Below the Red Line

Workers' Compensation Update

"We've Got You Covered!"

A Newsletter for Employers and Claims Professionals *February 2019*

A Word From The Practice Chair

As we wrap up February 2019, I guess we can say, "at least the weather wasn't boring." The subject matter around the Midwest this time of year does typically revolve around the weather. Over the past five days alone my work friends around the country have noted they almost blew-away (wind), washed-away (rain), were buried and could not go anywhere (snow), or were so numb they could not feel their fingers or toes (cold). If you follow and adhere to that weather predicting groundhog, this is supposed to pass soon and we are going to be in for a wonderful Spring (caveat: no holding one's breath!) I wish all of you great internal fortitude as you deal with the elements.

If you are reading this, you probably have attended (or really wanted to attend) our Annual Claims Handling Seminar. We know this has been popular with all of you so I wanted to let you know we have decided to take a year off, and will not be presenting the full standalone seminar in 2019. We will be working this year on updating the seminar to give it a fresh look when we bring it back in 2020. In the meantime, we would also like to use 2019 to spend more time with you, on a face-to-face basis at your workplace. We would be glad to present to you and your team on topics which are pertinent to you. Please contact me directly if you would be interested in that type of visit in 2019.

In this month's newsletter my partner, Brad Elward, analyzes the case of *Ashby v. Illinois Workers' Compensation Commission*, and the accident defense efforts put forth by the employer in bringing about a great, non-compensable result. The important features were the fact digging and gathering of information the employer and entire defense team did in preparation for trial. There is simply no substitute for aggressive claims handling and teamwork in our business.

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Fall While Using Stairs at Work Found Non-Compensable Under Neutral Risk Analysis

By: Brad Elward, Peoria Office

In last month's issue of *Below the Red Line* we discussed a recent ruling by the Illinois Appellate Court, Workers' Compensation Commission Division, dealing with an employee's fall on snow and ice in the employer's parking lot. In *Smith v. Illinois Workers' Compensation Comm'n*, 2019 IL App (3d) 180251WC-U, the appellate court held that a program manager who slipped and fell on ice and snow in a Park District–owned and maintained parking lot on her way to her vehicle at the end of the day was a compensable accident because the snow and ice constituted a hazardous condition on the premises.

In this month's newsletter, we examine a February 6, 2019 unpublished Rule 23 order where the appellate court upheld the Commission's decision to deny benefits to an employee who fell down a flight of stairs while he was going to clock in for his work shift. Unlike *Smith*, the petitioner in *Ashby v. Illinois Workers' Compensation Comm'n*, 2019 IL App (3d) 180319WC-U, did not encounter snow or ice, but rather rain, and did not face a hazardous condition or defect on the premises.

Facts of the Case

The petitioner, Torrie Ashby, worked as a dishwasher at a Hy-Vee grocery store in Peoria, Illinois. The store where the petitioner worked had two levels – the first housing the grocery store, a restaurant, and restrooms, and the second level consisting of a break room, lockers, a time clock, offices, restrooms, and a "club room." The evidence was split as to whether the second floor was open to the general public. The petitioner was using one of three ways to access the second floor (which he was instructed to do) when he slipped and fell backwards onto a landing. At the time of his fall he was wearing "high boots" because the area where he worked was wet; he was not carrying any items and was found to not be in a hurry. The petitioner testified that the stair area was wet, and indeed, it was raining on the day of the accident. Other employees testified that the stairs were not wet. There was no evidence of a defect on the stairs.

Arbitration and Commission Rulings

The arbitrator concluded that claimant did not sustain an accidental injury "arising out of" and "in the course of" his employment. Although the evidence clearly indicated that the stairs were available for use by the public, the arbitrator noted that "this factor was not 'the critical issue' in the case." *Ashby*, 2019 IL App (3d) 180319WC-U, ¶ 12. Instead, the arbitrator tacitly applied a neutral-risk analysis set forth in *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52 (1989), and concluded that to establish that his accident arose out of and in the course of his employment with respondent, the petitioner was required to prove that his employment exposed him to a greater degree of risk than the general public. The arbitrator determined that petitioner "failed to meet this burden because the risk of ascending the staircase constituted an 'activity of daily life also performed by members of the general public,' and claimant's employment 'did not expose him to a greater degree of risk than that of the general public.'" *Ashby*, 2019 IL App (3d) 180319WC-U, ¶ 12. The arbitrator also found that the stairs were dry and had a protective rubber coating. As a result, the arbitrator denied the petitioner's claim.

On review, the Commission unanimously affirmed and adopted the decision of the arbitrator, and the circuit court confirmed the decision of the Commission.

Appellate Court Analysis

On appeal, the petitioner argued his injuries were compensable as a risk distinctly associated with his employment because "this is a simple case of the employee falling at his workplace explained by his boots [sic] he was wearing being wet from raining conditions." *Id*. ¶ 15. The petitioner alternatively argued that his injuries were compensable under a neutral-risk analysis because he was exposed to the risk of traversing stairs to a greater degree than the general public both qualitatively and quantitatively. *Id*. The appellate court rejected both arguments, finding that the Commission's decision was not against the manifest weight of the evidence.

Initially, the court rejected the argument that the petitioner's injuries resulted from an employment-related risk. According to the court, "[i]n the context of falls, employment risks include tripping on a defect at the employer's premises or falling on uneven or slippery ground at a worksite. In this case, claimant fell while traversing stairs. There is no evidence that this kind of risk is distinctly associated with claimant's employment as a dishwasher for respondent." *Id*. ¶ 20. Moreover, although the petitioner described the front staircase as "narrow and steep" in his brief, the appellate court found that "he presented no evidence that the front staircase was defective." *Id*.

Furthermore, the appellate court rejected the argument that the stairs were wet, noting that the evidence of record supported the Commission's conclusion. According to the court, considerable evidence supported this point:

- Five of Hy-Vee's employees observed the stairs shortly after the fall and all testified that the stairs were dry.
- Weather records showed only trace amounts of rain (four one hundredths of an inch) in Peoria on the day of the accident, thereby aligning more with one witnesses' testimony that it was misting and contradicting the petitioner's testimony that it was "storming pretty bad."
- Several of the petitioner's co-workers testified that the base of the stairs was carpeted so as to absorb any moisture from people's feet as they entered the store.

Cumulatively, the appellate court found that "this evidence supports the Commission's finding that the stairs were dry at the time of the accident." *Id.* Accordingly, the court said that, "[g]iven the foregoing evidence, the Commission could reasonably conclude this case does not present an employment risk since traversing stairs is not a risk distinctly associated with claimant's employment and there was evidence that claimant's fall was not attributable to a defect on respondent's premises or the result of uneven or slippery ground at the worksite." *Id.*

Since no defect or hazardous condition was present, the appellate court applied the neutral risk analysis and concluded that the petitioner had failed to show that he faced a risk while traversing the stairs to a greater degree than the general public, both qualitatively and quantitatively. Concerning the qualitative aspect, the court noted that the petitioner "denied that he was carrying any work-related objects at the time of the accident" and had "himself denied that he was in a hurry to clock in, noting that he was not late for his shift." *Id.* ¶ 23. Concerning the quantitative aspect, although the petitioner argued "that he went up the front staircase twice each day (once to clock in and once to clock out), whereas the general public used the front staircase only on 'rare' occasions," there was no evidence that the petitioner encountered this common risk (of traversing the stairs) at any greater level than the general public. *Id.* ¶ 24.

Implications of the Case

Although an unpublished Rule 23 order, *Ashby* provides several points of interest. First, the case demonstrates the significance of prevailing on the facts before the Commission. Rather than re-examining the evidence, the appellate court's task was simply to confirm that the Commission's conclusions were consistent with the evidence found in the Record on Appeal. The Commission's factual findings that the stairs were not defective, were not wet, were open to the general public, and that the petitioner was not in a hurry when he fell carried the day, when applying the neutral risk analysis. The Commission's decision was assessed on a pure manifest weight of the evidence standard of review.

Second, *Ashby* shows that a well-defended case is winnable by employers. As we stressed in our prior month's discussion of *Smith*, it is imperative to perform a thorough investigation of the accident, confirming what the petitioner was wearing, whether there is a defect on the premises, whether the petitioner was in a hurry, whether the area in question was open to the general public, and the weather conditions, where applicable. Each of these factual points was well-developed in *Ashby* and the fruit of this effort resulted in not only a favorable Commission decision, but one easily defendable on appeal.

Third, *Ashby* confirms that the appellate court will still apply a neutral risk analysis in cases where the employee encounters a common risk faced by the general public, and where there is no evidence of a defect on the premises. *Ashby* was properly decided at all levels.

CAVEAT: It is still an open question as to whether the current appellate court will apply a neutral risk analysis to an injury from a common, everyday risk where the activity in question is related to or incidental to the employment.

As always, if you have any questions concerning this case or any other workers' compensation matter, please feel free to contact any of our workers' compensation attorneys across the State of Illinois or in Missouri.

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Brad concentrates in appellate practice and has a significant sub-concentration in workers' compensation appeals. He has authored more than 300 briefs and argued more than 225 appellate court cases, resulting in more than 100 published decisions. Brad is Past President of the Appellate Lawyers' Association. He has taught courses on workers' compensation law for Illinois Central College as part of its paralegal program and has lectured on appellate practice before the Illinois State Bar Association, Peoria County Bar, Illinois Institute for Continuing Legal Education, and the Southern Illinois University School of Law. Brad is the Co-Editor-In-Chief of the IICLE volume on Illinois Civil Appeals: State and Federal, and authored the chapter on "Workers' Compensation Appeals," and is author of the Workers' Compensation IICLE chapter on "Procedures, Appeals and Special Remedies."

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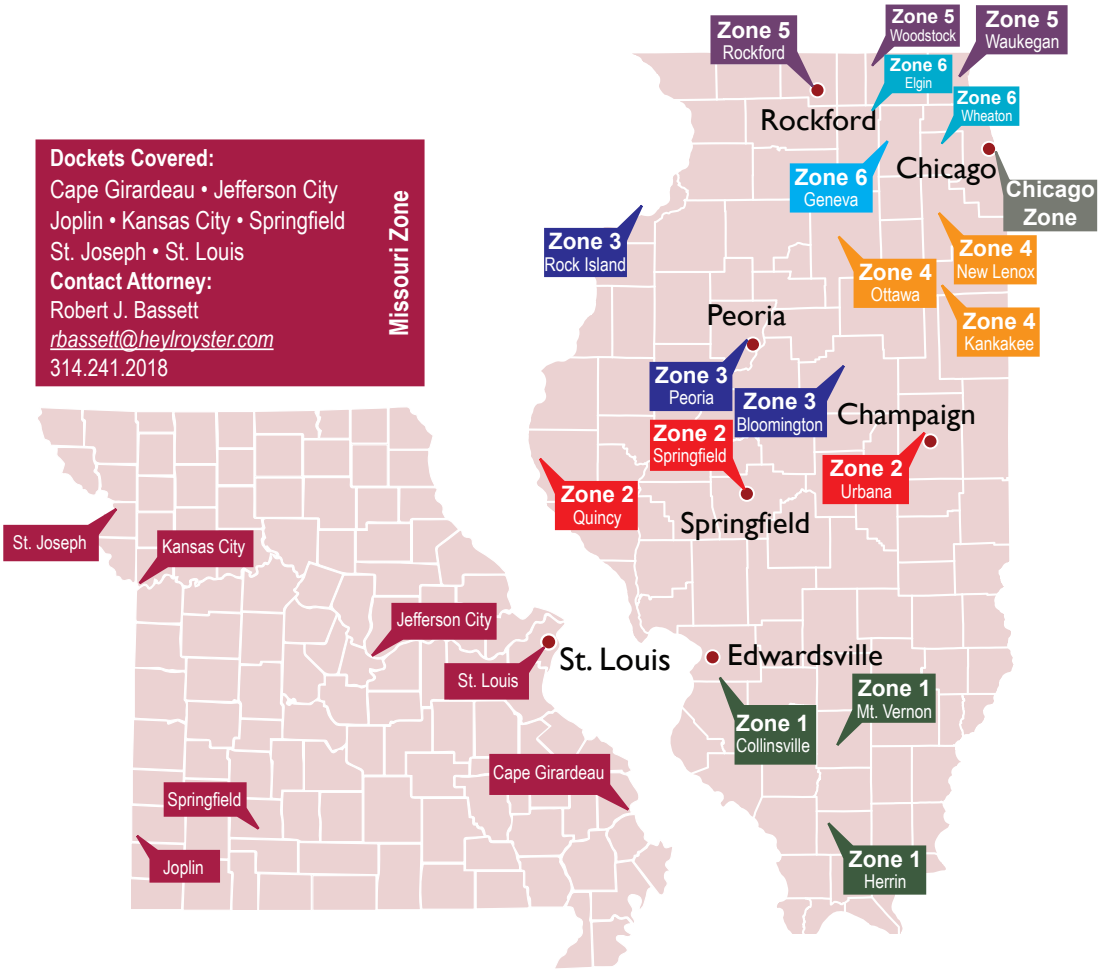

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