Below the Red Line

Workers' Compensation Update

"We've Got You Covered!"

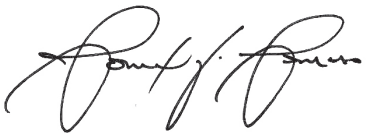
A Newsletter for Employers and Claims Professionals — *January 2019*

A Word From The Practice Chair

Welcome to 2019! I hope you are wearing your thermal gear as the polar vortex is no joke. I do hope you are staying warm with thoughts of Spring temperatures in the 40s. You know the old saying around Illinois: If you don't like the weather, then just give it a day. Including wind-chill, we are going to have a ninety degree swing in temperature by the end of this weekend. Yes, it's true, if you are not a hardy soul then dealing with wintertime in the Midwest is not for you. I just hope everyone is being smart and safe out there.

This is one of the reasons Heyl Royster likes to make house calls to our clients, so you don't have to hit the road. We have an open invitation here for you to contact me, so you can let me know what your Team needs from the perspective of continuing education and training. Let our Workers' Compensation Practice put together an in-house seminar/presentation for you. We do this for our clients in order to make sure you get what you need and we hit your target as far as your Team's needs. We enjoy these field trips and getting out to meet our clients at their office. Let me know how we can help your Team get even better.

This month's newsletter is about as timely as can be. My partner, Brad Elward, and my associate, Patti Hall, analyze for you an unpublished Rule 23 Decision from our Appellate Court, *Smith v. Illinois Workers' Compensation Comm'n*, based upon a slip and fall in a parking lot covered in snow. As you are probably aware, there is a long list of cases in Illinois which have this similar fact pattern. There is a good discussion as to the direction the Appellate Court seems to be taking and how we should deal with such a situation. As we have said before, and will undoubtedly say again, the devil is in the details. So, when you are investigating those new claims where a claimant slips and falls on snow/ice make sure you ask all the questions pertaining to where, when, who controlled the area, snow removal, and public access/use of the area. Speaking from the perspective of your counsel, the more information and details you have, the better off you will be as far as information and making an informed decision as to defenses and compensability. Until next month, I wish you warmth and good health.



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Snow and Ice as a *Per Se* Hazardous Condition?

By Brad Elward, & Patricia Hall

The Appellate Court, Workers' Compensation Commission Division, handed down an unpublished Rule 23 order on January 8, 2019, reversing a unanimous Commission decision, which denied benefits and held that the petitioner failed to show an increased risk.

Facts

In *Smith v. Illinois Workers' Compensation Comm'n*, 2019 IL App (3d) 180251WC-U, the petitioner, a program manager who worked for the Manhattan Park District, slipped and fell on ice and snow in a Park District-owned and maintained parking lot on the

way to her vehicle at the end of her work day. At the time of her accident, the petitioner had reached her car, she fell forward on both knees, squishing her legs underneath her. The evidence indicated it was a "very snowy day" and that the employer's superintendent had removed snow prior to the start of the work day. The administrative office from which the petitioner exited was adjacent to a driveway, which had been widened at one end to allow for nine parking spaces. The petitioner said her supervisor told her to park in one of these nine spaces. The small lot, as well as a large 40-space lot located one block away, was open to the general public on a first-come/first-serve basis.

Commission Ruling

The Commission, in a 3-0 decision, found that the petitioner failed to establish that she faced an increased risk versus the general public. The Commission found that because the lot was open to and used by members of the general public, the petitioner, as an employee, "was not exposed to any greater risk." *Smith*, 2019 IL App (3d) 180251WC-U, ¶ 12. It further concluded that "the accumulation of snow in the parking lot represented a natural accumulation as there was no evidence that [the Park District] created or contributed to a hazard." *Id*.

Appellate Court Reverses

On appeal, the appellate court in a unanimous decision reversed and found the Commission's decision was against the manifest weight of the evidence and contrary to law. After referencing a number of cases involving an employee's exposure to a hazardous condition on the premises, the appellate court cited *Mores-Harvey*, stating:

> [w]hether a parking lot is used primarily by employees or by the general public, the proper inquiry is whether the employer maintains and provides the lot for its employees' use. If this is the case, then the lot constitutes part of the employer's premises. The presence of a hazardous condition on the employer's premises that causes a claimant's injury supports the finding of a compensable accident.

Id. ¶ 18. *Mores-Harvey v. Industrial Comm'n*, 345 Ill. App. 3d 1034, 1040 (3d Dist. 2004). The appellate court concluded, "[t]he fact that this parking lot was also used by the general public is immaterial to the issue of compensability because claimant's injury was caused by a hazardous condition." *Smith*, 2019 IL App (3d) 180251WC-U, ¶ 18.

The court noted that there was no question that the injury in this case occurred on the employer's premises and that it resulted from a dangerous condition or defect on the employer's premises, namely ice and snow. *Id*. ¶ 20.

In reaching its conclusion, the court also distinguished the case of *Wal-Mart Stores, Inc. v. Industrial Comm'n*, 326 Ill. App. 3d 438 (4th Dist. 2001), which found an employee's slip and fall on parking lot ice and snow non-compensable because the risk faced – the ice and snow – was one equally faced by the general public. The *Smith* court said that, in that case, "the claimant was not walking to or from her parked car, but was being picked up by a friend. There was no evidence that anyone had asked the claimant's friend to park where she did." *Smith*, 2019 IL App (3d) 180251WC-U, ¶ 21. The court said further, "[t]hus, the claimant was, in a sense, not acting under the employer's control or restrictions when she left the store to go on break and so could not have faced any risks to a greater extent than those of the general public." *Id*. Because of these differences, the appellate court declined to follow *Wal-Mart*.

Moreover, the court said that the Commission's reliance on the natural accumulation doctrine, which precludes recovery in a civil suit where the snow fall is natural and has not been made hazardous by the defendant, was misplaced because the doctrine did not apply to workers' compensation cases.

At oral argument, the appellate court distinguished *Smith* from the court's 2017 decision in *Dukich v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160351WC, a published decision wherein the court found the petitioner's accident, which resulted from a slip and fall on wet pavement during a rainstorm,

did not "arise out of" her employment because it was a risk equally faced by all members of the general public. The court in *Smith* said there was a difference between rain and snow and that the latter constituted a hazardous condition.

Implications

The *Smith* case, although a non-precedential unpublished order, is a dangerous signal that the appellate court may find compensable any slip and fall accident on snow or ice, so long as it occurs on the employer's premises, and regardless of whether the location of the fall was open to the general public, and thus, presented an equal risk. Moreover, coupling *Smith* with the court's decision in *Crowder v. Illinois Workers' Compensation Comm'n*, 2018 IL App (4th) 180037WC-U, which held that an employee's fall on snow and ice, despite having occurred in an area open to the general public, was compensable, means that the "arising out of" inquiry will give credence to the presence of a hazardous condition on the premises over the fact that the condition was in an open, public area. This result is extremely troubling, because the employee in *Crowder*, was walking to a local Starbucks for coffee when she fell, and was not performing any work-related activity. Both *Smith* and *Crowder* were authored by Justice Cavanaugh and were unanimous appellate court decisions overturning a unanimous Commission decision to deny compensation.

Even as an unpublished decision, *Smith* provides valuable insight into the court's current approach to "arising out of" analysis. Read together, *Smith* and *Dukich* address both sides of the "weather spectrum" – one involves a fall on ice and snow and the other involves a fall in rain.

"Arising Out Of" Generally

While the court has been relatively active in the past year in addressing certain aspects of the "arising out of" analysis, it still has yet to tackle the troubling issue of compensability where the act being performed, while one falling within the employee's job duties, is nevertheless an everyday act. Will the court continued to follow the *Steak 'n Shake v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150500WC, decision from late 2016, which held that even accidents resulting from everyday risks were compensable so long as the risk occurred while the employee was performing an activity that was an integral part of the employee's job duties, or will it return to the days of *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC, ¶ 33, where the court said, "[t]he Commission should not award benefits for injuries caused by everyday activities like walking, bending, or turning, even if an employee was ordered or instructed to perform those activities as part of his job duties, unless the employee's job required him to perform those activities more frequently than members of the general public or in a manner that increased the risk?"

Handling Ice and Snow Cases Forward

The case law governing "arising out of" has been in flux over the past two years, with the court seeming to switch back and forth between different standards, while at the same time refusing to address prior contradictory cases. Certainly the court should give serious thought to what it truly wants the applicable standard to be for the various nuances of the "arising out of" analysis, and then clearly pronounce that law, overruling prior contradictory cases as no longer good law.

But from an employer's perspective, how should ice and snow cases be handled when they arise? The best advice is to continue to aggressively investigate parking lot falls, documenting the condition of the premises, ownership, and what the employee was doing at the time, and to have that information available for the defense of a potential case. Document what the employee was carrying, the type of shoes he or she was wearing, and whether there were any distractions present. Was the employee coming or going to work, or going on an errand over the lunch hour? Good defense counsel will continue to resist the current trend in the case law and argue for a more reasonable standard that moves away from what appears to be a near positional risk standard being

adopted by the appellate court to one that does not compensate for injuries resulting from risks equally faced by the general public. Having facts such as those identified above goes a long way in establishing that defense. The current goal is to return the standard to one that takes into account the increased risk analysis and which further does not treat ice and snow on the premises as a *per se* hazardous condition. If snow and ice are not a *per se* hazardous condition under the natural accumulation doctrine in civil cases, we should work to establish this doctrine in the context of a workers' compensation case.

Preventive Acts

Rain, snow, and ice will always be present in the Midwest. Lots should be regularly shoveled, plowed, and de-iced as carefully as possible, with documentation of removal times and dates. Employers should also be careful not to do anything to the premises that would accentuate or exacerbate an otherwise natural accumulation of rain, snow, or ice. A good example of this would be a defective downspout that causes water to run across a walkway or parking lot, which in turn freezes. Even if the defense bar succeeds in returning to an "arising out of" standard that also takes into account the fact that the parking lot or other area is open to the general public, liability under the Workers' Compensation Act may arise if the employer actively creates or contributes to a hazardous condition.

Another preventive suggestion to avoid future claims is to try to eliminate the amount of control the employer exercises over employee parking – avoid designated parking spaces or employee-only lots, or encouraging employees to park at the back of the lot. Encourage employees not to carry work-related items to their car, but to use designated loading zones, which can be better policed.

Finally, where possible, consider the benefits of providing security cameras that monitor parking lots. Cameras can help document what an employee was carrying, what they were doing, and the exact condition of the area where the fall occurred. Moreover, videos can be extremely valuable even where liability is established, as they can often identify what injuries occurred.

As always, if you have any questions concerning this case, the "arising out of" analysis, or any aspect of workers' compensation law, please feel free to contact any of our workers' compensation attorneys across the State of Illinois.

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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.

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Patricia focuses her practice on workers' compensation, employment & labor, casualty/tort litigation, and appellate advocacy. Before joining Heyl Royster, Patricia worked for legal assistance representing indigent clients in domestic relations cases in Illinois state court, as well as preparing estate planning documents for elderly clients. During the summer of 2014, she clerked for Judge Lisa Fabiano, and during the summer of 2015 she clerked for Judge Eugene Doherty – both of the 17th Judicial Circuit. In her third year of law school, Patricia clerked for the Shannon Law Group in Woodridge, IL, where she was responsible for cases involving consumer rights and breach of contract.

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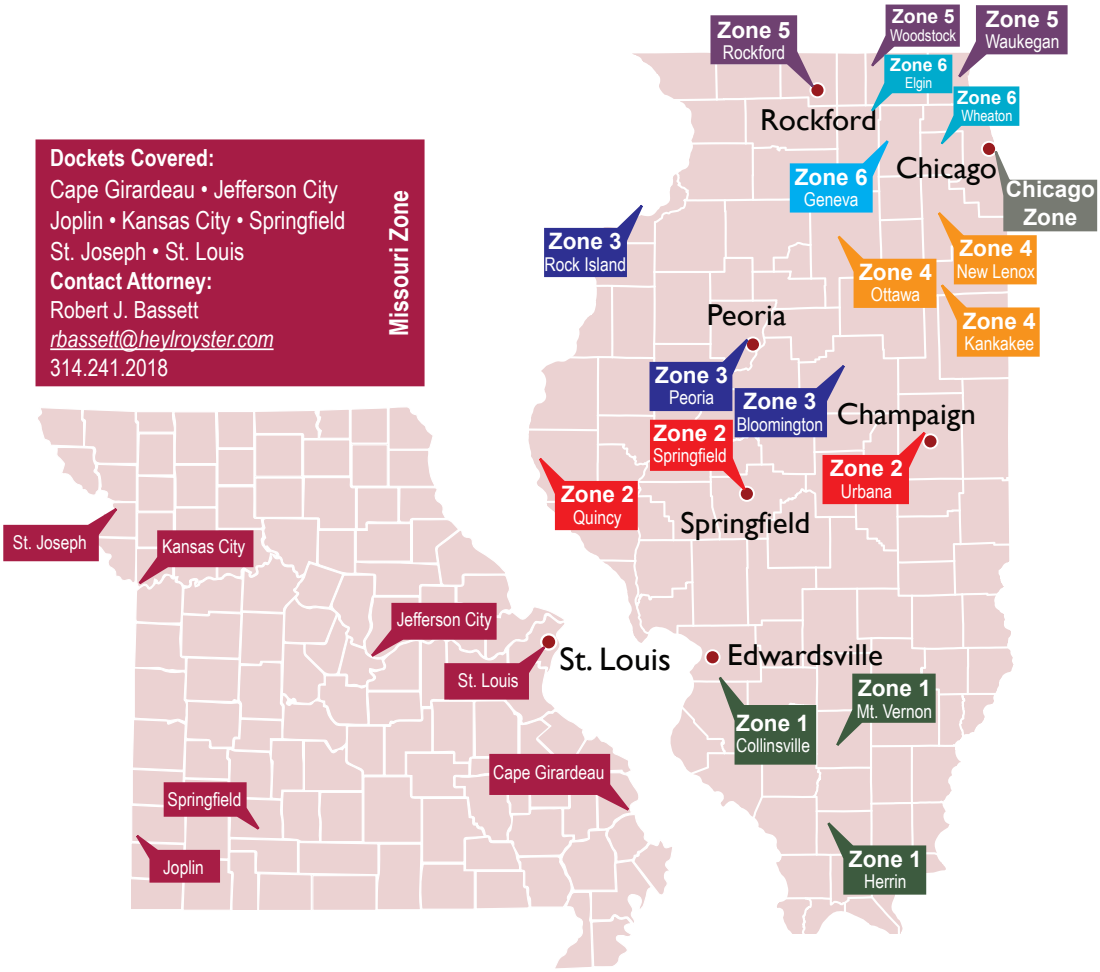

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