Illinois Association of Defense Trial Counsel
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THE NORMAL DAILY ACTIVITY EXCEPTION TO WORKERS' COMPENSATION CLAIMS

Kevin J. Luther
Heyl, Royster, Voelker & Allen
Rockford, Illinois

Kenneth F. Werts
Craig & Craig
Mt. Vernon, Illinois

John P. Bergin
Brann Strobel Lorenz Bergin & Millman
Chicago, Illinois

I. Risk Analysis in Illinois Workers' Compensation

The state of Illinois is approaching its 100th anniversary of the Illinois Workers' Compensation Act. Workplace injuries are the source of much litigation here in Illinois, as well as in other jurisdictions. This article addresses whether or not an "injury" is a compensable "accident" within the meaning of the statutory workers' compensation system. Most states, including Illinois, have adopted the entire British Compensation Act formula, which requires that an injury "arise out of and in the course of employment." *See,* Larson, WORKERS' COMPENSATION, Section 6.10 (1997).

The "arising out of" portion of this formula refers to "causal origin," and the "course of employment" portion refers to time, place, and circumstances of the accident in relation to the employment. Each part of this "accident" standard must be separately established and proven with evidence to support compensability. This article will primarily address the "arising out of" portion of the compensability test.

Exactly how this portion of the compensability test is analyzed depends on the jurisdiction. Several decades ago, the dominant rule in American compensation law was known as the "peculiar-risk doctrine." *See,* Larson, WORKERS' COMPENSATION, Section 6.20 (1997). Under the peculiar-risk doctrine, the claimant had to show that the source of the harm was in its nature peculiar to his or her occupation. For example, even if the claimant's work subjected him or her to a tremendously increased quantitative risk of injury by heat or cold, compensation could be denied with the conclusion that everyone was subject to this same weather. This rule, known as the peculiar-risk doctrine, has now been replaced by what is known as the "increased-risk test."

The increased-risk test is the prevalent test in the United States today. *See,* Larson, WORKERS' COMPENSATION, Section 6.30 (1997). This test differs from the peculiar-risk test in that the distinctiveness of the employment risk can be outweighed by the increased quantity of the risk that is qualitatively not peculiar to the employment. Therefore, even if the risk was common to the public, if it was actually a risk of his or her employment, then compensability will be established.

Illinois is an increased-risk jurisdiction. *See, Brady v. Industrial Comm'n*, 45 Ill. 2d 469 259, N.E.2d 272 (1970). The Illinois Supreme Court in *Brady* rejected a rule known as the "positional-risk doctrine." The positional-risk test provides that an injury arises out of employment if it would not have occurred, but for the fact that the conditions and obligations of the employment place the claimant in the position where he or she was injured. This test would provide that compensability will follow if the employment relationship itself placed the employee in a particular place at a particular time when he or she was injured by some "neutral" force that was neither personal to the claimant nor distinctly associated with the employment. *See,* Larson, WORKERS' COMPENSATION, Section 6.50 (1997).

With respect to the "arising out of" requirement, many jurisdictions hold that even if "usual" exertion leads to an injury, then the injury is deemed to be accidental and therefore compensable. *See,* Larson, WORKERS' COMPENSATION, Section 38.20 (1997). This is known as the "usual-exertion rule." Many jurisdictions, however, require a showing of "unusual exertion" in order to relate an injury to employment. *See,* Larson, WORKERS' COMPENSATION, Section 38.1(b) (1997). On this issue of "arising out of" or "medical causation," the state of Illinois does require "unusual exertion." *See, Illinois Bell Telephone v. Industrial Comm'n*, 35 Ill. 2d 474, 220 N.E.2d 435 (1966). Approximately a third of all jurisdictions require a showing of unusual exertion to relate, for example, a heart attack to employment. *See,* Larson, WORKERS' COMPENSATION, Section 38.31(b) (1997).

II. Pre-Sisbro — Normal Daily Activity Exception

The "arising out of" portion of the compensability test concerns itself primarily with medical causal connection. A frequently occurring fact pattern in the context of the "arising out of" portion of the compensability test are those situations where a claimant has a substantial pre-existing disease or medical condition. It has long been held that a respondent takes its employees as it finds them. *See, Rock Road Construction Co. v. Industrial Comm'n*, 37 Ill. 2d 123, 227 N.E.2d 65(1967). A compensable injury will be found on a showing that a pre-existing illness was aggravated or accelerated by the employment. *See*, *Illinois Valley Irrigation v. Industrial Comm'n*, 66 Ill. 2d 234, 362 N.E. 2d 339, 5 Ill.Dec. 868 (1977). If an employee's physical structure gives way under the stress of his or her usual labor, then the injury is an accident which arises out of his or her employment. To establish compensability, the employee need only prove that some act or phase of the employment was a medical causative factor in the resulting injury. *See, Wirth v. Industrial Comm'n*, 57 Ill. 2d 475, 312 N.E.2d 593 (1974).

Many of the factual situations involved in this "arising out of" issue are situations where an employee suffered a heart attack. The mere fact that an employee might have suffered a fatal heart attack, even if not working, is immaterial because the issue before the Industrial Commission is whether or not the work that was performed by the claimant constituted a causal factor in the heart attack. *Laclede Steel Co. v. Industrial Comm'n*, 6 Ill. 2d 296, 128 N.E.2d 718 (1955). A limitation to this general rule is that where it is shown that the employee's health has so deteriorated that any normal daily activity is an overexertion, or where it is shown that the activity engaged in presents risks no greater than those to which the general public is exposed, then compensation will be denied. *County of Cook v. Indus. Comm'n*, 68 Ill. 2d 24, 368 N.E.2d 1292, 11 Ill.Dec. 546 (1977); *Illinois Bell Telephone Co. v. Indus. Comm'n*, 35 Ill. 2d 474, 220 N.E.2d 435 (1966).

The above limitation is consistent with the fact that Illinois is an "increased-risk" jurisdiction, as opposed to a "positional-risk" jurisdiction. This limitation known as the "normal daily activity exception" is also consistent with the fact that Illinois requires "unusual exertion to prove the "arising out of," element.

A review of Illinois case law reveals that the normal daily living exception in Illinois had its genesis in the Illinois Supreme Court case of *National Malleable & Steel Castings Co. v. Industrial Commission*, 32 Ill. 2d 184, 204 N.E. 2d 748 (1965). The claimant was employed by the respondent for approximately 20 years. The widow of the claimant testified that her husband complained of pains in his chest and shortness of breath for about four or five days prior to the date of the alleged worker's compensation accident. The physicians who testified acknowledged that during the four or five day period before the alleged date of the accident, the claimant-decedent showed definite heart disease and that any exertion whatsoever would be both harmful and a precipitating factor, and would include such things as driving to work, going out to visit the doctor, or walking up and down stairs, all of which were done by the decedent. On the day before the alleged accident, the decedent worked ten hours, and on the day of the accident, the decedent reported to work but almost immediately reported to the respondent's first aid department complaining of pain across his chest and in both arms. No witnesses saw the decedent performing any work on the date of the occurrence.

The Illinois Supreme Court in *National Malleable Co.* noted that if a man's heart gives way under the stress of his normal duties and there is medical evidence to establish causal connection between the disability or death and the work performed, then payment of compensation is required. *See*, *Clifford-Jacobs Fortune Co. v. Industrial Comm'n*, 19 Ill. 2d 236, 166 N.E. 2d 582 (1960). This is the rule even in those situations where the employee had a previous existing heart condition which is aggravated by performing physical labor for the employer. *See, Town of Cicero v. Indus. Comm'n*, 404 Ill. 487, 89 N.E. 2d 354 (1950). The court noted that a review of leading heart cases at the time established, in each case, that a heart attack while on the job was determined to be compensable, if it

was attributable to specific incidents. *National Malleable Co.*, 32 Ill. 2d at 188, 204 N.E.2d at 750. The Supreme Court felt that there was no evidence showing that the initial heart attack bore a relationship to the employment, and the evidence showed that the condition of the employee was the same before, during, and after his brief period of time at the workplace on the date of the occurrence. The court then made the following statement which gives rise to the normal daily living exception here in Illinois:

> There are no Illinois decisions directly on point on this issue. The problem, however, has been reviewed by the New York Court in the case of *Burris v. Lewis*, 2 N.Y. 2d 323, 141 N.E.2d 424 (1957). There the court, in denying the claim for compensation, stated, "But where, as here, a heart has deteriorated so that any exertion becomes an over-exertion, where the mere circumstance that the employee was engaged in some kind of physical labor is what impels the doctor to testify that his work caused his death, we would have reached a point, if this award were to be upheld, where all that is necessary to sustain an award is that the employee shall die of heart disease."

National Malleable Co., 32 Ill. 2d at 189, 204 N.E.2d at 750-51.

The Supreme Court in *National Malleable Co.* went on to reverse the decision of the Industrial Commission which initially found that the claim was compensable. Id. at 190, 204 N.E.2d at 751.

The Illinois Supreme Court again considered this issue in a heart attack case the next year. In *Illinois Bell Telephone Co. v. Industrial Commission*, 35 Ill. 2d 474, 220 N.E.2d 435 (1966), the claimant-decedent previously suffered a heart attack (unrelated to his work) but then returned to work for the respondent in a light clerical position. On the day of his death, he was delivering papers to another office approximately four blocks away. He started feeling ill and was driven home. He had dinner, but later that evening he died due to a myocardial infarction. Id. at 475, 220 N.E.2d at 436.

The Illinois Supreme Court noted that an accidental death or injury, to be compensable, must not only be sustained in the course of employment but also must arise out of it. It must be of such a character that it may be seen to have its origin in the nature of, or have been incidental to, the employment, or it must have been the result of a risk which, by reason of the employment, the injured claimant was exposed to a greater degree than if he had not been so employed. *See, Id.* at 477, 220 N.E. 2d at 437. The court stated that if one's heart has deteriorated so that any exertion becomes an overexertion, it is not enough to merely show that he or she had engaged in some kind of physical activity before suffering the heart attack to establish compensability. *Id.*.

Following these two Illinois Supreme Court opinions, decisions in Illinois have continued to acknowledge the normal daily activity exception as well as the limitation where it is shown that the activity engaged in presents risks no greater than those to which the general public is exposed. In those situations compensation will be denied. This doctrine was followed by the appellate court in *Sisbro v. Industrial Commission*, 327 Ill. App. 3d 868, 764 N.E.2d 1163, 262 Ill.Dec. 46 (4th Dist. 2002 (hereafter *Sisbro I*). However, in 2003 the Illinois Supreme Court reversed *Sisbro I*. *Sisbro v. Indus.Comm'n*, 207 Ill. 2d 193, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003) (hereafter *Sisbro II*). Because of the reversal by the Supreme Court, as well as the fact that *Sisbro II* is the most recent Illinois Supreme Court decision discussing workers' compensation, a critical analysis of both the *Sisbro I* and *Sisbro II* decisions is required to determine if the normal daily living exception still exists in Illinois, and if so, how it is to be applied.

III. *Sisbro I* — The Appellate Court Decision

In *Sisbro I*, the appellate court addressed the issue of whether compensation may be denied when the claimant's health is so deteriorated that any normal daily living activity constitutes an overexertion. (*Sisbro I*, 327 Ill. App. 3d 868, 764 N.E.2d 1163, 262 Ill.Dec. 46 (4th Dist. (2002) rev'd.

207 Ill. 2d 193, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003). The court stated the well-known premise that the claimant has the burden of proving all elements of the claim by a preponderance of the evidence. Further, the employer takes the employee as it finds him, and an employer is not relieved from providing compensation by the mere fact that the condition of ill-being for which compensation is sought was brought on by a condition which was pre-existing. *O'Fallon Sch. Dist. No. 90 v. Indus. Comm'n*, 313 Ill. App. 3d 413, 417, 729 N.E. 2d 523, 526, 246 Ill.Dec. 150, 153. (5th Dist. 2000). The court noted the claimant is entitled to compensation if he or she can demonstrate that his work-related accident was a causative factor in the aggravation or acceleration of his or her pre-existing condition. However, there is a limitation to the rule when the employee's health is so deteriorated that any normal daily activity is an overexertion or where it can be shown that the activity engaged presented risks no greater than that to which the general public is exposed. *County of Cook v. Indus. Comm'n*, 69 Ill. 2d 10, 17, 370 N.E. 2d 520, 523, 12 Ill.Dec. 716, 719 (1977).

The court noted that these were two distinct exceptions. In *Sisbro I* the court found that the "normal daily activity" exception applied and held that a claimant is not entitled to compensation regardless of whether the condition of ill-being was caused by work-related aggravation of a pre-existing condition if the physical condition has so deteriorated that the condition could have been produced by normal daily activity. *Sisbro I*, 327 Ill. App. 3d at 872, 764 N.E.2d at 1168, 262 Ill.Dec. at 51.

The agreed facts were that on March 26, 1998, the claimant twisted his right ankle when he stepped into a pothole exiting his truck while delivering dairy product for his employer. It was also agreed that the claimant subsequently was diagnosed with a degenerative condition in his foot known as Charcot arthropathy.

The claimant's treating physician, Dr. Brennan Reed, testified that he treated the claimant for several years for foot problems related to the claimant's diabetes, including ulcerations. He testified that the claimant suffered from diabetic neuropathy which caused decreased sensitivity in the extremities to pain and temperature therefore weakening the individual's protective mechanism. Id. at 869, 764 N.E.2d at 1165, 262 Ill.Dec. at 48.

Dr. Reed testified he saw the claimant on April 6, 1998, which was 11 days following the incident. The claimant told Dr. Reed that he had twisted his ankle and had pain in his foot and ankle, but that the pain had decreased since the incident. Dr. Reed found no swelling and detected no pathology when he palpitated the foot. Therefore, he did not x-ray the foot. Two weeks later the claimant was complaining of swelling and pain in the foot. X-rays revealed marked chronic degenerative changes as well as the presence of multiple osteophytes. Dr. Reed made a diagnosis of acute onset of diabetic Charcot osteoarthropathy. Charcot, as described by Dr. Reed, was a breakdown of the joints and the extremities, and was usually initiated by trauma. Even a "very minor trauma" can initiate the condition. He further testified that even insidious trauma, or trauma of which the claimant may not be aware, could cause the condition. Dr. Reed connected the Charcot osteoarthropathy to the incident of March 26, 1998. *Id*. 870, 764 N.E. 2d at 1165-66, 262 Ill.Dec. at 48-49.

Dr. John Gragani examined the claimant at the request of the employer pursuant to Section 12 of the Workers' Compensation Act, 820 ILCS 305/12 (West 2002). Dr. Gragani agreed with the claimant's treating physician that the claimant had Charcot osteoarthropathy in the right foot and ankle. He was of the opinion that the Charcot osteoarthropathy in the ankle could not have been caused by the accident. He explained that the x-rays of April 24, 1998, indicated advance deterioration which could not have developed in the one month time period. He indicated that the condition does not develop in a matter of days but occurs "over the course of several months." He indicated that even minor trauma can result in a Charcot joint. *Sisbro I*, 327 Ill. App. 3d at 871, 764 N.E.2d at 1166, 262 Ill.Dec. at 49.Dr. Gragani also rejected the possibility that the claimant could have aggravated a pre-existing Charcot condition by twisting his ankle. The arbitrator awarded temporary total disability (hereafter "TTD") payments and medical expenses. The Industrial Commission affirmed the

arbitrator's decision on causal connection. The Circuit Court of Adams County, 00 MR 0024, Honorable Dennis R. Cashman, confirmed the Commission's decision. On appeal, the appellate court reversed the circuit court's decision.

As support for its reversal, the appellate court looked to the case of *County of Cook v. Industrial Commission*, 69 Ill. 2d 10, 370 N.E.2d 520, 12 Ill.Dec. 716 (1977), which held that the limitations to the aggravation rule have two distinct exceptions. The first of the two exceptions is the normal daily activity exception. The second exception occurs when the activity engaged in by the petitioner presents no greater risk than that to which the general public is exposed. *Sisbro I*, 327 Ill. App. 3d at 872, 764 N.E.2d at 1167, 262 Ill.Dec. at 50.

The court distinguished the phrases "would have" and "could have." The court noted "could" indicates a possibility or probability and that "would" indicates likelihood or certainty. The court also noted that there are cases finding 'the normal daily activity' exception is satisfied by testimony that such activity 'would have' caused the claimant's condition. The court went on to note that, [t"]he probability need not be so strong to satisfy the exception." Id. at 873, 764 N.E.2d at 1168, 2662 Ill.Dec. at 51.

The court rejected the claimant's position that the matter did not involve an aggravation of a pre-existing condition. The court found that there is no more reason to believe that Charcot arising from neuropathy, combined with trauma, is a "new condition." Therefore, the court analyzed the matter as a case involving the question of whether or not the pre-existing condition was aggravated by the accident. *Id.* The court, in ruling against the claimant, relied on the cases of *County of Cook v. Indus. Comm'n*, 68 Ill. 2d 24, 368 N.E.2d 1292, 11 Ill.Dec. 546 (1977), *Greater Peoria Mass Transit Co. v. Industrial Commission*, 81 Ill. 2d 38, 405 N.E.2d 796, 39 Ill.Dec. 817 (1980), and *Hansel & Gretel Day Care Center v. Industrial Commission*, 215 Ill. App. 3d, 284, 574 N.E.2d 1244, 158 Ill.Dec. 851 (3rd Dist. 1991).

In *County of Cook*, a clerk in the Recorder of Deeds office had a pre-existing aneurysm rupture as she rose from her desk to go to lunch. 68 Ill. 2d 24, 368 N.E.2d 1292, 11 Ill.Dec. 546 (1977). The *Sisbro I* court noted that in *County of Cook*, the long-term hypertension and pressure on the aneurysm would be increased by such daily activities as putting on shoes and stockings, getting out of bed, or bending over below the level of the heart. 327 Ill. App. 3d at 875, 764 N.E.2d at 1169, 262 Ill.Dec. at 52. In *County of Cook*, both "normal daily activity exception, as well as the "greater risk exception" were present. The act of standing up exposed the claimant to no greater risk than that to which the general public was exposed. Further, compensation would have been denied because any normal daily activity could have aggravated the claimant's pre-existing heart condition. *County of Cook,* , 68 Ill. 2d at 31-33, 368 N.E.2d at 1295-96, 11 Ill.Dec. at 550.

In *Greater Peoria Mass Transit Co. v. Industrial Commission*, 81 Ill. 2d 38, 405 N.E.2d 796, 30 Ill.Dec. 817 (1980), the court noted that the claimant was a bus driver who dislocated her shoulder when she fell while bending over to retrieve bus schedules that had fallen on the floor. The claimant had previously dislocated her shoulder and was predisposed to recurring subluxations, or partial dislocations.

The *Sisbro I* court also examined *Hansel & Gretel Day Care Center v. Industrial Commission*, 215 Ill. App. 3d 284, 574 N.E.2d 1244, 158 Ill.Dec. 851 (3rd Dist. 1991), a case in which the claimant's right knee became locked as she rose from her chair. The *Hansel* court reversed the award of benefits citing that the claimant's knee "could have locked up or gone out while she was walking, turning, getting out of bed, or, in short, performing the activities of everyday life." *Hansel & Gretel*, 215 Ill. App. 3d at 294, 574 N.E., 2d at 1251, 158 Ill.Dec. at 858. The *Hansel* court remarked that similar to the situation in *Greater Peoria Mass Transit Co.* and *County of Cook*, the claimant had not established that she was exposed to a risk not common to the general public. *Id.* In examining all three of these cases, the *Sisbro I* court noted that the two exceptions applied.

In *Sisbro I*, the appellate court found that the claimant's reliance on *General Refractories v. Industrial Commission*, 255 Ill. App. 925, 327 N.E.2d 1270, 194 Ill.Dec. 628 (3d Dist. 1994), did not support their position. In *General Refractories*, the appellate court recognized and applied the exceptions to the pre-existing condition rule. The appellate court there deferred to the Commission's finding that the claimant's condition was not so deteriorated that any normal activity could have aggravated his back.

In *Sisbro I*, the appellate court referred to the Illinois Supreme Court case of *Mason & Dixon Lines, Inc. v. Industrial Commission*, 99 Ill. 2d 174, 457 N.E.2d 1222, 75 Ill.Dec. 663 (1983), which had departed from the *County of Cook* line of cases. In *Mason & Dixon Lines*, the claimant's diabetes-induced gangrene in his foot was aggravated when a heavy cart rolled over the foot. There was expert testimony that any trauma to the foot could have aggravated the pre-existing gangrene and that the natural progression of the diabetic condition could have led to amputation regardless of any trauma to the foot. The *Sisbro I* court found that the Illinois Supreme Court reasoning in *Mason & Dixon Lines* was inconsistent with the *County of Cook* reasoning and, in fact, did not even mention the exceptions to compensation in pre-existing condition cases. In reviewing the various cases, the *Sisbro I* court concluded that the arbitrator and the commission did not consider the two exceptions to the rule permitting compensation for work-related aggravations of a pre-existing condition. The *Sisbro I* court then held that the claimant fell into one of the exceptions and held that the commission's award for compensation was against the manifest weight of the evidence. *Sisbro I*, 327 Ill. App. 3d 868, 764 N.E. 2d 1163, 262 Ill.Dec. 46 (4th Dist. 2002).

Justice Rarick filed a dissent in the *Sisbro I* case. Justice Rarick argued that the determination of whether the claimant's health was so deteriorated was a question of fact for the commission to decide. The commission, by awarding benefits, found the exception not applicable. Justice Rarick then made the statement, "The majority clearly has forgotten the principle that the Workers' Compensation Act was designed to protect all workers, whether they be healthy or ill, and compensate them for injuries incurred while working. I believe claimant is entitled to compensation in this instance, and therefore, I must dissent." *Id.* at 880, 764 N.E.2d at 1174, 262 Ill.Dec. at 57 (Rarick, J., dissenting).

IV. *Sisbro II* — The Supreme Court Decision

The *Sisbro* claimant appealed the *Sisbro I* decision to the Illinois Supreme Court. In *Sisbro II*, the Supreme Court of Illinois examined the compensability of aggravations of pre-existing conditions in the case of *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003).

The Illinois Supreme Court reversed the appellate court decision in *Sisbro I* and reinstated a finding of compensability. *Id.* The Supreme Court determined that the appellate court failed to accord the appropriate deference to the factual findings of the Industrial Commission and, in addition, applied an overly broad interpretation of the "normal daily activity" limitation on recovery in pre-existing condition cases.

To obtain compensation under the Act, the Supreme Court stated that the claimant bears the burden of showing by a preponderance of evidence that he or she suffered a disabling injury which arose out of and in the course of his or her employment. "In the course of employment" refers to the time, place, and circumstances surrounding the injury. The injury must also "arise out of" the employment. The "arise out of" component is primarily concerned with causal connection. To satisfy this requirement, it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury, *Sisbro II*, 207 Ill. 2d at 203, 797 N.E.2d at 672, 278 Ill.Dec at 77 (citing *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill. 2d 52, 58, 541 N.E. 2d 665, 133 Ill.Dec. 454 (1989).

The Illinois Supreme Court, in *Sisbro II*, noted that the Industrial Commission found that the claimant's act of twisting his ankle, as he stepped down from the 18-wheeler delivery truck, was an accidental injury which arose out of and in the course of his employment. It noted that the employer did not seriously dispute this finding; rather, the employer argued that the actual injury was not causally related to the claimant's disabling condition, Charcot osteoarthropathy. By framing the discussion on this "causal connection" aspect of the compensability issue, the Illinois Supreme Court then emphasized that typically these "causal connection" issues are factual determinations to be decided by the Industrial Commission. Based on these findings, the Illinois Supreme Court noted that it could end its review at this juncture, since its scope of review is limited to whether or not the Industrial Commission's award of compensation was against the manifest weight of the evidence. Because the petitioner's treating podiatrist opined that the work-related incident aggravated the pre-existing condition, creating a causal connection, the factual finding by the Industrial Commission was not against the manifest weight of the evidence.

The Illinois Supreme Court, nevertheless, continued on with its analysis and addressed the "normal daily activity" exception. The Supreme Court explained this exception to compensability as:

> The sole limitation to the above general rule is that where it is shown the employee's health has so deteriorated that any normal activity is an overexertion, or where it is shown that the activity engaged in presents risks no greater than those to which the general public is exposed, compensation will be denied.

Sisbro II, 207 Ill. 2d at 208, 797 N.E.2d at 674, 278 Ill.Dec. at 79 (citing *County of Cook*, 69 Ill. 2d at 18, 370 N.E. 2d 520, 12 Ill.Dec. 716.

Because the Illinois Supreme Court had already determined that the causal connection issue was factual and that it would not disturb any factual determination by the Industrial Commission, it reviewed and discussed prior Supreme Court decisions addressing the "normal daily activity" exception and distinguished those cases factually from the *Sisbro* facts. In three prior Illinois Supreme Court cases addressing the normal daily activity exception, the *Sisbro II* court noted that these decisions held that the manifest weight of the evidence showed that the employee's condition of ill-being was caused by the normal degenerative process of the pre-existing condition and *not* because of an accidental injury which arose out of the employment and aggravated or accelerated the pre-existing condition. In essence, the Illinois Supreme Court focused on the incident itself (stepping out of a truck into a pothole), as opposed to undisputed medical testimony (by both parties) that hypothetically the petitioner could have sustained the same injury just by walking on uneven ground. Because there was no dispute (or primary argument) that the act of stepping down out of a truck and twisting one's ankle is not a compensable accident, the Illinois Supreme Court chose to focus on the factual medical causal connection aspects of the claim. *Sisbro II* affirmed the original decision of the Industrial Commission and deemed the event incompensable.

Sisbro II does not eliminate the "normal daily activity" exception to the general rule of compensability. Nowhere in the decision does the Illinois Supreme Court state that such a defense no longer exists. In fact, the Illinois Supreme Court in *Sisbro II* went to great lengths to emphasize that in those prior Supreme Court cases finding no compensability there were several factual findings which were lacking. For example, in *County of Cook v. Industrial Commission,* 68 Ill. 2d 24, 368 N.E.2d 1292, 11 Ill.Dec. 546 (1977), the claimant, who for more than ten years suffered from hypertension, had a stroke as she pushed her chair back from her desk at work in preparation to go to lunch. The employee presented no expert evidence to establish a causal link between her stroke and her employment. A finding of compensability by the Industrial Commission was against the manifest weight of the evidence because the Supreme Court noted, that there was no evidence of a causal

connection between her employment and her condition of ill-being from the stroke. *Id.* at 34, N.E.2d at 1297, Ill.Dec. at 551.

The *Sisbro II* court also reviewed the case of *Greater Peoria Mass Transit District. v. Industrial Commission*, 81 Ill. 2d 38, 405 N.E. 2d 796, 39 Ill.Dec. 817 (1980). The Supreme Court emphasized the following facts. The employee bus driver completed her route and went to the drivers' room to return bus schedules and transfers. She actually dropped the papers on the floor and when bending over to retrieve them, she lost her balance and hit her shoulder. Medical evidence established that the employee's shoulder was a "time bomb" that might have dislocated with any normal daily activity. The Supreme Court concluded that although the dislocation occurred at work, it did not arise out of the employment because there was nothing in the records showing that the claimant's work (1) further deteriorated her shoulder; (2) aggravated it; (3) precipitated a dislocation; and (4) accelerated the occasion for its dislocation. *Id.* at 43, 405 N.E.2d at 799, 39 Ill.Dec. at 820.

Finally, the Illinois Supreme Court in *Sisbro II* focused on the case of *Hansel & Gretel Day Care Center v. Industrial Commission*, 215 Ill. App. 3d 284, 574 N.E. 2d 1244, 158 Ill.Dec. 851 (3rd Dist. 1991). In *Hansel & Gretel*, the medical evidence established that the claimant had a long-standing problem with her right knee over the past ten years, and it would occasionally "lock up." While at work, the employee's leg "locked up" after she was sitting at a low (children's) table. The surgeon testified that there was no way to tell whether the tear had been present before the work incident or how long it might have existed. The appellate court, on review, concluded that it was against the manifest weight of the evidence for the Industrial Commission to find that the incident at work aggravated the claimant's pre-existing condition. *Id.* at 294, 574 N.E.2d at 1251, 158 Ill.Dec. at 858.

The Illinois Supreme Court went to great lengths to state that its decision was factually based and that the issue of medical causal connection is a factual determination that is not to be disturbed unless it is against the manifest weight of the evidence. Because the event (stepping down out of a truck) was not the focus of the respondent's defense before the Illinois Supreme Court, the court noted this "concession" and focused its reasoning on the factual causal connection aspects of the claim. If the work-related event itself can be challenged as an act which does not arise out of and in the course of the claimant's employment, then an additional argument that "normal daily activity" would have caused the condition of ill-being is still a viable defense. Additionally, the causal connection issue can be challenged medically.

V. Post *Sisbro II* — Conclusion

Following *Sisbro II*, many workers' compensation practitioners who represent claimants maintained that the normal daily living exception no longer exists. A closer review of the *Sisbro II* opinion establishes clearly however, that the Illinois Supreme Court in *Sisbro II* did not eliminate the exception. Subsequent to *Sisbro II*, the appellate court has had occasion to consider the normal daily living exception.

In *Twice Over Clean, Inc. v. Industrial Commission,* 809 N.E.2d 779, 284 Ill.Dec. 212 (Ill. App.3d Dist., 2004) (hereinafter "*Twice Over Clean II*"), the claimant, following a heart attack, filed an application for workers' compensation benefits. The arbitrator determined that the claimant sustained a compensable injury and the Industrial Commission affirmed the arbitrator's decision. The Industrial Commission's decision was then affirmed by the circuit court. The employer appealed this ruling to the appellate court and the appellate court reversed, finding that the claimant was barred from recovering benefits due to the normal daily activity exception. *See, Twice Over Clean, Inc. v. Industrial Comm'n*, 337 Ill. App. 3d 805, 786 N.E,2d 1096, 272 Ill.Dec. 262 (3rd Dist. 2003) (hereinafter "*Twice Over Clean I*"). The claimant petitioned for leave to appeal to the Illinois Supreme Court, but the petition was denied. However, the Illinois Supreme Court, in the exercise of its supervisory authority, directed the appellate court to vacate its judgment and to reconsider its decision

in light of *Sisbro II*, which overturned the appellate court's decision in *Sisbro I*. The appellate court, in *Twice Over Clean II*, did vacate its previous decision, but once again in reviewing the evidence before the commission, and in light of the Supreme Court's decision in *Sisbro II*, it again reversed the Industrial Commission decision and therefore denied benefits.

In the *Twice Over Clean* cases, the claimant testified that he was engaged in removing asbestos, and in the middle of the afternoon while at work he began to experience pains in chest, neck, and left shoulder. After work ended, he went to his hotel and did not eat dinner. His pains returned, and eventually he became ill and was taken to a hospital where he was diagnosed with a past myocardial infarction. The claimant's family physician testified that, in his opinion, the myocardial infarction was caused by the physical activity associated with work on the day of the accident. The treating physician admitted on cross-examination that "any activity or no activity could put sufficient stress on the heart to result in a myocardial infarction." The treating physician further admitted that the claimant was a "heart attack waiting to happen."

The appellate court in *Twice Over Clean I* held that the claimant was not entitled to compensation irrespective of causation because, as the family physician admitted, the claimant's condition was so deteriorated that any activity, work related or not, might be sufficient to cause an infarction. In *Twice Over Clean II*, the appellate court interpreted *Sisbro II* to provide that a claimant's vulnerability to injury during normal daily activities is not an "exception" that applies to bar recovery despite the existence of a "sufficient causal connection" between work and the injury, but instead is a "limitation" on when a "sufficient causal connection" may be found in the first place. *Twice Over Clean II* noted that although the Supreme Court implied in *Sisbro II* that the concept of "sufficient causal connection" is no innovation, their examination of the opinion established that the phrase appeared only in one majority opinion and one dissent before *Sisbro II*.

The appellate court in *Twice Over Clean II* noted that *Sisbro II* provides a specialized definition of "sufficient causal connection" for aggravation cases. The appellate court held that *Sisbro II* established that a work activity is a "sufficient cause" of the aggravation of a pre-existing condition if none of the limitations articulated in *County of Cook* apply; that is, if the work activity presented risks greater than to which the general public is exposed, and the claimant's condition was not so deteriorated that his injury could have occurred through normal daily activity. The appellate court stated that the Supreme Court determined that these factors are "limitations" to be applied in the course of the causation analysis and not "exceptions" applied after that analysis.

The *Twice Over Clean II* appellate court also reviewed prior Supreme Court decisions, including *Sisbro II*, to conclude that the concept of "sufficient cause," as defined by *Sisbro II*, takes into account both, the no greater risk, and normal daily activity factors. In turning to the facts in *Twice Over Clean II*, the appellate court held that the normal daily activity limitation barred compensation. The appellate court, in coming to this conclusion, noted the following:

> Of course, we are careful to present our conclusion in the analytical framework set forth in *Sisbro II*. We do not hold that the claimant proved the causal connection between his employment and his injury and yet deny him compensation because his condition of ill-being would have occurred regardless of his employment. Rather, we hold that, in light of his susceptibility to a heart attack outside of work, he failed in the first instance to prove a "sufficient causal connection" between his work and his injury.

Twice Over Clean II, 809 N.E. 2d at 790, 284 Ill.Dec, at 224.

A dissent was filed in *Twice Over Clean II* by Justice Goldenhersh. Justice Goldenhersh stated that the Illinois Supreme Court in *Sisbro II* "instructed" the appellate court to "narrow" the normal daily activity limitation. Id. At 791, 284 Ill.Dec. at 225 (Goldenhersh, J., dissenting).

In conclusion, the Illinois Supreme Court in *Sisbro II* did not eliminate the normal daily living exception to compensability when considering whether or not an injury arises out of and in the course of employment. *Twice Over Clean II* does not eliminate the exception but characterizes *Sisbro II's* analysis of the exception as a limitation. Illinois is an "increased-risk" jurisdiction which, in the case of medical causation issues, requires "unusual exertion." These doctrines are consistent with the decisions on both *Sisbro II* and *Twice Over Clean II*, in that they recognize that the normal daily activity issue, be it a limitation or an exception, is a viable defense to workers' compensation claims in the state of Illinois.

ABOUT THE AUTHORS: **Kevin J. Luther** is a partner in the Rockford firm of *Heyl, Royster, Voelker & Allen* where he concentrates his practice in areas of workers' compensation, employer liability, professional liability and general civil litigation. He also supervises the workers' compensation practice group in the Rockford office. Mr. Luther received his J.D. from Washington University School of Law in 1984. He is a member of the Winnebago County, Illinois State and American Bar Associations, as well as the IDC.

Kenneth F. Werts is with the Mt. Vernon firm of *Craig & Craig*, where he specializes in workers compensation law, black lung and occupational disease law, and personal injury litigation. He received his B.A. in 1979 from the University of Illinois and his J.D. in 1984 from Southern Illinois University. Mr. Werts is a member of the Jefferson County, Illinois State (Chairman Worker's Compensation Law Section Council 1997-1998) and American Bar (Member Workers' Compensation and Employers' Liability Law Committee 2001-) Associations; IDC (Member Board of Directors, 2001-; Chair Employment Law Committee, 2001-2003; Chair Workers' Compensation Committee 2003-); and the National Association of Railroad Trial Counsel.

John P. Bergin is a partner in the Chicago law firm of *Braun Strobel Lorenz Bergin & Millman, P.C.* concentrating in workers' compensation and civil defense. He received a B.A. in Theatre and his J.D. from Loyola University Chicago. He authored a chapter in the IICLE Workers' Compensation Practice Handbook entitled Respondent's Trial Preparation. He is a member of the Illinois State Bar Association and Workers' Compensation Lawyers Association as well as the IDC.