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TELECOMMUTER INJURIES AND COMPENSABILITY UNDER WORKERS' COMPENSATION ACTS

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I. Introduction

Compensability of injuries under workers' compensation laws, suffered by telecommuters,[1] has been widely identified as an emerging issue for the last ten years or so. Indeed, in 2001 and 2002, four important articles were published that addressed the issue. One of these articles, addressing telecommuting and employment law in general, spoke of a "New Frontier in Legal Liability."[2] Another one of these articles was prompted by a 2000 decision of the Utah Supreme Court which awarded benefits to a full-time work-at-home employee.[3]

This writer has generally viewed this decision, *Ae Clevite, Inc. v. Labor Commission*,[4] as the first "modern" treatment of the issue. In this regard, many cases over the years may be found where the court must determine whether an employee working at home has suffered a work-related injury. The Larson treatise, indeed, has long featured a section on this course of employment issue.[5] Still, the Utah case was perhaps the first in which a court actually refers to

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[1] NCCI Classification Codes: "Clerical Telecommuter Employees" (Code 8871); "Telecommuting Drafting Employees" (Code 8871). *See Telecommuting and its Impact on Workers Compensation and Safety (Part I)*, THE JOURNAL OF WORKERS' COMPENSATION (2002), available at http://www.riskvue.com/articles/ww/ww0202.htm.

[2] Dawn Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 38 AMERICAN BUSINESS LAW JOURNAL 857 (2001).

[3] Matthew Duckworth, *The Need for Workers' Compensation Law in the Age of Telecommuters*, 5 JOURNAL OF SMALL & EMERGING BUSINESS LAW 403 (2001). The fourth article is Joan Gabel & N. Mansfield, *On the Increasing Presence of Remote Employees: An Analysis of the Internet's Impact on Employment Law as it Relates to Teleworkers*, 2001 UNIVERSITY OF ILLINOIS JOURNAL OF LEGAL TECHNOLOGY & POLICY 233 (2001).

[4] *Ae Clevite, Inc. v Labor Comm'n*, 996 P.2d 1072 (Utah Ct. App. 2000).

[5] ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW, § 16.10[4] (2009) (as cited in *Sandberg v. J.C. Penney Co., Inc*., 260 P.2d 495 (Oregon Ct. App. 2011)).

a "'work at home' arrangement" and the employer can be identified as facilitating an employee working full-time from his home because it had no local office.

Since 2001, courts in Pennsylvania (2006, 2011), Tennessee (2007), Oregon (2011), and New Jersey (2011), have all handed down decisions where the issue is the compensability of telecommuter injuries, or which feature a telecommuter in an ambiguous factual situation. These cases, and the issue in general, have continued to interest the insurance and legal communities. Of particular interest is that scholars referred to this issue as a "new frontier" in 2001, but some ten years later an insurance journalist remarked that the law remained "underdeveloped," and that the practice of telecommuting was still "changing [the] workers' comp terrain."[6]

The critical legal issue is whether injuries suffered by telecommuters "arise out of the employment" and are experienced in the "course of employment." The instructive court decisions to date all involve this issue and an employee laboring at or in the vicinity of a home office. No case to this writer's knowledge has yet been decided surrounding the more difficult situation: that of an injury or death suffered during a motor vehicle trip to or from the home office to the company's principal office or elsewhere. This is a difficult situation because "coming and going" has traditionally been considered *outside* the course of employment unless special circumstances, which can vary widely, are present. It is an important issue as well, as the most potentially hazardous part of a telecommuter's work is likely the occasional trip in the car, as opposed to his or her usual position in front of the computer screen.

Two subsidiary issues exist. The first is the challenge to the adjuster and the defense lawyer of verifying that the accident or injury really did arise in the course of employment. This issue of *authenticity* of the claim can obviously arise at the main office or the factory, but when a worker is laboring at home special problems of investigation arise. Rarely will there be any witnesses (a potential problem for the injured worker as well), and the home and its environs may well supply plenty of hazards that are not present in the home office. The second is the overlapping issue of *medical causation*. As illustrated by a 2011 New Jersey case, expert physicians may well disagree whether a non-obvious injury or disease really had its cause, in whole or in part, in the worker's home-office activities. Medical causation is ubiquitous in workers' compensation and hardly unique to the issue of telecommuters. Once again, however, the typical telecommuter's solitary labor presents a challenge to physicians, who must offer their opinions based upon fact-based hypotheticals.

This paper reviews the court decisions which have unfolded on this "new frontier" of legal liability. Prior to reviewing those cases, this paper defines telecommuting and examines the recent data on how many workers actually labor in this capacity. This article also analyzes, as an introductory matter, how risk managers have viewed telecommuting and workers' compensation injury hazards.

[6] Mark Noonan, *Telecommuting: Changing Workers' Comp Terrain*, RISK & INSURANCE (Sept. 14, 2011), available at http://www.riskandinsurance.com/story.jsp?storyId=533341348.

II. Telecommuting Defined

Telecommuting has no legal definition. Indeed, it is also referred to as "telework," or employees engaged in "work-at-home."[7] As discussed in workers' compensation, however, the reference is to a worker (1) engaged in an employee-employer relationship; (2) who is laboring, by design, at his or her home office part or all of the regular work week, as some sort of alternative work arrangement.[8] Thus, one is not including self-employed individuals or other types of independent contractors. Similarly, one is not referencing workers who only work at home on a haphazard basis, during an emergency, or has simply brought work back home from the office.[9] All of these situations pose their own challenges for workers' compensation, and on occasion principles of compensation may overlap, but telecommuting is a form of work that can and should be treated separately. The six cases treated below, notably, all involved *employees* working in *established* home offices.

While some workers have always labored at home, the growth in this employment phenomenon has occurred because of improvements and innovations in communications technology. "An employee telecommutes," the Tennessee Supreme Court declared, "when he or she takes advantage of electronic mail, internet, facsimile machines and other technological advancements to work from home or a place other than the traditional work site."[10] This type of work "is becoming an increasingly acceptable employment model. High-speed internet connections, sophisticated hand-held devices, and innovative telecommunications equipment routinely facilitate both official and unofficial telework."[11]

Estimates of how many workers telecommute seem to vary.[12] In 2008, an on-line author reported that in that year, "approximately 17.2 million Americans were telecommuters who

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[7] KATE LISTER & TOM HARNISH, THE STATE OF TELEWORK IN THE U.S.: HOW INDIVIDUALS, BUSINESS, AND GOVERNMENT BENEFIT (2011) , available at http://www.workshifting.com/downloads/downloads/Telework-Trends-US.pdf.

[8] Paul M. Ostroff, *Telecommuting: The Legal Landscape and Best Practices for Employers*, HUMAN RESOURCES, p. 69 (Winter 2008).

[9] When a worker has voluntarily taken work home to perform during the evening hours, he or she is typically considered to have made a personal choice to work. An injury sustained in the course of such activity is usually not considered to have arisen in the course of employment. *See, e.g., Ross v. Commission*, 2012 Ill. App. Unpub. LEXIS 1491 (Ill. Ct. App. 2012) (office worker who routinely returned home with laptop, cell phone, and pager, undertaking after-hours work on a voluntary basis, did not, on evening in question, sustain fatal injury arising in course of employment – fatal trip on motorcycle to take break and get snacks and cappuccino was not considered to have been a "personal comfort" break, when claimant was not in course of employment in the first place).

[10] *Wait v. Travelers Indemnity Co. of Illinois*, 240 S.W.3d 220 (Tenn. 2007).

[11] Nancy W. Vaughn, *Telecommuting: From Here to There; From There to Here, Legal Issues to Beware*, NACUA NOTES (May 25, 2010), available at http://counsel.cua.edu/NACUANotes/Telecommuting.cfm. An extensive discussion of work issues in the age of the Internet is found in Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GEORGIA LAW REVIEW 951 (2011). In discussing (briefly) workers' compensation, the author states, among other things, "[m]oving into an era of virtual work, one of the more serious injuries associated with the information age is [repetitive stress injuries, including] carpal tunnel syndrome and other similar traumas to the hands, wrists, and upper extremities and are engendered by repetitive motions such as typing at keyboards for extended periods….").

worked remotely at least one day per month …."[13] Another wrote that "40 percent or more of employers now offer telecommuting, and that as many as 17 percent of employees now telecommute either entirely or through part of the work week…."[14] In 2011, however, two extremely discerning analysts reported that only 2.9 million workers were true telecommuters, that is, employees who "considered home their primary place of work," or about 2.3% of the workforce.[15] They believe that "regular telecommuters will total 4.9 million by 2016, a 60% increase from the current level …."

With regard to demographics:

> The typical telecommuter is a 49-year-old, college-educated, salaried, non-union employee in a management or professional role, earning $58,000 a year at a company with more than 100 employees.
>
> Relative to the total population, a disproportionate share of management, professional, sales and office workers telecommute.[16]

The experience of the courts seems to bear out this profile. While a study of precedents is not empirical, it is worthy to note that in the cases summarized below, most of the claimants were professionals or executives:

TABLE

Occupations Involved in Six Telecommuter Precedents

State/Employer	**Occupation**
UTAH (*AE Clevite*)	District Sales Manager
PENNSYLVANIA (*Verizon*)	Systems Engineer
TENNESSEE (*American Cancer Society*)	Dir., Health Initiative and Strategic Planning
OREGON (*J.C. Penney*)	Interior Decorator
PENNSYLVANIA (*Greenleaf Service Corp.*)	International Sales Manager
NEW JERSEY (*AT&T*)	"Salaried Manager"

While most commentators believe that telecommuting will continue to expand, researchers still find that many managers are resistant to allowing the practice. A principal concern is mistrust – a worry over whether such employees are *actually doing their work.*[17]

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[12] In the 2002 risk management article, *Telecommuting and its Impact on Workers Compensation and Safety*, *supra*, the authors posited that the number is over 20 million. *See* http://www.riskvue.com/articles/ww/ww0202.htm.

[13] Vaughn, *supra*.

[14] Ostroff, *supra*.

[15] LISTER & HARNISH, *supra*, at p. 4.

[16] LISTER & HARNISH, *supra*, at pp. 4-5.

[17] LISTER & HARNISH, *supra*, at p. 25.

Employers concerned about perceptions of fairness, meanwhile, may hesitate to allow some employees to work at home while their colleagues are obliged to make the commute. And, of course, many occupations by their very nature cannot be performed at home.

Most commentators posit that employer, employee, and the community all stand to benefit by telecommuting.[18] The employer need not rent office space, the employee need not endure an unpaid, expensive commute, and the community enjoys fewer cars on the road and less carbon monoxide in the air. The federal government employs telecommuting, under the Telework Enhancement Act,[19] for its own workers to ensure "continuity of operations" during environmental crises and terrorist acts.[20]

III. Risk Management Issues for Workers' Compensation

According to one writer, NCCI reacted to the growth in telecommuting by developing two classifications, "Clerical Telecommuter Employees" (Code 8871); and "Telecommuting Drafting Employees" (Code 8871). The code is similar to "Clerical Office Employees NOC" (Code 8810), and "applies only to telecommuting employees not specifically included in descriptions of other classes assigned to the policy and not covered by any other special rules …. The employee must work in a residence office, defined … as 'a clerical work area located within the dwelling of the clerical employee.'"[21]

The same writer, who made his remarks in 2002, ventured that early concerns about a surge in claims by telecommuters – that might result in an increase in premium rates – had not unfolded. Those comments some ten years later still seem valid, and no crisis exists in claims filing by telecommuters. (Indeed, this author, a compensation judge with a heavy case load, has never entertained a controversy over telecommuting.)

As for the reason that relatively few claims are filed, the writer posited the following. These seem entirely correct:

> First, claims for clerical and drafting employees are generally fewer and less costly than other employments, as is evidenced by the low rates applicable to Codes 8810 and 8871.

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[18] An extensive discussion of the "pros and cons" is found in the 2002 risk management article, *Telecommuting and its Impact on Workers Compensation and Safety (Part II)*, pp. 7-9, THE JOURNAL OF WORKERS' COMPENSATION (2002). *See also Wait v. Travelers Indemnity Co. of Illinois*, 240 S.W.3d 220 (Tenn. 2007) (quotation on this pointed reproduced *infra*.)

[19] *See* http://www.opm.gov/news/six-month-deadline-of-telework-enhancement-act-met-with-significant-progress,1670.aspx.

[20] LISTER & HARNISH, *supra*, at pp. 10-11, 25.

[21] *Telecommuting and its Impact on Workers Compensation and Safety (Part I)*, pp.1-2 (2002), available at http://www.riskvue.com/articles/ww/ww0202.htm.

> Second, telecommuters are often longer-term, professional or "white-collar" employees. Such employees are traditionally less likely to file workers compensation claims.[22]

Still, the popularity of telecommuting has caused risk management professionals to counsel employers and insurers on methods to contain undue exposure. This advice addresses not only potential liability under workers' compensation but under other laws such as FLSA, Title VII, OSHA, and the Americans With Disabilities Act. Among the basic recommendations is that employers should reserve the right to inspect and monitor the home workplace to ensure that it is as safe as possible and compliant with OSHA requirements. Obviously, if this advice is followed the potential of a telecommuter ever encountering the workers' compensation system will, to the benefit of all, be materially reduced. Employers are also reminded that they must take into account the *geographic location* of their telecommuting employees, to ensure that proper insurance coverage is in place.

A ubiquitous piece of advice important to workers' compensation is that the employer oblige the employee to sign a telecommuting agreement to govern (that is, limit) the time, place, and activity parameters of his or her work at home. One thoughtful writer has set forth the following "best practices" in this regard:

> • Carefully instruct the employee and define in writing his or her working hours….
>
> • Establish written policies and a written agreement between the employer and the employee concerning the telecommuting arrangement that addresses the activities that are understood to be in the course of employment.
>
> • Specify that a single room in the house be used as the home office. This avoids the problem of an injury occurring elsewhere than the home or nearby being claimed as a work-related injury.
>
> • Set up procedures that define when the employees perform work, e.g., calling a supervisor or logging onto the computer network.[23]

These suggestions may well limit liability, but in the end the facts of each case will determine whether a worker has been injured in an accident arising out of and in the course of employment. A pre-injury agreement that some particular act is not within the course of employment may be given some weight, but it is up to the court to determine whether the legal "course of employment" test has been met. Virtually all workers' compensation laws, further, disallow pre-injury waivers and agreements by employees not to advance claims. The Workers Compensation and Employers Liability Insurance Policy echoes this principle, of course. As

[22] *Id.*, p.2.

[23] Ostroff, *supra*, p. 77.

approved in Pennsylvania, the policy states, critically: "B. *We Will Pay*…. We will pay promptly when due the benefits *required of you by the workers' compensation law*."[24]

The same author counsels:

> • Document that the employee's telecommuting arrangement is at his or her request and wholly voluntary, and that the performance of work at home is not a requirement of employment.
>
> • Do not compensate employees for travel or reimburse them for their mileage if they come to the main office for a meeting.[25]

Of course, the former recommendation can only be followed if it is *true* in the first place; the obligation or free choice to telecommute will vary in each case. In addition, simply because the work-at-home arrangement was voluntary does not mean that the injury will not be deemed to have arisen in the course of employment. The second recommendation, meanwhile, reflects the pervasive rule that mere commuting is not "course of employment," though an *exception is* usually made if the employee *is* reimbursed for mileage.

IV. The Reported Precedents to Date

Four reported precedents from around the country directly address the compensability of injuries suffered by telecommuters. They are from Utah, Pennsylvania, Tennessee, and Oregon. Two further cases feature a worker who was a telecommuter. These two cases highlight the difficulties in *proof* that telecommuter cases may present.

The issue of compensability has been handled by way of the statutory "arising out of the employment" and "course of employment" tests that are found in every workers' compensation law.[26] The "arising in" term requires that in every case the claimant must show that the injury somehow has its genesis in the circumstances and obligations of work; it is a "causal connection" requirement. The "course of employment" term, meanwhile, means that the claimant must show that the injury has taken place "within the period of employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto."[27] In many "gray area" cases, notably, the coverage determination turns on whether the activity the claimant has engaged in is truly "incidental" to his work or is, in contrast, an "abandonment" of the same.

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[24] *See* David B. Torrey, *Insurance and Workers' Compensation: Background and What the Workers' Compensation Lawyer Must Always Keep in Mind*, p. 8 (Pennsylvania Defense Institute 2009). The emphasis was added by the author.

[25] Ostroff, *supra*, p.77.

[26] The Pennsylvania Act combines the two – a 1972 amendment innovation. The Pennsylvania test is whether the injury arises in the course of employment and is medically related thereto. Section 301(c)(1) of the Act, 77 P.S. § 411(1).

[27] *Wait v. Travelers Indemnity Co. of Illinois*, 240 S.W.3d 220 (Tenn. 2007).

A fixed-situs employee who chooses to take work home, on a voluntary basis, is not considered in the course of employment. Accordingly, an injury suffered by such a worker during travel to and from the office while transporting such things as a file or work apparatus, and during the actual work at home, is usually not conceived of as "arising in the course of employment and related thereto."

It is always worthy to recall that to say that an injury did *not* arise in the course of employment suggests that a negligence lawsuit against the employer may lie. Thus, depending on the circumstances, an employer may wish to treat an injury, in the ambiguous situation, as work-related.

A. Cases Decided Under the "Arising" and "Course of Employment" Criteria

In the first two cases (2000, 2006), the courts hold that the employee suffered an injury arising in the course of employment, rejecting arguments from employers that the workers could not be conceived as suffering work-related injuries. In a case from Tennessee (2007), the result was somewhat different. The court found that the claimant, while working at her home, did suffer an injury in the *course* of her employment. However, it ultimately concluded that the injury did not *arise* from the employment. In the most recent case, from Oregon (2011), the court, like the initial two decisions, found compensability.

1. ***Utah***: *Slip and Fall in Driveway of Home.* In the Utah case, *Ae Clevite*,[28] the claimant, Tjas, was district sales manager for his company, an auto parts concern. His employer had no Salt Lake City office, so he used his home as a base of operations. He would often have occasion to receive USPS or courier deliveries from his employer. On the day of the injury, his driveway was very icy. He saw the letter carrier approaching with materials necessary for his business, and he went out to spread salt on the driveway. Unfortunately, he suffered a fall on ice and was rendered quadriplegic.

When he sought workers' compensation, the employer asserted that he did not suffer an injury arising in the course of his employment. Employer argued that it "never requested, directed, encouraged, or reasonably expected [claimant] to salt his driveway…. [Also, claimant] was not in an 'employer controlled' area when the injury occurred…."

The workers' compensation authorities and appeals court, however, awarded benefits. In the court's opinion, "Mr. Tjas' injury arose from a risk associated with his work for Ae Clevite due to the parties' 'work at home' arrangement…." It was true that the task of salting the driveway was one which Tjas was obliged to do anyway, "yet the fact remains that when he [did this task], it was in an attempt to remove a hurdle that could have prevented the delivery of the expected business package. In other words, Mr. Tjas' act of salting the driveway was motivated in-part by a purpose to benefit Ae Clevite and thus was *reasonably incidental*, rather than tangentially related, to his employment…." The requirement that an injury arise from the employment "is thought of more as a *condition* out of which the event arises than as the force producing the event in affirmative fashion."

[28] *Ae Clevite, Inc. v Labor Comm'n*, 996 P.2d 1072 (Utah Ct. App. 2000).

2. ***Pennsylvania***: *Fall Down the Stairs at Home*. In the Pennsylvania case,[29] the court recognized that a worker laboring at a home office, with the employer's permission or acquiescence (this writer's conceptualization), is working at an extension of the employer's premises. Thus, when the worker took a "personal comfort" break and fell down the stairs, she was still considered as suffering an injury arising in the course of employment.

The claimant, Alston, was a systems engineer for her employer. She had worked for the employer for many decades. She worked three days per week at employer's Freehold, New Jersey office. Two days a week, she worked at her home office. On January 7, 2002, she suffered an injury. In this regard, the claimant had gone upstairs, to where her kitchen apparently was located. While in the kitchen drinking a glass of juice, she received a work-related telephone call from her supervisor. Feeling that the work issue needed immediate attention, claimant went down the stairs to the office. While going down the stairs, she fell, hitting her head and neck. She missed a year of work and had surgery.

Claimant received a salary continuation-program type series of payments in the wake of her injury. However, she was left with a scar on her neck. This led her to file an original claim petition seeking disfigurement benefits.

The workers' compensation authorities granted the petition, rejecting an employer argument that the injury did not arise in the course of employment. The appeals court affirmed. The court noted that, under the Act and case law, where an employee on the employer's premises is injured while actually engaged in the furtherance of the employer's business or affairs, the claimant has suffered an injury arising in the course of employment.

Here, applying the court precedents, the court conceptualized the claimant as having a stationary job at "a fixed location approved by employer as her secondary work premises." The claimant was, hence, on the premises at the time. Importantly, the claimant had not "abandoned" her employment on the premises by going upstairs to get a glass of juice. The court explained:

> [T]here is a "well-established 'personal comfort' doctrine" under which an employee who sustains an injury during an inconsequential or innocent departure from work during regular working hours, such as going to the bathroom, is nonetheless considered to have sustained an injury in furtherance of the employer's business. . . .

While the court spoke of "secondary premises," as noted above, it also relied upon other precedents where workers, in exceptional circumstances, had incurred their injuries at home, even though they were not telecommuters. The court also referenced ancient home-office cases involving rural telephone operators who maintained switchboards at their Ohio and Nebraska residences.

[29] *Verizon, Pennsylvania, Inc. v. WCAB (Alston),* 900 A.2d 440 (Pa. Commw. 2006).

3. ***Tennessee***: *Assault by neighbor while claimant was in kitchen at home.* In *Wait*,[30] the claimant was employed as an executive for the American Cancer Society (ACS). Because office space was in short supply at the organization's Nashville, TN facility, ACS allowed claimant to work from her home. She converted her spare bedroom into an office, and ACS supplied all the office equipment and a separate, "dedicated" phone line. On the day in question, claimant was in the midst of her work, but stopped for lunch. While she was in her kitchen, she answered the door, and a neighbor with whom she had a passing acquaintance entered on a pretext. Without provocation or explanation, this neighbor, Sawyers, then "brutally assaulted [her] …, beating [her] until she lost consciousness. As a result …, [she] suffered severe injuries, including head trauma, a severed ear, several broken bones, stab wounds, strangulation injuries, and permanent nerve damage to the left side of her body."

The employer opposed her claim, and the trial court (claims are litigated in civil court in Tennessee) granted summary judgment in the employer's favor. It concluded that claimant did not suffer an injury arising out of or occurring in the course of her employment. The Supreme Court affirmed. However, it first held that claimant's injury *did* occur in the *course* of her employment. The claim was non-cognizable, instead because it did not *arise* out of the employment.

With regard to course of employment, the court held that the claimant was a telecommuter, and it conceived of claimant being in her kitchen as no different from a worker on the employer's usual premises being in its kitchen or break room. The court reasoned that "ACS was aware of and implicitly approved of the plaintiff's work site. Her supervisor and co-workers had attended meetings at the plaintiff's home office. It is reasonable to conclude that the ACS realized that the plaintiff would take personal breaks during the course of her working day including such [covered] incidental acts as eating, drinking, smoking, seeking toilet facilities, and seeking fresh air, coolness and warmth."

The court on this point cited the Larson treatise (section 16.10[4] (2009)), for the proposition that the risks of the *home* environment can be the risks of employment:

> [O]nce it is established that the home premises are also the work premises …, it follows that the hazards of home premises encountered in connection with the performance of the work are also hazards of the employment.
>
> …. That the employee is a telecommuter or other home-based worker should not, in and of itself, make any difference. Was the risk of injury a risk of *this* employment? So long as the employment subjects the employee to the actual risk of injury, the argument follows that the injury should be compensable.

The court could not, however, say that the injury *arose* out of claimant's employment. It considered claimant's assault injury to arise out of what Larson called a "neutral risk," that is,

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[30] *Wait v. Travelers Indemnity Co. of Illinois*, 240 S.W.3d 220 (Tenn. 2007). This case is nicely summarized and analyzed in a note published by the Tennessee Law Review. *See* Lindsay Scheck, *Workers' Compensation in Tennessee – Injuries Arising out of and in the Course of Employment – Limits on a Telecommuter's Coverage Based on Assault at Home*, 76 TENNESSEE LAW REVIEW 471 (2009).

one neither directly connected with work (covered) or exclusively personal (not covered.) Under Tennessee law, an injury in such instances is not thought to be compensable, as no causal connection to work exists. Here, "the facts do not establish that the plaintiff's employment exposed her to a street hazard or that she was singled out for her association with her employer." True, "but for" her employment she "would not have been at home to suffer these attacks." This "positional risk" analysis, however, is not the Tennessee test.

The Tennessee court was cognizant that, in addressing the issue of course of employment and the telecommuter, it was addressing an issue of first impression:

> This case requires us to apply the Act to a new and growing trend in the labor and employment market: telecommuting. An employee telecommutes when he or she takes advantage of electronic mail, internet, facsimile machines and other technological advancements to work from home or a place other than the traditional work site. … In 2006, approximately thirty-four million American workers telecommuted to some degree. …
>
> Telecommuting is a flexible arrangement that affords many benefits not only to the employer and the employee, but also to the community. Employers often use telecommuting as a recruiting tool to attract new employees, and telecommuting has been credited with improving retention, productivity, loyalty, and morale…. Employers often use telecommuting as a way to reduce overhead expenses, such as office space rental. Similarly, employees enjoy many benefits of working at non-traditional work sites, such as reduced travel time and work-related stress, which results in increased time for family and personal activities…. Furthermore, society benefits from telecommuting with reductions in traffic congestion and pollution…. Not surprisingly, however, this innovative working arrangement has resulted in an issue of first impression: whether the injuries a telecommuter sustains as a result of an assault at her home arise out of and occur in the course of her employment.

4. ***Oregon*****:** *Trip over dog on way from home to storage area.* In this case,[31] the claimant, Sandberg, was employed by J.C. Penney as a custom decorator. She worked at her employer's main operation one day per week, and the other days she would be on the road out on appointments with customers or working from home. She spent most of the time "travelling to and from her appointments and meeting with customers in their homes to sell decorating products." Employer required claimant to keep a significant inventory of fabric samples, books, and pricing guides in her car or at home. Sandberg kept these materials in her home garage. One day, as she was about to move certain of these items from the garage to her van, she had an accident and broke her leg. Specifically, Sandberg "walked out her back door…. When her foot came down" she noticed that her "dog was underfoot… [so] she shifted to her other foot, lost her balance and fell."

The ALJ and Board rejected the proposition that claimant had sustained an injury arising out of and in the course of her employment. The Court of Appeals, however, reversed. As the

[31] *Sandberg v. J.C. Penney Co., Inc*., 260 P.3d 495 (Oregon Ct. App. 2011).

Board noted, it was true that "the risk that claimant might trip over her dog did not arise out of the nature of her work as a custom decorator." However, in the present case, the employer had in effect made claimant's home an extension of its premises, and this altered the "arising out of the employment" analysis. According to the court, "claimant was walking around to her garage for the sole purpose of performing a work task. She fell while moving about an area in which she had to move about in order to perform the work task, given the conditions of her employment. Therefore, we conclude that claimant's injury resulted from a risk of her work environment. As such, it arose out of her employment."

True also, the employer did not have control over the conditions of claimant's home and, of course, it had no control over claimant's *dog*. Still,

> If an employer, for its own advantage, demands that a worker furnish the work premises, the risks of those premises encountered in connection with the performance of work are risks of the work environment, even if they are outside of the employer's control, and injuries resulting from those risks arise out of the employment.
>
> [H]ere, because employer did not provide space for claimant to perform all of her work tasks, she was required – as a condition of her employment and for the benefit of her employer – to work in her home and garage. Thus, those areas constitute claimant's work environment when she is working, and injuries suffered as a result of the risks of those environments, encountered when claimant is working, arise out of her employment.
>
> [I]f claimant tripped over a dog and injured herself while meeting with a customer in the customer's home, her injury would arise out of her employment. The same is true here because claimant was where she was, doing what she was, because of the requirements of her employment.

While this case is similar to *Verizon Pennsylvania, supra*, one difference is that in the Pennsylvania case, the court did *not* ground its ruling on an employer *requirement* that claimant maintain a home office. The Pennsylvania court referred only to claimant "working at her 'home office,' a fixed location approved by Employer as her secondary work premises.…"

B. Verifiability (the Authenticity Concern)

In any case where an accident is unwitnessed, the authenticity of the claim may be questioned. This is an age-old issue in workers' compensation cases. The issue seems particularly one of telecommuter claims. This is so because such employees typically work by themselves at a remote location, where the many potential hazards of the home lurk close by. The insurance adjuster who is assigned to such at-home injuries may face a challenge in investigating the circumstances of the incident because of a natural lack of witnesses.

This rather basic issue led to the denial of a claim in a dramatic 2011 Pennsylvania case.[32] There, a worker, Werner, was employed as the international sales manager for employer, Greenleaf Service Corporation. As a professional, he worked under a somewhat loose arrangement. He would work at his employer's facility in Saegertown, Pennsylvania (near Erie,) but also out at his home office in Fort Lee, New Jersey. He would also frequently travel for work, including trips out of the country.

In early 2007, he was scheduled to go on a trip to Europe, but he suffered a non-work accident to his hand which required stitches. He contacted his supervisors and indicated he was delaying the trip. This occurred on or about March 4, 2007. On March 8, 2007, Werner was at home – in the employer's view, still on some level of informal sick leave – in light of the hand injury. However, that morning, he did speak with his supervisor, and made a number of work-related e-mails from his home computer. These ended in the late morning. At roughly 2:00 p.m. on the same day, some hours later, the deceased's wife found him injured and unresponsive sitting in his desk chair of the home office. As it turned out, Werner had suffered a head injury and died ten days later on March 18, 2007.

The widow's claim for workers' compensation benefits was denied. At hearings, claimant's proofs were as noted above, but claimant also established that there was blood on the sidewalk at the front entry to the house. The deceased's glasses were there as well. The claimant stated that the decedent would often smoke in that general area. According to the opinion, claimant suggested that decedent was working at his home office on the day in question, and that he had merely taken a personal comfort-type break to smoke out front, where he apparently had fallen and struck his head. It is to be noted that decedent, when found, had a nosebleed, and claimant found bloody tissues and blood not only out front on the sidewalk in the smoking area, but also on the floor of the first level bathroom as well.

The WCJ denied the claim. The judge generally found all of the witnesses to be credible. Of note, however, she found credible the testimony of employer's witness that decedent was "actually on sick leave" on the day in question. True, according to the judge, decedent may have read some e-mails or made business phone calls on the day in question, but this "does not establish that he was in the course and scope of his employment at any time on May 8, 2007 let alone at the time he was injured and died." The Appeal Board affirmed, as did Commonwealth Court.

Of course, in a fatal claim such as this, the claimant bore the burden of proof. The court was satisfied that the findings were based on substantial evidence, and that the WCJ had not disregarded the evidence. In addition, the court acknowledged that an injury suffered at an at-home office can potentially be compensable. This was so held in the Pennsylvania telecommuter case *Verizon Pennsylvania, Inc., supra.* As discussed above, in that case, an at-home worker who had suffered an injury in the midst of a personal comfort break was found to have suffered an injury arising in the course of employment.

That case, however, was distinguishable. In this case, the specific circumstances surrounding the injury were *unknown*. The court concluded: "The record is unclear as to how decedent was injured, where decedent was injured, and at what specific time decedent was injured.

[32] *Werner v. WCAB (Greenleaf Corp.),* 28 A.3d 245 (Pa. Commw. 2011).

Perhaps more importantly, even if the cause, location and time of decedent's injury was established, there is nothing in the record demonstrating what decedent was doing when he was injured. Claimant's proffered explanation that decedent slipped and hit his head while outside smoking a cigarette – i.e., attending to his personal comfort – or retrieving business mail is speculative at best."

C. Verifiability (the Medical Causation Concern)

The overlapping, but more complex, issue of *medical causation* is also a verifiability concern. As illustrated by a 2011 New Jersey case, expert physicians may well disagree whether a non-obvious injury or disease really had its cause, in whole or in part, in the worker's home-office activities.

In that case,[33] the deceased worker was a long-time manager for her employer, AT&T. When she worked at home, she sat at her computer for long hours to meet various work deadlines. Although she had a "nine-to-five" job, at home she worked "all hours of the day and night." On Monday, September 24, 2007, she began working on a deadline during the evening. Although the length of time she worked that night was contested, computer records demonstrated that she sent an e-mail to a co-worker at 12:26 a.m. While it was never finally proven what she did between 12:26 and early the next morning, at 7:00 a.m. her son did find her at the desk of her home office. Shortly thereafter she reported acute leg pain, and at 9:00 a.m. told a co-worker that she was feely poorly. Still, she indicated that she would continue working on the deadline. She finished the project at 10:30 a.m. but an hour later she called for an ambulance. She was, however, pronounced dead at the hospital upon her arrival. The cause was a pulmonary embolism.

The widower's medical expert opined that the deceased's extended sitting was the cause of the embolism. Sitting for extensive periods, in this regard, "precipitates stasis of blood flow and [here] that blood flow … [led] to her developing clots." Employer's expert, meanwhile, opined that the embolism was caused by a combination of various risk factors, including age (47), morbid obesity, an enlarged heart, and recent renewed use of birth control pills.

The compensation judge credited the claimant's expert, applying the New Jersey cardiovascular statute and concluding that the injury was more than the result of "wear and tear of daily living"; to the contrary, the blood clot was caused in material degree "as a result of her work inactivity." He thus awarded benefits. The appellate court affirmed, adding that based upon a statement made by the late worker to her husband, "a logical inference" existed that the worker had "worked throughout the night. Thus, [her] work inactivity was 'in excess of the wear and tear' of her 'daily living.'"

V. Still Undecided Issue: Coming and Going

While a number of instructive precedents are now available, and one can discern a definite pattern of how courts will treat telecommuter issues, all of the above cases dealt with

[33] *Renner v. AT&T*, 2011 N.J. Super. Unpub. LEXIS 1668 (N.J. Super. 2011). Prior to remand: *Renner v. AT&T*, 2010 N.J. Super. Unpub. LEXIS 2847 (N.J. Super. 2010).

injuries at or in the vicinity of the home office. The true "underdeveloped" issue concerns compensability of injuries when the work-at-home employee *does* undertake some travel. Of course, some irony attends this issue, as one of the benefits of telecommuting is the *elimination* of travel.

For the telecommuter who has *defined days* when he labors (1) at the home office and (2) the employer's main premises, the direct trip to and from the latter will surely be interpreted as a mere commute. Such a worker has a fixed site of work on such days, and it is unclear why such a trip would transcend that of a mere commute. The trip is not attended by any increased risk or similar hazard. Thus, an injury occurring during such commute will not be considered the course of employment pursuant to the familiar exclusionary rule.[34] Not all trips, however, are direct commutes. One commentator has persuasively asserted, in this regard, that "if telecommuters are en route to pick up or drop off materials to their employers' worksite, the traveling employee exception will apply and injuries suffered either going to or coming home will be covered."[35]

A telecommuter who is laboring at his home office and who is directed, in the midst of his work, to report to the main office has a stronger argument that he is not undertaking a mere commute. The telecommuter who is directed to report to the main office because he has lost power and/or his or internet connection is in a similar position. Such workers can be conceived of as undertaking "special missions," an established exception to the exclusion-of-commuting rule.[36] They may also be conceived of as travelling between two of the employer's premises, an activity that has long been considered the course of employment.[37] In each instance, (1) the suddenness of change in the employee's work pattern may be conceived of as attended by an increased risk beyond that of a mere predictable commute, and (2) the employee is being obedient to a directive from the employer to make a special trip, thereby furthering its interests.

Other travel situations exist as well. For example, a telecommuter who runs out of crucial supplies and ventures out to purchase the same, and is injured in the course of doing so, may cast himself successfully as undertaking a special mission. He is, in such a situation, off the "premises," but he is actively furthering the employer's interests. Such situations may become murky, as the telecommuter may combine such a task with other personal chores. In

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[34] As noted above (p.2), the universal rule is that the employee's commute to and from work at a fixed site is not course of employment. *See, e.g., Pennsylvania State Police v. WCAB (Dick),* 694 A.2d 1181 (Pa. Commw. 1997) (police trooper was not in course of employment as he road his own motorcycle to work, despite allegation that he was planning to arrest the driver of the vehicle which ultimately caused him to crash and sustain injury).

[35] Dawn Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 38 AMERICAN BUSINESS LAW JOURNAL 857 (2001).

[36] ARTHUR LARSON, WORKERS' COMPENSATION, § 14.05 (2000).

[37] ARTHUR LARSON, WORKERS' COMPENSATION, § 13.01[4] (2000). *See, e.g., Denny's Restaurant v. WCAB (Stanton),* 597 A.2d 1241 (Pa. Commw. 1991). *See also Jonathan Sheppard Stables v. WCAB (Wyatt),* 739 A.2d 1084 (Pa. Commw. 1999) (jockey injured in motor vehicle accident while driving between racetrack and farm); *Ruth Family Medical Center v. WCAB (Steinhouse),* 718 A.2d 397 (Pa. Commw. 1998) (claimant, a physician who suffered injury in motor vehicle accident, while driving from hospital doing rounds, to the family practice office, was in the course of her employment).

this area, courts will likely recognize that a "dual purpose" attended the trip. This type of situation has long been observed in the compensation decisions.[38] The "dominant purpose" test, applicable in this context, generally provides that if the trip would not have been made but for the work task, an injury sustained while the worker is attending to a collateral, personal chore on the same trip will *not* negate course of employment. This is so barring any frank "abandonment," in the course of which the worker exposes himself to completely foreign risks.

VI. Conclusion

While telecommuting injuries may be a new frontier, and the case law underdeveloped, the time-tested criteria of "arising out of the employment" and in the "course of employment" seem to be working well to define the parameters of covered risks. This is a test, notably, that is intended to address *broadly* the risks of employment. The statutory test is not (except under the Texas statute), "course and scope" of employment, which is the more restrictive test that applies in the *tort* realm to determine whether an employee's actions are to be attributable vicariously to the employer.[39] This point is worth remembering, as on occasion the "course and scope" usage may mislead the adjuster or legal professional to believe that the employee must be in the "scope of his duties" at time of injury before coverage will apply. This has never been the rule and is not at present.[40]

That an expansive test – not a restrictive one – is usually applied,[41] seems especially important to remember given the ambiguous work situations undertaken by an employee who works at home.

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[38] ARTHUR LARSON, WORKERS' COMPENSATION, § 16.10[1] (2000).

[39] *See Ferrell v. Martin, Huston et al.*, 419 A.2d 152 (Pa. Super. 1980) (quoting Restatement, Agency 2d, § 228, comment a).

[40] *See* David B. Torrey, *The Argot of Workers' Compensation: The Law & Practice Behind Five Slang Expressions*, in COLLECTED PAPERS, PDI ADVANCED WORKERS' COMPENSATION SYMPOSIUM (November 2009).

[41] Further, in Pennsylvania, and in several other states, court rulings interpreting the "arising in" and "in the course of employment" tests are informed by the rule of liberal construction. Under this statutory interpretation principle, when the law is ambiguous, it is read liberally to award benefits and not restrictively to deny them.