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REMOTE WORKERS' COVID-19 CLAIMS: EXPOSING THE REAL DANGERS TO EMPLOYERS

August 2020

As of August 2020, Florida has more than 580,000* confirmed cases of COVID-19. Miami-Dade alone has over 148,000 cases, more than the entire state of South Carolina. Fort Lauderdale was a close second having surpassed 67,000 confirmed cases in Broward County. Other major cities, such as Tampa and Orlando, are also seeing large increases in the number of coronavirus cases.

The spread of COVID-19 through Florida's working population has many employers asking whether their employees will seek workers' compensation benefits on the belief they had contracted the virus as a direct result of their employment environment. That concern in understandable. However, there is an unseen danger that many employers are overlooking which has the potential to affect their workers' compensation claims significantly and more than COVID-19 ever will.

Like most other states, Florida's Workers' Compensation Act specifically excludes diseases of "ordinary life" from being considered "work related." Therefore, diseases such as colds and viruses are explicitly excluded from being work related. However, even in the event that COVID-19 was found not to be a disease of ordinary life, an employee seeking benefits for a COVID-19 exposure under the Florida Workers' Compensation Act would still face a heightened burden of proof requiring the submission of objective evidence confirming a level of exposure in the workplace that is medically accepted to directly cause the exact symptoms claimed.

COVID-19 has spread far and wide throughout the population, and its lengthy incubation period make it unlikely than an employee would be able to obtain the necessary objective evidence required to establish a work place exposure. Thus, in Florida and other states with a similar workers' compensation act, COVID-19 is unlikely to cause a significant rise in the payment of workers' compensation benefits and a resulting increase in premiums. However, an unintended consequence of COVID-19 could present some significant challenges for employers in the future—a dramatic increase of remote employment.

Due to the COVID-19 pandemic, many businesses elected to allow their employees to work remotely. As an example, after the start of the pandemic, LinkedIn reported a 28% increase in job searches using the word "remote." As the pandemic continued, both employers and employees have discovered that remote work is actually more efficient. Some argue that the COVID-19 pandemic will be seen as the tipping point for remote work to become the "new normal". Employers will realize the cost savings by reducing their office footprints while employees will also appreciate their saving commuting time and travel expenses to and from the office, as well as other "unseen" items such as takeout lunches, work wear attire, dry cleaning bills and happy hour tabs.

However, while remote work may be beneficial to an employer in some ways, it also removes their employees from a monitored and controlled workspace.

OSHA (Occupational Safety and Health Administration) regulations will not extend to include accidents that occur in an employee's home, potentially leaving the employer clueless about whether the employment or the employee's personal surroundings were responsible for the accident. Just as important, there will be few, if any, witnesses to an accident involving a remote employee.

This lack of oversight combined with working from home arrangements will undoubtedly result in cases that further blur the lines between what is considered to be a work-related activity and what is not.

For example, in the recent Florida case of *Valcourt-Williams v. Sedgwick CMS*, a home based adjuster filed a workers' compensation claim for injuries she sustained when she tripped over her dog while fetching a cup of coffee in her kitchen during her scheduled work hours. The Judge of Compensation Claims initially found in favor of the employee, noting that the employer "imported the work environment into the home and the claimant's home into the work environment." The Judge further noted that an injury at home during work hours could not be distinguished from an injury that would have otherwise occurred in an office. On appeal, the Florida First District Court of Appeal reversed the Judge of Compensation Claims, finding the accident did not "arise from employment" because the employee had failed to submit evidence the that the home-based employment had placed the employee at an increased risk of tripping over her dog.

While an extreme example, the Valcourt-Williams case demonstrates the potential challenges to determine if the employee was in the course and scope of their employment at the time of an accident. An accurate and appropriate answer requires a thorough investigation and, yet, remote employment by its nature presents a significant challenges to investigating accidents.

When an employee is injured in a place of business, there may be witnesses to interview or security video to review which can help an investigation. Additionally, the accident scene can be examined and preserved for an evaluation by an expert. However, with a remote employee the employer is unlikely to have access to the remote work location and, in the event they do gain access, it is unlikely that the scene of the accident will have been preserved.

Witnesses, if any, will be unreliable as they are likely be family members or individuals personally familiar with the claimant. Therefore, there will always be unresolved questions of whether the remote employee is being completely truthful about the circumstances surrounding their injury. After all, the finding in Valcourt-Williams matter could have had a completely different outcome had the employee just reported that she had tripped rather than admitting she had actually tripped over her dog.

So while the impact of this virus quickly brought forward a panic over an increase in claims due to COVID-19, the necessary discussion is whether employers and their carriers are prepared for the onslaught of new "office normal" in defense of worker's compensation claims. And if so, society's new normal of WFH will, by its very nature, stretch existing concepts for which activities are considered compensable.

Will the "coming and going rule" apply when an employee is injured on their way to the local coffee shop to work? Could the "comfort doctrine" extended to an injury while changing a load of laundry or washing the lunch dishes? Similar concepts such as "dual capacity" could also become more significant in the future as a result of remote employment. Only time, and landmark decisions, will tell. Perhaps, in addition to this new office normal, the pandemic will trigger immediate necessity for employers to quickly reassess and institute new alt-workplace WC policies to protect their own risks while also protecting their employees.

David S. Gold concentrates his practice exclusively on workers' compensation defense and subrogation and has extensive experience defending all manner of cases. He has defended employers, insurance carriers, self-insured corporations, third-party administrators and claims servicing agencies throughout the state of Florida. David is appointed as a faculty member for the School of Workers' Compensation at the prestigious Claims College, where he lectures frequently on matters regarding workers' compensation and is accredited by the Florida Department of Insurance to provide CEU courses for adjusters.