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## The Brown & Carlson Insight

### Early looks into the Increased Risk Test, post *Dykhoff*

#### [Supreme Court Kainz Decision](#)

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In March of 2015, the Supreme Court was once again asked to decide whether an incident "arose out of" employment in *Kainz v. Arrowhead Senior Living Community*. In *Kainz*, which is attached to this article, the Employee fractured her ankle while descending a staircase while at work. "As she was going down the flight of stairs, the employee's ankle inverted and twisted, causing an avulsion fracture. The employee testified that she was not carrying anything, but she was not holding onto a railing at the time she was injured. On cross-examination, she acknowledged that a railing was "handy." See *Kainz v. Arrowhead Senior Living Community*, 2014 WL 2453406 (Minn. WCCA August 6, 2014).

Procedurally, the employee was awarded compensation benefits at the administrative level. The employer and insurer appealed this decision, and the case was heard before the WCCA. The WCCA affirmed the compensation judge's original decision, relying on their own previous decision in *Dykhoff v. Excel Energy*, 2012 WL 6592145 (Minn. WCCA Nov. 29, 2012), in which they applied the "work-connection" and "positional risk" tests. However, after their *Dykhoff* reversal, the Supreme Court remanded *Kainz* back to the WCCA and ordered them to apply the "increased risk" test, as opined in *Dykhoff*. The WCCA once again heard this case and once again ruled in Ms. Kainz's favor. In issuing this decision, they relied on two important facts in establishing an "increased risk." The first being that the handrail did not descend all the way to the bottom of the stair case, and then second being that the stairs were "kind of steep."

This issue was once again appealed to the Supreme Court, who overturned the WCCA. In the attached decision, the Supreme Court opined that the findings of the WCCA were "manifestly contrary to the evidence." Specifically, there was contradictory evidence to support that there was an available



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handrail, and furthermore, there was photographic evidence as to the steepness of the stairs. As such, they remanded this case back to the original compensation judge to be reconsidered, in light of their Decision in *Dykoff*.

What does this mean? For the time being at least it appears that the Supreme Court has taken a strict application approach of the "increased risk test," and extended this to situations beyond those occurring on smooth flat surfaces. The simple fact that the employee was ascending/descending stairs will no longer be enough to make a claim compensable. The burden is on the employee to establish that something about those stairs in particular "increased their risk."

Should you have any questions regarding this or any other compensation matters, please feel free to contact myself or any of the attorneys at Brown & Carlson.

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STATE OF MINNESOTA

IN SUPREME COURT

A14-1521

OFFICE OF  
APPELLATE COURTS

MAR 04 2015

**FILED**

Arrowhead Senior Living Community,  
Self-Insured, administered by Berkley Risk  
Administrators Co.,

Employer-Relator,

vs.

Carol J. Kainz,

Employee-Respondent.

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Edward Q. Cassidy, Fredrikson & Byron, P.A., Minneapolis, Minnesota, for relator.

Steven T. Moe, Petersen, Sage, Graves, Layman & Moe, P.A., Duluth, Minnesota, for  
respondent.

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Considered and decided by the court without oral argument.

ORDER

Respondent Carol Kainz fractured her ankle on a staircase at her workplace, and filed a claim for workers' compensation benefits. The sole contested issue before the compensation judge was whether Kainz's injuries "arose out of" her employment. *See* Minn. Stat. § 176.021, subd. 1 (2014). The compensation judge awarded benefits to Kainz, concluding that the injuries "arose out of" her employment. The Workers' Compensation Court of Appeals (WCCA) affirmed, relying on its previous decision in *Dykhoff v. Xcel Energy*, 2012 WL 6592145 (Minn. WCCA Nov. 29, 2012), which had