



# PA Workers' Comp – COVID-19

Insurance Coverage, Protecting Employees, and Basic  
Risk Management

PACAH CONFERENCE – JULY 21, 2020

1:00 – 2:30 P.M.

# Ken Scholtz, Esq.

## Shareholder – Tucker Arensberg, P.C.

- ▶ 19 years of litigation experience
- ▶ Workers' Comp defense practitioner
- ▶ Clients include : nursing homes, home health aide providers, independent hospitals, regional health systems, and utility companies.
- ▶ Civil trial attorney
- ▶ Matters/specialties: premises liability, eminent domain, property damage, personal injury defense, breach of contract, landslide litigation, debt collection litigation.

# COVID – 19

## Basic Risk Management

- What's at risk?
- Whom are we protecting?
- How are we exposed?
- What can we do about it?

COVID – 19

## Insurance Coverage – your role

- What's covered?
- Who's covered?
- What's the extent of exposure?

### Pennsylvania COVID-19 Dashboard

Confirmed Cases

91,206

Probable

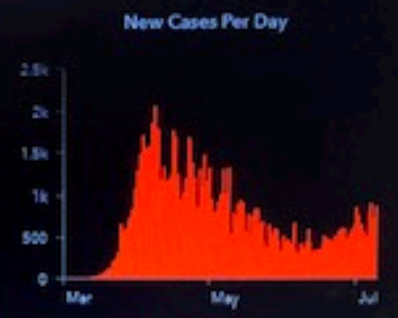
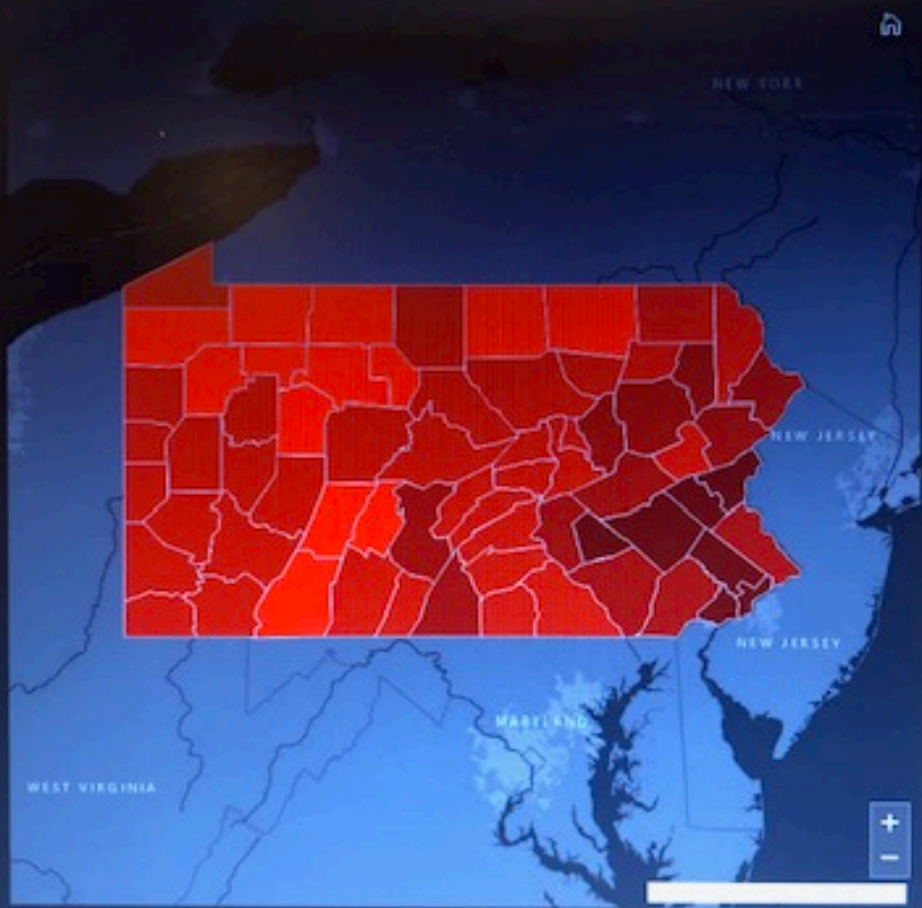
2,670

Negative

804,764

Deaths

6,880



Information last updated at 12:00 noon on 7/10/2020. Case count data, map and new cases per day data from PA-NEDSS. Deaths by day graph data from EDRS.

\*Case Counts in the charts above include confirmed and probable cases.

### Pennsylvania COVID-19 Dashboard

COVID-19 Patients Hospitalized

653

COVID-19 Patients on Ventilators

97

COVID-19 Patients on ECMO

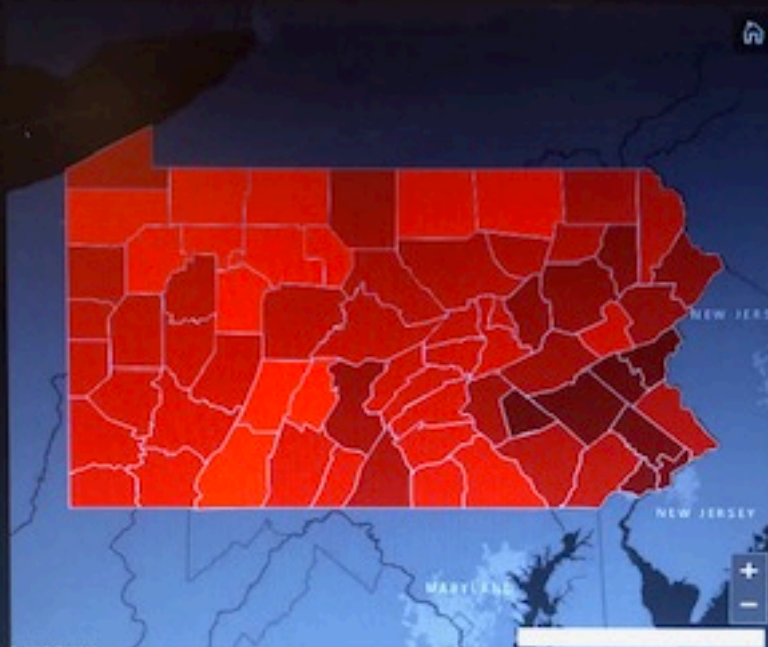
6

Total Ventilators in Use

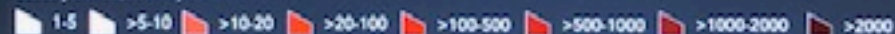


The total number (COVID-19 and non-COVID-19) of ventilators in use is indicated by the red band and shown as the number in the center of the gauge.

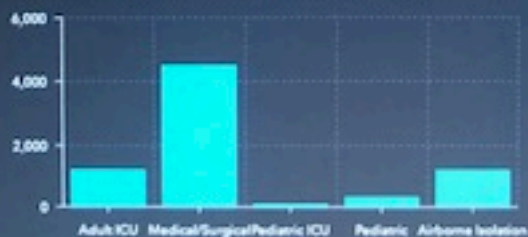
Source: Department of Health - Convera (formerly EC-HMS)



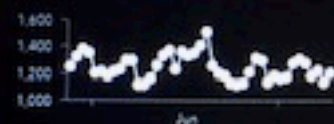
Cases per 100,000 Population



Available Beds (Total Counts)



Average Number Adult ICU Bed Availability (Past 14 days)



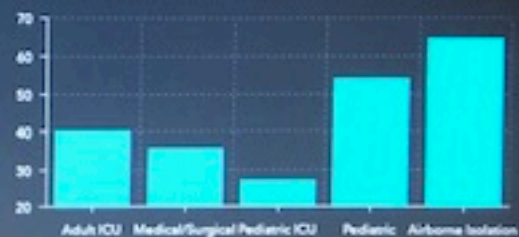
Average Number COVID-19 Patients Hospitalized (Past 14 days)



Average Number of COVID-19 Patients on Ventilators (Past 14 days)



Available Beds (%)



# PA personal care home COVID data:

Number of facilities with cases:	Number of cases among residents:	Number of cases among employees:	Number of deaths:
737	18,164	3,428	4,699

- 68% of total deaths in PA are in/from nursing homes
- 23% of current cases in PA are in/from nursing homes

# *PA personal care home COVID data:*

## COVID-19 Cases Associated with Nursing Homes and Personal Care Homes to Date by Facility Name

### **DOH:**

[COVID-19 Long-Term Care Facilities Data](#) (updated 7/7/2020 at 12:30 p.m.)

[COVID-19 Long-Term Care Facilities Data](#) (updated 6/30/2020 at 12:00 p.m.)

### **DHS:**

[COVID-19 Personal Care and Assisted Living Data](#) (updated 7/7/2020 at 12:00 p.m.)

[COVID-19 Personal Care and Assisted Living Data](#) (updated 6/30/2020 at 12:00 p.m.)

<https://www.health.pa.gov/topics/disease/coronavirus/Pages/LTCF-Data.aspx>



COVID – 19

## Basic Risk Management

Protection and preparedness:

- investigation;
- record-keeping; and
- what to expect if a claim is filed.

# Federal Response / Mandate

## **Audit of Nursing Homes' Reporting of COVID-19 Information Under CMS's New Requirements**

In response to the coronavirus disease 2019 (COVID-19) public health emergency, CMS added requirements to an existing regulation that requires nursing homes to report to State and local health departments communicable diseases, health care-associated infections, and potential outbreaks. Under one requirement, these facilities must now report COVID-19 data (such as information on suspected and confirmed infections, and deaths among residents and staff) to the Centers for Disease Control and Prevention through its National Healthcare Safety Network system. The data must be reported in a standardized format at least weekly. We will assess nursing homes' reporting of CMS-required information related to the COVID-19 public health emergency. Specifically, we will determine whether the data reported by nursing homes were complete, accurate, and reliable.

# Basic Risk Management

## Who's at Risk?

- residents / patients
- employees
- vendors/contractors
- doctors
- therapists
- business invitees



# Protecting Against Risk

- residents
  - treating all as positive;
  - PPE use;
  - limiting contact;
  - increased cleaning;
  - HVAC issues; and
  - limiting outside contact.



# Protecting Against Risk

- employees
- vendors / contractors
- doctors / therapists
  - temperature checks;
  - PPE use;
  - limiting contact/interaction;
  - HVAC issues; and
  - limiting outside contact.



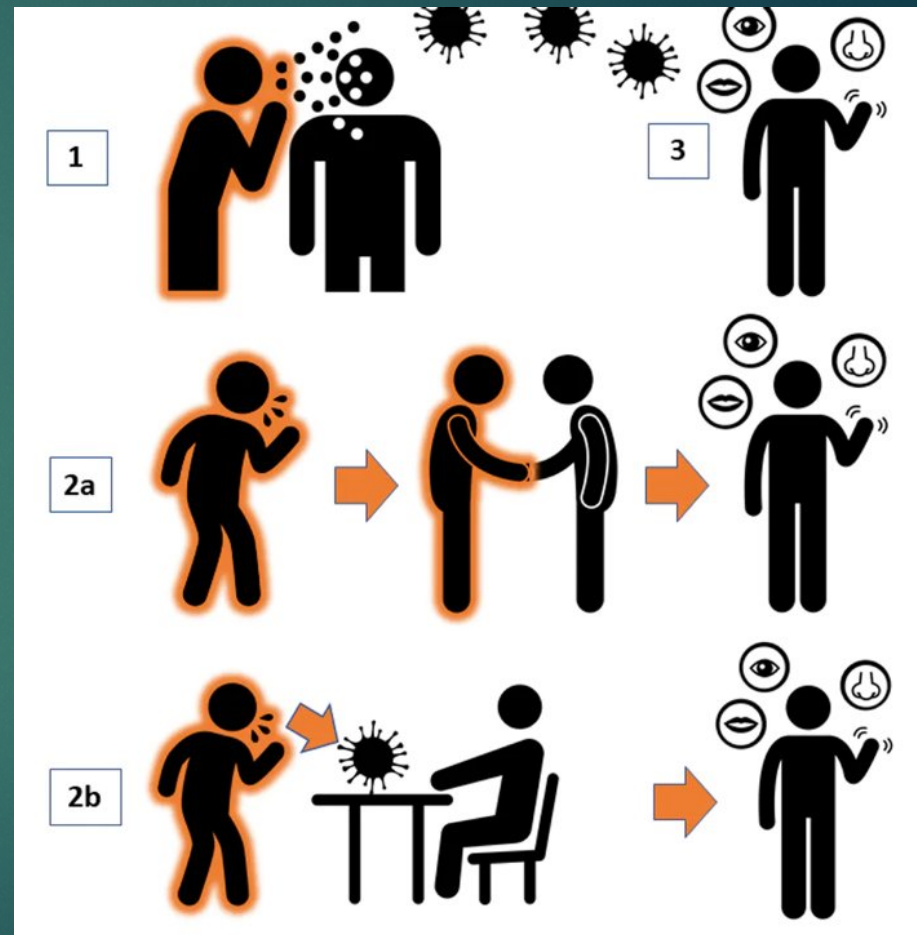
# Protecting Against Risk

- business invitees
  - prohibition on entry;
  - temperature checks;
  - PPE use;
  - limiting contact/interaction;
  - HVAC issues;
  - limiting outside contact.



# Protecting Against Risk

Good plan in place, and good execution, does not guarantee protection from infections or liability stemming from spread of infection.



## Litigation/Liability Risk

State/Federal Court claim for wrongful death, failure to protect by family of COVID infected resident/patient.



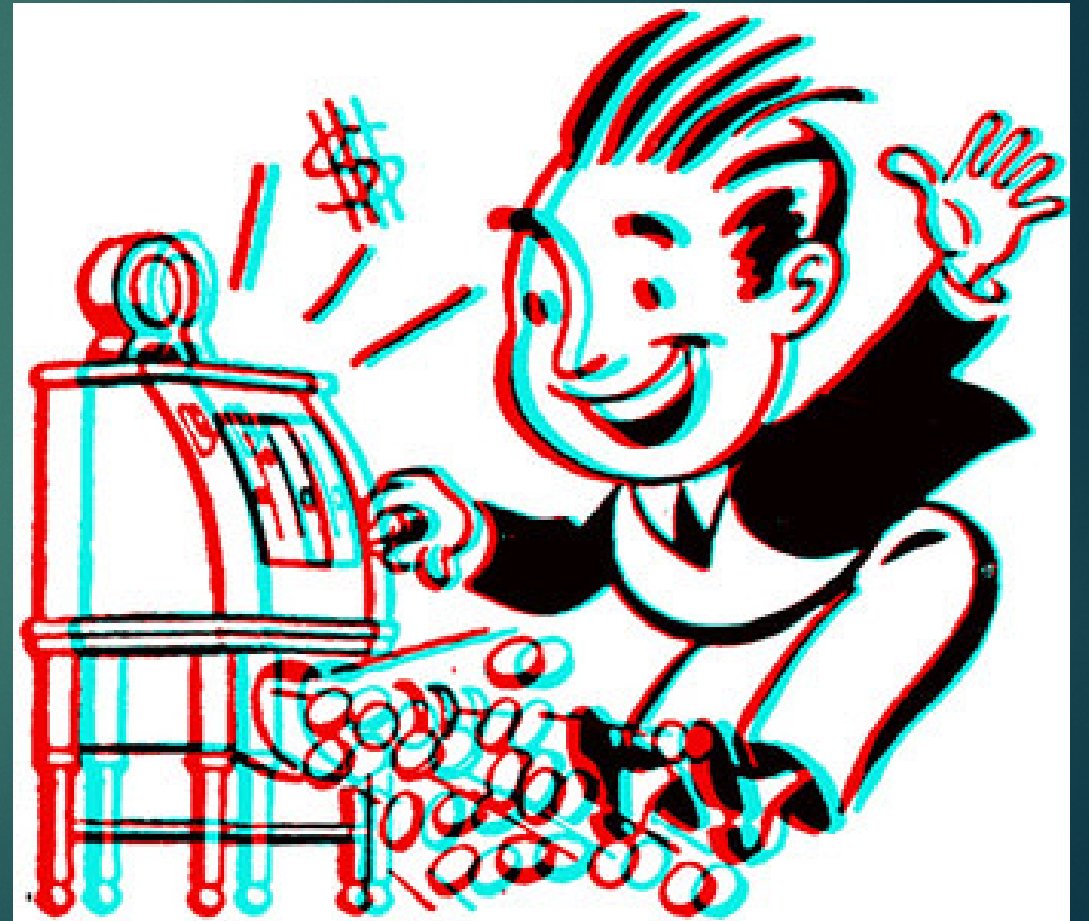


## Litigation/Liability Risk

PA nursing home negligence/abuse cases – jury verdicts and published settlements.

Average verdict/settlement: \$228,000\*

\*average compiled by tracking verdicts/settlements with money damages – from 43 verdicts/settlements over seven year period, there were three defense verdicts



# Litigation/Liability Risk

State Workers' Compensation claim for wage loss, medical benefits and/or fatality.



## Litigation/Liability Risk

“Lots more money goes through this hearing office than the Court of Common Pleas, I can guarantee you that much.”

-oft repeated quote, Workers' Compensation Judge William Lowman (Fayette County)

## Litigation/Liability Risk

State/Federal Court claim for wrongful death, failure to protect, by family of COVID infected vendor/contractor, visiting doctor or nurse who claims infection occurred on employer's premises.



# Litigation/Liability Risk

State/Federal Court subrogation or contribution claim stemming from alleged exposure resulting in payout to visitor/contractor/vendor.



## Litigation / Liability Timeline

State/Federal Court claim may not surface or be filed for years after an incident; litigation, once filed, will take years to resolve or be set for trial.



## Litigation / Liability Timeline

State Workers' Comp claim is more immediate, and will likely be resolved/decided within 18 months.

- Injured worker must provide notice of claim – including direct allegation of occurrence/onset in the workplace – within 120 days of positive COVID diagnosis.
- First hearing on Workers' Comp claim will occur within 30 days of Petition being filed.



# PA Workers' Comp Exposure

The PA Workers' Compensation Act recognizes “occupational disease” as a compensable work injury; employers (through WC insurance carriers) can be required to pay wage loss and medical benefits for time loss and medical care associated with COVID-19 as an occupational disease, or as an “injury” based on the onset of the infection.

For employees who may be exposed to COVID-19 in the workplace, contract the virus, and miss work and require medical care as a result – the state Bureau of Workers' Compensation will recognize (and likely accept) the claim as compensable – forcing the employer/carrier to pay Workers' Comp benefits to the employee.

[www.dli.gov](http://www.dli.gov).

# Workers' Comp Exposure

By mid-March, the PA Department of Labor & Industry website listed “filing options” for employees who contract the disease, as follows:

## **Two Filing Options for COVID-19**

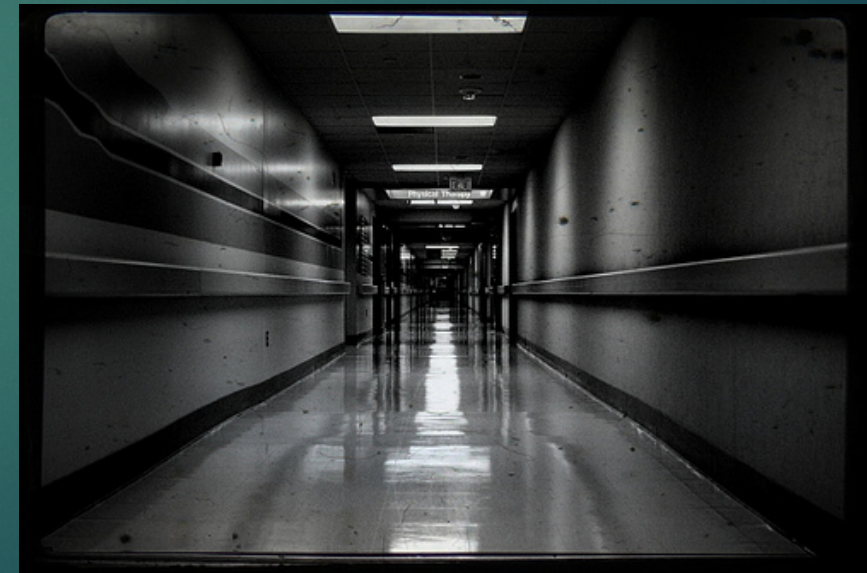
**Option 1:** An employee can file a typical “disease-as-injury” Workers’ Compensation claim, which would require the employee to provide medical evidence that they were exposed to COVID-19 in the workplace. Employees must provide this type of evidence for all injury-related claims.

**Option 2:** An employee could file an “occupational disease” Workers’ Compensation claim, which would require showing that COVID-19 is occurring more in the employee’s industry or occupation than in the general population, such as the healthcare industry.

[www.dli.gov](http://www.dli.gov).

# “Disease as injury” claims:

- healthcare worker/EMT/police from needlestick
- other workplace exposure (MRSA, Hep. C, carbon monoxide exposure)



# “Disease as Injury”



- treated as any other Workers' Comp claim
- notice of issue or relatedness provided within 120 days
- allegation of direct onset/exposure in the workplace

# “Occupational disease exposure” claims:



- coal miner black lung
- firefighter cancer
- paper mill mercury poisoning

# “Occupational disease”

- “presumption of exposure/onset in the workplace”
- higher incidence of disease in particular industry or workplace
- rebuttable presumption for employer to refute

# *City of New Castle* – “kiss of death”

30 years ago, the PA Commonwealth Court awarded benefits to the family of a City of New Castle Public Works Department employee who died from exposure to meningococcal septicemia that was determined to have been contracted at an office party.

In *City of New Castle v. W.C.A.B. (Sallie)*, 546 A.2d 132 (Pa. Commw. Ct. 1988), the Commonwealth Court upheld a determination that a fatal Workers' Compensation claim was compensable where a causal link between onset of the disease, and exposure at work, was established.

# City of New Castle

Two medical experts for deceased employee – established causal connection.

Commonwealth Court held “no obvious causal connection between a Claimant’s condition and work injury” – Medical evidence can serve to establish connection.





In *City of New Castle*, the testimony of the medical experts, combined with eyewitness testimony regarding the Claimant/decedent's exposure, was sufficient to affirm the award of survivor death benefits to Mr. Sallie's family. It is worth noting that the eyewitness testimony, from co-workers, was determined to prove that Mr. Sallie contracted the disease from giving a co-worker a **farewell kiss on the cheek at a maternity leave office party**. The medical expert testimony established the connection between that kiss, and the onset of the disease that ultimately killed Mr. Sallie.



# PA Workers' Comp

## Claim Petition

- temporary benefits for wage loss, medical, specific loss

# PA Workers' Comp

## Fatal Claim Petition

- benefits for funeral expenses, survival benefits for life of spouse, children w/ in age limit



# Recovered employee...(Claim Petition)

- 95% of COVID patients – the virus will “run its course” - and the employee will make a full recovery within weeks, or exhibit no symptoms at all...but will be subject to 14 day quarantine



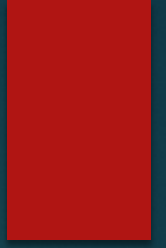
# Claim Petition

Workers' Compensation wage loss benefits would be limited to the period of required time off for recovery and/or quarantine. It is important to note that an employees' legal right of recovery as against an employer, for any sort of work injury, is limited to recovery of wage loss and medical benefits.

# Fatal Claim Petition

- Recovery of 50% earnings for life of spouse
- Recovery of 60% earnings for one child (through college)
- Recovery of 66% earnings for more than one child
- Funeral expenses

# Fatal Claim Petition



Recovery of 50% earnings for life of spouse (no kids)

*Example:* 50 year old nurse, \$25/hr = \$525/wk

1 year claim = \$27,300/yr.

27 year claim = \$737,100

# Fatal Claim Petition

- Recovery of 66% earnings for life of spouse (two kids)  
50 year old nurse, \$25/hr = \$699/wk., \$36,350/yr.  
12 year claim = \$436,176  
15 years beyond = \$409,500  
Total claim: \$845,676



# Fatal Claim Petition

What if surviving spouse lives to age 90?

Total claim recovery = **\$1,200,576**

# Fatal Claim Petition

Does it matter if surviving spouse has a job that pays \$150K/yr?

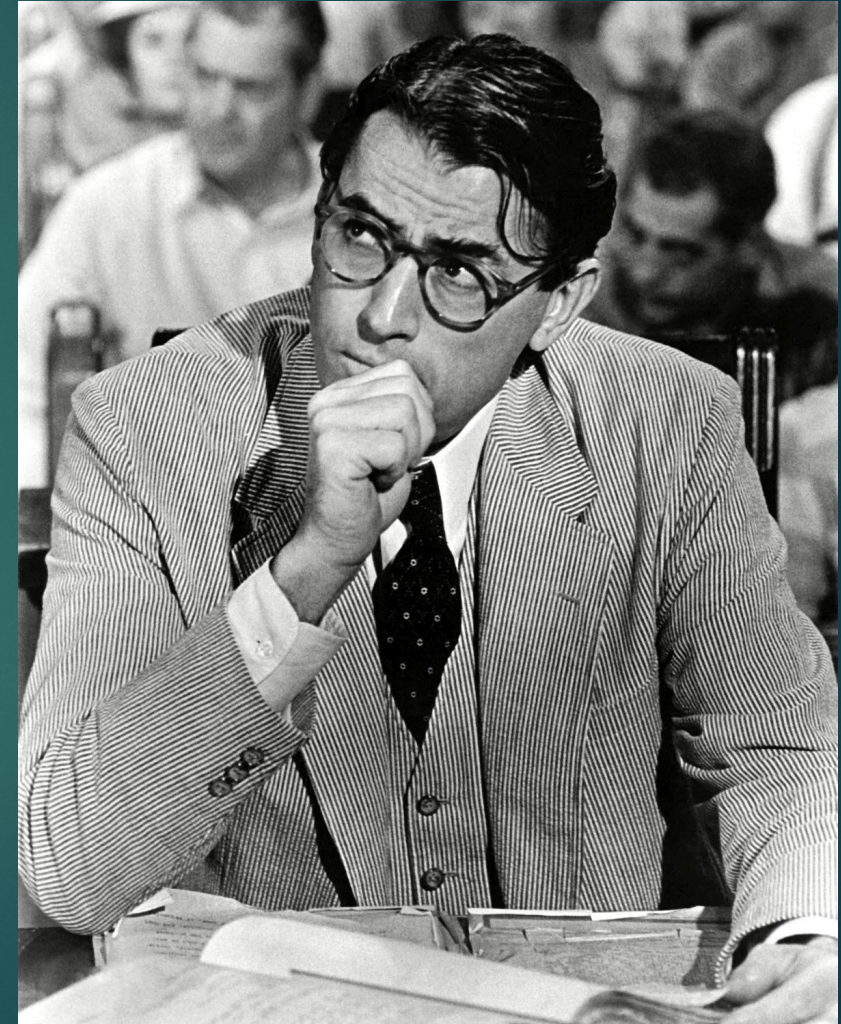


Does it matter if surviving spouse remarries?



# Employer defenses...

- What if employer can prove PPE for all employees?
- What if employer can show training and handwashing were ignored?
- What if employer can show excellent track record?



## Call your carrier...

Defer claim and defense to the WC carrier to process payments for wage loss and medical care...while taking the necessary steps to prevent future COVID-19 exposure in the workplace.

PA does not penalize employers for temporary acceptance of claim while investigation as to cause/onset continues.



Claim Defense Investigation  
Immediate Action Required

**CONTACT TRACING – MAKE IT WORK**

# CONTACT TRACING QUESTIONNAIRE

## - COVID-19 - REPORTED INJURY/ILLNESS CHECKLIST -

Have you had any symptoms of COVID-19 (fever >100.0° F, dry cough, fatigue) in the past 14 days? **YES** **NO**

- Date your first symptom began: \_\_\_\_\_.

- Have you consulted with your physician regarding these symptoms? **YES** **NO**

Have you been tested for COVID-19? **YES** **NO**

- If yes, what date were you tested? \_\_\_\_\_.

- Testing site/location? \_\_\_\_\_.

- Have you received test results? **YES** **NO**

- Outcome of test results? **POSITIVE** **NEGATIVE**

Regardless of test outcome, were you instructed to self-quarantine? **YES** **NO**

- If yes, list dates you were instructed to self-quarantine: \_\_\_\_\_.

## CONTACT TRACING QUESTIONNAIRE (con't)

List all healthcare professionals/organizations from whom you received care, treatment and/or testing for COVID-19, regardless of outcome of testing:

\_\_\_\_\_.

Do you know from whom you may have contracted COVID-19? **YES NO**

- If yes, what is the relationship of the person to you? \_\_\_\_\_.

- If yes, state whether this contact was at home, in the workplace, or other location: \_\_\_\_\_.

- If applicable, state **where** you had close contact\* with anyone who has tested positive for COVID-19: \_\_\_\_\_.

\* Per CDC guidelines, close contact for healthcare exposures is defined as follows: *a) being within approximately 6 feet (2 meters), of a person with COVID-19 for a prolonged period of time.*

## CONTACT TRACING QUESTIONNAIRE (con't)

Have you worked for another employer in 2020? **YES NO**

- If yes, state employer name(s): \_\_\_\_\_.

- If applicable, list dates of employment for each entity: \_\_\_\_\_.

Have you volunteered for any organization in 2020? **YES NO**

- If yes, state organization name(s): \_\_\_\_\_.

- If applicable, list dates of volunteer work: \_\_\_\_\_.

Not including employer representatives, have you notified anyone of your seeking treatment for COVID-19? **YES NO**

- If yes, state whom have you notified? \_\_\_\_\_.

**I attest that I have answered all questions above truthfully and completely:**

\_\_\_\_\_  
**Employee Name – printed**

**Employee Signature:**

**Date:**





# Contract tracing – dual benefit

- ▶ Preventing disease spread
- ▶ Protecting liability claim/defense



# Communication....?

- ▶ HIPAA
- ▶ State/Federal disclosure/reporting requirements
- ▶ Contact with insurance carrier
- ▶ Contact with lawyer
- ▶ Contact from family, or lawyer for family
- ▶ Contact with media

Reach of employer WC liability...

Are employees working from home able to file/collect WC benefits for injuries that occur at home?

# Who's "at work"?

For those workers whose office jobs have been relegated to home work stations, their work days, while obeying a "stay home" order, can be somewhat similar to their usual office work. But breaks and interruptions throughout the day can take the employee outside the scope of actual work.

According to PA law, a brief break – using the bathroom or grabbing a snack – will not interrupt the "on the clock" designation, as long as it is for the employee's "personal comfort." Arguing the reverse would be a losing proposition for employers.

# Who's "at work"?

Are you "acting in furtherance of the employer's interests?"

The scope of this protection for injured workers extends beyond the walls of an employer-owned workplace.

For decades, Pennsylvania Courts have awarded benefits regardless of whether the employee is on or off the employer's premises when an injury occurs...provided the injury occurred while the employee was "acting in furtherance of the employer's interests." See *Acme Markets, Inc. v. WCAB (Purcell)*, 819 A.2d 143 (Pa. Cmwlth. 2003); see also, *WCAB (Slaughaupt) v. United States Steel Corp.*, 31 Pa.Cmwlth. 329, 376 A.2d 271 (1977).

# Who's "at work"?

The law treats work-from-home employees much differently than traveling employees.

There is expansive protection for employees who travel as part of their job. For employees who travel, Workers' Comp benefit recovery extends to wherever they go, and to virtually whatever they do, while traveling for work. See *Roman v. WCAB (Dept. of Environmental Resources)*, 616 A.2d 128 (Pa. Cmwlth. 1992) (car accident while DEP employee traveling to site).

# Who's "at work"?

Work from home – NOT the same as traveling employee.





# Traveling employee...

*Baby's Room v. WCAB (Stairs)*, 860 A.2d 200 (Pa. Cmwlth. 2004) - furniture deliveryman injured while jumping to touch the rim of a customer's driveway basketball hoop – Commonwealth Court Opinion set forth: “intervals of leisure activity during the work day are deemed inconsequential departures from the act of delivering furniture for the employer.”



# Traveling employee...

*Evans v. WCAB (Hotwork, Inc.), 664 A.2d 216 (Pa. Cmwlth. 1996)* - PA contractor on remote job site on Emerald Isle, NC, fatally injured while bodysurfing at the end of a work day.

# Traveling or working from home?

By contrast, work-from-home employees are not given the same blanket protections as traveling employees. Work-from-home employees are also not afforded the same protections as those injured in the workplace...where “relatedness” is all but assumed because the injury occurred on the employer’s premises.

The millions of Pennsylvanians who are now working from home must prove that they were “acting in furtherance of the employer’s interests” in order to recover benefits in the event of an injury.



# Work from home – WC liability

The following examples and case references – both involving injuries sustained at home, with very different outcomes – can serve as a guide for employers in assessing whether a reported work-from-home injury is compensable through Workers' Comp:

- ▶ Employee trips and falls down the stairs after leaving her basement computer work station, to get a drink of juice in the kitchen. Yes, it's compensable. See *Verizon Pennsylvania, Inc. v. WCAB (Alston)*, 900 A.2d 440 (Pa. Cmwlth. 2006).
- ▶ Employee sustains head injury when he trips and falls while outside the house – getting the mail, during a smoke break. No, not compensable. See *Werner v. WCAB (Greenleaf Serv. Corp.)*, 28 A.3d 245 (Pa. Cmwlth. 2011).

# Werner

*Werner* best illustrates the employee's burden of proving "acting in furtherance" at the time of an injury. *Werner* involved a fatal head injury to an employee who was injured while going to get the mail during a smoke break; it was determined that he had been either on his front porch or driveway – away from his computer work station. In defending the claim, the employer sent an investigator to the home, to do a sort of "CSI" investigation. The investigation revealed the presence of blood in the driveway, from Claimant/decedent's head injury.

**CSI:**  
CRIME SCENE INVESTIGATION

# Werner

During litigation, at a hearing, the Claimant/decedent's widow admitted that he had gotten the mail that day, and that he took frequent smoke breaks, standing on the front porch and/or in the driveway. Because there was insufficient proof that his injury occurred while "acting in furtherance," the claim was denied...and the Commonwealth Court upheld the denial on appeal.



# Alston

Ms. Alston got a drink of juice in the kitchen, left her basement work station temporarily.

In contrast to *Werner*, *Alston* is the best example of the Court applying the “personal comfort doctrine” to uphold an award of Workers’ Comp benefits to a work-from-home employee, despite the fact that the employee had briefly interrupted her work at the time the injury occurred.



# Personal Injury? Negligence? Malpractice? Subrogation?

- ▶ COVID-19 does not alter course of basic care, protection and liability exposure
- ▶ COVID-19 has not slowed the frequency of filing claims
- ▶ COVID-19 has impacted perspective of public on front line workers
- ▶ COVID-19 has changed the way the public views emergency, ICU and long term care
- ▶ COVID-19 has amplified scrutiny on healthcare
- ▶ COVID-19 has illuminated breakdowns between government oversight and healthcare front lines



# Nursing Home Negligence and Premises liability

- ▶ COVID-19 impact on Court system
- ▶ Landowner liability
- ▶ Protections for business invitees

# What can long term care providers & facility owners do!?



## Litigation / Liability Exposure

### Insurance covered

- resident illness or death from exposure due to negligence of staff, administrators

### Insurance not covered

- resident illness or death from exposure due to egregious error – outside scope of staff, admin.



## How do we know what's covered?

- Policy language review
- Meeting/discussion with broker
- Meeting/discussion with carrier rep
- Call your lawyer

## Will insurance carrier fight impede defense of litigation?

- Reservation of rights
- Duty to defend
- Document everything, litigation “hold”
- Call your lawyer



## Immediate Action Required by Home/Facility

- **Plan execution**
- **Contact tracing**
- **prevent spread, protect against liability**

# 2021 and beyond...

- increased insurance premiums
- increased costs for everything
- added regulations/reporting
- compounded claim issues – residents, employees, contractors

# 2021 and beyond...

- vaccine widely available and effective
- return to normal life
- new government leadership



# 2020 Perspective...

For a small amount of perspective at this moment, imagine you were born in 1900...

-ages 14 – 18, WWI, 22 million dead

-ages 18 – 20, Spanish Flu, 50 million dead

-ages 29 – 33, Great Depression – unemployment 25%, world GDP drops 27%

-ages 39 – 45, WWII, 75 million dead

-smallpox epidemic ends in your 40s, kills 300 million during your lifetime

# 2020 Perspective...

-age 50, Korean War, 5 million dead

-age 55, Polio vaccine available


-age 55, the Vietnam War begins, 4 million people dead

-age 62, Cuban Missile Crisis

-age 75, the Vietnam War ends

Thank you...

...questions?



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