How to Control New York WC Claims For Remote Workers

Presenters
Michael F. Vecchione, Esq., Managing Partner
Vecchione, Vecchione, Connors & Cano, LLP
Jeffrey Stagg, SVP, National Claims Practice Leader
NFP

November 18, 2021
Please note that the following is intended to be used for general guidance purposes only — it is not intended to constitute legal advice, nor is it a dispositive position on coverage. Each claim is subject to review by the applicable insurer and coverage is dependent upon the terms and conditions of your specific insurance policy.
Introduction

• Remote workers are not a new phenomenon, but Covid-19 has significantly increased the number of workers working remotely.

• Existing case law is a guide to defending claims of remote workers.

• An accident at home is similar to an unwitnessed accident on the employer’s premises.
To be compensable under the Workers’ Compensation Law, an accidental injury must arise both out of and in the course of a claimant’s employment.” (Matter of Docking v Lapp Insulators LLC, 179 AD3d 1275, 1276 (2020)(citations omitted); See Workers’ Compensation Law Section 10(1). Matter of Button v Button, 166 AD3d 1258, 1259 (2018). There is no requirement that the underlying activity “be done at the employer’s direction or…directly benefit the employer.” For the resulting injury to be compensable (Matter of Purdy v Savin Corp., 135 AD2d 975, 976 (1987); See Matter of McFarland v Lindy’s Taxi Inc., 49 AD3d 1111, 1113 (2008), and “accidents that occur during employee’s short breaks, such as coffee breaks, are considered to be so closely related to the performance of the job that they do not constitute an interruption of employment.” Matter of Pabon v New York City Tr. Auth., 24 AD3d 833, (2005); accord Matter of Marotta v Town & Country Elec., Inc., 51 AD3d 1126, 1127 (2008).
• Matter of Capraro v Matrix Absence Management, 102220 3rd Dept AD sets forth the standard to determine the compensability of remote worker claims.

• In Capraro, the claimant purchased new office furniture for his home and was injured while carrying the furniture into his house. The employer had previously declined to purchase the furniture and the claimant purchased it on his own. The Judge and Board disallowed the claim. However, on appeal the Appellate Division rescinded the Board’s decision and referred the claim back to the Board to utilize the above standard.
Employees who work from home outside the direct physical control of their employers are potentially able to alternate between work-related and personal activities when they choose. For this reason, injuries sustained from employees working from home should only be found to be compensable when they occur during the employee’s regular work hours and while the employee is actually performing their employment duties or on a short break or using the bathroom. Injuries which occur while the claimant is not actively performing his or her work duties should be found to have arisen from “purely personal activities that are outside the scope of employment and not compensable.” (Siting Matter of McFarland supra).
The “home office exception” first set forth in Hille is now over 50 years old. While it is established in the New York Workers’ Compensation Law that injuries which occur at home may be deemed work-related and compensable, Appellate Division decisions and recent decisions of the Board demonstrate that the facts and circumstances of such claims will be carefully scrutinized. In recognition of the work-related and personal tasks that can take place in someone’s home, the issue of whether an injury arises while the employee is actually performing work-related duties at the time an injury occurs will turn frequently on the facts and circumstances involved.
Investigation/Remote work Guidelines

• Investigations into claims of remote workers are difficult, but not impossible. The record must be developed to determine exactly what the claimant was doing at the time of the accident and where they were.

• Establish whether the activity that caused the injury was work-related or personal.

• It is important for employers to develop clearly defined work hours, with possible clocking in and out for breaks, clearly defined employment duties while working from home, and documentation of what items, such as computers or furniture, will be covered by the employer.

• Employers should consider providing assembly and setup of any home office items supplied or directed by the employer.
Notice of Accident

As soon as the employer receives notice of an accident, the injured worker should be asked to provide a detailed written history of the incident, including the time, place and circumstances surrounding the incident, so the event is well documented to allow for proper review by the Workers’ Compensation Board for compensability.
Generally, carriers view a virtual workforce as less risky than being in the office. However, underwriters will look for the employer to have a formal virtual workforce program in place that addresses overall safety and ergonomics. If the employer of virtual employees can demonstrate that they have a solid program in place, the carrier’s underwriter would view that as favorable in their evaluation of the risk presented by that employer.
Employers can reduce the potential for work-related injuries for a remote workforce. Establish a clear telecommuting policy which establishes a designated work area, proper workstation, ergonomics, the hours of work including breaktimes and the general workflow process. The policy should also include either a home inspection or at minimum a survey to address and rule out any hazards. All remote workers and their managers should sign off on the telecommuting agreement and there should be regular compliance checkpoints to assure that the policy is being followed. The manager should communicate frequently to assure well-being and to keep the worker connected to the workplace.
When a remote worker is injured, is it automatically deemed covered?

The burden of proof is on the remote worker to establish their injury occurred in and out of the course of employment before it will be deemed compensable.
Would it be covered if a remote worker is on a break or taking a lunch in the remote workplace/their home and sustains an injury?

Generally, the Workers’ Compensation Board will allow Workers’ Compensation benefits to be paid for injuries sustained during minor deviations from work activity such as when going to the bathroom, taking a break or getting a quick lunch at the remote worksite.
If my remote worker lives in another state from where the company is located, what jurisdiction will the claim be in?

If the remote worker lives in another state from where the company is located, each state has different rules on whether it will accept jurisdiction of the claim. It is important to know the rules for jurisdiction for each state that you have remote workers. It is important that employers keep their brokers informed of the remote workers locations in order to insure proper workers compensation coverage.
If my remote worker fails to tell me about an injury and then reports it late, will that bar them from coverage?

Most states have very specific rules for the timeframe that an injured worker must notify their employer of a workplace injury. Claims can be barred if late notice is provided by the worker to the employer. We encourage employers to report workplace injuries immediately. This helps to move the injured worker quickly into the recovery process and gives the carrier every chance to investigate and control the claim.
Compensability of Covid-19 Claims

Traditionally viruses are treated as occupational diseases.

For an occupational disease to be compensable, the employment must be the hazard, not a co-employee or customer.
• Matter of Goldberg v 954 Marcy Corp. (276 N.Y. 313) establishes the definition of “occupational disease” as “one which results from the nature of the employment…conditions to which all employees of a class or subject.

• If a worker contracts a disease such as Covid-19, or as in the past, tuberculosis, it is important to know from whom they contracted the disease. Contracting a disease from a coworker is not compensable. That is the holding in the Court of Appeals in Paider v Park East Movers, 19 N.Y. 2d 373 (1967). Paider is still good case law as the Court of Appeals has not overruled or even questioned its holding in over 50 years.
The Board uses the case of Middleton v Coxsackie Correction Facility, 38 N.Y. 2d 130 (1975) to circumvent the occupational disease standard for compensability.

In Middleton, the claimant, a corrections officer, was exposed to one specific inmate who had a tubercular cough. He developed tuberculosis shortly after a lengthy exposure to the inmate and died within a few days of contracting tuberculosis. The hazard was the person who he was exposed to as part of his job. That is what made the claim and death compensable. As opposed to Paider, here the hazard was the job and not a coworker.
Theory of Prevalence

- The Board uses a theory of prevalence to judge the compensability of Covid-19 claims. Prevalence is determined by looking at the number of people with the condition (Covid-19) and the total population of at the facility where the employee worked.

- Employers must develop if exposure to Covid-19 was more likely to be exposed at work or outside of work. It is important to obtain information about an employee’s family situation (other family members who had Covid-19 and when they were diagnosed), what activities was the employee engaged in during the two weeks prior to contraction and whether or not they wore masks or other protective gear in public.
Conclusion

• Investigations should involve the claimant’s activities and exposures outside of work.

• Employers must document whether any exposures occurred at work.

• New York has not passed any new legislation covering Covid-19 claims.
Thank You.