Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got You Covered!"

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

A Word From The Practice Chair

As I draft this note I am looking out the window and watching snow fall. Growing up in the suburbs of Chicago taught me the best Halloween costume was one which had layers or could fit under a winter coat. My heart goes out to the little ones who will be trick or treating in the snow and winter temperatures this year. In my mind those hearty souls deserve and will get extra candy at my door. Yes, what I said is correct … it is snowing here in Champaign and I have already had a few days of checking the winter road conditions while preparing for travel during these early snow falls. This is way too soon and I really was not prepared. They just finished playing the last World Series baseball game for goodness sake (congrats to all you Washington Nationals fans). I like snow, but I would prefer to see it in December. Happy Halloween!

I want to share some news with you from the Commission. Two new arbitrators were appointed last Friday by Governor Pritzker to the Illinois Workers' Compensation Commission. Those new arbitrators are:

Linda Cantrell of Marion, IL. She has been an attorney for Winters, Brewster, Crosby and Schaffer. Arbitrator Cantrell is a current member of the Missouri Bar Association, Williamson County Bar Association, Illinois Bar Foundation, Illinois Trial Lawyers Association and the Association of Trial Lawyers of America. She earned her Bachelor of Science from St. Louis University and Juris Doctor from the Southern Illinois School of Law.

Christopher Harris of Chicago, IL. He was managing attorney and owner of Shield Law Firm LLC and volunteers at the Cook County Arbitration Center. Previously, he served as general counsel at International Services, associate attorney at Archer Law Group, and an attorney at his own firm Johnson and Harris. He is a member of the Illinois and Chicago Bar Associations as well as the Lakeview Chamber of Commerce. Harris earned his Bachelor of Arts in Political Science from the University of Illinois and his Juris Doctor from the University of Illinois College of Law.

The month's article is on a topic we find very frustrating these days, and I want to thank our associate Adam Rosner (Rockford office) for tackling the job. We all have those cases or situations where an employee is participating in an activity which the general public is exposed to every day (like climbing stairs or picking up a pencil that fell to the ground) and we know the question which is always raised is whether we can present an accident defense for our client, the employer. There is conflicting case law as to what analysis should be used. The good news is the Illinois Supreme Court is now getting involved in order to lay these conflicts to rest (hopefully!). Adam reviews *McAllister v. Illinois Workers' Compensation Commission*, 2019 IL App (1st) 162747WC. We discuss *McAllister* and review the conflicting case law on point. We are monitoring this Supreme Court review and will update you when a decision is made as it will indeed be a big deal in the world of workers' compensation. It is not every day we get the Illinois Supreme Court involved in a workers' compensation matter. In this case, it is indeed warranted.

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ILLINOIS SUPREME COURT GRANTED THE RULE 315(A) PETITION FOR LEAVE TO APPEAL IN *MCALLISTER V. ILLINOIS WORKERS' COMPENSATION COMM'N*, 2019 IL APP (1ST) 162747WC

By: Adam Rosner, Rockford Office

There has been much discussion recently about evaluating claims resulting from an everyday activity performed in the work place. In May, we provided you with an evaluation of recent case law and how it has shifted back and forth at the appellate level, applying one standard and then another in such cases, and leaving practitioners guessing which standard will govern their case.

One of the cases we discussed was the recent Appellate Court decision of *McAllister v. Illinois Workers' Compensation Comm'n*, 2019 IL App (1st) 162747WC. Four of the five justices of the appellate court issued a written statement as 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 are pleased to advise that the Supreme Court has accepted this petition. We eagerly await their decision clarifying this rapidly changing area of the law.

In *McAllister*, the claimant was a sous chef. He volunteered to look for a missing pan of carrots for a co-worker. The claimant alleged that his right knee "popped" when he stood up from a kneeling position. 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. 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.'" *McAllister*, 2019 IL App (1st) 162747 WC, ¶ 6. 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 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, ¶ 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.

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." *Id*. ¶ 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*.

While the employer did prevail in *McAllister*, there is concern regarding the path the court took to get to their decision. The decision 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, when appealing a decision, 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.

Further, in reaching its decision, the *McAllister* majority went on to place focus on whether the injury-producing act was required by the claimant's specific job duties and not whether it could be considered an "activity of everyday living."

We will continue to monitor this case and will immediately provide you with updated legal analysis upon receipt of the decision from the Supreme Court.

This article is a follow up and expansion upon the May issue of Below the Red Line, "Arising Out Of" and the Performance of Everyday Activities: A Solution or More Confusion, authored by retired Heyl Royster partner, Brad Elward.

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Adam joined Heyl Royster as an associate in 2019, having previously clerked for the firm during the summer of 2018. He concentrates his practice in the areas of Business and Commercial Litigation, Professional Liability, and Workers' Compensation.

During law school Adam clerked for the Honorable Judge Ronald J. White of the 17th Judicial Circuit, and later at the Federal Department of Labor, Solicitor's Division. During his final year he also served as managing editor of the *Northern Illinois University Law Review.*

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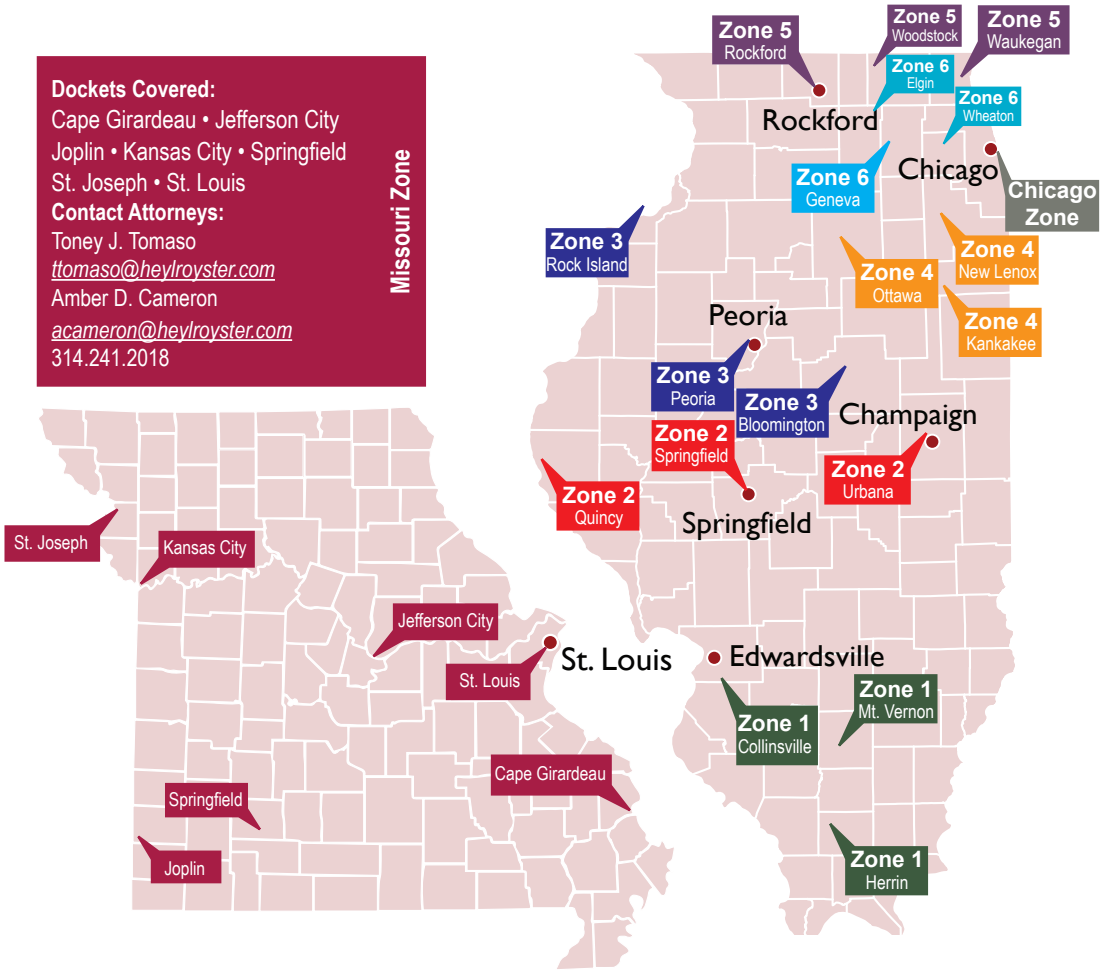

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