No. 124848

IN THE SUPREME COURT OF ILLINOIS

KEVIN MCALLISTER,

Plaintiff - Appellant,

v.

NORTH POND and
ILLINOIS WORKERS' COMPENSATION
COMMISSION,

Defendants - Appellees.

Appeal from First District Appellate Court
Workers' Compensation Division
Case No. 1-16-2747WC

Appeal from the Circuit Court of Cook County, Illinois,
Circuit Court No. 16 L 50097
The Honorable Ann Collins-Dole, Judge Presiding

RESPONSE BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE, NORTH POND

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ORAL ARGUMENT REQUESTED

Points and Authorities

Standard of Review

Argument

I. McAllister's injury did not arise out of a risk peculiar to his employment as a sous chef.

II. McAllister was not exposed to a neutral risk to a greater degree than the general public.

V. McAlister's interpretation of current case law is flawed.

Standard of Review

The review of an Illinois Workers' Compensation Commission's decision (here after "Commission") on factual questions is subject to a manifest weight of the evidence standard. *Fitts v. Indus. Comm'n*, 172 Ill.2d 303 (1996). "Whether an injury arose out of and in the course of his employment is typically a question of fact to be resolved by the Commission, and the Commission's determination will not be reversed unless it is against the manifest weight of the evidence. *Kertis v. Illinois Workers' Comp. Comm'n*, 2013 IL 120252WC, ¶ 13. If any facts upon any issue permit more than one reasonable inference, the determination of such issue presents a question of fact and the Commission decision will not be disturbed on review unless it is contrary to the manifest weight of the evidence. *Sekora v. Indus. Comm'n*, 198 Ill. App. 3d 584 (Ill. App. Ct. 1990). On questions of fact, the Commission's decision is against the manifest weight of the evidence only if the record discloses that the opposite conclusion clearly is the proper result." *Venture--Newberg-Perini, Stone & Webster v. Illinois Workers' Comp. Comm'n*, 2013 IL 115728, ¶ 14. However, when the facts are undisputed and susceptible to a single inference, the question is one of law, subject to *de novo* review." *Suter v. Illinois Workers' Comp. Comm'n*, 2013 IL 130049WC ¶ 15.

In this case, the facts relating to the circumstances and the way in which the claimant's (hereafter "McAllister") injury occurred are undisputed, *i.e.*, after looking for a pan of carrots in a walk-in cooler, McAllister injured

his right knee while going from a kneeling to standing position. C29. However, those facts are subject to more than a single inference. Specifically, the facts could support different inferences as to whether the physical act McAllister was performing at the time of injury was incidental to his employment as a sous chef. Also, different inferences could be drawn as to whether the risk of injury was in some way enhanced by his employment.

Although the facts in this case are undisputed, they clearly give rise to more than a single inference, thus the proper standard of review is whether the Commission's decision was against the manifest weight of the evidence.

Argument

I. McAllister's injury did not arise out of a risk peculiar to his employment as a sous chef.

"The purpose of the Illinois Worker's Compensation Act is to protect the employee against risks and hazards which are peculiar to the nature of the work he is employed to do." *Orsini v. Indus. Comm'n*, 117 Ill. 2d 38, 44 (1987). "What the law intends is to protect the employee against the risks and hazards taken in order to perform the master's task; and if no such risk or hazard caused or contributed to cause the injury, then the employee is not entitled to compensation." *Ceisel v. Indus. Comm'n*, 400 Ill. 574, 582 (1948).

There are three types of risks employees may be exposed to: (1) risks that are distinctly associated with employment; (2) risks that are personal to the employee, such as idiopathic falls: and (3) neutral risks that do not have any particular employment or personal characteristics." *Adcock v. Illinois Workers' Comp. Comm'n*, 2015 IL 130884WC ¶ 31.

The Commission determined, based on the facts of the case, that McAllister's injury occurred as a result of going from a kneeling to standing position on a single occasion. C273. This finding is unrebutted. The Commission further determined that this act was not peculiar to his position of employment as a sous chef. C273. "A peculiar risk is one that is peculiar to a line of work and not common to other kinds of work and one that is not common to the general public." *Karastamatis v. Indus. Comm'n*, 306 Ill. App. 3d 206, 209 (Ill. App. Ct. 1999).

No evidence has been provided to prove the act of going from a kneeling to a standing position is peculiar to the job duties of a sous chef. McAllister testified as to what his job duties as a sous chef consisted of; checking in orders, arranging the walk-in cooler, making sauces, prepping, cooking. C27. The evidentiary record is absent any testimonial expansion as to what each one of those duties consisted of or what physical acts were required of McAllister to perform those duties. Most compelling is the unrebutted fact that McAllister's testimony is absent any discussion as to a need to kneel while performing these duties. Based on this lack of evidentiary testimony, the Commission was well within their sound

discretion to find McAllister's injury took place after going from a kneeling and to a standing position on a single occasion. C273.

"Liability for worker's compensation cannot rest on imagination, speculation or conjecture, but must be based solely upon the facts contained in the record." *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill. 2d 52, 61 (1989).

Contrary to McAllister's assertions, the mere fact he knew items sometimes fell on the floor does not support an unrebuttable factual finding that he had performed this act on prior occasions or that this was an act he was required to perform in order to work as a sous chef. McAllister could have witnessed other employees look for items on the floor. McAllister could have been told by one of the cooks that the pan of carrots might of fell on the floor. Furthermore, it is unrebutted that McAllister was not performing his job as a sous chef when the injury occurred, but was assisting a cook in completing his duties. C28. The facts indicate a cook had lost a pan of carrots that he needed to set up his station. C28. McAllister testified he had "some time" and went and looked for the carrots on behalf of that cook. C28. The record is absent any testimony that the act of looking for carrots in the walk-in cooler, or any food item for that matter, was one McAllister performed on prior occasions. It would be pure speculation to find otherwise.

"The object of comparing between the exposure of the particular employee to a risk and the exposure of the general public is to isolate and identify the distinctive characteristics of the employment." *Caterpillar*

Tractor Co., 129 Ill. 2d at 62. Based on McAllister's own testimony, the act of going from a kneeling to a standing position on a single occasion is in no way distinctly associated with his duties as a sous chef. In direct contradiction to McAllister's present assertions, he himself, described the act as being no different than a person looking for a shoe underneath one's bed. C44. A physical act the Commission found to be common to the general public or an act exposing him to a neutral risk. C273. A finding supported by the evidence and a finding clearly not against the manifest weight of the evidence.

II. McAllister was not exposed to a neutral risk to a greater degree than the general public.

The Commission determined that the act of going from a kneeling position to a standing position on a single occasion exposed McAllister to a neutral risk. C273. "A neutral risk is a risk that has no particular employment or personal characteristics." *Potenzo v. Illinois Workers' Comp Comm'n*, 378 Ill. App. 3d 113, 116 (2007) McAllister's own testimony stated the act he was performing at the time of the injury was no different than a person looking for a shoe underneath one's bed. C44. "Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Adcock v. Illinois Workers' Comp. Comm'n*, 2015 IL 130884WC, ¶ 32, see also, *Caterpillar Tractor Co.*, 129 Ill. 2d at 58.

After properly determining McAllister was exposed to a neutral risk, the Commission analyzed whether McAllister was exposed to a neutral risk to a greater degree than the general public, either quantitatively or qualitatively. C273. "The increased risk may be qualitative (i.e. when some aspect of the employment contributes to the risk) or quantitative (such when the employee is exposed to the risk more frequently than member of the general public by virtue of his employment)." *Adcock*, 2015 IL 130884WC, ¶ 32, (See also *Greater Peoria Mass Transit Dist. V. Indus. Comm'n*, 81 Ill. 2d 38, 43 (1980)).

From a qualitative perspective, the facts show McAllister was not carrying anything when he stood up. C44. He did not strike his knee on anything at the time of the injury. C44. McAllister did not trip on anything, nor did he allege the injury resulted from a defect in the floor. C45. Although McAllister testified the floor was always wet, he did not claim he slipped on a wet surface. C45. There is no evidence in the record from a qualitative perspective that McAllister was exposed to an increased risk to a greater degree than the general public when he simply stood up on the date of the accident.

From a quantitative perspective, there is no evidence to contradict the Commission's finding that McAllister performed this act on a single occasion. C273. McAllister offered no testimony as to how frequently he needed to kneel to look for items that possibly fell on the floor or how frequently he had to kneel to perform any of his job duties. The only time McAllister testifies as to his need to kneel while at work, was the one time

on the date of the accident. C29. Thus, the Commission's inference that McAllister knelt only once at work was reasonable and was not against the manifest weight of the evidence. C273.

III. McAllister's argument focuses on the "act" being performed at the time of the injury, instead of the "risk" associated with the act.

"The Workmen's Compensation Act does not intend that the employer who comes within its provisions shall be an insurer of the safety of its employees at all times during the period of employment." *Illinois Country Club, Inc. v. Indus. Comm'n*, 387 Ill. 484, 491 (1944). "The purpose of the Act is to protect the employee against the risks and hazards taken in order to perform the employer's tasks." *Fisher Body Div. v. Indus. Comm'n*, 40 Ill. 2d 514, 517 (1968), *Orsini*, 117 Ill. 2d at 44. "This State....adheres to the general requirement that one's employment must subject him to an increased risk that is beyond that to which the general public is subjected." *Campbell 66 Express, Inc. v. Indus. Comm'n*, 83 Ill. 2d 353, 355 (1980).

The key term in those statements is the word "risk." "After determining the mechanism of injury, the Commission's first task in determining whether the injury arose out of the claimant's employment is to categorize the risk to which the claimant was exposed..." *Adcock*, 2015 IL 130884WC, ¶ 31.

As the Appellate Court's special concurrence properly stated, "the risks associated with any particular activity arises from the activity itself, not

from the activity's relationship to the claimant's work duties." *McAllister v. Illinois Workers' Comp. Comm'n*, 2019 IL 162747WC, ¶ 95. "The risk stems from the nature of the activity itself, not from its connection to an employment-related purpose." *Id.* ¶ 93. The mere fact a claimant is performing an act that is incidental to his employment does not automatically mean the claimant is exposed to a risk peculiar to his employment (for example, the act of a chef opening a door for a food delivery person once a week could be deemed an act incidental to his employment. However, the act of opening the door does not expose that same chef to a risk peculiar to this employment). The determining factor in addressing compensability based on the issue of "arising out of" should focus on the risk associated with the act being performed, not the act itself.

Contrary to this premise, McAllister's argument focuses on the act being performed and the reason the act was being perform at the time of the injury. In doing so, McAllister misinterprets this Court's ruling in *Caterpillar*, by arguing "the three acts" analysis determines when an accident arises out of one's employment. Brief for Plaintiff-Appellant at 21, McAllister v. Illinois Workers' Comp. Comm'n, No. 124848. According to McAllister, if one of the "three acts" is performed, the claimant it automatically exposed to a risk incidental to the employment. *Id.* at 24. If this was true, there would be no need to perform a risk assessment. Contrary to this argument, in *Caterpillar,* this Court never assessed the facts of that case according to McAllister's "three acts" analysis. This Court addressed the issue of "arising out of" based on the neutral risk analysis.

See generally *Caterpillar Tractor Co.*, 129 Ill. 2d 52. Furthermore, this Court has rendered multiple decisions on the issue of "arising out" one's employment subsequent to the *Caterpillar* ruling and in each one of those decisions this Court has repeatedly stated "an injury arises out of the employment if it results from a "risk" that originates in, or is incidental to, the employment." *Brady v. Louis Ruffolo & Sons Constr. Co.*, 143 Ill. 2d 542 (1991), *Baggett v. Indus. Comm'n*, 201 Ill. 2d 187 (2002), *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193 (2003), *Franklin v. Indus. Comm'n*, 211 Ill. 2d 272 (2004). In line with this case law, when addressing the issue as to whether an accident arose out of one's employment, the determining factor should be whether the performance of the act, at the time of injury, exposed him to a risk to a greater degree than the general public, not whether the act being performed was simply work related.

IV. To adopt McAllister's position would amount to this Court adopting the positional risk doctrine.

To award benefits based solely on the fact a claimant was performing a work-related act without assessing the risk associated with that act, would be to adopt the positional-risk doctrine. Professor Larson has defined positional risk, when "an injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed the claimant in the position where he or she was injured." 1 Larson's Workers' Compensation - Desk Edition § 3.05 (2019). The term "obligation" appears to encompass the "three acts" McAllister cites

to in *Caterpillar:* "typically, an injury arises out of one's employment if, at the time of the occurrence the employee was performing: (1) an act the employee was instructed to perform; (2) an act the employee had common law or statutory duty to perform; (3) an act the employee might reasonably be expected to perform incidental to his assigned duties. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58.

First and foremost, this Court stated "typically", which does not mean always. *Id.* Secondly, the employer (hereafter "North Pond") agrees with the special concurrence's interpretation in *McAllister* of this Court's statement in *Sisbro.* "In other words, *Sisbro* suggests that only injuries sustained during the performance of work-related acts arise out of the employment, not that all such injuries always arise out of the employment. *McAllister*, 2019 IL 162747WC, ¶ 87.

Furthermore, "this court has previously declined to adopt the positional risk doctrine, believing that doctrine would not be consistent with the requirements expressed by the legislature in the Act." *Brady v. Louis Ruffolo & Sons Constr. Co.*, 143 Ill. 2d 542, 552 (1991). Under McAllister's argument, injuries incurred while simply walking or navigating stairs could be found compensable based on the mere fact those acts were incidental to their employment, without even assessing the risk the claimant was exposed to at the time of the injury. This is clearly not the legislative intent of the Act.

V. McAllister's interpretation of current case law is flawed.

McAllister argues that the word "peculiar" is not used in this Court's ruling in *Caterpillar Tractor Co.* or *Sisbro*. Brief for Plaintiff-Appellant at 25, McAllister v. Illinois Workers' Comp. Comm'n, No. 124848. Therefore, the Commission's use of this analysis was improper in finding for North Pond was erroneous. *Id.* at 24. Although McAllister is correct in stating the word "peculiar" is not used in those cases, it is irrelevant to the issue at hand. In *Caterpillar*, the claimant did not allege he was exposed to a risk "peculiar" to his employment, the claimant argued he was at a greater risk than the general public at the time of the injury and the condition of the premises where the accident occurred contributed to his injury. *Caterpillar Tractor Co.*, 129 Ill. 2d at 59. Thus, this Court did not need to use the "peculiar or incidental" analysis to determine if the injury arose out of the employment. See generally *Caterpillar Tractor Co.*, 129 Ill. 2d 52. In *Sisbro*, the employer did not even dispute the issue of "arising out of," the issue in dispute was causal connection. *Sisbro,* 207 Ill. 2d at 206. McAllister's argument that the lack of this Court's use of the word "peculiar" in those decisions supports a finding that the Commission used the wrong analysis in their decision in the present case is flawed. McAllister's objection to the "peculiar and incidental to" analysis, when addressing the issue of arising out of, ignores case law precedent, prior to and post, this Court's ruling in *Caterpillar* and *Sisbro*. See *Borgeson v. Indus. Comm'n*, 368 Ill. 188 (1938), *Ceisel v. Indus.*

Comm'n, 400 Ill. 547 (1948), *Orsini v. Indus. Comm'n*, 117 Ill. 2d 38 (1987), *Baggett v. Indus. Comm'n*, 201 Ill. 2d 187 (2002), *Franklin v. Indus. Comm'n*, 211 Ill. 2d 272 (2004).

McAllister also takes exception with the "everyday activities" analysis used in *Addcock* and by the Appellate Court's special concurrence in this case. Brief for Plaintiff-Appellant at 22, McAllister v. Illinois Workers' Comp. Comm'n, No. 124848. McAllister argues this analysis sets forth a new proposition of law. *Id.* In making this argument, McAllister continues to focus on the act being performed and not the risk associated with the act. McAllister ignores the fact that everyday activities, such as walking, bending, turning, reaching, stretching are not "peculiar" or "distinctly associated" with any single position of employment. "A risk that is 'distinctly' associated with one's a claimant's employment is a risk that is peculiar to the claimant's work.'" *McAllister*, 2019 IL 162747WC, ¶ 83. Peculiar is defined as "belonging to, distinctively or primarily to one person, group, or kind; special or unique." *Peculiar*, Collins English Dictionary (12th ed. 2014). In other words, what the Appellate Court in *Addcock* and the special concurrence in *McAllister* are stating is, if the act being performed at the time of the injury, is an act that is performed everyday by the general public or other positions of employment, such as reaching, walking, bending, kneeling; the risk associated with that act cannot be said to be peculiar with any one position of employment. Thus, if the risk is not "peculiar" to the position of employment, it is a neutral risk and analyzed as such. This is not a new concept. North Pond argues, the term "everyday activities" is

synonymous with the term "neutral activities," or acts that are not "peculiar" to a position of employment or "personal" to a employee. Thus, if one of the "three acts" happens to be a neutral activity, the neutral risk analysis should be used to determine whether the injury as a result of the act arose out of the claimant's employment.

McAllister's argument appears to have already been addressed in this court's decision in the *Brady* case. In the *Brady* case, the Illinois Trial Lawyers Association urged this Court to apply an employer-benefit analysis in determining whether an injury arises out of the employment. *Brady v. Louis Ruffolo & Sons Constr. Co.*, 143 Ill. 2d 542, 553 (1991). This Court rejected that application and determined that analysis "would not focus on whether the activities resulting in the injury involved any risks required by or peculiar to the employment, but rather on the question whether the activities resulting in the injury benefited the employer." *Id.* at 53 "That approach would alter the statutory requirements for compensation under the Act-that the injury arise out of and in the course of a claimant's employment." *Id.* at 53

Conclusion

The Appellate's Court affirmation of the Commission's decision, finding petitioner's accident did not arise out of his employment was proper. This Court should affirm the that finding as well.

The Commission's finding that McAllister was not performing an activity peculiar to his employment on the date of the accident when he went from a kneeling to a standing position on a single occasion is supported by the evidence and clearly not against the manifest weight of the evidence.

Furthermore, the facts also support the Commission's finding that McAllister was not exposed to a risk to a greater degree than the general public at the time of the injury. This finding is also not against the manifest weight of the evidence.

Finally, North Pond believes, when addressing the issue of "arising out of" one's employment in the future, this Court should set precedent that the proper analysis is, whether the "risk" associated with the act being performed, at the time of the accident, was peculiar to the position of employment or whether the claimant was exposed to a risk to a greater degree than the general public as a result of the employment.

Respectfully submitted,

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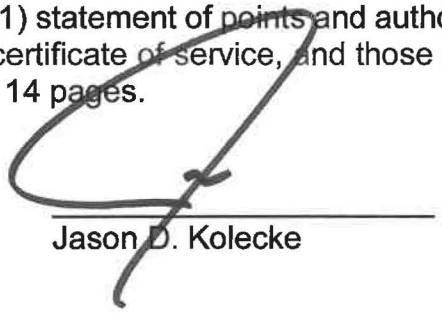
CERTIFICATE OF COMPLIANCE

I, Jason D. Kolecke, certify that this brief conforms to the Illinois Supreme Court Rules 341(a) and (b). The length of this brief excluding the pages containing the Rule 314(d) cover, the Rule 314(h)(1) statement of points and authorities, and the Rule 314(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14 pages.



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CERTIFICATE OF SERVICE

I, Jason D. Kolecke, attorney for the Defendant-Appellee, North Pond, certify that on December 4, 2019, the foregoing Brief of Defendant-Appellee, North Pond was electronically filed with the Clerk of the Court using the GreenFiling EFSP system and copies will be mailed to the following persons at the addresses shown by enclosing same in an envelope addressed to them and depositing same in a United Sates mailbox in Chicago, Illinois. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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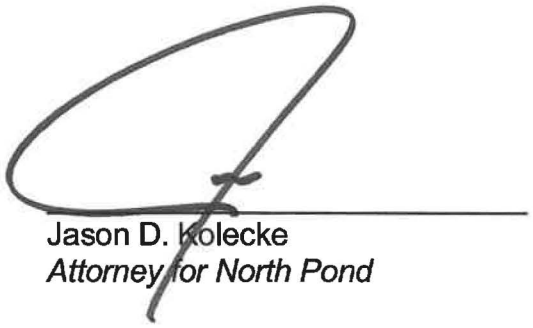

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No. 124848
IN THE SUPREME COURT OF ILLINOIS

Kevin McAllister, Plaintiff-Appellant, vs. North Pond THE ILLINOIS WORKERS' COMPENSATION COMMISSION, Defendant-Appellee.	)	Appeal from First District Appellate Court Workers' Compensation Division Case No. 1-16-2747WC Appeal from Circuit Court of Cook County Case No. 16L50097 Trial Judge: Honorable Ann Collins-Dole

NOTICE OF FILING

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The undersigned, being first duly sworn on oath, states that the above Response Brief on behalf of **Defendant-Appellee North Pond** was filed with the Clerk of the Illinois Supreme Court on December 4, 2019, using the GreenFiling EFSP system and copies will be mailed to the following persons at the addresses shown by enclosing same in an envelope addressed to them and depositing same in a United Sates mailbox in Chicago, Illinois. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

SUBSCRIBED AND SWORN to before me this
4th day of December 2019.

"OFFICIAL SEAL"
ANTONIA TORRES
Notary Public, State of Illinois
My Commission Expires 3/18/2022

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