Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got You Covered!"

A Newsletter for Employers and Claims Professionals *May 2020*

A Word From The Practice Chair

House Bill 2455, better known in Illinois as HB 2455, was passed by both houses on May 22, 2020, and now Governor J. B. Pritzker will have ten days to sign it into law. We do anticipate the Governor will sign it establishing a rebuttable presumption for front line workers and essential workers here in Illinois who have been infected by COVID-19. Click here to view our recent e-blast article on the proposed legislation if you did not already see it. Our Workers' Compensation Team will keep you posted regarding this story and issue as it further develops.

I would have a hard time keeping my update short and sweet if I were to tell you about all of the procedural changes that are going on at the Commission based upon our current pandemic and Phase 3 planning. Business is moving forward, but it looks very different. As of May 1, 2020, workers' compensation docket calls were taking place via video conferencing. As of June 1, we will be participating in our docket calls via WebEx (secure) video conferencing. Moving forward in June 2020, pre-trial hearings, motion practices, and other court matters which we would normally take before the Arbitrator will be done via video conferencing. Trials will still take place in person, but proper protocols and procedures will need to be followed by all participants. This includes time limits, proper scheduling, wearing of PPE, and following strict pre-trial regulations to make sure all parties are indeed ready for the trial. The overriding goal is to keep the workers' compensation wheels of justice moving, but in a manner that keeps Commission employees, parties, and attorneys safe during the ongoing pandemic. If any of this sounds unusual or confusing, please feel free to contact any of our Heyl Royster attorneys, and they can help you make sense of this brave new world the Commission and Chairman Brennan have created for all of us.

I want to thank the team of Amber Cameron (Edwardsville), Jordan Emmert (Rockford), and Jenna Scott (St. Louis) for putting together this issue's article on "arising out of" claims with an emphasis on parking lot cases wherein we compare and contrast findings and the law in Illinois and Missouri. This may not rival a Cubs vs. Cardinals series (which I know we are all sorely missing right now!), but I do hope you find it informative and helpful no matter what side of the river you find yourself working on. Because our workers' compensation team handles both States, we can help you deal with your workers' compensation needs in either location.

One final, personal note from me: for the past two and a half months, many of us have been dealing with some unprecedented times during the pandemic. I know that has not been easy. I want to thank all of our clients for digging in and continuing to do what they do best: handle claims and push their businesses forward the best way you know how. To say I am impressed by the great attitude our friends have brought to the new normal would be an understatement! This may sound trite, but from my Heyl Royster Team to yours, you have done one heck of a job under some extreme circumstances. I know we are taking baby steps forward, but here's hoping the worst is behind us. Now we can move forward with the same positive attitude we have all shown from the beginning. Good luck and good health to us all.

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Illinois v. Missouri: Employee Falls At and Away from Employer's Premises

By: Jordan W. Emmert, Amber D. Cameron, and Jenna A. Scott

As we all know, there are many aspects to an "arising out of" analysis in a workers' compensation case. In both Illinois and Missouri, a good amount of litigation has occurred over the years as to whether injuries to employees in parking lots and on/off the employer's premises are compensable under Workers' Compensation. In the fall of 2019, the Workers' Compensation Division of the Illinois Appellate Court addressed one aspect of the "arising out of" doctrine, aptly named the "parking lot rule," in its decision in *Walker Bros. v. Ill. Workers' Comp. Comm'n,* 2019 IL App (1st) 181519WC.

In *Walker Bros.*, the petitioner was a cook at the respondent's restaurant. Prior to an early morning shift in February of 2013, the petitioner parked his vehicle in an Ace Hardware parking lot near the employer's restaurant, and waited for a co-worker to arrive. The petitioner's co-worker arrived and began walking to the restaurant. Upon seeing his co-worker arrive, the petitioner exited his vehicle and rushed after his co-worker. As he did, the petitioner slipped and fell on a snowy and icy surface in the Ace Hardware parking lot. The petitioner landed on his shoulder, and ultimately had to undergo surgery.

To obtain compensation under the Act, the petitioner must show, by a preponderance of the evidence, that he suffered an accidental injury that arose out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). An injury "arises out of" one's employment if it originated from a risk connected with, or incidental to, the employment and involved a causal connection between the employment and the accidental injury. *Id.*

Generally speaking, when an employee slips and falls at a location off of the employer's premises while traveling to or from work, the resulting injuries do not arise out of and in the course of the employment, and are subsequently not compensable under the Act. *Joiner v. Industrial Comm'n,* 337 Ill. App. 3d 812, 815 (2003). This concept is usually referred to as the general premises rule. That being said, the Illinois Supreme Court has created an exception to this rule when an employer provides a parking lot to its employees. *DeHoyos v. Industrial Comm'n*, 26 Ill. 2d 110, 113 (1962).

If an employer provides a lot to its employees, and an employee is injured on that lot, the employee is entitled to recover under the Act. *Id.* However, the parking lot exception has been narrowed since it was first developed. A few years after the *DeHoyos* decision, the Supreme Court held that the controlling issue in parking lot cases tends to be whether or not the lot is owned by the employer, or controlled by the employer, or is a route required by the employer. *Maxim's of Illinois, Inc. v. Industrial Comm'n*, 35 Ill. 2d 601, 604 (1966). The employer's control or dominion over the parking lot is a significant factor in the analysis. *Joiner*, 337 Ill. App. 3d at 816. The Supreme Court has also recognized that "[r]ecovery has been permitted for injuries sustained by an employee in a parking lot provided by *and* under the control of an employer. (Emphasis added.) *Illinois Bell Tel. Co. v. Industrial Comm'n.*, 131 Ill. 2d 478, 484 (1989).

In *Walker Bros.*, the petitioner testified at the arbitration hearing that he parked in the nearby Ace Hardware parking lot because his employer gave the employees permission to park in that lot. He said that the supervisors posted a note in the employee break room stating, "we can only park at Ace but not between Thanksgiving and Christmas, park on the street." However, there were no signs in the Ace Hardware lot which reserved parking spots for the respondent's employees.

In addition to the petitioner, the petitioner's co-worker, the director of human resources for the employer, and the owner of the Ace Hardware also testified. The petitioner's co-worker stated that employees were not allowed to park in the respondent's lot due to its small size, but were not required to park at Ace Hardware either. The co-worker further testified parking was available on the street. The director of human resources testified the restaurant had an informal agreement with Ace which allowed the restaurant's employees to utilize a certain portion of the lot. The employer did not pay Ace for the use or maintenance on the lot, nor did its employees receive priority over Ace's customers.

At the trial level, the arbitrator found that the petitioner failed to establish that his accident arose out of and in the course of his employment. The petitioner sought review by the Commission, which reversed the arbitrator's decision, and the circuit court confirmed. The employer then appealed the decision to the appellate court.

Upon review, the Appellate Court considered, (1) whether the parking lot was owned by the employer, (2) whether the employer exercised control or dominion over the parking lot, and (3) whether the parking lot was a route required by the employer. *Walker Bros.,* 2019 IL 181519WC, ¶23. Ultimately, it held that the evidence presented at arbitration established that the employer had a longstanding agreement with the owner of Ace, where Ace allowed the employer's employees to park in a number of parking spaces from January through October. *Id.* at 24. Those parking spaces were also open to the general public, and there were no signs indicating that the spots were reserved for the respondent's employees. *Id.*

As a result, the Court held that the lot was not provided by the employer because the employer did not own the Ace parking lot, control the Ace parking lot, nor did it require its employees to park or travel through the Ace parking lot for their employment. *Id.* at 26. As a result, the injuries suffered by the petitioner did not arise out of his employment with the employer. *Id.*

As the *Walker Bros.* decision demonstrates, when dealing with parking lot injuries that occur in Illinois lots which may not be owned by the employer, it is critical to conduct a thorough factual investigation into the relationship between an employer and the owner of the lot, and the degree of control the employer retains over the lot and the route its employees take to enter the employer's place of business. The degree of control over the lot itself, and the degree to which the employer requires its employees to utilize a path through the lot, will have a profound impact on whether the injury is determined to arise out of the petitioner's employment.

As in Illinois, a good amount of litigation has occurred over the years in Missouri as it relates to falls on and off an employer's premises, including parking lots.

In general, injuries sustained while coming from or going to work in Missouri are not compensable unless there is an exception carved out to the "coming and going rule" set forth in *Kunce v. Junge Baking Co.*, 432 S.W.2d 602 (Mo. App. S.D. 1968). Before the extensive 2005 amendments to the Missouri Workers' Compensation Law, the "extended premises doctrine" was recognized by the Missouri Courts as an exception to the general rule that accidents occurring going to or coming from work were not deemed to arise out of and in the course of employment. In 2005, the legislature abrogated the extended premises doctrine and expressly limited compensable cases for injuries occurring when coming to or going from work to only those involving accidents that occur on property owned or controlled by the employer. Section 287.020.5 and 287.020.10, RSMo Supp. 2018, as amended effective

8/28/2005. As in Illinois, an analysis of whether an injury occurred on or off a location owned and controlled by the employer must be undertaken to further determine whether the injury arose out of the employment.

In Missouri, accidents that occur on property not owned or controlled by the employer, even if the accident occurred on customary, approved, permitted, usual or accepted routes used by the employee to get to and from their place of employment, are specifically excluded and are not compensable under Missouri Law. Section 287.020.5, RSMo Supp. 2018, further explained by *Hager v. Syberg's Westport*, 304 S.W.3d 771 (Mo. App. E.D. 2010). In *Hager*, an employee slipped and fell on an icy parking lot that was leased by his employer. The Court found that the lease only gave employees the right to park in an area, and the employer did not manage or maintain the lot. Therefore, it was the landlord, not the employer, who had control over the parking lot and compensation was ultimately denied under the Law. Conversely, in *Scholastic, Inc. v. Viley*, 452 S.W.3d 680 (Mo. App. W.D. 2014), the employee fell on a parking lot that was not owned by the employer but the lease agreement granted the employer exclusive use of the lot and the employer routinely instructed that certain maintenance for the lot be conducted by the landlord. In this case, the Court found the employer had exercised sufficient control over the lot and awarded benefits to the employee.

The Missouri Supreme Court has also recently issued two opinions that further limit the compensability of falls by employees. In *Annayeva v. SAB of the TSD of St. Louis*, 597 S.W.3d 196 (Mo. 2020), the claimant, a teacher, fell while walking through the school hallway in the morning heading to the room where she was required to clock-in. The Labor and Industrial Relations Commission denied her claim for workers' compensation benefits. The Supreme Court of Missouri affirmed the Commission's denial of the claim and found that claimant failed to prove her injury arose out of and in the course of her employment because the hazard or risk involved was one she was equally exposed to in her normal, non-employment life and thus, failed to carry her burden of proof.

The Missouri Supreme Court also recently issued its opinion in *Schoen v. Mid-Missouri Mental Health Ctr.*, No. SC98168, (Mo. Apr. 14, 2020). In *Schoen*, claimant, a nurse, was exposed to an insecticide while working and was sent to the emergency room a few days later with ongoing complaints. Claimant was later sent to an outside doctor by her employer. While at the doctor's office, claimant tripped and fell, sustaining a number of injuries. The Court held, consistent with its previous holdings in *Annayeva* and another decision from 2009, *Miller v. Missouri Highway and Transportation Commission* (construction worker walking on highway when his knee popped), that claimant was unable to demonstrate the risk of her tripping was a risk she would not have been exposed to outside of her employment and her injury did not "arise out of employment" as required by Missouri Statutory Law.

It is clear by the recent Missouri Supreme Court decisions of *Annayeva* and *Schoen* that Missouri is poised to continue to limit compensation for claims to only those that have a clear nexus to the work performed for the employer and occurring on property that is owned and/or sufficiently controlled by the employer.

The attorneys in the workers' compensation practice group at Heyl Royster have extensive experience investigating and defending workers' compensation claims in Illinois and Missouri. If you need assistance or advice relating to any aspect of a workers' compensation claim, do not hesitate to reach out to one of our attorneys.

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Jordan focuses his practice on civil litigation in both federal and state courts in the areas of civil rights/Section 1983 litigation, commercial litigation, and representing employers in employment law and workers' compensation matters.

In the area of employment law, Jordan focuses on employers' compliance with federal and state employment laws, such as the Family Medical Leave Act, anti-discrimination laws, and retaliatory discharge matters. He also represents employers in workers' compensation matters. Jordan is also involved in commercial litigation where he represents businesses that are involved in business disputes.

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Amber concentrates her practice in the areas of workers' compensation and toxic tort litigation. Her workers' compensation defense practice entails representing employers of all sizes at dockets in southern Illinois and eastern Missouri. She also devotes a portion of her practice to the defense of asbestos personal injury suits, representing the firm's clients at depositions, hearings, and procedural matters.

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Jenna received her J.D. from St. Louis University School of Law and her Bachelor of Science in Accounting from Bradley University. After her 1L year, Jenna gained valuable legal experience as an intern for Chief United States District Judge of the United States District Court for the Central District of Illinois James Shadid in Peoria. During her final year of law school, Jenna was a member of the Civil Litigation Clinic, where she argued in front of the Western District of Missouri Court of Appeals; drafted a Missouri Court of Appeals Appellate Brief; researched and drafted a federal court reply brief; and handled civil litigation cases throughout St. Louis County.

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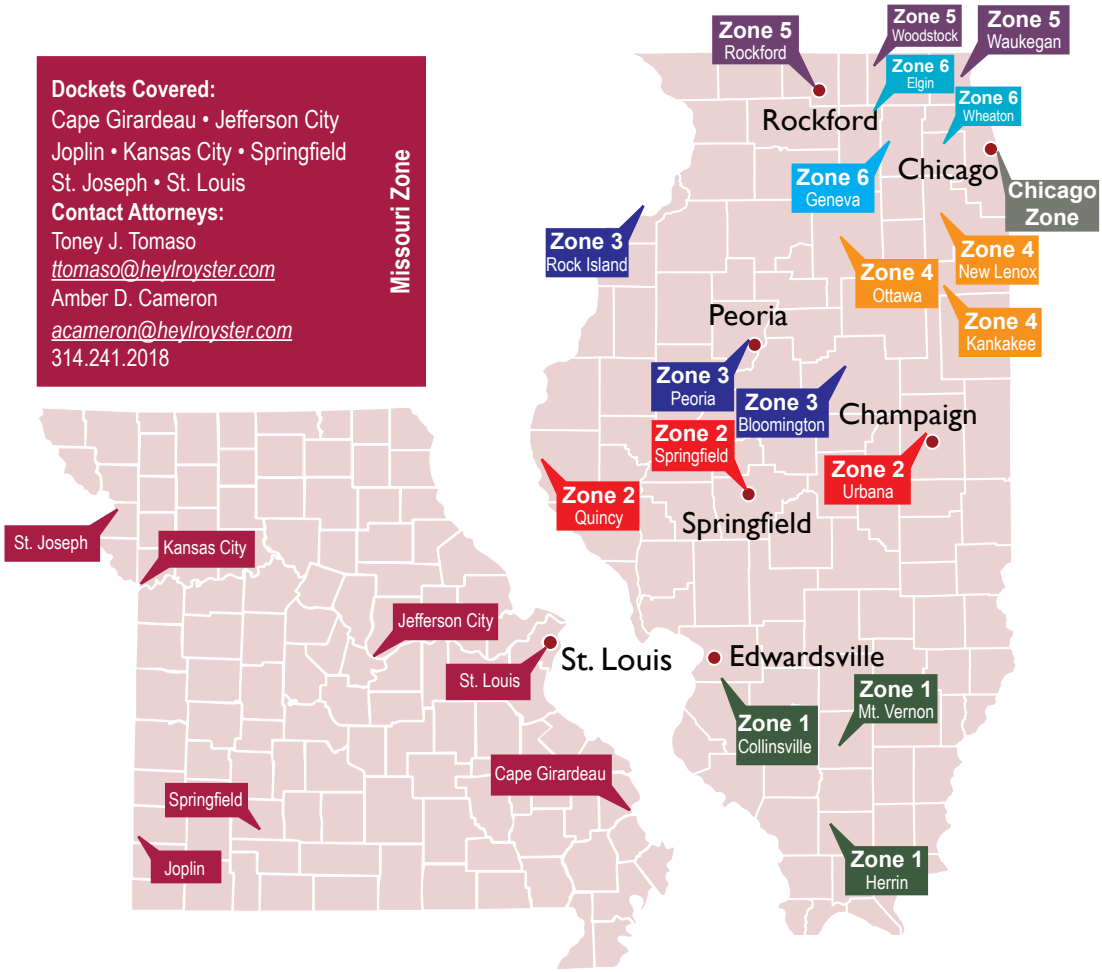

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