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# THE MEANING OF "ARISING OUT OF" EMPLOYMENT IN ILLINOIS WORKERS' COMPENSATION LAW

JOHN DWIGHT INGRAM\*

## INTRODUCTION

Workers' compensation laws were designed to eliminate the hassles and uncertainties of recovering for work-related injuries under prior employers' liability laws.<sup>1</sup> Prior to the enactment of workers' compensation laws, employees were forced to sue employers directly alleging negligence; employees had to prove their employers were at fault.<sup>2</sup> This placed a burden on the employee, who may not have had adequate resources to pursue a lawsuit.<sup>3</sup> Even if an injured employee could afford to sue, he<sup>4</sup> may have had to wait quite awhile before recovering, if he recovered at all.<sup>5</sup> Today, with the benefit of workers' compensation laws, workers who are injured "in the course of" and "arising out of" their employment are entitled to payment without legal formalities or undue expense.<sup>6</sup>

The current workers' compensation laws provide income replacement and coverage of medical expenses for employees who are injured on the job.<sup>7</sup> If the injury satisfies the statutory requirements of "arising out of" employment and being "in the course of" employment, the employee is awarded benefits regard-

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1. WORKERS' COMP. BUS. MGMT. GUIDE (CCH) ¶ 100 (1993) [hereinafter 1993 BUS. MGMT. GUIDE]. Worker's compensation laws exist in every state, the District of Columbia and Puerto Rico. *Id.* at ¶ 130.

2. *Id.* at ¶ 100.

3. *Id.*

4. When the gender for a personal pronoun could be either male or female, I use the masculine pronoun generically, due to habit and my masculine personal orientation. By doing so I avoid the rather awkward "he or she" and the grammatically incorrect "they." I trust that female authors will balance the scale on the other side.

5. 1993 BUS. MGMT. GUIDE, *supra* note 1, at ¶ 100.

6. *Id.*

7. *Id.*

less of fault.<sup>8</sup> However, an employee who recovers under workers' compensation is barred from suing the employer in tort; the workers' compensation benefits are the exclusive remedy for redress of the work-related injury.<sup>9</sup>

This article will survey how Illinois courts interpret the statutory requirement that, for an injury to be compensable under workers' compensation law, it must "arise out of" the injured worker's employment. First, the statutory requirements of workers' compensation laws will be discussed. Second, the five tests courts have utilized for determining when an injury arises out of the employment will be discussed. Third, the test Illinois courts have used will be examined. This part will focus on how Illinois courts apply the test to different situations in determining if the employee is covered under workers' compensation. Fourth, the manner in which Illinois courts may be liberalizing and stretching Illinois' purported test to allow recovery in many more situations will be discussed. I will conclude that, especially in the cases of "peril of the street," Illinois is allowing recovery without even giving effect to the words "arising out of" and going beyond even the most liberal test of determining when an injury arises out of the employment.

### I. STATUTORY REQUIREMENTS

In order for an injury to be compensable under the Illinois Workers' Compensation Act, it must "arise out of" and "in the course of" the injured workers' employment.<sup>10</sup> "[I]n the course of the employment" refer[s] to the time, place and circumstances under which the accident occurred."<sup>11</sup> Thus, if an injury "occurs within the period of employment at a place where the employee may reasonably be in the performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto," the injury occurred in the course of employment.<sup>12</sup> The time

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8. *Id.*

9. *Id.* An employee may receive benefits from his employer when he suffers a "personal injury by accident arising out of and in the course of employment." *Id.* at ¶ 130. These benefits may include loss of wages (generally one-half to two-thirds of the average weekly wage), hospital and medical expenses and death benefits. *Id.* One must be an employee to be covered by worker's compensation; independent contractors are not eligible. *Id.* An employee may recover under worker's compensation without regard to fault. *Id.* In fact, the employee's contributory negligence does not lessen his right to benefits. *Id.* The worker's compensation system is a quid pro quo arrangement; "[i]n exchange for the assured benefits, the employee (and the employee's dependents) give up their *right to sue* the employer for damages for any injury covered by a workers' compensation act." *Id.*

10. 820 ILCS 305/2 (1994).

11. *Chmelik v. Vana*, 201 N.E.2d 434, 438 (Ill. 1964).

12. *Id.*

and space requirement is construed liberally to include "a reasonable time before commencing and after concluding actual employment,"<sup>13</sup> especially where the injury occurs on the employer's premises while the worker is "going to or from his place of employment by a customary or permitted route. . . ."<sup>14</sup>

Since the statutory requirements are written in the conjunctive, the Illinois courts have properly held that each phrase must be given a separate meaning.<sup>15</sup> For an injury to "arise out of" the employment, there must be a causal connection between the employment and the injury; that is, the cause must be some risk connected with, or incidental to, the employment. The Illinois Institute for Continuing Legal Education states that:

To come within the statute, the employee must prove that some act or phase of the employment was a causative factor in the ensuing injury. He need not prove it was the sole causative factor or even that it was the principal causative factor but only that it was a causative factor in the resulting injury.<sup>16</sup>

This includes acts the employee was told to perform, acts incidental to his assigned duties and acts which he had a legal duty to perform. It also includes risks to which the employee is exposed which are different from, or greater than, the risks to which the general public is exposed.<sup>17</sup> Interpretation of the clause "arising out of" has led to much litigation.

Also, "an employer takes its employees as it finds them, and a preexisting condition does not bar compensation"<sup>18</sup> if the injury

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13. *Id.*

14. *M&M Parking Co. v. Industrial Comm.*, 302 N.E.2d 265, 268 (Ill. 1973). Many of these cases involve injuries incurred on parking lots maintained by employers for the use of employees. See, e.g., *Chmelik*, 201 N.E.2d at 434 and cases cited therein.

15. *Fire King Oil Co. v. Industrial Comm.*, 342 N.E.2d 1, 2 (Ill. 1976).

16. ILLINOIS WORKERS' COMPENSATION PRACTICE (Ill. Inst. for CLE, 1994) at 3-19.

17. *Komatsu Dresser Co. v. Industrial Comm.*, 601 N.E.2d 1339, 1344 (Ill. App. Ct. 1992). If the cause of injury is unrelated to the employment or the workplace environment, but rather is a hazard to which the worker would have been equally exposed apart from his work, the injury does not "arise out of" the employment. *Brady v. Louis Ruffolo & Sons Construction Co.*, 578 N.E.2d 921, 924 (Ill. 1991).

18. *Komatsu*, 601 N.E.2d at 1345. In *Komatsu*, a machinist had to lift parts weighing 30 and 40 pounds from a box next to his machine. *Id.* at 1341. The box was waist high and he had to bend from the waist to lift out a part. *Id.* One day when he bent over to pick up a part from the box, he felt a sharp pain in his lower back. *Id.* At the same time he sneezed, which caused the pain to spread throughout his entire lower back. *Id.* He had a pre-existing back condition. *Id.*

The court held the injury "arose out of" his employment. *Id.* at 1345. The act of bending aggravated his pre-existing condition. *Id.* In order to get parts from the box he had to bend from the waist, but he could not bend his knees when doing so, as one would ordinarily do. *Id.* Having to do this for eight hours a day was a greater risk than that of the general public. *Id.*

satisfies the tests stated above for "arising out of." Only "if an employee's health has so far deteriorated that any normal daily activity is overexertion" will compensation be denied on the basis of his preexisting condition.<sup>19</sup>

## II. TESTS USED TO DETERMINE ARISING OUT OF

Depending on which test a certain jurisdiction uses, an injury may or may not be considered "arising out of" employment, and thus may or may not be compensable under workers' compensation. The lines of interpretation of the 'arising' phrase can be reduced to the five summarized below. The peculiar risk doctrine and the proximate cause test are practically obsolete. However, the increased-risk, actual-risk and positional risk doctrines are widely used today. Taking a look at these doctrines helps to compare and contrast the views different jurisdictions take in determining whether an injury arises out of the employment. This is especially true when a jurisdiction like Illinois purports to use one test, and an examination of cases reveals that, at least in some instances, it is really applying another test.

### A. Proximate Cause Test

This test, used in some older workers' compensation cases, is nearly obsolete now due to the fact the it requires foreseeability, whereas workers' compensation laws permit recovery even if the injury was not foreseeable.<sup>20</sup> This test required that the harm be foreseeable and that the chain of causation not be broken by an independent intervening cause.<sup>21</sup>

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19. *Id.* at 1345. In *Hansel & Gretel Day Care Center v. Industrial Comm.*, a day-care worker attended a staff meeting, where she sat in a child's chair with her legs under a children's table. 574 N.E.2d 1244, 1246 (Ill. App. Ct. 1991). There were higher chairs available at their meeting. *Id.* She sat in children's chairs every day and had always gotten up successfully. *Id.* However, when she got up after the meeting her knee locked and she later had surgery. *Id.* She had prior history of her knee occasionally locking, and doctors testified that her knee could have locked just from walking, turning, or getting out of bed. *Id.* So, compensation was denied. *Id.* at 1251.

Similarly, in *Hopkins v. Industrial Comm.*, a police sergeant who usually sat in a swivel chair at the courthouse was sitting in a straightback chair. 553 N.E.2d 732, 732 (Ill. App. Ct. 1990). When he turned in the chair to answer a question he felt a "pop" in his back. *Id.* Doctors testified that the injury could have occurred anywhere with any normal activity. *Id.*

20. ARTHUR LARSON, WORKMENS' COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 6.20 (1991).

21. *Id.*

### B. Peculiar-Risk Doctrine

The peculiar risk doctrine was the dominant rule for courts at the time most workers' compensation laws were created.<sup>22</sup> Under this doctrine, the injured employee had to show "that the source of the harm was in its nature peculiar to his occupation."<sup>23</sup> This test required that the nature of the source of the harm, not its quantity, was peculiar to the occupation.<sup>24</sup> "Accordingly, even if his work subjected him to a tremendously increased quantitative risk of injury by heat, or cold, or lightning, the claimant might be turned away with the comment that 'everyone is subject to the same weather.'"<sup>25</sup> The peculiar risk doctrine is rarely used anymore by courts, and has generally been replaced by the increased-risk doctrine.

### C. Increased-Risk Doctrine

The increased-risk doctrine is the most widely used test today. To satisfy this test, an injured employee must show that the injury was caused by an increased risk to which he, as distinct from the general public, was subjected due to his employment.<sup>26</sup> "This test differs from the peculiar-risk test in that the distinctiveness of the employment risk can be contributed by the increased *quantity* of a risk that is *qualitatively* not peculiar to the employment."<sup>27</sup> Illinois purports to use the increased-risk doctrine in interpreting "arising out of" employment.<sup>28</sup>

### D. Actual-Risk Doctrine

Many courts have modified the increased-risk test and now require only that the injured employee show that the risk was actually a risk of his employment, even if the general public may also be subjected to the risk.<sup>29</sup> There is no real need to show a peculiar or increased risk; the employee must show only that the employment subjected him to the actual risk which injured him.<sup>30</sup> It does not matter under this test that the risk was com-

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22. *Id.* at § 6.6.

23. *Id.*

24. *Id.* at § 6.00.

25. LARSON, *supra* note 20, at § 6.20.

26. *Id.* at § 6.00.

27. *Id.* at § 6.30.

28. Campbell 66 Express, Inc. v. Industrial Comm'n., 415 N.E.2d 1043, 1044 (Ill. 1980). "This State . . . adheres to the general requirement that one's employment must subject him to an increased risk beyond that to which the general public is subjected." *Id.*

29. Larson, *supra* note 20, at § 6.00.

30. *Id.* at § 6.4.

mon to the general public.<sup>31</sup> Thus, if there is a risk, an injury stemming from it is compensable.<sup>32</sup> Under this doctrine, claimants may recover for "act of God" situations or "peril of the streets" situations.<sup>33</sup>

### E. Positional Risk Doctrine

Unlike Illinois, some other states construe the "arising out of" requirement much more liberally, and allow compensation in situations where a court applying the stricter test would not. These states sometimes apply the "positional risk" test, which is a "but for" approach. Under the "positional risk" test, an injury is compensable if it would not have happened "but for" the fact that the conditions or obligations of the employment put the claimant in the position where he was injured.<sup>34</sup> This test is being espoused by a growing number of jurisdictions. In 1991, the Illinois Supreme Court stated that Illinois Workers' Compensation law does not recognize the positional-risk doctrine, as it would be inconsistent with the Workers' Compensation Act.<sup>35</sup> However, this test is being adopted by a growing number of states.<sup>36</sup>

An example of the positional risk test is found in *Nippert v. Shinn Farm Construction Company*,<sup>37</sup> where workers were erect-

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31. WORKERS' COMP. BUS. MGMT. GUIDE (CCH) ¶ 3435 (1994) [hereinafter 1994 BUS. MGMT. GUIDE].

32. *Id.*

33. *Id.*

34. Larson, *supra* note 20, at § 6.00.

35. *Brady v. Louis Ruffolo & Sons Construction Co.*, 578 N.E.2d 921, 925-26 (Ill. 1991). The court stated that "[t]his court has previously declined to adopt the positional risk doctrine, believing that the doctrine would not be consistent with the requirements expressed by the legislature in the [Workmens' Compensation] Act. . . . [W]e continue to adhere to that view." *Id.* See also *Campbell* 66, 415 N.E.2d at 1044 (rejecting the positional risk doctrine). In *Campbell*, the court stated that "[t]his state has not adopted the positional-risk theory, but adheres to the general requirement that one's employment must subject him to an increased risk beyond that to which the general public is subjected." *Id.*

However, I will show in this article that Illinois courts in some situations, especially those involving perils of the street, do not rely on their traditional strict increased-risk test, and, in fact, do apply a positional risk or "but for" test in determining whether an injury arises out of employment.

36. 1994 BUS. MGMT. GUIDE, *supra* note 31, at ¶ 3435. These states are allowing recovery in cases in which the nature of the work is irrelevant to the injury. *Id.*

37. 388 N.W.2d 820, 821 (Neb. 1986). See also *Deffenbaugh Industries v. Angus*, 832 S.W.2d 869, 873 (Ark. Ct. App. 1992) (allowing workers' compensation benefits for an employee who was injured when a tornado destroyed the employee's mobile home that was located on the employer's premises; business operated 24 hours a day, 7 days a week, and he had to be available at all times to take calls from truckers who would be arriving, and to help unload trucks; he was awaiting a truck when tornado hit); *National Fire Ins. Co. v. Edwards*, 263 S.E.2d 455, 456 (Ga. Ct. App. 1979) (allowing workers' compensation recovery for a claimant in-

ing a shed on a farm. One worker was injured when he was thrown thirty feet by a tornado, whose path was one-half to one-and-one-half miles wide and travelled about fifty-eight miles.<sup>38</sup> The court held that his injury "arose out of" his employment, because his employment duties put him in a position where he would not otherwise have been, which exposed him to a risk, even though the risk was not greater than the risk to the general public.<sup>39</sup> "But for" his employment, he would not have been there to be injured.<sup>40</sup>

Some courts go even further in liberality. In *Circle K Store #1131 v. Industrial Commission of Arizona*,<sup>41</sup> an employee carried trash to a dumpster at the end of her shift. As she turned away from the dumpster, she turned her ankle and fell.<sup>42</sup> While the court referred to the fact that her employment put the employee in the place where the injury occurred, it really seemed to hold that an injury "arises out of" if the employee is on the job and performing duties for the employer, unless the cause of the injury is purely personal to the employee.<sup>43</sup> The effect of this analysis is to simply eliminate the "arising out of" requirement. According to the *Circle K* court, any injury which occurs "in the course of" the employment will be deemed to "arise out of" the employment unless its cause is personal.<sup>44</sup>

The increased-risk test, the actual-risk test and the positional-risk test are the three general tests widely used by courts today. Illinois courts generally purport to use the strictest test, the increased-risk test. However, as will be shown below, Illinois courts seem to be following the lead of other jurisdictions who construe the "arising out of" requirement much more liberally. This is true despite the Illinois Supreme Court's statement in *Brady v. Louis Ruffolo*<sup>45</sup> that Illinois rejects the positional-risk test.<sup>46</sup>

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jured when windstorm or tornado struck building in which he was working); *Whetro v. Awkerman*, 174 N.W.2d 783, 786 (Mich. 1970) (allowing workers' compensation recovery in two cases: (1) when a caretaker-gardener was injured by the collapse of the residence where he was working during a tornado; and (2) when a salesman died as a tornado destroyed the motel where he was staying while on business trip).

38. *Nippert*, 388 N.W.2d at 821.

39. *Id.* at 822.

40. *Id.*

41. 796 P.2d 893 (Ariz. 1990).

42. *Id.* at 894.

43. *Id.* at 898.

44. *Id.*

45. 578 N.E.2d 921, 925-26.

46. See *supra* note 36 and accompanying text for a discussion of the rationale of the Illinois Supreme Court in rejecting the positional risk test.



### III. ILLINOIS COURTS' APPLICATIONS OF THE "ARISING OUT OF" TEST

This section will describe the various situations where courts consider work-related injuries to "arise out of" employment. Thus, recovery may depend on whether the injured worker was in the performance of the duties of his job, whether the injury was created from a condition of the employer's premises, whether the risk to the employee was greater than the risk to the general public and whether the employee was exposed to a peril of the street when he sustained injury. This section will show that, in some situations, Illinois courts quite liberally construe the arising out of requirement without even applying the liberal "but for" test. This is especially true in cases involving "peril of the streets."

#### A. *The Performance of the Duties of a Job*

An injury "arises out of" the employment when the cause of the injury is an activity related to the performance of the duties of a job. In *Komatsu Dresser Company v. Industrial Commission*,<sup>47</sup> a machinist's work required him to lift parts weighing thirty and forty pounds from a box next to his machine.<sup>48</sup> The top of the box was waist high and he had to bend from the waist to lift out a part.<sup>49</sup> One day when he was bent over to pick up a part from the box, which was three-fourths empty, he felt a sharp pain in his lower back.<sup>50</sup> The court held that the injury "arose out of" his employment.<sup>51</sup> He had to bend from the waist to get parts, but couldn't bend his knees when doing so, as one would ordinarily do.<sup>52</sup>

In *Miller v. Reynolds*,<sup>53</sup> the plaintiff was a cook and housekeeper.<sup>54</sup> Her employers, the homeowners, called an animal control officer to trap raccoons on the roof.<sup>55</sup> The officer set and baited a trap, and plaintiff re-baited it several times that day and the next. The fifth time she fell and was injured.<sup>56</sup> Her employer (the wife) knew she was baiting the trap. The injured woman sued her employers for negligence.<sup>57</sup> The appellate court held that her ac-

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47. 601 N.E.2d 1339 (Ill. App. Ct. 1992).

48. *Id.* at 1341.

49. *Id.*

50. *Id.*

51. *Id.* at 1345.

52. *Komatsu*, 601 N.E.2d at 1345.

53. 558 N.E.2d 673 (Ill. App. Ct. 1990).

54. *Id.* at 675.

55. *Id.*

56. *Id.*

57. *Id.*

tion was barred by the exclusive remedy provision of the workers' compensation statute.<sup>58</sup> Her injury would be compensable under the Workers' Compensation Act, and therefore her employers were immune from a common law suit.<sup>59</sup>

Plaintiff's employers testified that her job involved only indoor work — cooking, cleaning, laundry, etc. — and did not involve climbing ladders.<sup>60</sup> But the court said that her employers knew she was tending to the trap, and made no objection.<sup>61</sup> They acquiesced, and it was for their benefit.<sup>62</sup> Therefore, climbing the ladder was a duty of her job.<sup>63</sup>

These cases may be contrasted with several recent cases in which the court held that an injury did not "arise out of" because it was not caused by the performance of job-related duties. In *Caterpillar Tractor Company v. Industrial Commission*,<sup>64</sup> the employee sprained his ankle when he stepped off a curb while walking from the plant to the parking lot at the end of his shift.<sup>65</sup> The court said that stepping off the curb was not part of his job duties.<sup>66</sup>

Similarly, in *Hopkins v. Industrial Commission*,<sup>67</sup> a police sergeant was sitting in a chair at the courthouse. When he turned in the chair to answer a question he felt a "pop" in his back.<sup>68</sup> The court held that his injury did not "arise out of" his employment.<sup>69</sup> Doctors had testified that the injury could have occurred anywhere with any normal activity.<sup>70</sup>

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58. *Miller*, 558 N.E.2d at 675. See 820 ILCS 305/5 (1994).

59. *Miller*, 558 N.E.2d at 677. Workers' compensation is based on a quid pro quo; the employee gives up the right to sue the employer for injuries suffered at work in exchange for receiving benefits without regard to fault. 1993 BUS. MGMT. GUIDE, *supra* note 1, at ¶ 513. The Guide states:

If the injury is found to be related to the employment, it does not matter who caused the injury, the employer or the employee; the employee is awarded benefits. At the same time, benefits provided by workers' compensation are the employee's exclusive remedy for redress of his or her work-related injury.

*Id.*

60. The employers presumably had ample liability insurance and wanted to help her collect the larger amount available in a common law action for elements such as pain and suffering which are not covered by workers' compensation.

61. *Miller*, 558 N.E.2d at 676.

62. *Id.*

63. *Id.*

64. 541 N.E.2d 665 (Ill. 1989).

65. *Id.* at 666.

66. *Id.* at 669.

67. 553 N.E.2d 732 (Ill. App. Ct. 1990).

68. *Id.* at 733.

69. *Id.* at 735.

70. *Id.* at 734.

### B. Condition of Employer's Premises

An injury "arises out of" the employment when the cause of the injury is a condition related to the employer's premises or the work environment. In *Scheffler Greenhouses, Inc. v. Industrial Commission*,<sup>71</sup> a greenhouse owner permitted an employee who rented a house on the greenhouse premises to build an above-ground swimming pool next to the greenhouse, and allowed employees to use the pool for relief from the hot, humid work environment.<sup>72</sup> A worker took a swim during her lunch break and, because the deck around the pool was narrow, she leaned back against the roof of the greenhouse to sunbathe.<sup>73</sup> The glass roof broke and she was injured.<sup>74</sup> The court held it could be found that the injury "arose out of" the employment.<sup>75</sup> The employer permitted use of the pool as a source of relief, and this was a benefit to the employer and incidental to the employment.<sup>76</sup> "[A] causative factor of injury was the hot, humid work environment which necessitated the use of the pool . . . and thereby exposed claimant to a risk to which she would not have been exposed apart from her work environment."<sup>77</sup>

Another example can be found in *Archer Daniels Midland Company v. Industrial Commission*,<sup>78</sup> where an employee who was walking from the plant parking lot to the plant slipped on ice and fell.<sup>79</sup> The court held that the injury "arose out of" the employment, because it was caused by a condition of the employer's premises.<sup>80</sup>

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71. 362 N.E.2d 325 (Ill. 1977).

72. *Id.* at 326.

73. *Id.*

74. *Id.*

75. *Id.* at 327.

76. *Scheffler*, 362 N.E.2d at 328.

77. *Id.* at 328. See also *Union Starch, Division of Miles Laboratories, Inc. v. Industrial Comm.*, 307 N.E.2d 118, 120 (Ill. 1974). An employee of a starch refinery was injured when he walked on a shed roof to get fresh air and the roof gave way. *Id.* Workers often went on roofs and fire escapes to get fresh air. *Id.* There was no warning sign to stay off this particular roof. *Id.* The court held that the cause of the injury was related to the employment environment and not to a hazard to which he would have been equally exposed apart from his employment. *Id.* at 121-22. The condition of the premises was a causative factor, and the employment did increase the risk exposure. *Id.*

78. 437 N.E.2d 609 (Ill. 1982).

79. *Id.* at 610.

80. See *All Steel, Inc. v. Industrial Comm.*, 582 N.E.2d 240, 242 (Ill. App. Ct. 1991). On a cold day an employee went to the parking lot during his lunch break to warm his car so it would start at the end of his shift. *Id.* at 241. The car caught fire. *Id.* He ran into the employer's building and got a fire extinguisher. *Id.* On the way back he slipped on melting snow on the floor and fell. *Id.* at 242. The court said his going out to warm his car was a reasonable necessary act of personal comfort which occurred "in the course of" employment. *Id.* His employer clearly con-

Two other examples can be found in *Pechan v. DynaPro, Inc.*<sup>81</sup> and *Beecher Wholesale Greenhouse, Inc. v. Industrial Commission*.<sup>82</sup> In *Pechan*, an office manager sued her employer for injuries caused by her exposure to second-hand smoke at work. The court held that the statutory immunity of the employer applied,<sup>83</sup> as the injury "arose out of" her employment.<sup>84</sup> Her employer knew of her sensitivity to second-hand smoke and allowed employees to continue smoking near her.<sup>85</sup> Her work thus caused her exposure to this unhealthy environment — a condition of her employer's premises.<sup>86</sup>

In *Beecher*, a salesman for a wholesale greenhouse was struck by lightning while talking with a customer on the telephone during a rainstorm with much thunder and lightning.<sup>87</sup> An electrical engineer testified that the condition of the greenhouse telephone system increased the risk of electrical shock due to lightning while using the phone: (1) high humidity and high dirt content in the greenhouse increased conductivity along the surface of the telephone line; (2) the telephone was situated at a high point in the building and thus served as a target for lightning; (3) the telephone was not well grounded, which tended to induce currents in the phone wire.<sup>88</sup>

### C. Greater Risk Than General Public

An injury "arises out of" the employment when the cause of the injury is a risk to which the employee is exposed because of his employment, and his exposure to the risk is greater than that of the general public. A good example of this can be found in *Holthaus v. Industrial Commission*.<sup>89</sup> A swimming pool manager was preparing the pool for its June opening.<sup>90</sup> At 6:00 p.m. she was working alone in the pool, and her car was the only car in the

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templated that employees would do this to facilitate their departure at the end of the workday. *Id.* The cause of the injury was not the fire. *Id.* at 242-43. It resulted from the fall due to snow on the floor of the building, i.e., a condition of the employer's premises. *Id.*

Contrast *All Steel and Archer Daniels with Caterpillar Tractor Co. v. Industrial Comm.*, 541 N.E.2d 665, 666 (Ill. 1989), where an employee sprained his ankle when he stepped off a curb while walking from the plant to the parking lot. There was nothing unusual or dangerous about the curb. *Id.* at 669-70.

81. 622 N.E.2d 108 (Ill. App. Ct. 1993).

82. 524 N.E.2d 750 (Ill. App. Ct. 1988).

83. *Pechan*, 524 N.E.2d at 751.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Beecher*, 524 N.E.2d at 751.

88. *Id.* at 752.

89. 469 N.E.2d 237 (Ill. App. Ct. 1984).

90. *Id.* at 238.

pool parking lot. An escaped convict came by and asked if it was her car in the lot.<sup>91</sup> He then tried to get her keys, she resisted, he shot her, and he escaped.<sup>92</sup> The court held that her injury "arose out of" her employment, as her work site created an enhanced risk of a criminal assault.<sup>93</sup> The pool area was isolated in early May; the convict found a lone woman who had a car, and was relatively isolated from anyone who might hear and help her.<sup>94</sup>

Yet in another case with quite similar facts, *Greene v. Industrial Commission*,<sup>95</sup> the court held that the injury did not "arise out of."<sup>96</sup> An Orkin service technician was brutally stabbed and killed in the Orkin parking lot in the early morning, near his loaded truck.<sup>97</sup> Nothing was taken from him or the truck.<sup>98</sup> The court said that the hazard was one to which he was equally exposed apart from his employment.<sup>99</sup> However, his wife had dropped him at the Orkin parking lot at 4:30 a.m., and his body was discovered at 7:30 a.m. by the service manager.<sup>100</sup> So this appears to have been an isolated area with a high risk of crime.<sup>101</sup>

A more readily understandable difference in result can be found by comparing the cases of *Rush-Presbyterian-St. Luke's Medical Center v. Industrial Commission*<sup>102</sup> and *Heath v. Jewel Companies*.<sup>103</sup> In *Rush-Presbyterian*, a dietary supervisor took an elevator from the seventh floor to the basement at 7:30 p.m. to get to the kitchen.<sup>104</sup> She was grabbed by two men, taken to a nearby stairway, and raped.<sup>105</sup> The court held that her risk was greater than the risk to the general public.<sup>106</sup> A psychiatrist had testified that nurses are more prone to sexual assault because they symbolize a strong maternal element to men with an Oedipal complex.<sup>107</sup> She was wearing a white uniform, was in an area

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91. *Id.*

92. *Id.*

93. *Id.* at 239-40.

94. *Holthaus*, 469 N.E.2d at 240.

95. 428 N.E.2d 476 (Ill. 1981).

96. *Id.* at 478.

97. *Id.* at 477.

98. *Id.*

99. *Id.* at 477.

100. *Id.* at 477.

101. *Id.* at 476-77.

102. 630 N.E.2d 1175 (Ill. App. Ct. 1994).

103. 628 N.E.2d 335 (Ill. App. Ct. 1993).

104. *Rush-Presbyterian*, 630 N.E.2d at 1176-77.

105. *Id.* at 1177.

106. *Id.* at 1179.

107. *Id.* An Oedipal complex is a desire to achieve sexual union with a mother figure.

mostly frequented by staff, and her attackers expressed disappointment when they discovered that she was not a nurse.<sup>108</sup>

In *Heath*, a stock clerk was unloading a late delivery after the store closed.<sup>109</sup> The door to the back room opened, and he was shot in the head.<sup>110</sup> He did not recognize the person who shot him.<sup>111</sup> There was no evidence that it was a dangerous neighborhood; there was no robbery; and no one else was hurt.<sup>112</sup> The court held that the Industrial Commission's finding that the injury did not "arise out of" the employment was not against the manifest weight of the evidence.<sup>113</sup>

#### D. Peril of the Street

Many cases involve an injury which occurs during travel — on foot, by bicycle, in a car, truck, bus, train, or plane. It is often found that the injured employee was exposed to a risk greater than the risk to the general public, as in *Campbell "66" Express, Inc. v. Industrial Commission*.<sup>114</sup> The driver of a tractor-trailer from Springfield to Chicago was injured when a tornado threw his vehicle 100 feet.<sup>115</sup> The court said it could be found that he had some kind of time schedule, however flexible, so he did not have the same freedom of choice as to whether to travel in bad weather

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108. For two similar cases, see *County of Cook v. Industrial Commission*, 520 N.E.2d 896, 897 (Ill. App. Ct. 1988) (allowing workers' compensation recovery when judge's secretary was stabbed and robbed while eating lunch in the courthouse parking lot, used mostly by municipal employees but also sometimes by members of the public; there was no lunchroom in courthouse, and her office was crowded and shared; court held her injury "arose out of" her employment, as she was exposed to the increased risk of being victimized; public rarely used the lot; there were many criminal defendants on the premises at noontime, especially that day), and *Chicago Housing Authority v. Industrial Comm.*, 609 N.E.2d 798, 799 (Ill. App. Ct. 1993) (affirming workers' compensation recovery when CHA carpenter was doing repair work in a public housing project early in the afternoon; he went to his car in an adjacent parking lot to get more tools; some adolescents behind a car hit him behind the head). The court held it could be found that place of attack presented greater risk of criminal assault. *Id.* at 801.

109. *Heath*, 628 N.E.2d at 336.

110. *Id.*

111. *Id.*

112. *Id.*

113. An even clearer example of an injury held to not "arise out of" employment can be found in *Brady v. Louis Ruffolo & Sons Construction Co.*, 578 N.E.2d 921 (Ill. 1991). An engineer was working at a drafting table 47 feet from the edge of a highway. *Id.* at 922. A truck carrying a load of gravel was hit by a car on the icy road, 350 feet from the building. *Id.* The truck's steering wheel locked, and the truck struck the building, causing injury to the engineer. *Id.* The court said the location of the work site did not create any greater risk than the risk to other people along the same highway. *Id.* at 924.

114. 415 N.E.2d 1043 (Ill. 1980).

115. *Id.* at 1044.

as an ordinary person would have.<sup>116</sup> Thus, he was subjected to a greater risk of injury from a tornado.<sup>117</sup>

Often called the "peril (or hazard) of the street" doctrine, the theory is that:

where employees, in the performance of their work, are exposed to the hazards of the street and to the hazards of automobile and railroad [and other forms of] transportation more than the general public, such risks become risks of the employment, and . . . injuries [that result from] such risks 'arise out of' such employment.<sup>118</sup>

In several cases courts found that an employee was exposed to greater risk while driving in his employer's parking lot just before or after work. For example, in *Chmelik v. Vena*,<sup>119</sup> the plaintiff was walking across his employer's parking lot to his car after work.<sup>120</sup> He was struck by the car of another employee who was also leaving work.<sup>121</sup> The court held that the injury "arose out of" employment.<sup>122</sup> There was greater risk than the risk to the general public, at quitting time, "when there is a mass and speedy exodus of the vehicles on the lot. . . ."<sup>123</sup>

Yet several cases strongly indicate that an injury can be held to "arise out of" the employment so long as the employment exposed the employee to the "peril of the street," even though the risk which caused injury was exactly the same as and no greater than the risk to which the general public was exposed. An early example of this can be found in *G.A. Dunham Company v. Industrial Commission*.<sup>124</sup> A heating engineer was asked by his employer to fly to Seattle on company business.<sup>125</sup> A bomb exploded and all passengers were killed in the crash.<sup>126</sup> The court held

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116. *Id.* at 1045.

117. *Id.*

118. *G.A. Dunham Co. v. Industrial Comm.*, 156 N.E.2d 560, 562 (Ill. 1959).

119. 201 N.E.2d 434, 436 (Ill. 1964).

120. *Id.*

121. *Id.*

122. *Id.* at 438.

123. *Id.* at 439. See *Hammel v. Industrial Comm.*, 626 N.E.2d 234, 235 (Ill. App. Ct. 1993). In *Hammel* the court allowed a workers' compensation recovery when, as the employee neared the exit to her employer's parking lot, the employee's car was struck by large truck en route to employer's scale. *Id.* The court said that configuration of the parking lot required trucks to cross employee traffic to reach designated areas of premises and, thus, created a hazard to which general public was not exposed. *Id.* at 236. See also *Sangster v. Keller*, 589 N.E.2d 940, 941 (Ill. App. Ct. 1992) (allowing workers' compensation recovery when two employees were both driving out of employer's parking lot after work when collision occurred). The *Sangster* court said the use of the driveway by employees, especially at starting and quitting times, resulted in increased risk of harm. *Id.* at 942.

124. 156 N.E.2d 560, 561 (Ill. 1959).

125. *Id.*

126. *Id.*

that this was a risk of the employment, and the employee's death "arose out of" the employment despite the fact that the engineer's exposure to an aircraft bombing was exactly the same as that of every other passenger.<sup>127</sup> There was not even any evidence that he was a frequent flyer and thus *more frequently* exposed to such danger.<sup>128</sup>

The court in *Torbech v. Industrial Commission*<sup>129</sup> took a similar approach. A store employee was to work from 2:00 or 3:00 p.m. until 9:00 p.m.<sup>130</sup> The store owner suggested that the employee get food from a restaurant across the street and bring it back to eat in the store, as she was the only one there when the owner left.<sup>131</sup> She was hit by a car while crossing the street.<sup>132</sup> The court held that her injury "arose out of" her employment as she was in the street because of the demands of her employment.<sup>133</sup> Here again, her exposure to risk was identical to that of any member of the general public.<sup>134</sup>

An extreme example of the "peril of the street" test can be found in *City of Springfield v. Industrial Commission*.<sup>135</sup> A detective had gone home for lunch and was returning to the station in an unmarked police car when his car was hit by another car.<sup>136</sup> The majority of the court said that since he was "on call" and had his radio on as required, his employer had authority over him at the time and, thus, he was "in the course of" his employment.<sup>137</sup> That being the case, his injury was compensable, since it was caused by a "peril of the street."<sup>138</sup>

Application of the "peril of the street" test has the effect of eliminating the "arising out of" test for injuries incurred by employees while travelling "in the course of" their employment. As Justice Stouder pointed out in his dissent in *City of Springfield*,<sup>139</sup> the detective's injury was not caused by the perfor-

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127. *Id.* at 566.

128. *Id.*

129. 276 N.E.2d 344 (Ill. 1971).

130. *Id.* at 344.

131. *Id.*

132. *Id.*

133. *Id.* at 345.

134. *Torbech*, 276 N.E.2d at 345. *But see* *Lynch Special Services v. Industrial Comm.*, where a warehouse security guard went to a restaurant one-and-one-half blocks away during work hours to get coffee and donut. 389 N.E.2d 1146, 1146 (Ill. 1979). On the way back he slipped and fell on the icy sidewalk. *Id.* at 1147. The court said the injury didn't "arise out of"; the icy sidewalk was not a hazard peculiar to his employment. *Id.*

135. 614 N.E.2d 478 (Ill. App. Ct. 1993).

136. *Id.* at 479.

137. *Id.* at 480.

138. *Id.*

139. *City of Springfield*, 614 N.E.2d at 481-82 (Stouder, J., dissenting).



mance of any duties of his job, nor by a risk to which he was exposed more than the general public.<sup>140</sup> He was not assigned to patrol duty; he was not responding to an emergency call or on his way to a crime scene or investigation.<sup>141</sup> His travel was no different than anyone returning to work. He was exposed to no greater risk than the general public. He was not conducting any police-related activity; he was just driving. Justice Stouder argued in his dissent that:

Under the majority's rationale, [he'd be covered if he] slipped and [fell] in the shower while listening to his police radio. . . . Workers' compensation is not a general . . . health and accident insurance policy [, and t]he facts in this case should not be construed in such a way as to make it so.<sup>142</sup>

#### IV. THE EFFECT OF THESE CASES ON THE FATE OF THE INCREASED-RISK DOCTRINE IN ILLINOIS

Illinois purports to apply a strict and traditional test for the statutory requirement that, to be compensable, an injury must "arise out of" the employment. In most cases the courts have indeed applied a strict and traditional test. An exception can be found in cases involving travel while in the course of employment, where the employee is exposed to the "peril of the street." In these cases, the courts often apply, at most, a "but for" test,<sup>143</sup> and at times do not even discuss "arising out of" so long as the injury was "in the course of."

In at least one case, the Illinois Supreme Court has allowed a workers' compensation claim where the cause of injury would not even satisfy a "but for" test for "arising out of." In *Eagle Discount Supermarket v. Industrial Commission*,<sup>144</sup> claimant broke his ankle while playing frisbee during an unpaid lunch break on the employer's parking lot.<sup>145</sup> The court applied the usual rule that activities on the employer's premises during a lunch break are "in the course of."<sup>146</sup> There the analysis ended; there was no discussion of the "arising out of" requirement except the court's statement that it was irrelevant that "the injury was not actually caused by a hazard of the employment."<sup>147</sup>

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140. *Id.* at 481.

141. *Id.*

142. *Id.*

143. The "but for" test states that "but for" the job requirements the employee would not have been at the place of injury. See *supra* notes 34-42 and accompanying text for a more thorough discussion of the "but for" test.

144. 412 N.E.2d 492 (Ill. 1980).

145. *Id.* at 494.

146. *Eagle Discount Supermarket*, 412 N.E.2d at 496.

147. *Id.* On September 15, 1980, subsequent to the injury in *Eagle Discount Su-*

If the approach of *Eagle Discount Supermarkets* was followed, it would effectively eliminate the "arising out of" requirement. That would violate the canon of statutory construction that each word and phrase in a statute should be presumed to have some meaning.<sup>148</sup> Since "arising out of" and "in the course of" are stated in the conjunctive in the statute, each should be presumed to have a separate meaning; they should not be treated as synonymous, and neither should be deemed superfluous.

#### CONCLUSION

Before an injured employee may recover under the Illinois Workers' Compensation Act, he must show that he was in the course of employment when the injury occurred and that the injury "arises out of" the employment. Of the five general tests for determining whether an injury arises out of employment, Illinois courts purport to use the strict increased-risk doctrine. However, Illinois courts, like other jurisdictions, have been much more liberal in interpreting "arising out of," especially in the case of perils of the street. Although Illinois courts have said the courts must give meaning to each of the words in a statute, they seem to be contradicting themselves by allowing recovery in some cases without even analyzing the case under the most liberal "but for" approach.

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*permarket*, the Workers' Compensation Act was amended to eliminate coverage for "injuries incurred while participating in voluntary recreational programs. . . ." ILL. REV. STAT. ch. 48, para. 138.11. (Smith-Hurd 1983).

148. *Kozak v. Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago*, 447 N.E.2d 394, 397 (Ill. 1983). "The words in a statute are to be given their ordinary and popularly understood meaning." *Id.*

