Working from Home…What Injuries are Compensable?

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In this new and largely unchartered work climate, businesses are seeing an increasing number of their employees working from home. Some of these will be temporary, but many will likely transition into a new culture of permanent remote workers. As this new work environment evolves, it is important to be aware of potential for injury, what would be considered "at work" vs. "off work" and remain ever mindful of best practices for employees and employers in this age of remote employment.

Kentucky generally follows the "going and coming" rule, which holds that an employee injured while traveling to or from work is not within the scope of employment. Thus, injuries that occur during the period of travel while the employee is off the clock would not be compensable. However, there are exceptions to that rule which include: the traveling employee, activities which involve service to the employer and the employer conveyance exception. Traveling employees are those whose work requires travel to perform the work activity. These include traveling salespeople, home health workers, etc. Those workers are considered in the course and scope of their employment at any time they are in continuous travel performing a service to the employer.

The second exception is that of an individual who is performing a service to the employer. A traveling employee is just a specially carved out subset of the "service to employer" exception which is more broadly interpreted. The service to the employer exception applies when travel is not necessarily a part of the employee's work, but they are performing a task which benefits the employer. An example of this exception dealing with at home working may be a situation where the employee is going to drop off company mail and is involved in an accident.

The signature Kentucky case regarding this exception is *Receveur Construction Co. v. Rogers*, 958 SW 2d 18 (Ky. 1997). In Rogers, the employer provided a company truck and a gas card to the superintendent and benefited from his use of the truck which allowed him to start his days earlier and work later by avoiding a stop at the office. It is important to note, however, that injuries that occur while using a company vehicle are not always compensable (i.e. if running a purely personal errand) just as a company vehicle is not required to make an activity "work-related" as we see in the example in which the employee is performing a task that is a direct service to the employer.

The final exception to the going and coming rule is that of the employer conveyance. This exception involves use of a vehicle under the employer's control, such as a transportation bus. In these cases, it is often the situation that even the slightest amount of "control" by the employer will tie the injury to employment. These cases largely overlap the "service to the employer" with the conveyance such as cases where an employer has directed the employee to ride with a co-worker to work.

The second part of our analysis is determining when the employee is in "the course and scope of employment." The determination of when the employment "begins" is largely governed by the operating premises rule. This rule stands for the notion that once the employee reaches the employer's physical premises, he comes within the protection of the statute, and thus an injury which occurred on the premises would be compensable.

However, this is not a clear-cut determination either. First, there are "gray areas" such as parking lots, general entryways, sidewalks, etc. which may or may not be under the employer's control. The questions in these scenarios are: 1) Is the area for private or public use? 2) Does the employer own, maintain or control the area in question?

A preliminary investigation will usually easily determine whether the area is owned or maintained by the employer. If one or both of those is the case, it will likely be compensable. However, the level of control can sometimes make the determination a little less clear. A typical example of this is when the area is neither owned nor maintained by the employer, but the employer does have some bit of control over the property where the injury occurred. In the case of *Pierson v. Lexington Public Library*, 987 SW2d 316 (Ky. 1999), the court held that a parking garage that was neither owned nor maintained by the public library was within the operating premises because the library leased spaces, and it influenced the employee's decision to park there by providing free parking.

Another such example of control can even be if the employer is able to have some influence over the property manager, cleaning service, etc. who maintains the otherwise public area.

When evaluating "at home" claims it is important to determine at what point the home or remote office becomes the employer's operating premises. This involves analyzing the "personal comfort" doctrine. This doctrine subscribes to the notion that an employee can step away from work momentarily to address his/her own personal needs and still be within the course and scope of employment. This would include things like a bathroom or smoke break, hanging out in the break room while on the clock or ceasing outside employment while taking shelter during inclement weather. Injuries which occur during these brief breaks will almost always be found compensable.

At home or remote work scenarios will likely see a surge in and expansion of the personal comfort doctrine as we see more and more employees taking fewer formal breaks and working non-traditional hours in this "less formal" work environment. The prevailing case which carves out an exception to the personal comfort doctrine is *US Bank v. Schrecker*, 455 DE3d 382 (Ky. 2014). In Schrecker, the employee worked in an office building on a busy four lane road. She was entitled to a 1-hour paid break and two paid breaks a day. The employees were permitted to leave during lunch and would often cross the street to fast food restaurants during their break.

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On the day in question, the employee signed out for her paid afternoon break to get lunch and crossed the street where there was no crosswalk. She was struck and injured. The court turned to *Larson's Workers' Compensation Law* treatise (Larson's) for guidance since there was no case law on point in Kentucky. Larson's indicated that not only the retention of authority by the employer was a factor, but also the hazard encountered by the employee off premises. If there is a hazard which does not flow from the employment condition, the employer would not be liable.

Overall, the court found the activity to be short in duration and paid and possibly encouraged, which would seemingly make the activity applicable under the personal comfort doctrine. However, the court was ultimately persuaded by the fact that the employee voluntarily exposed herself to a hazard (i.e. jaywalking in heavy traffic), which involved a drastic deviation from normal activities or protection under the personal comfort doctrine.

Finally, when discussing remote injuries, it is important to integrate not only the deviation analysis in *Schrecker*, but that of the substantial deviation rule in general. The claim will not be compensable when the employee makes a substantial deviation from an otherwise work-related mission in order to conduct personal business without benefit to the employer. While all the activities leading up to and following the personal activity may be protected, the employee removes himself from work activity during the period of the deviation. If the incidents of the deviation are operative in causing the accident it will likely be deemed non-compensable. *Ratliff v. Epling*, 401 SW2d 43 (Ky. 1966).

When dealing with the remote working environment, the first question becomes "Is the home/remote workplace considered operating premises under the control of the employer?" If the employee is performing regular work activity, providing a benefit to the employer and not performing a prohibited activity, the answer will likely be "yes." The next question is, "If it is questionable as to whether the activity was in the course and scope of employment, was the employee serving a need of the employer and/or ministering to his own personal comfort"? This is where we are very likely to see an expansion of the personal comfort doctrine to the ever-increasing remote work scenarios.

Based on decisions like *Schrecker*, it is likely that the judges and courts will continue to apply the "standard deviation" principle in reverse. Instead of analyzing the other elements of "control" on the part of the employee, the courts may very well begin to find that so long as the activity was not illegal or prohibited by the employer, the claims will largely be compensable. Courts have declined to make a hard, fast rule that so long as the employee is clocked out and off the premises the claim in non-compensable.

With the remote work claims, it is likely that courts will give deference to the personal comfort doctrine in most cases. There is an obvious rise in employees working non-traditional hours which changes the dynamic of "work hours" and the employers' control, while largely unmonitored, will still be considered in these situations due to the employee's activities providing benefit to the employer.

Best practices for mitigating risks of injuries boil down to communication on the part of the employer and the employee. As physical interaction with our co-workers decreases, interpersonal communication should increase. If there are set policies as to specific work hours and anticipated work activity, those should be clearly established by the employer and followed by the employee as if the employee were specifically present in a workplace. Establishing rules of engagement and diligently working together as a team will promote a healthier at-home work environment and decrease miscommunication regarding workspace, work activities and perimeters of "work."

Finally, activities that are purely for the health and welfare of the employee can still be considered work-related if they are providing a better work environment. Injuries which result from activities such as working out, especially if there is a group challenge or encouragement from the employer, can be work-related if they are ministering to personal comfort or providing a better work environment overall. Employers and employees should be aware of what activities are discouraged or prohibited in the workplace as well as what hazards in the home workplace are or are not incident to employment.

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