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McALLISTER V. IWCC/NORTH POND LLINOIS SUPREME COURT,

SEPT. 24, 2020 CASE SUMMARY AND SUBSEQUENT IWCC AND COURT DECISIONS INTERPRETING McALLISTER

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McALLISTER V. IWCC/NORTH POND LLINOIS SUPREME COURT, SEPT. 24, 2020 CASE SUMMARY AND SUBSEQUENT IWCC AND COURT DECISIONS INTERPRETING McALLISTER

Kevin McAllister v. Illinois Workers' Compensation Commission, 2020 IL 124848 (September 24, 2020)

Claimant, Kevin McAllister, injured his right knee while working as a sous-chef for his employer, North Pond restaurant. Petitioner was kneeling in a cooler looking for carrots and rose from his kneeling position when he allegedly injured his right knee. The Arbitrator awarded workers' compensation benefits, but the Commission reversed finding that the injury did not "arise out of" the claimant's employment. The Circuit Court of Cook County then affirmed the Commission's decision and the Appellate Court affirmed the judgment of the Circuit Court. Claimant filed a petition for leave to appeal, which was granted by the Illinois Supreme Court.

The Illinois Supreme Court held that claimant's knee injury was employment related because it was caused by acts that were incidental to and causally connected to claimant's job duties as an arranger of the walk-in cooler. The Illinois Supreme Court also held that the Commission's finding that claimant's acts were unrelated to his employment were against the manifest weight of evidence in the record. Lastly, the Illinois Supreme Court held that *Caterpillar Tractor* prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment when a claimant is injured performing job duties involving common bodily movements or routine everyday activities. In so holding, the Illinois Supreme Court overruled *Adcock* and its progeny to the extent that they found that injuries attributable to common bodily movements or routine everyday activities, such as bending, twisting, reaching, or standing up from a kneeling position, are not compensable unless a claimant can prove that he or she was exposed to a risk of injury from these common bodily movements or routine everyday activities to a greater extent than the general public.

The Illinois Supreme Court reversed the appellate court's judgment, which in turn reversed the circuit court's judgment and the Commission's decision. The case was then remanded with directions to enter an order consistent with the arbitration decision.

Background

Claimant filed an application pursuant to the Workers' Compensation Act seeking benefits for an injury he sustained to his right knee. Claimant worked as a sous-chef for North Pond restaurant. His job duties included checking in orders, arranging the restaurant's walk-in cooler, making sauces, and prepping and cooking food. On the date of the accident, claimant was working at the restaurant setting up his station for the evening shift when another cook mentioned that he may have misplaced a pan of carrots in the walk-in cooler. Claimant went into the walk-in cooler to locate the pan of carrots and while kneeling on both knees checked the shelves. Claimant explained that sometimes food items get knocked underneath the bottom shelves. As claimant attempted to stand up from his kneeling position, he felt his right knee "pop." The knee "locked up" and he could not

straighten his leg. Claimant hopped over to a table, stood there for a minute, and then hoped into his boss's office to sit down and tell him what happened. Claimant described his position while kneeling as similar to the position he would be in if he were looking for something underneath his bed. After reporting the accident, the general manager drove claimant to the hospital emergency room.

Claimant had a previous right knee injury approximately one-year prior and underwent surgery to repair the injury. He received workers' compensation benefits for the injury. Claimant then returned to full-time work duties after recovering from the surgery. An MRI was ordered, which revealed a re-tearing of claimant's medial meniscus. Surgery was recommended and performed. Claimant testified that he paid out-of-pocket for his surgery and anesthesia. Petitioner also attended physical therapy post-surgery, which he also paid for out-of-pocket. Petitioner did not receive any medical benefits. Claimant was off work for the injury from August 7, 2014 through September 15, 2014. He did not receive any workers' compensation benefits while he was off work.

Arbitrator's Decision

The Arbitrator found that claimant's act of looking for the misplaced pan of carrots in the walk-in cooler was an act the employer reasonably could have expected claimant to perform in order to fulfill his duties as a sous-chef. The Arbitrator concluded that claimant's knee injury therefore "arose out of" and occurred in the course of his employment with the restaurant and was covered under the Act. The Arbitrator awarded TTD benefits, PPD benefits, and medical expenses. Additionally, he determined that the employer's refusal to pay claimant's TTD and medical benefits was dilatory, retaliatory, and objectively unreasonable. As a result, the Arbitrator also imposed penalties under Section 19(k) and 19(*l*) of the Act. He also awarded claimant attorneys' fees under Section 16a of the Act.

Commission's Decision

The Commission set aside the Arbitrator's decision finding that the claimant failed to prove that his knee injury "arose out of" his employment because he was subjected to a neutral risk which had no employment or personal characteristics. The Commission found that claimant's knee injury did not result from an employment-related risk but rather from a neutral risk of standing up from a kneeling position, which had no "peculiar" employment characteristics. The Commission determined that claimant had not established that he was exposed to this neutral risk to a greater degree than the general public. One Commissioner dissented and would have affirmed the Arbitrator's decision in its entirety.

Circuit Court Decision

The Circuit Court agreed with the Commission that claimant's act of standing up from a kneeling position was a neutral risk that did not expose him to more risk than that to which the general public was exposed. The Circuit Court found the Commission correctly decided that claimant had been subjected to a non-compensable neutral risk and that the Commission's decision was not against the manifest weight of the evidence.

Appellate Court Decision

All five justices agreed with the Commission's determination that claimant was not injured due to an employment-related risk, and that the determination was not against the manifest weight of the evidence. However, the panel disagreed on whether a compensable injury can arise out of employment when the employee is injured while performing job duties that involve common bodily movements or routine "everyday activities" such as bending, twisting, reaching, or standing up from a kneeling position.

The majority cited *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52 (1989) for the proposition that an injury arises out of a claimant's employment if, at the time of the injury, the claimant was performing an act that he might reasonably be expected to perform incidental 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. However, the majority determined that claimant's knee injury did not arise out of his employment because 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 not distinctly related to his employment.

A minority of two justices took a different position and cited *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC, for the proposition that a claimant who is injured while performing an everyday activity such as standing up from a kneeling position could only obtain compensation if he could establish that his job duties required him to engage in that activity to a greater degree than the general public, even in situations where the activity is directly related to the claimant's job duties.

Standard of Review

Claimant contended the appropriate standard of review was *de novo* as the facts related to the circumstances surrounding his injury were undisputed and susceptible to only one reasonable inference – that he was injured while performing an act that he might reasonably be expected to perform incident to his assigned duties as a sous-chef.

The employer contended the facts surrounding the injury were subject to more than a single inference and, therefore, the appropriate standard of review was against the manifest weight of the evidence. Specifically, the employer contended the facts could support different inferences as to whether the physical act claimant was performing was incidental to his employment and, alternatively, different inferences could be drawn as to whether the risk of injury was in some way enhanced by claimant's employment.

The Illinois Supreme Court agreed with the employer and applied the standard of review of "against the manifest weight of the evidence."

Proof required to obtain Workers' Compensation Benefits

The Illinois Supreme Court stated the Act is a remedial statute, which should be liberally construed to effectuate its main purpose of providing financial protection for injured workers. In order for a claimant to be entitled to workers' compensation benefits under the Act, the injury must "arise out of" and "occur in the course of" the claimant's employment. Both elements must be present at the time of the accidental injury in order to justify compensation. A claimant bears the burden of proving by a preponderance of the evidence two elements: (1) that the injury occurred in the course of claimant's employment and (2) that the injury arose out of claimant's employment.

Course of employment

The phrase "in the course of employment" refers to the time, place, and circumstances of the injury. A compensable injury occurs in the course of employment when it is sustained while a claimant is at work or while he performs reasonable activities in conjunction with his employment.

The parties did not dispute that claimant's injury occurred in the course of employment. Therefore, the Illinois Supreme Court did not address this element. It only addressed the second element of whether claimant's knee injury arose out of his employment.

Arising out of employment

The arising out of component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. A risk is incidental to employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. These risks are categorized into three categories of risks to which the complaint was exposed. Generally, all risks to which a claimant may be exposed fall into one of the three categories.

3 Categories of Risk

The three categories of risk recognized 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.

1. **Employment Risks**

Employment risks include the obvious kinds of industrial injuries and occupational diseases. These are universally compensated, as they are deemed to arise out of claimant's employment and are compensable under the Act. Examples include tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work-related task which contributes to the risk of falling.

2. Personal Risks

Personal risks include non-occupational diseases or injuries. They are caused by personal infirmities, such as a trick-knee, or caused by personal enemies. They generally do not arise out of employment and are, therefore, non-compensable under the Act. There is an exception that exists when the work place conditions significantly contribute to the injury or expose the employee to an added or increased risk of injury.

3. Neutral Risks

Neutral risks have no particular employment or personal characteristics. Examples include stray bullets, dog bites, lunatic attacks, lightning strikes, bombing, and hurricanes. Injuries resulting from neutral risks generally do not arise out of employment and are compensable only where the employee was exposed to the risk to a greater degree than the general public. This increased risk may be either qualitative or quantitative. The risk is qualitative if some aspect of the employment contributes to the risk. The risk is quantitative when the employee is exposed to a common risk more frequently than the general public.

Type of risk claimant was exposed to in McAllister

The Illinois Supreme Court first analyzed whether claimant's injuries arose out of an employment-related risk. 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 incidental to his or her duties.

The Court found that claimant's knee injury arose out of an employment related risk because the evidence established that at the time of the occurrence his injury was caused by one of the risks distinctly associated with his employment as a sous-chef. The court reasoned that claimant's employer could reasonably expect him to perform the acts of kneeling down on the floor in the walk-in cooler to look for a pan of carrots misplaced by a coworker and then standing up from the kneeling position injuring his knee in fulfilling his assigned job duties.

The Court noted that it is generally recognized that an employee who sustains an injury while extending ordinary courtesies to fellow employees are within the reasonable incidents of the employment. The Court further noted that the modern rule brings within the course of employment any activity undertaken in good faith by one employee to assist a co-employee in the latter's performance of his work. The reasoning for this is that it would be contrary to human nature and to the employer's best interests to forbid employees to help each other out on pain of losing compensation benefits for any injuries thereby sustained.

The Court reasoned that in this case, one of claimant's job duties was to arrange the walk-in cooler. Once he learned that a fellow chef had misplaced a pan of carrots in the cooler,

it would be reasonable for his employer to expect claimant to go into the cooler to assist his coworker in looking for the pan of carrots as he would be most familiar with where the food would be located in the cooler. Given claimant was responsible for arranging the cooler, claimant had a duty to find misplaced food kept in the cooler. The court found that the evidence clearly established that, at the time the claimant injured his knee, he was not only assisting a coworker in furtherance of the employer's business, but was also performing an act his employer might reasonably expect him to perform incidental to fulfilling his assigned job duties.

Therefore, the knee injury was found to be employment related, as it was caused by kneeling and standing while assisting a coworker's search for carrots in the cooler. These were found to be acts that were incidental to and causally connected to claimant's job duties as an arranger of the walk-in cooler.

The Illinois Supreme Court disagreed with the Commission's finding that claimant was subjected to a neutral risk which had no particular employment or personal characteristics. The Commission reasoned that claimant's act of standing up after having kneeled on one occasion was not particular to his employment and it could have just as easily occurred while he was performing this task in any other area of his life, whether it be looking under his car in his driveway or picking up an item that dropped underneath his bed.

Similarly, the Illinois Supreme Court disagreed with the appellate court's finding that it was the Commission's prerogative to find claimant's act of searching for the misplaced pan was too remote from the specific requirements of his employment to be considered incidental to his assigned duties. The appellate court therefore found that the Commission's decision was supported by the record, and not against the manifest weight of the evidence. The Illinois Supreme Court therefore found that the Commission's finding was against the manifest weight of the evidence.

Injuries caused by common bodily movements

The Illinois Supreme Court noted the appellate majority held that claims involving common bodily movements and everyday activities should be analyzed under the *Caterpillar Tractor* test, without engaging in an additional neutral-risk analysis. The special concurrence relied on *Adcock* in its argument that claims involving common bodily movements and everyday activities should be analyzed under the neutral-risk doctrine, and that recovery of workers' compensation benefits should be allowed only if claimant can establish that he or she was exposed to a risk of injury, either qualitatively or quantitatively, to a greater degree than the general public.

The Illinois Supreme Court held that the *Caterpillar Tractor* test prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment when the claimant is injured performing job duties involving common bodily movements or routine everyday activities. In determining whether an injury resulted from an everyday activity or common bodily movement, it must be determined whether the employee was injured performing one of three categories of employment related acts as delineated in *Caterpillar Tractor.*

The Court then provided examples of cases which fell into each category of employment related acts delineated in *Caterpillar Tractor*. The first example was a claimant who was a care-giver at an assisted-care facility who twisted her body and injured her neck assisting a resident in the shower. It was found that she sustained an injury arising out of her employment where she was attempting to ensure the safety of a resident, which was an act claimant might reasonably be expected to perform incidental to her assigned duties. *Autumn Accolade v. IWCC*, 2013 IL App (3d) 120588WC.

The second example involved a claimant-teacher who twisted her body and injured her back pursuing a student running down the hallway. It was found that she sustained an injury arising out of her employment where she was ordered specifically to undertake the risk of pursuing a running student. *O'Fallon School District No. 90 v. Industrial Comm'n*, 313 Ill. 2d 562 (1964).

The third example involved an off-duty sheriff's deputy who sustained fatal injuries while assisting a motorist. It was found he sustained an employment-related risk rather than a neutral risk because aiding distressed motorists and vehicles was one of the normal, incidental functions of all deputy sheriffs. *County of Peoria v. Industrial Comm'n*, 31 Ill. 2d 562 (1964).

The Illinois Supreme Court found that the Commission should consider applying a neutral risk analysis only if it is established that the risk of injury for a worker who was on the job does not fall within one of the three categories of employment related acts in *Caterpillar Tractor*.

Thus, the Illinois Supreme Court prescribed the proper test is *Caterpillar Tractor* for analyzing whether an injury arises out of a claimant's employment when a claimant is injured performing job duties involving common bodily movements or routine everyday activities. It further stated that common bodily movements and everyday activities are compensable and employment related if the common bodily movement or everyday activity resulting in an injury had its origin in some risks connected with, or incidental to, employment so as to create a causal connection between the employment and accidental injury.

A claimant is not required to provide additional evidence establishing that he or she was exposed to the risk of injury, either qualitatively or quantitatively, to a greater degree than the general public, once he or she has presented proof of involvement in an employment-related risk causing injury. Thus, the Illinois Supreme Court held that *Adcock* and its progeny are overruled in this regard.

COMMISSION DECISIONS AFTER MCALLISTER

Brenda Burnett v. Windmill Nursing, 20 IWCC 0633 (October 27, 2020)

Petitioner was walking on December 12, 2016, while working as a certified nursing assistant, and felt a cramp in her left foot. The following day, petitioner presented to the Hospital complaining of left foot pain and swelling, but denied any injury. She listed the

onset of the injury as gradual. The mechanism of injury was listed at "none" and "it occurred at home". Petitioner was diagnosed with a left foot sprain. She returned to the hospital on December 13, 2016, with continued complaints of left foot pain and new complaints of left ankle pain. On January 12, 2017, petitioner treated with a new physician and stated the pain began on December 13, 2016, following a period of prolonged walking. She was diagnosed with a stress fracture of the 2nd metatarsal. On March 16, 2017, petitioner's treating physician, for the first time, opined her stress fracture was due to excessive walking at work.

Arbitrator Carlson found that petitioner failed to prove that she sustained a compensable accident on December 12, 2016 as she failed to contemporaneously report her work injury to her treating physicians. This was based on the fact that petitioner had been treating with the same physician since January 12, 2017,- and the doctor did not provide an opinion regarding causation until March 6, 2017. It also appeared that petitioner visited him for the sole purpose of obtaining the causal connection statement.

Arbitrator Carlson found that petitioner's injury while waking was a neutral risk. The Arbitrator stated that whether or not a neutral risk injury arises out of a claimant's employment depends on whether the claimant was exposed to a risk greater than that to which the general public is exposed. The Arbitrator used the quantitative risk analysis from *Adcock* and stated that he was willing to find compensability under the analysis based on petitioner's overuse theory. However, her treating physician provided no basis or details regarding the basis of his causation opinion. Ultimately, the Arbitrator found that petitioner failed to prove that she sustained a compensable accident and was not entitled to TTD or medical benefits.

The Commission affirmed and adopted the decision of the Arbitrator. However, it wrote additionally on the issues of accident and causation citing *McAllister.* The Commission noted that *McAllister* decision was rendered after the Arbitrator's decision and after parties submitted their arguments to the Commission. The Commission stated that the *McAllister* court ruled that *Caterpillar Tractor* prescribes the proper test for analyzing whether an injury arises out of a claimant's employment when the claimant is injured performing job duties involving common bodily movements or routine everyday activities. The Commission also noted that *Adcock* and its progeny were overruled to the extent that they find that injuries attributable to common bodily movements or everyday activities are not compensable unless a claimant can prove that he or she was exposed to a risk of injury from these activities to a greater extent than the general public.

Thus, the Commission stated once it is established that the injury is work-related, *Caterpillar Tractor* does not require claimants to present additional evidence for work-related injuries that are caused by common bodily movements or everyday activities. Accordingly, 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.

In this case, the Commission decided on the issue of whether petitioner's walking is a risk distinctly associated with her employment. Specifically, whether walking is an act that petitioner might reasonably be expected to perform incidental to her assigned duties. One of petitioner's job duties was "transporting laundry". Based on that job duty, the commission stated walking to the laundry might reasonably be expected to be incident to her job duties.

Although the Commission found that petitioner's injury caused by walking would have been an act that petitioner might reasonably be expected to perform incidental to her assigned duties and therefore satisfying the *McAllister* and *Caterpillar Tractor* tests, it ultimately affirmed the Arbitrator's decision based on the fact that she did not report the injury to her medical providers and stated that it occurred at home.

Aaron Ramirez v. City of Chicago, 20 IWCC 0636 (October 28, 2020)

Petitioner, a laborer who performed garbage collection, claimed a knee injury that occurred while working. Petitioner alleged that he went to grab a garbage cart and began pulling the cart when he experienced an abrupt onset of left knee pain. He testified that his knee felt torn and the pain was so severe he fell to the ground and began rolling around. It was later discovered petitioner had a meniscus tear.

The Arbitrator found that petitioner sustained an accident arising out of and in the course of employment. The Arbitrator stated that a member of the general public would not be required to pull a heavy cart across a rocky alley surface. The Commission affirmed and adopted the Arbitrator's decision. Additionally, the Commission noted that the Arbitrator's finding that petitioner sustained accidental injuries arising out of and in the course of employment on the date in question due to an employment-related risk is further supported by *McAllister*.

Douglas Rees v. Buffalo Grove Park District, 20 IWCC 0722 (December 7, 2020)

Petitioner was employed as a maintenance worker for respondent. He alleged he sustained a work-related injury after closing a van door on his right index finger. Respondent argued that petitioner's injury was not peculiar to his employment and the act of slamming his finger in the door of a vehicle is a neutral risk. Petitioner testified that he had completed a job and was driving back to respondent's yard and parked his vehicle to unload equipment. He opened the passenger side front door to retrieve a bucket of tools when respondent's other workers started pulling into the yard. Because his van was parked where the other workers needed to park, he began rushing and this caused him to close the passenger door onto his finger. Petitioner sustained a laceration to his finger requiring sutures.

The Arbitrator found the circumstances of petitioner's accident constituted an employment-related risk. Petitioner was in a crowded truck terminal, a place he had a right to be, unloading his truck when the accident occurred.

The Commission affirmed the Arbitrator's decision, but found that the instant case must be evaluated in light of *McAllister.* The Commission found that the act of closing the door

to move respondent's van so that the other employees could park was within the reasonable contemplation of what the employee may do in the service of the employer. Thus, petitioner was injured while performing an act respondent might reasonably expect him to perform to fulfill his job duties.

Joseph Pate v. Illinois Department of Corrections, 20 IWCC 0759 (December 22, 2020)

Petitioner worked as a senior parole agent in the sex offender unit. His job duties involved visiting parolees at their homes, investigating whether a particular house was suitable for a parole release, checking on parolees' progress, transporting parolees back to the penitentiary, attending court dates, training and weapons range dates. He was assigned a squad car to perform his duties. Petitioner described his squad car as his office. Petitioner stated the squad car was confining, even when he was alone, because the cage restricted seat movement and the radios and siren box were in the right side of the passenger compartment and pushed against his weapon when he sat down. Petitioner described having to shimmy in order to exit the vehicle.

On June 16, 2015, petitioner was conducting an investigation of a parolee. He alleged he parked his squad car on the wrong side of the street such that the driver's door was on the curb side. He parked this way so that other local patrol cars would see him there. Petitioner stated he began to shimmy out of his squad car, wearing his sidearm and protective vest which he described as thick and heavy. The shimmy caused his weight to shift right. Petitioner put his foot down in order to use his steering wheel for leverage when exiting the car. When he put his foot down, he stated he felt his knee pop and twist. Petitioner was ultimately diagnosed with a torn meniscus.

The Arbitrator found that petitioner proved that he sustained an accident that arose out of and in the course of his employment, which resulted in a disabling injury. The Arbitrator found that petitioner was a traveling employee, who is required to travel away from his job in order to perform his job. Employees whose duties require them to travel away from their employment premises are treated differently from other employees when considering whether an injury arose out of and in the course of employment. The Arbitrator stated an injury sustained by a traveling employee arises out of his employment if he is injured while engaging in conduct that was reasonable and foreseeable. The Arbitrator ultimately found that the facts of this case satisfy the arises out of prong of proving accident, stating petitioner's mechanism of injury was both reasonable and foreseeable.

On the issue of whether the employee's activity was compensable, respondent argued that petitioner was exposed to a neutral risk no different than members of the general public by virtue of his employment. The Arbitrator found that petitioner's injuries resulted from an employment-related risk, not a neutral risk. The Arbitrator noted that even if petitioner's injury should be considered a neutral risk, a traveling employee may still be exposed to that risk to a greater degree than the general public.

The Commission modified the Arbitrator's decision, but otherwise affirmed and adopted. The Commission cited *McAllister,* stating petitioner was acting in the ordinary course of

his duties as a parole agent when he suffered the knee injury. The Commission further stated that exiting the squad car and entering the property that is the subject of his investigation are acts petitioner might reasonably be expected to perform. Consequently, the Commission found the risk to petitioner was distinctly associated with his employment, not a neutral risk.

Kathy Dunn v. Cook County, 20 IWCC 0774 (December 31, 2020)

Petitioner was employed as a public health nurse as a supervisor of medical staff. She was assigned to oversee various cook county medical clinics at various court facilities throughout the county. On January 7, 2011, petitioner entered the Markham court facility medical clinic, which was fully remodeled. The floors were slippery and shiny linoleum because they were new. Petitioner went to sit on a stool to take a telephone call and the stool rolled out from under her. Petitioner fell on her left side and left hip. Petitioner claimed injuries to her left shoulder, left hip, and lower back.

The Arbitrator found petitioner failed to prove by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with respondent. The Arbitrator stated the disputed accident issue involves an analysis of "arising out of" and the issue of "increased risk". The Arbitrator found that this issue was resolved pursuant to the current applicable law as set forth in the recent cases of *Kevin McAllister v. IWCC.* I note this was the Illinois Appellate Court's findings with regard to the *McAllister* case, as the Illinois Supreme Court case had not yet been decided. The Arbitrator noted the appellate court's view of McAllister focused the employment risk inquiry on whether the injury-producing act was required by the claimant's specific job duties and not whether it could be further considered an activity of daily living. Activities necessary to the fulfillment of 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. The activity must be required by the employment.

The Arbitrator found in this case that petitioner's act of sitting on the stool was not required by her employment. This was not an act the employee had to do to fulfill her duties. Petitioner was not injured while performing an act she was instructed to perform. The Arbitrator found that there was nothing to suggest that petitioner's work duties and this chair rolling out from her was in any way peculiar to her employment or was required by her employment. Thus, this risk was not considered to be an employment-related risk.

A neutral-risk analysis was then applied by the arbitrator. The Arbitrator found that petitioner did not establish that she was exposed to a neutral risk to a greater degree than the general public and therefore her injury was also non-compensable. The Arbitrator stated petitioner presented no evidence that her employment duties qualitatively increased her risk of harm. Petitioner also presented no evidence that her employment quantitatively increased her risk of harm, that is, she was exposed to a common risk more frequently than the general public.

The Commission reversed the decision of the Arbitrator, finding that petitioner sustained an accident that arose out of and in the course of her employment with respondent. Citing

the Supreme Court's holding of *McAllister,* the Commission noted the three categories of risks recognized by case law. The Commission also noted that *McAllister* stated that *Caterpillar Tractor* prescribes the proper test for analyzing whether an injury arises out of a claimant's employment when a claimant is injured performing job duties involving common bodily movements or routine everyday activities. The Commission noted that *Caterpillar Tractor* and *Sisbro* make it clear that common bodily movements are compensable and employment related if the common bodily movement resulting in an injury had its origin in some risks connected with, or incidental to, employment so as to create a causal connection between the employment and the accidental injury. *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 than the general public, once he has presented proof that he was involved in an employment-related accident.

The Commission found that the evidence in this case supports that petitioner was injured due to an employment related risk. Petitioner presented to the Markham clinic and her job duties included answering phones. The employee workstations had chairs with wheels and the chairs had no backs or arms. Petitioner described the floors as being recently waxed and similar to that of an ice skating rink. The Commission found that the act of sitting in this particular chair while performing her job duties represents an act that can be reasonably expected to be performed incidental to her assigned duties and, therefore, is a risk distinctly associated with her employment. The Commission found that the petitioner was injured as the result of an employment related risk and, therefore, the accident arose out of and in the course of her employment.

The Commission also found that the accident was compensable under the neutral risk analysis. It stated the third category of risks involves neutral risks that have no particular employment or personal characteristics. Qualitatively, the chair provided to the employees contributed to the risk of injury. The petitioner would sit on this chair while performing various aspects of her job. Petitioner's job duties and use of the chair therefore qualitatively increased her risk of injury. Quantitatively, petitioner was exposed to the risk of injury more frequently than the general public. The Commission reasoned the chair provided to the employees was not a chair commonly used among the general public. Petitioner had to sit in this type of chair frequently throughout the day, which increased her risk of injury more frequently than the general public.

Steven Fornear v. Illinois Department of Corrections, 20 IWCC 301 (June 4, 2020)

Petitioner alleged a repetitive walking/standing claim. Petitioner worked at Tamms Correctional Center and alleged injuries to his bilateral hips stemming from repetitive walking/standing on concrete floors. The Arbitrator found that petitioner failed to prove that his accident arose out of his employment. The Arbitrator cited *Peoria County Bellwood Nursing Home v. Industrial Commission* stating that in cases involving repetitive trauma, the petitioner must show the injury arose out of and in the course of employment and was not the result of a normal degenerative aging process. The Arbitrator continued stating that simply performing work over a period of time is not legally sufficient to prove that work is repetitive enough to cause an increased risk to the petitioner. The Arbitrator

also found that petitioner failed to prove a causal relationship because the medical opinion upon which they relied was based on incomplete information about the claimant's job duties. In this case, the expert physician's testimony did not include any information about the force used to perform any of the job activities listed by petitioner.

The Commission affirmed the Arbitrator's decision, but applied different reasoning. The Commission found that the Arbitrator misconstrued petitioner's accident theory. The Commission found that petitioner associated his symptoms with climbing and descending several flights of stairs multiple times per shift while wearing a heavy-duty belt. The Commission then stated that to determine whether petitioner's injury arose out of his employment, it must first determine the type of risk to which he was exposed. The Commission stated that injuries resulting from a neutral risk generally do not rise out of employment and are compensable only where the employee was exposed to the risk to a greater degree than the general public. The increased risk can be either qualitative or quantitative. The Commission found that even concluding petitioner was exposed to a neutral risk to a greater degree than the general public, his claim still failed because he failed to meet his burden of proof on causation. Citing *Sisbro,* the Commission stated an employee need only prove that some act or phase of employment was a causative factor of a resulting injury. The only limiting factor to this general role is where it is shown that the employee's health has so deteriorated that any normal daily activity is an over-exertion or where it is shown that the activity engaged in presented risks no greater than those to which the general public is exposed.

The Commission stated that although medical testimony as to causation is not necessarily required, where the question is one within the knowledge of experts only and not within the common knowledge of laypersons, expert testimony is necessary to show that the work activities caused the condition complained of. In cases based on repetitive trauma, the claimant generally relies on the medical testimony establishing a causal connection. In this case, the Commission found the only causation opinion was provided by the IME physician, who opined that petitioner's condition of ill-being was attributable to petitioner's anatomy. The IME physician found that while petitioner experienced symptoms at work, the underlying condition was not related to or caused by petitioner's work duties. The IME physician further stated that petitioner's hips had so deteriorated that any normal daily activity is an over-exertion. Based on the IME physician's opinions, the Commission found that petitioner failed to prove that his condition of ill-being was causally related to a repetitive trauma injury.

The Dissent affirmed and adopted the Arbitrator's finding that petitioner did not suffer an injury that arose out of and in the course of employment. The Dissent found that traversing stairs was a neutral risk. The Dissent cited *McAllister* stating that neutral risks are compensable only where the employee was exposed to a risk to a greater degree than the general public. The Dissent found that petitioner's act of climbing stairs was a neutral risk that was increased both qualitatively and quantitatively. Petitioner was exposed to a qualitative increased risk when performing his patrolling duties requiring him to traverse numerous flights of stairs while wearing an equipment belt. Petitioner was exposed to a quantitative risk when he was required to climb flights of stairs on a frequent basis during his work shift, which exposed him to a risk to a greater degree than the general public. As

for the causation issue, the Dissent found that petitioner's employment was a causative factor in the resulting condition of ill-being to petitioner's hips. The Dissent noted that although the IME physician did not believe petitioner's tight iliotibial bands were caused by his job duties, the physician did agree that petitioner's job duties could aggravate the tight bands on both hips. Citing *Sisbro*, the Dissent stated that a work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being.

Steven Borque, Jr. v. WLS-TV, 20 IWCC 776 (December 31, 2020)

Petitioner worked as a news photo-journalist for WLS-TV. Petitioner was injured while attempting to get coverage of the Blackhawks Stanley Cup float during a parade. Petitioner was climbing a latter with his camera. When he descended from the ladder, petitioner's right knee buckled under the weight of the camera causing him to fall on the ground. Petitioner subsequently suffered repeated instability episodes in his knee. The Arbitrator found that petitioner suffered an accident that arose out of and occurred in the course of his employment by respondent. The Arbitrator stated that the "in the course of" elements refers to the time, place and circumstances under which the accident occurred. Citing *Dodson*, the Arbitrator found that injuries that occur on an employer's premises within a reasonable time before and after work are generally deemed to arise out of and in the course of employment. The Arbitrator noted the two different approaches of determining whether an injury arose out of employment as laid out in *Caterpillar Tractor.*

First, an injury arises out of employment where its origin stems from a risk connected with, or incidental to, the employment. The Arbitrator found in this case that petitioner's accident occurred in the course of employment because the accident occurred while petitioner was assigned by respondent to cover the parade with a reporter.

The second approach states an injury arises out of employment where it is caused by some risk to which the employee is exposed to a greater degree than the general public by virtue of his employment. The Arbitrator found that petitioner's specific employment duties performed directly placed him at an increased risk of injury. The Arbitrator reasoned that petitioner's work assignment specifically required him to climb and descend the ladder to access the float and required him to carry the camera on his shoulder while doing so. As a result, there was an increased risk that petitioner's right knee could buckle under the weight of the camera and this was entirely connected to the direct nature of the work that petitioner was performing.

Therefore, the Arbitrator found that petitioner's accident arose out of and in the course of employment with respondent because it occurred during an assignment in which respondent directed and that his injury occurred as a result of an inherent and increased risk in the specific and required nature of his work – his knee buckling under the weight of his heavy camera as he descended a ladder on the side of a parade float. The Arbitrator found that petitioner sufficiently proved "accident" under either theory of recovery: whether analyzing accident "risk" under the *Adcock* or *McAllister/Moreno* application theories. The Commission affirmed and adopted the decision of the Arbitrator.

Emily Purcell v. Illinois Workers' Compensation Commission (University of Illinois, Appellee) Decision of Illinois Appellate Court, Workers' Compensation Division, Appeal No. 4-20-0359WC, Filed April 27, 2021

Claimant was employed as an administrative assistant on a temporary basis for the University of Illinois. She was required to turn in her timecard at the personnel services building every other Friday. On the date of the claimed accident, claimant took a bus to campus for work and arrived at approximately 8:20 a.m. Her shift was scheduled to start at 8:30 a.m. She intended to walk to the personnel services building to drop off her timecard prior to commencing work. She crossed the street and walked in the direction of the personnel services building and approached a chain barrier/fence. She attempted to "hop" over it. The heel of her shoe got caught and she fell onto her right elbow. She ultimately required surgery on the right elbow 10 days later.

Claimant admitted there was no defect with the fence or the ground around it where she fell. She admitted there were no obstructions or anything else that would have prevented her from taking a route that would have allowed her to avoid the chain fence. She admitted that it would have been safer to use a route that did not require her to cross a chain fence, and that it would only have taken a couple of extra seconds for that alternate route.

Claimant contended that her injury arose out of an employment related risk which was distinctly associated with her employment. She argued that her actions in hopping over a chain was an act the University might reasonably expect her to perform to fulfill her duties as a temporary employee who was required to drop off her timecard. Claimant relied on the *McAllister* decision in making this argument.

The Appellate Court rejected claimant's arguments. The Court found claimant voluntarily hopped over the chain fence when the heel of her shoe got caught and she was injured. This decision exposed her to an unnecessary danger entirely separate from her employment responsibilities. Claimant voluntarily exposed herself to an unnecessary personal danger solely out of personal convenience. Thus, claimant's injuries did not arise out of employment and compensation was denied.

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