Below the Red Line

Heyl Royster

Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals — *October 2009*

A Word from the Practice Group Chair

As summer winds down and the leaves begin to turn, this month's issue of *Below the Red Line* highlights the Personal Comfort Doctrine and a recent Appellate Court decision, *Circuit City Stores, Inc. v. Workers' Compensation Comm'n*, 391 Ill. App. 3d 913, 909 N.E.2d 983 (2nd Dist. 2009), which declined to apply the doctrine but still found the employer liable. While some may wonder after reading the *Circuit City* decision exactly what an employer can do to protect itself in a similar situation, please take note of our author's suggestions which hopefully can improve future results.

Our author this month is Attorney Lynsey Welch. Lynsey practices workers' compensation out of our Rockford office and has experience with arbitrators in Northern Illinois and Chicago. We hope you enjoy her article.

Kevin J. Luther
Chair, WC Practice Group
kluther@heylroyster.com

Want to see past issues of *Below the Red Line*?
Go to our website at www.heylroyster.com and click on "Resources"

Our Practice Group Offers:

- EEOC, OSHA, and Department of Labor Representation
- Workers' Compensation Training for Supervisors
- In-House Seminars
- Employment and Harassment Training and Testing
- Risk Management of Workers' Compensation Liability
- Appellate Court Representation

This Month's Author:

Lynsey Welch is an associate in the Rockford office of Heyl, Royster, Voelker & Allen. A native of the Rockford area, Lynsey began her career at Heyl Royster as a law clerk in the Rockford office. While in law school, Lynsey was an Assistant Editor of the Northern Illinois University Law Review, a member of the Public Interest Law Society, and a member of the Women's Law Caucus. She concentrates her practice in the areas of workers' compensation, toxic torts and asbestos, and tort litigation.

WHAT IS THE PERSONAL COMFORT DOCTRINE?

The Personal Comfort Doctrine is a common law doctrine adopted by the courts to address injuries that occur when an employee is engaged in acts that are for his personal comfort and not necessarily "on the job." The Doctrine provides that:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the … method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment. *Karastamatis v. Industrial Comm'n*, 306 Ill. App. 3d 206, 211, 713 N.E.2d 161 (1st Dist. 1999)(*quoting* 2A. Larson & L. Larson, WORKERS' COMPENSATION LAW §21.00, at 5-5 (1998)).

In other words, even an act of personal comfort may be deemed non-compensable where the employee voluntarily exposes himself to a risk outside any reasonable exercise of his duties. Nevertheless, as will be seen below, the employer may still end up responsible if the employer has knowledge of or has acquiesced in the practice or custom. *See Eagle Discount Supermarket v. Industrial Comm'n*, 82 Ill. 2d 331, 412 N.E.2d 492 (1980).

The Personal Comfort Doctrine allows purely personal activities to be brought within the scope of the Workers' Compensation Act. Examples of these activities include eating and drinking, obtaining fresh air, seeking relief from the heat or cold, showering at an employer-provided facility, resting, and smoking. As this short list indicates, if an employee is injured while engaged in an activity that is purely for his or her own comfort at work, but is so closely incidental to the work, the injuries occurring during those activities may be within the course of the work itself.

THE CLAIMANT MUST STILL PROVE BOTH "ARISING OUT OF" AND "IN THE COURSE OF" THE EMPLOYMENT

Contrary to many petitioners' attorneys' viewpoints, a claimant relying on the Personal Comfort Doctrine must still prove that his injury both "arose out of" and "in the course of" his employment with the employer. The Doctrine resolves only the "arising out of" element and does not answer the "in the course of" question. The term "arising out of" employment is defined as a risk which has its origins in some risk so connected, so incidental, to the employment as to create a causal connection between the employment and injury. For an injury to have arisen out of employment, the risk of injury must be a peculiar risk to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment. "In the course of" refers to the time, place, and circumstances under which the accident occurred.

SIGNIFICANT CASES INVOLVING THE DOCTRINE

The Personal Comfort Doctrine frequently comes into play when an employee is injured while on a work or lunch break. The courts have held that the Doctrine applies to injuries during the lunch hour because a lunch break is considered incidental to employment. Indeed, this is true regardless of whether the employee is paid for the break or even if the employee is not eating during the break.

For example, in *Eagle Discount Supermarket v. Industrial Comm'n,* 82 Ill. 2d 331, 412 N.E.2d 492 (1980), the employee worked as a shelf stocker for an Eagle grocery store. The employee worked third shift and was permitted an unpaid lunch break between 1:30 and 2:30 a.m. Eagle did not restrict its employee's activities during lunch breaks. On the date of the accident, the claimant and other employees had taken lunch and were permitted by the night manager to eat outside. Because the store was closed, the manager also turned on the parking lot lights. The claimant finished eating and was playing Frisbee in the lot when he tripped and fell and injured his ankle. The Court held that the claimant was injured while participating in a recreational activity on the employer's premises during an authorized lunch break.

Upholding the Commission's application of the Personal Comfort Doctrine, the Court observed that the night manager

was aware that the employees played Frisbee in the lot and had turned the lights on so they could play on the night of claimant's injury. The Court determined that the claimant was engaged in an act of personal comfort and was, therefore, acting in the course of his employment when he was injured. The Court found that the activity further arose out of the employment, because the activity was "an accepted, regular and normal one which occurred on the premises during an authorized lunch break." *Discount Supermarket v. Industrial Comm'n,* 82 Ill. 2d at 338.

The Court stated that the most critical factor in determining whether the accident arose out of and in the course of employment is the location of the occurrence. Thus, where the employee sustains an injury during the lunch break and is still on the employer's premises, the act of procuring lunch has been held to be reasonably incidental to the employment." *Eagle Discount Supermarket*, 82 Ill. 2d at 339. Moreover, it appears that the Court found that, even if the employee did expose himself to an unnecessary and unreasonable risk, the injury nevertheless occurred in the course of employment because the employer knew, acquiesced, and possibly participated in the employees' routine Frisbee game.

In *Union Starch v. Industrial Comm'n*, 56 Ill. 2d 272, 307 N.E.2d 118 (1974), the claimant was on a break and stepped out onto a roof to drink a soda and get fresh air. The roof collapsed causing injury. The Court held that the premises were a causative factor and the claimant's employment increased his risk of exposure. It was noted that it had been the custom for the fifteen years the claimant was working for the employer for employees to seek refuge to the roof of the work building for fresh air. The Court noted that it was not unreasonable to infer from this fifteen year history that the claimant could have assumed there was no prohibition against using this roof to seek fresh air.

In both *Eagle Discount Supermarket* and *Union Starch*, the Court hinted at an obligation on the part of the employer to make a formal policy against such actions that led to the injuries. In both cases, there were no facts indicating that the claimants' actions while on break, or on company property, were unreasonable. One possible means of defending against such injuries occurring on company property during a break may be evidence of a company-wide safety policy evidencing company-approved break locations.

The case of *Karastamatis v. Industrial Comm'n.,* 306 Ill. App. 3d 206, 713 N.E. 2d 161 (1st Dist. 1999), involves an injury at a picnic. In *Karastamatis*, the claimant was hired to work at a church picnic setting up tents, driving a van, cleaning, and stocking gear and food. During a break, the claimant was dancing with guests of the picnic with the employer's permission when he injured his leg. Although the Court found that the Personal Comfort Doctrine would be applicable to bring the accident "in the course of" element, the claimant failed to prove the "arising out of" requirement. The Court held that the claimant's injuries did not result from some risk or hazard peculiar to his employment because the employee was not hired to dance but rather was hired to set up, stock the picnic, and serve beer and food. As a result, the risk of injury from dancing was not peculiar to his work or incidental to his employment because it did not belong to, nor was it in any way connected with, what he had to do in fulfilling his contract for service.

In the decision of *Illinois Consolidated Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 732 N.E.2d 49 (5th Dist. 2000), the Court upheld the award of benefits to an employee who office worker who broke her ankle after falling down a flight of stairs at work. The claimant had left her desk and gone upstairs to use the women's restroom, because there was no women's restroom on her floor. On her way back down the stairs, which were the sole means of accessing the restroom, she fell. The claimant did not know what caused the fall. The Court reasoned that "[u]sing the restroom to meet the demands of personal health or comfort certainly falls within those acts considered incidental to the employment." The Court addressed the risk aspect, concluding that she was exposed to a greater risk because she was continually forced to use the stairs to seek personal comfort.

Of course, not all cases alleging that the Personal Comfort Doctrine applies result in its application. In *Ealy v. Industrial Comm'n*, 189 Ill. App. 3d 76, 544 N.E.2d 1159 (4th Dist. 1989), the claimant had been working as a relief manager at a Kerasotes Theatre supervising concessions and box office personnel. Her duties required her to work at one of two locations, which were across the street from one another. Company rules required all employees to take a break after six hours of work, and also prohibited employees from eating in the foyer. No break room was provided and the employees were on break at their discretion.

The claimant took her break and went to a local restaurant near the theater; while at the restaurant, she and one of her employees and her supervisor discussed work. When they returned to the theater, the claimant slipped and fell on ice in an alley. The Appellate Court affirmed the Commission's denial of benefits and refusal to apply the personal Comfort doctrine, finding that the claimant had merely fallen on ice and that she went to the restaurant of her own volition; the

trip was not occasioned by her employment. It further noted that she was exposed to no greater risk than any member of the general public.

Likewise, in *Lynch Special Services v. Industrial Comm'n*, 76 Ill. 2d 81, 389 N.E.2d 1146 (1979), the claimant, a security guard, sustained injuries when he slipped on an icy sidewalk while returning from a restaurant where he had gone for breakfast during work hours. In this case, the Court rejected the Personal Comfort Doctrine and further found that the injury resulted from a risk common to the general public, falling on ice. The Court noted that the claimant's need for food was not occasioned by the demands of his work, but rather by his lack of planning. Unlike cases where the employment necessitates the claimant's presence in a particular location, the claimant in Lynch knew his working hours when he left home and could have either eaten before he left for work or brought food and eaten at his station, as guards ordinarily did. His decision to go to the restaurant neither benefited nor accommodated his employer. Moreover, the Court observed that the cause of the injury, the icy sidewalk, was not a hazard peculiar to the claimant's employment.

In *Branch v. Industrial Comm'n*, 95 Ill. 2d 268, 447 N.E.2d 828 (1983), the claimant testified that, on the date of his alleged injury while working for General Telephone Co., he opened the employer's heavy metal door and removed his coat. In doing so, he felt a sharp pain and experienced a "hot poker" type sensation as he removed his coat. The Arbitrator found that the claimant had proven the elements of his case and relied on the Personal Comfort Doctrine to establish the "in the course of" the employment element. The Commission, however, reversed and rejected application of the Personal Comfort Doctrine, finding that the act was simply one commonly undertaken by the general public.

One last case worthy of discussion is *Curtis v. Industrial Comm'n*, 158 Ill. App. 3d 344, 511 N.E.2d 866 (5th Dist. 1987). There the claimant was employed as a truck driver and general laborer in street maintenance. The claimant asked the employee in charge of respondent's main garage, for permission to take home a barrel of waste gasoline from the garage, which he intended to use at home. The claimant was told not to take the barrel itself because there was a deposit on it. During their lunch break, the claimant had a co-worker help him pour some of the gasoline into a bucket the claimant had in his truck. The gas began to spill and was ignited and as a result of the fire, the claimant sustained serious burns.

The claimant argued that his actions on his lunch break were similar to *Eagle Discount Supermarket* and *Union Starch.* The Court held that under the Personal Comfort Doctrine, certain lunch hour injuries relating to an employee's personal comfort, such as recreation or stepping outside for fresh air, are incidental to employment, and thus within the course of employment. However, the facts in *Curtis* and those in *Eagle Discount Supermarket* and *Union Starch* were distinguishable because the claimant's activities during his lunch hour did not involve relaxation activities. Rather, his actions were undertaken solely for a personal benefit to obtain free gasoline. Thus, his activities were not incidental to his employment as a truck driver and laborer, and not "within the course of" his employment.

THE *CIRCUIT CITY* DECISION

In a recent appellate decision, the Commission and then the Appellate Court went to great lengths to find a claimant's actions reasonable. In *Circuit City Stores, Inc. v. Workers' Compensation Comm'n,* 909 N.E. 2d 983 (2nd Dist. 2009), a male claimant was at work for Circuit City when a female co-worker asked for his help in dislodging a bag of snack chips from the vending machine located near an employee break room. The claimant initially tried shaking the vending machine, but when he failed to obtain the chips in question, he hit the machine with his shoulder and hip. He fell to the floor immediately complaining of hip pain. X-rays showed an impacted, slightly displaced fracture through the right femoral neck. At trial, a Circuit City representative testified that the snack machines were maintained near the break area for customers and "for the convenience and comfort of employees." The claimant was not on break at the time of his injury and was technically violating company protocol when he went to the vending machine.

The Commission applied the Personal Comfort Doctrine and found the claim compensable. Although the case was reversed by the circuit court, the Appellate Court, Workers' Compensation Division, reversed and reinstated the Commission's decision, finding that it was reasonably foreseeable that an employee might resort to butting a machine with his or her shoulder after unsuccessful attempts at dislodging a product. However, the Court did not apply the Personal Comfort Doctrine because it was not the claimant, but a co-worker, who was seeking personal comfort by accessing the vending machine.

> By its own terms, the personal comfort doctrine applies to employees who sustain injuries seeking their own personal comfort. … The doctrine has never been

applied, and does not apply, to injuries sustained by an employee while assisting a co-worker who is seeking personal comfort. *Circuit City Stores, Inc. v. Workers' Compensation Comm'n,* 909 N.E. 2d at 991.

Instead, because the claimant was assisting a co-worker, the Court applied the "Good Samaritan Doctrine," which holds that it is reasonably foreseeable that an employee might render assistance to a co-worker. Thus, while the claimant's actions were not at the express instructions of his employer, his actions in aiding a fellow employee could have been reasonably expected or foreseen. Moreover, the Court opined that the claimant's means of assisting his fellow employee was not so unforeseeable so as to take him outside the scope of his employment.

Handling Future Claims

While some of the more recent cases involving the Personal Comfort Doctrine have sided with the employee, proper investigation and documentation can lead to a successful resolution of such a claim for an employer. When an employee reports an injury that may fall under the Personal Comfort Doctrine, the employer should immediately perform a full investigation into the location of the accident, specifically documenting the condition of the accident location and whether there is any apparent defect. Similarly, if a written statement is taken from the employee or witnesses, efforts should be made (to the extent possible) to emphasize that there was no defect in the premises. The investigation should also include whether there were any policies prohibiting the conduct causing the injury, and if so, whether there is any evidence that the employer has acquiesced in the behavior, despite the rules.

Lynch Special Services cautions that certain employer actions might also affect what might otherwise be a non-compensable accident. There, the Court warned that certain factors, such as the shortness of the lunch hour or the employer's direction to "hurry back," might enhance what would otherwise be a general, and therefore non-compensable, risk.

Preparation for such claims can begin long before an injury via an employee handbook. Using a written policy, an employer can specifically limit the acceptable employee actions when on breaks and when off-duty. As previously discussed, a safety policy restricting any horseplay on company premises and delineating permissive actions is important. So too is designating one person as the sole authority for granting deviations to company policy. A signed signature page by each employee should be obtained as proof of receipt and understanding of such policies. If the employee acknowledges what they are not allowed to do on breaks, it is more difficult for them to later argue that their actions were reasonable.

Employers should also be careful not to acquiesce in activities that are dangerous or that violate company policy. As was the case in *Eagle Discount Supermarket*, where the employer had clearly consented to the potentially dangerous activities, an employer can by its actions undo the benefits of a policy against horseplay by participating in or acquiescing in the behavior.

Please contact us if you have any questions concerning injuries which have the potential to fall within the Personal Comfort Doctrine.

For More Information

If you have questions about this newsletter, please contact:

Kevin J. Luther
Heyl, Royster, Voelker & Allen
Second Floor
National City Bank Building
120 West State Street
P.O. Box 1288
Rockford, Illinois 61105
(815) 963-4454
Fax (815) 963-0399
E-mail: kluther@heylroyster.com

Please feel free to contact any of our workers' compensation lawyers in the following offices:

Peoria, Illinois 61602
Chase Bldg., Suite 600
124 S.W. Adams Street
(309) 676-0400
Fax (309) 676-3374
Bradford B. Ingram - bingram@heylroyster.com
Craig S. Young - cyoung@heylroyster.com
James M. Voelker - jvoelker@heylroyster.com
James J. Manning - jmanning@heylroyster.com
Stacie K. Linder - slinder@heylroyster.com

Springfield, Illinois 62705
National City Center, Suite 575
1 N. Old State Capitol Plaza
P.O. Box 1687
(217) 522-8822
Fax (217) 523-3902
Gary L. Borah - gborah@heylroyster.com
Daniel R. Simmons - dsimmons@heylroyster.com
Sarah L. Pratt - spratt@heylroyster.com
John O. Langfelder - jlangfelder@heylroyster.com

Urbana, Illinois 61803
102 East Main Street, Suite 300
P.O. Box 129
(217) 344-0060
Fax (217) 344-9295
Bruce L. Bonds - bbonds@heylroyster.com
John D. Flodstrom - jflodstrom@heylroyster.com
Bradford J. Peterson - bpeterson@heylroyster.com
Toney J. Tomaso - ttomaso@heylroyster.com
Jay E. Znaniecki - jznaniecki@heylroyster.com
Joseph K. Guyette - jguyette@heylroyster.com

Rockford, Illinois 61105
Second Floor
National City Bank Building
120 West State Street
P.O. Box 1288
(815) 963-4454
Fax (815) 963-0399
Kevin J. Luther - kluther@heylroyster.com
Brad A. Antonacci - bantonacci@heylroyster.com
Thomas P. Crowley - tcrowley@heylroyster.com
Lynsey A. Welch - lwelch@heylroyster.com
Dana J. Hughes - dhughes@heylroyster.com
Bhavika D. Amin - bamin@heylroyster.com

Edwardsville, Illinois 62025
Mark Twain Plaza III, Suite 100
105 West Vandalia Street
P.O. Box 467
(618) 656-4646
Fax (618) 656-7940
James A. Telthorst - jtelthorst@heylroyster.com

Appellate Statewide:

Brad A. Elward - belward@heylroyster.com
Peoria Office

www.heylroyster.com

The cases or statutes discussed in this newsletter are in summary form. To be certain of their applicability and use for specific situations, we recommend that the entire opinion be read and that an attorney be consulted. This newsletter is compliments of Heyl Royster and is for advertisement purposes.