

# Shelter in Place: Liability in the Post-Covid-19 Remote Workplace

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# Roadmap

- ▶ Telecommuting Prior to COVID-19
- ▶ AOE/COE
- ▶ Important Doctrines
- ▶ WFH: Where are we now?
- ▶ Potential Issues in a Work-From-Home Environment
- ▶ Addressing WFH Claims
- ▶ Employer Defenses
- ▶ Role of Ergonomics
- ▶ Potential Solutions and Best Practices

# Telecommuting on the Rise

- Even before COVID-19, more and more people were working from home.
  - 159% increase in remote work from 2005-2017. (<https://www.forbes.com/sites/cognitiveworld/2020/03/09/a-deep-dive-into-remote-work-for-our-future-of-work/#4e372de21843>)
- Since COVID-19, telecommuting has increased in the United States.
  - A study conducted from 4/1/2020-4/5/2020 found that over one third of workers responded to the pandemic by shifting to remote work. (*COVID-19 and Remote Work: An Early Look at US Data*, Erik Brynjolfsson MIT, Stanford & NBER, John Horton MIT & NBER, Adam Ozimek Upwork, Daniel Rock MIT, Garima Sharma MIT, Hong Yi Tu Ye MIT, April 8, 2020)
- Telecommuting will probably continue to increase.
  - A 3/30/2020 survey by Gartner, Inc. showed that 74% of CFOs intend to shift some of their employees to work from home permanently. (<https://www.gartner.com/en/newsroom/press-releases/2020-04-03-gartner-cfo-surey-reveals-74-percent-of-organizations-to-shift-some-employees-to-remote-work-permanently>)

# Basic AOE/COE Concepts

- Conditions of Compensation Liability (LC 3600)
  - AOE/COE: “[A]t the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.” (LC 3600(a)(2))
  - Proximate Cause: “[T]he injury is proximately **caused by the employment.**” (LC 3600(a)(3))
- Broad interpretation of what is incidental to employment
  - A service to the employer, or a reasonable belief that the activity is contemplated by the employment contract.
  - The employee's work places her into a place of danger.
  - The risk of injury does not need to be foreseeable or peculiar to the employment.
  - The risk does not need to be within the employer's control.

# Injuries at Home: Important Doctrines

- Generally, injuries occurring outside of work are not compensable.
  - But this is based on the premise that the employment relationship is suspended when the employee is not at work. The general rule assumes the employee is not working at home.
- Important doctrines:
  - **Going and Coming Rule**
  - Dual Purpose Doctrine
  - Special Missions
  - Commercial Traveler Rule
  - Personal Comfort Doctrine

# Going and Coming Rule

- Injuries while going to and from employment are not compensable because going to and from employment is not a service that benefits the employer. (*Ocean Acci. & Guarantee Co. v. Industrial Acci. Com. (Slattery)*, 173 Cal. 313 (Cal. 1916))
- This only applies to an ordinary commute to a fixed place at a fixed time. (*Hinojosa v. Workmen's Comp. Appeals Bd.*, 8 Cal.3d 150 (Cal. 1972))

# Dual Purpose Doctrine

- The going and coming rule does not apply to injuries resulting from the combined performance of the employee's business and the employer's business unless the employee was not serving the employer either directly or indirectly.
- Although this is an exception to the going and coming rule, the courts could treat it as independent authority for the compensability of at-home injuries.

# Dual Purpose Doctrine

- *Dimmig v. Workers' Comp. Appeals Bd.*, 6 Cal. 3d 860 (Cal. 1972)
  - Employee killed in a car accident while returning home from night classes.
  - Employee believed his employment was conditioned on continued attendance at night classes. The employer did nothing to dispel his belief.
  - The trial judge and the WCAB denied the claim.
  - The Court held that the injury was compensable even though the employee was on his way home from the night classes, because the trip was part of a special activity that was within the course of the employment.
  - The employer received a benefit from the employee's attendance at night classes, so an injury sustained while driving to and from the classes fell within the course of his employment.

# Dual Purpose Doctrine (Secondary Jobsite)

- *Wilson v. Workers' Comp. Appeals Bd.*, 16 Cal. 3d 181 (Cal. 1976)
  - After driving her children to school, a teacher was on her way to work with class supplies and graded papers in her car when she was in a car accident.
  - The trial judge found the claim compensable. The WCAB disagreed.
  - The Supreme Court said that this was an ordinary commute. The employer's implicit requirement to work beyond classroom hours did not require labor at home. There was no claim that the facilities at school were not sufficient to permit completion of the work.
  - The Supreme Court looked to the circumstances of the employment – not the convenience of the employee – to determine whether the home was a secondary jobsite such that the going and coming rule did not apply.

# Dual Purpose Doctrine (Secondary Jobsite)

- *Bramall v. Workers' Comp. Appeals Bd.*, 78 Cal. App. 3d 151 (Cal. App. 4th Dist. 1978)
  - Legal secretary injured in a car accident on her way home from work.
  - Her car contained two long Spanish depositions, which she was taking home to translate. She could not complete this work in the after-hours environment of the office.
  - She said that she brought the work home for her own convenience and that she also had to go home to make dinner for her family.
  - The court of appeal said that it was sufficient that the business purpose was a concurrent motivation for the decision to take the depositions home for translation and that, unlike *Wilson*, there was evidence that the employee could not complete her work at the office.
  - If the trip involves an incidental benefit to the employer in excess of those common ordinary commutes, then it falls within the dual purpose doctrine. However, if the employee is going home to do a mere “tidbit” of work, then the going and coming rule applies.

# Dual Purpose Doctrine (Secondary Jobsite)

- *Santa Rosa Junior College v. Workers' Comp. Appeals Bd.*, 40 Cal.3d 345 (Cal. 1985)
  - Employee was a math teacher who was killed in a car accident on his way home from work. He was driving from Santa Rosa to Ukiah. He was going to grade papers that evening. He worked at home on the evenings regularly. His home had an area set aside as his workspace. Other faculty worked at home frequently due to frequent disruptions on campus. The employer did not encourage or discourage working from home.
  - The trial judge did not find the claim compensable. It was entirely the employee's choice to work at home. The WCAB held that the nature of the work and the frequent interruptions from students and phone calls "essentially required" the employee to maintain a second jobsite at home.
  - The Supreme Court disagreed. There is no "white-collar" exception to the going and coming rule. Such a rule would "extend workers' compensation benefits to workers injured in their homes themselves, as well as en route to and from their regular workplaces."
  - Working from home was the employee's choice. The employer did not require it.

# Dual Purpose Doctrine (Secondary Jobsite)

- *Warner v. Workers' Comp. Appeals Bd.*, 77 Cal. Comp. Cases 9 (Cal. App. 2d Dist. 2011) (Unpublished)
  - Los Angeles County firefighter on Catalina Island. Employee required to live on the island and respond to emergencies twenty-four hours per day.
  - Employee does not live at a fire station because there is no room for him. He receives a stipend to offset increased cost of living.
  - Employee works scheduled times at the fire station on the weekdays but is not at the fire station on weekends when he is on call.
  - Residents know he is a firefighter and sometimes go to his house for assistance. When they do, they walk through a wisteria-laden path.
  - On a weekend, the employee was on call at home when his wife asked him to help her trim the wisteria, which grows in the pathway to his house. If it is not trimmed, it will hit people walking on the pathway in the face. Injured occurred while trimming the wisteria.

# Dual Purpose Doctrine (Secondary Jobsite)

- *Warner v. Workers' Comp. Appeals Bd.*, 77 Cal. Comp. Cases 9 (Cal. App. 2d Dist. 2011) (Unpublished) (cont'd)
  - Trial judge found the claim not compensable because “trimming the wisteria was far removed from the reasonable contemplation of the employment.” The WCAB agreed because trimming the wisteria was purely a personal act and not a service to the employer.
  - The court of appeal disagreed. The employee was “required to work at home every other weekend because there is no place for him to stay at the fire station.” Just before the injury, he had finished some paperwork in his home office and was on his way to inspect equipment on a fire truck. The county also requires firefighters to maintain fire station grounds. Trimming the wisteria ensures residents have safe access to the employee's house and allows him to reach his fire truck in a safe and timely manner.
  - Although his wife asked him to help trim the wisteria, he was “engaging in an activity that benefited both himself and his employer.”

# Dual Purpose Doctrine (Secondary Jobsite)

- *Warner v. Workers' Comp. Appeals Bd.*, 77 Cal. Comp. Cases 9 (Cal. App. 2d Dist. 2011) (Unpublished) – Dissenting Opinion
  - Doing some work at home is not conclusive. The employer did not require the employee to work at home. Thus, the secondary jobsite exception does not apply. “Even if the home were a secondary jobsite, that does not mean that every injury at that site is compensable. If the employee is performing a personal act when injured, the injury would not necessarily be compensable.”
  - There is no evidence that the employee's wife or the employee cut the wisteria as a safety measure. “If trimming vegetation in a personal residence arises out of the employment, so would any activity in or around the residence.”

# Special Missions

- The going and coming rule does not apply where the employee is on her way to or returning from a special mission or errand for the employer, unless the injury occurs during a substantial deviation for personal purposes
- The special activity is expressly or impliedly required by the employment.
- “Special” means and extraordinary relative to the routine duties of the employment.

# Special Missions

- Factors to determine whether a deviation is substantial (*Trejo v. Maciel*, 239 Cal. App. 2d 487, 496-497 (Cal. App. 1st Dist. 1966))
  - Whether the route could be used for both the employee and the employer's purposes.
  - The amount of time consumed in the personal activity.
  - The nature of the deviation.
  - Whether the deviation induced the employee to go on the special mission.
  - Whether the deviation related to the performance of the errand.
- Example of a substantial deviation: *Fleetwood Enterprises v. Workers' Compensation Appeals Bd.*, 134 Cal. App. 4th 1316 (Cal. App. 4th Dist. 2005)
  - Accident occurred after the business portion of a trip was complete. The employee and his wife were sightseeing in Italy. There was no continuing or resumed business purpose at the time of the injury.

# Commercial Traveler Rule

- If the employment necessitates an employee's trip, then an injury during the trip is compensable even if there are both personal and professional reasons for engaging the injurious activity.
- The activity at the time of the injury must bear some relation to the purpose of the employment.
  - Being in the company of the employer for purely social purposes at the time of the injury is not within the course of his employment. *Dalgleish v. Holt*, 108 Cal. App. 2d 561 (Cal. App. 3d Dist. 1952)
  - Getting medical treatment for a preexisting, non-industrial medical problem is not in the course of employment. *LaTourette v. Workers Compensation Appeals Bd.*, 17 Cal. 4th 644 (Cal. 1998)
  - Substantial deviation to go sight-seeing. *Fleetwood Enterprises v. Workers' Compensation Appeals Bd.*, 134 Cal. App. 4th 1316 (Cal. App. 4th Dist. 2005)

# Personal Comfort Doctrine

- Acts performed during work that are necessary for the personal comfort, convenience, or welfare of the employee are within the course of employment whether they are on or off the employer's premises. (*Fireman's Fund Indem. Co. v. Industrial Acci. Com. (Elliot)*, 39 Cal.2d 529 Cal. 1952)
  - These acts, i.e., visiting the restroom, obtaining a drink of water, taking a coffee break, have been found necessary and customary such that they become part of "normal working conditions." (*Elliott, supra*)
- An employee is still within the course of her employment when performing acts necessary to her personal comfort, convenience, or welfare.
  - The act does not have to be part of the employee's work duties.
  - The act does not have to occur on the employer's premises.
  - The act does not have to occur during regular working hours.
- These acts are helpful to the employee's morale and efficiency in performing work duties.

# AOE/COE and WFH: Where are we now?

- ▶ All home-based workers have the same workers' compensation benefits as in-office employees.
  - ▶ Employee must show that he or she was acting in the interest of the employer at the time the injury occurred. Employer's lack of control over the conditions of an employee's home-based work premises is irrelevant.
  - ▶ When an employee's home is also an employee's work premises, it is often interpreted that the hazards an employee encounters when performing work at home are also hazards of his or her employment. Employers are responsible for providing the same safe work environment for telecommuters as for employees who work on company property.
- ▶ General rule: if an employee deviates from performing their job for a personal benefit and is not furthering the business of the employer, then any injury that occurs during the period of deviation is usually not considered within the course and scope of employment and, therefore, is not covered.

# AOE/COE and WFH Potential Scenarios

- Trip and fall at refrigerator
- Horseplay
- Pet care
- Child care
- Repetitive motion injuries
- Lack of witnesses to corroborate
- No security video

# AOE/COE and WFH Potential Scenarios

- ▶ Additional Consideration: Subrogation
  - ▶ Negligence of landlord?
  - ▶ Roommate?
  - ▶ Premises liability?

# Work From Home Issues

# Potential Issues In a Work-From-Home Environment

- ▶ It's difficult for an employer to ensure that the ergonomics of the space that the employee is working from are proper
  - ▶ For example, an ergonomic chair or a desk that has a built-in riser would help minimize the potential effects of sitting at a desk for eight hours, but that's harder to enforce for employees working from home
- ▶ Workspace at home may not be fully dedicated to what the worker is doing
  - ▶ Worker may be sharing work space with their 12-year-old's homework space
  - ▶ This commingling can lead to some awkward workspaces that can lead to injuries over time
- ▶ More difficult to monitor hours worked
  - ▶ Employers see many instances where employees who work from home put in more hours and have a harder time adhering to a set schedule. In turn, they can find themselves getting more tired, which can lead to them not working as safely

# Potential Issues In a Work-From-Home Environment (cont'd)

- ▶ It's harder to disprove injuries stemming from work-from-home injuries
  - ▶ Lack of witnesses
  - ▶ Lack of supervision
  - ▶ Relying on employee to create a safe space for themselves
- ▶ Over time, work-from-home issues can result in potential cumulative trauma injury claims
- ▶ With COVID-19, working from home is more mandatory than optional, placing heavier strain on employers to ensure employees are working in a safe environment

# Ways to Address Work-from-Home Claims

- ▶ Advise employers to implement risk mitigation strategies to help minimize potential claims in the first place
- ▶ Is this really a new injury? Aggravation v. Exacerbation
  - ▶ Aggravation is an increase in the severity of a pre-existing condition where the underlying pathology is permanently moved to a higher level.
  - ▶ Exacerbation is a temporary increase in the symptoms of a pre-existing condition that returns to its prior level within a reasonable period of time.
  - ▶ We can argue that working from home post-COVID for 3 months is really a temporary exacerbation of pre-existing symptoms, such that there is no PD (maybe TD)

# Ways to Address Work-from-Home Claims (cont'd)

- ▶ Assess the time period where the condition allegedly developed –
  - ▶ Is it medically plausible to develop carpal tunnel syndrome after working from home post-COVID-19 for three months? More likely a flare-up of a pre-existing condition?
- ▶ Non-industrial apportionment to work-from-home factors, such as not setting up an ergonomic workstation, working more hours than mandated, etc.

# Employer Defenses & Best Practices

# Employer Mechanisms to Defend Against Claims

- ▶ Risk management and safety strategies
  - ▶ A first line of defense after a cumulative trauma or musculoskeletal claim occurs requires reviewing the injured person's workplace to learn whether the injury could have been avoided, and what measures will prevent a similar future occurrence
- ▶ High-quality, evidence-based medical assessment
  - ▶ To help determine whether the injury is work-related
  - ▶ This involves evaluating how work is accomplished and what tasks they might automate

# Employer Mechanisms to Defend Against Claims (cont'd)

- ▶ Risk mitigation practices + macro view of ergonomics that considers how work gets done and the engineering of production processes
  - ▶ Engineering risk out of jobs and processes, or at least greatly reducing it
  - ▶ Beyond basic ergonomic evaluations and post-offer employment testing
  - ▶ Examples: designing warehouse-type food stores so that workers move entire pallets of products into place with forklifts rather than manually stocking shelves; robotics; automation
- ▶ Administrative Controls
  - ▶ Examples: job rotations reducing the hours workers are exposed to stressful tasks
- ▶ Wellness programs
  - ▶ Particularly helps with people with comorbidities that impact claim severity
  - ▶ There is good data that fitness and overall health have a relationship with musculoskeletal types of disorders

# Looking at Ergonomics

- ▶ Goal of ergonomics:
  - ▶ Per the CDC and National Institute for Occupational Safety and Health (NIOSH), to “prevent soft tissue injuries and musculoskeletal disorders (MSDs) caused by sudden or sustained exposure to force, vibration, repetitive motion, and awkward posture.”
  - ▶ Well recognized that exposure to the above, along with overexertion, microtasks, and other reactions, can be a causative factor to a work injury.
  - ▶ The federal Occupational Safety and Health Administration (OSHA) has a broad category of injuries labeled under MSDs, which includes upper and lower extremity injuries, and impact the muscles, nerves, ligaments, tendons, and blood vessels with ailments ranging from carpal tunnel syndrome and tendinitis to shoulder and lower back strains.
  - ▶ OSHA reported in 2014 that work-related musculoskeletal disorders account for one of every three dollars spent on workers' comp, and the U.S. Bureau of Labor Statistics estimates they account for 34% of all lost workdays.
  - ▶ OSHA also reported that MSDs cost employers \$20 billion annually in direct workers' comp costs and up to five times in indirect costs.

# Role of Ergonomics in Workers' Comp

- ▶ Ergonomic assessments may be used to defeat claims of AOE/COE
  - ▶ *Cole v. WCAB* (2003) 68 Cal. Comp. Cases 813 (writ denied).
    - ▶ Dealt with issue of whether a station was ergonomically correct
    - ▶ A defense ergonomic evaluator, who was retained to controvert AOE/COE, indicated that the applicant's chair was correctly adjusted and that she was provided a lumbar support, thus demonstrating no ergonomic defect with the applicant's chair
    - ▶ As a result, the QME found no aggravation of the applicant's pre-existing degenerative disc disease
- ▶ Poor ergonomics may be deemed as a mechanism of injury
  - ▶ *Jackson v. Shasta Lake*, 2016 Cal. Wrk. Comp. P.D. LEXIS 155 (panel decision).
    - ▶ The Board noted that a "[r]eview fo the records indicate that the claimant was exposed to prolonged periods of time in which she had a suboptimal ergonomic arrangement for her desk, in which she has to raise her arms and shoulders too high, putting her in prolonged postures of cervical extension and shoulder musculature extension leading to increased pain and inability to continue to focus her attention on her work."

# Role of Ergonomics

- ▶ Per the CDC, “[t]o create an ergonomically sound work environment, NIOSH ergonomists and industrial hygienists recommend designing tasks, workspaces, controls, displays, tools, lighting, and equipment to fit employee’s physical capabilities and limitations.”
- ▶ Currently, case law indicates ergonomic equipment not considered medical treatment
  - ▶ *Costa v. SCIF*, 2010 Cal. Wrk. Comp. P.D. LEXIS 126 (panel decision)
    - ▶ The Board indicated, “[w]e are not persuaded that the recommended ergonomic equipment fits within the definition of apparatuses under the circumstances presented here, i.e., where the injured worker needs to have her work station modified at another employer’s place of business for as long as a physician recommends such modification.”
- ▶ Possible future trend?
  - ▶ IMR Decision CM18-0060719 (2018) 83 Cal. Comp. Cases 1628
    - ▶ Ergonomic desk chair is medically necessary and appropriate
    - ▶ MTUS ACOEM guidelines state, “It is often then helpful to discuss practical strategies for modifying the worksite to accommodate the worker and strategies to reduce the risk of recurrent injury, including addressing toxicological exposures, ergonomic factors, supervision, interpersonal factors, personal protective equipment, and task design.”
    - ▶ IMR noted, “The requested ergonomic desk chair does qualify as a practical strategy for reducing the risk of recurrent injury. The current request is medical necessary.”
- ▶ Long run game: engaging in proper ergonomics promotes safety in the workplace and additionally reduces the risk of injury, thus resulting in cost savings over time

# Role of Ergonomics: Possible Future Trend?

- ▶ IMR Decision CM18-0060719 (2018) 83 Cal. Comp. Cases 1628
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# Role of Ergonomics Outside Workers' Comp: CA Ergonomics Standard

- ▶ 8 C.C.R. § 5110: Standard triggered when an employer has at least one employee experiencing a repetitive motion injury resulting from performing identical tasks and determined by a doctor to be work-related
  - ▶ If triggered, a written program must be developed covering a worksite evaluation, control of the exposures that caused the motions, and plans for training employees
- ▶ Long run game: while the employer is not automatically liable for ergonomic assessments and adjustments without being prompted, engaging in proper ergonomics promotes safety in the telecommuting space and additionally reduces the risk of injury, thus resulting in cost savings over time

# Potential Solutions and Best Practices

- ▶ California law requires employers to provide “a healthful and safe” work environment even when telecommuting from home (LC 6400)—potential solutions and best practices to ensure this include:
- ▶ Telecommuting policy that outlines the employer’s expectations for employees who work from home, including language requiring remote workers to maintain a safe work environment
- ▶ Contracts between employers and employees establishing ergonomic standards that must be met when working from home
- ▶ Encouraging the employee to find a **dedicated workspace** where they don’t have to keep one eye out on their children, for example, will ensure that they minimize distractions, which means a more efficient, less distracted and safer employee
- ▶ Training related to workstation setup and safety measures

# Potential Solutions and Best Practices

- ▶ When appropriate and possible, periodic checks of employee home offices, such as occasional in-person/video evaluations to confirm standards are met, to help identify and eliminate work area safety hazards. At very least have them fill out a survey
- ▶ Create safety checklist for home office and provide training to employees regarding safe workstations
- ▶ Encouraging open communication/follow-up between management + employees
- ▶ Provide clear guidelines on their obligation to report all work injuries timely and provide guidance, in writing, who they should report injuries to while working from home
- ▶ If feasible, have employees keep daily log of actual time worked, including time taken for personal breaks and meal breaks

# Provide Practical Ergonomic Tips

- ▶ The same safety and productivity risks that apply to office workers still affect remote employees (Cal OSHA has determined that 1/3 of dollars spent in workers' compensation is due to ergonomic injuries)
- ▶ Continue to advise employees to practice good ergonomic habits to avoid injuries:
  - ▶ Create a dedicated work space with a table or desk as a main work surface
  - ▶ Ensure proper seating (it doesn't always have to involve expensive office chairs!)
  - ▶ Ensure equipment is positioned to promote a comfortable neutral posture to reduce potential discomfort
  - ▶ Maintain movement—it's your friend!

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# Thank you !



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