

LEGAL LINES

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Front of the Line

Is The Normal Daily Activity Exception to Work Related Accidents on Life Support?

By William P. Dewyer JD

The general rule in workers' compensation is that the employee need only prove some active phase of the employment was a causative factor in the resulting injury. However, there are limitations to this rule. In a situation where an employee's health has so deteriorated that any normal daily activity could be an overexertion, or where the activity that the employee is engaged in presented no greater risk than that which the general public is exposed to, compensation will be denied. This "normal daily activity exception" was specifically addressed in *Sisbro v. Industrial Commission*, 207 Ill.2d 193, 797 N.E.2d 665 (2003).

In *Sisbro*, the Illinois Supreme Court overturned an Appellate Court decision denying compensation. The court held that the ruling was against the manifest weight of the evidence, as compensation should be awarded if a work related injury aggravates a preexisting condition.

The claimant in *Sisbro* was a delivery truck driver who was required to load and unload products from his truck at various grocery stores. In addition, he was a 54 year old male who had type II diabetes and suffered, without dispute, from diabetic neuropathy. While at work on March 26, 1998, this Petitioner went to a dairy to pick up a load of dairy products. While exiting his vehicle he turned his ankle after stepping into a pothole at the delivery site. This caused immediate pain and swelling. He subsequently developed Charcot arthropathy.

The Commission's award of compensability was ruled, by the Appellate Court, to be against the manifest weight of the evidence. It was noted that the medical evidence established that a normal daily activity would have been sufficient to cause Charcot arthropathy in the claimant, and therefore, compensation should be denied.

In overturning the Appellate Court Decision, the Supreme Court found that the Appellate Court was incorrect when it held that a claimant whose preexisting condition was aggravated by an accident at work is not entitled to benefits if his health has so deteriorated that his condition of ill-being could have been produced by normal daily activity. The argument made by the Respondent in

Sisbro was essentially, that even if the claimant can establish an injury at work that could have aggravated a preexisting condition, compensation should be denied if his condition has so deteriorated that any daily activity could have caused the same aggravation. While the Appellate Court agreed with this argument, the Supreme Court did not.

In *Sisbro*, the Supreme Court noted that employers take their employees as they find them and even if an employee has a preexisting condition, compensation will not be denied if it can be established that the employment was a causative factor in the aggravation. *Sisbro v. Industrial Commission*, 207 Ill.2d 193, 205, 797 N.E.2d 665 (2003)

In its decision, the Supreme Court distinguished the line of cases cited in *Sisbro* standing for the proposition that the claimant cannot receive benefits, where the condition of ill-being could have been caused by normal daily activities. The Supreme Court went on to recognize that the mere fact that an event or injury happened while at work is not automatic entitlement to compensation. However, one must judge whether the accident came from the disease alone, or whether the employment contributed to it. In other words, the issue is whether the injury is a result of the disease alone, or of the disease and employment taken together?

One of the cases that the Court distinguished was *County of Cook v. Industrial Commission*, 69 Ill.2d 10, 370 N.E.2d 520 (1977). In that case, the Petitioner had a ten (10) year history of hypertension, with past hospitalization. The petitioner suffered a stroke at work as she pushed her chair back from her desk in preparation to go to lunch. Expert testimony was presented by the employer noting no causal relationship between work duties and the Petitioner's stroke and subsequent disability. The Supreme Court held in *County of Cook*, that there was no causal connection between the employment and the Petitioner's stroke.

Once the Court distinguished each of the cases cited for the proposition that the claimant was not entitled to benefits, it was noted that in each of those cases, the manifest weight of the evidence

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The Power Line News From The World Of Worker's Compensation

By John F. Power III JD

April 30, 2003—Belated congratulations go out to attorney Carol Cesaretti and **Hobbs Corporation**, now known as **Hobbs Honeywell**, in their **zero award** before Arbitrator Giordano on the issue of causal connection and average weekly wage.

October 20, 2003—Congratulations go out to Attorney Bill Dewyer and **Superior Ambulance Company** for their recent **zero award** before Arbitrator Rybacki on the issue of accident arising out of and in the course of the employment.

November 20, 2003—on this date, Commissioners David Akemann, representing the employer community, Barbara Sherman, representing the employee community, and Jacqueline Kinneman, representing the employee community, were approved by the Senate Executive Committee and subsequently the full Senate.

Held, pending further reviews, were the appointments of Commissioners James DeMunno, representing the employer community, Chairman Dennis Ruth and James Serkland, representing the public community, and Paul Rink, representing the public community. It is noted that these appointments were held in the Executive Committee and are anticipated to be represented to the Committee with subsequent review by the full Senate in mid-January 2004.

In the interim, the acting commissioners will continue to render decisions consistent within their charge under the statute.

November 2003—Industrial Commission announced the appointment of three (3) additional arbitrators consisting of: Kurt Carlson, Paula Gomora, and Jennifer Teague. All three arbitrators are experienced workers' compensation attorney's, practicing in various locales. Mr. Carlson has both petitioner and respondent expe-

rience. After training, the new arbitrators will be assigned as follows: Kurt Carlson-Chicago; Paula Gomora-Woodstock, DeKalb and Kankakee; Jennifer Teague-Carlyle, Whittington and Mount Vernon.

Additional changes being announced effective January 1, 2004, Arbitrator Akemann will be assigned to Wheaton and beginning February 1, 2004, Arbitrator Falcioni will be assigned to Bloomington and Ottawa; and Arbitrator Dibble will be assigned to Bellville and Herrin.

December 19, 2003—Arbitrator Raymond J. Rybacki announces his retirement from the Industrial Commission effective December 31, 2003/ It is noted that Arbitrator Rybacki has served 35 years as an Arbitrator and 3 years as the Chairman of the Industrial Commission.

Today and every day, please remember the following rules relative to emergency petitions:

1) A response to a 19(b) Petition shall be filed within (15) fifteen days of service of the Petition for immediate hearing under section 19(b). Failure to respond timely or in good faith may result in the assessment of attorney's fees under Section 16 of the Workers Compensation Act. (Rules governing practice before the Industrial Commission, Section 7020.80)

2) Never forget that a 19(b-1) response must be filed within fifteen (15) days after the receipt of a filed 19(b-1) Petition. An employer who does not timely file and serve a written response without good cause may not introduce any evidence to dispute the claim of the employee, but may cross-examine the employee or any witness brought by the employee and otherwise be heard. (Illinois Worker's Compensation Act, Section 19 (b-1).

March 11, 2004—Save the date for our annual Power & Cronin **St. Patrick's Day** celebration!

*End of an era—
Arbitrator Rybacki
retires!*

*New Arbitrators
announced*

*St. Patrick's Day
Celebration with Power
& Cronin, Ltd.*

March 11, 2004

Med Line—Technology Update

By Maureen T. Sherlock RN MPH

Recalling back to the late 1980's when the MRI scan was introduced with its limited applications, we questioned whether it would really replace the CT scan. Now, few question the MRI because it is so commonplace. A new scan, the **PET/CT** scan by Siemens is being introduced and it is considered the most important innovation in health care in 100 years.

The **PET/CT** scan (Positron Emission Tomography and Computed Tomography) identifies "hot spots" in the body that are diseased. It is presently utilized in cardiology to assess damage caused by infarction. In oncology, it is used to detect cancer and isolate radiation to tumors. Utilization and application for use on multiple body systems is already anticipated and being tested. Presently, insurance already covers 30 diagnostic codes. The scan can detect cancer in a patient before symptoms or definitive diagnosis of cancer has been made. Unfortunately, cancer detection, is not covered by insurance! The scan is painless, taking between 15-30 minutes to complete and costing approximately \$3,000.

Hospitals offering this procedure are limited. At this time, only one Chicagoland hospital, **Advocate Illinois Masonic Medical Center** has the ability to offer the **PET/CT** scan.

Between the Lines—Legislative Update

By Daniel J. Cronin JD

In November and December of 2003 during the legislative veto session, there was no substantive legislation passed regarding workers' compensation. There is still talk, however, about the lawsuit being filed by interested businesses to challenge the constitutionality of the version of Industrial Commission funding to the General Revenue Fund, which emanated from Senate Bill 1903 which was enacted as Public Act 93-32. This attempts to permit funds in excess of the Industrial Commission budget to be funneled to the General Reserve Fund.

Relative to businesses, it is noted that House Bill 810 was passed in the final hours of the veto session, this being an agreed bill that was negotiated between businesses and other relevant parties regarding unemployment taxes. This bill was signed into law in late December 2003 by Governor Blagojevich.

The Normal Daily Activity Exception

By Bill Dewyer JD Article continued from Page 1

established that the employee's condition was caused by the normal degenerative process of the pre-existing condition. The Court then found that in this case, the claimant twisted his ankle while performing work duties and therefore, the injury was causally connected to the onset of Charcot. *Sisbro v. Industrial Commission*, 201 Ill.2d 193, 214, 797 N.E.2d 665 (2003).

The limitation of the general rule that compensation is available to a claimant as long as a work related injury was a causative factor in the aggravation or acceleration of the preexisting condition is historically rooted in heart attack claims. In their most recent decision, the Supreme Court in *Twice Over Clean v. Industrial Commission*, 205 Ill.2d 650, 796 N.E.2d 1060 (2003), ordered the Appellate Court to reconsider the decision denying a Commission award for a heart attack claim, in light of the *Sisbro* decision.

In *Twice Over Clean*, the claimant, working as a laborer, removing 45 pound bags of asbestos from an unheated building during cold weather, was denied compensation where the medical evidence showed a 90 percent occlusion of the right coronary artery, thus establishing the claimant's heart condition was so far deteriorated that any stress, even that of normal daily activity could have brought about the claimant's heart attack. It was the lack of a causal relationship between the employment and the injury that was noted by the Court in *Twice Over Clean* to be the distinguishing factor. The Supreme Court remanded to the Appellate Court to decide *Twice Over Clean* based upon its decision filed May 22, 2003 in *Sisbro*.

The mere fact that the event occurs at work does not necessarily entitle the claimant to compensation. Where medical evidence establishes that the employee's condition was a "time bomb" that might have occurred with any normal daily activity, the injury does not arise out of employment. Where evidence indicates the preexisting condition was the actual cause of the condition of ill-being, compensation will be denied, as was the case in *County of Cook*.

In practical terms, what is necessary for evidentiary purposes, is to determine whether the claimant's work further deteriorated, aggravated, precipitated, or accelerated the preexisting condition. If the preexisting condition was found to be affected by the work activity then it is deemed to have been a **causative factor** arising out of one's employment.

The *Sisbro* decision has arguably defined and limited the normal daily activity exception with the clarification that if the preexisting condition alone was the cause of the injury, compensation will be denied as any normal activity could have caused the injury and the resulting disability. However, if an adequate basis exists that the occupational activity engaged in aggravated or accelerated a preexisting condition, then a causative factor will be found with a concomitant compensability finding. In *Sisbro*, based upon facts and the record, the court found that an award of compensation must be confirmed.

While *Sisbro* seems to narrow the defenses of employers regarding preexisting conditions, the specific facts of each case controls the outcome. Implementation of the normal daily activity and the time bomb defenses, while somewhat limited in the context of the *Sisbro* decision, are still very much alive and available as defenses in these types of claims, if the claim is thoroughly developed.

Therefore, the normal daily exception to be used there cannot be a "pothole" that will "trip" you up!

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What's My Line

By Tammy A. Paquette JD

I have been employed at Power & Cronin since June, 2001, initially as a law clerk and in 2003 becoming a licensed attorney. I grew up in the southern suburbs of Chicago and went to Loyola University where I earned my Bachelor of Arts degree. I am a graduate of DePaul University Law School, and received my Juris Doctorate. While in law school, I was the Assistant Notes and Comments Editor on the *DePaul Journal of Health Care Law*. I began my professional legal career as a law clerk for Commonwealth Edison. In their legal department, I was exposed to different areas of law, including: personal injury, environmental law, employment law, and workers' compensation.

After attaining professional experience at Commonwealth Edison, I moved to the Illinois Attorney General office in the Child Welfare Litigation Bureau. At that stage, I was able to obtain a limited license to practice law under governmental provision, Supreme Court Rule 711, which permits arguing cases as law student in the Circuit Court of Cook County. Additionally, I had the opportunity to draft numerous court pleadings and briefs supporting significant legal issues with peoples lives held in the outcome.

Working as a law clerk prior to becoming licensed and practicing in the area of workers' compensation permitted me to gain academic exposure to workers' compensation as well as practical exposure to the systems required to navigate the complexities of the Illinois Industrial Commission. These experiences permitted me to learn the ropes prior to being licensed and thus, has placed me in a better position to effectively advocate on behalf of clients.

I am married and have two young school aged children who consume many of my hours enjoying their ice skating sports!

Power & Cronin, Ltd. is an Illinois law firm with a state-wide litigation practice. Our lawyers have trial and appellate experience in the areas of:

General Civil Litigation

Municipal Law

Insurance Defense

Civil Rights Defense

Professional Liability Defense

Workers' Compensation Defense

Employment Litigation Defense

Tort Defense of Municipalities, Individuals and Businesses

Our clients include a wide range of employers, local governments, insurance companies, public and private risk management pools, self-insured companies, third-party administrators and service companies.

At Power & Cronin, Ltd., we pride ourselves on expert legal representation and personal attention to details. We interact with our clients to assist in developing procedures to contain current losses and avoid losses in the future. Additionally, we provide aggressive and cost efficient representation in order to protect our clients' interests.

We thank you for considering our firm to represent you and we look forward to working with you in the future.

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