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Workers' Compensation Report

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Loaning Employer Not Liable in Tort When Borrowing Employer Assumes Liability

With limited exceptions, an injured worker can only obtain recovery from his or her employer pursuant to the provisions of the Illinois Workers' Compensation Act. 820 ILCS 305/1 *et seq*. In many situations, an employer loans an employee to another borrowing employer. The exclusive remedy provision of the Illinois Workers' Compensation Act does protect both the loaning and borrowing employer against liability for an independent tort action brought by the injured worker. *See Chaney v. Yetter Manufacturing Co.*, 315 Ill. App. 3d 823, 734 N.E.2d 1025 (4th Dist. 2000).

In a recent appellate court decision, a worker was employed by a temporary employment agency and was directed by an employee of another temporary employment agency (Staffing Resources) to move an item at a warehouse maintained by a third party. The injured worker sought and received worker's compensation benefits from his employer (his own temporary employment agency) following the injury. The employee then filed suit against the owner of the warehouse as well as Staffing Resources, whose employee directed the petitioner to perform a certain act that led to his injury. *See Behrens v. California Cartage Co.*, 373 Ill. App. 3d 860, 870 N.E.2d 848 (1st Dist. 2007).

The owner of the warehouse filed a Motion to Dismiss pursuant to Section 2-619 of the Illinois Code of Civil Procedure, which was granted. The temporary employment agency, defendant Staffing Resources, moved for summary judgment, arguing that as a loaning employer, it cannot be held liable when the borrowing employer assumed liability under the doctrine of *respondeat superior* for the actions of the employee. The circuit court granted summary judgment on behalf of the loaning employer, Staffing Resources.

The petitioner argued in the appellate court that the exclusive remedy provision of the Illinois Workers' Compensation Act contained no language exempting a "third party loaning employer" from tort liability and therefore could not be utilized by Staffing Resources to avoid liability. The appellate court noted that Staffing Resources was not relying upon exclusivity provisions of the Act but rather, was relying on the common law argument and defense of respondent superior.

The petitioner also argued that the correct test for determining loaned employee liability is the scope-of-employment test, not the right-to-control test. The appellate court cited an Illinois Supreme Court decision that held that Illinois uses the right-to-control test to determine liability under the loaned-servant doctrine. *See Crespo v. Weber Stephen Products Co.*, 275 Ill. App. 3d 638, 656 N.E.2d 154 (1st Dist. 1995). The appellate court also noted that Staffing Resources had offered an affidavit from the warehouse chief operating officer, which stated that the warehouse had the right to direct and control the petitioner's work and the manner in which it was performed while in the warehouse. This unrebutted affidavit established that the petitioner was under the direction and control of the warehouse, not the third party loaning employer, Staffing Resources.

Therefore, under the doctrine of *respondeat superior*, the petitioner was not allowed to maintain an independent tort action against the third party loaning employer. This defense, in addition to the exclusive remedy provision, is helpful to loaning employers who are faced with independent tort actions as a result of injuries that take place at borrowing employer facilities and operations.

Personal Comfort Doctrine

When an employee has taken a break during work hours and suffers an injury at work, the personal comfort doctrine may apply to bring the activity within the scope of the Illinois Workers' Compensation Act. The personal comfort doctrine holds that certain activities of an employee, which are purely for his or her personal comfort at work, are so closely incidental to the work that injuries occurring during those activities are within the course of the work itself. The personal comfort doctrine can apply to acts such as eating, drinking, obtaining fresh air, seeking relief from heat or cold, showering, resting and smoking. 2 A. Larson & L. Larson, Workers' Compensation Law, Section 21.10 at 5-5 (1998). The personal comfort doctrine has also encompassed the use of a restroom at the place of employment. *Illinois Consolidated Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 732 N.E.2d 49 (5th Dist. 2000).

If an employee is injured while engaged in any of the above acts while at work, his injury may be found compensable under the Illinois Workers' Compensation Act pursuant to the personal comfort doctrine. However, an employee seeking coverage under the personal comfort doctrine must still prove that his injury "arose out of" and "in the course of" his employment by the employer. This article will analyze the personal comfort doctrine in relation to both the "in the course of" and "arising out of" requirements of the Act. This article will also review the case law regarding the personal comfort doctrine and illustrate recent Illinois Workers' Compensation Commission decisions with respect to the personal comfort doctrine.

An injury is compensable under the Workers' Compensation Act only if it "arises out of" and "in the course of" employment by the employer; *e.g., Orsini v. Industrial Comm'n, et al*., 117 Ill. 2d 38, 509 N.E.2d 1005, 1008 (1987), *Karastamatis v. Industrial Comm'n, et al.*, 306 Ill. App. 3d 206, 713 N.E.2d 161, 164 (1st Dist. 1999). The elements "arising out of" and "in the course of" are used conjunctively, and therefore both must be present at the time of injury in order to justify compensation. *Orsini*, 509 N.E.2d at 1008.

The phrase "in the course of" refers to the time, place, and circumstances under which the accident occurred. *Eagle Discount Supermarket v. Industrial Comm'n, et al*., 82 Ill. 2d 331, 412 N.E.2d 492, 496 (1980). If the injury occurs within the time period of employment, at a place where the employee can reasonably be expected to be in the performance of his or her duties, and occurs while he or she is performing those duties or doing something incidental thereto, the injury is deemed to have occurred in the course of employment. *Segler v. Industrial Comm'n*., 81 Ill. 2d 125, 406 N.E.2d 542 (1980).

Courts have held that the personal comfort doctrine applies to injuries during the lunch hour because lunch break is considered incidental to employment. In *Mt. Olive & Staunton Coal Co. v. Industrial Comm'n*, 355 Ill. 222, 189 N.E. 296 (1934), an employee was injured during his lunch break while still on the employer's premises. It was necessary for the employees to cross railroad tracks in going to and from the shed where they were to eat their lunch on the employer's premises. The employee was injured while crossing these tracks going to the shed in order to eat his lunch. The court held that these trips to and from the shed were necessary and incidental to employment. Thus, the employee's accident arose out of and in the course of his employment. *Mt. Olive & Staunton Coal*, 355 Ill. at 298.

Even if an employee is not paid for lunch, the injury can still be deemed to be in the course of employment. Further, even if the employee is not under the employer's control, being free to leave the employer's premises, the act of procuring lunch can still be found to be reasonably incidental to employment. 1A A. Larson, Workers' Compensation Section 21.21(a) at 5-5 (1979), found in *Eagle Discount Supermarket v. Industrial Comm'n*, 412 N.E.2d at 496-497.

The personal comfort doctrine has been extended to apply to work breaks even if the employee is not eating during the break. In *Sparks Milling Co. v. Industrial Comm'n, et al*., 293 Ill. 350, 127 N.E. 737 (1920), the employee fell from a fire escape and was killed. One of the conclusions that could have been drawn from these facts, according to the court, was that the employee fell from the fire escape while recovering from exhaustion caused by the heat and dust inside the mill in which he worked. *Sparks Milling*, 127 N.E. at 739. Based on these facts, the court held that it necessarily follows that the injuries resulting in the employee's

death arose out of his employment. *Id.* Showering in a locker room provided by the employer has also been found to fall under the personal comfort doctrine. *Chicago Extruded Metals v. Industrial Comm'n, et al.*, 77 Ill. 2d 81, 395 N.E.2d 569 (1979).

However, there are limits. In *Ealy v. Industrial Comm'n*, 189 Ill. App. 3d 76, 544 N.E.2d 1159 (4th Dist. 1989), an employee, during a break, went to a restaurant off of her employer's premises. The court held that the trip to the restaurant was not occasioned by the demands of her employment. The evidence did not demonstrate that petitioner's trip off site either benefited or accommodated her employer. Also, the court noted that the respondent did not retain authority over the employee during her break, and the Commission did not err in finding that the petitioner's injury from a fall on ice was not occasioned by a risk peculiar to or incidental to her employment. *Ealy*, 544 N.E.2d at 1161. Similarly, in *Lynch Special Services v. Industrial Comm'n*, 76 Ill. 2d 81, 389 N.E.2d 1146 (1979), the employee's act of going off premises to a restaurant was held to neither benefit nor accommodate his employer. In fact, the court noted that the employee left the employer's warehouse unprotected during his absence. *Lynch Special Services*, 389 N.E.2d at 1150. Therefore, the court held that petitioner's injury could not be said to have arisen out of and in the course of his employment when he fell on ice away from the employer's premises. *Id.*

Courts have held that even if the personal comfort doctrine applies, an injury is not deemed to have occurred in the course of employment if the employee voluntarily and in an unexpected manner exposes himself or herself to a risk outside any reasonable exercise of his or her duties. In *Segler v. Industrial Comm'n*, 81 Ill. 2d 125, 406 N.E.2d 542 (1980), the employee was injured when he tried to use a large industrial oven to heat a frozen potpie. The court held that the employee was not in the reasonable exercise of his duties at the time of the injury. The employee's actions were held to be "unnecessary, inherently dangerous, and unreasonable." *Segler*, 406 N.E.2d at 543.

However, even if an injury results from an unreasonable or unnecessary risk, it will be considered within the course of employment if the employer had knowledge of or acquiesced in the practice or custom. *White Star Motor Coach Lines v. Industrial Comm'n*, 336 Ill. 117, 168 N.E. 113 (1929). In *White Star*, the employee entered a closed bus and a closed garage for an hour's rest. Unfortunately, he also started the motor of the bus and died. *White Star*, 168 N.E. at 120-121. The court held that the employee went to an unnecessarily dangerous place and incurred an additional risk, which put him outside any reasonable requirement of the employment. *Id.* at 125. The court also noted that this was done without any knowledge or acquiescence on the part of the employer. *Id.* at 124.

In *Union Starch v. Industrial Comm'n*, 56 Ill. 2d 272, 307 N.E.2d 118 (1974), the court noted that it had apparently been the custom for the 15 years that the employee had been working for the employer for employees to seek refuge on the roof of the work building for fresh air. The court noted that this conduct might be deemed an added risk or unusual departure from the employee's duties. There was no express prohibition against using the window to seek access to the roof, and the roof was easily accessible through a window. The court noted that it was not unreasonable to infer from this that the employee could have assumed there was no prohibition against using this roof to seek fresh air. *Union Starch*, 307 N.E.2d at 121-122. The court held it was not improper for the Commission to determine that this injury arose out of employment, even though the employee's acts might be considered unreasonable, because it appeared that the employer had knowledge of the practice and did not prohibit the practice. *Id.* at 122. In contrast, in the *Segler* case, where the employee used an industrial oven to heat his potpie, there was no evidence indicating that the employer had knowledge of or acquiesced in the employee's actions. The employee testified that during the one and a half years he had worked in the specific area where the incident occurred, he had only seen one person place food in the oven. *Segler*, 406 N.E.2d at 543.

Along with proving that an injury occurred "in the course of" employment, as indicated above, the employee must also prove that his injury "arose out of" his employment with the employer. An injury arising out of one's employment is defined as one which has its origin in some risk so connected, or incidental, to the employment as to create a causal connection between the employment and injury. *Orsini*, 509 N.E.2d at 1008. For an injury to have arisen out of employment, the risk of injury must be a peculiar risk to the work or a risk

to which the employee is exposed at a greater degree than the general public by reason of his employment. A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his duties. *Id.* If the injury results from a hazard to which the employee would have been equally exposed apart from the employment, then it does not arise out of his employhment. Thus, an injury is not compensable if it resulted from a risk personal to the employee rather than incidental to the employment. *Id.* at 1009. Employer acquiescence alone cannot convert a personal risk into an employment risk. *Id.*

According to *Karastamatis*, *supra*, even if the personal comfort doctrine applies, the claimant must still prove that an injury arose out of his or her employment. *Karastamatis*, 713 N.E.2d at 165. In *Union Starch*, where the employee stepped onto an adjoining roof outside to get some fresh air, the court held that this injury arose out of the employee's employment. The employee was apparently seeking relief from the heat and stuffy air. The court held that "the Commission could reasonably infer that the cause of the injury was related to the employment environment" because the working premises were warm. *Union Starch*, 307 N.E.2d at 120-121. In *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 362 N.E.2d 325 (1977), the court held that the employee's hot, humid work environment was a causative factor of the employee's injury. *Scheffler Greenhouses*, 362 N.E.2d at 328. During a lunch break, the employee was injured while using a pool on the work premises. The court held that the Commission could have reasonably inferred that the hot work environment necessitated the use of the pool and thereby exposed the claimant to a risk to which she would not have been exposed apart from her work environment. *Id.* Therefore, the injury arose out of the employee's employment. In *Roberts and Oake v. Industrial Comm'n*, 378 Ill. 612, 39 N.E.2d 315 (1942), during a lunch break, the petitioner attempted to run for a truck that was driving down the street. *Scheffler Greenhouses*, 39 N.E.2d at 315-316. He attempted to jump on the running board of the truck, lost his footing, was sideswiped by the truck, and died. *Id.* at 316. The court held that, "Where a lunch period is not subject to the employer's control or restricted in any way and the employee is free to go where he will at that time and that employee is injured on a public street, the injury does not arise out of the employment." *Id.*

Probably the best known case involving the personal comfort doctrine is *Eagle Discount Supermarket v. Industrial Comm'n, et al.*, 82 Ill. 2d 331, 412 N.E.2d 492 (1980). In *Eagle*, the employee, who was a shelf stocker, was on a lunch break when he suffered an injury while playing Frisbee on the employer's premises. *Eagle Discount*, 412 N.E.2d at 494. The supreme court held that the Commission decision that the personal comfort doctrine applied and that the employee's injury arose out of and in the course of employment was not against the manifest weight of the evidence. *Id.* at 497. The employee was injured while participating in a recreational activity on the employer's premises during an authorized lunch break. The employee voluntarily remained on the premises and was not paid for his lunch. However, the court noted that this will not defeat an employee's claim. The court further noted that the employee was not exposed to an unnecessary or unreasonable risk. Even if the employee did expose himself to an unnecessary and unreasonable risk, the court held that the Commission could still find that the injury occurred in the course of employment because the employer knew, acquiesced, and possibly participated in the employees' routine Frisbee game. *Id.*

In *Orsini v. Industrial Comm'n, supra.*, the employee was not on a lunch break but was waiting for parts to be delivered to continue working. During this time, the employee decided to work on his own car while still on the employer's premises. The employer knew and acquiesced to this activity. The employee was injured when his car lurched forward and pinned him against his workbench. *Orsini*, 509 N.E.2d at 1006. The parties agreed that the injury occurred in the course of employment, so the main issue was whether the injury arose out of the employment. *Id.* at 1008. The supreme court held that the Commission decision, that the injury did not arise out of employment, was not against the manifest weight of the evidence. *Id.* at 1010. The risk of injury in repairing or working on one's own automobile is not ordinarily related or incidental to the duties for which he or she is employed, even if the work is done on the employer's premises. The risk of harm was not increased by any condition on the employer's premises but was rather caused by a defect in the employee's car. *Id.* at 1009. The employee was not required to work on his own car by the employer. The employee voluntarily exposed himself to an unnecessary danger entirely separate from the activities and responsibilities of his job. *Id.* at 1009. Further, the court noted that the employee was performing an act of a personal nature, solely for his own convenience, an act outside any risk connected to his employment. *Id.*

In the 1999 *Karastamatis* case, the Illinois Appellate Court First District found that even though the personal comfort doctrine applied, the injury did not arise out of the employment. *Karastamatis*, 713 N.E.2d 161. In *Karastamatis*, the employee was hired to work at the employer's annual picnic to put up tents, drive a van, clean, and stock gear and food. During a break, with the employer's permission, the employee was allowed to dance with guests of the picnic. While dancing, the employee injured his leg. *Id.* at 163. The court held that the personal comfort doctrine might be applicable but that this only established that the claimant was in the course of his employment. According to the *Karastamatis* court, the personal comfort doctrine has no application to the "arising out of" requirement, otherwise, "one on break is in a better position to recover workers' compensation benefits than an individual injured while working." *Id.* at 165. With respect to "arising out of" and causation, the court held that the employee's injuries did not result from some risk or hazard peculiar to his employment. *Id.* at 164. The employee was not hired to dance but rather he was hired to set up, stock the picnic, and serve beer and food. The risk of injury from dancing was not peculiar to this work nor incidental to his employment because it did not belong to, nor was it in any way connected with, what he had to do in fulfilling his contract of service. *Id.* at 164-165.

Two recent Workers' Compensation Commission decisions have also interpreted the personal comfort doctrine. In *Huner v. Zaffiri Concrete Foundation*, 04 IL.W.C. 07321, 05 I.W.C.C. 0885, 2005 WL 3634622 (November 7, 2005), the court held that the *Eagle* decision controlled. In *Huner*, the employee and co-employees were playing Frisbee while waiting for a cement truck to arrive. There was no work that needed to be done until the cement truck arrived. Playing sports was typical during downtimes when there was no work to be performed, according to the record. A co-owner of the employer had participated in basketball and football in the past during the downtimes. The co-owner was on the site on the date of the accident. The employee was injured when he jumped off a truck after retrieving a Frisbee. The Commission held that the employer knew and acquiesced in the activity. Here, in fact, the employer also participated. The court held that liability is imposed where the employee is injured while engaged in a recreational activity occurring on the premises during an authorized break. *Id*.

In *Livingston v. Abbott Laboratories*, 03 IL.W.C. 33110, 07 I.W.C.C. 0324, 2007 WL 1257234 (March 22, 2007), the Commission applied the personal comfort doctrine in a case involving a company picnic. The personal comfort doctrine was applied because this case involved a lunch hour and involved a recreational activity, making the claim compensable because the picnic took place during an extended lunch break. *Id.* The Commission cited to *Eagle* to support its position. The Commission essentially said that it was an important factor that the activity took place on the company premises during an authorized lunch break and therefore was not a recreational activity within the scope of Section 11, which governs work picnics. *Id.*

In conclusion, although the personal comfort doctrine will likely apply to an injury suffered during a break, the employee must still prove that his or her injury arose out of and in the course of his or her employment with the employer. The injury will not be found to be "in the course of" employment if the employee voluntarily and in an unexpected manner exposed himself or herself to a risk outside any reasonable exercise of his or her duties. However, even if the injury resulted from an unreasonable or unnecessary risk, the injury might still be held to have occurred in the course of employment if the employer has knowledge of or acquiesced in the practice or custom. In order to meet the "arising out of" requirement, the employee must show that his work was a causative factor of his injury. As an example, if an employee steps outside to get some fresh air after working in a hot and stuffy work environment, courts have held that the employee has met the burden of proving causation. Recent Commission decisions have applied the personal comfort doctrine, even where the injury occurred during a company picnic, because the company picnic took place over an extended lunch break.

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