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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 *Dykoff 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 *Dykoff* reversal, the Supreme Court remanded *Kainz* back to the WCCA and ordered them to apply the "increased risk" test, as opined in *Dykoff*. 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

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.

Striving to exceed our clients' expectations.

STATE OF MINNESOTA

IN SUPREME COURT

A14-1521

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

Employer-Relator,

vs.

Carol J. Kainz,

Employee-Respondent.

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.

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

applied a "work-connection test" that balanced the "arising out of" element with the "in the course of" element to determine the compensability of a workplace injury. *See Kainz v. Arrowhead Senior Living Community*, 2013 WL 1704315 at *4 (Minn. WCCA Apr. 1, 2013). We stayed Arrowhead's appeal while we considered *Dykhoff*. After reversing the WCCA's decision in *Dykhoff*, *see Dykhoff v. Xcel Energy*, 840 N.W.2d 821 (Minn. 2013), we remanded this case to the WCCA for further consideration. *See Kainz v. Arrowhead Senior Living Community*, 843 N.W.2d 785 (Minn. 2014).

On remand, the WCCA again affirmed. *Kainz v. Arrowhead Senior Living Community*, 2014 WL 4253406 (Minn. WCCA Aug. 6, 2014). This time, the WCCA applied the "increased risk" test from our decision in *Dykhoff*, which requires an employee to show that her workplace "exposed her to a risk of injury that was increased over what she would face in her everyday life"—in other words, a "special hazard." 840 N.W.2d at 827.

The WCCA primarily relied on two factual findings to conclude that the injury in this case was compensable under the increased-risk test. First, the WCCA held that the compensation judge's finding that "[n]o handrails were on that portion of the stairway where [Kainz] inverted and twisted her ankle" was supported by substantial evidence in the record. After our review of the record, however, we conclude that this finding is "manifestly contrary to the evidence." *Pelowski v. K-Mart Corp.*, 627 N.W.2d 89, 92 (Minn. 2001). Specifically, the WCCA failed to observe that the compensation judge's findings were self-contradictory. In his order, the compensation judge found that the injury occurred on the sixth step out of twelve on the stairway, where there was "[n]o

handrail[]," yet also found that the handrails extended "about two-thirds" of the way down the staircase. Both findings cannot be true; one or the other must be incorrect. The WCCA also relied on photographic evidence to conclude that the compensation judge's "no-handrails" finding was not clearly erroneous. However, we have reviewed the photographic evidence in the record, which conclusively shows that the handrails extend all the way down the staircase.

Second, the WCCA relied on Kainz's testimony that the staircase was "kind of steep" to hold that the injury was compensable under the increased-risk test. However, the compensation judge did not make a finding regarding the steepness of the stairs, and there is potentially conflicting evidence in the record (including the photographs) regarding whether the stairs are so steep that they presented a "special hazard" for Kainz. Of course, when the compensation judge made his findings, he did not have the benefit of our decision in *Dykhoff*.

Because the WCCA's decision was "manifestly contrary to the evidence," *see Pelowski*, 627 N.W.2d at 92, we reverse. To give the compensation judge an opportunity to reconsider his decision in light of *Dykhoff*, we remand to the compensation judge for further proceedings consistent with this order.

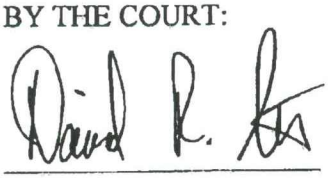
Therefore, based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the decision of the Workers' Compensation Court of Appeals filed August 6, 2014, be, and the same is, reversed, and the matter is remanded to the compensation judge for the purpose of reconsideration consistent with this order and with *Dykhoff v. Xcel Energy*, 840 N.W.2d 821 (Minn. 2013). *See Hoff v.*

Kempton, 317 N.W.2d 361, 366 (Minn. 1982) (explaining that summary dispositions "have no precedential value because they do not commit the court to any particular point of view," doing no more than establishing the law of the case).

Dated: March 4, 2015

BY THE COURT:



David R. Stras
Associate Justice

LILLEHAUG, J., took no part in the consideration or decision of this case.