

By Jessica Uhlenkamp

Employers often do not realize what telecommuting means for their workers' compensation coverage; unfortunately, the courts have taken an expansive view toward home-office claims.

# Defending Claims and Making the Home a Safer Place

The easiest workers' compensation injury case is one in which the injury occurs at work. However, there are other occasions when a worker is also covered by workers' compensation beyond the physical workplace as well. For

example, a traveling employee and those who are sent on special errands on behalf of their employer are well-known exceptions.

As of January 2016, 3.7 million employees worked from home at least half of the time. Those who work at home full time, excluding those who are self-employed, have increased 103 percent since 2005. With working from home, traveling, and telecommuting becoming more and more common, attorneys across the United States are likely to see a significant increase in the number of questionable workers' compensation claims that arise from within the home.

Handling these claims can be difficult from a defense perspective because your greatest defense—that the injury was not work related—can be virtually ignored in some situations. Is there any way to combat these types of claims?

Defense attorneys who come across these workers' compensation claims may want to argue two major points: (1) the home office

is not a secondary or primary place of employment, or (2) the employee was not engaged in work activities at the time of the accident. Neither of these arguments are cut and dried, but they can be helpful to combat these otherwise expansive workers' compensation claims. Perhaps the best defense, however, is prevention. Attorneys should recommend that their employer clients encourage safety in the home so that injuries do not occur in the first place. Attorneys can do this through a variety of methods.

## Qualifications of the Home Office: Home as a "Work Situs"

Compensable injuries that occur while working at home generally arise because the home is considered the employee's main place of employment or secondary place of employment. States vary on whether a home can constitute a primary or secondary place of employment, which depends on a number of factors.

In New York, a claimant must show that the employee's home has become part of the employer's premises. The court considers the quantity of work performed at the home and how often the employee works from home before determining that the home is a secondary work site. *Bobi-*



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*nis v. State Ins. Fund*, 235 A.D.2d 955 (N.Y. 1997). In *Bobinis*, the claimant presented no evidence that he maintained an office in the home or that he had work equipment in the home. The court also noted that the employer encouraged its employees to work in the office as much as possible. In that case, there simply was not enough evidence for the court to conclude that the injuries that the employee sustained while traveling between work and home were compensable.

Although the facts of that case scream “going and coming rule,” they may have been compensable if the home office was considered the employee’s secondary place of employment. This expansion can be terrifying to defense attorneys involved in workers’ compensation cases.

In *Kirchgaessner v. Allisnace Capital Management Corp.*, 39 A.D. 3d 1096 (N.Y. 2007), the court also added a factor: “special circumstances of the particular employment which make it necessary, as opposed to personally convenient, for an employee to work at home.” In that case, the court determined that workers’ compensation was not available when the employee only worked from home a few days per month, and the employer encouraged employees to come into the office as often as possible.

Determining whether a home can qualify as a secondary or a primary place of employment is an extremely fact-intensive analysis. Whether the home is the primary location is a much easier question because the majority, if not all, of an employee’s work would be performed in his or her own home. Whether a home is a secondary place of employment is not as straightforward.

To determine that a home can be considered a secondary place of employment, a court will look at several factors, including

- Whether the employer encouraged employees to take work home
- Whether the employer provided equipment or supplies to the employee at his or her home or away from the employer’s premises
- How often the employee worked from home
- The reason for the employee working from home (convenience for the employee versus necessity)
- Whether the employee has a designated location in the home for work activities

- The quantity of the work that the employee performs at home

There may be additional factors that a court will consider as well.

If you are trying to argue that a home is not a secondary place of employment, then it will help to point out how these particular factors do not support the claim. The employer and the employer’s preferred policies will be helpful in answering this particular question: did the employer encourage employees to take work home? Could they bill their time to the employer for this work? Were they paid extra for taking work home as an incentive? Questions such as these can be helpful to a defense because employees may take work home without their employer realizing it. If the practice of taking work home is not approved or encouraged by an employer, then a court is much less likely to award compensation.

Although this article focuses on accidents that occur within the home office, the most common place for accidents to happen in this type of situation is traveling between the primary place of employment and the secondary place of employment. Car accident workers’ compensation claims in this type of situation are relatively common across the United States. As a defense attorney, you may want to advise employers to allow their employees to remain at their home or at work, but not both, especially on a particular day. Although this may not always be possible, it will help reduce workers’ compensation claims for car accident-related injuries.

### Deviations from Employment

Most of the exceptions that apply in the workplace will apply in the home office. In *Munson v. Milmar/Interline Brands*, No. WC08205 (Dec. 2008), for example, a Minnesota Workers’ Compensation Court of Appeals determined that an employee working from home could be compensated for an injury that he sustained while working at home. At the time of the accident, the employee was walking down the stairs after getting a cup of coffee. The employee stated that he was performing work for his employer at the time of the accident, but he was taking a break. Minnesota extended its personal comfort doctrine to situations in the home, just as if the employee was in the office.

In that case, the court found it important that the employee was required to maintain a home office by his employer. The analysis was extremely fact specific. That could mean that if an employee deviates significantly from his or her work in the home, then benefits may not be available.

An extremely similar case occurred in Pennsylvania. The employee was on the

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phone with her supervisor when she fell down the stairs. The reason that she was on the stairs at all, however, was because she had gotten something to drink before returning to her home office. Again, the court invoked the personal comfort doctrine to determine that her injuries were compensable.

If you can show that an employee was not just on a break that would have otherwise been covered as if they had been in the office, then you may be able to avoid compensability. For example, in *Wait v. Traverlers Indem. Co. of Ill.*, 240 S.W.3d 220 (Tenn. 2007), the Tennessee Supreme Court determined that a woman who was assaulted in her home while she was working from home and making lunch could not receive workers’ compensation benefits. In that case, the woman worked entirely from home, and even hosted meetings with other co-workers and supervisors there. The court determined that the injury did occur in the course of her employment, but it did not arise out of her employment. For an assault to arise out of her employment, it must have same “inherent connection”

to the employment. The court determined that this particular assault did not have this inherent connection because it was a neighbor who assaulted her, and she allowed the neighbor into her house during her lunch break, not someone that had an association with her employment.

The case law in this area implies that you should show that an injury had nothing to

have anything to do with the employee's job duties or employment.

Employers should be encouraged to require their employees to document regular break times and lunches. They could also require that breaks and lunch occur at specific times. Claims such as these are especially vulnerable to fraud, and requiring specific break and lunch times can help cut down on employees stating that they were on a break from work when they were injured when they were not actually working at all.

Again, the analysis is extremely fact specific, so depositions that ask an employee in-depth questions about an injury and its cause will be extremely important in these types of cases.

### Encouraging Safety in the Home Office

Employers that allow their employees to work from home are generally not permitted to inspect an employee's home to ensure that it is a safe environment. Somewhat counterintuitively, however, the Occupational Safety and Health Administration (OSHA) may still require that employees follow certain safety protocols in their home as well. This requirement creates an interesting overlap between OSHA obligations and workers' compensation law.

Common sense tells us that following the safety standards prescribed by OSHA or other regulatory agencies does cut down on the occurrence of accidents. So how can employers combat these risks and cut down on workers' compensation benefit claims without violating employee privacy?

### Set Written Obligations

Having written safety expectations can encourage workers to have safe worksites in their homes. Although in most workers' compensation situations, whether the employee is violating a safety protocol for the home may not matter much legally, safety protocols can generally help encourage employees maintain safe worksites. This can cut down on the number of workers' compensation benefit cases as a whole.

### Ask an Employee to Describe the Workspace

Employers may also want their teleworking employees to describe their work-

spaces to their employers. This will get them thinking about the potential hazards in a workspace and allow an employer to get a better idea of where its employee is working. An employer might also be able to identify potential safety problems before they become a major issue. OSHA does require an employee to disclose potential hazards in his or her workplace, so this might be a good tool to use for concerned employers.

### Encourage Working from One Location

Accidents happen far more often on the road than they do within the home. Employers will want to encourage their teleworking employees to work from inside their homes, not from a coffee shop or another location. This keeps employees in the home and away from more serious dangers. In fact, working from home actually likely prevents more work-related injuries than it causes. This is, in part, because it cuts down on travel time.

If possible, employers might also want to encourage employees to have the home office on the main level of the home. This avoids having to go up and down stairs to get to a workspace. Unfortunately, many home accidents occur on the stairs, and that can be avoided by eliminating the need to move from floor to floor.

### An Employee Classification Strategy: Independent Contractors

In some states, it might be more beneficial to allow teleworking employees to be independent contractors. Many independent contractors are not covered by workers' compensation, so that eliminates a huge risk. However, you need to read your state's laws carefully if you plan to make this transition. New Jersey, for example, has an extremely expansive definition of an employee, and an employer may not be able to get around an employee classification.

### Other Wrinkles

Three other wrinkles and their ramifications to consider are that sometimes a telecommuting employee

- (1) may legitimately receive benefits from more than one state;
- (2) may become entitled to workers' compensation due to "travel to work" and

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do with an employee's job duties for it to be non-compensable. This analysis is similar to the one that you would complete when the worker was injured on the employee's premise. Because the analysis is similar, common exceptions would also apply. For example, states that have a "horseplay" rule might be able to use that defense here.

If, for example, an employee who works at home himself while playing with his children over a lunch break, he likely would not have an injury that "arose out of" his employment because his children have nothing to do with his work duties. The major question is always whether the activity would benefit the employer, and instances of horseplay generally do not benefit the employer. This would be true despite the fact that lunch is usually considered covered under the personal comfort exception.

Defense attorneys may want to look for evidence of the following:

- Longer than usual breaks in work time
- Deviations from normal working hours
- The very specific activity that the employee was engaging in at the time of the injury
- Whether the accident or the injury involved another person who did not

(3) may become entitled to it by taking work home. Workers' Compensation Benefits in More than One State

The jurisdictional requirements to bring a workers' compensation claim vary widely from state to state. In some situations a claimant has a choice of jurisdictions because of telecommuting activities. Presumably, a claimant's attorney will evaluate which state would be the most beneficial to the client before filing and only file in one state or another.

However, the Supreme Court has stated, in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980), that it is possible for a claimant to get workers' compensation benefits in more than one state. This is because the Supreme Court has determined that the Full Faith and Credit Clause of the United States Constitution does *not* apply in workers' compensation benefit awards. It has also determined that a particular state has no legitimate interest in preventing another state from awarding benefits.

#### **Travel to Work from a Home Office**

Once a home office is determined to be an employee's main place of employment, many of the other "travel" compensation events would likely apply to the employee's home as well. Interestingly, this can even apply when an employer requires the employee to be in the office on a limited basis.

Travel to work may also make a claim compensable if a claimant mainly works from his or her home. In *Bentz v. Liberty Northwest*, 57 P.3d 832 (Mont. 2002), an employee mainly worked from home but was required to travel periodically to work as a condition of his employment. The claimant injured his hip by slipping and falling on ice as he stopped to get the mail on his way back home to continue work. The Montana Supreme Court determined that this injury was compensable.

The takeaway from this type of situation may be to advise employers to share the time spent in the office and at home equally so that a home does not become a secondary place of employment. In the alternative, employers may want to encourage working in the office regularly instead of requiring only occasional office appearances so that a home does not become the primary work location.

#### **Taking Work Home**

An employee may also be compensated for taking work home. In *Bramall v. Workers' Comp. Appeals Bd.*, 144 Cal. Rptr. 105 (Cal. Ct. App. 1978), an employee took work home to complete there. The employer was aware of this practice and condoned it. The employee was not paid overtime, but she was allowed to cut hours elsewhere whenever she did this. When the employee was involved in an auto accident on the way home from work, it was compensable as falling under the dual purpose exception to the going and coming rule. If an employee does not have permission to take work home, or if an employer does not specifically encourage the practice, workers' compensation benefits may be avoidable.

#### **Balancing Employer Needs with Home Safety**

Employers often need their employees to work from their homes, and with the wide availability of the internet, telecommuting is becoming more and more frequent. Having telecommuting employees can cut down on overhead for many employers, and employees like the flexibility as well. It is easy to see why it is becoming so popular.

Employers often do not realize what this type of change means for their workers' compensation coverage, however. Unfortunately, there isn't really a good way to combat this type of claim after it has been made because of the expansive view that the courts seem to take toward these home-office claims. Defense attorneys can attempt to argue that a claim is not covered because the employee's home was actually not a secondary place of employment or that the employee was not engaged in work activities at the time of the injury. Both of these arguments touch on the traditional requirements of "arose out of" and "in the course of" employment. In addition, advising an employer to engage in simple preventive measures could go a long way to cut down on claims. 