

## TELECOMMUTING:

### *THE GOING AND COMING RULE IN A PARALLEL UNIVERSE?*

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Science fiction writers are sometimes fond of utilizing parallel universes as plot devices. The people and places are familiar but in the parallel universe some aspects are just not right, like a pirate Starship Enterprise commanded by an evil Captain Kirk. The Going and Coming Rule is a fundamental proposition of the theoretical workers' compensation universe: Injuries to fixed situs employees during their local commutes are not compensable. The two exceptions to the rule, the "special hazard" or "special risk" and "special mission" or "special errand" are also parts of this universe. A fixed situs employee with a defined premises contrasts with a "traveling employee" who is covered door-to-door absent a deviation. Incidental materials from work, like papers to be graded by a schoolteacher or briefs to be read by a lawyer, do not automatically transform fixed situs to traveling employees.

Yet where is a telecommuter's fixed situs place of employment? The answer is not clear cut and depends upon the facts of a given case. An employee who only is required to be at a headquarters location one day per month should be considered differently from someone permitted to work at home one or two days per week. Additional considerations involve whether the employer or employee supplies the mechanisms of telecommuting -- the computers, cell phones, and so forth. The formality of the arrangement may run a spectrum from adherence to written guidelines to employees who are free to do as they wish as long as work is delivered in a timely fashion.

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A few years ago David B. Torrey focused on telecommuting as having unique impacts on workers' compensation claim "authenticity" and "medical causation."<sup>1</sup> Admittedly, authenticity considerations arise regardless of where a compensable injury may occur. The on-premises unobserved accident which is reported late or the cry of "ouch" overheard by several workers unaware that the claimant had just been disciplined raise similar authenticity concerns. Telecommuting injuries typically may not be witnessed formally because potential observers, if present, would be family and friends rather than "objective" co-workers. In addition, telecommuters face the temptation to mischaracterize an injury as when a fall down the basement stairs morphs into a trip to the downstairs home office rather than the laundry room. Medical causation issues also become more intricate for telecommuters because the employer lacks control of what now become employment-related risks.

Although a telecommuter workers' compensation parallel universe might be forming, not enough cases have been reported to discern its features fully. Some cases thought of as raising telecommuting issues can be decided with reference to old fashioned workers' compensation principles like arising out of and course of employment. So far, telecommuting cases only have appeared in a distinct minority of jurisdictions. Initially we shall survey these cases before addressing how telecommuting claims might be decided in Ohio.

#### NEW JERSEY

As of now, Renner v. AT&T, 218 N.J. 435 (2014), is one of two preeminent telecommuting cases. Its facts all invoked telecommuting, but the basis on which it was decided involved medical causation and statutory interpretation. Cathleen Renner had worked for AT&T for twenty-five years and was a salaried manager. Under a telecommuting agreement she

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<sup>1</sup> David B. Torrey, "Telecommuter Injuries and Compensability under Workers' Compensation Acts; VII Pennsylvania Bar Association Workers' Compensation Law Section Newsletter III (June 2012); 32-47.

worked from home three days per week. AT&T provided a laptop and speakerphone to facilitate Renner working at home. Interestingly, her job responsibilities included preparing business continuity plans in case of strikes.

On the evening of September 24, 2007 Renner spent several hours working in her home office. At 12:26 a.m. on September 25, 2007 she sent an e-mail to a co-worker. When her teenage son awakened at 7:00 a.m. he observed her working in her office. At 7:50 a.m., while taking her son to the school bus, she stopped and grabbed her leg due to pain. At about 9:00 a.m. Renner told a co-worker she was not feeling well. She sent several e-mails and completed her project at 10:30 a.m. About an hour after the last e-mail she called Emergency Medical Services. When EMS arrived she was screaming, "I can't breathe..I'm choking." She was dead on arrival at a local hospital. The autopsy revealed the cause of death was an embolism lodged in her pulmonary artery.

Renner's husband filed a dependency claim. He was awarded benefits by the compensation judge who held that the death had been due to a "compensable occupational disease" under New Jersey's general occupational disease statute. AT&T appealed, contending that the claim should have been decided under the statute governing cardiovascular or cerebral vascular claims requiring "...a preponderance of the credible evidence that the injury or death was produced by the work effort or strain in excess of the wear and tear of the claimant's daily living."<sup>2</sup>

Two medical experts differed as to the roles played by aspects of her telecommuting in Renner's death. Her expert stressed the work effort of sitting at her desk for such a long period of time. The clot had formed in her leg, evidenced by the pain she noticed when taking her son to the school bus, and became the pulmonary embolism that caused her death. AT&T's expert

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<sup>2</sup> Id.

disagreed, emphasizing personal risk factors having nothing to do with her employment: morbid obesity, birth control pills, age, and enlarged heart. The New Jersey Supreme Court concluded:

...Cathleen's responsibilities did not require her to remain in a seated position for long, uninterrupted stretches of time. She was not confined to a specific space or instructed not to move from her workstation. Moreover, at both her home and employer workstations, Cathleen had control over her body positions and movement while working...(W)e conclude that Cathleen's extended sitting while conducting her professional responsibilities at her home office does not constitute a "work effort or strain involving a substantial condition, event or happening" to support a compensable cardiovascular claim.<sup>3</sup>

#### PENNSYLVANIA

Cases of recent vintage bearing on telecommuting begin with one illustrating what Larson terms "the English Rule," which actually was first announced in 1907!<sup>4</sup> The Employer had three methods for receiving paychecks, direct deposit, regular mail, or personal retrieval, in Hoffman v. Workers' Compensation Appeal Bd., 559 Pa. 655 (1999). On her day off a secretary came to the hospital for the sole purpose of getting her paycheck. While there she slipped and fell. The courts below had denied benefits because collection of a paycheck did not advance the employer's interests and the claimant had alternative means to collect it. The Pennsylvania Supreme Court *reversed*, holding that receipt of wages was in the course of employment because it was part and parcel of the employment relationship.

A classic telecommuting case is Verizon Pennsylvania v. Workers' Compensation Appeal Board (Alston), 900 A.2d 440 (2006). Alston had been employed for thirty-two years as a systems engineer. She worked three days per week at Verizon's Freehold, New Jersey facility and two days per week at home where she had a basement office. Alston had been in her kitchen drinking a glass of juice when she received a call from her supervisor. As she was descending the steps to her home office she fell. Her neck injuries required surgery. Alston received full

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<sup>3</sup> Id. at 449.

<sup>4</sup> Lex K. Larson, Arthur Larson, WORKERS' COMPENSATION LAW: CASES, MATERIALS, AND TEXT (5th Ed., 2013) at 182.)

pay and medical benefits from Verizon. When she sought disfigurement benefits litigation ensued.

...(T)o date, there is no appellate precedent from Pennsylvania specifically discussing the issue of workers' compensation coverage for employees who work at an "at-home office" outside of the employer's primary work office. We, thus, look to workers' compensation law generally and apply it by analogy to the category of employees who conduct their business at an "at-home office."<sup>5</sup>

Verizon argued the trip to the kitchen for juice had been a "deviation," an argument rejected by the court because even traveling employees are entitled to personal comfort activities. Alston had never left the premises of her home and home office. Furthermore, "...Claimant, here, was engaged in furthering the business of her Employer because, at the time of her injury, she was speaking with her supervisor on the telephone and descending the stairs in order to address a work matter that her supervisor called to discuss with her."<sup>6</sup>

In contrast with Verizon, where the employer was aware of and condoned use of the home office, activities *contrary* to the Employer's policies cannot be used to create a compensable claim. Home healthcare aides were not allowed at a patient's home when the patient was not present in Fenwick-Staten v. Workers' Compensation Appeal Board (Chadds Ford Criticare), 2009 Pa Commw. Unpub. LEXIS 172 (2009). The patient had gone to her daughter's home for the Christmas holidays. The daughter requested that the aide check the patient's mail, which she performed without being paid or informing her employer. On one visit the aide tripped on the sidewalk and broke her leg. She requested medical leave from the employer and then sought workers' compensation. The aide's theory was that the unpaid visits constituted a "special mission" furthering the employer's interests. The court rejected her

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<sup>5</sup> Id. at 444.

<sup>6</sup> Id. at 446.

theory, distinguishing Hoffman and Verizon. A “special mission” could not be contrary to the employer’s own policies and she was not being paid for her activities.

Pennsylvania’s most interesting telecommuting case split three judges who could not agree on the appropriate workers’ compensation principle to be applied to the facts in Werner v. Workers’ Compensation Appeal Board (Greenleaf Serv. Corp.), 28 A.3d 245 (2011). Werner was an international sales manager who, when not traveling, worked out of his employer’s Pennsylvania facility or his Fort Lee, New Jersey home, usually on a weekly basis. In his home he had a basement office with a computer, printer, and fax owned by his employer. On the second floor he had a personal computer, printer, and fax. He had an out-of-work injury for which stitches needed to be removed, causing him to delay a business trip to Europe.

When home, Werner’s pattern was to be at his home office desk at 8 a.m. or before. On the day in question Werner’s wife called down to him at 11:30 a.m. that she was leaving. She returned about 1:00 p.m., got no answer from Werner, and assumed he was on the phone. Prior to going to the grocery at 2:00 p.m. Werner’s wife called down to him, got no answer, and went to the home office where she found him slouched in his chair and unconscious with a nose bleed. She later found bloody tissues and Werner’s cell phone in the first floor bathroom. The wife also found Werner’s glasses and blood on the sidewalk near the front door in an area where Werner would go outside to smoke.

The compensation judge denied benefits, finding: “...The fact that he may have read some emails or made some business phone calls does not establish that he was in the course and scope of his employment...”<sup>7</sup> The reviewing court discussed in some detail the factual and legal analogies to Verizon. In contrast to Verizon, however, “...where the specific circumstances surrounding the claimant’s injury were clear, little is known about the circumstances surrounding

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<sup>7</sup> Id. at 249.

Decedent's injury in the present matter...(T)here is nothing in the record demonstrating what Decedent was doing...Claimant's proffered explanation that Decedent slipped and hit his head while outside smoking a cigarette - i.e. attending to his personal comfort - or retrieving business mail is speculative at best..."<sup>8</sup>

The dissent argued that the Verizon precedent had been misapplied. If Werner had been at the Employer's office headquarters and injured during a personal comfort break this would have been compensable. If Werner had been traveling and was injured taking a personal comfort break this also would have been compensable.

...(W)here, as here, an employer has approved an employee's use of a home office, I submit that the home office is the equivalent of the employer's premises. Thus, when the employee is injured while taking a break at home, he has not abandoned his work but, rather, remains in the course and scope of employment..."<sup>9</sup>

#### TENNESSEE

The best known and most discussed telecommuting case is Wait v. Travelers Indemnity Company of Illinois, 230 S.W.3d 220, 2007 Tenn. LEXIS 1033 (2007). Kristina Wait was the Senior Director of Health Initiative and Strategic Planning for the American Cancer Society (ACS). Because of a lack of space at its Nashville office, the ACS had allowed Wait to work from home. Wait converted a spare bedroom into an office and ACS paid for a dedicated business telephone line, a facsimile, other office equipment, and supplies. Wait's supervisor and co-workers attended meetings at her home office.

Sawyers, who lived about a block away from Wait, had met Wait and her husband briefly on a couple of social occasions during the Summer of 2004. On September 3, 2004 Wait was in her kitchen preparing lunch when Sawyers knocked. Wait admitted him, he stayed a short time, and left. A moment later, Sawyers returned claiming he had left his keys. Wait again let him in

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<sup>8</sup> Id. at 251-252.

<sup>9</sup> Id. at 252.

but this time Sawyers brutally attacked her, beating her severely until she lost consciousness. Among Wait's injuries were stab wounds, broken bones, a severed ear, and permanent nerve damage.

After defining telecommuting, the Tennessee Supreme Court began its analysis with whether Wait was in the course of her employment when assaulted. It compared Wait's kitchen "...to the kitchens and break rooms that employers routinely provide at traditional work sites."<sup>10</sup> The Court emphasized ACS awareness and approval of her work site. It concluded that Wait had been in the course of her employment when assaulted. The critical inquiry, however, turned on whether Wait's injuries arose out of employment. The Court classified this as a "neutral force" assault rather than one having an "inherent connection" to employment or an "inherently private" dispute.<sup>11</sup> Tennessee utilizes the phrase "street risk," a term often associated with New York cases during the 1920s where workers were injured by what Larson calls "neutral risks." Employing this Tennessee doctrine, Wait's injuries did not arise out of her employment:

...When an employee suffers a "neutral assault" within the confines of her employer's premises - whether the premises be a home office or a corporate office - the "street risk" doctrine will not provide the required causal connection between the injury and the employment unless the proof fairly suggests either that the attacker singled out the employee because of his or her association with the employer or that the employment indiscriminately exposed the employee to dangers from the public."<sup>12</sup>

Larson's textbook treatment of Wait suggests that it is still part of a familiar theoretical universe rather than a parallel one. It is first discussed as a problem case under "Assaults by Strangers." It appears again as a problem case for "Working at Home" (where it is the next problem after the legendary "California Game Warden"). In Larson's "Teacher's Manual" the more detailed discussion follows the former problem: "In spite of the fact that the trial court's

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<sup>10</sup> Id. at 226.

<sup>11</sup> Id. at 227.

<sup>12</sup> Id. at 230.

summary denial of Wait's claim was affirmed by the Supreme Court of Tennessee, telecommuters should not view the decision as a stinging defeat." (at Page 27.) There are four reasons. First, the Tennessee Supreme Court never departed from a standard course and arising framework. Second, it ignored the possible argument that, since the employer cannot enforce a safe work environment at an employee's residence, it should not be responsible for the risk of injury. Third, like the court in Verizon, the home office made no difference in applying the personal comfort doctrine. Finally, similar circumstances *may* create a further exception to the going and coming rule: "Since the general rule in most jurisdictions is that an injury sustained during work-related travel between one part of the employer's premises and another is compensable, an injury sustained in traveling from the office-in-the home to the employer's primary premises would appear to fall outside the ordinary going and coming rule." (at Page 28.)

Eight years after Wait a parallel universe has not appeared in Tennessee. Autwell v. Back Yard Burgers, 2015 Tenn. LEXIS 185, reversed a trial court finding that the claimant had been a traveling employee or alternatively on a special mission. A regional manager for burger restaurants had spent the weekend moving his wife to a new residence outside the area for which he had managerial responsibilities. On his way to a Monday morning meeting he was injured in a motor vehicle accident. This was not an accident which took place while he was going from one restaurant to another. The court noted that the only distinction with a normal Monday morning commute was that he was leaving from his wife's new residence and his presence there had been a personal errand.

#### HOW WOULD AN OHIO TELECOMMUTING CLAIM BE DECIDED?

The analytic framework for deciding an Ohio telecommuting claim would be provided by Ruckman v. Cubby Drilling, 81 Ohio St.3d 117 (1998). Ruckman ostensibly clarified seven

years of confusion in the application of the going and coming rule in Ohio but did so in a way that raised further questions. The facts involved members of gas well drilling crews who were injured in motor vehicle accidents on their way to drilling sites. The drilling sites were subject to change depending on the work assignment.

The Ruckman Syllabus language is directly applicable to possible facts in a telecommuting setting. For a claim to be barred by the going and coming rule “...the focus is on whether the employee commences his or her substantial employment duties only after arriving at a specific and identifiable workplace designated by his employer.” The home offices encountered in the previous fact patterns would easily meet this definition. The Court goes on to state: “Despite periodic relocation of job sites, each particular job site may constitute a fixed place of employment.” This *may* suggest that travel to or from a home office would be analyzed in the same way as any going and coming fact pattern with a fixed situs.

Ruckman’s Syllabus then adds a further provision: “A fixed-situs employee is entitled to workers’ compensation benefits for injuries occurring while coming and going from or to his place of employment where the travel serves a function of the employer’s business and creates a risk that is distinctive in nature from or quantitatively greater than risks common to the public.” This provision was intended to “modify” Littlefield v. Pillsbury, 6 Ohio St.3d 389 (1983). Although Ruckman was unanimous in its judgment, two justices joined in a concurring opinion stressing: “...(A)n employee who is required to report to various or constantly changing work sites is not generally subject to the going-and-coming rule.”<sup>13</sup> In other words, Ruckman and his colleagues should have been found to be traveling employees.

Confronted with the facts of a telecommuting case, an Ohio court likely would focus on how the circumstances “serve a function of the employer’s business.” For difficult fact patterns

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<sup>13</sup> Ruckman at 132.

like Renner or Wait this might make it easier for an Ohio court to rule for the claimant. Both cases were, in effect, on premises injuries at the telecommuters' fixed situs home offices. If some kind of travel were to be added to the equation, peculiar facts and circumstances would determine whether compensation would be barred due to deviation.

### CONCLUSION

In the above speculation about Ohio telecommuting cases we emphasized the role to be played by "peculiar facts and circumstances." For those of us who deal with workers' compensation daily, we recognize that our cases often are won and lost not necessarily by our skills as attorneys but rather by a claim's peculiar facts and circumstances. Of course, we are responsible for presenting the peculiar facts and circumstances. Telecommuting claims may not develop into a parallel universe after all.