Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got You Covered!"

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

A Word From The Practice Chair

I do hope you enjoyed your recent Mother's Day weekend, and you are venturing outside and enjoying the warmer weather Mother Nature is providing. Sometimes it is the small things that put a smile on your face – the smell of freshly cut grass; hearing the birds chirping in the morning; and the kids telling you how excited they are to sleep in and not use their alarm clock this summer. I do hope you are doing your fair share of smiling this Spring.

My partner Brad Elward has provided us with an excellent summation and analysis of a recent appellate court decision in the case of *McAllister v. Illinois Workers' Compensation Commission*. On its face, this is a great decision for employers wherein, the injured worker was denied benefits for the act of bending down and standing back up resulting in an injury to his knee. Benefits were denied because the injured worker was performing an activity which the general public is exposed to everyday, and not one that was particular to his employment as a chef. So, this case failed the "arising out of" aspect of a compensable claim analysis. But, Brad Elward goes well past this surface aspect of the case and delves into some problems the new case law establishes for us – the claims handlers and practitioners. The results leave more questions than answers, which will probably lead us to a scenario where this case will be reviewed by the Illinois Supreme Court. And, I can tell you this, it is not a common thing for the Supreme Court to take up a workers' compensation case. If they do take this case up for consideration and review, it will be with good cause because this is an important issue which needs to be addressed and nailed down once and for all.

Lastly, we also need to share with everyone the new statute signed into law by Governor J.B. Pritzker (PA 101-0006) which lifts the previous 25 year statute of limitations period on claims where the injured worker has been diagnosed with a condition which resulted from some type of exposure (for example, asbestos) while working and that exposure was more than 25 years ago. The old law would bar such an action by the statute of limitations. But, that has now been lifted and it opens the possibility of some really old claims coming down the road which we will need to deal with today.

These topics are timely and interesting, so please take a look at these articles and feel free to contact me with any questions as to how this impacts your claims handling.

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"Arising Out Of" and the Performance of Everyday Activities: A Solution or More Confusion?

By: Brad Elward, Peoria Office

A number of "arising out of" decisions have been handed down by the Appellate Court, Workers' Compensation Commission Division, over the past few years, addressing the standard for workers' compensation claims involving an accident resulting from an everyday activity performed in the work place. Indeed, the law has shifted back and forth, applying one standard then another in such cases, and leaving practitioners guessing

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what standard will govern their case. In *Young v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130392WC, the appellate court held that, "when a claimant is injured due to an employment-related risk – a risk distinctly associated with his or her employment – it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public." *Young*, 2014 IL App (4th) 130392WC, ¶ 23.

One year later, in *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC, the appellate court applied a different standard, holding that the 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." *Adcock*, 2015 IL App (2d) 130884WC, ¶ 39. According to the court, "a 'neutral risk' analysis should govern such claims." *Id*.

To make matters worse, fifteen months after *Adcock*, the court switched gears again in *Steak 'n Shake v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150500WC and *Mytnik v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152116WC, returning to a *Young* standard, and silently disavowing *Adcock*.

Needless to say, practitioners have been confused as to what standard applies and how the facts of their case involving an injury arising from an everyday activity performed at work would be evaluated. This confusion was made even worse by the fact that several members of the court, who were part of the *Young*, *Adcock*, and *Steak 'n Shake* decisions, by 2017 were no longer members of the Appellate Court, Workers' Compensation Commission Division.

The New Decision

In *McAllister v. Illinois Workers' Compensation Comm'n*, 2019 IL App (1st) 162747WC, published on May 15, 2019, the appellate court once again attempted to clarify its prior rulings. In *McAllister*, the claimant was injured while working as a chef, when he stood up from a kneeling position after volunteering to look for a misplaced pan of carrots for a coworker. The Illinois Workers' Compensation Commission denied the claim and found that claimant failed to show that his injury "arose out of" his employment because the risk was too far removed from the requirements of his employment to be considered an employment-related risk. *McAllister*, 2019 IL App (1st) 162747WC, ¶¶ 1-2. The appellate court affirmed the Commission's decision, finding that there was sufficient evidence in the record from which the Commission could have reached its decision to deny benefits.

In *McAllister*, the claimant was "at work getting ready for service while the other restaurant employees were beginning to set up their stations. One of the cooks was looking for a pan of carrots he had cooked earlier in the day." *Id*. ¶ 6. The claimant testified that the cook was "busy doing other things" and since the claimant "had some time," he began looking for the carrots. According to the claimant, he "began his search in the walk-in cooler because that was where the cook said he had put the carrots." *Id*. "He checked the top, middle, and bottom shelves in the cooler, but he was unable to locate the carrots." He then "knelt down on both knees to look for the carrots under the shelves because 'sometimes things get knocked underneath the shelves *** on[to] the floor.'" *Id*. The claimant found nothing on the floor, but as he stood back up, "his right knee 'popped' and locked up, and he was unable to straighten his leg. He 'hopped' over to a table where he stood 'for a second,' and then hopped another 20 or 30 feet to the office where he told his boss about the injury." *Id*.

According to the claimant, he was not carrying or holding anything when he stood up from a

kneeling position and injured his knee. Moreover, nothing struck his knee or fell on his knee. "He did not trip over anything, and he noticed no cracks or defects on the floor." *Id*. ¶ 7. It was noted that, although the claimant testified that the floor "was 'always wet' in the walk-in cooler, he did not notice 'anything out of the ordinary' at the time of his injury." *Id*. And, he did not claim that he slipped on a wet surface. Instead, the claimant was simply standing up from a kneeling position when he felt his knee pop. On cross-examination, the claimant admitted that "the kneeling position he assumed while looking for the carrots was similar to the position he would be in while 'looking for a shoe or something under the bed.'" *Id*.

The majority of the appellate court, Justices Thomas Harris, Donald Hudson, and James Moore, upheld the Commission's decision on a factual basis, finding that an "arising out of" determination "requires an analysis of the claimant's employment and the work duties he or she was required or expected to perform. Only after it is determined that a risk is not employment-related should the Commission consider and apply a neutral-risk analysis." *McAllister*, 2019 IL App (1st) 162747WC, ¶ 73. According to the majority, "the evidence in this case was such that the Commission could properly find that claimant's injury did not stem from an employment-related risk." *Id*. The majority stated:

> The risk posed to claimant from the act of standing from a kneeling position while looking for something that had been misplaced by a coworker was arguably not distinctly related to his employment. Claimant's work for the employer did not require him to perform that specific activity. Further, it was the Commission's prerogative to find claimant's act of searching for the misplaced pan of food was too remote from the specific requirements of his employment to be considered incidental to his assigned duties.

Id. Thus, the majority found that the Commission's determination that claimant was not injured due to an employment risk "was supported by the record and not against the manifest weight of the evidence." *Id*.

On its face, *McAllister* appears to be a good decision for employers, as the employer prevailed and the claim was denied. But deeper down, the decision is troubling because it places the entirety of the "arising out of" analysis in cases involving injuries resulting from everyday activities performed at work at the discretion of the Commission's factual findings, which are reviewed under a manifest weight of the evidence standard. Under that standard, the employer must show that an opposite result is clearly apparent. Once the Commission concludes that the accident resulted from an act or risk associated with the employment, no further analysis is required and the employer faces a difficult manifest weight of the evidence standard on appeal. No neutral risk analysis is performed.

Moreover, in reaching its decision, the *McAllister* majority went on to address the lengthy Special Concurrence authored by Justice William Holdridge and joined by Justice Thomas Hoffman, two members of *Adcock's* majority. The Special Concurrence argued that *Adcock's* principles should be adopted in order to establish a clear standard for evaluating such injuries. The majority specifically rejected *Adcock*, and signaled a return to *Young*.

According to the majority, "what makes a risk distinct or peculiar to the employment is its origin in, or relationship to, the specific duties of the claimant's employment." *McAllister*, 2019 IL App (1st) 162747WC, ¶ 69. "A risk that is required by the claimant's employment and necessary to the fulfillment of the claimant's job duties removes it from the realm of what is common to the general public (a neutral risk) even if the activities attendant to the risk have neutral characteristics, *i.e.*, involve common bodily movements." *Id*. The court further stated:

> [W]e find it is clearer and more straightforward to focus the employment risk inquiry on whether the injury-producing act was required by the claimant's specific job duties and not whether it could further be considered an "activity of everyday living." Activities necessary to the fulfillment of a claimant's job duties present risks that are distinct or peculiar to the employment and, as a result, are not common to the general public. In our previous appellate court decisions addressing this issue – *Steak 'n Shake*, *Mytnik*, *Young*, and *Autumn Accolade* – the claimants were performing activities required by their employment and best characterized as employment-related risks.

McAllister, 2019 IL App (1st) 162747WC, ¶ 48.

The overall decision, totaling 61 pages between the majority and Special Concurrence, is notable as it is one of the most thorough analysis the appellate court has ever conducted in a workers' compensation case.

Four of the five justices of the appellate court have issued a written statement required by Supreme Court Rule 315(a) stating that the case involves a substantial question warranting consideration by the Supreme Court. A Rule 315 petition for leave to appeal was filed in the Illinois Supreme Court on May 14, 2019. We would like to see the Court accept this petition and clarify this rapidly changing area of the law once and for all.

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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."

NEW LEGISLATION

On May 17, 2019, Illinois Governor J.B. Pritzker signed into law P.A. 101-0006 (SB 1596), which lifts the previous 25-year statute of limitations period on claims filed by individuals diagnosed with latent diseases after exposure to toxic substances such as asbestos, radiation, and beryllium in the workplace. The amendment added section 1.2 and modified sections 5 and 11 of the Workers' Compensation Act, 820 ILCS 305/1.2, 5, 11, and similarly added section 1.1 and modified sections 5 and 11 of the Occupational Disease Act, 820 ILCS 310/1.1, 5, 11. The changes provide that the exclusive remedy provisions "do not apply to any injury or death sustained by an employee as to which the recovery of compensation benefits under this Act would be precluded due to the operation of any period of repose or repose provision." 820 ILCS 305/1.2; 820 ILCS 310/1.1.

These amendments attempt to alleviate the impact of the Illinois Supreme Court's holding in *Folta v. Ferro Engineering*, 2015 IL 118070, which held that a decedent, whose workers' compensation/occupational disease claim was barred by the expiration of the 25-year statute of limitations, could not pursue a civil remedy against the employer due to the Acts' exclusive remedy provisions.

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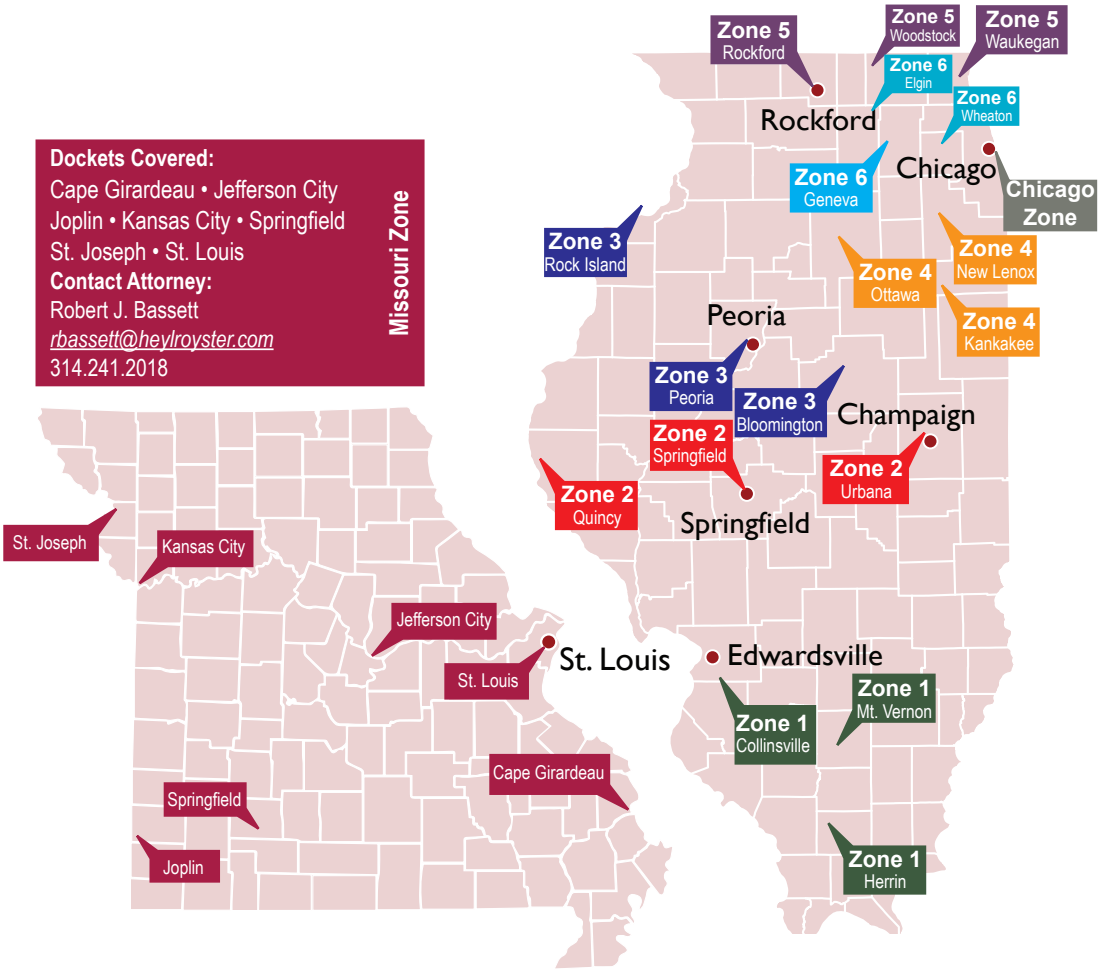

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