No. 124848

Appeal to the Supreme Court of Illinois

KEVIN MCALLISTER, Plaintiff-Appellant,

v.

NORTH POND and

ILLINOIS WORKERS' COMPENSATION COMMISSION, Defendant-Appellees.

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

Appeal from Circuit Court of Cook County, Illinois
Case No. 16L50097
Honorable Ann Collins-Dole

REPLY BRIEF OF PLAINTIFF-APPELLANT, KEVIN MCALLISTER

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ARGUMENT

I. *Caterpillar Tractor* maintains that a "three acts" analysis does prove a risk distinctly associated with employment

This Court in *Caterpillar Tractor* confirmed that one of "three acts" can establish whether a claimant's injury arose out of his employment. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill. 2d 52, 58 (1989) citing *Howell Tractor & Equipment Co. v. Industrial Comm'n,* 78 Ill. 2d 567, 573 (1980). Defendant-Appellee, North Pond restaurant (hereinafter "Defendant") rejects this Court's language. Response Brief and Argument for Defendant-Appellee, North Pond, p. 8-9 (Dec. 4, 2019). In *Caterpillar Tractor*, this Court stated,

> "Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties."

129 Ill. 2d at 58 citing *Howell Tractor,* 78 Ill. 2d at 573.

Defendant first takes issue with this Court's use of the adverb "typically" in the above quote, improperly concluding that the use of this word, by definition, means that not all injuries will be held to arise out of employment if it is proven that one of the "three acts" applies. *See* Resp. Br. for Def., p. 9-10; *see generally Caterpillar Tractor*, 129 Ill. 2d 52. Defendant's position, however, is unsound. Defendant takes the word "typically" out of context from the facts of *Caterpillar Tractor* and overlooks that the "three acts" analysis itself comes from prior Supreme Court decisions. *See Howell Tractor*, 78 Ill. 2d at 573; *David Wexler & Co. v. Industrial Com.*, 52 Ill. 2d 506, 510 (1972); *Ace Pest Control, Inc. v. Industrial Com.*, 32 Ill. 2d 386, 388 (1965); *see generally Caterpillar*

Tractor, 129 Ill. 2d 52. This Court has never emphasized a restraint on when injuries will be held to arise out of employment if it is proven that one of the "three acts" applies.

Defendant also misunderstands the concept of risk doctrine. The risk doctrine states that there are three categories of risk to which an employee may be exposed: (1) risks distinctly associated with one's employment; (2) neutral risks which have no particular employment or personal characteristics; and (3) personal risks. *See* 1 A. Larson, Workers' Compensation Law § 4 (2018); *see also Illinois Institute of Technology Research Institute v. Industrial Comm'n,* 314 Ill. App. 3d 149, 161 (1st Dist. 2000). The first category of risks – risks distinctly associated with one's employment – are also referred to as employment-related risks. *Id.* If a claimant is injured due to an employment-related risk, then the injury is said to arise out of the claimant's employment. *See Young v. Ill. Workers' Comp. Comm'n,* 2014 IL App (4th) 130392WC ¶ 22. One of the ways to determine if a risk is employment-related, or distinctly associated with one's employment, is to perform the "three acts" analysis. *See Caterpillar Tractor*, 129 Ill. 2d at 57. The "three acts" analysis does not omit a risk assessment as Defendant claims; rather, it proves risk by proving the injury occurred due to an employment-related risk.

II. This Court would not be adopting the positional risk doctrine by following *Caterpillar Tractor*

The positional risk doctrine maintains that "an injury may be said to arise out of the employment if the injury 'would not have occurred but for the fact that the conditions or obligations of the employment placed claimant in the position where he was injured by a neutral force…'" *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 552 (1991) citing Larson, *The Positional-Risk Doctrine in Workmen's Compensation*, 1973

Duke L.J. 761. A neutral force is defined as a risk personal to the claimant and not distinctly associated with the employment. *Id.* Defendant argues that solely applying a "three acts" analysis per *Caterpillar Tractor* would be analogous to adopting the positional risk doctrine. Resp. Br. for Def., p. 9-10. However, if a risk is distinctly associated with employment, then positional risk does not apply by definition because positional risk applies to neutral forces. As such, McAllister never asked this Court to adopt the positional risk doctrine because McAllister was injured by a risk distinctly associated with his employment, not a neutral force. Defendant's argument misses the mark.

Ultimately, there is an evident difference between a claimant sustaining an injury by mere fact of being on the employer's premises versus sustaining an injury while performing an act which the employee might reasonably be expected to perform incident to his assigned duties. For example, there is a difference between a parts inspector reaching into a box to remove a part for inspection (an act distinctly associated with employment), or a caregiver reaching to remove a dish soap while assisting a resident in showering (an act distinctly associated with employment), versus a secretary reaching to hang her coat on a coat hanger at work (an act not distinctly associated with her employment). The first and second scenarios establish an employment-related risk by virtue of the "three acts" analysis, while the third scenario would not prove an employment-related risk nor a showing that the claimant was exposed to a risk to a greater degree than the general public when hanging her coat at work. Thus, the "arising out of" requirement would not be met in the third scenario. *See also Young*, 2014 IL App (4th) 130392WC and *Autumn Accolade v. Ill. Workers' Comp. Comm'n*, 2013 IL App (3d) 120588WC.

III. A claimant need not prove an increased risk if his injury was incidental to his employment

McAllister is asking this Court to follow its precedent in *Caterpillar Tractor* in determining the compensability of his claim. *See generally Caterpillar Tractor* at 129 Ill. 2d 52. In doing so, McAllister is relying on current law and not misinterpreting it as Defendant would argue. *See* Resp. Br. for Def., p. 8. Numerous appellate court decisions from the last decade have all followed the "three acts" analysis citing to *Caterpillar Tractor*, and in doing so, have **focused on the act** of the claimant at the time of injury **to prove a risk** distinctly associated with employment. *See Steak 'n Shake v. Ill. Workers' Comp. Comm'n*, 2016 IL App (3d) 150500WC; *Mytnik v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 152116WC*; Young*, 2014 IL App (4th) 130392WC*; Autumn Accolade*, 2013 IL App (3d) 120588WC. Nonetheless, Defendant urges that the only determining factor when addressing whether an accident arose out of one's employment "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." Resp. Br. for Def., p. 9. Not only is Defendant's argument in opposition of Supreme Court precedent, it would uproot decades of lower court decisions that have used a "three acts" analysis citing to *Caterpillar Tractor*.

Moreover, this Court has previously stated in *Illinois Bell Telephone Co. v. Industrial Com*., 35 Ill. 2d. 474, 477 (1966) that in order to arise out of employment, an injury "must be of such character that it may be seen to have had its origin in the nature of, or have been incidental to, the employment, **or** it must have been the result of a risk to which, by reason of employment, the injured employee was exposed to a greater degree than if he had not been so employed." *Id*. at 477 (emphasis added). This case reiterates

that it is sufficient to meet the "arising out of" requirement if the injury is of such character that it was incidental to the claimant's employment. *See Id*. This Court's use of the word "or" shows us that claimant must prove his injury was either "incidental to" employment **or** the result of "increased risk" by nature of being exposed to that risk to a greater degree than if not so employed. *See Id*. Thus, it is evident that a claimant can meet his "arising out of" burden by proving that his injury is "incidental to" his employment instead of being forced to prove an increased risk for all everyday activities or common bodily movements, as Defendant argues. *See* Resp. Br. for Def., p. 12-13.

IV. Defendant is asking this Court to expand neutral risk which will uproot decades of Supreme Court case law

Defendant seeks for this Court to expand neutral risk and to adhere to the appellate court majority's flawed opinion in *Adcock*. *See Adcock v. Ill. Workers' Comp. Comm'n*, 2015 IL App (2d) 130884WC. Defendant argues that the term "everyday activities" is synonymous with the term "neutral activities," and thus, if one of the "three acts" happens to be a neutral activity then the neutral risk analysis must be applied. Resp. Br. for Def., p. 12-13. Defendant further claims "everyday activities such as walking, bending, turning, reaching, stretching are not 'peculiar' or 'distinctly associated' with any single position of employment." *Id*. at 12. However, Defendant's position is wrong and it plainly contradicts prior case law. Everyday activities such as reaching, bending and wiping have all specifically been held to be "distinctly associated" with employment. *See Steak 'n Shake*, 2016 IL App (3d) 150500WC, ¶ 37 (finding that claimant's injuries caused by wiping a table occurred as a result of a risk distinctly associated with her employment); *Mytnik*, 2016 IL App (1st) 152116WC, ¶ 38 (finding the manifest weight of the evidence established that

claimant's injuries caused by bending over to pick up a bolt occurred as a result of a risk distinctly associated with his employment); *Young*, 2014 IL App (4th) 130392WC, ¶ 28 (finding the manifest weight of the evidence established that claimant's injuries caused by reaching into a box to retrieve a part for inspection occurred as a result of a risk distinctly associated with his employment).

To follow Defendant's position would require this Court to overturn years of case precedent and to change the standards for what is deemed to arise out of employment. That is precisely what the appellate court majority did in *Adcock* when it expanded neutral risks to include everyday activities or common bodily movements. 2015 IL App (2d) 130884WC, ¶ 54. When the category of neutral risks was first introduced, it was intended to account for unforeseen disasters such as stray bullets, dog bites, lunatic attacks, lightning strikes, bombing and hurricanes. *See Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d 149. It was not until recently that the appellate court started adding its own interpretations of the law and, in doing so, creating its own standards for compensability pertaining to the "arising out of" requirement. *See generally Adcock*, 2015 IL App (2d) 130884WC. Rather than following Supreme Court precedent, Defendant's position merely supports the appellate court's improper expansion of law.

V. The Commission's decision was contrary to the manifest weight of the evidence and McAllister's act of kneeling was distinctly associated with his employment

The Illinois Workers' Compensation Commission's (hereinafter "Commission") decision will not be disturbed on review unless it is contrary to the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). In other words, if the factual evidence supports the Commission's conclusion, then it should not be disturbed.

See Id. However, in this case, no supporting facts from the record were ever provided to explain why McAllister's injury did or did not result from an employment-related risk. *See generally* Commission Decision and Opinion on Review (Jan. 8, 2016). Neither the Commission Decision nor Defendant's brief point to any factual evidence to support the Commission's finding that McAllister's injury was not the result of an employment-related risk. *See generally* Comm'n. Decision; Resp. Br. for Def. Instead, both ignore the actual record while discussing employment-related risks and simply circle back to an argument about applying a neutral risk analysis in this case. *Id*. By reviewing the undisputed facts, however, the manifest weight of the evidence shows that McAllister made this showing.

The undisputed facts in support of this finding are as follows: 1) McAllister was a sous chef (which, by definition, is the second ranking chef next to the executive chef) (C43); 2) His duties included preparing food, cooking food and arranging the walk-in cooler (C43); 3) McAllister and his cooks were setting up their stations for dinner service (C44); 4) One of the cooks was looking for a pan of carrots for dinner service (C44); 5) McAllister went to find the carrots in the walk-in cooler (C44); 6) McAllister checked all the shelves of the cooler and could not find the carrots (C45); 7) McAllister knelt down on both knees to look underneath the shelves in the walk-in cooler as sometimes food items would get knocked under the shelves (C45-46); 8) McAllister did not find the pan of carrots (C45,60); 9) As McAllister stood back up, empty-handed, his right knee popped and locked up (C45); and 10) Other than the floor being wet, McAllister noticed no cracks or defects in the surface (C61).

Based on these undisputed facts, McAllister was undeniably engaging in an act distinctly associated with his responsibilities as a sous chef. As second in command,

looking for a lost food product fell within his job duties, and he was kneeling on the ground for no other purpose but to find the carrots. Such an act is undoubtedly incident to his duties as a sous chef. Therefore, the manifest weight of the evidence proves that McAllister met his burden just as the claimant did in *Steak 'n Shake*. *See* 2016 IL App (3d) 150500WC.

In *Steak 'n Shake*, the appellate court affirmed the Commission's ultimate decision awarding benefits, citing to *Caterpillar Tractor*. *Id*. Significantly, the court overruled the Commission's "arising out of" analysis which employed a neutral risk analysis rather than finding that claimant's act of wiping down a table resulted from a risk distinctly associated with her employment. *Id*. at ¶ 37. The court reasoned and held as follows:

> In this case, claimant was injured while wiping down a table at work. Her unrebutted testimony established that her duties as a manager were to keep the flow of customers moving in an efficient manner. She credibly testified that, to that end, she would on occasion clean and bus tables if necessary to keep the customer flow moving. The employer provided no evidence to rebut claimant's credible testimony. Thus, the record establishes that claimant was injured while engaged in an activity that the employer might reasonably have expected her to perform in the fulfillment of her job duties. Claimant's injury, therefore, resulted from a risk distinctly associated with her employment, and the manifest weight of the evidence supports the Commission's ultimate finding of a compensable injury."

Id. at ¶ 38. The court in *Steak 'n Shake* correctly overturned the Commission's analysis, thereby reaffirming that a claimant need not prove an act peculiar to his employment to prove the "arising out of" requirement.

Notwithstanding the above, Defendant argues that the Commission's decision was correct because "[n]o 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." Resp. Br. for Def., p. 3. However, McAllister did not have to prove that his action of standing up after kneeling

was peculiar to his job. Instead, it was sufficient for McAllister to prove that the act of standing up after kneeling down in the walk-in cooler at work to look for a pan of carrots was an act distinctly associated with his responsibilities as a sous chef.

The facts of *Steak 'n Shake* and *McAllister* share many similarities yet wrongly resulted in opposite outcomes. Both claimants were in a managerial role responsible for an ultimate goal – McAllister was to provide food for dinner service (C43-44) and the claimant in *Steak 'n Shake* was to keep the customer flow moving. 2016 IL App (3d) 150500WC, ¶ 5, 38. Neither of the claimants were expressly told by their employer to perform the specific task that resulted in their injuries. (C43-46); *Steak 'n Shake*, 2016 IL App (3d) 150500WC, ¶ 5. Both claimants testified that the task in question occurred "sometimes" or "on occasion." (C45-46); and *Steak 'n Shake*, 2016 IL App (3d) 150500WC, ¶ 38. It is clear that neither case should have required a neutral risk analysis because both injuries resulted from a risk distinctly associated with employment – both claimants were engaged in acts which the employees might reasonably be expected to perform incident to their assigned duties. Thus, applying a proper analysis to McAllister's claim should have led the Commission to only one apparent conclusion: that McAllister might reasonably be expected to perform the act of kneeling in the walk-in cooler to locate food, and thus, that his injury arose out of his employment.

CONCLUSION

WHEREFORE, the Plaintiff-Appellant, KEVIN McALLISTER, respectfully requests this Court to: 1) hold that the appellate court decision was against the manifest weight of the evidence and reinstate the Arbitration Decision; 2) expressly overturn *Adcock* and the proposition that "everyday activities" or common bodily movements are not

compensable unless they pass a neutral risk analysis; 3) reaffirm that the only appropriate analysis to be used when determining whether an injury was due to an employment-related risk should be the "three acts" analysis outlined in *Caterpillar Tractor*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 10 pages.

BY: /s/ Karolina M. Zielinska
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PROOF OF SERVICE

Karolina M. Zielinska, attorney for the Plaintiff-Appellant, Kevin McAllister, certifies that on December 18, 2019, the foregoing Reply Brief of Plaintiff-Appellant, Kevin McAllister 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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