KLAUKE LAW GROUP LLC
PROTECTING AND DEFENDING EMPLOYERS

Phone (312) 600-4006
Fax (866) 680-2062

Schaumburg Office & Mail Center
1900 E Golf Road, Suite 950
Schaumburg, Illinois 60173-5034

Chicago Office
155 N Wacker Drive, Suite 4250
Chicago, Illinois 60606

To the Clients of KLG

October 21, 2020

Musings on McAllister

The Illinois Supreme Court has weighed in on a workers' compensation case, McAllister v. Ill. Workers' Comp. Comm'n, 2020 IL 124848 (Ill. 2020) It is rare that the Supreme Court accepts a workers' compensation case. A workers' compensation case must first be arbitrated at the Illinois Workers' Compensation Commission (IWCC) and then the Commission reviews the Arbitrators decision on the first level of review. The Commission decision is the final decision of the IWCC and is given great deference by the higher courts because the IWCC commissioners are specially trained to identify issues and apply the Illinois Workers' Compensation Act to the facts of the case.

The IWCC decision may be appealed to the circuit court if the case presents a matter of law or if there is a dispute on the factual matters decided by the IWCC. Matters of law are reviewed de novo which means the courts can take a fresh look at the legal findings. Factual matters are reviewed under the standard of manifest weight of the evidence; meaning, the decision of the IWCC is upheld unless it is against the manifest weight of the evidence. The reviewing court must not substitute its own judgement for the IWCC's factual findings or for the ultimate decision. Reviewing courts may only reverse the IWCC if no rational trier of fact would agree with the IWCC decision.

The circuit court's decision may also be appealed to the Appellate Court. However, the Appellate Court reviews the IWCC decision, not the decision of the circuit court. The same standards apply. To get to the Supreme Court, the Appellate court must allow the petition to proceed with a further appeal. If they agree, then the Supreme Court may accept the case or decide not to hear the case. So, the pathway to the Supreme Court is long and rare in the workers' compensation context.

It was very interesting for the Illinois Supreme Court to accept the case of McAllister v. Ill. Workers' Comp. Comm'n, 2020 IL 124848 (Ill. 2020) which was by all accounts a simple manifest weight of the evidence case involving a sous chef who injured his knee by rising from a kneeling position while in a walk in cooler looking for carrots on August 7, 2014. The knee had been injured before in 2013 and had surgery but Petitioner had returned to full time work duties. His duties included checking in orders, making sauces, prepping, cooking food and *arranging the restaurants walk-in cooler.*

The injury was diagnosed as a re-tear of the medical meniscus. Surgery was performed. After physical therapy, he returned to work full duty without restrictions on September 15, 2014.

The arbitrator ruled for Petitioner finding the injury arose out of and in the course of employment and found that looking for carrots is something the employer would reasonably have expected a sous chef to do. The IWCC reversed and found that the Petitioner failed to prove his injury arose out of the employment as there was no increased risk of injury over the general public. The circuit court affirmed and so did the Appellate Court. The Appellate Court decision is a must read in determining the reasoning behind these lines of cases. It also frames the issue for the Supreme Court and makes clear the reason they allowed the case to be presented for further appeal as well as the vast difference of opinion regarding the arising out of employment analysis within the court itself.

The Supreme Court has now settled the internal Appellate Court spat regarding the legal analysis of the arising out of employment element of a workers' compensation case. The Court found that the starting point for analysis of the "arising out of" element is outlined in the Caterpillar Tractor case. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52 (1989) held that an injury arises out of a claimant's employment for purposes of the Act if, at the time of injury, the claimant was performing an act that he might reasonably be expected to perform incident to his employment or causally connected to what the claimant must do to fulfill his assigned job duties, even if the act involves an everyday activity. The Court confirmed the long held analysis of three risk categories 1) risks distinctly associated with the employment and therefore compensable; 2) risks personal to the employee like idiopathic diseases and therefore generally not compensable; and 3) neutral risks which have no particular employment or personal characteristics; for example lightning, stray bullets, lunatic attacks, dog bites which need an increased risk of the injury caused by the employment that exceeds the risk facing the general public.

Up to this point, there is no controversy in the Supreme Court decision. The three risk categories have been long standing. The controversy surfaces in which category to place an injury that occurs from a "common bodily movement" or an everyday activity for instance reaching, bending, sitting, turning and in this case getting up from a kneeling position. Many past cases analyzed these cases as neutral risks and required the claimant to prove that some aspect of the job increased the risk of injury either qualitatively (by the nature of the job requirements) or quantitatively (an increased number of times the task is performed). The Supreme Court has now definitively ruled that an injury occurring during a common bodily movement is a risk distinctly associated with the employment *IF* the employee was engaged in work that his employer would have reasonably expected him to perform when the injury occurred.

Logically, a sous chef would be expected to be in the walk-in cooler getting produce or looking for produce and an injury occurring while doing so is not completely unexpected. Kneeling down to look under a low shelf in a walk-in cooler is not really an everyday activity. I guess getting up from a kneeling position is something that is done every so often but maybe not an everyday activity. It is a common body movement, but it happened in a cold damp walk in cooler.

The take-away from this case is that the analysis of an arising out of the employment case must start by determining whether the injuries arose out if an employment related risk *distinctly associated with the employment*. This is done by asking three questions; 1) was the employee performing tasks he or she was instructed to perform by the employer; 2) was the employee performing tasks that he or she had a statutory or common law duty to perform, or: 3) was the employee performing tasks that might be reasonably expected to perform incident to the assigned duties. If any of these questions are answered in the affirmative, the court will find that the injury arose out of the employment. The neutral risk analysis is unnecessary and is reserved for situations where the risk encountered is not distinctly associated with the employment like injuries from a tornado, hurricane, lunatic attack, dog bite, lightning strike, tidal wave, asteroid strike, alien invasion, something unconnected to the employment, random and not an everyday occurrence. How about a worldwide pandemic? Oh wait, the legislature already proclaimed that the current worldwide pandemic is work related, but I digress. The random events unconnected to the employment that result in an injury are neutral risks and must go through the additional analysis as to whether the employment increased the risk of injury to a greater degree than the general public either qualitatively or quantitatively. These events are very rare.

Cases that used to be considered neutral risks like an unexplained fall or fall on a staircase may now be compensable by asking the three questions outlined by the court without any risk analysis whatsoever. At least in prior such cases the court had to consider whether the employment increased the risk in some way. The dissent in the William G. Ceas & Co. v. Industrial Com'n, 633 N.E.2d 994, 261 Ill.App.3d 630, 199 Ill.Dec. 198 (Ill. App. 1994) frames the unexplained fall on a staircase issue quite well.

> "Professor Arthur Larson has explained that recovery in a pure unexplained fall case can only be justified by an acceptance of the positional risk doctrine. (1 A. Larson, The Law of Workmen's Compensation § 10.31(a), at 3-94 (1992, originally published: 1952.) Our supreme court has explained that:
>
> "Under the positional risk doctrine, an injury may be said to arise out of the employment if the injury 'would not have occurred but for the fact that the conditions or obligations of the employment placed claimant in the position where he was injured by a neutral force, meaning by "neutral" neither personal to the claimant nor distinctly associated with the employment.' " (Brady v. Louis Ruffolo & Sons Construction Co. (1991), 143 Ill.2d 542, 552, 161 Ill.Dec. 275, 279, 578 N.E.2d 921, 925, quoting Larson, The Positional-Risk Doctrine in Workmen's Compensation, 1973 Duke L.J. 761.)
>
> Professor Larson has explained that risks causing injury can be separated into three categories: risks personal to the claimant, risks distinctly associated with employment, and neutral risks. Personal risks are not compensable, while risks associated with the employment are compensable. The confusion is over what should be done when an injury is caused by a "neutral" risk. (Larson, Workmen's Compensation §§ 7.00 through 7.30, at 3-12 through 3-14.) [261 Ill.App.3d 643] Professor Larson considers unexplained falls during the course of employment to be an example of a neutral risk. With regard to such falls, Larson states:
>
> "If an employee falls while walking down the sidewalk or across a level factory floor for no discoverable reason, the injury resembles that from stray bullets and other positional risks in this respect: The particular injury would not have happened if the employee had not been engaged upon an employment errand at the time. In a pure unexplained-fall case,

there is no way in which an award can be justified as a matter of causation theory except by a recognition that this but-for reasoning satisfies the 'arising' requirement." Larson, Workmen's Compensation § 10.31(a), at 3-94.

Illinois has never accepted the "but-for" reasoning of the positional risk doctrine (See Brady, 143 Ill.2d 542, 161 Ill.Dec. 275, 578 N.E.2d 921; Campbell "66" Express, Inc. v. Industrial Comm'n (1980), 83 Ill.2d 353, 47 Ill.Dec. 730, 415 N.E.2d 1043; Decatur-Macon County Fair Association v. Industrial Comm'n (1977), 69 Ill.2d 262, 13 Ill.Dec. 662, 371 N.E.2d 597), and therefore compensation would not be warranted in a pure unexplained fall case. By rejecting the positional-risk doctrine and allowing recovery for unexplained falls, Illinois has adopted positions that are inherently inconsistent. In this case, it was generally agreed that there was nothing wrong with the condition of the stairs on which the decedent fell. Because the Commission could draw no inference that a defect in the stairs existed, this was a pure unexplained fall. As such, compensation was improper. Cases such as Chicago Tribune and Rydson were not necessarily wrongly decided, because the inferences the Commission drew in those cases placed them in the category of risks associated with the employment. Those cases were only erroneous to the extent they suggested that compensation would be proper in a pure unexplained fall case.

To recover in this case, the claimant must have shown that there was an increased risk of harm. The mere fact that an injured party was present at the place of injury because of employment duties will not by itself suffice to establish that the injury arose out of the employment. (Brady, 143 Ill.2d 542, 161 Ill.Dec. 275, 578 N.E.2d 921.) A claimant must demonstrate that the risk of injury sustained is peculiar to his [261 Ill.App.3d 644] employment, or that it is increased as a consequence of the work. (Orsini v. Industrial Comm'n (1987), 117 Ill.2d 38, 109 Ill.Dec. 166, 509 N.E.2d 1005.) If an industrial accident is caused by a risk unrelated to the nature of the employment, or is not fairly traceable to the workplace environment, but results instead from a hazard to which the claimant would have been equally exposed apart from his or her work, the injury cannot be said to arise out of the employment. Material Service Corp. v. Industrial Comm'n (1973), 53 Ill.2d 429, 292 N.E.2d 367.

> The injury in this case occurred while the decedent was descending a flight of stairs. Descending stairs is not a hazard uniquely related to the decedent's employment, but rather is an ordinary activity engaged in by the general public. As we noted in Elliot v. Industrial Comm'n (1987), 153 Ill.App.3d 238, 106 Ill.Dec. 271, 505 N.E.2d 1062, an idiopathic fall case, the act of descending stairs does not establish a risk greater than those faced outside of work. Absent a showing of an increased risk, the Commission erred in finding that the accident arose out of the decedent's employment. William G. Ceas & Co. v. Industrial Com'n, 633 N.E.2d 994, 261 Ill.App.3d 630, 199 Ill.Dec. 198 (Ill. App. 1994)"

The court majority in *Ceas* found the fall down a flight of stairs compensable not because the employee was reasonably expected to be performing the task but because the employer placed pressure on the employee to rush down the stairs to mail a FedEx package thereby increasing the risk of injury. The court has in the past found that a staircase is not inherently dangerous and therefore an injury caused by a staircase required some showing that the injury incurred was increased by the employment in some fashion even if the stair case was on the employers premises. This required investigation about the stair structure, foreign material, frequency of use, the alternatives to staircase use, whether the employee was carrying anything for the employer or was rushing for some employment related reason. Arguably, *McAllister* obviates the need for such an analysis and would merely ask the question: Was the employee reasonably expected to traverse the staircase in the performance of their duties? If so, would not all injuries on the staircase be compensable whether or not the employee merely missed a step or tripped over their own feet? Are we not dangerously close to accepting the Positional Risk Doctrine that the law and courts have so carefully rejected time and time again?

Interestingly, the court used the Caterpillar case as the starting point for the analysis. In Caterpillar, the employee was denied benefits. The claim occurred after an employee injured his foot/ankle stepping off a curb as he left his employers premises. The claimant was not injured while performing his job duties, but he was on company premises and therefore technically still "in the course of employment". The court stated " we do not find that claimant has established that he was exposed to a risk not common to the general public..." Caterpillar Tractor Co. v. Industrial Com'n, 541 N.E.2d 665, 129 Ill.2d 52, 133 Ill.Dec. 454 (Ill. 1989). This is confusing, why can't the court state its finding in the affirmative; for instance, we find that claimant failed to establish that he was exposed to an employment related risk or that he was exposed to a risk common to the public and therefore not compensable.

In deciding *McAllister*, the Supreme Court specifically overruled the Appellate Court decision in *Adcock v. Ill. Workers' Comp. Comm'n*, 38 N.E.3d 587 (Ill. App. 2015). Adcock injured his knee while turning in a swivel chair. The IWCC denied benefits but the Appellate Court reversed using the neutral risk analysis for an everyday activity but finding that the nature of the work and the frequency of turning in the chair allowed the case to be compensable. The McAllister court overruled Adcock and its progeny to the extent that they find injuries attributable to common bodily movements or routine every activities such as bending, twisting, reaching or standing up from a kneeling position are required to be analyzed under the neutral risk category.

The outline for analyzing injuries as I see it is:

Injury occurs

1. Conduct investigation
2. Determine facts

Analyze the risk type

1. Risk incident to employment
    a. Task reasonably expected = compensable
    b. Task not reasonably expected–go to neutral risk analysis

2. Risk personal to employee (idiopathic conditions/explained v unexplained falls)
    a. No contribution by employment = not compensable
    b. Contribution by employment = partial or full compensability

3. Risk is neutral (random, unexpected events)
    a. Employment increased risk
        Qualitatively (some aspect of the employment contributes) = compensable
        Quantitatively (frequency increased) = compensable
    b. Employment did not increase risk = not compensable.

The difference now is that most injuries in the course of employment will be found to flow from a task performed by employees that were reasonably expected by the employer; and therefore, compensable without ever analyzing whether the risk of the injury was *increased* by the employment. The McAllister decision does not eliminate the need to prove that the injury arose out of the employment, but it makes it far easier. Those commentators who claim that the arising out of standard is

eliminated are not correct. The perfect example is the Caterpillar case where the court applied the same analysis but found the injury did not arise out of the employment because the premises was not a contributing cause of the injury and there was no distinctive characteristics of the employment that increased risk of injury. Curiously, the McAllister court stated, "*Caterpillar Tractor* does not require a claimant to provide additional evidence establishing that he was exposed to the risk of injury, either qualitatively or quantitatively, to a greater degree that the general public, once he has presented proof that he was involved in an employment related accident." So, we are left with an arising out of employment analysis that is as clear as mud. However, you can be sure that the Petitioner bar will be emboldened by the McAllister opinion and attempt to convince employers that everything is compensable. More fish to shoot in the proverbial barrel.