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January 3, 2003

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Hon. Clifton Lacy, M.D., Commissioner
Department of Health and Senior Services
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Re: 02-0237 - Whether there is Workers'
Compensation Coverage for Smallpox
Health Care Team Members for
adverse reactions to smallpox
vaccine

Dear Commissioner Lacy:

You have asked whether workers' compensation benefits are payable for adverse reactions from the administration of the smallpox vaccine to individuals who serve as a member of a smallpox health care team. For purposes of this opinion, all references to a "smallpox health care team" include all individuals who serve on the response teams and clinics identified in the State's Smallpox Vaccination Plan. Please be advised that all such individuals, whether public or private employees or volunteers, are eligible for workers' compensation coverage for illnesses resulting from the vaccination.

It is our understanding that the federal government has recommended that certain individuals receive the smallpox vaccine as part of preparations for a potential bioterrorism attack on the United States. Specifically, the federal Centers

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for Disease Control's Advisory Committee on Immunization Practices (ACIP) has recommended that hospitals form smallpox health care teams, consisting of various health care workers who would be vaccinated and trained to care for patients with smallpox. The ACIP recommendations contemplate that these individuals will perform functions within their regular areas of professional expertise. According to the ACIP, smallpox vaccination would be voluntary.

At the direction of the Centers for Disease Control, the State has developed a smallpox vaccination plan. This plan provides for vaccination of health care workers who will staff Public Health Response Teams (PHRT), Hospital Health Care Response Teams and vaccination clinics. The New Jersey Department of Health and Senior Services (the Department) will establish 5 regional PHRTs, which will coordinate with hospitals in investigating and responding to potential smallpox cases. The PHRTs will be composed of Department employees, a State Police representative, county employees (from county health departments) and volunteer health care workers.

The plan proposes that the State's 85 acute care hospitals establish Hospital Health Care Response Teams along the lines recommended by the ACIP. According to the State's plan, it is preferred that the hospital team be comprised of permanent full-time hospital staff.

In addition, there are to be 6 vaccination clinics. Lead County Health agencies, known as Local Information Network Communication System agencies, will supply staff for the clinics.

(1) Workers' Compensation Coverage for Employees

The initial criterion for a claim to be compensable under the Workers' Compensation Act of New Jersey, N.J.S.A. 34:15-1 et seq. is that an employment relationship must exist between the worker and the employer. See N.J.S.A. 34:15-7 ; N.J.S.A. 34:15-36. As described above, many of the vaccinated individuals who participate in the smallpox program will be State, county or hospital employees. Thus, the requisite employment relationship under workers' compensation law is present.*

^a We understand that it is possible that some of the team members may be contract workers. Independent contractors are

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The critical question here is whether an employee's injury from the vaccination is a compensable disability under workers' compensation law, in view of the voluntary nature of the vaccination. All employees, regardless of whether public or private, are covered by workers' compensation for claims of personal injuries or for death, "arising out of and in the course of employment." N.J.S.A. 34:15-7. The term "arising out of" refers to causal origin, and describes a risk reasonably incidental to the employment, such that it belongs to or is connected with what a worker has to do in fulfilling his duties. Klein v. New York Times Co., 317 N.J. Super. 41, 47 (App. Div. 1998). The term "in the course of" employment refers to "'the time, place and circumstances of the accident in relation to the employment.'" Coleman v. Cycle Transformer Corp., 105 N.J. 285, 288 (1986), quoting 1A Larson, Workers' Compensation Law §6.10 (1985). These two elements are construed liberally to "implement the legislative policy of affording coverage to as many workers as possible." See Brower v. ICT Group, 164 N.J. 367, 373 (2000).

For the reasons that follow, workers' compensation claims of employees for injuries from the smallpox vaccine are compensable where the employer has required the employee to be vaccinated. Similarly, it is our opinion that workers' compensation coverage applies where the employer encourages vaccination, but does not require it, and also where the employer makes no recommendation concerning vaccination and leaves the decision to be vaccinated up to the employee.

It is a settled principle of workers' compensation law that an activity is in the course of employment if it directly or indirectly advances the employer's interests. 2 Larson's Workers Compensation Law §20.01 at 20-1. In determining whether the "arising out of and in the course of employment"

not covered by the Workers' Compensation Act. Auletta v. Bergen Center, 338 N.J. Super. 464, 471 (App. Div. 2001), certif. den. 169 N.J. 611 (2001). However, the statute does permit self-employed individuals to obtain workers' compensation insurance coverage. N.J.S.A. 34:15-36. Since the determination of whether a person is an employee or an independent contractor depends upon the facts of the particular situation, this opinion cannot provide advice with regard to team members who may be independent contractors.

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requirements of the statute have been met, New Jersey courts adhere to the "mutual benefit doctrine," which states that activities are in the course of employment where "'a clear and substantial benefit' has enured to the employer by reason of the permitted activity." Daus v. Marble, 270 N.J. Super. 241, 247 (App. Div. 1994), quoting Mikkelson v. N.L. Industries, 72 N.J. 209, 213 (1977). "This doctrine has found application in a wide variety of settings, bringing within the ambit of compensability injuries resulting out of an employee's educational, recreational, or health-care related activities having a nexus to the employment relationship." Mikkelson, 72 N.J. at 213.

In Mikkelson, the Supreme Court specifically indicated that the mutual benefit doctrine applies where the employer encouraged the employee's participation in the activity in question. Id. at 215. Accord, Strzelecki v. Johns-Manville, 65 N.J. 314, 317 (1974). The Court cited Saintsing v. Steinbach Co., 1 N.J. Super. 259 (App. Div. 1949), aff'd o.b. 2 N.J. 304 (1949), as an example of a case where the employer's encouragement of an activity rendered the resulting injury compensable. In Saintsing, the petitioner was in the defendant's employ at its department store in Asbury Park. The store proposed that a vaccination service be made available to its employees to guard against a smallpox epidemic which was threatened as a result of several cases in New York City. The employer purchased the vaccine and administered it free of charge on the store premises to all employees who elected to be immunized. The employer indicated in a bulletin to its workers that it strongly urged them to be inoculated. The petitioner chose to be vaccinated and suffered an adverse reaction. In determining that the claim was compensable, the court noted that it was immaterial, under the mutual benefit analysis, whether the employer directed the employees to be vaccinated, or simply urged them to be vaccinated. The court concluded that, with regard to the employer's efforts in urging employees to be vaccinated,

it would be unrealistic to find that they were for the exclusive benefit of the employees and were not additionally designed to further a sound employer-employee relationship and safeguard the employer against the serious effects of a case of smallpox amongst its employees. [Id. at 264].

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See also Freedman v. Spicer Mfg. Corp., 97 N.J.L. 235 (E. & A. 1921) (workers' compensation coverage for injuries resulting from influenza vaccination program set up by employer); Sanders v. Children's Aid Society, 265 N.Y.S. 698, aff'd 262 N.Y. 655, 188 N.E. 107 (1933) (workers' compensation coverage for injuries resulting from employer-required diphtheria immunization).

As noted above, the mutual benefit doctrine continues to be viable in New Jersey. See Mikkelson, supra, and Daus, supra. Accordingly, the Saintsing decision is still good law, and directly controls the situation where an employer requires or encourages employees to receive the smallpox vaccine. Thus, if an employer encourages a worker to be vaccinated in order to serve on a smallpox response team, the employee is eligible for workers' compensation benefits in the event an injury is caused by the vaccination.

The mutual benefit doctrine is also applicable even where the employer does not encourage the activity in question. The key is whether the employer received a benefit from the activity, not whether it required the activity. Mikkelson, supra, 72 N.J. at 214 ("where the activity otherwise confers a benefit upon the employer, lack of employer initiative of, or control over, the activity, as here, is not of itself fatal"). Mikkelson involved an injury which occurred during an employee's attendance at a union meeting, held away from the employer's premises, to ratify a collective bargaining agreement. The court held that the union meeting was for a purpose which benefitted both the employer and employee and therefore fell within the mutual benefit doctrine. Id. at 217.

Similarly, in Kenney v. Rockingham School Dist., 190 A.2d 702 (Vt. 1963), which was cited with approval by the New Jersey Supreme Court in Strzelecki, supra, 65 N.J. at 319, the court held that the mutual benefit doctrine covered the situation where the employee, at her sole option, enrolled in an evening course to improve her job skills.

With regard to the mutual benefit doctrine, the courts have contrasted work-connected injuries covered by the workers' compensation law with risks that are "personal" to the employee and therefore do not satisfy the "arising out of" employment requirement. Coleman v. Cycle Transformer Corp., supra, 105 N.J. at 292. Risks that arise from the "personal proclivities"

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of the worker are not compensable. Howard v. Harwood's Restaurant Co., 25 N.J. 72, 85 (1957). Thus, in Sparrow v. LaCachet, Inc., 305 N.J. Super. 301, 306-307 (App. Div. 1997), the court denied compensation for an employee's injuries resulting from a facial she had at her place of employment, a beauty salon. The court determined that the facial was solely for her own personal benefit, and therefore "it was the 'personal proclivities' of the employee which gave rise to the harm." Id. at 307.

Plainly, the decision of an employee to be vaccinated under the circumstances here does not arise out of a "personal proclivity." Such a decision is both work-connected and of benefit to the employer. As in Mikkelson, where the employee attended the union meeting of his own volition, the voluntary nature of the vaccination does not affect the compensability of resulting injuries pursuant to the mutual benefit doctrine.

A hospital employee's decision to receive the smallpox vaccination, for the purpose of enabling him to serve on a team providing care to patients with smallpox, falls within the mutual benefit doctrine. The benefit to the hospital is tangible: the employee's action supports the hospital's duty to care for patients with smallpox or smallpox-like symptoms. In addition, as noted in Saintsing, supra, such inoculation protects the employer against the consequences of smallpox spreading among other employees and patients.

The same rationale applies to employees of the New Jersey Department of Health and Senior Services and county health departments. Vaccination will assist these agencies in fulfilling their duties to prepare for and respond to a potential outbreak of infectious disease.

(2) Workers' Compensation Coverage for Volunteers

We understand that it is also contemplated that some team members may be unpaid volunteers, rather than employees of the hospital. Workers' compensation coverage generally is not afforded to unpaid volunteers. See Cerniglia v. Passaic, 50 N.J. Super. 201 (App. Div. 1958). However, the Legislature has extended such coverage to several categories of volunteers. N.J.S.A. App. A:9-57.1, a supplement to the Disaster Control Act, specifically provides workers' compensation benefits to

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civil defense volunteers (also known as emergency management volunteers). This statute was enacted in 1952 "to provide disability, death and medical and hospital benefits to civil defense volunteers who may suffer injury as a result of participation in authorized civil defense service." Statement to Senate No. 61, L.1952, c.12. The statute broadly applies to volunteers who are injured during authorized civil defense duties, including pre-attack training and practice. N.J.S.A. App. A:9-57.1. Claims by such volunteers are to be filed with the Division of Workers' Compensation. N.J.S.A. App. A:9.57.2.

It is our opinion that N.J.S.A. App. A:9-57.1 et seq. covers volunteers on a smallpox health care team who are vaccinated. Such volunteers are engaged in the critical civil defense activity of preparing for a possible bioterrorism attack. This service is plainly authorized pursuant to both federal and State plans for homeland security. As a result, vaccinated smallpox health care team member volunteers fall within the statutory coverage afforded to volunteers who perform "authorized civil defense service." N.J.S.A. A:9-57.1; N.J.S.A. App. A:9-57.2(a).

Coverage of injuries under this statute does not depend upon the existence of an actual attack or an emergency order issued by the Governor pursuant to the Disaster Control Act, N.J.S.A. App. A:9-30 et seq. The statute simply provides workers' compensation benefits to volunteers engaged in emergency management activities authorized by the Director of Civil Defense (now the Emergency Management Director within the State Police). N.J.S.A. App. A:9-57.1. There is no statutory language requiring an emergency order by the Governor as a precondition to receipt of benefits by volunteers covered by N.J.S.A. App. A:9-57.1.

The legislative history of this statute confirms that the act is directed at activities involved in preparation for an emergency, not just those that occur during a declared emergency. N.J.S.A. App. A:9-57.1 et seq. was enacted in order to implement a recommendation for such a law, made by Governor Driscoll in his Annual Message to the Legislature, dated January 8, 1952. See Statement to S.61. In making this recommendation, Governor Driscoll noted the critical role played by New Jersey's volunteer civil defense force in "preparing against the possibility of war," and supporting the "campaign for peace--

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upon the principle that the country which is best prepared to meet any eventuality is least likely to be attacked." Annual Message at 6. Plainly, the Governor's plan, upon which the Legislature relied when it enacted the statute, envisioned compensating volunteers for injuries sustained in preparing for a possible attack, rather than in responding to an actual attack.

This legislative intent is confirmed by the words of the statute itself, which specifically refer to training and practice activities by volunteers. N.J.S.A. App. A :9-57.1. Similarly, the Attorney General at the time of enactment of this statute understood the legislation to include coverage for pre-emergency training activities. In Formal Opinion 38 (1952), the Attorney General determined that the statute applied to any training of civil defense volunteers "for meeting emergencies which might occur in connection with defense problems..." (emphasis supplied).

Thus, workers' compensation coverage for volunteers under N.J.S.A. App. A:9-57.1 et seq. is not dependent upon the declaration by the Governor of an emergency. Instead, the statute is intended to cover periods of preparation for a potential emergency, which necessarily take place prior to the issuance of an emergency declaration. This conclusion is consistent with the judicial construction of the Disaster Control Act, to which N.J.S.A. App. A:9-57.1 et seq. is a supplement. In Worthington v. Fauver, 88 N.J. 183 (1982), the Supreme Court firmly rejected the contention that gubernatorial orders directed at ameliorating prison overcrowding were invalid under the Disaster Control Act because the Governor could not take such action before a serious disruption in a prison occurred. Id. at 195. The Court stated:

The stated purpose of the act is to prevent damage from occurring. N.J.S.A. App. A:9-33. The definition of "disaster" at N.J.S.A. App. A:9-33.1(1) includes not only events that have resulted in damage, but "incidents" that prospectively "endanger" the health, safety or resources of residents of the State and that "may become" too large in scope to be handled by localized government services.... Similarly, N.J.S.A. App. A:9-45(I) authorizes regulation of "any matter ... that will aid in the prevention of loss to and destruction of property." This language belies any intent by the Legislature that the Governor

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must wait for a catastrophe to occur before taking appropriate action to prevent such incidents. [Ibid., emphasis in original].

In reaching this conclusion, the Court noted State v. Congdon, 76 N.J. Super. 493 (1962) with approval. In State v. Congdon, the Appellate Division rejected the argument that civil defense preparation directives, issued by State officials pursuant to the Disaster Control Act, are only lawful during an actual or impending emergency. The court held that the Disaster Control Act is concerned with preparation for emergencies and is not limited to periods of threatened or immediate danger. Id. at 500-503. The court observed, in language which is apt today:

[T]he intent of the Legislature was not to wait until the community had been struck by the holocaust of modern warfare before civil defense measures could become effective. We may take judicial notice of the contemporary conflicts in international relations, the increased range and tempo of destruction inherent in modern weapons, and the necessity of government to plan for the protection of its citizens under these circumstances. [Id. at 501]

The same rationale applies here. To prepare for an attack involving the introduction of smallpox, health care volunteers are to be vaccinated and trained to provide medical care and management of smallpox patients and individuals with suspected smallpox. See Summary of ACIP Smallpox Vaccination Recommendations at 3. Such civil defense activities in preparation for a possible attack are covered by N.J.S.A. App. A:9-57.1. This statute does not require the State to wait for a smallpox emergency to occur before taking action to protect New Jersey citizens. Accordingly, volunteers who receive smallpox vaccinations are entitled to workers' compensation benefits under this statute.

It should be noted that N.J.S.A. App. A:9-57.1 requires a civil defense volunteer to register "with a district or regional office of the Director of Civil Defense" and obtain an identification card issued for the purpose of engaging in authorized civil defense activities. Pursuant to a Reorganization Plan dated July 22, 1976, the duties of the civil defense director were transferred to the New Jersey Department of Law and Public Safety. See Note to N.J.S.A. App. A :9-37.

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Subsequently, Executive Order 101 (1980) established the Office of Emergency Management in the Division of State Police and directed that this Office will exercise all functions of the Office of Civilian Defense Director. See also N.J.S.A. App. A:9-57.2, amended by L. 1995, c. 383 (providing that civil defense volunteers were renamed emergency management volunteers by Executive Order 101). Accordingly, volunteer members of a smallpox health care team must register with the Office of Emergency Management as emergency management volunteers to ensure workers' compensation coverage.

(3) Absence of Final FDA Approval of Vaccine

You have also asked whether our conclusions regarding workers' compensation coverage are affected by the fact that the Food and Drug Administration (FDA) has not issued final approval of the vaccine. You have advised that the use of the vaccine will be permitted under an FDA Investigational New Drug Protocol. Please be advised that the status of the vaccine, with regard to the FDA approval process, has no impact on our conclusions concerning workers' compensation coverage. Initially, we note that the smallpox vaccine is a legitimate drug, having been distributed by the federal government pursuant to an FDA-sanctioned protocol. In any event, the statutory requirements for a work-related injury, which are discussed above, contain no exception for a vaccine which has not received final FDA approval.

In conclusion, you are advised that employees and volunteers who serve on smallpox health care teams are eligible for workers' compensation coverage for illnesses resulting from the smallpox vaccination.

Sincerely yours,

DAVID SAMSON
ATTORNEY GENERAL OF NEW JERSEY

By: _____

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