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## Telecommuting and Workers' Compensation in Wisconsin: Adopting Standards for the Work-From-Home Revolution

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# TELECOMMUTING AND WORKERS’ COMPENSATION IN WISCONSIN: ADOPTING STANDARDS FOR THE WORK- FROM-HOME REVOLUTION

*The modern trend of telecommuting has gained popularity in recent years, with many employees working from home in lieu of reporting to brick-and-mortar offices. Yet the law has failed to keep up with this trend, particularly in the context of workers’ compensation. And with the rise in telecommuting, a rise in workers’ compensation claims for injuries sustained in the home is likely to follow. While the common law provides a framework for resolving telecommuter claims in Wisconsin, this framework invites inconsistent application and fails to abide by the purpose of Wisconsin’s Workers’ Compensation Act. In anticipation of the inevitable rise in workers’ compensation claims for telecommuter injuries, the Wisconsin Legislature must address telecommuter claims in the state’s workers’ compensation statute.*

*This Comment recommends that the Wisconsin Legislature amend the Workers’ Compensation Act to create clear standards for the compensability of telecommuter injuries. First, this Comment summarizes the history and background of the Workers’ Compensation Act while discussing how Wisconsin courts and the Labor and Industry Review Commission have resolved telecommuter claims. Next, this Comment will explore how telecommuter claims have been resolved in other jurisdictions. Finally, this Comment will analyze how Wisconsin can effectively adopt clear standards for telecommuter injuries and what those standards should require.*

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## I. INTRODUCTION

In recent years, technology has changed the definition of the workplace.<sup>1</sup> Now, a growing number of people are opting to work from the comfort of their homes instead of reporting to a physical workplace, a trend often referred to as “telecommuting.”<sup>2</sup> The COVID-19 pandemic<sup>3</sup> accelerated this trend, especially among white-collar professions, as the U.S. Bureau of Labor Statistics estimates that 31% of U.S. employers increased telecommuting during the pandemic.<sup>4</sup> There is no sign that the rise in telecommuting will end anytime soon, with a June 2022 Gallup survey finding that 49% of remote-capable workers are working a hybrid schedule, while 29% of remote-capable workers are working an exclusively remote schedule.<sup>5</sup> Proponents of telecommuting champion its convenience for employees and the financial costs it saves for employers.<sup>6</sup>

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1. Natalie Hamingson & Sean Peek, *Communication Technology and Inclusion Will Shape the Future of Remote Work*, BUS. NEWS DAILY, <https://www.businessnewsdaily.com/8156-future-of-remote-work.html> [https://perma.cc/UXF7-GB4U] (Oct. 24, 2023).

2. *Id.*; Scott L. Nelson, *Telecommuting*, LITIG., Spring 2009, at 47, 47 (defining “telecommuting” as “work arrangements in which an employee regularly performs officially assigned duties at home or other worksites geographically convenient to the residence of the employee”).

3. Tedros Adhanmon Ghebreyesus, Dir.-Gen., World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020) (transcript available on the World Health Organizations Website), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [https://perma.cc/NG7Z-JVZG].

4. Michael Dalton & Jeffrey A. Groen, *Telework During the COVID-19 Pandemic: Estimates Using the 2021 Business Response Survey*, U.S. BUREAU OF LAB. STATS.: MONTHLY LAB. REV., Mar. 2022, <https://www.bls.gov/opub/mlr/2022/article/telework-during-the-covid-19-pandemic.htm> [https://perma.cc/4WB6-6F8M].

5. Ben Wigert & Sangeeta Agrawal, *Returning to the Office: The Current, Preferred and Future State of Remote Work*, GALLUP (Aug. 31, 2022), <https://www.gallup.com/workplace/397751/returning-office-current-preferred-future-state-remote-work.aspx> [https://perma.cc/9QPC-LQ7F].

6. See Zara Greenbaum, *The Future of Remote Work: When It's Done Right, Telework Can Improve Employee Productivity, Creativity and Morale*, *Psychologists' Research Finds*, MONITOR ON PSYCH., Oct. 2019, at 54, 56.

However, with all the benefits of telecommuting come challenges for the labor force, especially in the context of workers' compensation.<sup>7</sup> In Wisconsin, workers' compensation is a statutory scheme governed by the Workers' Compensation Act, which provides employees with medical expenses and lost wages following an injury that is work-related.<sup>8</sup> While Wisconsin courts and the Labor and Industry Review Commission<sup>9</sup> (Commission) have addressed workers' compensation claims for telecommuter injuries in the past, Wisconsin currently has no clear standards to govern these claims.<sup>10</sup> Consequently, there is much uncertainty surrounding when telecommuter claims are compensable.<sup>11</sup> As more employers and employees opt for telecommuting,<sup>12</sup> there is bound to be an influx of workers' compensation claims for injuries sustained in the home. With no clear guidelines to resolve telecommuter claims, the inevitable rise of claims will pose challenges for employees and employers, who may be subject to prolonged litigation with unpredictable results.<sup>13</sup>

To remedy the problems stemming from the lack of clear standards for telecommuter injuries in Wisconsin, this Comment proposes that the Wisconsin Legislature should codify a set of standards for telecommuter injuries. Part II summarizes the background of Wisconsin's Workers' Compensation Act and discusses the ways in which Wisconsin courts and the Commission have resolved telecommuter claims. Part III surveys how other jurisdictions have resolved telecommuter claims. Part IV provides an analysis of how Wisconsin can effectively adopt clear standards for telecommuter injuries and what those standards should entail. This Part also includes rough guidelines for how the standards' language should be drafted. Finally, Part V summarizes all findings in a conclusion.

## II. WISCONSIN'S WORKERS' COMPENSATION ACT

To gain a better understanding of how telecommuter injuries have been addressed in Wisconsin, it is necessary to first discuss the underlying history, purpose, and provisions of the Workers' Compensation Act.<sup>14</sup> Wisconsin courts

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7. See 17 CHARLES F. DOMER & THOMAS M. DOMER, WISCONSIN PRACTICE SERIES: WORKERS' COMPENSATION LAW § 11:9 (2023); Robert Ingle, *Telecommuting: "Taking Your Work Home With You" Will Never Be The Same Again*, MD. BAR J., Nov./Dec. 2000, at 3, 7 (2000).

8. DOMER & DOMER, *supra* note 7, § 1:1.

9. See generally LIRC's Program Responsibilities, WIS. LAB. & INDUS. REV. COMM'N, [https://lirc.wisconsin.gov/program\\_respons.htm](https://lirc.wisconsin.gov/program_respons.htm) [<https://perma.cc/6P65-37DU>].

10. See *Augustine v. Kenosha Visiting Nurse*, WC Claim No. 1998-064631, 2000 WL 1498228, at \*1 (Wis. Lab. & Indus. Rev. Comm'n Sept. 13, 2000).

11. See *id.*; Joan T. A. Gabel & Nancy Mansfield, *On the Increasing Presence of Remote Employees: An Analysis of the Internet's Impact on Employment Law as it Relates to Teleworkers*, 2001 U. ILL. J.L. TECH. & POL'Y 233, 235.

12. Wigert & Agrawal, *supra* note 5.

13. See DOMER & DOMER, *supra* note 7, § 11:9.

14. WIS. STAT. § 102.03 (2021–22); DOMER & DOMER, *supra* note 7, § 2:6.

and the Commission have viewed telecommuter injuries in two specific contexts: where the home serves as a primary workplace<sup>15</sup> and where the home serves as an additional workplace.<sup>16</sup> Under both contexts, it is apparent that there is no bright-line rule for when an employer will be liable for a telecommuter's injury.<sup>17</sup> Still, decisions by the courts and Commission may suggest what a codified telecommuter statute would look like.

### A. Background

The origins of the Workers' Compensation Act are rooted in the labor movement of the late nineteenth and early twentieth centuries.<sup>18</sup> As the number of workplace injuries grew during the American Industrial Revolution, the common law made redress for workplace injuries difficult.<sup>19</sup> And in borderline cases, employees and employers were faced with expensive litigation with unpredictable results.<sup>20</sup> In response, the Wisconsin State Federation of Labor<sup>21</sup> (WSFL) began to promote the need for a workers' compensation system in 1894.<sup>22</sup> However, workers' compensation was not considered by the Wisconsin Legislature until 1905, when Frederick Brockhausen, a Wisconsin Assembly member who also served as the secretary-treasurer of the WSFL, introduced the state's first workers' compensation bill.<sup>23</sup>

Although the idea of a workers' compensation system became popular among the public, employers disagreed as to how it should be implemented.<sup>24</sup> Employers supported a voluntary system, where employers could choose whether to be governed by the workers' compensation law or remain under the common law, with employees paying a percentage of the insurance costs.<sup>25</sup>

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15. See *Black River Dairy Prods., Inc. v. Dep't of Indus., Lab. & Human Rels.*, 58 Wis. 2d 537, 545, 207 N.W.2d 65 (1973).

16. See *Fay v. Trek Diagnostic Sys., Inc.*, WC Claim No. 2003-049932, 2005 WL 1900473, at \*3 (Wis. Lab. & Indus. Rev. Comm'n July 28, 2005).

17. See *Abramson v. CUNA Mut. Ins. Soc'y*, WC Claim No. 91040700, 1993 WL 51567, at \*3 (Wis. Lab. & Indus. Rev. Comm'n Jan. 15, 1993); *Fay*, 2005 WL 1900473, at \*3.

18. ROBERT W. OZANNE, *THE LABOR MOVEMENT IN WISCONSIN: A HISTORY* 127 (1984).

19. *Id.* at 125–26; JOSEPH A. RANNEY, *WISCONSIN AND THE SHAPING OF AMERICAN LAW* 127 (2017). The common law rules of “contributory negligence,” “assumption of the risks,” and the “fellow servant doctrine” made redress for injured workers improbable. OZANNE, *supra* note 18, at 125. First, under “contributory negligence,” an injured worker was denied damages if their own negligence contributed to their injury in any way. *Id.* Next, “assumption of the risks” held that an injured worker would be denied damages if they had any knowledge of the risks associated with their work activity. *Id.* And, finally, the “fellow servant doctrine” absolved employers from paying damages to injured workers if another employee was responsible for the injured worker's injury. *Id.*

20. RANNEY, *supra* note 19, at 127.

21. See generally OZANNE, *supra* note 18.

22. *Id.* at 126.

23. *Id.* at 125.

24. *Id.* at 126–27.

25. *Id.* at 126.

After several years of advocacy by the WSFL, the Wisconsin Legislature passed the Workers' Compensation Act into law in 1911.<sup>26</sup> At its conception, the Act reflected a compromise between labor and industry.<sup>27</sup> Employers could choose to either be governed by the Act at their own cost or opt out and forgo the common law protections of "assumption of the risks" and the "fellow servant doctrine."<sup>28</sup> Moreover, employees could choose whether to be governed by the Act or reserve the right to seek damages under tort law.<sup>29</sup> Declared to be the first constitutional workers' compensation law in the United States, the Act was regarded as a significant development in the labor movement.<sup>30</sup>

Today, the Workers' Compensation Act is often called the "grand bargain," as it precludes an injured worker from bringing a civil action against his or her employer in exchange for guaranteed compensation for their injury.<sup>31</sup> Further, by eliminating negligence from the determination of benefits, the Act operates under a "no fault" system.<sup>32</sup> Thus, the Act provides a remedy through balancing the interests of employees and employers by eliminating employers' civil liability and ensuring injured workers' compensation.<sup>33</sup>

However, the Workers' Compensation Act does not subject an employer to strict liability for all injuries that occur throughout the workday. Specifically, the employee must prove that his or her injury was sustained while "performing [a] service growing out of and incidental to his or her employment."<sup>34</sup> The usual workers' compensation claim comes in the form of a body strain or a slip and fall.<sup>35</sup> However, injuries under various circumstances have been found to be

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26. *Id.* at 127.

27. *Id.*

28. *Id.*

29. *Id.*

30. DOMER & DOMER, *supra* note 7, § 2:1; *Wisconsin's Pioneering Worker's Compensation Law Turns 100*, WORKCOMPWIRE (Apr. 29, 2011), <https://www.workcompwire.com/2011/04/wisconsin-pioneering-workers-compensation-law-turns-100/> [<https://perma.cc/VF9M-59B9>]. New York enacted a compulsory workers' compensation law in 1910; however, the New York Court of Appeals overturned the law, holding that it deprived employers of property without due process of law. *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 436, 441 (N.Y. 1911). Later in 1911, the Wisconsin Supreme Court upheld the voluntary Workers' Compensation Act, leading to more workers' compensation laws around the country. *See Borgnis v. Falk Co.*, 147 Wis. 327, 367–68, 133 N.W. 209 (1911); RANNEY, *supra* note 19, at 128. The Workers' Compensation Act eventually became compulsory for both employees and employers in 1931. OZANNE, *supra* note 18, at 127.

31. MADELINE KASPER & JILLIAN SLAIGHT, WIS. LEGIS. REFERENCE BUREAU, WORKERS' COMPENSATION LAW IN WISCONSIN 2 (2018), [https://docs.legis.wisconsin.gov/misc/lrb/wisconsin\\_policy\\_project/wisconsin\\_policy\\_project\\_1\\_1.pdf](https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_policy_project/wisconsin_policy_project_1_1.pdf) [<https://perma.cc/BA34-YQBM>].

32. *Id.*

33. *See id.*

34. WIS. STAT. § 102.03(1)(c)1. (2021–22).

35. WIS. DEP'T OF WORKFORCE DEV., WIS. STATE LAB'Y OF HYGIENE, 2019 WISCONSIN WORK INJURY CLAIMS 1 (n.d.), <https://dwd.wisconsin.gov/wc/statistics/pdf/2019-highlights.pdf> [<https://perma.cc/JB4V-29CT>].

compensable under the Act, from an employee who was injured while napping<sup>36</sup> to an employee who was murdered at work.<sup>37</sup>

Finally, claims brought under the Workers' Compensation Act are first decided by an administrative law judge, and then may be appealed to the Labor and Industry Review Commission.<sup>38</sup> Decisions by the Commission may then be appealed to the circuit court and through the higher courts of the Wisconsin court system.<sup>39</sup> To achieve the Act's purpose of "provid[ing] prompt justice for injured workers and . . . prevent[ing] . . . the delays that might arise from protracted litigation," courts and the Commission construe the Act liberally.<sup>40</sup> The history, purpose, and provisions of the Act illustrate its function of guaranteeing compensation for employees who are injured on the job while creating certainty for the employers who are responsible for compensating injured workers.

### *B. Telecommuter Injuries in Wisconsin*

Since workplace injuries are typically sustained by manual laborers who use dangerous equipment or constantly exert physical movement,<sup>41</sup> it is initially difficult to imagine how a nonmanual telecommuter would sustain a workplace injury. However, the issues surrounding telecommuter injuries can take many forms. For example, an accountant works from home and never reports to a physical office. Further, the accountant is a salaried employee who is not obligated to follow a set work schedule. One day, the accountant takes a break from work to walk her dog and accidentally trips over a stack of files in her office. This injury raises many questions in the context of workers' compensation: Was her injury sustained while performing a task related to her employment?<sup>42</sup> Was her injury sustained while taking a personal break from work and covered under the personal comfort doctrine?<sup>43</sup> And, with a limited presence in the employee's home, How can the employer verify the events

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36. *Am. Motors Corp. v. Indus. Comm'n*, 1 Wis. 2d 261, 271, 83 N.W.2d 714 (1957).

37. *Allied Mfg., Inc. v. Dep't of Indus., Lab. & Hum. Rels.*, 45 Wis. 2d 563, 566, 173 N.W.2d 690 (1970).

38. *DOMER & DOMER*, *supra* note 7, § 27:1.

39. *Id.*

40. *Cnty. of Dane v. Lab. & Indus. Rev. Comm'n*, 2009 WI 9, ¶ 34, 315 Wis. 2d 293, 759 N.W.2d 571 (quoting *Bosco v. Lab. & Indus. Rev. Comm'n*, 2004 WI 77, ¶ 48, 272 Wis. 2d 586, 681 N.W.2d 157).

41. *Top Work-Related Injury Causes*, NAT'L SAFETY COUNCIL: INJURY FACTS, <https://injuryfacts.nsc.org/work/work-overview/top-work-related-injury-causes/> [https://perma.cc/XVU3-T2PK].

42. See WIS. STAT. § 102.03(1)(c)1. (2021–22).

43. See *Am. Motors Corp. v. Indus. Comm'n*, 1 Wis. 2d 261, 264–65, 83 N.W.2d 714 (1957). Under the personal comfort doctrine, an employee who is injured at work while taking a personal break is still entitled to workers' compensation benefits unless the break involves an activity in which "an intent to abandon the job temporarily may be inferred," or some other egregious circumstance. *Id.*

causing the injury to adequately defend the claim? As slip and falls, mental trauma, or overexertion are just a few examples of injuries that can occur in an office setting, attention is owed to these injuries in the context of telecommuters.<sup>44</sup>

Workers' compensation benefits are not limited to injuries sustained by employees on their employers' physical premises.<sup>45</sup> In Wisconsin, injuries sustained by telecommuters in their homes fall under Wisconsin Statutes section 102.03(1)(c)4,<sup>46</sup> which provides: "[T]he premises of the employer include the premises of any other person on whose premises the employee performs service."<sup>47</sup> Thus, there are few statutorily defined limits to when Wisconsin telecommuters can recover workers' compensation benefits for work-related injuries sustained in their homes.<sup>48</sup> Further, telecommuter injuries can occur in two specific contexts: injuries where the home serves as a primary workplace and injuries where the home serves as an additional workplace.<sup>49</sup> While the Workers' Compensation Act provides little guidance on when such injuries are compensable, Wisconsin courts and the Commission have addressed these issues and provide some suggestions.<sup>50</sup>

#### i. The Home as a Primary Workplace

In the first context of telecommuter injuries, the home serves as the place where the employee completes the majority of his or her work.<sup>51</sup> Thus, the employee may never report to a physical office, limiting the employer's ability to supervise the employee.<sup>52</sup> This poses challenges on the employer's ability to defend such claims, as there is often limited evidence of the injury available to the employer, and the employer is largely unable to enforce measures that would prevent injuries from occurring.<sup>53</sup> Aside from a few exceptions, the following cases illustrate that both Wisconsin courts and the Commission will generally award workers' compensation benefits for injuries sustained by telecommuters arising out of employment if the employee normally works from

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44. See NAT'L SAFETY COUNCIL, *supra* note 41.

45. See *Abramson v. CUNA Mut. Ins. Soc'y*, WC Claim No. 91040700, 1993 WL 51567, at \*3 (Wis. Lab. & Ind. Rev. Comm'n Jan. 15, 1993).

46. *Id.*

47. WIS. STAT. § 102.03(1)(c)4. (2021–22).

48. *See id.*

49. 2 LEX K. LARSON, LARSON'S WORKERS' COMP. LAW § 16.10[1] (Matthew Bender ed., 2023).

50. *See* WIS. STAT. § 102.03 (2021–22).

51. *See Black River Dairy Prods., Inc. v. Dep't of Indus., Lab. & Human Rels.*, 58 Wis. 2d 537, 545, 207 N.W.2d 65 (1973).

52. *See id.*; Gabel & Mansfield, *supra* note 11, at 235.

53. *See* Gabel & Mansfield, *supra* note 11, at 235.



home and was acting consistent with his or her employment at the time of the injury.<sup>54</sup>

Telecommuters will generally be eligible to recover workers' compensation benefits for injuries sustained in the course of employment where the home serves as the general workplace.<sup>55</sup> In *Black River Dairy v. Department of Industry, Labor & Human Relations*, the claimant was employed as a pizza salesman and traveled the state promoting his employer's pizza brand.<sup>56</sup> Because the employer's offices were located in a different town from where the claimant lived, the claimant was not required to report to the office and could set his own work hours.<sup>57</sup> One day, when heading out to his truck for work, the claimant injured himself after slipping on a patch of ice on his driveway.<sup>58</sup>

The court held that because the claimant's home was his primary workplace, his injury was compensable under the Workers' Compensation Act.<sup>59</sup> In coming to its conclusion, the court considered Professor Larson's indicia for when the home serves as a general place of employment: "[T]he quantity and regularity of work performed at home; the continuing presence of work equipment at home; and the special circumstances of the particular employment that make it necessary and not merely personally convenient to work at home."<sup>60</sup> Here, the claimant was forced to work from home as the employer maintained no place of business in the claimant's town and therefore satisfied the "special circumstances" prong of Larson's indicia.<sup>61</sup>

While Wisconsin courts and the Commission will consider Larson's indicia for when the home serves as a general place of employment, they have not been formally adopted as the official test for telecommuter injuries.<sup>62</sup> In *Abramson v. C.U.N.A. Mutual Insurance Society*, the claimant first suffered an injury on the employer's premises and a subsequent injury while working at home.<sup>63</sup> Prior to her injuries, the claimant's employer provided her with a laptop to perform

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54. *Black River Dairy Prods., Inc.*, 58 Wis. 2d at 545; *Abramson v. CUNA Mut. Ins. Soc'y*, WC Claim No. 91040700, 1993 WL 51567, at \*3 (Wis. Lab. & Indus. Rev. Comm'n Jan. 15, 1993); *Town of Russell Volunteer Fire Dep't v. Lab. & Indus. Rev. Comm'n*, 223 Wis. 2d 723, 730–31, 589 N.W.2d 445 (Ct. App. 1998); *Augustine v. Kenosha Visiting Nurse*, WC Claim No. 1998-064631, 2000 WL 1498228, at \*1 (Wis. Lab. & Indus. Rev. Comm'n Sept. 13, 2000).

55. *Black River Dairy Prods., Inc.*, 58 Wis. 2d at 545.

56. *Id.* at 539.

57. *Id.* at 539–40.

58. *Id.* at 540–41.

59. *Id.* at 545 ("[F]rom the record, the only reasonable inference that can be drawn is that the employer did not provide the premises nor the means to perform this service that was not only beneficial to the employer but essential. [The Claimant] had to perform this service on his own premises.").

60. *Id.* at 545–46; see also 2 LARSON, *supra* note 49, § 16.10[2].

61. *Black River Dairy Prods., Inc.*, 58 Wis. 2d at 646.

62. *Abramson v. CUNA Mut. Ins. Soc'y*, WC Claim No. 91040700, 1993 WL 51567, at \*3 (Wis. Lab. & Indus. Rev. Comm'n Jan. 15, 1993).

63. *Id.* at \*2.

work from home.<sup>64</sup> The court held that while courts consider Larson's indicia for when the home serves as a general workplace, the indicia have not been codified, nor formally determined to be dispositive by the courts, and the actual test is the statutory language in Wisconsin Statutes section 102.03(1)(c)4.<sup>65</sup> Nevertheless, the court's decision turned on the location of where the claimant sustained her injury and the quantity of work that the claimant was performing.<sup>66</sup> Because there was evidence that the claimant did more than just "some tidbit of work" at her home, and because the claimant was working at the time of her injury, the court deemed the claimant's injury compensable.<sup>67</sup>

A telecommuter performing duties consistent with his or her employment at the time of injury will likely be eligible to recover workers' compensation benefits.<sup>68</sup> In *Town of Russell v. Labor & Industry Review Commission*, a volunteer firefighter was killed while trying to save his family from a fire in his own home.<sup>69</sup> The court awarded death benefits to the deceased firefighter's wife after determining that he was acting as a volunteer firefighter and not some "ordinary citizen" at the time of his death.<sup>70</sup> Specifically, the firefighter pounded on the wall to alert neighbors of the fire and broke open a window so his family could get air, which were all things he was trained to do as a firefighter.<sup>71</sup> Here, the court awarded death benefits on the premise that the firefighter could perform his work duties regardless of where a fire occurred—in this case, his own home.<sup>72</sup>

However, a telecommuter who works at home for his or her own convenience may be barred from receiving workers' compensation benefits.<sup>73</sup> In *Augustine v. Kenosha Visiting Nurse*, the claimant was working from home while taking care of her ill daughter and became injured while getting paperwork from her car.<sup>74</sup> The court noted that if an employee works at home for his or her own personal convenience, and not for the convenience of the

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64. *Id.* at \*1.

65. *Id.* at \*3.

66. *Id.* ("The 'work at home' injury constitutes a work-related injury because, in part, 'the premises of the employer include the premises of any other person on whose premises the employee performs service' . . . Ms. Abramson's 'work at home' injury involved something far greater than the performance of only 'some tidbit of work' for her employer at home.")

67. *Id.*

68. *Town of Russell Volunteer Fire Dep't v. Lab. & Indus. Rev. Comm'n*, 223 Wis. 2d 723, 730–31, 589 N.W.2d 445 (Ct. App. 1998).

69. *Id.* at 728.

70. *Id.* at 731.

71. *Id.*

72. *See id.* at 732 ("The [Commission] found that the facts supported the inference that [the claimant] was acting within his training and duties as a volunteer firefighter when he attempted to save the lives of his family. We defer to that finding.")

73. *Augustine v. Kenosha Visiting Nurse*, WC Claim No. 1998-064631, 2000 WL 1498228, at \*1–2 (Wis. Lab. & Indus. Rev. Comm'n Sept. 13, 2000).

74. *Id.* (Anderson, Comm'r, dissenting).

employer, then injuries sustained at home through the course of employment may not be compensable.<sup>75</sup> Hence, the court determined that the claimant was working at home for the employer's convenience, as the employer requested that she perform the work at home, and sustained her injury while completing the work.<sup>76</sup>

In short, Wisconsin courts and the Commission suggest that telecommuters can recover workers' compensation benefits for injuries sustained in his or her home when the employee's home is the primary workplace and the employee is performing work consistent with his or her employment at the time of the injury.<sup>77</sup> However, an employee working at home for some personal benefit will not likely recover.<sup>78</sup> Still, the Wisconsin Legislature's silence on these particular circumstances leaves a vast gray area as to when these injuries will be compensable.<sup>79</sup>

#### ii. The Home as an Additional Workplace

In the second context of telecommuter injuries, an employee is injured on a commute between the premises of his or her employer and the home.<sup>80</sup> While injuries sustained on an employee's commute to and from work are typically not compensable under the Workers' Compensation Act, an exception exists when the employee's commute is necessary for some work-related purpose.<sup>81</sup> This exception increases the employer's potential chances of liability, as an employer could theoretically be liable for injuries occurring on the employer's premises, the employee's commute, and at the employee's home.<sup>82</sup> Here, when commuting to and from work, the employee is essentially commuting from one workplace to another.<sup>83</sup> The following case demonstrates how Wisconsin courts and the Commission apply the dual-purpose doctrine, which is the test for whether an employee's commute was necessary for a work-related purpose.<sup>84</sup>

An employee whose commute is necessary for a work-related purpose will likely be eligible to receive workers' compensation benefits for any injury

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75. *Id.*

76. *Id.* ("There is an aspect of convenience in this case, but it is the convenience to the employer not the applicant.")

77. See *Black River Dairy Prods., Inc. v. Dep't of Indus., Lab. & Human Rels.*, 58 Wis. 2d 537, 545, 207 N.W.2d 65 (1973); *Town of Russell Volunteer Fire Dep't*, 223 Wis. 2d at 732.

78. *Augustine*, 2000 WL 1498228, at \*1.

79. See WIS. STAT. § 102.03 (2021–22); *Abramson v. CUNA Mut. Ins. Soc'y*, WC Claim No. 91040700, 1993 WL 51567, at \*3 (Wis. Lab. & Indus. Rev. Comm'n Jan. 15, 1993).

80. See *Fay v. Trek Diagnostic Sys., Inc.*, WC Claim No. 2003-049932, 2005 WL 1900473, at \*2 (Wis. Lab. & Indus. Rev. Comm'n July 28, 2005).

81. *Id.*

82. See *id.*; Ingle, *supra* note 7 at 7–8; 2 LARSON, *supra* note 49, § 16.10[1].

83. See *Fay*, 2005 WL 1900473, at \*2; Ingle, *supra* note 7, at 7–8; 2 LARSON, *supra* note 49, § 16.10[1].

84. See *Fay*, 2005 WL 1900473, at \*2; 2 LARSON, *supra* note 49, § 16.10[1].

sustained on his or her commute, even if there is also a personal purpose involved.<sup>85</sup> In *Fay v. Trek Diagnostic Systems*, the claimant was injured in a car accident when driving to work one morning.<sup>86</sup> The claimant sought workers' compensation benefits, as his job required him to use special software that could only be accessed on his home desktop.<sup>87</sup>

The Commission noted that although the coming and going rule typically precludes workers' compensation benefits for injuries sustained while commuting to and from work, such injuries may be compensable where the commute is necessary for a work-related purpose.<sup>88</sup> While personal convenience may still be a factor in the commute home, the claimant had to show that it was necessary for him to complete his work at home—specifically that he had no way of completing the work on the employer's premises.<sup>89</sup> Thus, although a commute to or from work will not be covered if no work is required to be performed at home, a commute to or from work will be covered if the employee is required to perform work at home.<sup>90</sup> However, the claimant's failure to show that he actually worked at home over the particular weekend in question indicated that his commute was not necessary for a work-related purpose, and the Commission denied workers' compensation benefits.<sup>91</sup>

Much like telecommuter injuries where the home serves as the primary workplace, the Wisconsin Legislature's silence has created substantial uncertainty surrounding telecommuter injuries where the home serves as an additional workplace.<sup>92</sup> Under both contexts, it is difficult for an employer to anticipate with any certainty whether they will be liable for an employee's injury occurring at his or her home or commute to work.<sup>93</sup> This uncertainty negates the underlying purpose of the Workers' Compensation Act, which is to balance employees' interests with employers' interests.<sup>94</sup> If there are no clear guidelines for when employees can recover workers' compensation benefits for telecommuter injuries, both employees and employers will be subjected to the

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85. See *Fay*, 2005 WL 1900473, at \*2.

86. *Id.*

87. *Id.*

88. *Id.* (“[I]f the trip home for the business purpose to do work on the computer application would have occurred even without the personal purpose of returning home – then the trip both ways from work to home should be covered.”).

89. See *id.*

90. See *id.*

91. *Id.*

92. See *id.*; WIS. STAT. § 102.03 (2021–22).

93. See *Abramson v. CUNA Mut. Ins. Soc’y*, No. 91040700, 1993 WL 51567, at \*3 (Wis. Lab. & Indus. Rev. Comm’n Jan. 15, 1993); *Fay*, 2005 WL 1900473, at \*2.

94. See *Cnty. of Dane v. Lab. & Indus. Rev. Comm’n*, 2009 WI 9, ¶ 34, 315 Wis. 2d 293, 759 N.W.2d 571 (quoting *Bosco v. Lab. & Indus. Rev. Comm’n*, 2004 WI 77, ¶ 48, 272 Wis. 2d 586, 681 N.W.2d 157); KASPER & SLAIGHT, *supra* note 31, at 2.

prolonged litigation and delayed justice that the Act seeks to avoid.<sup>95</sup> However, decisions by the courts and Commission provide some guidance on these issues, which may suggest what clearer standards for telecommuter injuries would look like.

### III. APPROACHES TO TELECOMMUTER INJURIES IN OTHER JURISDICTIONS

Like Wisconsin, case law in most other jurisdictions has used Larson's indicia as guidance for when a telecommuter's injuries are compensable.<sup>96</sup> Still, some jurisdictions have modified their application of Larson's indicia,<sup>97</sup> or have created their own standards for when telecommuter injuries arise in specific contexts.<sup>98</sup> Meanwhile, the rise in telecommuting due to the COVID-19 pandemic has led other jurisdictions to use their courts and legislatures in an attempt to craft clearer standards for telecommuter injuries.<sup>99</sup> The following approaches have been taken by other jurisdictions and may provide insight for how Wisconsin can fashion an appropriate remedy for telecommuter injuries.

#### A. Case Law

Maryland courts have modified the third prong of Larson's indicia for when the home serves as a general workplace by asking if the employer "acquiesced to" or "reasonably should have known" that the employee was using his or her home as a primary workplace.<sup>100</sup> In *Schwan Food Co. v. Frederick*, the claimant's job required him to meet delivery drivers to obtain deliveries for his accounts.<sup>101</sup> The claimant did not report to a formal office.<sup>102</sup>

One day, the claimant planned on taking his son to daycare on the way to his first account; however, the claimant slipped on ice while walking to his car.<sup>103</sup> The court determined that the claimant failed to prove that his employer "acquiesced to" or "reasonably should have known" that he was using his home as a primary workplace.<sup>104</sup> Specifically, although the claimant's employer did not have a local office for him to report to, the employer would often rent space

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95. *See Cnty. of Dane*, 2009 WI 9, ¶ 34.

96. *See generally* 2 LARSON, *supra* note 49, § 16.10 (discussing an overview of telecommuter injury cases in various jurisdictions).

97. *See, e.g.*, *Schwan Food Co. v. Frederick*, 211 A.3d 659, 678 (Md. Ct. Spec. App. 2019); 2 LARSON, *supra* note 49, § 16.10[2].

98. *See Wait v. Travelers Indem. Co.*, 240 S.W.3d 220, 226–28, 230 (Tenn. 2007).

99. *Capraro v. Matrix Absence Mgt.*, 132 N.Y.S.3d 456, 458–59 (App. Div. 2020); OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007); H.B. 447, 134th Gen. Assemb., Reg. Sess. (Ohio 2022); 2 LARSON, *supra* note 49, § 16.10[2].

100. *Schwan Food Co.*, 211 A.3d at 678; 2 LARSON, *supra* note 49, § 16.10[2].

101. *Schwan Food Co.*, 211 A.3d at 664.

102. *Id.*

103. *Id.*

104. *Id.* at 678.

for the claimant to conduct meetings and the employer did not reimburse the claimant for mileage incurred while driving to his first account of the day.<sup>105</sup> By requiring employers to approve of telecommuting as a prerequisite to recovery for work injuries sustained in the home, it becomes more clear what injuries an employer will be liable for and employers will be better equipped to anticipate such injuries.

Further, the Tennessee Supreme Court has held that although a telecommuter may recover workers' compensation benefits for an injury sustained during a "personal break" at home, a telecommuter will not recover for an injury sustained in an assault at home if the assault is unrelated to the telecommuter's employment or to the telecommuter's relationship with the aggressor.<sup>106</sup> In *Wait v. Travelers Indemnification Co.*, the claimant was assaulted by her neighbor while preparing lunch in her kitchen on a workday.<sup>107</sup> Here, the court held that the fact that the injury occurred on the telecommuter's lunch break did not preclude it from being considered as arising out of the course of employment because injuries occurring during "personal breaks" are compensable.<sup>108</sup> However, the court determined that the claimant's injury did not arise out of employment because there was no evidence that the assault was motivated by any factor related to the claimant's employment, or even by the telecommuter's relationship with the aggressor.<sup>109</sup> By limiting compensability under these unique circumstances, the court provided some clarity to the types of injury causing events that employers will be liable for.

Finally, the New York State Workers' Compensation Board made one of the first attempts to develop clearer standards for telecommuter injuries in response to the COVID-19 pandemic.<sup>110</sup> In *Capraro v. Matrix Absence Management*, the claimant was injured while carrying office furniture into his home.<sup>111</sup> The Workers' Compensation Board denied benefits, holding that the claimant's injuries were not work-related.<sup>112</sup> The Workers' Compensation Board came to its decision by deriving two standards that must be met for a telecommuter to recover for his or her injuries.<sup>113</sup> First, the injury must occur during normal work hours, and second, the employee must have been "actively engaged in work duties" during the time of the injury.<sup>114</sup> The board noted that

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105. *Id.* at 683–84.

106. *See Wait v. Travelers Indem. Co.*, 240 S.W.3d 220, 226–28, 230 (Tenn. 2007).

107. *Id.* at 223.

108. *Id.* at 226.

109. *Id.* at 227–28, 230.

110. *See Capraro v. Matrix Absence Mgt.*, 132 N.Y.S.3d 456, 458–59 (App. Div. 2020); 2 LARSON, *supra* note 49, § 16.10[2].

111. *See Capraro*, 132 N.Y.S.3d at 458.

112. *Id.*

113. *Id.* at 458–59.

114. *Id.*

the second prong excludes injuries occurring during personal activities like restroom breaks.<sup>115</sup>

Nonetheless, the appellate court reversed and remanded the board's decision, holding that the board's standard was contrary to the "remedial nature" of the state's workers' compensation law.<sup>116</sup> Moreover, the court declared that the proper standard asks whether the employee "was engaged in a 'purely personal' activity that was not 'reasonable and sufficiently work related under the circumstances.'"<sup>117</sup>

All three of the preceding cases illustrate how courts have derived clearer standards for telecommuter injuries by restricting a telecommuter's ability to recover for his or her injuries. In *Schwan Food Co. v. Frederick*, the court required a heightened showing that the employee was permitted to work from home.<sup>118</sup> Further, in *Wait v. Travelers Indemnity Co.*, the court precluded recovery for random acts of assault by requiring telecommuters to prove either a connection between the assault and the employee's work, or that the assault arose out of the employee's relationship with the aggressor.<sup>119</sup>

Meanwhile, other courts have found barriers to limiting telecommuter liability where the restrictions appear to conflict with the purpose of the state's workers' compensation law.<sup>120</sup> For example, *Capraro* demonstrates that court-created standards imposing a higher burden on telecommuters may be found to be inconsistent with the workers' compensation law and could be consequently overturned by higher courts.<sup>121</sup> Given the liberal construction of the Workers' Compensation Act in Wisconsin, it is likely that heightened standards imposed by the Commission would be overturned by the higher courts.<sup>122</sup> Thus, the ability of Wisconsin courts and the Commission to fashion an appropriate remedy for telecommuter injuries may be limited.<sup>123</sup>

### B. Statutory

Currently, Ohio is the only state that has codified specific requirements for injured telecommuters to recover workers' compensation benefits.<sup>124</sup> In 2022,

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115. *Id.* at 459.

116. *Id.*

117. *Id.* (quoting *Neacosia v. New York Power Auth.*, 649 N.E.2d 1188, 1191 (N.Y. 1995)).

118. *See Schwan Food Co. v. Frederick*, 211 A.3d 659, 678 (Md. Ct. Spec. App. 2019).

119. *See Wait v. Travelers Indem. Co.*, 240 S.W.3d 220, 226–28, 230 (Tenn. 2007).

120. *See Capraro*, 132 N.Y.S.3d at 459.

121. *See id.*

122. *See Cnty. of Dane v. Lab. & Indus. Rev. Comm'n*, 2009 WI 9, ¶ 34, 315 Wis.2d 293, 759 N.W.2d 571.

123. *See id.*

124. *See Louise Esola, New Ohio Law Limits Work-From-Home Injuries in Comp.* BUS. INS. (Aug. 31, 2022), <https://www.businessinsurance.com/article/20220831/NEWS08/912352148/New-Ohio-law-limits-work-from-home-injuries-in-comp> [<https://perma.cc/E3MC-366G>].

the Ohio General Assembly amended its workers' compensation statute to include three conditions that must be satisfied before an injured telecommuter can recover benefits.<sup>125</sup> Specifically, injured telecommuters cannot recover workers' compensation benefits unless his or her injury: (1) "Arises out of" employment, (2) "was caused by a special hazard of the employee's employment activity," and (3) "is sustained in the course of an activity undertaken by the employee for the exclusive benefit of the employer."<sup>126</sup> Thus, the Ohio statute limits a telecommuter's eligibility to recover benefits for an injury sustained at his or her home.<sup>127</sup>

The Ohio statute seeks to remedy many of the potential issues that may arise with telecommuter injuries.<sup>128</sup> In response to the growing number of telecommuters since the COVID-19 pandemic, the drafters of the statute sought to reduce the uncertainty of which telecommuter claims would be compensable.<sup>129</sup> The most important component of the statute may be the "special hazard" element.<sup>130</sup> The special hazard element limits compensability to injuries caused by a special hazard of the telecommuter's job.<sup>131</sup> Accordingly, the statute imposes a fact-specific analysis.<sup>132</sup> For example, a telecommuter who falls down the staircase of his or her home while completing some work-related task will be found to have a compensable injury, while a telecommuter who falls down the staircase on the way to feed a pet dog will have a non-compensable injury.<sup>133</sup>

Since no case has interpreted the Ohio statute, the courts may need guidance in defining the boundaries of a "special hazard." Courts may find guidance from the "special hazard" exception to the coming and going rule that the Ohio Supreme Court recognized in *MTD Products, Inc. v. Robatin*.<sup>134</sup> In *MTD Products, Inc.*, the claimant was injured in a car accident while turning into his

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125. See H.B. 447, 134th Gen. Assemb., Reg. Sess. (Ohio 2022); see also OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

126. OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

127. See *id.*

128. See OHIO LEG. SERV. COMM'N, FINAL ANALYSIS, H.B. 447 FINAL ANALYSIS, 134th Gen. Assemb., Reg. Sess., at 1–2 (2022), <https://www.legislature.ohio.gov/download?key=19538&format=pdf> [<https://perma.cc/RXX8-7WFD>]; Esola, *supra* note 124.

129. Esola, *supra* note 124.

130. See Marisa Bartlette Willis, *United States: Ohio House Bill 447 and Remote Work Injuries*, MONDAQ (Oct. 4, 2022), <https://www.mondaq.com/unitedstates/discrimination-disability-sexual-harassment/1236546/ohio-house-bill-447-and-remote-work-injuries> [<https://perma.cc/CF7B-GW9A>]; H.B. 447, 134th Gen. Assemb., Reg. Sess. (Ohio 2022).

131. OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

132. *Id.*

133. See *id.*

134. *MTD Prods., Inc. v. Robatin*, 572 N.E.2d 661, 663–64 (Ohio 1991). The Wisconsin Supreme Court rejected a special hazard exception to the coming and going rule after finding a lack of legislative intent to include the exception. *Jaeger Baking Co. v. Kretschmann*, 96 Wis.2d 590, 599, 292 N.W.2d 622 (1980).



employer's parking lot.<sup>135</sup> To determine if the coming and going rule was defeated by a "special hazard" of employment, the court applied a two-part test: (1) "But for' the employment, the employee would not have been at the location where the injury occurred," and (2) "the risk is distinctive in nature or quantitatively greater than the risk common to the public."<sup>136</sup> The court held that while the claimant's injury satisfied the first prong, the claimant failed to satisfy the second prong because driving on "busy, public streets" was not a distinct or heightened risk created by his employment.<sup>137</sup>

Still, it is not clear from the statute how an employer would obtain evidence to disprove the compensability of telecommuters' injuries, especially with a limited presence in their employees' homes.<sup>138</sup> Several additional measures have been suggested for employers to limit their exposure, including limiting the type of work a telecommuter can perform at home, limiting the number of hours a telecommuter can work, and requiring telecommuters to conduct all work in a designated area of the home.<sup>139</sup> Although the statute may not result in entirely certain outcomes for determining compensability, proponents of the statute assert that it will provide clarity to employers in helping them better predict what telecommuter injuries will be compensable.<sup>140</sup>

While most jurisdictions use Larson's indicia to determine the compensability of telecommuter injuries, modifications to the indicia by Maryland and Tennessee courts show how carve outs can provide clarity to the indicia under certain circumstances.<sup>141</sup> Additionally, the failed attempt to limit compensability for telecommuter injuries by the New York State Workers' Compensation Board illustrates the potential barriers that Wisconsin courts and the Commission may similarly face should they take the initiative to establish formal standards.<sup>142</sup> Finally, the recent amendment to Ohio's workers' compensation statute demonstrates how legislation can be used to remedy telecommuter liability and circumvent many of the challenges that may arise through action taken by the courts.<sup>143</sup>

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135. *MTD Prods., Inc.*, 572 N.E.2d at 664.

136. *Id.* at 664 (citing *Littlefield v. Pillsbury, Co.*, 453 N.E.2d 570, 571 (Ohio 1983)).

137. *Id.*

138. See OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

139. Willis, *supra* note 130.

140. See Esola, *supra* note 124.

141. See *Schwan Food Co. v. Frederick*, 211 A.3d 659, 678 (Md. Ct. Spec. App. 2019); *Wait v. Travelers Indem. Co.*, 240 S.W.3d 220, 226–28, 230 (Tenn. 2007); see also 2 LARSON, *supra* note 49, § 16.10[2].

142. See *Capraro v. Matrix Absence Mgt.*, 132 N.Y.S.3d 456, 459 (App. Div. 2020); *Cnty. of Dane v. Lab. & Indus. Rev. Comm'n*, 2009 WI 9, ¶ 33, 315 Wis.2d 293, 759 N.W.2d 571.

143. See *Capraro*, 132 N.Y.S.3d at 458–59; H.B. 447, 134th Gen. Assemb., Reg. Sess. (Ohio 2022); OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

## IV. ANALYSIS

With the inevitable rise of telecommuting over the coming years,<sup>144</sup> Wisconsin should adopt formal standards to determine the compensability of telecommuter injuries. Both employers and employees would benefit from a defined framework that makes the compensability of telecommuter injuries foreseeable.<sup>145</sup> Further, to avoid the potential pitfalls of a framework established by the courts,<sup>146</sup> the Wisconsin Legislature should amend the Workers' Compensation Act to codify these standards. Still, in amending the Workers' Compensation Act, the Wisconsin Legislature should consider the purpose of the Act,<sup>147</sup> and balance the interests of employees and employers.<sup>148</sup>

*A. Adopting Formal Standards for Telecommuter Injuries in Wisconsin*

To eliminate the current uncertainties surrounding telecommuter injuries, the Wisconsin Legislature should adopt formal standards to determine the compensability of telecommuter injury claims.<sup>149</sup> The Wisconsin Legislature likely did not anticipate the modern rise of telecommuting when they enacted Wisconsin Statutes section 102.03(1)(c)4. Thus, the statute does not address the potential problems that can arise when telecommuters sustain injuries in the home. Instead, Wisconsin courts and the Commission use Larson's indicia as a quasi-default framework to determine the compensability of telecommuter injuries,<sup>150</sup> but neither the courts nor the Commission are bound to the indicia in reaching its decisions.<sup>151</sup>

The current absence of a formal framework for determining the compensability of telecommuter injuries in Wisconsin is troublesome because it could lead to inconsistent decisions, resulting in significant uncertainty for employees and employers.<sup>152</sup> For example, the inconsistent application of Larson's indicia in two different cases could lead to differing decisions for similar injuries. Consequently, an employee will never know when his or her

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144. Bryan Robinson, *Remote Work is Here to Stay and Will Increase into 2023, Experts Say*, FORBES (Feb. 1, 2022, 6:24 AM), <https://www.forbes.com/sites/bryanrobinson/2022/02/01/remote-work-is-here-to-stay-and-will-increase-into-2023-experts-say/> [<https://perma.cc/4JHM-8DPQ>].

145. See Gabel & Mansfield, *supra* note 11, at 235.

146. See *Capraro*, 132 N.Y.S.3d at 458–59.

147. See *Cnty. of Dane*, 2009 WI 9, ¶ 34.

148. See *KASPER & SLAUGHT*, *supra* note 31, at 2.

149. See *Abramson v. CUNA Mut. Ins. Soc'y.*, WC Claim No. 91040700, 1993 WL 51567, at \*3 (Wis. Lab. & Indus. Rev. Comm'n Jan. 15, 1993); *Fay v. Trek Diagnostic Sys. Inc.*, WC Claim No. 2003-049932, 2005 WL 1900473, at \*4 (Wis. Lab. & Indus. Rev. Comm'n July 28, 2005).

150. See *Black River Dairy Prods., Inc. v. Dep't of Indus., Lab. & Human Rels.*, 58 Wis.2d 537, 544–46, 207 N.W.2d 65 (1973); *Abramson*, 1993 WL 51567, at \*3; *Augustine v. Kenosha Visiting Nurse*, WC Claim No. 1998-064631, 2000 WL 1498228, at \*2 (Wis. Lab. & Indus. Rev. Comm'n Sept. 13, 2000); *Fay*, 2005 WL 1900473, at \*4.

151. See *Augustine*, 2000 WL 1498228, at \*2.

152. See *id.*

injury will be compensable under the Workers' Compensation Act and an employer will never know when they will be liable for an employee's injury under the Act.<sup>153</sup>

Additionally, the lack of formal standards for telecommuter injuries in Wisconsin may lead to decisions that are inconsistent with the purpose of the Workers' Compensation Act.<sup>154</sup> The Commission's decision in *Augustine* provides a good example.<sup>155</sup> Although the Commission did not outright preclude recovery for injuries where the reason for telecommuting was for personal convenience to the employee, the Commission nevertheless entertained the idea that such injuries may not be compensable where a telecommuter is only telecommuting for personal convenience.<sup>156</sup> Here, the Commission relied on the third prong of Larson's indicia in reaching its decision.<sup>157</sup>

However, in construing the Workers' Compensation Act liberally, consistent with the Act's purpose, it is unlikely that a higher court would uphold a decision by the Commission that limited compensability because it was only convenient for the employee to work from home.<sup>158</sup> And again, the lack of formal standards for telecommuter injuries circumvents the purpose of the Act by creating uncertainties that may impose prolonged litigation and delayed justice for employees and employers.<sup>159</sup> The inconsistencies and uncertainties that currently surround compensability for telecommuter injuries in Wisconsin strongly support the need for adopting formal standards. The next issue involves how the formal standards should be established and what those standards should entail.

*B. Amending the Workers' Compensation Act to Adopt Formal Standards for Telecommuter Injuries in Wisconsin*

Like Ohio,<sup>160</sup> the Wisconsin Legislature should amend the Workers' Compensation Act to establish formal standards to determine the compensability of telecommuter injuries. Formal standards for telecommuter injuries could be established in two primary ways: through the courts<sup>161</sup> or

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153. *See id.*

154. *See* Cnty. of Dane v. Lab. & Indus. Rev. Comm'n, 2009 WI 9, ¶ 34 315 Wis.2d 293, 759 N.W.2d 571.

155. *Augustine*, 2000 WL 1498228, at \*1.

156. *Id.*

157. *Id.* at \*3; *See* 2 LARSON, *supra* note 49, § 16.10[2].

158. *See* Cnty. of Dane, 2009 WI 9, ¶ 33 ("We will not read into the statute a limitation the plain language does not evidence . . . [T]he statute must be broadly construed in order to best promote its statutory purposes.").

159. *See id.*

160. OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

161. *See* 2 LARSON, *supra* note 49, § 16.10.

through the Wisconsin Legislature.<sup>162</sup> While most jurisdictions have established standards for telecommuter injuries through the adoption of Larson's indicia in some form by the courts,<sup>163</sup> other jurisdictions have shown that this method may be hindered by potential conflicts with the purpose of the respective workers' compensation law.<sup>164</sup>

Naturally, formal standards for telecommuter injuries that adequately address the problems surrounding such injuries<sup>165</sup> limit the ability of a telecommuter to receive compensation.<sup>166</sup> Standards that prescribe the circumstances where a telecommuter may recover will preclude recovery under other circumstances. For example, the firefighter's wife in *Town of Russell* may be denied benefits if the firefighter was not on duty on the night of the fire.<sup>167</sup> Or, the salesman in *Black River Dairy* may be denied benefits if he was not injured by some hazard related to his work duties.<sup>168</sup> Thus, any effort by Wisconsin courts or the Commission to interpret Wisconsin Statutes section 102.03(1)(c)4. to incorporate formal standards for telecommuter injuries<sup>169</sup> may diverge from the liberal construction of the Workers' Compensation Act and likely be viewed in conflict with the purpose of the Act.<sup>170</sup> Accordingly, formal standards must be established by the Wisconsin Legislature through an amendment to the Act.

Although formal standards for telecommuter injuries would inherently restrict compensability,<sup>171</sup> the Wisconsin Legislature should still consider the purpose of the Workers' Compensation Act<sup>172</sup> in developing the formal standards. Therefore, the formal standards must account for the interests of both

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162. See OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

163. See 2 LARSON, *supra* note 49, § 16.10.

164. See *Capraro v. Matrix Absence Mgt.*, 132 N.Y.S.3d 456, 458–59 (App. Div. 2020).

165. *Augustine v. Kenosha Visiting Nurse*, WC Claim No. 1998-064631, 2000 WL 1498228, at \*1 (Wis. Lab. & Indus. Rev. Comm'n Sept. 13, 2000).

166. See *Schwan Food Co. v. Frederick*, 211 A.3d 659, 678 (Md. Ct. Spec. App. 2019) (limiting a telecommuter's ability to receive workers' compensation benefits to circumstances where the employer approves of the employee's telecommuting); *Wait v. Travelers Indem. Co.*, 240 S.W.3d 220, 230 (Tenn. 2007) (limiting a telecommuter's ability to receive workers' compensation benefits from an assault because the employee had no personal relationship with the aggressor); OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2021–22).

167. See *Town of Russell Volunteer Fire Dep't v. Lab. & Indus. Rev. Comm'n*, 223 Wis.2d 723, 730-31, 589 N.W.2d 445 (Wis. Ct. App. 1998); OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

168. See *Black River Dairy Prods., Inc. v. Dep't of Indus., Lab. & Hum. Rels.*, 58 Wis. 2d 537, 545–46, 207 N.W.2d 65 (1973); OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

169. *Abramson v. CUNA Mut. Ins. Soc'y*, No. 91040700, 1993 WL 51567, at \*3 (Wis. Lab. & Indus. Rev. Comm'n Jan. 15, 1993) (noting that telecommuter injuries in Wisconsin currently fall under Wisconsin Statutes section 102.03(1)(c)4.).

170. See *Cnty. of Dane v. Lab. & Indus. Rev. Comm'n*, 2009 WI 9, ¶ 33, 315 Wis.2d 293, 759 N.W.2d 571; *Capraro v. Matrix Absence Mgt.*, 132 N.Y.S.3d 456, 458–59 (App. Div. 2020).

171. See *Schwan Food Co.*, 211 A.3d at 678; *Wait*, 240 S.W.3d at 226–28, 230; OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

172. See *Cnty. of Dane*, 2009 WI 9, ¶ 34.

employees and employers.<sup>173</sup> The Wisconsin Legislature can look to the Ohio statute,<sup>174</sup> doctrines in Wisconsin case law, and case law from other jurisdictions to develop standards that adequately address the current issues surrounding telecommuter injuries.<sup>175</sup>

i. Employees' Interests

Considering the interests of employees, formal standards for telecommuter injuries that uphold the purpose of the Workers' Compensation Act<sup>176</sup> would seek to provide a route to compensation that eliminates the current uncertainties surrounding such injuries.<sup>177</sup> The current absence of formal standards for telecommuter injuries contradicts the purpose of the Act,<sup>178</sup> as there is no framework for a telecommuter to apply to his or her injury to determine its compensability.<sup>179</sup> Subsequently, a telecommuter may be faced with extensive litigation to receive compensation for his or her injury, which may deter them from seeking compensation altogether.<sup>180</sup>

First, to reduce the uncertainties that telecommuters currently face, the Wisconsin Legislature can turn to the recent amendment to Ohio's workers' compensation statute as an example of how compensation can be limited to certain contexts.<sup>181</sup> Essentially, the Ohio statute limits compensability for telecommuter injuries to when the injury: (1) arises out of employment, (2) was caused by a hazard particular to employment, and (3) was sustained while performing a work-related task.<sup>182</sup> Adopting guidelines similar to these will clarify when a telecommuter injury is compensable by making a distinction between injuries that are actually related to work and injuries merely sustained at the telecommuter's home.<sup>183</sup> Still, more modifications can be made to develop a provision that caters to the interests of employees.

Next, to eliminate unnecessary litigation and expand compensability to as many telecommuters as possible, all telecommuter injuries should be treated alike, regardless of the circumstances that led to the employee's decision to work from home. The Workers' Compensation Act was originally passed in

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173. *See id.*

174. OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

175. *Augustine v. Kenosha Visiting Nurse*, WC Claim No. 1998-064631, 2000 WL 1498228, at \*1 (Wis. Lab. & Indus. Rev. Comm'n Sept. 13, 2000).

176. *See Cnty. of Dane*, 2009 WI 9, ¶ 34.

177. *Abramson v. CUNA Mut. Ins. Soc'y*, WC Claim No. 91040700, 1993 WL 51567, at \*3 (Wis. Lab. & Indus. Rev. Comm'n Jan. 15, 1993); *Fay v. Trek Diagnostic Sys. Inc.*, WC Claim No. 2003-049932, 2005 WL 1900473, at \*5 (Wis. Lab. & Indus. Rev. Comm'n July 28, 2005).

178. *See Cnty. of Dane*, 2009 WI 9, ¶ 34.

179. *Abramson*, 1993 WL 51567, at \*3; *Fay*, 2005 WL 1900473, at \*5.

180. *See Abramson*, 1993 WL 51567, at \*3; *Fay*, 2005 WL 1900473, at \*5.

181. *See* OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

182. *See id.*

183. *See id.*

response to common law rules that placed significant barriers to employees' potential for recovery.<sup>184</sup> Thus, the standards should not consider whether the telecommuter was working at home for personal convenience,<sup>185</sup> or the amount of work the telecommuter typically performs at home.<sup>186</sup> Such standards place unnecessary barriers to recovery and treat telecommuters unequally. Generally, if an employee is injured while undertaking a work-related task at home, and the injury was caused by the work-related task, then the standards should permit the employee's recovery.<sup>187</sup>

Adopting a standard that treats all telecommuters equally will eliminate the need for litigation concerning the definition of a telecommuter in each particular case and also ensures more telecommuters are eligible for compensation under the statute—both consistent with the purpose of the Workers' Compensation Act.<sup>188</sup> As will be discussed below, frivolous claims can be prevented by modifying the standards to require employees to show that the employer acquiesced to the employee's practice of telecommuting.<sup>189</sup> Standards that treat all telecommuters similarly will best fulfill the purpose of the Act and accommodate the interests of employees.<sup>190</sup>

Similarly, the standards should also account for a telecommuter who occasionally may need to report to some other location for work.<sup>191</sup> In doing so, the Wisconsin Legislature should officially adopt the dual-purpose doctrine as the codified test for when a telecommuter's commute is compensable.<sup>192</sup> Accordingly, a commute between home and some other location for a work-related purpose should be compensable under the new standards.<sup>193</sup>

Again, the Wisconsin Legislature can prevent frivolous claims by requiring the employee to prove that the employer acquiesced to his or her telecommuting<sup>194</sup> and by maintaining the requirement that an employee prove that his or her commute was necessary for a work-related purpose.<sup>195</sup> For example, an employee who leaves a work-related function and is injured on his or her commute home will not recover without proving he or she had work to

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184. OZANNE, *supra* note 18, at 125–26; RANNEY, *supra* note 19, at 127.

185. *Augustine v. Kenosha Visiting Nurse*, WC Claim No. 1998-064631, 2000 WL 1498228, at \*3 (Wis. Lab. & Indus. Rev. Comm'n Sept. 13, 2000).

186. *Id.* at \*3; 2 LARSON, *supra* note 49, § 16.10[2].

187. See OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

188. See *Cnty. of Dane v. Lab. & Indus. Rev. Comm'n*, 2009 WI 9, ¶ 34, 315 Wis.2d 293, 759 N.W.2d 571.

189. See *Schwan Food Co. v. Frederick*, 211 A.3d 659, 678 (Md. Ct. Spec. App. 2019).

190. See *id.*

191. See *Fay v. Trek Diagnostic Sys. Inc.*, WC Claim No. 2003-049932, 2005 WL 1900473, at \*2 (Wis. Lab. & Indus. Rev. Comm'n July 28, 2005).

192. See *id.* at \*2; 2 LARSON, *supra* note 49, § 16.10[1].

193. See *Fay*, 2005 WL 1900473, at \*2; 2 LARSON, *supra* note 49, § 16.10[1].

194. See *Schwan Food Co.*, 211 A.3d at 678.

195. See *Fay*, 2005 WL 1900473, at \*2; 2 LARSON, *supra* note 49, § 16.10[1].

complete later at home.<sup>196</sup> To create more certainty for employees and bring more telecommuters under the Workers' Compensation Act,<sup>197</sup> the standards should account for telecommuters who may need to occasionally commute to locations outside of the home for work-related purposes. Still, just as the standards should fulfill the interests of employees, they should likewise consider the interests of employers.

## ii. Employers' Interests

Telecommuter standards that bear the purpose of the Workers' Compensation Act must also cater to the interests of employers and create greater certainty for when an employer is liable for an employee's injury.<sup>198</sup> Again, this can be achieved through the codification of a set of standards that resemble those recently amended to Ohio's workers' compensation statute.<sup>199</sup> However, these standards can be modified even further to reduce an employer's liability to certain contexts.

First, to ensure that employers maintain discretion over their employees' ability to telecommute, the standards should require an employee to show that his or her employer acquiesced to or explicitly authorized the employee's practice of telecommuting.<sup>200</sup> Similar to the Maryland Appellate Court's decision in *Schwan Food Co.*, the standards should limit compensability to where an employer "acquiesced to" or "reasonably should have known" that the employee was using his or her home as a workplace.<sup>201</sup> Alternatively, an employer could explicitly authorize telecommuting or even require that the employee telecommute. Either way, employers must maintain the autonomy to authorize telecommuting to balance the potential increase in liability that may result from treating all telecommuters alike. Telecommuter standards that consider the interests of employers should allow employers to maintain discretion over their employees' ability to telecommute.

Yet, for some employers, it may still be desirable to permit telecommuting despite the risks for workers' compensation liability. As noted previously, even with clarified standards for telecommuter injuries, the employer's minimal presence in the employee's home may pose challenges for employers to defend these claims.<sup>202</sup> Recently, a growing number of employers have begun using productivity software to monitor telecommuting employees, which may aid in

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196. See *Fay*, 2005 WL 1900473, at \*2.

197. See *Cnty. of Dane v. Lab. & Indus. Rev. Comm'n*, 2009 WI 9, ¶ 34, 315 Wis.2d 293, 759 N.W.2d 571.

198. *Abramson v. CUNA Mut. Ins. Soc'y*, WC Claim No. 91040700, 1993 WL 51567, at \*3 (Wis. Lab. & Indus. Rev. Comm'n Jan. 15, 1993); *Fay*, 2005 WL 1900473, at \*2-3.

199. See OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

200. See *Schwan Food Co. v. Frederick*, 211 A.3d 659, 678 (Md. Ct. Spec. App. 2019).

201. *Id.*

202. See Gabel & Mansfield, *supra* note 11, at 235.

proving whether an employee was performing a work-related task at the time of his or her injury.<sup>203</sup> However, concerns over invasion of privacy<sup>204</sup> and accuracy<sup>205</sup> may render productivity software impractical. For this reason, the standards should take employers' ability to defend telecommuter claims into consideration.

The Wisconsin Legislature could enact standards that address employers' ability to defend telecommuter claims in two ways. First, the Wisconsin Legislature should place a particular emphasis on a special hazard element, like the Ohio statute.<sup>206</sup> Under the special hazard element, an employee may not recover without showing that he or she was injured by a hazard related to his or her work activity.<sup>207</sup> However, defining a special hazard may be challenging.

As noted above, Wisconsin courts and the Commission can turn to the Ohio Supreme Court's interpretation of the special hazard exception to the coming and going rule in defining the parameters of a special hazard in the context of telecommuter injuries.<sup>208</sup> This rule confines recovery to circumstances where, at the time of injury, the employee would not be at home "but for" employment," and the employment creates a risk that is unique or "quantitatively greater" than what is faced by the general public.<sup>209</sup> Hence, applying these standards to the example of a telecommuting accountant, a special hazard element would preclude injuries for claims caused by activities unrelated to work, such as walking a dog or doing laundry during the workday.

Next, the Wisconsin Legislature should categorically eliminate application of the positional risk doctrine in telecommuter claims.<sup>210</sup> Under the positional risk doctrine, an injury is found compensable where "employment places the

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203. See Jodi Kantor, Arya Sundaram, Aliza Aufrechtig & Rumsey Taylor, *The Rise of the Worker Productivity Score*, N.Y. TIMES (Aug. 14, 2022), <https://www.nytimes.com/interactive/2022/08/14/business/worker-productivity-tracking.html> [https://perma.cc/PZ4F-G4QL].

204. Irina Raicu, *Productivity and Privacy: The Case Against Remote Employee Tracking Tools*, FORBES (Aug. 11, 2020, 3:25 PM), <https://www.forbes.com/sites/irinaraicu/2020/08/11/productivity-privacy-versus-employee-tracking-tools/?sh=43774e1322c6> [https://perma.cc/C7WZ-LYNQ].

205. Kantor, Sundaram, Aufrechtig & Taylor, *supra* note 203.

206. OHIO REV. CODE ANN. § 4123.01(C)(4)(b) (West 2007).

207. *See id.*

208. *See* MTD Prods., Inc. v. Robatin, 572 N.E.2d 661, 664 (Ohio 1991).

209. *See id.* MTD Products imposes a high standard of recovery for employees invoking the special hazard exception to the coming and going rule, as employees must prove that their job increased the risk that caused their injury. *See id.* However, it would be consistent with the purpose of the Workers' Compensation Act to treat the special hazard element and work-necessitated commute elements as separate conditions of recovery to cover more employees under the Act. *See* Cnty. of Dane v. Lab. & Indus. Rev. Comm'n, 2009 WI 9, ¶ 34, 315 Wis.2d 293, 759 N.W.2d 571. In other words, an injury sustained during a work-necessitated commute should always be considered a special hazard of employment and be deemed compensable under the Act. Otherwise, the MTD Products test would only permit recovery for employees involved in car accidents during a work-necessitated commute under egregious circumstances. MTD Prods., Inc., 572 N.E.2d at 664.

210. *See* Allied Mfg., Inc. v. Dep't of Indus., Lab. & Hum. Relations, 45 Wis.2d 563, 567, 173 N.W.2d 690 (1970).



employee in [a] particular place at [a] particular time when [they are] injured by a force which is not solely personal to [them].”<sup>211</sup> In other words, the positional risk doctrine applies to injuries where a job places an employee in a “zone of special danger.”<sup>212</sup> Thus, under the positional risk doctrine, common hazards around the home could theoretically lead to liability where they result in injury, regardless of any direct connection between work and the hazard itself.<sup>213</sup>

The positional risk doctrine may also lead to liability for violent attacks that occur in the home.<sup>214</sup> In *Allied Manufacturing v. Department of Industry, & Human Relations*, the court held that a murder was compensable under the positional risk doctrine because of “the loneliness of the environment” in which the employee worked.<sup>215</sup> Particularly, the employee was working alone in an office and was stabbed.<sup>216</sup> This case can be compared to *Wait*, where the Tennessee Supreme Court denied benefits to an employee injured in an assault because the assault was not motivated by any factor related to the claimant’s employment, or by the telecommuter’s relationship with the aggressor.<sup>217</sup> While benefits were denied in *Wait*, it can be argued that the positional risk doctrine could have applied because working at home alone may expose someone to the risk of dangerous attacks.<sup>218</sup> However, this would be unreasonable for employers, as the fact that the employee was working from home alone would be dispositive in finding the employer liable.<sup>219</sup>

Because the positional risk doctrine creates liability based only on the per se dangers of working from home, claims would become difficult to defend.<sup>220</sup> However, a special hazard element would limit compensability to injuries stemming from risks that are created and accelerated by the employee’s particular employment.<sup>221</sup> For example, barring medical causation issues, a telecommuting accountant may recover benefits if she develops carpal tunnel from working at her desk,<sup>222</sup> but would not recover benefits if she is injured

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211. *Id.*

212. *Id.*

213. *See id.*

214. *See id.*; *Wait v. Travelers Indem. Co.*, 240 S.W.3d 220, 226 (Tenn. 2007).

215. *Allied Mfg., Inc.*, 45 Wis.2d at 569.

216. *See id.* at 565.

217. *Wait*, 240 S.W.3d at 226–28, 230.

218. *See Allied Mfg., Inc.*, 173 N.W.2d at 692.

219. *See id.*

220. *See id.*

221. *See MTD Prods., Inc. v. Robatin*, 572 N.E.2d 661, 663–64 (Ohio 1991); OHIO REV. CODE ANN. § 4123.01(C)(4)(b) (West 2007).

222. *See WIS. STAT. § 102.03(1)(c)1.* (2021–22); *see also* Greg Rienzi, *Six Steps to Pain-Free Work Habits: Here’s Why You Should Be Paying Attention to Ergonomics*, JOHN HOPKINS UNIV.: HUB AT WORK (Aug. 1, 2016), <https://hub.jhu.edu/at-work/2016/08/01/six-steps-to-pain-free-work-habits/> [<https://perma.cc/VB59-FBBD>].

from tripping over her child's toy. Together, adopting a special hazard element and eliminating the positional risk doctrine in telecommuter claims creates standards that address an employer's ability to defend telecommuter claims.

*C. Drafting the Language of a Telecommuter Statute*

To implement the provisions proposed above, the Wisconsin Legislature should amend Wisconsin Statutes section 102.03(1)(c)4. to read similarly as follows:

4. An injury sustained by an employee on a premises other than the premises of the employer is compensable if:
  - a. The employee suffers an injury or disability arising out of employment;
  - b. The employee's injury or disability is caused by a special hazard particular to the employee's employment;
  - c. The injury was sustained during an employment activity or a commute necessary for a work-related purpose; and
  - d. The employee is authorized to perform the employment activity on the premises.
- 4m. The characteristics associated with the time and place of an employee's injury shall not be considered in determining an employer's liability under s. 102.03(1)(c)(4).

Rewriting Wisconsin Statutes section 102.03(1)(c)4. is necessary to eliminate the vague language of the current statute. Subdivision 4 is divided into four paragraphs that spell out the conditions to recovery for telecommuter injuries. Importantly, the special hazard element, employer authorization requirement, and the coming and going rule are all codified as conditions to recovery.

Additionally, subdivision 4m is added to prohibit application of the positional risk doctrine to telecommuter claims. Drafting suitable language for subdivision 4m may pose the greatest difficulty to the Wisconsin Legislature, as it will be difficult to codify the prohibition of a common law doctrine. Also, the bar against considerations of the time and place of an employee's injury may be overarching. For instance, the time and place of the injury is relevant in determining whether the employee had permission to perform the act resulting in injury on the particular premises. Thus, emphasis must be placed on "characteristics associated with" as a modifying phrase in the subdivision. Of course, this proposed language serves as a rough suggestion, and the Wisconsin Legislature can revise this language as they see fit.

Telecommuter standards that abide by the purpose of the Workers' Compensation Act<sup>223</sup> considers the interests of employees and ultimately provides greater certainty for when an injury is compensable—even if that means that compensability is limited in some contexts.<sup>224</sup> Therefore, the Wisconsin Legislature should adopt standards like the recent amendment to Ohio's workers' compensation statute, which allows compensability where an employee is injured while performing a work-related task at home and the injury was caused by the work-related task.<sup>225</sup> The Wisconsin Legislature can create even more certainty by ensuring all telecommuters are treated alike, and by codifying the dual-purpose doctrine as the official test for injuries sustained by telecommuters during a commute.<sup>226</sup> These standards will bring more telecommuters under the Act and provide swift justice by avoiding extensive litigation, consistent with the Act's history and purpose.<sup>227</sup>

Likewise, telecommuter standards that reflect the purpose of the Workers' Compensation Act will also consider the interests of employers and provide more certainty for when employers will be responsible for compensating such injuries.<sup>228</sup> The Act's purpose of prompt justice through minimized litigation is equally as important for employers as it is for employees.<sup>229</sup>

However, the codification of clarified standards alone will not be enough to adequately fulfill the interests of employers. Instead, the Wisconsin Legislature should go further to ensure that the standards give employers the authority to authorize telecommuting,<sup>230</sup> and to lift the burdens employers face in defending telecommuter claims.<sup>231</sup> Still, employers need to take the initiative to enact employer-specific policies to reduce their risk of liability.<sup>232</sup> Codified telecommuter standards that uphold the purpose of the Workers' Compensation Act, while also balancing the interests of employees and employers, will best provide a proper remedy for telecommuter claims in Wisconsin.

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223. *Cnty. of Dane v. Lab. & Indus. Rev. Comm'n*, 2009 WI 9, ¶ 34, 315 Wis.2d 293, 759 N.W.2d 571.

224. *See Schwan Food Co. v. Frederick*, 211 A.3d 659, 678 (Md. Ct. Spec. App. 2019); *Wait v. Travelers Indem. Co.*, 240 S.W.3d 220, 226 (Tenn. 2007); OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

225. *See* OHIO REV. CODE ANN. § 4123.01(C)(4) (West 2007).

226. *See Fay v. Trek Diagnostic Sys. Inc.*, WC Claim No. 2003-049932, 2005 WL 1900473, at \*2 (Wis. Lab. & Indus. Rev. Comm'n July 28, 2005); 2 LARSON, *supra* note 49, § 16.10[1].

227. *See Cnty. of Dane*, 2009 WI 9, ¶ 34; OZANNE, *supra* note 18, at 125–26; RANNEY, *supra* note 19, at 127.

228. *See Cnty. of Dane*, 2009 WI 9, ¶ 34.

229. *See id.*; OZANNE, *supra* note 18, at 125–26; RANNEY, *supra* note 19, at 127.

230. *See Schwan Food Co. v. Frederick*, 211 A.3d 659, 678 (Md. Ct. Spec. App. 2019).

231. *See Gabel & Mansfield*, *supra* note 11, at 235.

232. Nicole Andrescavage & Gregory Tumolo, *Workers' Compensation Claims Involving Remote Workers: What Employers and HR Professionals Need to Know*, EMPS. ASS'N OF THE NE. (Mar. 1, 2022), <https://www.eane.org/workers-compensation-claims-involving-remote-workers-what-employers-and-hr-professionals-need-to-know/> [<https://perma.cc/AR6U-4G5N>].

## V. CONCLUSION

The rise in telecommuting presents both obstacles and opportunities for employees and employers alike. Workers' compensation claims are among those obstacles. States like Wisconsin that do not have clear standards for telecommuter injuries leave a vast gray area for when such injuries are compensable. Standards for telecommuter injuries may be developed by the courts or legislatures. However, the Wisconsin Legislature is best suited to enact standards for telecommuter injuries to avoid the issues that may arise with court developed standards.

In creating standards for telecommuter injuries, the Wisconsin Legislature can look to the recent amendment to Ohio's workers' compensation statute, as well as case law related to telecommuter injuries from other jurisdictions. Additionally, the standards should reflect not only the purpose of the Workers' Compensation Act but also the interests of employees and employers. Developed standards for telecommuter injuries provides more certainty for employees and employers, along with addressing the barriers employers face in defending telecommuter claims. Adopting formal standards for telecommuter injuries is necessary to keep pace with trends in the modern workforce.

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