Below the Red Line

Workers' Compensation Update

"We've Got You Covered!"

A Newsletter for Employers and Claims Professionals *September 2020*

A Word From The Practice Chair

I want to thank you all for making September 2020 a wonderfully successful month here at Heyl Royster. Our Workers' Compensation Team put on four different webinars this month on COVID-19 related topics that touch on our daily workers' compensation practices. They included an extremely timely case law update highlighted by the recent Supreme Court decision which came out hours before our presentation. How is that for timely service? I know we normally would get together somewhere in Illinois and see each other in person, but due to the times we find ourselves in right now, the webinar is the best and safest choice for getting together. We had some great questions from the audience which really hit home on the issues I believe we are all facing today. If you need to get your hands on the presentation materials or want access to the recordings all you need to do is contact me. Send me an e-mail or call me, and I can make sure you get what you need. I also want to thank the hard working teammates I have here at Heyl Royster for jumping in and providing our clients with great timely and important content. We are looking forward to the next time we can visit with you virtually and present on the latest happenings in the world of workers' compensation.

It is not often the Illinois Supreme Court weighs in on and issues a decision on a purely workers' compensation matter and issue. Frankly, it has been about seven years. It is just uncommon. This is the reason why it was so important to take a deep dive into all things *McAllister* for our newsletter this month. We have been talking about *McAllister* for quite some time because it has been around for so long. We found this case helpful to a defense position for employers when an employee injures themselves performing an everyday activity with common bodily movements. We now have direction and certainty from the Supreme Court on this point and my partner Dan Simmons outlines the decision and how it will impact claims handling moving forward. He also provides some tips for future claims handling in light of this recent decision.

The Heyl Royster Team hopes that you and yours are safe and healthy and enjoying your Fall 2020. I am not sure what Halloween is going to look like this year, but I can tell you this, I will still be eating my fair share of candy! If we can assist you in any manner regarding your workers' compensation claims and issues please don't hesitate to contact me or any of the Heyl Royster workers' compensation team members.

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McAllister v. Illinois Workers' Compensation Commission: The Supreme Court Provides An "Arising Out Of" Test

By: Dan Simmons, Springfield Office

Questions concerning whether events at work that result in injury arise out of the injured worker's employment have been subject to substantial litigation over the past few years. The Workers' Compensation Commission and the Workers' Compensation Commission Division of the Illinois Appellate Court have taken varied approaches to the question, frequently leading to confusion among practitioners, employers, and insurance carriers on whether a particular work event that causes injury is a compensable claim. The Illinois Supreme Court addressed the issue in *McAllister v. Illinois Workers' Compensation Commission,* 2020 IL 124848.

McAllister: The Facts

The petitioner worked as a sous chef for North Pond Restaurant in Lincoln Park. North Pond Restaurant is an upscale fine dining restaurant. The petitioner's job duties included checking in orders, arranging the restaurant's walk in cooler, making sauces, and prepping and cooking food.

While working on setting up his station for the dinner service, another cook mentioned that he may have misplaced a pan of carrots in the walk in cooler. The petitioner went into the walk in cooler to locate the pan of carrots and, while kneeling on both knees, he checked the top, middle, and bottom shelves. As the petitioner attempted to stand up from his kneeling position, he felt his right knee pop. He immediately hopped into his boss's office to sit down and tell him what happened. The general manager of the restaurant then drove the petitioner to the hospital emergency room.

On cross examination at arbitration, the petitioner agreed that he did not find the pan of carrots and when he stood up from his kneeling position, he was not holding anything in his hands. The floor in the walk in cooler was always wet, but the petitioner did not notice any cracks and did not trip over anything or strike his knee on anything. The petitioner agreed that he simply stood up from a kneeling position and felt his right knee pop.

The Arbitrator found that the act of looking for the misplaced pan of carrots was an act that the employer could have expected the petitioner to perform and found that the knee injury arose out of the petitioner's employment. The Commission reversed, finding the petitioner was subject to a neutral risk that had no particular employment characteristic. The circuit court agreed, finding that standing up from a kneeling position was a neutral risk that did not expose the petitioner to more risk than that to which the general public was exposed. The Appellate Court affirmed. The court determined that the knee injury did not arise out of the petitioner's employment because the risk posed to the petitioner from the act of standing from a kneeling position was arguably not distinctly related to his employment.

McAllister: The Illinois Supreme Court Holding

All risks to which an employee may be exposed fall within one of three categories. The three categories of risk are:

1. Risks distinctly associated with the employment;
2. Risks personal to the employee; and
3. Neutral risks which have no particular employment or personal characteristics.

The Court noted that the first step in analyzing the facts of *McAllister* is to determine whether the petitioner's injuries arose out of an employment

related risk – a risk distinctly associated with the claimant's employment.

In determining whether the injuries arise out of an employment related risk, the Court announced the test to be applied to the facts in *McAllister* or any case. The Court held that a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing:

1. Acts he or she was instructed to perform by the employer;
2. Acts that he or she had a common law or statutory duty to perform; or
3. Acts that the employee might reasonably be expected to perform incident to his or her assigned duties.

Applying the test to these facts, the Court found that the petitioner's knee injury arose out of an employment related risk because the evidence established that at the time of the occurrence the petitioner's injury was caused by one of the risks distinctly associated with his employment. The Court found that the third part of the test applied because the act of looking for the misplaced pan of carrots might reasonably be expected of the petitioner in fulfilling his assigned job duties as a sous chef.

The Court concluded its opinion by addressing the issue of injuries caused by common bodily movements that have been the subject of litigation over a number of years. The Court reaffirmed that the three-part test it announced is the proper test to analyze whether an injury arises out of an employee's employment, even involving common bodily movements, or routine every day activities. If it is established that the risk of injury falls within one of the three categories, then it is established that the injury arose out of the employment. Only if it is established that the risk of injury for a worker who was on the job does not fall within the three categories should a neutral risk analysis be considered. Additionally, as long as a claimant establishes that he satisfied one of the three parts of the test to show that he was exposed to a risk of injury, the claimant does not need to provide additional evidence establishing that the exposure was to a greater degree than that presented to the general public.

Examples of Injuries That Satisfy the *McAllister* Test

The Illinois Supreme Court went back to some previously decided appellate court cases to give examples of injuries that, in its view, satisfied one of the three parts of the test announced in *McAllister*.

- A caregiver at an assisted care facility who twisted her body and injured her neck assisting a resident in the shower sustained an injury arising out of her employment, because she was attempting to ensure the safety of the resident. The caregiver's activity might reasonably be expected to be performed as part of her assigned duties.
- A teacher who twisted her body and injured her back chasing a student who was running down a hallway sustained an injury arising out of her employment, because she was specifically ordered to undertake the risk of chasing the running student.
- An off duty sheriff's deputy sustained fatal injuries while assisting a motorist. The deputy was subject to an employment related risk, because helping distressed motorists and vehicles was one of the normal, incidental functions of all deputy sheriffs.

Examples Where the Risk of Injury Does Not Fall Within One of the Three Parts of the *McAllister* Test But Arise Out of Employment Using a Neutral Risk Analysis

Likewise, the Supreme Court provided examples from previously decided appellate court cases where the risk of injury for a worker who was on the job did not fall within one of the three categories of the

test. After determining that none of the three parts of the test have been met the Commission may consider using a neutral risk analysis in determining if the occurrence arose out of employment. If the claimant can establish exposure to the risk is greater than that of the general public the occurrence can be found to arise out of the claimant's employment.

- A semi driver's travel requirements subjected him to increased risk of injury from tornadoes beyond that to which the general public was exposed, therefore, his tornado related injuries arose out of his employment.
- A salesman who was injured by lightning traveling through a telephone line sustained an injury arising out of his employment, because the telephone line was located at a high point on the building, the telephone line was not well grounded and the high humidity and dirt content in the greenhouse he was working in increased conductivity along the surface of the telephone line.
- An employee who was injured by falling building debris during a storm sustained an injury arising out of his employment because the construction of the building and its roofing materials increased the danger that the roof would collapse during the storm.

McAllister: Where Do We Go From Here?

The Court established a bright line, three-part test to determine whether an employee's injuries arise out of an employment related risk. The first two parts of the test should typically be subject to an easy answer. It should be immediately apparent whether the act being performed was instructed to be performed by the employer, thereby addressing the first part of the test. The second part of the test concerning acts that an employee had a common law or statutory duty to perform will most likely see limited application and can easily be decided. The significant prong of the test is the third question concerning whether an employee might reasonably be expected to perform the act incident to the employee's assigned duties. These are acts not specifically directed by the employer. The key part of the test is whether the employer could reasonably expect the employee to perform the activity.

The reasonableness component of the petitioner's activity could have possibly been addressed in *McAllister*. The petitioner said that he knelt on both knees while checking the top, middle, and bottom shelves. The employer possibly could have challenged the claimed necessity for kneeling and that checking the shelves would only require standing or bending so that kneeling was not a reasonable activity. The petitioner also claimed that sometimes food items get knocked underneath the bottom shelves. That claim apparently was not rebutted at arbitration. The employer possibly could have provided testimony of another chef or the general manager that food items do not get knocked underneath the bottom shelves of the walk in cooler, if that indeed was the case, kneeling in a search for the pan of carrots could not have been reasonably expected by the employer.

The opening for addressing claims concerns whether the specific act engaged in by the employee at the time of the injury was one that the employer could reasonably have anticipated to be performed. There is no question that the three-part test announced in *McAllister* is now the standard that must be applied to fact patterns going forward. If it can be established that the activity engaged in by the petitioner was not something that could reasonably be anticipated by the employer, there is a basis for denying that the injury was related to a risk associated with the employment.

Personal and Neutral Risks Are Still Generally Not Compensable

Personal risks, including non-occupational diseases, injuries caused by personal conditions like a trick knee, and injuries caused by personal enemies are generally not compensable. For

example, an employee who is simply walking down a defect-free hallway who has her knee go out and falls would not have an injury arising out of her employment, because the risk to her was personal and not work related. The exception to the rule exists where the workplace conditions significantly contribute to the injury or expose the employee to added or increased risk of injury. In these situations, it will still be important to establish that the area where the petitioner was working or walking was free of defects, and there was nothing about the workplace that increased the risk to the employee.

Likewise, neutral risks have no particular employment or personal characteristics and are generally considered not to arise out of employment. Neutral risks include stray bullets, dog bites, lunatic attacks, lightning strikes, bombing, and hurricanes. If the exposure was to a neutral risk, the case can be compensable only if the employee was exposed to that risk to a greater degree than that encountered by the general public. The increased risk can be qualitative, such as some aspect of the employment that contributes to the risk, or quantitative, such as where the employee is exposed to a common risk more frequently than the general public. The main thing to note in *McAllister* is that a neutral risk analysis is not to be applied while determining whether the risk is directly related to the employment as found in the three-part test. Only if the three-part test is not satisfied is a neutral risk analysis appropriate. Defenses to neutral risk claims remain unchanged by the *McAllister* opinion.

Conclusion

McAllister clearly establishes a three-part test to determine whether an act being performed by an employee poses a risk distinctly associated with the claimant's employment. The key for analyzing future claims most likely is to determine whether the act being performed by the employee might reasonably be anticipated to be performed as part of the employee's job duties. What is reasonable is a fact question that will require investigation to be able to demonstrate to the Commission that, if appropriate, the activity engaged in by the petitioner at the time of the injury was something that could not reasonably have been anticipated by the employer to be performed as part of the employee's job duties. Defenses to whether an occurrence "arises out of" employment remain. *McAllister* provides structure for how cases are to be analyzed in the future. Rather than remove defenses to an "arising out of" claim, *McAllister* clarifies the test to be applied with appropriate defenses flowing from application of the test.

Dan Simmons, *Springfield Office*

Dan has extensive litigation experience and has taken more than 40 cases to jury verdict in both state and federal courts. He counsels and represents employers in Central Illinois on workplace risk management, including ways to minimize retaliatory discharge claims. Dan has also arbitrated hundreds of workers' compensation claims before the Illinois Workers' Compensation Commission. He is a frequent author and lecturer on civil liability and workers' compensation issues, and he speaks to both clients, and Illinois attorneys seeking continuing legal education. He has a particular focus on speaking with employers on issues of risk management and injury prevention.

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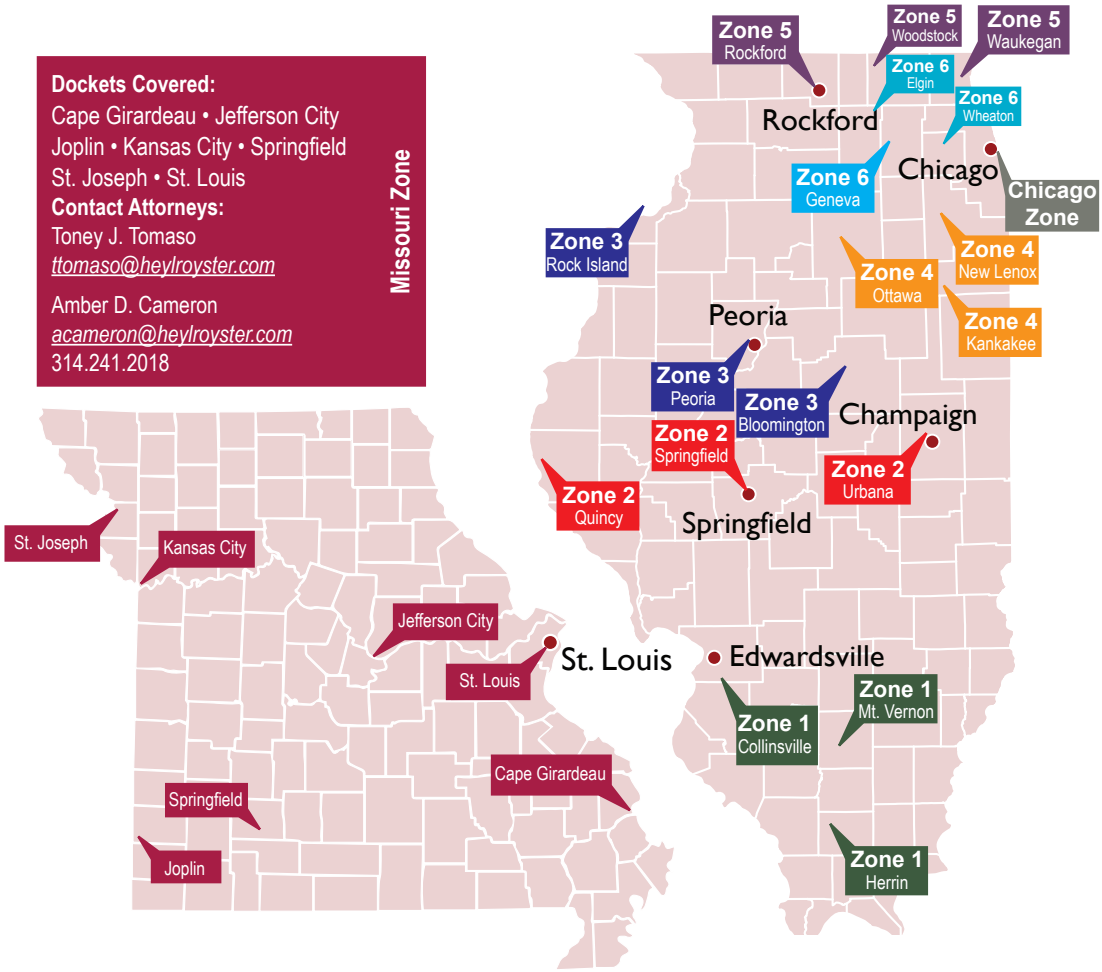

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