

LASTING EFFECTS OF CORONAVIRUS ON WORKERS' COMPENSATION AND REMOTE WORKERS

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IS COVID-19 COMPENSABLE?

- “Accident” means an undesignated, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. K.S.A. 44-508d
- Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases, except that compensation shall not be payable for pulmonary emphysema or other types of emphysema. K.S.A. 44-5a01



IS COVID-19 COMPENSABLE?

- Claimant must submit medical evidence establishing a probability that working conditions caused the disease.
- Claimant does not have burden to pinpoint the specific evidence, but rather with the totality of the evidence, establish a probability that the claimant experienced a greater risk of exposure during employment than in non-work activities.



2 COMMON THREADS TO COMPENSABILITY IN OCCUPATIONAL DISEASE:

- The disease was either objectively present at the workplace, or more likely than not present.
- Even without the unequal exposure test, the risk of regular population contracting the disease was extremely low.
 - Ex :A COVID outbreak at work cuts in favor of employee.



EXAMPLES OF OCCUPATIONAL DISEASE CASES:

Box v. Cessna Aircraft Co., 236 Kan. 237, 244, 689 P.2d 871, 878 (1984)

- Exposure to paint fumes led to pulmonary disease
- There was ample substantial and competent evidence to support the trial court's finding that claimant was engaged in an occupation or employment which exposed him to a special risk, a special and peculiar hazard of the disease from which the trial court found he suffers



EXAMPLES OF OCCUPATIONAL DISEASE CASES:

Armstrong v. City of Wichita, 21 Kan. App. 2d 750, 759, 907 P.2d 923, 929 (1995)

- We hold that in a workers compensation case involving occupational disease, a claimant is not required to prove that his treating physician's opinions, diagnosis, or treatment satisfy either the Daubert or the Frye tests.

Baldwin v. Jensen-Salsbery Lab'ys, 10 Kan. App. 2d 673, 675, 708 P.2d 556, 558 (1985)

- Maintenance worker contracted brucellosis when he cut his hand and became infected from conditions existing in the plant.



CAN EMPLOYERS MANDATE THE VACCINE?

- Yes, for now
- Kansas
 - Proposed legislation would prohibit employers from taking adverse action against employees who refuse to get vaccinated
 - Other proposed legislation would prohibit individuals from being forced or pressured to take an “investigational” or experimental medication, which is aimed at COVID-19 Vaccines
- Missouri
 - Proposed legislation would prohibit public employers from requiring vaccination
 - Other proposed legislation would prohibit employers from requiring immunization against contagious illnesses



COVID-19 VACCINE

- What about the vaccine?
- Is an employee's adverse reaction caused by a vaccination which was received at her place of employment is compensable?



COVID-19 VACCINE

An adverse reaction is likely compensable if:

- An employer provides, arranges, or encourages inoculation.
- The result of the employee receiving the vaccine is mutually beneficial.
- If the employer has implemented a vaccine mandate, it would likely be an easier case.



DOYLE V. LAKELAND REGIONAL HOSPITAL, 2011 WL 6156776 (LIRC)

- Claimant was compensated after sustaining an adverse reaction after receiving the flu vaccine administered by employer's agent on employer's premises. Employer did not require employees to have flu shots, but because the reactions to the shot were an "unexpected traumatic event" identifiable by time and place of occurrence, produced objective symptoms of an injury, and was during a single work shift, the adverse reaction was deemed an accident.
- The Commission found a clear connection between the work and injury and said there was no need to consider whether the worker would have been equally exposed to the risk in non-employment life (as the employee received the vaccine on the premises of employer).



Pichainarong v. Ford Motor Co., 2009 WL 1904573 (LIRC).

- Merely providing access to the vaccine and not so much as advising employees to be inoculated could be a different case: more along the lines of denied compensation. In *Pichainarong*, the employer merely arranged for employees to receive flu vaccine free of charge on its premises but neither required nor encouraged receiving it. Further, employees were required to wait for breaks to get vaccinated.



PREVIOUS CASE LAW ON VACCINATIONS

- The Court has held that where the employer creates the need for the flu vaccine to prevent infection of patients and other employees, that the hazard or risk that may result from a flu vaccination is related to employment.



Rhodenbaugh v. Kansas Emp. Sec. Bd. of Rev.

- Employee owed a duty to the hospital to follow the safety rule by either receiving the flu vaccine or meeting the applicable exemptions. Her failure to comply with the rule met the statutory definition of job-related misconduct and thus disqualified her for unemployment benefits
- 52 Kan. App. 2d 621, 633–34, 372 P.3d 1252, 1261 (2016)





REMOTE WORKERS



REMOTE WORK

- A **remote employee** is someone who is employed by a company, but works outside of a traditional office environment. This could mean working from a local coworking space, from home, at a coffee shop, or in a city across the world.
- In every business, productivity and efficiency are key in the success of the business. Remote working allows an employee to create a workplace that is the most efficient and productive for them. There must be a debunking of the concept remote workers are in their pajamas watching the Flintstones, and only occasionally monitoring email.



AT HOME WORK SPACES

- May include dining rooms, spare bedrooms, basements, kitchen tables, often nothing like an office environment.
- Employers have no control over remote work spaces to ensure spaces are safe, ergonomic, or to reduce the possibility of injury.



STATISTICS PRE COVID-19



- Working from home had dramatically increased over the last ten years.
- 20% of workers said they worked from home all or part of the time, 6% did so full time
- Forbes believed the U.S. Work force would soon consist of 50% remote workers

STATISTICS POST COVID-19

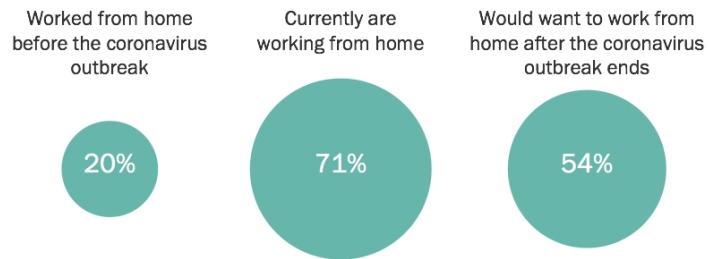
- As of April 2020, 67 percent of organizations reported an increase in spending on web conferencing software. Companies with digital output are quick to understand the necessity of a reliable software solution given that remote work is a trend that is here to stay beyond the Covid-19 pandemic.
- More than 4.3 million people in the USA work remotely, which is 3.2% of the entire workforce.
- Around 16% of companies hire only full-time remote workers, but 44% of them still don't allow remote work at all.



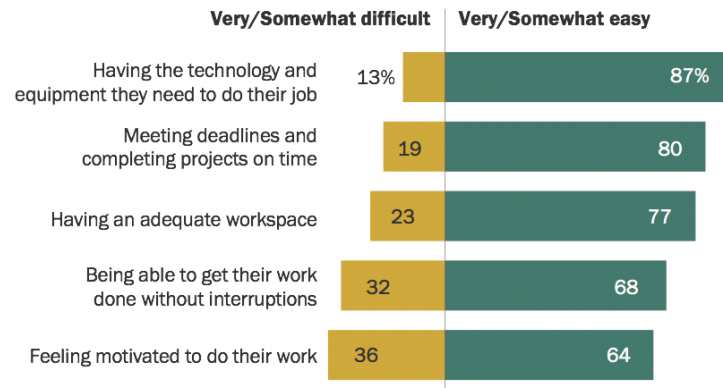
OPINIONS ON WORK FROM HOME DURING COVID

Many workers would like to telework after the pandemic is over; transition to working from home has been relatively easy for many

Among employed adults who say that, for the most part, the responsibilities of their job can be done from home, % saying they ___ all or most of the time



Among employed adults who are currently working from home all or most of the time, % saying that, since the coronavirus outbreak, each of the following has been ___ for them



Note: For bottom panel, share of respondents who didn't offer an answer not shown.
Source: Survey of U.S. adults conducted Oct. 13-19, 2020.
"How the Coronavirus Outbreak Has – and Hasn't – Changed the Way Americans Work"

PEW RESEARCH CENTER

- Survey conducted in October 2020 by Pew Research Center
- Majority expressed desire to continue working from home after pandemic
- Biggest issues were motivation and interruptions
 - Younger workers were more likely to have problems with motivation
 - Unsurprisingly, parents had biggest issues with interruptions
- 36% of respondents indicated that their workplace was open but they chose not to go in



REMOTE WORKERS & COMPENSABILITY

- In general, injuries that occur at home are not compensable. With the increase of remote workers nationwide since COVID, the analysis has become more complicated. In order to be compensable, an injury at home **must arise out of and in the course of the employment.** (K.S.A. 44-508f(3)(B))
- Key requirement: injury must come from a hazard or risk to which the employee **would NOT have been equally exposed outside of, and unrelated to, the employment in normal non-employment life.**



COMPENSABILITY CONTINUED

- An injury has been held to arise out of an in the course of employment when it occurs within the period of employment at a location where the employee would reasonably be engaged in fulfilling the duties of employment or something incidental thereto.
 - Burden is on the **employee** to establish a causal connection between the conditions under which the work is required to be performed, and the resulting accident
- Ordinary daily activities and purely personal likely not compensable
- Mutually beneficial act even if advantage to employer slight is likely to be compensable
- Whether employer requires such action or activity – was the injury sustained carrying out a task that is an integral or necessary part of the employment?



RISK SOURCE ANALYSIS - KS

KING V. ANDERSON NEWS COMPANY (KS)

- Appeals Board for the Division of Workers Compensation in Kansas found that an employee had a compensable claim for an injury that occurred while transporting work materials home in order to work on an employment-related project from home.
- It is likely that courts will apply similar principles in response to the significant increase in employees working remotely as a result of COVID-19.



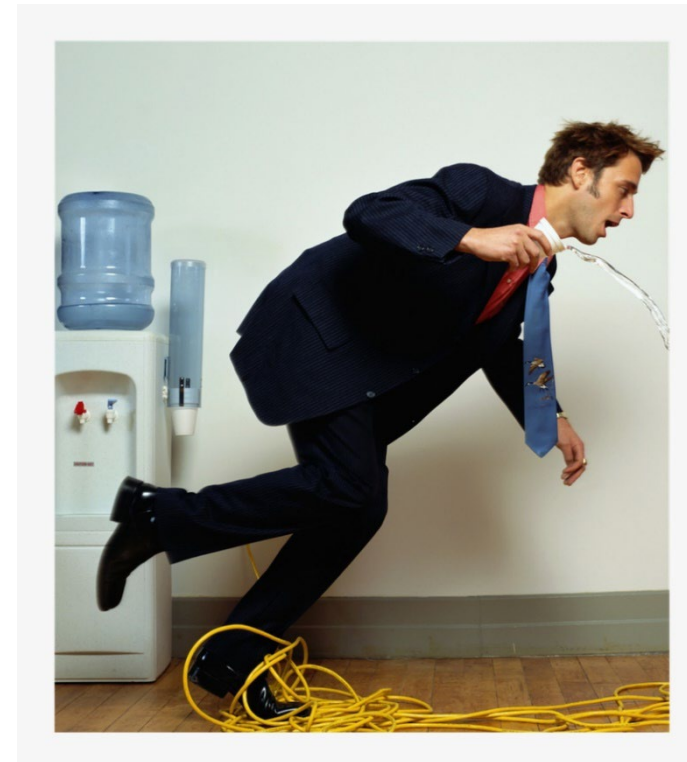
THE FAMILY
Handyman



RISK SOURCE ANALYSIS

Johnson v. Stormont Vail Healthcare Inc., 57 Kan. App. 2d 44, 49, 445 P.3d 1183, 1187 (2019)

- Here, Claimant sustained a “neutral risk” injury when she fell without explanation.
- Injuries that are caused by natural aging or day-to-day activities, injuries from neutral risks with no particular employment or personal character, injuries from risks personal to the worker, and injuries from idiopathic causes are not compensable under our system of workers compensation.



RISK SOURCE ANALYSIS

- three general categories of risks in workers compensation cases:
 1. those distinctly associated with the job;
 2. risks which are personal to the worker; and
 3. the so-called neutral risks which have no particular employment or personal character.
- - Johnson was entitled to workers compensation benefits because under the circumstances, the neutral risks had a particular employment character. The entire statute must be applied—not just one part.



TAKEAWAYS

1. Every case will be very fact intensive
 - Perform a thorough initial investigation (recorded statement, photos)
2. Identify the risk which caused the accident
 - Personal risk or employment-related risk
3. Is the employee equally exposed to this risk in their normal non-employment life?
4. Case law likely to provide guidance as we move forward
 - **Call Karl & Aaron or any MVP attorneys to get updates as case law drops**





Questions?

But seriously.....call us. We
are lonely and miss
human interactions.

