTD exposure. In addition, the medical exposure would be substantially higher for the hospitalization which may include admission to the ICU and use of a ventilator which would result in the potential for increased permanency apportioned to the person as a whole.

There will then be a very small percentage of cases that could result in a death claim, which would have potential exposure for medical bills for long term hospitalization and death benefits

The potential exposure for COVID-19 cases runs the gamut and will have to be looked at on a case by case basis. In addition, as more is learned about the virus and its potential long-term effects, the exposure analysis will change.

# INDIANA

## I. Has there been Legislation in Indiana in response to COVID-19?

a. There have been no legislative, executive, or administrative changes to the Indiana Worker's Compensation statutes in response to COVID-19.

b. The only communication regarding the effect of COVID-19 on worker's compensation in the State of Indiana was posted on the Board's website (https://www.in.gov/wcb/) on April 2, 2020, which states as follows:

> "The agency has received numerous questions regarding worker's compensation coverage for employees who contract Covid-19, particularly those on the front lines. In Indiana, workers' compensation benefits are paid by employers, not the State. Under our laws, the State cannot tell employers they must automatically cover employees who contract Covid-19. Whether an individual contracts the virus in the course and scope of their employment is a determination that must initially be made by the employer. This decision is routinely made at the time the employee notifies the employer of the injury, or in this case, contraction of the virus.
>
> It is well accepted that first responders, as defined in P.L.113-2020, and health care providers, as defined at IC 16-18-2-163, as well as others directly involved in the provision of services to those exhibiting symptoms of Covid-19 are more susceptible to contraction of the disease as a direct result of their work duties. Others whose jobs necessarily entail close interaction with many people in a public setting are also more vulnerable to exposure and possible infection than those working remotely or in a limited office setting.
>
> Employers are urged to consider making a prospective decision as to whether any vulnerable segment of their workforce will be presumptively covered under the provisions of the Indiana Worker's Compensation Act should they:
>
> a.) Be quarantined at the direction of the employer due to a confirmed or suspected Covid-19 exposure,
> b.) Receive a Covid-19 diagnosis from a physician without a test,
> c.) Receive a presumptive positive Covid-19 test, or
> d.) Receive a laboratory-confirmed Covid-19 diagnosis.
>
> Employers are encouraged to relay such decisions to their workforce and workers' compensation insurance carrier/third party administrator as soon as possible in order to allay fears and expedite the claims process. Plans of action upon any occurrence listed above should also be communicated."

c. The communication from the Worker's Compensation Board rules out an explicit presumption for a COVID-19 infection occurring in the course of and arising out of an infected employee's employment, but suggests that there may be an implicit presumption, particularly with first responders, health care providers, and other positions that may necessarily require contact with infected individuals

## II. Pursuing benefits under Indiana Workers' Compensation law

a. In Indiana, compensability of occupational diseases is covered under a separate (Chapter 22-3-7), but mostly identical, set of statutes as compensability for acute physical injuries (Chapter 22-3-3) and are analyzed with the same standards for compensability and medical causation. Occupation disease means "a disease arising out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where such diseases follow as an incident of an occupational disease." (IC 22-3-7-10(a))

   "A disease arises out of the employment only if there is apparent to the rational mind, upon consideration of all of the circumstances, a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workers would have been equally exposed outside of the employment." (IC 22-3-7-10(b))

   In order for an employee who contracts COVID-19 to prove a compensable case, they would have to show that the exposure to COVID-19 satisfied the requirements of "arising out of" and "occurred during the course and scope of" employment.

   Based on the posting from the Worker's Compensation Board, we may expect the burden to be even lower for employees that are first responders, health care workers, or other employees whose employment necessitates exposure to infected individuals.

## III. Impact of Light Duty Work and Payment of TTD

a. If the employer is closed due to COVID-19 and the employee is no longer able to work light duty being accommodated by the employer.

   i. We would argue that the employee's inability to work following the shutdown is not due to a work injury, but due to reasons unrelated to the injury that affect all employees equally. Therefore, we would argue that no temporary total disability is owed and the employee can seek alternate employment or unemployment benefits, just as the other, non-injured, laid off employees would.

ii. If the employer can no longer offer light duty due to a partial shutdown or if only certain employees are laid off, the Board would be more likely to find that the employee's inability to work is related to their work injury, thus likely to find that the employee is entitled to TTD.

b. If the employer is open and the employee refuses to go to work due to COVID-19 concerns

i. If an injured employee on light duty was to refuse work due to COVID-19 concerns, the employer could refuse compensation for his refusal. Under Indiana Code 22-3-3-11, "If an injured employee, only partially disabled, refuses employment suitable to his capacity procured for him, he shall not be entitled to any compensation at any time during the continuance of such refusal unless in the opinion of the worker's compensation board such refusal was justifiable."

In other words, if the employee on work restrictions refuses work within their restrictions, they would not be entitled to any disability payments (or even medical treatment) so long as the refusal continues. However, such a suspension of compensation would need to be preceded with the service of State Form 54217, Notice of Suspension of Compensation and/or Benefits, outlining the consequences of employee's refusal.

Additionally, based on the facts of the circumstances, the Board could determine that the employee's refusal of work was justifiable, thus entitled the employee to disability compensation.

c. Impact of an employee being at maximum medical improvement (MMI) for the work accident and injuries

i. Once an employee reaches MMI, the employer is no longer obligated to start paying maintenance if there are permanent restrictions in place.

## IV. Exposure once employees reaches MMI.

a. Permanent partial impairment (PPI) exposure will obviously vary based on the specifics of the employee's condition as related to COVID-19 and any complications. We would anticipate that any permanent impairment resulting from COVID-19 would be based on the degree on pulmonary dysfunction. Permanent impairment in Indiana is based on statutory values which are not based on the employee's age or wages. According to the AMA *Guides to the Evaluation of Permanent Impairment*, Sixth Edition, pulmonary dysfunction can range from 0% whole person impairment (WPI) for an asymptomatic worker at MMI (statutory value $0), 2-10% WPI minimal permanent dysfunction (up to $17,500), 11-23% WPI for mild dysfunction (up to $42,876), 24-40% WPI for moderate dysfunction ($82,230), and 45-65% WPI for severe dysfunction (up to $174,990).

b. Should the employee perish or become permanently and totally disabled from working as a result of a compensable exposure, the employee or their statutory dependents (generally their spouse and/or minor children) would be entitled to benefits in the amount of 500 weeks of temporary total disability (less any TTD previously paid). A death claim would also include up to $10,000 in burial benefits.

# WISCONSIN

## I. Wisconsin Legislation in response to COVID-19.

a. Rebuttal Presumption

Wisconsin WC law now includes a limited rebuttable compensability presumption regarding exposures to the novel coronavirus (SARS-CoV-2) that causes coronavirus disease 2019 (COVID-19). On Monday, April 13, 2020, the Wisconsin legislature introduced bills, S.B. 932, A.B. 1038 (2020), ultimately taken up during an April 14, 2020 "Extraordinary Session," of the legislature in which most members video-conferenced to participate and, ultimately, pass 2019 Wisconsin Act 185, which was not a WC-specific legal change but part of a broader package billed as general COVID-19 relief.

Act 185 changed the conditions of liability section of our Wisconsin workers' compensation law, where you see rules such as the course/scope and arising-out-of employment tests. Other presumptions already exist under Wisconsin law, housed not within Ch. 102, but instead within a more general evidentiary chapter. Those presumption rules remain unchanged. The new statutory language enacted reads:

> (a) In this subsection, "first responder" means an employee of or volunteer for an employer that provides firefighting, law enforcement, medical, or other emergency services, and who has regular, direct contact with, or is regularly in close proximity to, patients or other members of the public requiring emergency services, within the scope of the individual's work for the employer.
>
> (b) For the purposes of benefits under this chapter, where an injury to a first responder is found to be caused by COVID-19 during the public health emergency declared by the governor under s. 323.10 on March 12, 2020, by executive order 72, and ending 30 days after the termination of the order, the injury is presumed to be caused by the individual's employment.
>
> (c) An injury claimed under par. (b) must be accompanied by a specific diagnosis by a physician or by a positive COVID-19 test.
>
> (d) An injury claimed under par. (b) may be rebutted by specific evidence that the injury was caused by exposure to COVID-19 outside of the first responder's work for the employer.

Wis. Stat. § 102.03(6). The effect on WI WC law was limited, with Act 185's other changes affecting the Division more on unemployment insurance concerns.

This law is effective for occupational exposures manifesting on or after April 17, 2020. The presumption also ends 30 days after Governor Evers' Public

Health Emergency Executive Order expires. This Order was not part of the Wisconsin Supreme Court case in which the Safer at Home Order, issued not by Gov. Evers but a designee, was found to be unconstitutional.

b. How does the amended statue impact evaluating the compensability of claims?

The Wisconsin response and legislative changes through 2019 Wisconsin Act 185 are limited in scope because this presumption rule applies to first responders only, and even then, only a certain subset of those first responders. The duration is also limited and geared toward the state of emergency.

The presumption can still be rebutted but considering the very difficult issues surrounding proving or disproving the factual predicate for the exposure, these claimants will be very likely to prevail at hearing by benefiting from the presumption of work-relatedness. Still, we would expect this change to have limited impact considering the described scenario is only on a smaller subset of claims that would have been likely accepted in the first instance.

## II. Pursuing benefits under Wisconsin law.

An occupational disease is an industrial exposure resulting not from a single incident but rather due to a process, usually extending over a considerable span of time that eventually ripens into a disabling affliction. *Kohler v ILHR Dept.*, 42 Wis. 2d 396, 400 (Wis. 1969). Wisconsin law mandates that an employer take an employee "as-is"; that is, the fact that an employee may be susceptible to injury or disease due to a personal or pre-existing condition does not relieve the employer from being held liable if the employee sustains a work-related injury or exposure. However, Applicant still has the burden of proving all facts necessary to recover benefits beyond a legitimate doubt. The legal standard applicable to an occupational disease is work exposure causing the disease or to some appreciable extent furthering the progress of the disease. The occupational exposure must only be a "material factor" in the development of the condition.

More particularly, the causation test for occupational diseases requires courts to assess whether work exposure was either "the sole cause of the condition" or "at least a material contributory causative factor in the condition's onset or progression." *Shelby Mut. Ins. Co. v. DILHR*, 109 Wis. 2d 655, 659–60, (Ct. App. 1982). Even one day of exposure can lead to an occupational disease claim. *Gumieny v. Cty. Concrete Corp. & Zurich Am. Ins.*, Claim No. 2004-017501, (July 11, 2006). The courts have found these tests to be satisfied even where work only furthers the disease progress by a measure of 5%. Thus, these tests are easy to satisfy.

There are major causation issues regarding exposure despite the low standard. It would be very difficult to show where the worker was exposed, absent circumstance such as working in healthcare caring for infected patients. This difficult burden is obviated in Gov. Evers' proposed bill summaries, which imply that without a compensability presumption, COVID-19 exposures essentially cannot be proved.

One issue that arises regardless of the jurisdiction is that COVID-19 is too new for doctors to understand and thus provide an opinion upon to the requisite degree of medical and surgical certainty. In order to support a claim, a claimant needs a competent medical opinion linking exposure to the workplace. With coronavirus, at this point, there is not enough known about the incubation period for a credible medical opinion to be provided. As the Court explained in *Pfister* & *Vogel L. Co. v. Industrial Commission*, "[i]t is often impossible to find the source from which a germ causing disease has come. The germ leaves no trail that can be followed. Proof often does not pass beyond the stage of possibilities or probabilities, because no one can testify positively to the source from which the germ came, as can be done in the case of physical facts which may be observed and concerning which witnesses can acquire positive knowledge. Under such circumstances the commission or the court can base its findings upon a preponderance of probabilities or of the inference that may be drawn from established facts." *Pfister & Vogel L. Co. v. Industrial Commission*, 194 Wis. 131, 133-134 (1927). "Preponderance of probabilities" meant that in a given situation the inferences are strong enough to point to a fact as a probability and not as a speculative possibility. *Cheryl Gabriel, Applicant*, No. 2005-010687, 2008 WL 412258, at *3 (Wis. Lab. Ind. Rev. Com. Jan. 31, 2008).

Short of a single infected employee, even if multiple persons in a particular setting are sick, there may be a question as to who was the first, and from where the exposure arose. However, there are certain circumstances, such as exposure for employees in health care, where a claim is likely compensable and should be accepted. For example, if an employee working in the healthcare field had direct contact with someone infected with the coronavirus, their exposure likely arises out of their employment and they likely have a compensable claim for workers compensation benefits. With that said, short of extraordinary circumstances or a credible medical opinion, claims related to coronavirus can be denied.

## III. Impact of Light Duty Work and Payment of TTD

### a. Employer is closed due to COVID-19 and employee is not at MMI.

Our office recommends paying TTD benefits. In situations where a claimant is on work restrictions, though light duty is unavailable due to the COVID-19 pandemic or other reason, the claimant would likely be owed TTD benefits until they achieve end of healing or are placed in an alternative work environment. Temporary total disability is owed during the healing period unless "suitable employment that is within the physical and mental limitations of the employee is furnished to the employee by the employer or some other employer." Wis. Stat. 102.43(9)(a).

### b. Employer is open during the pandemic but employee chooses not to work due to COVID-19?

An employer is unlikely to be found liable for TTD benefits where the employee elects not to work despite the availably of suitable employment. Here, it is the claimant's volitional action, rather than a work injury, that is causing the wage

loss. As the appellate court recently explained in a decision on whether TTD is due after a voluntary retirement, while a purpose of workers' compensation law is to compensate an employee for lost time due to a work injury, where wage loss is instead occasioned for reasons entirely unrelated to the injury such as a voluntary, unrelated retirement, then no TTD is due because the wage loss was caused by that choice and not the injury. *Mueller v. LIRC*, 2019 WI App 50, 388 Wis. 2d 602, 933 N.W.2d 645, 18-0707. We would argue the same principles apply where an employee could in theory return to work but for a personal decision.

The duty to pay TTD comes to an end if the employer makes a bona fide offer of suitable employment that the employee unreasonably refuses to accept. Wis. Stat. §102.43(9)(a). There is little guidance as to what unreasonably refuse to accept means in the context of an epidemic. Certainly, if the employee was in one of the high-risk categories, he or she would have a better case than if the employee was in a low risk category. You have a reasonable basis upon which to suspend TTD/TPD liability under these circumstances, but the courts/ALJ may be sympathetic to this argument because the act is liberally construed in favor of the employee's interests, and so a court—even if this defense is not invoked out of a genuine fear of the virus but instead to evade an accommodation—could award benefits during this timeframe.

## IV. Exposure once employees reaches MMI.

In theory, a PPD rating could be imposed after an employee recovers from the effects of a compensable COVID-19 illness. Permanent partial disability would be assessed as a percentage of 1000 weeks as an unscheduled body as a whole injury. Wis. Stat. § 102.44(3).

Exposure projections are difficult to develop because litigated cases on respiratory impairment are limited, and typically involve serious fact patterns in which, due to permanent restrictions precluding a full duty return to work, a claim for functional PPD is subsumed within a larger loss of earning capacity claim. (Like functional PPD, LOEC is assessed as a percentage of 1000 weeks, but imposed based on wage impairment and other factors.)

At this time, we expect claims will either be very serious and potentially involve the death of a worker, or relatively minor and include claims for only lost time and medical expense without any PPD rating. Regardless, as in any claim, PPD is evaluated at end of healing through a WKC-16 final medical report, which must be obtained if more than three weeks of disability occur.

# MISSOURI

## I. Has there been Legislation in Missouri in response to COVID-19?

a. There was much anticipation about legislation from the Missouri General Assembly when the legislature reconvened this spring. However, when the legislature adjourned on May 15, 2020, there were no bills passed addressing COVID-19 and workers' compensation.

b. A review of proposed bills being discussed as related to workers' compensation in general also did not seem geared toward COVID-19 specifically, though a couple appear responsive to the pandemic. For example, bills were proposed to better identify an "emergency worker" and also to establish a presumption for post-traumatic stress given these occupations.

c. Therefore, unless there is a special session of the Missouri General Assembly this summer, it does not appear a specific COVID-19 bill will be introduced or discussed until the legislature reconvenes in January 2021.

d. However, Governor Parson issued an emergency order on April 7, 2020 in conjunction with the Missouri Department of Labor and Industrial Relations. This amended the regulations that supplement the Missouri Workers' Compensation Statutes by adding 8 CSR 50-5.005.

e. **Amendment of the Missouri Workers' Compensation Regulations through 8 CSR 50-5.005**

   i. In Missouri, occupational diseases are covered under the same set of statutes as acute injuries and are analyzed with the same standards for compensability and medical causation.

      1. The occupational disease must still "arise out of" and occur "during the course and scope of" employment.

      2. The employee's work activities or the exposure that occurred at work must be the "prevailing factor" in medically causing the condition or injury to occur. (RsMo 287.067)

      3. Ordinary diseases of life which the general public is exposed to outside of employment are not compensable. The disease need not to have been foreseen or expected, but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. (RsMo 287.067)

ii. The emergency rule creates a presumption that First Responders infected by or quarantined due to COVID-19 are deemed to have contracted a contagious or communicable occupational disease arising out of and in the course of the performance of their employment.

    1. The rule further defines a “First Responder” as law enforcement officer, firefighter or an emergency medical technician (EMT), as such occupations are defined in Section 287.243.

    2. The presumption includes situations where the First Responder is quarantined at the direction of the employer due to suspected COVID-19 exposure, or the display of any COVID-19 symptoms, or receives a presumptive positive COVID-19 test, or receives a COVID-19 diagnosis from a physician, or receives a laboratory–confirmed COVID-19 diagnosis.

    3. A First Responder is not entitled to the presumption if a subsequent medical determination establishes by “clear and convincing evidence” that the First Responder did not actually have COVID-19, or contracted or was quarantined for COVID-19 resulting from exposure that was not related to employment.

    4. The emergency rule became effective April 22, 2020, though applied retroactively to all First Responders meeting the rule’s requirements. The rule is set to expire on February 1, 2021 or at the end of the state of emergency declared in Executive Order 20-02, whichever is later.

iii. A major issue with the emergency rule is the ambiguity with the definition of a “First Responder” and therefore the scope of who this rule even covers in the first place. For example, the rule does not state whether it includes emergency room physicians and nurses, or medical providers directly treating COVID-19 patients.

    1. Other statutes in Missouri define “First Responder” in different ways. For example, Section 67.145 defines them as any person trained and authorized by law or rule to render emergency medical assistance or treatment. However, this section pertains to the political activity of first responders and references that it is applicable to this section of the law. Therefore, an argument could be made that first responders as defined in this section is not applicable to the executive orders.

    2. Under Section 192.800, a "First responder" is defined as any person trained and authorized by law or rule to render emergency medical assistance or treatment. Such persons may include, but shall not be limited to, emergency first responders, police officers,

sheriffs, deputy sheriffs, firefighters, ambulance attendants and attendant drivers, emergency medical technicians, mobile emergency medical technicians, emergency medical technician-paramedics, registered nurses or physicians. Section 192 falls under Title XII- Public Health and Welfare, so it is likely a strong argument could be made that physicians and nurses should be included as first responders under the executive orders.

iv. As a result, there could be some disagreement among employers and employees as to who exactly is covered by the emergency rule. While it is likely the intent of the rule was to cover all medical professionals dealing with the COVID-19 pandemic, the rule was enacted under Chapter 287 of the Missouri Statutes which has a provision for "strict construction" of the wording contained therein. If that is applied, one could argue for the application of the rule only to those professions that are specified.

v. If the employee qualifies as a "First Responder" and can show they were directed to quarantine or a positive COVID-19 test, the rule then shifts the burden of proof to the employer to overcome the presumption that this exposure happened at work.

    1. The use of the phrase "clear and convincing evidence" is a high standard for employers to meet under the rule's provisions.

    2. If the employee is around large crowds or those that have tested positive for COVID-19, it appears more likely that the employee's exposure came from that situation as opposed to something in their personal lives.

    3. Employers will need to investigate this in detail to find out where employees have been outside of work, who they may have also been exposed to, if other family members and/or neighbors have tested positive before the employee did, etc.

vi. The employer also needs to verify the validity of the test for COVID-19 and/or the physician diagnosis to ensure the employee actually has the virus and is not exhibiting symptoms of another condition or illness.

vii. Even if the employee cannot establish the elements of the rebuttable presumption under the Emergency Rule, the current rule or other provisions of the Statues do not prevent them from filing for benefits under the previously enacted provisions for injury or occupational disease.

## II. Pursuing benefits under 8 CSR 50-5.005 and Missouri Workers' Compensation law.

a. In Missouri, occupational diseases are covered under the same set of statutes as acute injuries and are analyzed with the same standards for compensability and medical causation. The occupational disease must "arise out of" and "occur during the course and scope of" employment. Further, the employee's work activities, or the exposure that occurred at work must be the "prevailing factor" in medically causing the condition or injury to occur. (RsMo. 287.067).

   In order for an employee who contracts COVID-19 to prove a compensable case, they would have to show that the exposure to COVID-19 satisfied the requirements of "arising out of" and "occurred during the course and scope of" employment. For employees who are not considered first responders or healthcare workers, this would be difficult to prove without a presumption of exposure. Unless it could be shown that the employee was performing their regular job duties, and because of that, they were exposed to and contracted COVID-19, it is unlikely an employee would prevail.

b. Furthermore, the employee would have to show that the exposure that occurred at work was the "prevailing factor," not merely a factor, in their development of the virus. Employees would also have to show that their job duties put them at a "greater risk" than the general public for contracting the virus. Therefore, most employees could not successfully argue that because their job required them leave their home, they contracted the virus. However, an employee working somewhere such as a dentist's office may be able to prove a compensable case because their job requires direct contact with patients who may have the virus. On the other hand, a warehouse worker would have a more difficult time proving compensability.

## III. Impact of Light Duty Work and Payment of TTD

a. If the employer is closed due to COVID-19 and the employee is no longer able to work light duty being accommodated by the employer.

   i. If the employer can no longer offer light duty due to being closed because of the pandemic, the inquiry would shift back to whether the employee is otherwise still temporarily incapable of engaging in any type of substantial and gainful employment. If it is not reasonable to believe any other employer would hire and retain the employee due to the temporary restrictions, TTD would have to be paid.

   ii. This is a factually driven situation that will need to be reviewed in each case, as there is no clear standard for when restrictions are not severe enough that TTD will need to be paid. Furthermore in light of the COVID-19 pandemic and if many industries are still shut down, a Judge is likely to determine that there are no jobs in the open labor market at this time for an employee with restrictions, thereby making it more likely benefits will be owed in the case of light duty restrictions regardless of how minimal those restrictions may be. This is a unique situation and the location and type of

jobs available will greatly dictate whether Judge believes benefits are owed.

b. Impact of the employee being placed at maximum medical improvement (MMI) for the work accident.

    i. Once the employee reaches MMI, the employer is no longer obligated to pay TTD or start paying maintenance of any kind if there are permanent restrictions in place.

    ii. If the employer is accommodating permanent restrictions and then shuts down due to COVID-19, the employee is treated no differently than full duty workers.

## IV. Exposure once employees reaches MMI.

a. PPD exposure will obviously vary based on the specifics of the employee's condition as related to COVID-19 and any complications.

b. In mild cases with more flu-like symptoms and no hospitalization or other significant treatment necessary, there is an argument that no PPD should be owed because the employee fully recovered from the virus after a period of time.

    i. That being said, depending on the duration of the recovery and venue of the claim, some Judges in Missouri could find or award minor PPD at the level of the body as a whole (400 week level)

c. Further complications that are longer lasting like respiratory issues could lead to additional PPD at the level of the body as a whole as well. There is a higher likelihood that PPD would be awarded if the employee suffered complications due to COVID-19 that exceeded that of the flu, or other virus.

d. If the employee's case is more severe and requires hospitalization and/or a ventilator, a Judge is more likely to award a higher amount of PPD. Actual ongoing issues on the part of the employee and difficulties with day to day life because of residuals from the virus would need to be assessed.

e. Severe cases requiring surgery for lung transplants or issues with extremities and circulation due to COVID-19 complications would lead to higher PPD at the level of those specific body parts.

# IOWA

## I. There is no enacted legislation regarding compensability of COVID-19 under the Iowa Occupational Disease Law.

## II. Pursuing benefits under the Iowa Occupational Disease Law.

General Factors:

The Iowa Supreme Court has recognized that in order to prove causation in an occupational disease case, the employee must establish the following: 1) the disease must be causally related to the exposure to harmful conditions of the field of employment and 2) those harmful conditions must be more prevalent in the employment concerned than in everyday life or in other occupations. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). Iowa Code 85A.12 further defines the employee's burden of proof.

The employee must prove that the diseases was "due to the nature of an employment in which the hazards of such disease actually exist, and which hazards are characteristic thereof and peculiar to the trade, occupation, or process, or employment, and such disease actually arises out of the employment." (Iowa Code 85A.12).

## III. Impact of Light Duty Work and Payment of TTD

a. Employer is closed due to COVID-19.

i. Has employee reached maximum medical improvement?

The employee is not entitled to temporary total disability compensation under any circumstances after they reach maximum medical improvement. If the closure persists for an extended period of time and Employee has permanent work restrictions, then Employee may be entitled to vocational rehabilitation benefits. If the Employee does not have permanent work restrictions, then the employee would not be eligible for vocational rehabilitation.

ii. If employee is not at MMI, is TTD owed in your jurisdiction?

The employee would be entitled to temporary total disability compensation during periods of closure if they have not reached maximum medical improvement if the Employee is completely off of work or has been released to work on temporary work restrictions. If the Employee has not been released to maximum medical improvement but has been released

to return to work full duty without restrictions, then the employee would not be entitled to temporary total disability compensation during the closure.

b. Employer is open during the pandemic but employee chooses not to work due to COVID-19?

If light duty accommodation is offered to an employee, the employer can suspend TTD if employee's refusal to accept the accommodated position is "unreasonable." Whether employee's refusal to attend is unreasonable will depend heavily on the facts and circumstances surrounding their refusal.

If the employee is refusing to attend work due to fear of COVID-19 exposure, factors to consider in determining whether employee's refusal to attend is unreasonable would likely include the following: risk of exposure at work; risk of exposure in the community; and whether the employee, or someone in their family, has a pre-existing condition that places them in a category for greater risk of death or severe illness if exposed to COVID-19.

However, it should be noted that if the employee fails to explain their reasons for their refusal to accept light duty in writing, will then be forever barred from challenging the reasonableness of the accommodation at a later date by operation of law.

## IV. Exposure once employees reaches MMI.

If COVID-19 exposure is deemed compensable as an occupational disease in Iowa, it would be considered a body as a whole injury. Body as a whole injuries in Iowa are compensated at based on loss of industrial disability.

An employee is entitled to a loss of industrial disability evaluation if they have permanent restrictions or impairment to the body as a result of the occupational disease. Although permanent impairment remains a factor to entitlement to loss of industrial disability compensation, the employee's permanent restrictions, or lack thereof, primarily drive exposure for Employee's entitlement to loss of industrial disability.

For example, if an employee has permanent impairment to the body as a whole but no permanent work restrictions, then it is more likely than not that they will be unable of establishing any loss of industrial disability. As it applies to COVID-19, if an employee is released to maximum medical improvement with no restrictions, then it is more likely than not that they have sustained no loss of industrial disability. If they have sustained no loss of industrial disability, then they are not entitled to PPD.

If the employee is released to maximum medical improvement with some restrictions, likely breathing or air quality restrictions, then it is likely employee will have sustained minimal loss of industrial disability. However, that will depend on the severity of those restrictions.

# NEBRASKA

**I. There is no enacted legislation regarding compensability of COVID-19 under the Nebraska Workers' Compensation Act.**

**II. Pursuing benefits under the Nebraska Workers' Compensation Act for an Occupational Disease.**

a. General Factors

In Nebraska, 'occupational disease' is defined in Neb. Rev. Stat. 48-151(3) as "only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed."

An occupational disease must be a natural incident of a particular occupation and must attach to that occupation a hazard which distinguishes it from the usual run of occupation and which is in excess of that attending employment in general…The statute does not require that the disease be one which originates exclusively from the employment. The statute requires that the conditions of the employment must result in a hazard which distinguishes it in character from employment generally. *Ritter v. Hawkeye-Security Insurance Co., 178 Neb. 792,795, 135 N.W.2d 470, 472 (1965).*

The Nebraska Supreme Court has not defined "ordinary diseases of life" in terms of 48-151(3). It, however, has not been asked to address whether a virus is a compensable occupational disease.

The most instructive analysis provided by the Nebraska Supreme Court on how it might evaluate a virus like COVID-19 can be found in *Risor v. Nebraska Boiler*, 277 Neb 679, 765 N.W.2d 170 (2009). In *Risor*, the employee claimed exposure to loud noises as a boiler manufacturer was a compensable occupational disease. The Nebraska Supreme Court disagreed. It reasoned that exposure to loud noises was too broad to make it peculiar to employee's employment as a boiler manufacturer specifically stating that other professions such as firefighters, police officers and others would be exposed to such a hazard.

**III. Impact of Light Duty Work and Payment of TTD**

a. Employer is closed due to COVID-19.

i. Has employee reached maximum medical improvement?

The employee is not entitled to temporary total disability compensation under any circumstances after they reach maximum medical improvement. If the closure persists for an extended period of time and Employee has permanent work restrictions, then Employee may be entitled to vocational

rehabilitation benefits. If the Employee does not have permanent work restrictions, then the employee would not be eligible for vocational rehabilitation.

ii. If employee is not at MMI, is TTD owed in your jurisdiction?

The employee would be entitled to temporary total disability compensation during periods of closure if they have not reached maximum medical improvement if the Employee is completely off of work or has been released to work on temporary work restrictions. If Employee has not been released to maximum medical improvement but has been released to return to work full duty without restrictions, then the employee would not be entitled to temporary total disability compensation during the closure.

b. Employer is open during the pandemic but employee chooses not to work due to COVID-19?

The employee would not have reached maximum medical improvement and been released to return to work on temporary work restrictions before temporary total disability compensation might be owed under this factual scenario. If light duty accommodation is offered to an employee, the employer can suspend TTD if Employee's refusal to accept the accommodated position is "unreasonable." Whether Employee's refusal to attend is unreasonable will depend heavily on the facts and circumstances surrounding their refusal.

If the Employee is refusing to attend work due to fear of COVID-19 exposure, factors to consider in determining whether Employee's refusal to attend is unreasonable would likely include the following: risk of exposure at work; risk of exposure in the community; and whether Employee or someone in their family has a pre-existing condition that places them in a category for greater risk of death or severe illness if exposed to COVID-19.

## IV. Exposure once employees reaches MMI.

If COVID-19 exposure is deemed compensable as an occupational disease in Nebraska it would be considered a body as a whole injury. Body as a whole injuries in Nebraska are compensated at based on loss of earning capacity that is evaluated by a vocational counselor.

An employee is entitled to a loss of earning capacity evaluation if they have permanent restrictions or impairment to the body as a result of the occupational disease. Although permanent impairment remains a factor to entitlement to loss of earning capacity compensation, the employee's permanent restrictions, or lack thereof, primarily drive exposure for Employee's entitlement to loss of earning capacity.

For example, if an employee has permanent impairment to the body as a whole but no permanent work restrictions then it is more likely than not that they will not have sustained any loss of earning capacity. As it applies to COVID-19, if an Employee is

released to maximum medical improvement with no restrictions then it is more likely than not that they have sustained no loss of earning capacity. If they have sustained no loss of earning capacity, then they are not entitled to PPD.

If the employee is released to maximum medical improvement with some restrictions, likely breathing or air quality restrictions, then it is likely Employee will have sustained minimal loss of earning capacity. However, that will depend on the severity of those restrictions.

# KANSAS

## I. Has there been Legislation in Kansas in response to COVID-19?

Other than the suspension of in-person hearings, the Kansas Division of Workers' Compensation has not taken any specific action as it relates to COVID-19 exposure claims.

Kansas Governor Kelly issued various executive orders relative to stay at home measures but, unlike other states, has not issued any executive orders regarding presumption of liability under workers' compensation.

The Kansas legislature is not in session and neither the legislature nor Legislative Coordinating Council have taken any action to modify the workers' compensation law in response to the pandemic. Likewise, neither the Kansas Department of Labor nor Division of Workers' Compensation have enacted any administrative regulation in specific response to COVID-19 exposures.

We have yet to see how the Division judges will respond to any COVID-19 claims but, for the time being, we are taking the position that the Act's occupational disease provisions will be applied to each case individually and be very case by case, fact specific.

## II. Pursuing workers' compensation benefits under Chapter 44, Article 5a. – Occupational Diseases provisions.

a. Compensability under the Workers' Compensation Act.

Disablement or death from an occupational disease shall be treated as the happening of an injury by accident. KSA 44-5a01(a). This is significant for the terms applicable to injury by accident found in KSA 44-508(f).

- Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined. KSA 44-508(f)(1).
- An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates, or exacerbates a preexisting condition or renders a preexisting condition symptomatic. KSA 44-508(f)(2).
- An injury by accident shall be deemed to arise out of employment if:
    1. There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
    2. The accident is the prevailing factor causing the injury, medical condition, and resulting disability.

- “Prevailing” as it relates to “factor” means the primary factor, in relation to any other factor.

b. Definition of Occupational Disease

The elements of a compensable occupational disease are found in K.S.A. 44-5a01(b).

- "Occupational disease" shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged.
- "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk.
- Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases.

Kansas remains a very strict burden of proof state requiring satisfaction of the prevailing factor standard to be considered a compensable injury. “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

"Occupational disease" shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases.

The key terms are “nature of the employment”, “special risk”, and “ordinary diseases of life. As a general rule, virus related illnesses would not be viewed as compensable due to consideration as an ordinary disease of life and condition to which the general public is or may be exposed to outside of the particular employment.

However, severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) that causes coronavirus disease 2019 (COVID-19), presents as unique. Although community spread is largely responsible for the pandemic, from a legal perspective, it may not yet be viewed as an “ordinary disease of life” in the context of Kansas workers’ compensation compensability.

## III. Impact of Light Duty Work and Payment of TTD

**a.** Employer is closed due to COVID-19.

**i.** K.S.A. 510c(b)(2) states: (2) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee’s actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee’s actual job duties with the employer, without or without accommodation. If the employer’s ability to offer accommodated work changes, the inquiry would shift back to whether the claimant is otherwise still temporarily incapable of engaging in any type of substantial and gainful employment. If it is not reasonable to believe any other employer would hire and retain the claimant due to the temporary restrictions, TTD would have to be paid.

**b.** Employer is open during the pandemic, but employee chooses not to work due to COVID-19?

A refusal by the employee of accommodated work within the temporary restrictions imposed by the authorized treating physician shall result in a rebuttable presumption that the employee is ineligible to receive TTD benefits.

## IV. Exposure once employees reaches MMI.

Kansas mandates use of the AMA Guides to the Evaluation of Permanent Impairment to address permanent disability. Statistics tend to support most

COVID-19 patients recover completely without any residual permanent impairment that can be objectively determined under the AMA Guides.

To the extent any functional impairment is assessed, it would be considered body as a whole on a 415 week schedule reduced by the number of weeks of TTD paid after the first fifteen weeks.