

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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Case No.: \_\_\_\_\_

PRIMECARE MEDICAL OF WEST VIRGINIA, INC., Employer Below,

*Petitioner,*

v.

BRITTANY FOSTER, Claimant Below,

*Respondent.*

PETITIONER'S BRIEF

*Brittany Foster, Claimant*

v.

*PrimeCare Medical of West Virginia, Inc., Employer*

State of West Virginia Workers' Compensation Board of Review

Claim No. 2021009577

PRIMECARE MEDICAL OF WEST VIRGINIA, INC.

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## **QUESTION PRESENTED**

Whether the State of West Virginia Workers' Compensation Board of Review committed clear legal error in its conclusory determination that Brittany Foster's contraction of COVID-19, a community-acquired disease, was causally related to her employment with PrimeCare Medical of West Virginia, Inc. such that it amounted to a compensable injury.

## **STATEMENT OF THE CASE**

1. Petitioner, PrimeCare Medical of West Virginia, Inc. ("Petitioner"), is a West Virginia Corporation that previously<sup>1</sup> staffed medical personnel within various correctional facilities throughout the State of West Virginia, including the Southern Regional Jail.

2. The instant appeal concerns the State of West Virginia Workers' Compensation Board of Review's ("Board of Review") Order entered August 29, 2022, reversing the Claim Administrator's Order of March 1, 2021, and finding that Claimant's workers' compensation claim relating to COVID-19 is a compensable injury. (*See generally Order, Appendix* at pp. 809-829.).

3. Claimant was previously employed by Petitioner as the Health Services Administrator at Southern Regional Jail in Beaver, West Virginia. Beginning on or about July 27, 2020, until approximately July 31, 2020, as part of her administrative role as the Health Services Administrator, Claimant undertook a limited role in

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<sup>1</sup> Petitioner's contractual relationship with the State of West Virginia, pursuant to which it provided medical staffing to various jails throughout the State of West Virginia, ended earlier this year.



administering COVID-19 tests to inmates located in the Medical Unit of Southern Regional Jail -- a few of which returned as positive. (See Deposition Transcript of Brittany Foster, *Appendix* at pp. 460). During the time that Claimant undertook her limited role in administering such tests, she wore all available personal protective equipment (*i.e.*, “PPE”) including a mask (specifically a medical grade N-95 mask), gloves, and protective gown. (Deposition Transcript of Brittany Foster at 7:17-23, *Appendix* at pp. 461.)

4. On July 30, 2020, again as part of her administrative role as the Health Services Administrator, Claimant attended a management staff meeting scheduled by the Superintendent of Southern Regional Jail with the heads of each department in the jail. Masks were required to be worn by all participants throughout the meeting. (See Melissa Jeffrey, LPN Affidavit, *Appendix* at pp. 492.).

5. Five days later, on August 4, 2020, Claimant underwent a COVID-19 test at Summers County ARH Hospital, which was negative. (See *id.* at ¶ 6, *Appendix* at p. 492.)

6. Eleven days after the aforementioned administrative meeting, Claimant underwent a second COVID-19 test on August 10, 2020, which returned positive. (See *id.* at ¶ 9, *Appendix* at p. 496.). However, in the days prior to her positive COVID-19 test and after her negative COVID-19 test, Claimant engaged in numerous non-occupational activities that increased her risk of COVID-19 exposure. (See Deposition Transcript of Brittany Foster, *Appendix* at p. 464, 469-472.) For example, ten days prior to her second test, on August 1, 2020, Claimant visited a drive-through zoo along

with her mother, father and two nieces. (*See Id.*, *Appendix* at p. 464.) Additionally, during this time, Claimant visited the grocery store, pharmacy and gas station, where she admittedly did not use the same PPE measures that she utilized at work. (*See id.* at 469-472.)

7. Claimant completed an Employees' and Physicians' Report of Occupational Injury or Disease (WC-1) form, which she signed on September 22, 2020. (*See Employees' and Physicians' Report of OID dated Sept. 25, 2020, Appendix* at pp. 22-23.) The physicians' portion of the form was completed by Dr. Ajay Anand, and dated September 25, 2020. (*See id.*) On this form (and later during his deposition discussed *infra*), Dr. Anand certified that Claimant's COVID-19 was "N/A" (meaning non-applicable) to an occupational condition. (*Id.* (shown below).)

|  |  |  |  |   |
|--|--|--|--|---|
| 7. Condition is a direct result of:  |  | <input type="checkbox"/> Occupational Injury?                  | <input type="checkbox"/> Occupational Disease? | <input type="checkbox"/> Non-Occupational Condition? <i>N/A</i> |
| 8. Did this injury aggravate a prior injury/disease? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No. If Yes, explain:   |  |  |  |   |
| 9. Description of injury or occupational disease: <i>COVID-19</i>  |  |  |  |   |
| 10. Body part(s) injured: <i>N/A</i>   |  | 11. ICD9-CM Diagnosis Code(s) in order of severity: <i>N/A</i> |  |   |
| 12. Name of physician referred to: <i>Ajay Anand, MD</i>   |  | 13. If the patient was hospitalized, where? <i>Hinton ARH</i>  |  |   |
| <small>I certify the statements and answers set forth in this section are true and correct to the best of my knowledge. I am aware the law provides for severe penalties if I knowingly certify a false report or statement, withhold material fact or statement or knowingly aid or abet anyone attempting to secure benefits to which he or she is not entitled. In signing this form, I acknowledge I have been informed of my responsibilities under West Virginia's Workers' Compensation Law and agree to abide by such in the administration of services provided thereunder. I understand the submission of false statements or billing may result in prosecution under state and federal law. I further agree to release any office notes/test results immediately to the employer or their representative.</small> |  |  |  |   |
| Signature: <i>Ajay Anand</i>   |  | Date: <i>9/25/2020</i>   |  |   |

8. On October 22, 2020, Claimant completed a second WC-1 form. The physicians' portion of the form was completed by Dr. Matthew Haag, and dated October 20, 2020. (*See Employees' and Physicians' Report of OID dated October 20, 2020, Appendix* at pp. 20-21.). On this form, Dr. Haag certified that Claimant's COVID-19 was a "non-occupational condition[.]" (*Id.* (shown below).)

|   |  |
|---|--|
| 7. Condition is a direct result of: <input type="checkbox"/> Occupational Injury? <input type="checkbox"/> Occupational Disease? <input checked="" type="checkbox"/> Non-Occupational Condition?  |  |
| 8. Did this injury aggravate a prior injury/disease? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No. If Yes, explain:  |  |
| 9. Description of injury or occupational disease: COVID-19  |  |
| 10. Body part(s) injured/involved:<br>pulmonary, cardiovascular   | 11. ICD-10-CM Diagnosis Code(s) in order of severity:<br>J18.9, I49.9, J96.01, U07.1 |
| 12. Name of physician referred to:  | 13. If the patient was hospitalized, where? Summers County ARH                       |
| <small>I certify the statements and answers set forth in this section are true and correct to the best of my knowledge. I am aware the law provides for severe penalties if I knowingly certify a false report or statement, withhold material fact or statement or knowingly aid or abet anyone attempting to secure benefits to which he or she is not entitled. In signing this form, I acknowledge I have been informed of my responsibilities under West Virginia's Workers' Compensation Law and agree to abide by such in the administration of services provided hereunder. I understand the submission of false statements or billing may result in prosecution under state and federal law. I further agree to release any office notes/test results immediately to the employer or their representative.</small> |  |
| Signature: <i>[Signature]</i>   | Date: 10/20/20   |

9. On November 20, 2020, Claimant submitted a claim with Petitioner's Workers' Compensation Claims Administrator following her COVID-19 diagnosis.

10. On March 1, 2021, the Claims Administrator denied compensability for Claimant's workers' compensation claim, citing "non-occupational injury[.]" as confirmed by both Dr. Anand and Dr. Haag, and pre-existing conditions included on the physicians' portion of the WC-1 form.

11. On April 7, 2021, the Board of Review filed an *Acknowledgement and Automatic Time Frame Order*, acknowledging Claimant's protest to the Claims Administrator's March 1, 2021 denial of compensability. (See generally *Acknowledgment and Automatic Time Frame Order, Appendix* at pp. 1-2.).

12. On August 29, 2022, the Board of Review issued an Order reversing the Claims Administrator's March 1, 2021 denial and awarding temporary total disability benefits from August 10, 2020 through March 9, 2022, and continuing thereafter as substantiated by proper medical evidence. (See *Order, Appendix* at p. 820.)

### **SUMMARY OF ARGUMENT**

The Board of Review erred in concluding that Claimant's contraction of COVID-19 was an occupational injury sufficient to warrant the award of workers'



compensation benefits. West Virginia law has strict requirements as to what elements a disease must meet in order to be considered an occupational disease for which workers' compensation benefits can be awarded and COVID-19 simply does not meet those requirements – especially based on the evidence presented in the record below. COVID-19 is a communicable (*i.e.*, community-acquired) disease that is now unfortunately known as a disease of ordinary life. The transmissibility and contraction of COVID-19 exceeds far beyond that of a workplace – a fact that has become evident to all of the world during this pandemic. Diseases of ordinary life are not compensable under the workers' compensation statutory regime and the Board of Review's decision in this case offends the balance of interests for which the workers' compensation program is designed to remedy. Accordingly, this Court should reverse the Board of Review's decision below.

#### **SUMMARY REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is warranted in this matter because the disqualifying elements set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure are not met as Petitioner believes that the decisional process would be significantly aided by oral argument and Petitioner is unaware of any controlling authority of this Court where the issue of workers' compensation claims arising from COVID-19 have been authoritatively decided. *See* W. Va. R. App. P. 18(a). More specifically, Petitioner is unaware of any opinions produced by this Court in relation to workers' compensation claims arising from COVID-19, and therefore Petitioner asserts that this is a case

involving issues of first impression and appropriate for Rule 20 oral argument. *See* W. Va. R. App. P. 20(a).

### **ARGUMENT**

The Board of Review committed clear legal error in its reversal of the Claims Administrator's denial of compensability, and this Court should reverse its decision because: (1) there is insufficient evidence of a direct causal connection between Claimant's COVID-19 infection and her work conditions; (2) the temporary disability benefits awarded to Claimant far exceed any plausible scope of compensability as evidenced by the record below; and (3) holding employers responsible for employees' COVID-19 infections, when it is impossible to confirm the source of such infection, unreasonably overburdens employers and causes unnecessary administrative and financial strain and is unsupported by the statutory framework set forth in the West Virginia Workers' Compensation Act.

#### **A. Standard of Review**

The standard of review applicable to this Court's consideration of workers' compensation appeals has been set out under West Virginia Code Section 23-5-12A(b), as follows:

(b) The Intermediate Court of Appeals shall set a time and place for the hearing of arguments on each claim and shall notify the interested parties thereof. The review by the Court shall be based upon the record submitted to it and such oral argument as may be requested and received. The Intermediate Court of Appeals may affirm, reverse, modify, or supplement the decision of the Workers' Compensation Board of Review and make such disposition of the case as it determines to be appropriate. Briefs may be filed by the

interested parties in accordance with the rules of procedure prescribed by the Court. The Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the Workers' Compensation Board of Review, if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review's findings are:

- (1) In violation of statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the Board of Review;
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law;
- (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code § 23-5-12A(b). *See Hammons v. W. Va. Off. Of Ins. Comm'r*, 235 W. Va. 577, 582-83, 755 S.E.2d 458, 463-64 (2015). As recognized in *Justice v. West Virginia Office of Insurance Commission*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012), the de novo standard of review is applied to questions of law arising in the context of decisions issued by the Board of Review. *See also Davies v. W. Va. Off. Of Ins. Comm'r*, 227 W. Va. 330, 334, 708 S.E.2d 524, 528 (2011).

**B. The State of West Virginia Workers' Compensation Board of Review's decision should be reversed as the communicable nature of COVID-19 precludes the finding of a direct causal connection between Claimant's work conditions and the alleged occupational disease.**

It is well-established law that in order for a claim to be compensable under the West Virginia Workers' Compensation Act, three elements must co-exist: (1) a personal injury; (2) received in the course of employment; and (3) resulting from that employment. *See Barnett v. State Workmen's Compensation Commissioner*, 153 W. Va. 796, 172 S.E.2d 698 (1970); *Jordan v. State Workmen's Compensation Commissioner*, 156 W. Va. 159, 191 S.E.2d 497 (1972). To dispel any ambiguity associated with this three-pronged compensability test for occupational diseases, the West Virginia Legislature codified West Virginia Code Section 23-4-1(f) and promulgated that no ordinary disease of life to which the general public is exposed outside of employment is compensable unless the following elements are apparent: (1) that there is a direct causal connection between the conditions under which work is performed and the occupational disease; (2) that it 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; (3) that it can be fairly traced to the employment as the proximate cause; (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment; (5) that it is incidental to the character of the business and not independent of the relation of employer and employee; and (6) that it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have

been foreseen or expected before its contraction. W.Va. Code § 23-4-1(f). Claimant's evidence before the Board of Review was insufficient to meet these statutory requirements; thus, reversal of the decision below is warranted.

In purported support of its *Order*, the Board of Review relied upon Bulletin No. 21-01, issued by the West Virginia Office of the Insurance Commissioner on January 19, 2021, which provides that workers' compensation claims for COVID-19 shall be properly investigated and not summarily refused, denied or rejected outright due to the nature of the injury alone without proper investigation. (*See Order*, at p. 10, *Appendix* at p. 818); *see also*, W. Va. Insurance Bulletin 21-01. The Bulletin further notes that "[i]t is not likely that every workers' compensation claim for COVID-19 will be ruled compensable after investigation." *See* W. Va. Insurance Bulletin 21-01. In sum, the Bulletin provides no direct guidance regarding whether all workers' compensation claims for COVID-19 should be decided in a particular manner, but instead recognizes that the considerations set forth in West Virginia Code Section 23-4-1(f) must be applied to COVID-19 claims in the same fashion as all other communicable diseases.

Since the inception of the COVID-19 pandemic, the transmissibility of the virus has been a prominent area of discussion among health care providers and the driving force behind policies and recommendations promulgated by the Centers for Disease Control and Prevention ("CDC"). It has become common knowledge that the threat of COVID-19 infection exists in every facet of personal and work life, and the possibility of transmission poses a necessary risk for those whose work and private



affairs requires human interaction. According to the CDC, “COVID-19 spreads when an infected person breathes out droplets and very small particles that contain the virus. These droplets and particles can be breathed in by other people or land on their eyes, noses, or mouth. In some circumstances, they may contaminate surfaces they touch.”<sup>2</sup>

In consonance with CDC guidance, mask usage is an effective measure to prevent the transmission of COVID-19 infection.<sup>3</sup> Further, CDC guidance on preventative actions states that “[r]espirators (for example, N-95) provide higher protection than masks.”<sup>4</sup> This differentiation is imperative in this matter because an N-95 respirator was utilized by Claimant throughout each of the instances where she was required to provide COVID-19 testing to inmates and officers. (Deposition Transcript of Brittany Foster at 7:17-23, *Appendix* at pp. 461.) During her deposition, Claimant confirmed the same by testifying as follows:

Q: When you’re performing the testing, what kind of protective clothing and/or devices are you wearing?

A: **Glove[s], gown, PPE, and then a 95 mask.**

Q: Were you able to wear the recommended PPE when you were performing the testing on all occasion?

A: **The inmates, yes, and the officers when we tested them as well.**

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<sup>2</sup> Centers for Disease Control and Prevention, *How COVID-19 Spreads*, Updated August 11, 2022, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>

<sup>3</sup> Centers for Disease Control and Prevention, *How to Protect Yourself and Others*, Updated August 11, 2022, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html#masks>

<sup>4</sup> *Id.*

*Id.*

The importance of mask usage, especially in the medical field, is highlighted by a nationwide study of multi-disciplinary health care providers and staff published on March 10, 2021, which casts doubt on the notion that workplace factors, including contact with COVID-19 positive individuals, have any substantial impact on seropositivity levels among health care personnel. (See Risk Factors Associated with SARS-CoV-2 Seropositivity Among US Health Care Personnel, *Appendix* at pp. 476-489.) The study collected data from over 24,000 health care personnel throughout four sites included in the CDC Prevention Epicenters Program. *Id.* Following an analysis of the data, the study concluded that the factors presumed to be most associated with COVID-19 infection risk among health care personnel, including workplace role, environment and caring for COVID-19 positive patients, were not associated with increased risk of COVID-19 infection. (See *id.* at 11, *Appendix* at pp. 487.). Therefore, according to this study, the infection prevention strategies undertaken by health care personnel, such as the N-95 mask, gloves and gown utilized by Claimant, are effective in preventing COVID-19 transmission in the workplace. Unfortunately, based on the limited analysis set forth in the Board of Review's subject *Order*, no serious consideration was given to this fact and the evidence that Claimant engaged in activities outside of her employment *without* the protections of PPE (making her exposure outside of employment more likely) was seemingly disregarded. Accordingly, reversal is warranted.

Claimant presented to Summers County ARH Hospital on September 25, 2020 and was examined by Dr. Ajay Anand, a cardiologist, to undergo requisite screening and completion of the Employees' and Physicians' Report of Occupational Injury and Disease ("WC-1"). Dr. Anand was responsible for completing the portion of the WC-1 indicating whether the condition is a direct result of one of three options: occupational injury, occupational disease or non-occupational condition. Instead of selecting one of the options, Dr. Anand affirmatively indicated "N/A" in the margin of the Report – thus indicating that Claimant's COVID was not related to her employment. (See Employees' and Physicians' Report of OID dated Sept. 25, 2020, *Appendix* at pp. 22-23.). The record below demonstrates that Dr. Anand was not alone in this regard as Claimant sought the execution of a second WC-1 form from her primary care physician, Matthey Haag, D.O., on October 20, 2020. (See Employees' and Physicians' Report of OID dated Oct. 20, 2020, *Appendix* at pp. 20-21.). On this occasion, Dr. Haag indicated that Claimant's COVID-19 infection was a "non-occupational condition." *Id.* Therefore, both Claimant's primary treating physicians could not confirm that her COVID-19 diagnosis was occupationally related, yet nonetheless, the Board of Review disregarded this fact and found it to be a compensable injury.

In fact, despite submitting fifty-four (54) individual records and statements (amounting to hundreds of pages of medical records) from health care providers which Claimant alleges to have resulted from her COVID-19 infection, only one medical professional has offered the opinion that Claimant's COVID-19 infection is an

occupational disease and that was the physician Claimant hired – *i.e.*, Dr. Bruce A. Guberman. Dr. Guberman was hired by the Claimant to perform an independent medical evaluation on March 9, 2022, nearly a year and a half after her original diagnosis of COVID-19. (*See generally* Report of Bruce A. Guberman, M.D., *Appendix* at pp. 605-613.). It is of note that Claimant (and the Board of Review in its *Order*) seem to disregard the fact that none of Claimant’s treating physicians have offered an opinion that her COVID-19 exposure occurred while at work, but instead, relied on the thoughts of Dr. Guberman – an sole IME physician who himself does not treat or diagnose patients with COVID-19. (*See* Deposition of Dr. Bruce A. Guberman at 18:7-23, *Appendix*, at p. 734.) Specifically, Dr. Guberman testified as follows:

Q: You’ve never treated a COVID-19 patient, have you?

A: **No.**

Q: In fact, you wouldn’t be able to go into a hospital and treat a COVID-19 patient?

MR. HENRY: Note my objection. I think that question was asked and answered earlier.

MR. SIMONTON: You can answer it again, make sure I understood.

**THE WITNESS: No. I don’t have any hospital – I probably could get temporary privileges. When I was in practice before in Cincinnati, you could – we had patients that wound up in another hospital, we could get temporary privileges.**

Q: Have you ever diagnosed COVID-19?

A: **Just in myself.**

(*Id.*)

Nevertheless, despite referencing no medical tests, literature or clinical studies in support (and setting aside his lack of clinical experience and privileges), Dr. Guberman perplexingly opined that Claimant contracted COVID-19 in the workplace. (*See generally* Report of Bruce A. Guberman, *Appendix* at pp. 605-613.). The same was confirmed during his deposition on May 18, 2022, wherein he specifically stated:

Q: That wasn't my question. I'm asking you about the source of it, Doctor. You're relying on no medical tests to determine a source; true?

A: **Yes.**

Q: No medical literature; true?

A: **The medical literature would not be pertinent.**

Q: No peer-reviewed publications recognizing a medically qualified source or test of determining the source; true?

A: **Yeah. Correct.**

(Deposition of Dr. Bruce A. Guberman at 26:6-16, *Appendix* at pp. 742.). Therefore, despite confirming under oath that no scientific or otherwise reliable methodology exists for determining the source of Claimant's COVID-19 infection, Dr. Guberman reached the conclusion (admittedly unsupported by evidence) that Claimant's contraction of COVID-19 occurred in the workplace – and the Board of Review just erroneously accepted this as the truth. (*See id.*) This type of mere conclusory evidence is utterly insufficient to justify an award of workers' compensation benefits and falls far short of satisfying the evidentiary elements necessary to conclude that Claimant's

COVID-19 is an occupational disease. Accordingly, this Court should reverse the decision of the Board of Review.

**C. If this Court determines that Claimant's COVID-19 infection was an occupational disease, the period of compensability awarded by the State of West Virginia Workers' Compensation Board of Review should be substantially reduced.**

The Board of Review awarded temporary total disability ("TTD") benefits from August 10, 2022 through March 9, 2022, and continuing thereafter as substantiated by proper medical evidence. (*See Order, Appendix at pp. 820.*). However, the Board of Review erred by disregarding critical components of the record, which were identified in the "Findings of Fact," but not referenced in the Board of Review's discussion of its determination.<sup>5</sup> *See id.* The components of the record, largely derived from the diagnoses and opinions of Claimant's treating physicians and Petitioner's experts, indicate that Claimant's COVID-19 symptoms completely resolved much earlier than March 9, 2022, and any continued adverse health conditions are more likely a result of Claimant's unrelated medical conditions.

A detailed review of the Findings of Fact included in the *Order* indicates that from September 1, 2020 to November, 10, 2021, although Claimant was examined several times by various medical providers, the only impressions or diagnoses even referencing Claimant's COVID-19 infection were produced by Dr. Anand, who testified that he did not treat Claimant for her COVID-19 infection. *See id.*; (*see also* Deposition Transcript of Dr. Ajay Anand at 12:1, *Appendix at pp. 550.*). The Findings

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<sup>5</sup> Petitioner acknowledges that the pertinent records are referenced in the report. However, the Board of Review merely mentioning Claimant's medical history, without providing any analysis of the same, is not sufficient to indicate that the Board of Review adequately considered Claimant's medical history.

of Fact reference a November 10, 2021 visit with Dr. Charles Porterfield, a pulmonologist, who notes that Claimant “had COVID last year, but asthma has not recovered from COVID with continued dyspnea.” *See id.* at pp. 816; (*see also* Progress Note of Dr. Porterfield, *Appendix* at pp. 523.). However, it is disputed whether Claimant’s asthma diagnosis predated her COVID-19 infection. (*See* Report of Thomas J. Parker, M.D., *Appendix* at pp. 626.). As identified by Petitioner’s pulmonology expert, Dr. Thomas Parker, Claimant’s records from Dr. Patel’s office on September 1, 2020 include asthma in Claimant’s “past medical history.” *Id.*; (*see also* Medical Record from Dr. Vishnu Patel dated Sept. 1, 2020, *Appendix* at pp. 401.).

Dr. Anand was deposed on January 7, 2022 and was inquired regarding his understanding of the origin of Claimant’s continued medical ailments. To this point, Dr. Anand testified as follows:

Q: Were you able to determine whether any of the conditions that you treated her emanated from COVID-19?

A: COVID – to say that her complaints and problems are because that (phonetic), but she said she has suffering short of breath, and she (indiscernible) her feet or ankles. It appeared to me that this could be part of the sepsis (phonetic?) or heart failure. It’s difficult to say. I thought that maybe, you know, to see a pulmonologist and (indiscernible).

Q: In terms of your notes, it appears that that multiple diagnoses included in your notes through – the last note I have, which is December 14, 2021, from a standpoint of her – or the conditions that you treated her for, has she reached maximum medical improvement, or does she need additional testing and/or treatment?



**A: She's (indiscernible) okay. She is still short of breath. And we should have note (indiscernible) pain diagnosis (indiscernible). So I think we should keep her (indiscernible). If this could be difficult, it could be just part of long (indiscernible) syndrome after COVID-19. We don't know (indiscernible).**

**Q: You indicated – I'm sorry, Doctor. Go ahead.**

**A: I don't know what the cause of her (indiscernible). And also, she is morbidly obese, and this could be cause of her shortness of breath, but can't say that it was like that by the way, testing, or not. It's like – we don't have a – cannot pinpoint the whole thing (phonetic).**

(Deposition Transcript of Dr. Ajay Anand, *Appendix* at pp. 550-551.). Although he admittedly did not treat Claimant for her COVID-19 infection, Dr. Anand was able to identify several alternative sources for Claimant's prolonged health conditions.

Further, Dr. Thomas Parker, a pulmonology and critical care expert, set forth a detailed analysis of Claimant's prolonged conditions in his April 14, 2022 report. Critically, Dr. Thomas opined that:

[h]er COVID-19 test was positive on [August 11, 2020] but she cleared the COVID-19 virus from her body very quickly as her COVID-19 test was negative on [August 20, 2020]. She recovered from the COVID-19 pneumonia very quickly as shown by normal total lung capacity on pulmonary function tests [September 1, 2020].

(See Report of Thomas J. Parker, M.D., *Appendix* at pp. 627.). Moreover, Dr. Parker attributed Claimant's tachycardia and bradycardia issues to obstructive sleep apnea, opined that Claimant does not have any residual pulmonary effects from COVID-19



pneumonia as evidenced by chest x-rays, and opined that Claimant does not have congestive heart failure because the echocardiogram results on September 14, 2021 indicated a normal left ventricular ejection fraction and her BNP was normal on May 5, 2021. *See id.* Overall, Dr. Parker opined that the entirety of Claimant's current medical symptoms are related to asthma and obstructive sleep disorder. Despite the scope of Dr. Parker's opinions regarding not only the source of Claimant's current medical conditions, but the source of her COVID-19 infection, the only reference to Dr. Parker in the discussion of the Board of Review's decision was a note that he relied on a record not submitted to evidence.

In clear contrast, Claimant's independent medical evaluation expert, Dr. Bruce A. Guberman's expert report was extensively highlighted and analyzed throughout the Board of Review's discussion of its determination. Specifically, the Board of Review noted that "Dr. Guberman evaluated the claimant and opined that she has a history of COVID-19 infection, most likely related to exposure at a work environment, and persistent symptoms consistent with "long" COVID." (*Order, Appendix* at pp. 820.). The "discussion" section continues to cite Dr. Guberman's opinion regarding "long" COVID two additional instances. However, throughout the discussion of its determination, the Board of Review does not mention its finding of fact that "[Dr. Guberman] explained that all of the peer reviewed literature about long COVID is not definitive as it is more speculative and most studies end with a statement that more studies are needed." *See id.* at 818.

In conclusion, the scope of TTD awarded to Claimant by the Board of Review is wholly unsupported by the pertinent medical records, as well as the Board of Review's Findings of Fact. Therefore, if this Court determines that Claimant's COVID-19 infection was an occupational disease, this Court should reduce the scope of the TTD awarded by the Board of Review to a more appropriate amount of time given the medical records and expert opinions in this matter.

**D. The West Virginia Workers' Compensation Board of Review's decision in this matter utterly disregards the balance of employers' and employees' interest by awarding benefits for an alleged occupational injury without any determination as to the source of the alleged injury.**

"The COVID-19 pandemic has raised unique concerns and questions regarding the filing and compensability of workers' compensation claims." *See* W. Va. Insurance Bulletin No. 21 – 01. In that regard, investigations are required to "determine whether the injury [*i.e.*, the contraction of COVID-19] occurred in the course of and resulting from the employee's covered employment, which would necessarily include a determination of the cause and place of injury." *Id.* (emphasis added). No evidence in this matter has concluded, by any reliable means, the "cause and place" of Claimant's COVID-19 exposure. In fact, none of Claimant's treating physicians have certified or opined that her contraction of COVID-19 was, in any way, related to her employment with Petitioner. Therefore, the Board of Review's determination that Claimant's COVID-19 is a compensable injury is, quite simply, impermissible and must be reversed.

The West Virginia statutory system of determining and awarding workers' compensation benefits represents a compromise to the competing, and both equally valid, interests of employers and employees. *See generally*, W. Va. Code § 23-1-1. The Board of Review's *Order* in this matter, awarding benefits to Claimant for a known communicable disease that effects all aspects of ordinary life far beyond mere employment, is in degradation to the appropriate balance struck among employees' and employers' interests. The Board of Review's implicit justification for the award in this case leaves the entire West Virginia workers compensation system open to the possibility of claims for diseases which are widely-recognized as diseases of ordinary life unrelated to employment becoming the basis for future compensable injuries. For example, the implicit basis for the Board of Review's determination that Claimant's COVID-19 was employment-related was the fact that she worked in a health care setting and had contact with COVID-19 positive patients. By that logic, one must ask: would a nurse working in a health care setting caring for a patient that has a common cold be entitled to an award of benefits if he/she subsequently develops a cold? The answer, under West Virginia's long-established workers' compensation law, is a resounding "no." Yet, the Board of Review's rationale for its decision in this matter leaves the workers' compensation system vulnerable to such claims which would, almost certainly, overburden the obligations of employers in the State of West Virginia.

The Board of Review's *Order* in this matter represents the establishment of an unworkable standard that disregards the balance of all parties' various interests and

ignores the well-established statutory elements setting forth that before an occupational disease can be determined to be the basis of a workers' compensation award, it must be established that there is: (1) a direct causal connection between the conditions under which work is performed and the occupational disease; (2) that it 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; (3) that it can be fairly traced to the employment as the proximate cause; (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment; (5) that it is incidental to the character of the business and not independent of the relation of employer and employee; and (6) that it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction. W.Va. Code § 23-4-1(f). Here, the Board of Review offered no explanation its *Order* as to how any of these elements are satisfied with respect to Claimant's exposure to COVID-19. Accordingly, this Court should reverse its decision.

### CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests that this Court reverse the decision of the West Virginia Workers' Compensation Board of Review.

RESPECTFULLY SUBMITTED,

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**CERTIFICATE OF SERVICE**

I, Mark R. Simonton, counsel for Petitioner, PrimeCare Medical of West Virginia, Inc., do hereby personally certify the a true and correct copy of the foregoing *“Petitioner’s Brief”* was served upon the following by the Court’s File & ServeXpress e-file system and by depositing an envelope containing the same in the United States Mail, First Class, postage prepaid, this **29<sup>th</sup>** day of **September, 2022** addressed as follows:

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