Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got the State Covered!"

A Newsletter for Employers and Claims Professionals — *July 2013*

A Word From The Practice Group Chair

Welcome to the July edition of *Below the Red Line*. With this newsletter, we attempt to keep you up-to-date on the most recent developments in the workers' compensation arena. Often, the best way to do that is to advise you of trends which have been developing over several months. In this edition, Dana Hughes of our Rockford office presents a very important article outlining interesting yet troubling trends developing at the appellate court level on the issue of accident compensability.

The "arising out of" element of compensability has always been an important issue to analyze for defense purposes. Illinois is not and never has been a positional risk state and as a result, numerous injuries which occur in the workplace do not necessarily present a risk "arising out of" the employment. There is a large body of published case law in Illinois addressing the "arising out of" issue, and many of those cases are decided in favor of the employer, due to the fact that the risk causing the injury is no greater than that found by members of the general public. As is noted in Dana's article below, there have been a number of cases decided by the Appellate Court in the past few months which could limit this defense in certain factual scenarios. You should expect petitioner's attorneys to cite some of these cases against you in their attempt to argue that all accidents are compensable, so long as the claimant is performing an activity he or she is required to do.

While we all need to be aware of these cases and the increased exposure they present, the traditional "arising out of" defense still exists in Illinois, and we should continue to present viable "arising out of" defenses when appropriate. Please be in touch with us if you have questions on your individual files. Obviously, this analysis impacts compensability, and should be completed immediately upon the filing of each case. We are happy to discuss your cases with you as you make acceptance/denial decisions.

We at Heyl, Royster wish you the best as you enjoy the rest of your summer, and look forward to working with you in defense of your workers' compensation claims.

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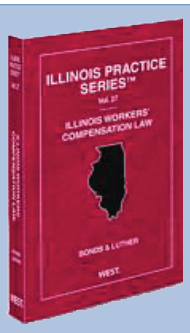

Heyl Royster is pleased to announce that two of our partners, Bruce Bonds and Kevin Luther, have authored Illinois Workers' Compensation Law, 2012-2013 edition (Vol. 27, Illinois Practice Series, West). The book, which can be obtained at store.westlaw.com, provides a full overview of Illinois Workers' Compensation law and practice including the 2011 Amendments to the Illinois Workers' Compensation Act, and is a "must" for risk managers and claims professionals.

INTRODUCTION

A recent batch of appellate court decisions are re-defining what was once believed to be a well-settled area of the law relating to the "arising out of" analysis. These cases, which deal with employees encountering what appear to be an otherwise common risk, seem to be moving the law toward a position whereby any act by the employee, so long as it relates to the employee's work duties, is a risk inherent in the employment and no longer subject to the traditional "increased risk" analysis associated with a neutral risk. While stopping short of adopting a positional risk theory, these recent cases diminish one of the employer's long-time defenses to workplace accidents. Unfortunately, the cases, even though decided by the same court, are conflicting. Nevertheless, a shift of some sort is clearly underway.

THE "ARISING OUT OF" ELEMENT OF ACCIDENT

by Dana J. Hughes - Rockford Office

For a workers' compensation claimant to recover, he must first show his injuries "arose out of" and "in the course of" his employment. Typically, the "in the course of" the employment requirement is readily satisfied because injuries sustained on the employer's premises or at a place where the claimant might reasonably have been while performing his job duties. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013-14 (1st Dist. 2011). Whether an injury occurs "in the course of" the employment is usually relatively clear, but the "arising out of" requirement can provide a real opportunity to deny - and to prevail on - questionable claims.

For a claimant's injury to "arise out of" the employment, the origin of the injury must be associated with some risk connected with, or incidental to the claimant's employment so as to create a causal connection between the claimants' employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989). If the risk is personal to the claimant, *i.e.*, an idiopathic fall, it is generally deemed to not "arise out of" the employment unless some aspect of the employment exposes the claimant to a greater risk of injury. When a claimant sustains injury due to a risk that is neutral - meaning a risk to which the general public is exposed - the injury is not compensable unless the claimant's employment exposed him or her to that risk to a greater degree than that which the general public is exposed.

When a court performs this neutral risk analysis, it typically takes a qualitative or quantitative approach to determine whether claimant has been exposed to an increased or greater risk. *Id.* For example, even though the risk is common, such as walking down stairs, the fact that the employee must encounter it more frequently can result in the risk being compensable.

Recent "Arising Out Of" Cases Involving Risks Commonly Faced by the General Public

Illinois State Treasurer v. Illinois Workers' Compensation Comm'n, 2013 IL App (1st) 120549WC-U

In *Illinois State Treasurer*, the claimant allegedly injured her wrists as a result of her work duties as a home healthcare provider for an elderly man. The Illinois State Treasurer was named as custodian of the Injured Workers' Benefit Fund because the claimant's employer - the elderly man - did not have workers' compensation insurance. The claimant alleged that she had to perform various tasks as a caregiver and companion for the man. Her essential responsibilities included whatever the homebound man needed her to do including assisting him with showering and bathing, preparing meals, performing light chores around the house and retrieving his mail, medications, and other deliveries that arrived through the mail. In order to retrieve these mail items, the claimant would have to ascend and descend stairs outside the claimant's home.

On the date of the alleged accident, the claimant was working for her home-bound employer when the doorbell rang. The claimant testified that she normally wore house slippers while working in the employer's home, but before she would travel downstairs she would change into her regular shoes. When trying to put on her regular shoes she fell, hit her head against a wall and lost consciousness. She allegedly injured both of wrists in the fall and was later diagnosed with broken wrists.

At trial, the arbitrator found the claimant's accident "arose out of" and "in the course of" her employment. The Commission affirmed the arbitrator's decision unanimously, which the circuit court confirmed. On appeal, the State argued that the Commission's finding that the claimant's injury "arose out of" her employment was against the manifest weight of the evidence. In a 5-0 order reversing the Commission, the appellate court agreed.

According to the court, the claimant's injuries clearly were sustained "in the course of" her employment because her fall occurred on the employer's premises while she was working. The court then addressed the risk that resulted in the claimant's injures. A risk is evaluated under one of three categories: (1) a risk distinctly associated with the claimant's employment; (2) a risk personal to the claimant or; (3) a risk neutral to the claimant in that it has no particular employment or personal characteristics. The court noted that the claimant's act of changing her shoes did not involve a risk unique to her employment. She was not required to wear house slippers inside or change her footwear to retrieve the mail. Members of the general public regularly perform the same actions. In applying a neutral risk analysis, the court noted that the claimant presented no evidence to suggest that the risk to which she was exposed was any greater than that to which the general public is exposed. She simply fell while attempting to change her shoes. Hence, the record does not support a *reasonable* inference that the claimant's fall "arose out of" her employment.

The claimant urged the court to infer that she was exposed to a neutral risk to a greater degree than the general public. In her mind, the Commission could properly have inferred that she was required to wear house slippers per her employer's direction or for her employer's benefit, which would require her to change her shoes prior to descending the staircase thereby increasing her risk of falling. Alternatively, she argued the Commission could have inferred that she was in a hurry to answer the door in furtherance of her employment duties. Finally, the Commission could have inferred she was required to descend stairs more frequently than the general public. The claimant's arguments failed because she failed to present any evidence to support the inferences. The court noted that the inferences were without evidentiary support, and without support from the record, the claimant could not sustain her burden. A possible inference based on mere speculation is not enough.

In January 2013, the Appellate Court, Workers' Compensation Commission Division, authored an unpublished, non-precedential Rule 23 Order in this case. Shortly thereafter, the court granted a motion to publish the order, but the opinion has not yet been released due to an unrelated jurisdictional issue being considered on rehearing.

Autumn Accolade v. Illinois Workers' Compensation Comm'n, 2013 IL App 3d 120588WC

On May 30, 2013, same the appellate court held that a care-giver who was reaching for soap while assisting a resident in the shower, sustained an accident that "arose out of" and "in the course of" her employment. On appeal, the employer argued that the claimant failed to prove an accident "arising out of" her employment because the act resulting in her injury – reaching for a soap dish – was not a risk peculiar to her employment but rather was one to which members of the public are equally exposed.

The claimant's job duties required her to assist residents with showering. On the alleged accident date, the placement of the soap dish was such that suds were created on the shower floor as the water ran over the soap dish. When claimant noticed this, she, while hanging onto the resident, attempted to move the soap dish and felt a "pop" in her neck. She timely reported the incident and sought medical treatment. The petitioner's treating physicians, as well as respondent's IME physician, found that the petitioner's condition of ill-being was causally related to the alleged work incident.

As a general rule, an injury "arises out of" employment if claimant was performing acts that she was instructed to perform by her employer, acts which she had a common law or statutory duty to perform, or acts which she might reasonably be expected to perform incidental to her assigned duties. *Caterpillar Tractor Co. v. Industrial Comm'n*, 12 Ill. 2d 52, 58 (1989). A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling her duties. If the employee is performing a task which is not incidental to her employment, and is not personal to the employee, then the Court must do a neutral risk analysis to determine whether the claimant was exposed to a risk greater than that faced by the general public. Here, the court indicated that the Commission's finding that the claimant's injury occurred while engaged in activities that she might be reasonably expected to perform incidental to her assigned duties was supported by the record.

The employer argued that the Commission's decision was inconsistent with two prior supreme court decisions, and one appellate court decision. *See Hansel and Gretel Day Care Center v. Industrial Comm'n,* 215 Ill. App. 3d 284 (3d Dist. 1991); *Board of Trustees of The University of Illinois v. Industrial Comm'n*, 44 2d 207 (1969); and *Greater*

Peoria Mass Transit District v. Industrial Comm'n, 81 Ill. 2d 38 (1980). In *Board of Trustees*, the Commission awarded benefits to a teacher's assistant who injured his back while turning in his chair. The appellate court reversed the Commission's decision, finding that the claimant failed to prove that the chair was defective or unusual in any way and holding that the Commission's decision was against the manifest weight of the evidence. The *Board of Trustees'* court further noted however, that the claimant's medical history - the claimant had a severely degenerated spine prior to the alleged work occurrence - supported a denial of compensability.

In *Greater Peoria Mass Transit*, the Illinois Supreme Court set aside the Commission's decision awarding benefits to a claimant who lost her balance and stumbled when she leaned over to pick up work documents. The claimant dislocated her shoulder as a result of the alleged accident. The *Greater Peoria* court relied heavily on medical testimony, specifically that the claimant had previously dislocated her shoulder. The court found, as it did in *Board of Trustees*, that any normal activity could have precipitated the dislocation of the claimant's shoulder. In *Hansel and Gretel*, again, the supreme court relied on medical testimony concerning the claimant's significant pre-accident medical condition and setting aside the Commission's decision. In *Hansel and Gretel*, the claimant was simply in the process of standing up when she caught and injured her knee. These three cases have long provided the backbone of the employer's "arising out of" defense when concerning common acts.

The *Autumn Accolade* court distinguished the three cases, asserting each involved risks that were not distinctly associated with the claimants' respective job duties. One could argue that the medical evidence in three cases also weighed heavily in the court's decisions.

Gross v. Illinois Workers' Compensation Comm'n, 2013 IL App (3d) 120448WC-U

In this recent unpublished Rule 23 Order the appellate court held the claimant failed to establish causal connection between his alleged work activities and his condition of ill-being with respect to his knee. The claimant alleged that after ascending four stairs in the course of his work day, he reached the platform at the top of the stairs, pivoted, and felt a pop in his knee. The claimant had extensive pre-accident knee problems including significant pain and limitations in his activities of daily living. At arbitration, he testified that his knee essentially felt the same following the accident. Even though there were additional treatment recommendations on the table following the alleged accident, the arbitrator denied compensation. The Commission affirmed the arbitrator, and the circuit court confirmed.

On appeal, the claimant argued that the Commission's decision was against the manifest weight of the evidence. The employer, urging for the court to affirm the Commission's decision, countered that the claimant's actions did not "arise out of" his employment, and that his condition of ill-being with respect to his knee was not causally related to his employment. Interestingly, the appellate court did not even address the issue of accident, but rather focused on the evidence addressing causation. The court found there was sufficient medical evidence in the record for the Commission to deny compensation based on lack of causation.

Based on the recent cases, it is unclear whether the Commission would have assessed this risk as one incidental to the claimant's employment or a risk that is neutral. The claimant testified that he was required to ascend and descend these four stairs in order to protect the courthouse, which was what he was hired to do. At the time of the accident, he was securing a door which is arguably incidental to his employment. However, as we have seen in past cases, ascending and descending stairs is a neutral risk that is encountered by all members of the general public. It is apparent that the court refused to address this issue because of the clear lack of causal connection. The significance of the *Gross* decision is that in a case where an accident is questionable, strong medical evidence may be just as critical in defending the claim.

Smeltz v. Illinois Workers' Compensation Comm'n, 2013 IL App (1st) 120717WC-U

Anna Smeltz alleged two accidental injuries "arising out of" and "in the course of" her employment with Marriott. The claimant was employed as a housekeeper, which required her to clean approximately 11 to 13 rooms per day. Cleaning each room involved making two to three beds per room. Because the hotel did not provide fitted sheets, housekeepers were required to tuck flat sheets under each corner to create "hospital corners." The claimant testified that on both occasions, she was lifting up the corner of a king-size mattress to make the "hospital corners" when she felt sharp pain in her low back.

Despite the fact that claimant's extensive pre-accident history of low back pain and problems were well-documented in the record, the Commission awarded the claimant 60 percent loss of use of the person as a whole (20 percent for the first accident, 40 percent for the second accident.)

On appeal, the employer argued that the claimant did not sustain accidents "arising out of" her employment with Marriott. The employer argued that the act of making beds was a risk to which the general public was exposed. The court, in conducting a neutral risk analysis, found that making approximately 20 to 30 beds per day exposed claim-

ant to an increased risk of injury. The court affirmed the Commission's decision.

This unpublished decision discussing the "arising out of" element of accident is particularly notable because of Justice Stewart's special concurrence**.** Justice Stewart criticized the majority's quantitative analysis of the neutral risk doctrine - that making 20-30 beds per day exposed the claimant to a risk greater than that which the general public is exposed. Rather, Justice Stewart argued that the court should have merely found that because the claimant was making beds as she was required to do as part of her job as a housekeeper, that the risk was incidental to the claimant's employment, thereby satisfying the "arising out of" requirement of the element of accident.

Mann v. Illinois Workers' Compensation Commission, 2013 IL App (4th) 120800WC-U

In a pleasantly surprising, yet unpublished, opinion affirming the Commission's denial of compensation, the court as recent as June 28 found that the claimant failed to prove that his injuries arose out of his employment after he fell from a picnic-type table in the employer's break room. The claimant alleged that while on break he grabbed a cup of coffee and took a seat at the table. He then decided to slide away from the table a bit because he felt he was sitting too close to his coffee. He fell from the bench he was sitting on, seriously injuring his shoulder. The arbitrator noted that the claimant easily satisfied his burden of proving that his injury occurred in the course of his employment pursuant to the personal comfort doctrine. The arbitrator found, and the Commission and circuit court agreed, that the claimant failed to prove that his injuries arose out of his employment.

Applying a neutral risk analysis, the arbitrator and Commission likened sitting at a picnic table to other activities such as walking on a public sidewalk or traversing stairs. In order to recover for his injuries, the claimant would have to have shown that something about his use of the picnic table by virtue of his employment exposed him to a neutral risk greater than that risk is experienced by the general public. The arbitrator cited the credible testimony of respondent's witness, the employer's health and safety director, who testified that the table was a standard size, it was approved by an inspecting authority, and it was still in use on the employer's premises. The claimant and his coworker offered testimony that the table was too small, and both testified that the table caused them discomfort when they used it. The claimant did not offer any additional testimony to show that the table was hazardous or otherwise defective. Further, while he testified that other employees may use the table up to three times during each work day, he testified that he had used the table "on other occasions" which was insufficient to establish a greater risk (assuming that sitting at a picnic table presents a risk such that frequent use would expose the claimant to an increased risk.) The arbitrator found the claimant's testimony insufficient to establish that he was exposed to a risk greater than that of the general public. That finding was affirmed all the way up through the appellate court.

It is important to keep in mind that the "arising out of" element of accident is factual. The Commission's decision on the element of accident will not be disturbed unless it is against the manifest weight of the evidence. Here, the record below was replete with conflicting testimony about the physical characteristics of the table, the frequency by which the claimant used the table, and pre-accident complaints about the safety of the table. Fortunately for this employer, the arbitrator and subsequently the Commission, resolved the conflict in the respondent's favor. Since an opposite conclusion was not clearly apparent, the circuit and appellate courts refused to disturb the decision of the Commission. One could argue that if the Commission found in claimant's favor in this case that neither the circuit nor the appellate court would have reversed the decision on that finding.

Springfield Urban League v. Illinois Workers' Compensation Comm'n, 2013 Ill App (4th) 120219WC

This decision, handed down on June 17, 2013, is arguably an illustration of the risk analysis urged by Justice Stewart in his special concurrence in *Smeltz*, discussed above. The same appellate court held that a bus driver who tripped on a kinked mat on her way out of a meeting sustained an accident that arose out of her employment. The court, in finding that the risk of tripping over the mat was incidental to the claimant's employment, cited the following facts in support of its finding: that the claimant had to attend the meeting as part of her employment, the meeting place was controlled by her employer, and she was performing tasks required by her work.

For argument's sake, the act of walking over a mat outside a building is a neutral risk, and requires an analysis of whether the claimant was somehow exposed to a greater risk than that of the general public by virtue of her employment. A quantitative analysis - the number of times claimant is exposed to the risk - would result in a denial of compensation because there was no evidence to suggest that the claimant was required to traverse this area multiple times as a result of her employment. A qualitative analysis - some aspect of the employment contributes to the risk - would not result in a finding of accident either because the claimant presented no testimony that anything about

her employment, other than the fact that she walked over the mat, contributed to the risk of falling. The court did not conduct a neutral risk analysis here even though prior decisions would suggest that a neutral risk analysis may be appropriate when a claimant falls while walking.

The court here did focus on the fact that the arbitrator and the Commission found that the mat was kinked or bunched, suggesting a defect in the mat. If a claimant is injured as a result of a defect on the employer's premises, then the injury arises out of the employment. The testimony of the claimant's witnesses regarding the condition of the mat conflicted with that of the employer's witnesses in that the parties did not agree that the mat was bunched when the claimant tripped on it and fell. Thus, the employer could not overcome the manifest weight of the evidence standard on appeal because an opposite conclusion was not clearly apparent from the record.

The court's holding in *Springfield Urban League* further suggests that the court may be widening its interpretation of what will be deemed a risk distinctly associated with or incidental to a claimant's employment for purposes of satisfying the "arising out of" prong of the critical element of accident. The wide net that the court is now casting is arguably catching risks that would have been previously evaluated as personal to the claimant or neutral.

What Do These Cases Mean For Your Claims Handling?

Justice Stewart's comments and the Court's holding in *Autumn Accolade* suggest that the court is perhaps trending toward finding that neutral risks - those to which the general public are equally exposed - will be deemed to be risks associated with the claimant's employment if the claimant is performing an activity that she is required to do.

The reality of the court's current posture on this issue is that a neutral risk analysis may not always be required. The court seems to be increasingly finding that certain activities are distinctly associated with the claimant's employment, therefore, making the injuries "arise out of" the employment without further analysis. As one would expect, the farther one moves back from the act being performed, the more the act can generally be considered as required by and therefor incidental to the employment.

As seen above, the court has paid particularly close attention to the medical evidence where the accident is questionable. As illustrated in *Gross*, the court did not conduct an accident analysis even though the parties argued the issue extensively before the court. The claimant's testimony in that case, along with strong medical evidence, supported a finding of no compensability, so the court simply bypassed the issue of accident which arguably is the first hurdle to compensability. Interestingly, the court commented that it was not required to reach the question of accident because it found that the claimant's condition of ill-being was not causally related to the employment activity, regardless of whether the alleged injury "arose out of" the claimant's employment.

These cases also drive home another point which really could be applied to all workers' compensation claims – a complete and thorough investigation of all claims is necessary in order to develop the strongest defenses. In at least one of these cases, the court, while on one hand acknowledging that certain facts may bring the case within the realm of compensability, nonetheless found insignificant facts to do so within the context of the case at hand.

Whether these cases truly signal a move away from the traditional risk analysis for cases involving a neutral risk is yet to be conclusively established. Indeed, none of the "increased risk" cases traditionally relied on by employers over the years have been overruled. However, it is apparent that more must be done when confronted with such cases and that renewed emphasis must be placed on medical causation.

For a further discussion of how these cases may impact your claims handling, please contact any of our workers' compensation attorneys across the state.

Dana J. Hughes - Rockford Office

A native of Rockford, Dana has been an associate in our Rockford office since 2006. She represents employers before arbitrators and commissioners of the Illinois Workers' Compensation Commission and before the circuit court in third party liability claims. Dana has also represented businesses in subrogation matters, and has defended businesses and individuals in automobile negligence and premises liability actions. Her writing has been published in the Northern Illinois University Law Review and Kane County Bar Association newsletter. Dana has presented before the Illinois State Bar Association's Insurance Law Section and contributes to Heyl Royster's annual claims handling publication. Dana serves on the Winnebago County Bar Association's Board of Directors and volunteers as an arbitrator in the 17th Circuit's court-annexed arbitration system.

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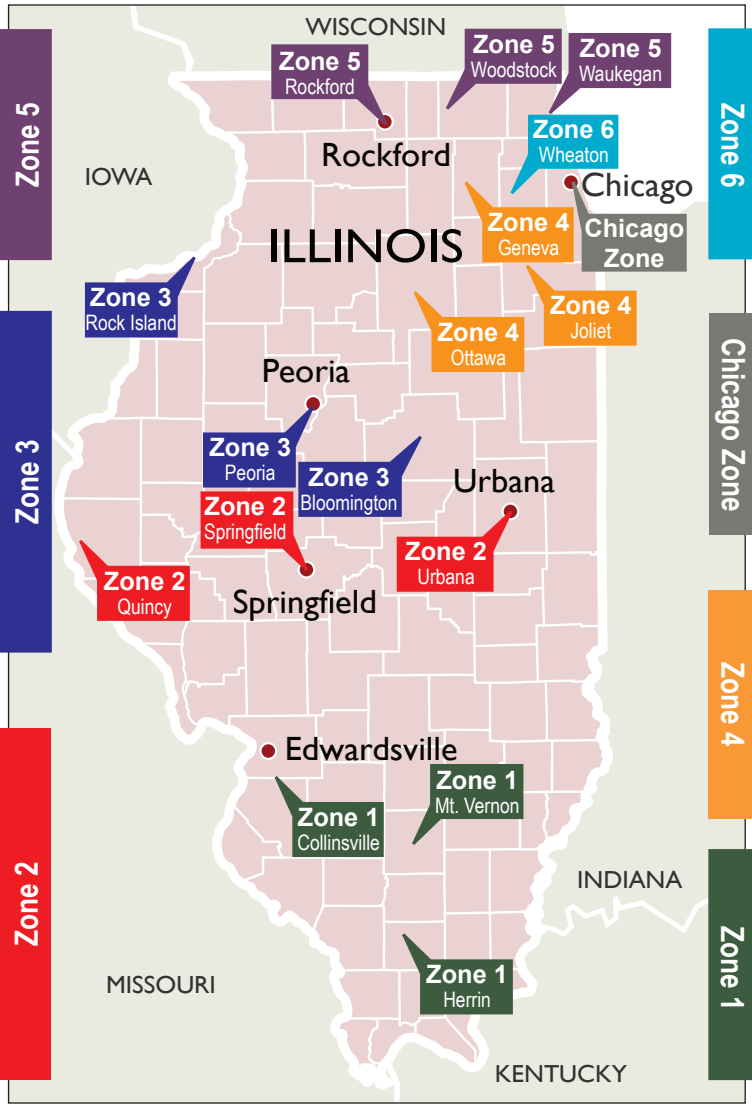

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