

# Remote Workers & Workers' Compensation Claims

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## Objectives:

- ▶ To gain a general understanding of how the New York Workers' Compensation Law deals with injuries to employees who work remotely.
- ▶ To understand what factors will determine whether a claim is or is not compensable.
- ▶ To understand the way claimant's attorneys will approach claims for remote workers.
- ▶ To review some prior remote worker cases to understand the framework within which the New York Workers' Compensation Board will analyze claims.
- ▶ To understand best practices for an employer to take when they employ remote employees.

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## Is the injured worker at work or at home?

- ▶ Prior to Covid-19 the trend of employees working from home had begun to pose challenges in determining whether an at home injury, for a worker who regularly works from home, is covered under the workers' compensation law.
- ▶ In *Matrix Absence Management*, 2019 NY Wrk. Comp. Lexis 4808 (2019) the Board noted that the distinction between what is work related and what is personal is not always as clear as it might be when the employee works on the employer's premises. This case also noted that the legal standards to address whether an injury taking place in a traditional employer-controlled workspace cannot always be reasonably applied to employees who work from home.



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## Long established framework for dealing with remote injury claims.

- ▶ Cases that provide guidance for remote injury claims began to develop in the late 1960s. The first major case addressed a worker who worked on the employer's premises much of the time, but also worked some of the time from home. That case, *Hille v. Gerald Records*, 23 N.Y.2d 135 (1968) dealt with a death that took place when a worker had been working at a recording studio until 2:30 in the morning and was involved in a fatal accident on his route home. Ultimately, this claim was found to be compensable. And this case is still the leading case that the Board and the Courts will look to in New York State to analyze the injury of a remote worker. The framework and guidance it provided, more than 50 years ago, continues to be wrestled with every time a remote worker case comes before the Board/Courts.


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## Was it a work injury, or a purely personal injury?

*Hille* provided us several key factors to consider including:

1. The work from home must be beneficial to the employer, "not merely personally convenient" for the claimant to be working from home.
2. The "work duties associated with the employees home [must be such] that it can genuinely be said that the home has become part of the employment premises".

These two factors are still often the first two criteria that are looked at when a Board Panel or Court analyze a claim for an at home worker.



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## Hille was meant to be "applied with caution"

### Chance for abuse of this legal rule was anticipated.

- ▶ The majority opinion in *Hille* said the courts in future cases would need to proceed with caution to professional employees, "such as teachers, doctors, lawyers and the like, who have frequent occasion to carry home work of varying degrees of importance and substantiality" and warned that allowing the *Hille* case to be compensable should not result in a "process of gradual erosion, through the device of finding some tithbit of work performed at home".
- ▶ The dissenting opinion thought that the decision was incorrect and was opening the door for claims where there was no reason or necessity for the worker to be working remotely from home and where there is no benefit to the employer in having the employee working from home.



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### Claimant's Attorneys response to at home worker claims/remote worker claims

- The Court's concern in Hille proved to be correct.
  - Claimant's counsel have tried, with some success, to erode the limitations on what will covered in order to have more and more claims covered by workers' compensation.
- Covid-19 and the shift of more and more professional workers not going to the office, but working remotely will increase opportunity to stretch the law further.
- Historically claimant's counsel have tried to make all activities that might even tangentially be connected with work compensable.
- As we come out of Covid-19 employers need to evaluate their business model to determine if it makes sense to return workers to an office setting, or whether it may be more beneficial to have them continue to work from home saving overhead costs and expenses.
- Insurance carriers will need to re-evaluate the risk they bear in a home working environment that may not be as safe as an office and which is not ever really under the physical control of the employer.

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### Hypothetical to see how liability might increase

- Hypothetical injury: Claimant sitting at desk in their office at home. She is on a zoom call with her boss and is discussing an important report that they are about to send to a customer. The only equipment provided by the employer is a laptop computer, paper and pens. The desk, chair, office furnishings and fixtures all belong to and/or have at all times been owned or controlled by the claimant. As the claimant shifts her weight in the chair, the left rear leg of the chair which is in disrepair breaks. When the chair breaks, the claimant falls and hits her head on the desk and dislocates her left shoulder trying to catch herself as she falls.
  - Survey: Will this claim be compensable?

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### The claim will almost certainly be compensable

Analysis: The only possible defense to this claim will be if the employer can show that the at home work arrangement was only provided for the benefit of the claimant and not the employer. Otherwise, all the facts seem to suggest the claim is compensable. The claimant was working and therefore was in the course of her employment when the injury arose. The injury was caused by her sitting and doing her work and she suffered a specific injury as a result. Workers' Compensation in New York is a no fault system. The fact that the chair may have been old or in disrepair will not make any difference. This is because "work done by the employee at home injured to the benefit of the employer and the employer permitted the employee to work from home."


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### Second hypothetical—Based on a real case our firm handled a few years ago:

- Claim involved 22 year old female licensed social worker employed by a county jail as a counselor and suicide prevention worker.
  - Routinely completed written reports from home with employer's knowledge and encouragement to avoid having to provide her with an office. At home claimant used a laptop computer provided by the employer.
  - One weekend per month claimant was on call for suicide emergencies and other mental health emergencies. If called the claimant would have to report to work.
  - Claimant's supervisor stated a female colleague, but did not mention, that claimant does very plainly and avoid making anyone around male inmates (including one she offends she had to counsel) to avoid potential problems the might encounter if the ground is dirt or gravel or the night is particularly dark. This non-mandatory practice was given by the supervisor to avoid possible harassment from male inmates and as a safety measure to protect the claimant.
  - Sunday morning on a weekend the claimant was on call when the injury took place (around 10:30 in the morning). On this date of injury, the claimant was at church "forward to the street" as a family member was celebrating a first communion. She was wearing a short skirt and a mid-length and sleeveless blouse. While at church he was called and told to come to jail as soon as the incident a male prisoner was suicidal.
  - Because of what she was wearing claimant drove home a short distance to change clothing. Once home she changed into attire she felt was more appropriate for work. As she was walking to her home realizing at a very rapid pace to leave her house and head into work, she tripped on a tear in her living room rug and fell fracturing her right ankle.
  - Result: Claim was compensable. Board's analysis: Claimant regularly worked from home and had a regular at home work arrangement that was of benefit to employer. On weekends she was on call, she frequently took calls from her home remotely, which was again to employer's benefit, as a safety measure and only just for the night shifts. Employer's policy stated the employee must not drink alcohol while on duty, which was to work from the claimant's home on weekends. At time of injury, she fell because she had to come home to change clothes for work, and do for the nature of her work she would have gone straight from church to the call to come into work to work. And the non-mandatory dress code established by her supervisor reasonably made the claimant feel she had to first go home and change clothes. Further, because she was in a hurry to leave her home and get to work as quickly as possible due to the urgency of the situation (i.e., the suicidal inmate), this likely contributed to her tripping and falling.
  - Once the case was established the objective became limiting damages and ultimately trying to settle the claim.
- This is an example of very bad facts and a very sympathetic claimant. It is also an example of good lawyering by claimant's attorney. These claims are fact specific and the facts will be dispositive. The facts as a whole will be examined on a case by case basis. Much will depend on the credibility of the claimant and the details of what they were doing at the time of the injury. [www.theweekend.com](http://www.theweekend.com)

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### Any potential benefit to the employer may be enough to create liability:



McFarland v. Lindy's Taxi, Inc, 49 A.D.3d 1111 (3rd Dept 2008)

- Fact Pattern: Claimant is out driving his cab, takes a meal break and parks his car in a parking lot so he can eat. As he is eating he is asked to assist another motorist whose car battery is dead. Claimant agrees and as he places jumper cables on the battery the battery explodes resulting in the loss of his left eye.
- Evidence shows the employer has a policy forbidding assistance of another motorist and that taxi cabs purposefully were not supplied with jumper cables to try and prevent employees from doing so.
- Evidence firmly establishes the employee was taking a meal break when this incident took place.

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### Result:


- Result: Claim is compensable.
  - Reasoning:
    - The employee was a remote worker
    - The Court was convinced and held that vehicle (the cab) was clearly marked with the employer's name and therefore the employee's decision to violate company policy and assist another motorist "created a good will benefit to the employer."
  - This claim is instructive, in that it demonstrates how hard it is to control the work environment with outside employees. Additionally, the case shows that even risks that an employer tries to prevent with written policies and procedures, may still not be eliminated for the remote worker.

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### The work environment can be completely unpredictable with remote employees and the liability can be completely unexpected.

Levi v. Interstate Photo Supply Corp, 46 A.D.2d 951 (3<sup>rd</sup> Dept. 1974)

- Fact pattern: claimant worked as an import manager at employer's premises in Long Island. But one-half day per week to one quarter of his work time was spent outside of the office. He also frequently worked from home with the employer's knowledge and approval and when he worked from home his work duties would be completed by 5:00 p.m.
- Employee could use his own judgment on whether to return to the office or work at home in New York City.
- In Summer of 1972 claimant on morning of incident had a business meeting in Manhattan from 1:00 to 2:30 p.m., and so his home being closer he decided it would be a waste of time to travel clear out to Long Island (taking 1 1/2 hours to get there) so he headed home.



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### Levi v. Interstate Photo Supply Corp, Con't...

- At 3:45 p.m. the claimant's body was found partly in and partly out of the elevator on the second floor of his apartment building. He had been shot in the head by an unknown assailant 5 or 10 minutes earlier and his wallet had been stolen.
- Result??
  - Claim is compensable and death benefits were owed to the widow.
  - Why?
    - Employer knew claimant worked from home and approved.
    - On date of injury claimant told to call if his supervisor if he decided to work from home after the meeting and was told to do additional work when he got home.
    - At time of his death he had work papers in his brief case.
    - "Claimant's home had therefore achieved the status of a place of employment and, in journeying there at the conclusion of his business meeting... decedent was in the course of his employment."
    - Trip home was for the convenience of the employer because that was the only location where he could continue to work for the balance of that work day.

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### Other key factors that have been identified over the years to be important in determining whether an at home worker's injury will be covered under the workers' compensation law.

- Was the activity purely a personal pursuit or within the scope of the employment? The test will be whether the activity at the time of injury is reasonable and sufficiently work related under the particular circumstances of that case. See **Wellpoint, Inc.** 2014 NY Wrk. Comp. Lexis 11971 (2014).
- Where employees are at home and outside direct control of their employers, able to alternate between work related and personal activities, injuries generally must take place during regular working hours and while employee is actually performing work duties.
  - Injuries which occur while taking a short break, getting something to eat, exercising or using the restroom generally are not compensable. See **Matrix Absence Management**, 2019 NY Wrk. Comp. Lexis 4888 (2019).
- Has the employee set up a separate area for work in their home? See **Fine v. S.M.C. Microsystems Corp.**, 75 N.Y.2d 912 (1990).
- Was the equipment belonging to the employer maintained in the home and was business regularly conducted from the home? Did the employer furnish the equipment or did the equipment belong to the employee? See **Weimer v. Weimanch, Ltd.**, 117 A.D.2d 846 (9<sup>th</sup> Dept. 1986) (involving worker whose home was the corporate address for the employer and where much of the business portion of the company took place), compare to **Matrix Absence Management**, (involving worker whose claim was disallowed where he ordered furniture to set up a home office which was not paid for by his employer and where in the injury took place while he was setting up the furniture he had purchased for his home office space).

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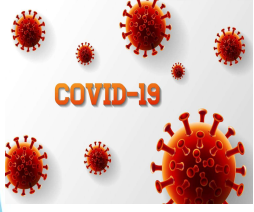
### Other key factors that have been identified over the years to be important in determining whether an at home worker's injury will be covered under the workers' compensation law.

- Quantity and regularity of work performed at home.
- Presence of work equipment (equipment owned by the employer) in the employee's home (see **Hille**, supra).
- Particular circumstances that might establish that the particular employment situation or assignments make the at home work necessary for the employer to carry out their business and not merely personally convenient for the worker to work from their home.
- Whether the nature of the injury has something to do with work or was purely a personal act that resulted in the injury. In other words, was the injury due to the distinctive nature of the work.

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### Work at home in the age of Covid-19

Get ready, the claims are already beginning to be filed:



- Most companies had no choice but to transition to a remote work environment.
  - Hard to argue during Covid-19 that work was not being done remotely for benefits of the employer or that work being done remotely was only for the convenience of the worker.
  - Quantity of work from home/remotely and frequency/regularity of working from home increased for most businesses and their employees.
  - Many more employees now have company equipment in their homes.
  - Much easier for claimants to establish that home had achieved the status of a place of employment.
  - Employer can still argue that injury was purely personal, but this is a harder to now that so much of the work done is now at home and as always with remote employees the elements may switch between work related and purely personal/pursuit on a daily basis.
  - Work hours have also become more flexible, making it harder to disprove a claim to compensable, as work from home during Covid-19 often did not require that assignments were to be completed during particular business hours.
  - The survival of the business often required employers to have their employees work from home, so little thought was given to the subject of liability for at home work injuries.

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### Best Practices for employers with remote employees:

- Require in office work whenever possible, and only for as long as absolutely necessary (i.e. when the at home work being done is so valuable that not having it done from home is the only reasonable option for an employer), so that you have as much control over the work environment as possible and can assure employee safety.
- If the at home work arrangement is only for the benefit/convenience of the worker, and is not of any benefit to the employer put this in writing and have the employee sign it.
- Demand at home workers keep to a set schedule and that they document their time and activities. Attendants, have the supervisors check in with at home employees regularly and monitor where the claimant is physically located.
- If they work at home, consider providing office equipment that you know is safe and that is ergonomically sound. Inspect the equipment you provide them periodically to make sure it is in good repair.
- If work is done by computer, have your IT department set up a VPN and keep records of when the employee is logged in and performing work for the benefit of the employer.

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The End.  
Any Questions???

