Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got the State Covered!"

A Newsletter for Employers and Claims Professionals — *May 2014*

A Word From The Practice Group Chair

As we close the month of May, I would like to take this opportunity to thank all of you who were able to attend our annual firm seminar on May 15th. We always enjoy these presentations and appreciate the opportunity to spend time with our clients. Although some of the information we reported regarding trends of the Appellate Court were not favorable, we hope you found the seminar helpful in the management of your claims. We always strive to help keep you up-to-date, not only on the current state of the law, but on the best strategies to effectively manage your claims to successful conclusion.

Those of you able to attend know we spent some time addressing the Appellate Court's trend with regard to the "arising out of" analysis. Unfortunately, the trend continues. In this edition of *Below the Red Line*, Brad Elward reports on a new case which was decided by the Appellate Court shortly after our seminar. The Appellate Court continues in their effort to broaden the definition of "arising out of", and once again they have reversed a favorable respondent's decision from the commission. Brad offers some suggestions for management of this decision, and we will continue to work with you in our mutual effort to control costs despite this disturbing trend.

We wish you an enjoyable summer as we move into the month of June. We hope you find some time for relaxation and enjoyment of the beautiful weather. As always, please do not hesitate to contact us if we can be of assistance in any way.

Very truly yours,

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In this issue . . .

SUPREME COURT AGREES TO HEAR BOND ISSUE ON APPEAL BY TREASURER ACTING ON BEHALF OF STATE INJURED WORKERS' BENEFIT FUND

On May 28, 2014, the Illinois Supreme Court agreed to hear the case of Illinois State Treasurer ex officio custodian of the *Injured Workers' Benefit Fund v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 120549WC. The case involves a dismissal of the Treasurer's judicial review based on a failure to file an appeal bond under section 820 ILCS 305/19(f). Although refusing to characterize the Treasurer's ex officio custodial appeal as one by the State, which would have meant no appeal was possible due to section 19(f)'s prohibition of state appeals, the appellate court concluded that the state was acting on behalf of the employer, and that under section 19(f), the employer would have to file a bond to perfect a judicial review.

The briefing will take place over the summer months and oral argument should follow at some point between October and December of this year. We will keep you posted on developments. While the case concerns a state entity, there is the potential for this case to impact how the appellate court interprets section 19(f) respecting all employers.

RECENT DECISION UPDATE – *ARISING OUT OF*

By: Brad Elward, belward@heylroyster.com

In early May, the Illinois Appellate Court, Workers' Compensation Commission Division, handed down the latest in its recent string of "arising out of"/increased risk decisions. For those of you who attended our recent spring seminar, you know that many of these decisions have expanded the law as to what is compensable, making more activities a risk of the employment.

The following article provides a brief background on "arising out of" and then discusses the most recent appellate court decision on the topic, offering some insights into how that case fits within the body of existing law.

"Arising Out Of"/Increased Risk

An injury is compensable under the Act only if it "arises out of" and "in the course of" the employment. The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. The words "arising out of" refer to the origin or cause of the accident and presuppose a causal connection between the employment and the accidental injury. Both elements must be present at the time of the accidental injury to justify compensation. According to the case law, the purpose of the Workers' Compensation Act (Act) is to protect employees against risks and hazards which are peculiar to the nature of the work they are employed to do. *Fisher Body Division, General Motors Corp. v. Industrial Comm'n* , 40 Ill. 2d 514, 517 (1968).

An injury "arises out of" the employment if it originates from a risk connected with, or incidental to, her job, and involves a causal connection between the employment and the accidental injury. *Tinley Park Hotel and Convention Center v. Industrial Comm'n*, 356 Ill. App. 3d 833, 839 (1st Dist. 2005). A risk is incidental to the employment where it belongs to or is connected with what a worker has to do in fulfilling her duties. Often, the analysis boils down to whether the employee, when encountering a condition, is exposed to a risk to a greater degree than the general public due to her employment.

The Backdrop of Prior Case Law

In *Litchfield Healthcare Center v. Industrial Comm'n*, 349 Ill. App. 3d 486 (5th Dist. 2004), the claimant had punched in on the time clock, and then returned to her car for some equipment she had forgotten. She had testified that she would have been disciplined had she not had the equipment. When returning from her car, she tripped on uneven concrete and fell. The court found the claimant was exposed to a defective sidewalk and that her regular use of that particular parking lot at the suggestion of her employer exposed her to the defective sidewalk to a degree beyond that to which the general public would be subjected. The court held, "when an injury to an employee takes place in an area which is the usual route to the employer's premises, and the route is attendant with a special risk or hazard, the hazard becomes part of the employment, and the accident is compensable.

In *Metropolitan Water Reclamation Dist. of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010 (1st Dist. 2012), the appellate court found compensable an employee's fall on a sidewalk while she was walking from her bank office to another facility a few blocks away to make a deposit. Although there was no evidence of a defect, there was mention of a condition on the premises – a depression. The employee encountered this depression at least three times a week as part of her employment, creating an increased risk versus the general public. In reaching its conclusion, the court applied the street risk doctrine, which holds, where the claimant's job requires that she be on the street to perform the duties of

her employment, the risks of the street become one of the risks of the employment. Thus, any injury sustained while performing that duty is causally related to her employment.

Since *Metropolitan Water Reclamation*, the appellate court has addressed the "arising out of" concept on a number of occasions. For example, in *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, it held that an employee's fall occasioned by a defect on the premises (a wrinkled floor mat) in a restricted area is compensable. Likewise, in *St. John's Hosp. v. Workers' Compensation Comm'n*, 2012 IL App (4th) 110373WC-U, it held that a fall resulting from a non-defective condition (a code-compliant stair tread) encountered on a repetitive basis by the employee may be compensable based on the employee more frequently encountering the condition versus the general public. There, the employee fell in a stairwell, which she used as many as two times per month. This is equally true whether the condition is encountered on (*St. John's*) or off (*Metropolitan Water Reclamation*) the employer's premises.

In late 2013, the appellate court issued its decision in *Village of Villa Park v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 130038WC, which involved a fall on an employee-only stairwell. There, the employee was a community service officer employed by the Village. At the time of the accident, the claimant was walking down a flight of stairs and his right knee gave out, causing him to fall. The employee had suffered a non-work-related injury to his right knee and was awaiting surgery for that condition. The evidence at arbitration showed that the claimant used the stairs 4-6 times per day to change clothing, and to access the lunch room, meeting rooms, and to get necessary equipment. The evidence was also undisputed the employer knew about the prior non-work-related knee injury and the employee's issues in walking. The Commission found the accident compensable and the appellate court affirmed.

On appeal, the court reasoned that the claimant was continually forced to use the stairway both for his personal comfort and to complete his work-related activities. Moreover, he was required to traverse the stairs a minimum of six times per day, which constituted an increased risk on a quantitative basis from that to which the general public was exposed. According to the court, the employer was aware the claimant had a prior knee injury and nevertheless required him to traverse the stairs. This, the court found, also placed him in a position of greater risk of falling.

The Next Step – *Brais*

In *Brais v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 120820WC, the appellate court held that an employee, who was injured while walking on a defective sidewalk as she entered her employer's premises through the only available entrance at the time, sustained an accident "arising out of" her employment.

The Facts

The claimant, Jane Brais, worked for the Kankakee County Circuit Clerk's Office as a child support coordinator. On the day of her accident, Brais was returning to her office at the courthouse from a work-related meeting at a nearby administrative building. Brais and other employees would typically use the employee's entrance at the rear of the courthouse. However, the employee entrance was locked at 9:30 a.m., which meant she had to use the main entrance.

As Brais was nearing the main entrance stairs, she caught the heel of her shoe in a defect in the sidewalk, and fell. Brais said the sidewalk where she fell had huge cracks and was broken up. She testified, "you could pretty much see the gravel that they put down underneath the concrete." *Brais*, 2014 IL App (3d) 120820WC, ¶5. Brais testified there was a one-half to a one inch difference in the level between the smooth concrete and the crumbled concrete.

Brais filed her claim against Kankakee County, which the arbitrator denied. According to the arbitrator, Brais' accident "occurred when she was walking along a public pathway going in to the county courthouse." *Id*. ¶14. He added, "In doing so, she was not subjected to a risk to which the general public is not exposed or that was peculiar to her work." *Id*. He further found that the risk to the claimant which caused her injuries was no greater to her than to the general public. The Commission affirmed the arbitrator's denial of the claim and the circuit court confirmed.

The Appellate Court Ruling

On appeal, in a decision authored by Justice Bruce Stewart, the appellate court reversed, finding the claim compensable and remanding for further determinations. Initially, the court found there were no disputed facts concerning the accident, thus warranting a *de novo* review of the evidence. Under the *de novo* review, the appellate court can decide the case as if it were the trier of fact.

The appellate court began its inquiry by reviewing the Supreme Court's 1980 decision in *Bommarito v. Industrial Comm'n*, 82 Ill. 2d 191 (1980), wherein the claimant was walking from her car through one of the two alleyways leading to her employer's rear door when she stepped

in a hole and fell, sustaining injuries. All employees were required to enter and exit the building through the rear door. At the time the employee was trying to enter the building, the alleyway was crowded with trucks unloading merchandise. As she walked around a truck and maneuvered around a parked car, she fell into the hole. In examining whether the claimant sustained injuries "arising out of" her employment, the *Bommarito* Court observed that when an injury occurs "in an area which is the sole or usual route to the employer's premises, and the route is attendant with a special risk or hazard, the hazard becomes part of the employment." *Bommarito*, 82 Ill. 2d at 196-197. The Court noted, "The [employer] has created a situation whereby the claimant was forced to dodge traffic and debris in order to gain admission to her place of work." *Id*. at 198. She was not free to choose a certain route to work.

Returning to the facts of the case, the *Brais* court found that the employee's presence on the sidewalk approaching the steps to the courthouse's front door was occasioned by the demands of her employment, which required her to attend a meeting in the administration building two blocks from her office. The court noted that her attendance at the meeting was for the benefit and accommodation of her employer. As in *Bommarito*, the claimant did not freely choose a certain route because the employee door was locked at 9:30 a.m. As a result, the front door was her only access point to the courthouse at the time of her accident.

The appellate court dismissed the employer's argument that the general public used the same sidewalk and faced the same hazard as did Brais. According to the appellate court, when an employee is injured in an area which is the sole or usual route to the employer's premises, and there is a special risk or hazard on the route, the hazard becomes part of the employment. The court found that the special hazards or risk encountered as a result of using the sole or usual access route satisfied the "arising out of" requirement in the Act. The appellate court noted that the front entrance to the courthouse "was not only a *usual* access route for the claimant, it was her *sole* route since the employee entrance was locked." *Id*. ¶28. Therefore, because of the demands of Brais' job requiring her to attend a meeting at the administration building, her risk of injury on the defective sidewalk was greater than the general public.

The appellate court distinguished the well-known *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52 (1989), where the claimant tripped while crossing a curb on the employer's premises, but was denied benefits. In that case, Court found the curb in question was just like any other curbing and that the claimant was not required to use any particular route or to continuously traverse the curb as part of his job duties. In the instant case, in contrast, the court observed there was a special hazard – the sidewalk was cracked and uneven – and that it was encountered as part of her employment.

In closing, the *Brais* Court said, "[t]his case does not merely involve the risks inherent in walking on a sidewalk which confront all members of the public. This case involves a cracked and defective sidewalk which was a contributing cause of the claimant's injury. Because the claimant encountered a special hazard or risk as a result of using a sole or usual access route, her injury arose out of her employment." *Brais*, 2014 IL App (3d) 120820WC, ¶29. The court concluded, "Application of the existing case law to the undisputed facts in this case reveals that the only reasonable inference that can be drawn from the evidence is that the claimant's injuries arose out of her employment." *Id*.

Justice Thomas Harris filed a special concurrence, noting that the facts did not establish that the route taken was Brais' "usual" route to her employer's premises rather it was on these facts, her sole route. Justice Harris stated that law does not require a claimant to prove her path was both the sole and usual route; "*Bommarito* supports compensability if the injury occurs along the sole *or* usual route." *Id*. ¶34 (emphasis in original).

What *Brais* Means Going Forward

Does *Brais* truly mean that any increased risk faced by the employee is compensable regardless of whether the risk was one equally faced by the general public? At first blush, it appears the answer is no. The appellate court, in crafting its opinion, was careful to state that the hazard becomes part of the employment only when an employee is injured in an area which is "the sole or usual route to the employer's premises, and there is a special risk or hazard on the route." This ruling is consistent with *Bommarito*, as well as other prior decisions.

It would be interesting to see how the appellate court would have ruled had the employee entrance been unlocked and available. One also wonders why the court did not consider the possibility that Brais could have avoided the main entrance by simply calling a co-worker and asking that the employee-only door be unlocked for her to enter. In either situation the employee would have had an alternative to encountering the uneven pavement near the main entrance. Had Brais had those options available to her and nevertheless chose to enter through the main courthouse entrance, would the appellate court have found the fall compensable based on increased frequency of encountering the condition as necessitated by attending the meeting?

In considering the other case law mentioned above, it is apparent that more claims will be deemed compensable even when an employee encounters a risk to which the general public is equally subjected. The *Brais* court could have limited its compensability analysis to those situations where an employee encounters a dangerous condition on the premises while using the sole means of entry and left alone the increased risk analysis. When an employer requires the employee to take a certain route, the cases have consistently said that this is sufficient to justify imposing liability.

Yet, the broader language of "usual route to the employer's premises" is expansive and could potentially encompass many scenarios beyond the so-called "sole route" situation. As the Special Concurrence points out, at the time of her fall, Brais was not using her usual means of access to the courthouse; it was locked. Moreover, the court's comments concerning increased risk are also troublesome.

The open questions from *Brais* are clear – how will the court utilize the increased risk versus the general public concept when the employee is injured using her "usual route" to the premises, and where does that route begin and end? Would an employee's fall while walking two blocks from her public parking spot be deemed compensable if that route was her usual route to the employer's premises, but not on property owned by the employer? Would the analysis change if the risk was one equally faced by the general public yet one encountered on the employee's usual route to the premises?

The answers to these questions will have to await further case law.

As always, should you have any questions concerning the recent "arising out of" cases, please feel free to contact any of our workers' compensation attorneys across the state. With offices in six locations, we cover all arbitration zones.

Workers' Compensation Group

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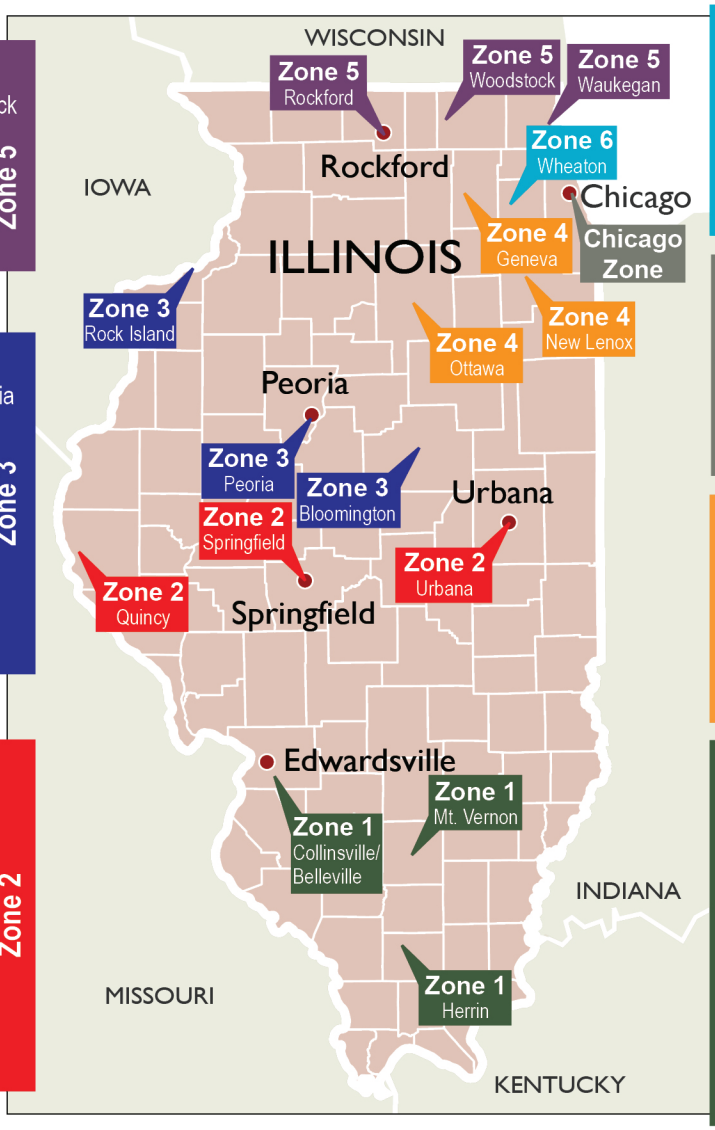
ILLINOIS ZONE MAP



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