

FRIDAY, OCTOBER 30, 2020

PERSPECTIVE

Navigating Workers' Comp Claims When Employees Work From Home

By Neelu K. Khanuja

Prior to the COVID-19 pandemic, the U.S. Bureau of Labor Statistics reported that approximately 10.8% of workers were working remotely. Due to the numerous pandemic stay-at-home orders, there has been a significant increase of remote workers. Approximately 31% of workers switched from working onsite to working at their home offices by the first week of April. This change created exposure for injuries sustained at the home office.

On March 19, Gov. Gavin Newsom became the first governor to issue a stay-at-home order mandating all individuals to stay at home due to the pandemic unless they were essential critical infrastructure workers. Consequently, some of the nonessential employers were forced to shut down, lay off or furlough their workers, and others required all workers to work remotely.

Employers must manage workers' compensation risks arising from remote employment, including maintaining oversight, ensuring that a worker's home workstation is compliant with health and safety policies, and the possibility that a remote worker is performing his or her job duties outside of normal business hours.

Employers have less control over home office setups, including the tools, chair and desk that the remote worker is utilizing on a day-to-day basis than they do for a worker on their premises. For example, a remote worker may not have the appropriate ergonomic equipment in their home office, which increases the potential for a work-related injury. The Occupational Safety and Health Administration estimated approximately a third of dollars spent on workers' compensation to pertain to claims involving ergonomic injuries, specifically musculoskeletal disorders. If a remote worker is consistently in an uncomfortable posture for a prolonged period of time, they may

develop pain in the joints and muscles in the upper extremity, lower extremity or back. To reduce the workers' compensation risks associated with remote employment, OSHA recommends employers establish an ergonomic process that consists of training workers, providing management support, and encouraging early reporting of work-related injuries.

There is a projected increase in the number of claims resulting from injuries workers sustain while working remotely. The fact that the injured remote worker did not sustain the injury on the employer's premises does not change their eligibility for workers' compensation benefits. The injured worker is eligible to receive the same workers' compensation benefits for an injury sustained at the home office as they would for an injury sustained onsite.

Whether an employer is ultimately liable for an injury sustained at home, as lawyers say, depends. The first consideration is determining whether the injured worker's home office is a "second jobsite." Pursuant to the California Workers' Compensation Appeals Board, the home is a second jobsite "if the circumstances of the employment — and not mere dictates of convenience to the employee," require work to be performed at home. *Wilson v. WCAB*, 41 Cal. Comp. Cases 76 (1976). On the other hand, if the worker decides to work from home out of personal convenience and not for any particular benefit to the employer, the employer or insurance carrier would not be liable for any injury sustained while the worker is working from home. When a claim is filed, it is essential for the employer and insurance carrier to evaluate the extent the remote employment is serving the employer's interest before denying or accepting liability for the injury.

For example, one injured worker worked from home to timely translate depositions after normal business hours since she was not able to work uninterrupted at the office. The em-

ployer expected the injured worker to promptly translate the depositions, and for that reason, the injured worker took the depositions home after hours to benefit and serve the employer's interest. Despite the injured worker not receiving paid overtime for the depositions translated after hours at home, she commonly took longer compensated lunches for working the extra time. Additionally, the employer was aware that the injured worker regularly translated depositions from home and approved of it. The employer's implied approval of the injured worker's remote work sufficed in establishing her home was a second jobsite. *Bramall v. WCAB (Dunnington)*, 43 Cal. Comp. Cases 288 (1978).

Similarly, the board held that an injury sustained at home while working remotely may be considered work-related if the employer is aware of the remote employment and gives express or implied approval. *Santa Clara Valley Transportation Authority v. WCAB (Tidwell)*, 82 Cal. Comp. Cases 1514 (2017). Employers who have directed workers to work remotely in compliance with the stay-at-home order during the COVID-19 pandemic have provided their express approval for purposes of establishing the home as a second jobsite. Employers may argue that the injury did not occur when the worker was working at home during normal business hours. Unfortunately, it is difficult for the employer to conclusively prove that the injury occurred outside of the course of employment as there is lack of oversight and supervision at the worker's home office.

Furthermore, whether the injury occurs on the employer's premises or the worker's home office, the parties to a workers' compensation claim need to consider the applicability of the personal comfort doctrine. The employer or insurance carrier may have liability for an injury that did not occur when the worker was performing his or her job duties. The California Supreme

Court defines the personal comfort doctrine as acts "necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment." *Whiting-Mead Commercial Co. v. Industrial Acci. Com.*, 178 Cal. 505 (1978). The acts necessary to the life, comfort and convenience of the worker include, "eating lunch, getting a drink of water, smoking tobacco where not forbidden by the employer, attending to the wants of nature, changing to or from working clothes." *Fireman's Fund Indem. Co. v. Industrial Acci. Com.*, 39 Cal. 2d 529 (1952). Thus, the employer and/or insurance carrier have exposure for injuries sustained while the worker is performing acts necessary to his or her life, comfort and convenience when working onsite or offsite.

Based on the foregoing, the outcome of Newsom's stay-at-home order is projected to benefit injured remote workers in their claims. In sum, we can anticipate the claims filed for injuries sustained at home during the COVID-19 pandemic to result in an overall increase in workers' compensation costs. ■

Neelu K. Khanuja is
founding partner of Khanuja Law Firm.

