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The Traveling Employee— Is the "Reasonable and Foreseeable" Standard Eroding?

While Illinois appellate courts seem to revisit the various risks considered in an "arising out of" employment analysis time and time again, the traveling employee standard does not seem to get as much attention. A "traveling employee" is an employee whose work duties require him to travel away from his employer's premises. *The Venture-Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 17. Recall that for injuries to be compensable under the Workers' Compensation Act, an employee must establish that the injuries occurred as a result of an accident that "arose out of" and occurred "in the course of" the employment. 820 ILCS 305/2. If an employee is a "traveling employee," the "in the course of" test typically is met, as a traveling employee is deemed to be "in the course of his employment" from the time that he leaves home until he returns. *Kertis v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120252WC, ¶ 16. The analysis then turns on whether the employee can establish his injuries "arose out of" his employment. In the context of traveling employees, the Illinois Supreme Court established that an injury sustained arises out of his employment if he was injured while engaging in conduct that was reasonable and foreseeable, i.e., conduct that "might normally be anticipated or foreseen" by the employer. *Robinson v. Industrial Comm'n*, 96 Ill. 2d 87, 92 (1983).

In *Potenzo v. Illinois Workers' Compensation*, 378 Ill. App. 3d 113 (1st Dist. 2007), despite establishing that the employee was a traveling employee, the appellate court seemingly conducted a risk analysis when the claimant sustained injuries as a result of a physical assault. The employee, a truck driver, was making a delivery to a customer's location in a back alley when he was physically assaulted. *Potenzo,* 378 Ill. App. 3d at 114. He could not provide a reasoning for the assault. *Id*. The court noted that the activity that caused the employee's injuries—a physical assault in a back, public alley—was a risk to which the general public was exposed. *Id.* at 119. However, the court agreed with the employee that he was exposed to that risk to a greater degree than the general public as a result of his work as a traveling employee truck driver. *Id.* It appeared the court was going to award benefits based on that analysis. In the end, however, the court noted the activity the employee was engaged in at the time of the assault – unloading his truck – was certainly reasonable and foreseeable by his employer and therefore, his injuries arose out of his employment. *Id.*

More recently, the appellate court confirmed the suspicion that any risk analysis is entirely extraneous once it has established that the employee is a traveling employee. In *Kenaga v. Illinois Workers' Compensation*, 2017 IL App (1st) 161859WC, the employee police officer filed a claim for injuries sustained when he fell down the stairs of a public parking garage at the courthouse. Clearly dismissing the need for a risk assessment, the court stated, "under the traveling-employee doctrine, the risk to which a claimant is exposed is not part of the inquiry." *Kenaga*, 2017 IL App (1st) 161859WC, ¶ 15.

In other words, these cases suggest that the risk posed to the particular traveling employee at the time of the injury is irrelevant to determining whether the injury "arises out of" the employment relationship for purposes of recovering

under the Act. But, does the refusal to consider the risk associated with the activity create an almost *per se* rule for compensability, as long as the person is a traveling employee? A rule that fails to take into account a risk analysis for traveling employees could be said to tiptoe around the fine line that is positional risk. It is long settled that Illinois has not adopted the positional risk doctrine. *See Illinois Institute of Technology Research Institute v. Industrial Comm'n,* 314 Ill. App. 3d 149, 163 (1st Dist. 2000) ("It is not enough that the employment placed claimant in a particular place at a particular time. This is known as positional risk and Illinois has expressly and repeatedly rejected this doctrine.") However, eliminating the risk assessment when the employee is a traveling employee could create a situation where an employee is awarded benefits simply because "the employment placed claimant in a particular place at a particular time." *Illinois Institute*, 314 Ill. App. 3d at 163.

For example, consider an employee that drives to the employer's premises every morning and loads his delivery truck. After loading, he leaves to make deliveries throughout the state. It is clear he is a traveling employee as contemplated by the case law. Now, assume he stops at a customer's location and makes a delivery. After closing the door to the trailer of his truck, he begins the walk back to the cab to drive to his next stop. While walking beside his truck, he trips over his shoelace and falls, sustaining injuries. Per *Kenaga*, it is not necessary to note that he was not carrying anything relative to his employment, nor was he in a hurry. It is not necessary to note there were no defects in the area beside his truck, he wasn't inspecting the truck for anything, or that it was a beautiful, sunny day with no weather elements affecting him. Because he is a traveling employee, the inquiry is whether or not it is "reasonable and foreseeable" to his employer that he would be walking beside his truck. Certainly, that's the case. There is no evidence he had deviated from his employment.

But isn't awarding this employee benefits exactly the positional risk doctrine that Illinois has rejected? The only fact associated with the truck driver's employment under this hypothetical is the fact that he was "on the clock" at the time of the fall.

Perhaps more extreme, consider the same truck driver scenario as above, but instead of tripping over his shoelaces, he gets stung by a single bee, has an allergic reaction, and needs to be hospitalized. Is it "reasonable and foreseeable" that an employee could get stung by a bee walking beside his truck in a job that requires him to be outside? Probably so. Is he at any greater risk of a bee sting than a member of the general public? Absent some additional evidence otherwise, no. Yet he likely would be awarded benefits simply by virtue of his status as a traveling employee. Consider this too: his co-worker, who is not a traveling employee and works only in the office, gets stung by a single bee, has an allergic reaction, and needs hospitalization the same day the truck driver does. The truck driver's incident would likely get him workers' compensation benefits, but his co-worker's would not.

Continuing with that comparison, consider a bank branch manager whose job requires her to travel to different branches every day. Is she a traveling employee? While walking through the parking lot to one of the bank locations, she trips in a pothole in the parking lot and falls, sustaining injuries. One of that location's regular tellers (not a traveling employee) trips in the same pothole. The branch manager is likely to be awarded workers' compensation benefits since it is "reasonable and foreseeable" she would be walking through that parking lot, while the teller is not, since she was at "no greater risk."

Assuming benefits are awarded in the above scenarios, and absent some evidence of an obvious deviation from employment in similar circumstances, is the "reasonable and foreseeable" analysis even necessary? If employers are expected to reasonably foresee that an employee could trip over his shoelaces beside his truck doing no activity associated with his employment other than walking, what would not be "reasonable and foreseeable?" The dichotomy created by

application of the "reasonable and foreseeable" analysis (or lack thereof) without any risk assessment simply does not make sense. If the argument for a "reasonable and foreseeable" standard is due to the *different* risks that present themselves to traveling employees—whether they be different by virtue of quantity or quality, wouldn't an assessment of the three—tiers of risks (neutral, personal, employment) address those issues, but also allow for more consistency in situations like those above?

Although recent case law seems to suggest a risk analysis is not necessary when the claimant is a traveling employee, defense attorneys should continue to address the activity the employee was engaged in at the time of the alleged accident using the theories of compensability considered in a risk analysis without officially referencing the risks. Failing to do so seems to accept a positional risk theory of compensability. We have to continue to fight compensability on unreasonable claims like those considered above in order to avoid the traveling employee becoming an all-encompassing label for benefits.

About the Author

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