

THE IDC MONOGRAPH:

The Conflict of the Positional Risk Doctrine in Illinois: Its Rejection and Adoption

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The Conflict of the Positional Risk Doctrine in Illinois: Its Rejection and Adoption

An Introduction to the Positional Risk Doctrine

One of the basic tenets of the Illinois Workers' Compensation Act is that compensation shall only be provided for accidental injuries which arise out of and in the course of the employment.¹ An injury "arising out of" one's employment has been defined as one which has its origin in some risk so connected with, or incidental to the employment so as to create a causal connection between the employment and the injury.² The phrase "in the course of" for purposes of the Workers' Compensation Act refers to the time, place, and circumstances under which an accident occurred.³

One theory which challenges the basic tenets of the Act is the positional risk doctrine. The premise of the positional risk doctrine is that an injury is compensable if it would not have happened but for the fact that the conditions or obligations of employment place the employee in the position he or she is in when the injury occurs⁴ and is caused by a neutral force or risk,⁵ act of God,⁶ or chance occurrence.⁷ Under the positional risk doctrine, it is only necessary that an employee's work brings him or her within the range of danger by requiring his or her presence in the locale where the peril strikes, even though any other person present would be injured, irrespective of his or her employment.⁸

Some states have adopted the positional risk doctrine while others have rejected it.⁹ The courts in both Indiana and Wisconsin have applied the positional risk doctrine and have awarded benefits in cases where a claimant was murdered in the workplace.¹⁰ In each case, the courts held the cause of death was a neutral risk.¹¹

The courts in Virginia have replaced the positional risk doctrine with an "actual risk test."¹² In *Marion Correctional Treatment Center v. Henderson*, a security guard was awarded benefits when he fell down some stairs from his observation tower. The Court of Appeals of Virginia held the claimant's employment exposed him to a particular danger from which he was injured. As such, he was entitled to benefits because of the actual risk posed by his employment.

Similarly, the Arkansas Court of Appeals issued a decision refusing to adopt the positional risk doctrine but instead applying an increased risk doctrine.¹³ In *Weber v. All American Arkansas Poly Corp.*, a claimant was denied benefits

when she went into premature labor allegedly due to stress associated with money being stolen from her purse at work. The Court held that Arkansas had not adopted the positional risk doctrine, and it applied an increased risk analysis. The Court held the claimant was not exposed to an increased risk of theft because of her employment setting, and it therefore denied benefits.

The premise of the positional risk doctrine is that an injury is compensable if it would not have happened but for the fact that the conditions or obligations of employment place the employee in the position he or she is in when the injury occurs and is caused by a neutral force or risk, act of God, or chance occurrence.

The Illinois Supreme Court has expressly rejected the positional risk doctrine.¹⁴ In *Brady v. Louis Ruffolo & Sons*, the claimant was injured when a truck crashed into the building where he was working. The parties and the court agreed the claimant sustained injuries in the course of his employment. Consequently, the sole issue presented to the supreme court was whether the injuries “arose out of” the employment.

In its analysis, the court noted that an injury may be compensable under the Act even though the precipitating cause of the accident originated in some unusual external force.¹⁵ However, the court also noted the mere fact that a claimant was present at the place of an injury because of his employment duties will not by itself suffice to establish that the injury arose out of the employment.¹⁶ Furthermore, a claimant must demonstrate that his risk of the injury sustained is pe-

culiar to his employment, or that it is increased as a consequence of the work.¹⁷

In rendering its decision, the court stated 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 the claimant in the position where he was injured by a neutral force.”¹⁸ The court noted it has previously declined to adopt the positional risk doctrine believing that the doctrine would not be consistent with the requirements expressed by the Legislature in the Act.¹⁹

In *Brady*, the Illinois Supreme Court expressly rejected the positional risk doctrine holding the doctrine is inconsistent with the requirement that a claimant’s injury must arise out of his employment. However, there are several categories of cases in which the Supreme Court’s edict has been circumvented or possibly ignored. The types of cases include injuries on parking lots,²⁰ injuries sustained by traveling employees,²¹ and injuries sustained as a result of unexplained or idiopathic falls.²²

From the defense perspective, it is frustrating to watch the courts erode the foundation of the Workers’ Compensation law by carving out exceptions which allow claimants to obtain benefits without having to prove the primary components of a work-related injury. The remainder of this Monograph more fully examines these categories of cases and how they relate to the positional risk doctrine.

Parking Lot Injuries

One situation where the courts seem to have created an exception to the supreme court’s rejection of the positional risk doctrine is when an employee sustains an injury in a parking lot provided by the employer. Courts have generally found that parking lots owned, controlled, maintained or required by the employer to be used by employees are extensions of the work place and injuries occurring in those parking lots are in the course of employment. If the accidental injury is the result of a hazardous condition on the parking lot or exposes the employee to a greater degree of risk than that to which the general public is exposed, the courts generally find that the injury arises out of the employment and is compensable under the Workers’ Compensation Act. So what constitutes a hazardous condition or creates a greater degree of risk in a parking lot than that to which the general public would be exposed? In this section we will look at how the

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courts have explained the compensability of parking lot injuries without adopting the positional risk doctrine.

In *Caterpillar Tractor Co. v. Industrial Comm'n*,²³ the employee exited the building after work intending to go to his car, and as he stepped off the curb on to the driveway, he twisted his ankle. The driveway was part of the company premises and was used by both employees and by the general public to pick up employees. The Illinois Supreme Court reiterated its adherence to the maxim that an injury is not compensable unless it is causally connected to the employment. The court noted that where liability has been imposed under the Workers' Compensation Act, "the injury occurred either as a direct result of a hazardous condition on employer's premises (citations omitted) or arose from a risk connected with, or incidental to, the employment (citations omitted)."²⁴ The court found that the claimant failed to establish that he was exposed to a risk not common to the general public. The court stated that "[c]urbs, and the risks inherent in traversing them, confront all members of the public."²⁵ There was nothing to distinguish this curb from any other curb. The court again implicitly rejected the positional risk doctrine when it stated, "[T]he mere fact that the duties take the employee to the place of injury and that, but for the employment, he would not have been there, is not, of itself, sufficient to give rise to the right of compensation. (Citations omitted)"²⁶

In *Fligelman v. City of Chicago*,²⁷ a police officer was walking from his car parked in the police headquarters lot to police headquarters when a chunk of concrete fell from a bridge overhead and struck him on the arm. The officer sued the City of Chicago alleging that the City negligently maintained the bridge. The court granted the City's motion for summary judgment on the basis that the Illinois Pension Code barred the common law action. The court found that the dilapidated bridge over the parking lot created a hazardous condition in the work premises and, therefore, the injury arose out of the employment. In rejecting plaintiff's argument that the court was implicitly adopting a positional risk doctrine, the court held that the parking lot at police headquarters subjected the officer to an increased risk of harm because it sat under a dilapidated bridge. The court found that although members of the public are at times exposed to the same risk by walking under the bridge, regular use by police officers exposed them to a greater risk.

In *Mores-Harvey v. Industrial Comm'n*,²⁸ the employee slipped and fell on snow and ice while exiting her vehicle in the employer's parking lot. Although the public was allowed to park on the same lot, the employee parked in an area des-

ignated for employee parking. The court rejected the employer's argument that the decision in *Caterpillar Tractor* was controlling and found that unlike the curb in *Caterpillar Tractor* the ice and snow presented a hazardous condition on the employer's premises. Additionally, by restricting where the employee could park, the employer exercised control over the employee's actions and created a greater risk than that to which the general public was exposed. The court also rejected the employer's argument that by finding the injury compensable, it was implicitly adopting the positional risk doctrine. The court noted that under the positional risk doctrine an injury arises out of the employment if it would not have occurred but for the fact that the conditions or obligations of the employment placed the claimant in the position where he was injured by a neutral force. The court found that the positional risk doctrine was irrelevant because the employee was injured as a result of a hazardous condition on the employer's premises and not a neutral force.

The key to defending these parking lot cases is to show that the employee was not exposed to any greater risk in using the employer's parking lot than the general public would face in using the same lot.

In *Litchfield Healthcare Center v. Industrial Comm'n*,²⁹ after clocking in at work, the claimant went to her car which was parked in a lot used by both employees and the public to retrieve a tool for work. As she was returning to the building, she tripped on the uneven sidewalk, twisting her ankle. The court noted that the risk of tripping was not unique to claimant's employment or personal to her. The court determined that her injury arose out of her employment because she was exposed to the defective sidewalk and the risk of tripping more frequently than members of the general public.

In *Vill v. Industrial Comm'n*,³⁰ the claimant, a security guard, parked in the lot designated by her employer which

was also used by hospital visitors and patients. Claimant parked her vehicle in a space near the administration building next to a sport utility vehicle that was close to the yellow line. Claimant could only open her car door a short distance and twisted her knee as she was exiting her car. Although claimant testified that her injury was the result of a stepping in a crack on the parking lot surface, the court affirmed the Industrial Commission's finding that the injury was not the result of a defective or hazardous condition on the employer's parking lot. The court further held that exiting a vehicle parked in close proximity to another did not expose the claimant to a risk uncommon to the general public. Thus, the claim for benefits was denied.

The court has extended the employers' premises to include parking lots owned, controlled, maintained and required by employers to be used by employees. For an injury occurring on an employer-controlled parking lot to arise out of employment, the injury must be the result of a hazardous condition on the lot or must expose the employee to a greater risk than that to which the general public is exposed. The hazardous condition can be but does not have to be unique to the employer's parking lot. Ice and snow as well as cracks in the parking lot can cause compensable injury although these are the types of conditions found in almost any parking lot used by the general public. The key to defending these parking lot cases is to show that the employee was not exposed to any greater risk in using the employer's parking lot than the general public would face in using the same lot.

The Traveling Employee Rule: On the Road with Positional Risk

When considering the issues raised by positional risk in the world of workers' compensation law, one must consider the special considerations given to "traveling employees." With regard to such employees, it can be argued that the courts have come closest to adopting positional risk as the law of the land. As illustrated by the following discussion, it is difficult to point to an instance where the courts have ruled against a traveling employee – regardless of the "in the course of" issues that apply to most other types of employees. In fact, it appears that the Commission and the courts have replaced the "in the course of" analysis with a positional risk analysis.

In terms of workers' compensation law, the traveling employee rule is well settled: a "traveling employee" is defined as one who is required to travel away from the

employer's premises in order to perform his job.³¹ Almost since its inception the Commission and the courts have been constantly expanding this definition. For instance, it is not necessary for an individual to be a traveling salesman or a company representative who covers a large geographic area in order to be considered a "traveling employee." In *Wright v. Industrial Commission*,³² the court refused to distinguish between an employee who is continuously traveling and one who travels to a job location and returns when the work is completed. On the other hand, if the employee happens to be a traveling salesman, the rule has even wider application. In *Urban v. Industrial Commission*,³³ a traveling salesman was held to be in the course of the employment from the time that he left home until he returned, on the basis that one cannot separate going to and coming from work from the moment that the salesman is actually calling on a customer. Thus, the definition of a traveling employee is broad and getting broader.

This was not always the case. Previously, if the employee was required to travel and was involved in the performance of reasonable services for the employer at an appropriate time and place, an injury was considered to be in the course of the employment.³⁴ However, the employee's activity must have provided some benefit to the employer.³⁵ An analysis of the more recent cases indicates that this requirement is in the process of being eliminated, as is particularly true when the facts involve recreational activities associated, no matter how tangentially, with work duties.

One of the most litigated fact patterns in regard to traveling employees arises when an accident occurs during a recreational activity associated with work duties. Although Section 11 of the Illinois Workers' Compensation Act³⁶ states unequivocally that injuries arising out of voluntary recreational activities are not compensable, Illinois courts have repeatedly held that even though the recreational activities of a traveling employee fall outside the scope of employment, any injuries incurred during those activities are compensable under the Act as long as the recreational activity and the employee's conduct were reasonable and foreseeable. This added protection is afforded under the Act because "it is expected that an employee working out of town will seek some type of recreational activity on his days of rest."³⁷ "It would be obviously unreasonable and contrary to the intentment of the Workers' Compensation Act and its purposes to say that a traveling employee has the protection of the Act

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only when in the physical act of performing his or her duties and only in the course of a normal business day.”³⁸ A review of recent appellate decisions illustrates this trend.

In *David Wexler & Co. v. Industrial Commission*,³⁹ the court stated that even though a traveling salesman was killed in an automobile accident on a legal holiday while on an extended business trip and was returning to his motel from a recreational activity at the time of the accident and not from an appointment with a prospective buyer, the accident arose out of and in the course of the salesman’s employment and his widow was entitled to recover workmen’s compensation.

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In *Bagcraft Corp. v. Industrial Commission*,⁴⁰ the court stated that injuries incurred by a traveling employee while engaged in recreational activities are compensable as long as the recreational activity and employee’s conduct were reasonable and foreseeable. Additionally, the court went on to state that the statute precluding an employee from recover-

ing worker’s compensation benefits from accidental injuries incurred while participating in voluntary recreational activities, unless the employee was ordered or assigned to participate in the activity, does not apply to traveling employees.

In *Wright*, the court went even further. In this case, the deceased claimant was a construction supervisor sent to Tennessee where he was to remain for a number of months. The supervisor was killed in an automobile collision that occurred on a Saturday afternoon when it was not certain whether the deceased claimant was performing a duty for the employer or not. The court held that even if the employee was engaged in reasonable private conduct, the accidental death would be compensable. It was not unreasonable or unforeseeable that a traveling employee would be driving his automobile on a highway 6 miles from the motel where he was staying while engaged in his employer’s project. It is expected that an employee working out of town will seek some type of recreational activity on his days of rest.⁴¹

Possibly the ultimate application of this rule came in *Insulated Panel Co. v. Industrial Commission*⁴² where injuries to a traveling employee during a sightseeing trip with the company president were reasonable and foreseeable and thus compensable. In this case, the claimant, co-employees, and the employer’s president traveled to Hawaii to install an industrial freezer. On a day off, the claimant accompanied the employer’s president on a sightseeing trip and walked toward a lagoon and an unrestricted area. The claimant stepped on a lava road that gave away and fell 20 feet. In finding the claimant’s injuries compensable, the court noted that the claimant was invited to accompany the employer’s president on the sightseeing trip. Thus, it was reasonable and foreseeable to anticipate that the claimant would go on the sightseeing trip. Likewise, the type of activity in which the claimant was engaged when injured—stepping over a lava rock—was also reasonable and foreseeable. This development can also be viewed as taking the “personal comfort doctrine” to its illogical extreme: any old comforting activity will do, making it nearly impossible for the traveling employee to leave the course of employment.

Of course, occasionally the courts will spot a fact pattern which even they believe is an outlier, as in *Bailey v. Industrial Commission*⁴³ where the court determined that the widow of a traveling worker killed in an automobile accident after leaving a party hosted by a business unrelated to that of his employer was not entitled to workers’ compensation benefits. Applying what is rapidly becoming an archaic notion, the court held that the worker’s attendance at the party

presented no business advantage to the employer, and there was no indication as to where the worker was driving at the time of his death.

The traveling employee doctrine is also being extended into an area where positional risk should clearly apply to negate the claim: drivers making local deliveries. The appellate court awarded compensation to a traveling employee assaulted during a delivery, finding the Commission's denial against the manifest weight of the evidence in *Potenzo v. Illinois Workers' Compensation Commission*.⁴⁴ There, the claimant, a truck driver, was assaulted while making a delivery at an employer location—a loading dock in the alleyway at the rear of the employer's store. There was no theft of company property, though when the claimant regained consciousness two days later, he found his ring and watch were missing. Further, the motive for the assault and identity of the assailant were unknown. First, the court remarked there was no question the claimant's injuries were sustained in "the course of" his employment as he was in the act of unloading an employer truck at an employer location when the attack occurred. Thus, the assailant issue was "arising out of." Claimant argued that as a traveling employee's duties exposed him to an increased risk of contact with street crime; consequently, he was not compelled to establish his risk of being attacked as peculiar to his employment, but simply his employment exposed him to the same risk as the general public. The court agreed with the claimant's contention noting that his duties as a traveling employee required him to traverse the streets and unload trucks in the areas accessible to the public. The risk of being assaulted, although one to which the general public was exposed, was a risk to which the claimant, by virtue of his employment, was exposed to a greater degree than the general public. Clearly, the only identifiable connection to work in this case was the position he was in, yet he recovered.

In summary, an argument can easily be made that the Illinois courts have been incrementally adopting positional risk as a basis for compensability under the guise of protecting traveling employees and, in the process, abandoning the "in the course of" analysis contained in the Act and still applicable to all other types of employees. The immediate effect of this "creeping positionalism" has been to increase workers' compensation exposure for employers with traveling employees on staff and, as the definition and application of this rule continues to expand, that exposure will expand accordingly.

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The Impact of the Positional Risk Doctrine on Unexplained and Idiopathic Falls

Another area where the positional risk doctrine is seemingly applied is that involving unexplained and idiopathic falls. While application of the doctrine has been expressly rejected by the appellate court decisions,⁴⁵ there is no question that it has impacted the risk analysis for such claims. As discussed above, the positional risk doctrine substitutes "but-for the employment" reasoning in place of the "arising out of" requirement.⁴⁶ Indeed, what the positional risk doctrine has done is to force the analysis beyond the simplistic characterization of the cause and shift it to an assessment of the risks presented by the employment.

Given this shift, what appears to be a seemingly unrelated event—such as a seizure or fall while walking down stairs—can become a compensable claim because the risk of injury from the otherwise idiopathic or unexplained event was increased or enhanced by the employment. A perfect example of this is in the area of falls caused by a seizure. If the employee has a seizure as a result of an idiopathic condition and falls on the concrete floor, striking his head, the accident is likely to be deemed as not arising out of the employment. The reasoning is that the risk of injury was common to members of the general public. Similarly, if that same

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employee suffers a seizure while working on a scaffolding or ladder, and as a result of the added height imposed by the work environment, falls and is injured by the fall, the claim is likely compensable.⁴⁷

As a general rule, risks which are idiopathic arise out of the employment only where the employment conditions significantly contribute to the injury by increasing the risk of fall or the effects of falling. An increased risk may be presented where the employment increased the danger of falling or risk of injury, such as a fall onto a dangerous object or from heights.

Three Types of Risks

As discussed earlier, “arising out of” the employment pertains to the origin or cause of a claimant’s injury.⁴⁸ Determining that question involves a categorization of the risk to which the employee was exposed.⁴⁹ The risks to which an employee may be exposed are categorized into three groups: (1) risks distinctly associated with the employment; (2) risks personal to the employee, such as idiopathic falls; and (3) neutral risks that have no particular employment or personal characteristics.⁵⁰ As a general rule, risks which are idiopathic arise out of the employment only where the employment conditions significantly contribute to the injury by increasing the risk of fall or the effects of falling.⁵¹ An increased risk may be presented where the employment increased the danger of falling or risk of injury, such as a fall onto a dangerous object or from heights. As Justice Stouder wrote in his dissent in *William G. Ceas v. Industrial Commission*:

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.... A claimant must demonstrate that the risk of injury sustained is peculiar to his employment, or that it is increased as a consequence of the work.⁵²

Increased risk must be shown; or else the analysis adopts the positional risk doctrine.

Examples of Idiopathic Falls

Idiopathic falls are those caused by conditions purely personal to the employee. Common examples include seizures, epileptic fits, weakened knees, and fainting. In *Oldham v. Industrial Commission*,⁵³ the appellate court affirmed the Commission’s decision to deny benefits where the decedent suffered an idiopathic fall while at work. The decedent had reported that she was not feeling well, then started to walk away from her station, when she fell and struck her head on the clay tile floor. She later died of her injuries. Witnesses reported no defects or debris on the floor. The appellate court found that the act of standing itself did not establish a risk of injury greater than those faced outside of work. The court observed:

It is impossible to speculate whether decedent would have been standing, sitting, driving, walking, or resting in bed if she had not been working. The need to stand was not unique to decedent’s work. In addition, two witnesses testified, and the Commission so found, that decedent was walking away from her station without having been relieved when the attack occurred. The Commission might reasonably have inferred, therefore, that she did not remain at her station while ill.⁵⁴

The court further held that “a clay tile floor does not constitute a heightened risk.”⁵⁵ A similar result obtained in *Prince v. Industrial Commission*,⁵⁶ where the employee suffered an epileptic seizure, fell, and struck his head on a concrete floor. The court affirmed the denial of benefits, finding that the concrete floor presented no risk not encountered by the general public and was not unique to the employment.

*Elliot v. Industrial Commission*⁵⁷ presents yet another

idiopathic fall at work, this time occasioned by weakness in the claimant's leg as a result of a prior automobile accident. In that case, the court rejected application of the positional risk doctrine, stating that "[more] is required than the fact that an injury occurred at the employee's place of work." The claimant had testified that he was "just walking down the stairs." The court noted that the claimant could have been walking down the stairs at home and that there was no evidence that the stairs were unique to the claimant's employment.

In a slightly different fact pattern, the court in *Ervin v. Industrial Commission*,⁵⁸ upheld the award of compensation benefits where the decedent suffered a heart attack and fell into a fire which he had been allowed to build at work for warmth. Even though the fall was deemed idiopathic, the claim was held compensable because the decedent was near the fire at work, which increased his risk of injury from such a fall.

Likewise, in *Nabisco Brands, Inc. v. Industrial Commission*,⁵⁹ the claimant suffered an idiopathic fall while walking down a flight of stairs at work. The fall was nevertheless found to be compensable because the claimant, at the time of the fall, was carrying a box of heavy, sharp kitchen knives, which exacerbated the injuries from the fall, thereby increasing the risk to the employee.

In each case, while finding that the initial cause of the fall was idiopathic, the court looked beyond the cause and focused on how the injuries sustained from the fall were impacted by the employment. In three of the noted cases, the court found no increased risk. In the remaining two decisions, the court found increased risk due to the circumstance of employment. One wonders whether the analysis in the three cases denying compensability would change if the employment required the claimant to more frequently use the stairs or concrete walkways or if the location of the accident could be classified as unique to the employment.

The Problems of Deeming Unexplained Falls Compensable in the Face of *Brady*

Unexplained falls are those resulting from an employee's encounter with a so-called neutral risk. Examples of this are injuries to claimants resulting from stray bullets⁶⁰ or simply falls that cannot be explained. As pointed out by Larson in his treatise *Larson's Workers' Compensation Law* and at least two Illinois appellate court Special Concurrence and Dissents, there is an inherent inconsistency in finding unex-

plained falls compensable in states such as Illinois, which reject the positional risk doctrine.⁶¹ As Larson explains, recovery in a pure unexplained fall case can only be justified by an acceptance of the positional risk doctrine. 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 satisfied the "arising" requirement.⁶²

While some Illinois appellate court cases have made the bold statement that unexplained falls are compensable per se,⁶³ a close reading of each case shows that in each case it is possible to point to specific evidence in the record from which the Commission could have concluded that the claimant was exposed to a greater risk of injury than that to which the general public was exposed.

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exposed to a greater risk of injury than that to which the general public was exposed.

A few exceptions to this discussion occurred in three cases running from 1979 through 1994. In *Sears, Roebuck & Co. v. Industrial Commission*,⁶⁴ the claimant fell in an open area accessible to all members of the general public. The court nevertheless found the accident compensable because the employee was required to be where she fell by the circumstances of her employment. *Sears* was followed in 1985 by the decision of *Chicago Tribune Co. v. Industrial Commission*,⁶⁵ where the court found an unexplained fall compensable. There, the claimant slipped and fell in the employer's building while coming to work. The claimant stated that her foot had gone straight out in front of her and she fell, striking her head on a ledge and losing consciousness. The record showed that the floor was clear, dry, and free of any foreign substances and that the claimant was wearing high heels at the time she fell. In short shift, the appellate court found the claim compensable, stating that "[t]his was clearly a case of an unexplained fall on the [employer's] premises", which "therefore "arose out of and in the course of [the] claimant's employment."

In 1994, the appellate court again addressed an unexplained fall and held it compensable despite any indication that there was a defect in the employer's premises. In *William G. Ceas & Co. v. Industrial Commission*,⁶⁶ the decedent fell down a flight of stairs while at work and subsequently died from her injuries. The evidence showed that the claimant had suffered from cancer and had been weak as a result. Moreover, there was some evidence that the claimant had been rushing to meet a last-minute deadline assigned by her boss. The appellate court found that the fall was unexplained

and deemed it compensable. Arguably, one could justify the compensability finding based on the evidence that the decedent was required by her job to rush to meet a last-minute deadline, and therefore, faced an increased risk as a result of the employment. Since the case does not state as much, it is rather troublesome in the overall risk analysis associated with falls.

In 2006, the appellate court appeared to move away from the results of *Sears, Roebuck, Chicago Tribune* and *William G. Ceas* with its decision in *First Cash Financial Services v. Industrial Commission*.⁶⁷ There, the claimant fell in a bathroom which was open to the general public. The Commission found the fall compensable on the basis that the floor may have been dirty. The appellate court reversed the Commission's decision, ruling that the conclusion that the floor was dirty was speculative. The court continued, stating that "[b]y itself, the act of walking across a floor at the employer's place of business does not establish a risk greater than that faced by the general public."⁶⁸ Because there was no evidence that the floor was defective or otherwise dirty, the appellate court reversed the Commission and denied the claim. Interestingly, had the court desired to simply deem unexplained falls compensable, the *First Cash Financial Services* case presented the perfect opportunity to do so.⁶⁹ However, the court in the face of no explanation for the fall and no evidence suggesting a defect, denied the claim. *First Cash Financial Services* appears to signal that unexplained falls will not be compensable absent evidence that supports an increased risk posed by the employment. This treatment is consistent with how the court has treated idiopathic falls and with the Supreme Court's rejection of the positional risk doctrine.

(Endnotes)

- ¹ *Dietzen Co. v. Industrial Board of Illinois et al.*, 279 Ill.11, 116 N.E. 684 (1917).
- ² *Orsini v. Industrial Commission*, 117 Ill. 2d 38, 509 N.E.2d 1005 (1987).
- ³ *Id.*
- ⁴ *Fligelman v. City of Chicago*, 275 Ill. App. 3d 1089, 657 N.E.2d 24 (1st Dist. 1995).
- ⁵ *Estate of Sims v. Industrial Commission of Arizona*, 138 Ariz. 112, 673 P.2d 310 (Ct.App.Div. 1 1983).
- ⁶ *Wunschel v. City of Jersey City*, 96 N.J. 651, 477 A.2d 329 (1984).
- ⁷ *Id.*
- ⁸ *Olde South Custom Landscaping, Inc. v. Mathis*, 229 Ga. App. 316, 494 S.E.2d 14 (1997).
- ⁹ *Allied Mfg., Inc. v. Dept. of Industry, Labor & Human Relations*, 45 Wis. 2d 563, 173 N.W.2d 690 (1970);
Manous, LLC d/b/a Mayberry Cafe, Inc. v. Manousogianakis, 824 N.E.2d 756 (2005).
- ¹⁰ *Id.*
- ¹¹ *Id.*
- ¹² *Marion Correctional Treatment Center v. Henderson*, 20 Va. App. 477, 458 S.E.2d 301 (1995).
- ¹³ *Weber v. All American Arkansas Poly Corp.*, 46 Ark. App. 311, 879 S.W.2d 462 (1994) (A dissenting opinion argued the positional risk doctrine had been adopted by the Arkansas courts, and the dissenting opinion contended the positional risk doctrine should apply to the facts presented before the court).
- ¹⁴ *Brady v. Louis Ruffolo & Sons Construction Company*, 143 Ill. 2d 542, 578 N.E.2d 921 (1991).
- ¹⁵ *Campbell 66 Express, Inc. v. Industrial Commission*, 83 Ill. 2d 353, 415 N.E.2d 1043 (1980). The claimant was awarded benefits after being struck by a tornado while driving a vehicle. The Court held the claimant was exposed to a risk greater than that to which the general public would be exposed because he was obligated to drive late at night presumably due to a time schedule and was therefore at a greater risk of dangers stemming from a collision or inclement weather.
- ¹⁶ *State House Inn v. Industrial Commission*, 32 Ill. 2d 160, 204 N.E.2d 17 (1965).
- ¹⁷ *Orsini v. Industrial Commission*, 117 Ill. 2d 38, 509 N.E.2d 1005 (1987).
- ¹⁸ The Court described “neutral” as being neither personal to the claimant nor distinctly associated with the employment. *Brady v. Louis Ruffolo & Sons Construction Company*, 143 Ill. 2d 542, 578 N.E.2d 921 (1991). See also A. Larson, *The Positional Risk Doctrine in Workmen’s Compensation*, 1973 DUKE L.J. 761.
- ¹⁹ *Brady*, 143 Ill. 2d at 552, 578 N.E.2d at 925 (1991).
- ²⁰ See *Homerding v. Industrial Commission*, 327 Ill. App. 3d 1050, 765 N.E.2d 1064 (1st Dist. 2002); *Mores-Harvey v. Industrial Commission*, 345 Ill. App. 3d 1034, 804 N.E.2d 1086 (3rd Dist. 2004).
- ²¹ See *Robinson v. Industrial Commission*, 96 Ill. 2d 87, 449 N.E.2d 106 (1983); *Bailey v. Industrial Commission*, 247 Ill. App. 3d 204, 617 N.E.2d 305 (1st Dist. 1993); *Bagcraft Corporation v. Industrial Commission*, 302 Ill. App. 3d 334, 705 N.E.2d 919 (3rd Dist. 1998).
- ²² *William G. Ceas and Co. v. Industrial Commission*, 261 Ill. App. 3d 630, 633 N.E.2d 994 (1st Dist. 1994).
- ²³ *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 541 N.E.2d 665 (1989).
- ²⁴ *Id.* at 62.
- ²⁵ *Id.*
- ²⁶ *Id.* at 63.
- ²⁷ *Fligelman v. City of Chicago*, 275 Ill. App. 3d 1089, 657 N.E.2d 24 (1st Dist. 1995).
- ²⁸ *Mores-Harvey v. Industrial Commission*, 345 Ill. App. 3d 1034, 804 N.E.2d 1086 (3rd Dist. 2004).
- ²⁹ *Litchfield Healthcare Center v. Industrial Commission*, 349 Ill. App. 3d 486, 812 N.E.2d 401 (5th Dist. 2004).
- ³⁰ *Vill v. Industrial Commission*, 351 Ill. App. 3d 798, 814 N.E.2d 917 (1st Dist. 2004).
- ³¹ *Hoffman v. Industrial Commission*, 128 Ill. App. 3d 290, 470 N.E.2d 507 (2nd Dist. 1984).
- ³² *Wright v. Industrial Commission*, 62 Ill. 2d 65, 338 N.E.2d 379 (1975).
- ³³ *Urban v. Industrial Commission*, 34 Ill. 2d 159, 214 N.E.2d 737 (1966).
- ³⁴ *Olson Drilling Co. v. Industrial Commission*, 386 Ill. 402, 54 N.E.2d 452 (1944).
- ³⁵ *U.S. Industries, Production Machine Division v. Industrial Commission*, 40 Ill. 2d 469, 240 N.E.2d 637 (1968).
- ³⁶ 820 ILCS 305/11.
- ³⁷ *Howell Tractor & Equipment Co. v. Industrial Commission*, 78 Ill. 2d 567, 403 N.E.2d 215 (1980).
- ³⁸ *Wright*, 338 N.E. 2d at 379.

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- ³⁹ *David Wexler & Co. v. Industrial Commission*, 52 Ill. 2d 506, 288 N.E.2d 420 (1972).
- ⁴⁰ *Bagcraft Corp. v. Industrial Commission*, 302 Ill. App. 3d 334, 705 N.E.2d 919 (3rd Dist. 1998).
- ⁴¹ *Wright v. Industrial Commission*, 62 Ill. 2d 65, 338 N.E.2d 379 (1975).
- ⁴² *Insulated Panel Co. v. Industrial Commission*, 318 Ill. App. 3d 100, 743 N.E.2d 1038 (2nd Dist. 2001).
- ⁴³ *Bailey v. Industrial Commission*, 247 Ill. App. 3d, 204, 617 N.E.2d 305 (1st Dist. 1993).
- ⁴⁴ *Potenzo v. Industrial Commission*, 378 Ill. App. 3d 113, 881 N.E.2d 523, (1st Dist. 2007).
- ⁴⁵ *Rodin v. Industrial Commission*, 316 Ill. App. 3d 1224, 1229, 738 N.E.2d 955, 960 (1st Dist. 2000); *see also Illinois Consol. Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 356, 732 N.E.2d 49, 57 (5th Dist. 2000) (Special Concurrence, J. Rakowski and McCullough).
- ⁴⁶ 1 A. Larson & L. Larson, LARSON'S WORKERS' COMPENSATION LAW § 7.04(1), at 7-15 (1999).
- ⁴⁷ *See Williams v. Industrial Commission*, 38 Ill. 2d 593, 232 N.E.2d 744 (1967) (The claimant suffered an idiopathic fall at work on a level surface and encountered no increased risk as a result of the employment.).
- ⁴⁸ *Restaurant Development Group v. Hee Suk Oh*, 392 Ill. App. 3d 415, 420, 910 N.E.2d 718, 722 (1st Dist. 2009).
- ⁴⁹ *William G. Ceas & Co.* 261 Ill. App. 3d at 636, 633 N.E.2d at 998 (1st Dist. 1994).
- ⁵⁰ *First Cash Financial Services v. Industrial Commission*, 367 Ill. App. 3d 102, 105, 853 N.E.2d 799, 803 (1st Dist. 2006).
- ⁵¹ *Williams v. Industrial Commission*, 38 Ill. 2d 593, 232 N.E.2d 744 (1967).
- ⁵² *William G. Ceas*, 261 Ill. App. 3d at 643, 644.
- ⁵³ *Oldham v. Industrial Commission*, 139 Ill. App. 3d 594, 487 N.E.2d 693 (2nd Dist. 1985).
- ⁵⁴ *Id.* at 596-97.
- ⁵⁵ *Id.* at 597.
- ⁵⁶ *Prince v. Industrial Commission*, 15 Ill. 2d 607, 155 N.E.2d 552 (1959).
- ⁵⁷ *Elliot v. Industrial Commission*, 153 Ill. App. 3d 238, 505 N.E.2d 1062 (1st Dist. 1987).
- ⁵⁸ *Ervin v. Industrial Commission*, 364 Ill. 56, 4 N.E.2d 22 (1936).
- ⁵⁹ *Nabisco Brands, Inc. v. Industrial Commission*, 266 Ill. App. 3d 1103, 641 N.E.2d 578 (1st Dist. 1994).
- ⁶⁰ In *Restaurant Development Group v. Hee Suk Oh*, 392 Ill. App. 3d 415, 420, 910 N.E.2d 718, 722 (1st Dist. 2009), the court held that a death resulting from a stray bullet constituted a compensable accident due to the increased risk associated with the location of the restaurant and the hours worked by the decedent.
- ⁶¹ 1 A. Larson & L. Larson, LARSON'S WORKERS' COMPENSATION LAW § 7.04(1), at 7-15 (1999); *Illinois Consol. Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 356, 732 N.E.2d 49, 57 (5th Dist. 2000) (special concurrence, J. Rakowski and McCullough); *William G. Ceas & Co. v. Industrial Commission*, 261 Ill. App. 3d 630, 636, 633 N.E.2d 994 (1st Dist. 1994) (J. Stouder and McCullough, dissenting).
- ⁶² 1 A. Larson & L. Larson, LARSON'S WORKERS' COMPENSATION LAW § 7.04(1), at 7-15 (1999).
- ⁶³ These cases are discussed in Justice Rakowski's special concurrence in *Illinois Consolidated Telephone Co. v. Industrial Commission*, 314 Ill. App. 3d 347, 354, 732 N.E.2d 49 (5th Dist. 2000) ("Unfortunately, several recent cases have repeated the statement in *Chicago Tribune* that unexplained falls arise out of the employment. By way of *dictum*, these cases imply that *all* such falls arise out of the employment." (emphasis added)).
- ⁶⁴ *Sears, Roebuck & Co. v. Industrial Commission*, 78 Ill. 2d 231, 399 N.E.2d 594 (1979).
- ⁶⁵ *Chicago Tribune Co. v. Industrial Commission*, 136 Ill. App. 3d 260, 483 N.E.2d 327 (1st Dist. 1985).
- ⁶⁶ *William G. Ceas & Co. v. Industrial Commission*, 261 Ill. App. 3d 630, 633 N.E.2d 994 (1st Dist. 1994).
- ⁶⁷ *First Cash Financial Services v. Industrial Commission*, 367 Ill. App. 3d 102, 853 N.E.2d 799 (1st Dist. 2006).
- ⁶⁸ *Id.* at 104.
- ⁶⁹ A similar approach was taken in *Rodin v. Industrial Commission*, 316 Ill. App. 3d 1224, 738 N.E.2d 955 (1st Dist. 2000), where the court upheld the Commission's denial of a claim involving an employee's allergic reaction to otherwise wholesome food. The court refused to apply the positional risk doctrine and found there was no evidence of any increased risk associated with the employment. Of particular interest to this article, the court stated, "[the] fact that the claimant would not have consumed the food which caused his reaction had he not been ordered to attend the T-5 luncheon does not, standing alone, mandate a finding that his allergic reaction arose out of his employment, as Illinois has never adopted the positional risk doctrine." *Id.* at 1229.