

Are Remote Injuries Compensable in NC? Must Employers Provide Masks at Work?

The novel coronavirus is posing unfamiliar questions. Among them: how does North Carolina address compensability of an injury that occurred remotely?

“The state does not have special rules regarding the compensability analysis of an employee working remotely or telecommuting. Those cases are analyzed exactly like every other case,” notes Bruce Hamilton, a partner with Teague Campbell.

“The employee has to prove an injury by accident arising out of and in the course of their employment. The issues that come up with these cases have to do with problems of proof. In other words, there is virtually no way to independently verify what the employee says happened to cause the injury or when the injury occurred,” he adds.

“We do not have any video in the employee’s home, we cannot conduct an immediate investigation of the area where the accident supposedly took place, we do not have any coworker witnesses, and so on. The other unique problem with telecommuting cases is determining when the workday starts and ends. In other words, when is an employee in the course of employment?”

“We recommend that employers give their telecommuting employees specific work hours, if possible. In fact, if they can have employees clock-in and clock-out that is helpful in establishing the actual hours of employment,” he says.

Employers and employees may also be wondering about the use of facemasks, respirators, gloves, and other personal protective equipment. “There is no specific standard covering COVID-19, and the OSHA general duty clause has not been interpreted to require all employers to provide PPE or require employees to wear PPE,” note Teague Campbell attorneys Patrick Scott and Natalia Isenberg.

“As was the case prior to COVID-19, such determination is left to the employer and is based on the employer’s assessment of workplace risk factors. However, employers should now include COVID-19 concerns in their risk-factor assessment, and OSHA has provided guidance to employers in classifying employees’ risk,” they add.

If an employer decides to implement a PPE policy, the policy should be in writing and should be distributed to all employees. The written policy should generally include: An explanation with facts addressing the reason for the policy (e.g., to protect everyone involved);

- Employees covered under the policy (e.g., all employees);
- Instruction for proper use;
- Specifications on when face coverings are required (e.g., at all times inside the building);
- Instructions for disposal/cleaning; and
- Consequences for not abiding by the policy. Employers should have all employees sign the policy, and should continue to update the policy based on the most current guidelines.

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How will Layoffs affect Indemnity Benefits?

By: Elizabeth Ligon

While the North Carolina Industrial Commission has not yet issued any decisions specifically related to COVID-19, there are prior cases that have considered whether a claimant is entitled to indemnity benefits when their disability is the result of economic conditions. In general, when a claimant's disability is due to an economic downturn, rather than a work-related injury, indemnity benefits are not owed.

Whether a claimant is entitled to indemnity benefits following layoffs due to COVID-19 will largely depend on whether the claimant was already out of work and receiving TTD benefits, or whether he was able to continue working within his restrictions prior to the outbreak. If an employer was able to accommodate claimant's work restrictions until claimant was laid off due to company-wide layoffs as a result of COVID-19, an argument can be made that claimant's disability is not related to a work injury but is rather due to economic conditions as a result of a worldwide pandemic. In other words, but for the pandemic, claimant would be able to continue working.

In an accepted claim, it is generally claimant's burden to prove their entitlement to indemnity benefits. In order to meet that burden, a claimant must show (1) that he was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that he was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that his incapacity to earn was caused by his injury.

In *Medlin v. Weaver Cooke Constr.*, the North Carolina Supreme Court stated, "Because the focus is on earning capacity, broad economic conditions, as well as the circumstances of particular markets and occupations, are undoubtedly relevant to whether a claimant's inability to find equally lucrative work was because of a work-related injury."

"Whether in a boom or bust economy, a claimant's inability to find equally lucrative work is a function of both economic conditions and his specific limitations. Both factors necessarily determine whether a specific claimant is able to obtain employment that pays as well as his previous position; the Commission makes this determination based on the evidence in the individual case."

Therefore, if an injured worker is out of work due to COVID-19, and not as a result of his work-related injury, an argument can be made that they are not entitled to TTD benefits.

However, if an employer was unable to accommodate claimant's work restrictions prior to the outbreak and claimant was already out of work receiving TTD benefits, it would be much more difficult to argue that claimant's disability is only due to the economic crisis. Therefore, claimant would likely be entitled to ongoing TTD benefits regardless of the layoffs.

Similarly, in cases where a claimant had returned to work but was working reduced hours and receiving TPD benefits, they would likely be entitled to ongoing TPD benefits following company-wide layoffs because their wage-earning capacity is not solely the result of the economy. Rather, their wage-earning capacity is the result of both their work injury and the current economic crisis.

Another issue that has arisen is when an employer remains open and has not instituted mass layoffs, but they are unable to continue accommodating a claimant's light duty position. If most non-injured employees are able to continue working their regular jobs, but an injured employee's restrictions are no longer able to be accommodated, it would be more difficult to argue that the claimant's disability is strictly due to economic conditions since only the injured worker's work status is affected. In that case, TTD benefits would likely need to be initiated.

Elizabeth Ligon is an attorney in Teague Campbell's Raleigh office. She obtained her undergraduate and law degrees from the University of North Carolina at Chapel Hill.



President's Note

The Threat of House Bill 1057

As we alerted our members a few weeks ago, NCASI is part of a statewide business coalition opposing House Bill 1057. The bill seeks to establish that an “essential worker” infected with the coronavirus must have contracted it at work and it is up to the employer to prove that is not the case. The list of such workers includes first responders, healthcare workers, and essential service workers.

We see great potential for havoc here. Employers will essentially have to accept all Covid-19 claims from these covered workers – regardless of where the claims originated - because the bill specifies the presumption “may only be rebutted by clear and convincing evidence” That will be a very high bar for employers to clear. As you know, the standard in workers’ compensation has been the greater weight of evidence.

We have expressed our concerns in a letter to the lead sponsor Rep. Darren Jackson, with copies to all other sponsoring members. We recognize that employees who work for essential businesses are incredibly valuable during this difficult time. But the fact

remains these employees are already afforded protections pursuant to the Workers’ Compensation Act.

Workers who can prove they were infected on the job are entitled to workers’ compensation benefits.

But to put the onus on employers is unfair and unreasonable. How could an employer possibly prove that a worker who claims to be infected on the job was actually infected while, say, picking up a prescription at a drug store or while walking the dog in the neighborhood?

Thanks to our lobbying efforts, nearly 20 legislators have dropped their sponsorship of the bill. We are optimistic but not complacent. This won’t be over until it is over.

With very best wishes,

Stephanie L. Gay



Novel virus, Uncertain Impact

The coronavirus may have both a short-term and a lingering impact on workers’ compensation but it is too early to draw firm conclusions, notes Dr. John Ruser, president & CEO, Workers Compensation Research Institute.

“In the short run, we may see a drop in claims with the shutdown of businesses and a subsequent recession, but an increase in claims to the extent that COVID-19 is compensable. In the future, we may see some longer run health effects of COVID-19, while potential delays in elective treatments may result in delayed return to work and longer duration of disability,” he says.

As employers resume normal operations, they should be alert to the fact that workers returning to work may initially be at higher risk of injury than workers who stayed on the job and in condition. “Our annual benchmarking of various workers’ compensation performance metrics across states will allow us to see the impact COVID-19 has on workers’ compensation systems,” Dr. Ruser says.

“We will evaluate the impact of the virus on the composition of claims and their costs, how the virus may have affected the

delivery of care to workers, and the impact of that on worker and claims outcomes, including duration of disability,” he explains.

Just as states vary in their response to the pandemic, so they are tackling the issue of compensability in their own ways. “Some states consider that their current laws, regulations, and procedures are sufficient to provide compensation for workers who demonstrate that they contracted COVID-19 at work. Other states have changed their rules, by either executive order or legislation, to increase the likelihood that a worker who contracts COVID-19 may be eligible for workers’ compensation,” Dr. Ruser says.

Based in Cambridge, Massachusetts, WCRI is an independent, not-for-profit research organization that provides research and statistical information about public policy issues involving state workers’ compensation systems in the U.S.



coming up

March 24-26, 2021

NC Association of Self-Insurers' Annual Conference.

Holiday Inn Resort, Wrightsville Beach

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The employers' voice in workers' comp

Insurance unlikely to cover business interruption

By: Brad Inman

Most policies pay for business interruption arising from physical damage to the covered property. In most cases, contagious diseases do not constitute property damage, especially when passed from person to person, although creative policyholder attorneys are already testing the nuances and language of this traditional interpretation.

Many policies have a virus exclusion which attempts to foreclose coverage for damages caused by viruses or other microorganisms. Another hurdle for insureds involves the cause of their business interruption. The vast majority of businesses which closed due to the COVID-19 pandemic did not do so because of the direct and verified presence of coronavirus at their insured property, but rather because of governmental orders to shut down.

Insurance companies and organizations across the country have attempted to nip in the bud any business-interruption claims. An April 17 letter by North Carolina Insurance Commissioner Mike Causey was perhaps the most direct.

“Standard business interruption policies are not designed to provide coverage for viruses, diseases, or pandemic-related losses because of the magnitude of the potential losses,” Causey said. “Insurability requires that loss events are due to chance and that potential losses are not too heavily concentrated or catastrophic. This is not possible if everyone in the risk pool is subject to the same loss at the same time.”

Perhaps. We recommend a review of the policy terms and consideration of a claim submission since coronavirus-related insurance claims for business interruption losses will involve complexity and uncertainty above and beyond those present in a typical business -interruption claim.

Brad Inman is a partner in Teague Campbell's Raleigh office. He received his undergraduate and law degree from the University of North Carolina at Chapel Hill.