

# WORKERS' COMPENSATION UPDATE: Compensability in IL Expanded to Cover Certain Personal & Neutral Risks

## Labor & Employment Law Update

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In a recent workers' compensation case, the personal and neutral risk defenses have been seriously eroded via an appellate court created exception based on the number of times an employee is exposed to a neutral risk (no greater risk than the general public/no defect) with employer knowledge of the personal condition.

In the case of *Village of Villa Park*, a community service officer suffered from a right knee condition related to a prior non-work injury (fall on ice at his vacation home). Due to the injury suffered in that accident, the petitioner was scheduled for surgery, at the time of the work incident. He continued to work his regular duties which were clerical in nature and conducted on the main floor of the building. These occasioned him to use a normal stairway open to the general public to the lower level of the building, which contained locker rooms, a briefing room, a lunch area and a shooting range.

Before his shift, he would descend the stairway to the locker room to change into his uniform. He would go to lunch, acquire rain gear or other equipment from the lower level during the day. At a minimum, he would traverse the stairs six times per day. The stairs were without defect and consisted of ten steps to a landing and an additional ten steps to ground level. At the time of the accident, he was returning to the lower level locker room, when his knee gave out after three steps, causing him to fall seven stairs to the landing below. He injured his back and right knee. A denial of the right knee injury was not presented to the appellate court.

The appellate court noted the two types of risks involved in this case: risk personal to the employee and neutral risk. The weak knee is a personal risk. The stairs are a neutral or common risk. The court found six times per day use was sufficient to expose the employee to a "common risk" **more** frequently than that to which the general public was exposed. The risk was increased on a quantitative basis because he was "continually forced to use the staircase" by his employer for his personal comfort and for work-related activities. The court also noted that the employer knew of the prior knee injury but placed him in a

position of an increased risk based on a quantitative analysis. The risk was no longer neutral because of the frequency (repetitiveness) with which the claimant was required to traverse the stairs with his known weak knee.

This appears to create a new exception to the general rule of non-compensability for personal risk in an area of neutral risk where the employer has knowledge of the claimant's pre-existing condition or weakness. Of course, this not only expands the compensability of fall down cases, but brings into question where (how many times per day) is the quantitative line drawn and what action should be taken when the employer has "knowledge" of the pre-existing condition or weakness. Apparently, judicial activism on the part of the appellate courts to expand compensability is alive and well.

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