Workers' Compensation

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I. LEGISLATION

The Chairman's Advisory Council of the State Board of Workers' Compensation again submitted significant legislation for 2005. Perhaps the most significant amendment to the Workers' Compensation Act[1] concerns the determination of catastrophic designation.[2] If an injury has not already been accepted as a catastrophic injury by the employer, and the authorized treating physician has released the employee to return to work with restrictions, there will be a rebuttable presumption, during a period not to exceed 130 weeks from the date of injury, that the injury is not a catastrophic injury. In making a determination as to whether an injury is catastrophic, the State Board of Workers' Compensation (the "Board") will consider all relevant factors, including the number of hours for which an employee has been released.[3]

When an employee who has a designated catastrophic injury reaches the age of eligibility for retirement benefits as defined in the Social Security Act,[4] a rebuttable presumption arises that the injury is no

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1. O.C.G.A. §§ 34-9-1 to -421 (2004 & Supp. 2005).
2. O.C.G.A. § 34-9-200.1(g) (2004 & Supp. 2005).
3. *Id.* § 34-9-200.1(g)(6)(A).
4. 42 U.S.C. § 416(l) (2005).

longer a catastrophic injury.[5] This presumption is not triggered by "early retirement," as defined in the Social Security Act, which begins when the employee reaches sixty-two years of age.[6] The Social Security Act defines the term "retirement age" on a floating scale based upon the age that an individual reaches early retirement, typically starting at age sixty-five and working upwards.[7] Additionally, when a party requests a determination of non-catastrophic status in accordance with the employee reaching the age of eligibility for retirement benefits, no hearing may be scheduled less than ninety days after the hearing is requested.[8] Following a determination as to the catastrophic or non-catastrophic nature of an employee's injury, either party may request a new determination upon reasonable grounds.[9]

Another feature in the legislative package indefinitely extended the period of time during which an employer may receive a workers' compensation insurance premium discount for adopting a drug-free workplace program.[10] The eight-year limit has been removed, and the premium discount shall now continue for participating employers so long as the employer maintains certification of a drug-free workplace.[11] The insured must remain certified for each year in which the premium discount is granted.[12]

The 2005 legislation also grants the Board the authority to promulgate rules and regulations concerning the electronic submission and transmission of documents and filings.[13] This amendment is set out in both the statute relating to the creation of the Board[14] and in the statute relating to the rulemaking and subpoena powers of the Board.[15]

Effective July 1, 2005, the maximum rate for temporary total disability was raised to $450 per week, while the minimum rate increased to $45.[16] The maximum for temporary partial disability was raised to $300.[17]

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5. O.C.G.A. § 34-9-200.1(g)(6)(B).
6. 42 U.S.C. § 416(l)(2).
7. *Id.* § 416(l).
8. O.C.G.A. § 34-9-102(a) (2004 & Supp. 2005).
9. O.C.G.A. § 34-9-200.1(i).
10. O.C.G.A. § 34-9-40.2 (2004 & Supp. 2005).
11. *Id.* § 34-9-40.2(b).
12. *Id.* § 34-9-40.2.
13. O.C.G.A. § 34-9-40 (2004 & Supp. 2005); O.C.G.A. § 34-9-60 (2004 & Supp. 2005).
14. O.C.G.A. § 34-9-40.
15. O.C.G.A. § 34-9-60.
16. O.C.G.A. § 34-9-261 (2004 & Supp. 2005).
17. O.C.G.A. § 34-9-262 (2004 & Supp. 2005).

Continuing the apparent march of the Subsequent Injury Trust Fund ("SITF") into oblivion, House Bill 200[18] further fine-tuned the sunset legislation passed in 2004. Under its present configuration, the SITF will not reimburse for claims occurring after June 30, 2006, two years earlier than under the previous configuration.[19] The SITF will then process the run-off claims and will essentially cease to exist on December 31, 2020.[20]

II. RECENT CASES

A. *Catastrophic Designation*

The court of appeals continued to provide direction for applying the definition of a catastrophic injury. In *Davis v. Carter Mechanical, Inc.*,[21] the employee was injured when a steel platform fell on his leg.[22] The administrative law judge ("ALJ") designated the injury as "catastrophic," but the appellate division reversed. The superior court affirmed the appellate division's decision. On appeal, the employee sought to show that his injury was catastrophic pursuant to the Official Code of Georgia Annotated ("O.C.G.A.") section 34-9-200.1(g)(6) as being "'of [such] a nature and severity that prevents the employee from being able to perform his or her prior work and any work available in substantial numbers within the national economy for which such employee is otherwise qualified.'"[23] The appeal focused on the second half of this definition, namely whether work was available in substantial numbers in the national economy for which the employee was available.[24] At the hearing before the ALJ, the employee's vocational expert testified that, in his opinion, "no work was available in substantial numbers within the national economy for which [the employee] was qualified given his limitations."[25] These limitations included physical restrictions stemming from the injury and low scores in intellectual aptitude and educational level tests.[26]

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18. GA. H.R. BILL 200, Reg. Sess. (2005).
19. O.C.G.A. § 34-9-368(a) (2004 & Supp. 2005).
20. *Id.* § 34-9-368(c).
21. 272 Ga. App. 773, 612 S.E.2d 879 (2005).
22. *Id.* at 773, 612 S.E.2d at 879.
23. *Id.*, 612 S.E.2d at 881 (quoting O.C.G.A. § 34-9-200.1(g)(6) (2004)).
24. *Id.*
25. *Id.* at 774, 612 S.E.2d at 881.
26. *Id.* The employee tested at a fourth grade level for reading comprehension, a seventh grade level for vocabulary, and a third grade level for spelling. He graduated high school out of the special education curriculum, and his vocational expert testified that the employee would likely have trouble filling out a job application. *Id.*

Contrary to the testimony of the employee's expert, the employer's vocational expert testified that a labor market survey indicated the existence of a substantial number of jobs available in the national economy that the employee was capable of performing. The employer's expert explained that by "available," he meant that the jobs existed, not that there were necessarily job openings.[27]

The employee's first argument revolved around the definition of available. He argued that the language of O.C.G.A. section 34-9-200.1(g)(6) "requires not just proof of existing jobs, but rather proof of a substantial number of job openings for which the [employee] is otherwise qualified."[28] The court noted that this particular code section was amended in 1995 to reduce confusion in applying federal Social Security Administration findings to state workers' compensation proceedings.[29] The court also noted that the Workers' Compensation Act's definition of catastrophic injury was edited to align more closely with the definition used by the Social Security Administration.[30] Quoting from the Social Security Act, the court observed that qualifications for disability included the inability to "'engage in any other kind of substantial gainful work which *exists* in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.'"[31]

Consequently, the court held that the legislature's use of the term available requires nothing beyond a showing that work exists in substantial numbers in the national economy.[32] The court also held that the employer's vocational expert's failure to interview the employee or consider all appropriate factors merely went to the weight of the evidence and did not render such evidence incompetent.[33] Finally, although the testimony of the employer's expert conflicted with standards set out by the Social Security Act and the Workers' Compensation Act, the court ruled that the Board could have found that the expert's testimony complied with the standards of both acts because the expert never conceded that the jobs would require accommodation.[34]

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27. *Id.* at 774-75, 612 S.E.2d at 881-82.
28. *Id.* at 776, 612 S.E.2d at 882.
29. *Id.*, 612 S.E.2d at 882-83.
30. *Id.*
31. *Id.* (quoting 42 U.S.C. § 423(d)(2)(A) (2005)).
32. *Id.* at 777, 612 S.E.2d at 883.
33. *Id.* at 777-78, 612 S.E.2d at 883-84.
34. *Id.* at 779, 612 S.E.2d at 884-85.

B. Change in Condition/Refusal of Suitable Employment

In *Freeman v. Southwire Co.,*[35] the issue was whether an employee who was already working at a lighter duty job and subsequently developed a disabling non-work-related condition was justified in refusing to continue working in the light duty position specifically created to accommodate her previous work injury.[36] Sandra Freeman developed carpal tunnel syndrome while working for Southwire. In order to comply with her doctor's recommendations, Southwire eliminated certain portions of Freeman's job that required repetitive hand movements. Freeman agreed that her new lighter job, walking around the plant and inspecting machines and wire samples, was suitable to her restrictions. She continued to work until she developed Sjogren's disease, a condition that caused swelling in her legs and ankles. Freeman was then unable to do the walking that her lighter job required, so she resigned and sought workers' compensation benefits.[37]

The ALJ, the appellate division, and the superior court all agreed that her refusal to do her light job was related to her subsequent development of Sjogren's disease. They also agreed that because her light job was suitable to her work injury when it was offered, she was not entitled to benefits when later she had to stop working. The employee appealed to the court of appeals, arguing that because her new non-work-related condition developed after her job injury, she was justified in refusing to work the lighter job.[38]

The court of appeals agreed with the superior court and affirmed the denial of benefits.[39] The court pointed out that under O.C.G.A. section 34-9-240,[40] a two-pronged inquiry must be made: the Board must first determine if the employment offered to the employee is suitable, and if so, if the employee's refusal to do the job is justified.[41] In this case, at the time the lighter work was offered, all parties agreed it was suitable. Only after she developed Sjogren's disease did Freeman contend that the job was no longer suitable.[42] The court noted that the later development of the Sjogren's disease did not provide justification for refusal of

35. 269 Ga. App. 692, 605 S.E.2d 95 (2004).
36. *Id.* at 694, 605 S.E.2d at 97.
37. *Id.* at 693, 605 S.E.2d at 96.
38. *Id.* at 692-93, 605 S.E.2d at 96.
39. *Id.* at 694, 605 S.E.2d at 97.
40. O.C.G.A. § 34-9-240 (2004).
41. *Freeman*, 269 Ga. App. at 694, 605 S.E.2d at 97 (citing City of Adel v. Wise, 261 Ga. 53, 54-55, 401 S.E.2d 522, 524 (1991)). *See* O.C.G.A. § 34-9-240(a) (2004).
42. *Freeman*, 269 Ga. App. at 694, 605 S.E.2d at 97.

the light work because the statute only references the time when the lighter duty job is offered, not any subsequent time when some other non-work-related injury may arise.[43]

C. Continuous Employment

In *Amedisys Home Health, Inc. v. Howard*,[44] the issue was whether an accident occurring at the employee's home was covered under the Workers' Compensation Act (the "Act"). Howard was a twenty-four hour on-call field nurse who worked on Friday, Saturday, and Sunday. Her job required her to visit patients' homes in the mornings. However, she was allowed to complete her paperwork at her own home because the reports on her patient visits were due the following morning. Howard was injured when she fell in her driveway in the early evening while carrying her paperwork, a pager, a cell phone, and a pizza. The employer contended that she was hurt when she was going inside her home to have dinner.[45]

The ALJ denied the claim, but the appellate division reversed and granted benefits to the employee. The superior court affirmed the decision of the appellate division.[46] The court of appeals affirmed as well, holding that the employee's action in taking her cell phone, pager, and paperwork into her home "was reasonably incident to her employment" because she was subject to be on call twenty-four hours a day.[47] Therefore, the principle of continuous employment applied to the case.[48]

D. Coverage

The case of *FitzSimons v. W.M. Collins Enterprises, Inc.*,[49] provides an example of how fraud and misrepresentation can result in coverage at the expense of an insurance agent. W.M. Collins Enterprises, Inc. ("Collins") hired Albritton as a subcontractor to do construction work. Prior to Albritton's starting work, Collins tried to confirm that Albritton had workers' compensation coverage for building activities. Howard FitzSimons, president of Insurance Management Associates, provided Collins with a certificate of insurance on behalf of Albritton to verify his workers' compensation coverage. A Collins representative noted, however, that the insured listed on the certificate of insurance was

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43. *Id.*
44. 269 Ga. App. 656, 605 S.E.2d 60 (2004).
45. *Id.* at 656, 657, 658, 605 S.E.2d at 61, 63.
46. *See id*. at 656, 605 S.E.2d at 61.
47. *Id.* at 658, 605 S.E.2d at 62-63.
48. *Id.*
49. 271 Ga. App. 854, 610 S.E.2d 654 (2005).

"Cherokee Motor Sports, Jim Albritton DBA."[50] The representative contacted FitzSimons on two separate occasions to specifically verify that Albritton had workers' compensation insurance for construction work.[51] FitzSimons, who was listed as the contact person on the insurance certificate, twice assured the Collins representative that Albritton had appropriate insurance, going so far as to state that the representative "didn't have to worry about" Albritton's company because the insurer was already aware that Albritton was working as a builder.[52]

When one of Albritton's employees was subsequently injured at the job site, Collins and its workers' compensation insurer had to pay benefits as a statutory employer under O.C.G.A. section 34-9-8(a)[53] because Albritton did not, in fact, have insurance for performing construction work. Collins and its workers' compensation insurer then sued FitzSimons and Insurance Management Associates for fraud, negligent misrepresentation, punitive damages, and attorney fees. A jury returned a verdict in favor of Collins and its insurer.[54]

On appeal, FitzSimons argued the evidence demanded the conclusion that his statements were merely opinions relating to insurance coverage and were not sufficient to sustain a finding of fraud.[55] The court of appeals held that FitzSimons reassured Collins that Albritton had insurance for building activity through the certificate of insurance and the two phone calls.[56] The court also held that this evidence was sufficient for the jury to conclude that FitzSimons "intended to induce Collins to hire Albritton to do construction work for which he was not insured."[57] In addition, the court upheld the conclusion that Collins justifiably relied on FitzSimons' representations as to the actual existence of an insurance policy for construction work when no such policy actually existed.[58] *FitzSimons*, therefore, provides a classic example of coverage produced by misrepresentation and fraud, resulting in the insurance agent paying both workers' compensation benefits and punitive damages.[59]

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50. *Id.* at 855, 610 S.E.2d at 655.
51. *Id.*, 610 S.E.2d at 655-56.
52. *Id.*, 610 S.E.2d at 656.
53. O.C.G.A. § 34-9-8(a) (2004).
54. *FitzSimons*, 271 Ga. App. at 856, 610 S.E.2d at 656.
55. *Id.* at 857, 610 S.E.2d at 656-57.
56. *Id.* at 856, 610 S.E.2d at 656.
57. *Id.*
58. *Id.* at 857, 610 S.E.2d at 657.
59. *Id.* at 854, 610 S.E.2d at 654.

E. Death Benefits: Surviving Spouse

An interesting interpretation of dependency benefits is found in *One Beacon Insurance Co. v. Hughes*.[60] An employee was injured in a 1994 work-related accident and received temporary total disability benefits until his death in 2001. His wife began receiving death benefits, but the employer soon stopped paying on the grounds that the husband and wife had exceeded the $100,000 statutory limit on workers' compensation benefits. The wife alleged that she had elected to receive benefits until age 65 and that no cap applied to those benefits. She further claimed that if a cap did apply, it was the $125,000 cap that was in the statute at the time of her husband's death, and that the employer was not entitled to a credit for benefits paid during her husband's life. The ALJ held that the applicable cap was $100,000, and the employer was not entitled to a credit for benefits paid to the employee prior to his death. The superior court reversed the decision concerning the amount of the cap, holding that the law at the time of employee's death controlled.[61]

The court of appeals held that the controlling version of the statute was the version in place at the time of the plaintiff's husband's injury, which included a $100,000 cap, and not the version of the statute at the time of his death.[62] The court also held that the cap was intended to limit a surviving spouse's payments to $100,000.[63] Even if that spouse was entitled to receive benefits until age sixty-five, O.C.G.A. section 34-9-265(d)[64] distinctly limits the surviving spouse's benefits to $100,000, regardless of age.[65] Furthermore, the court held that the employer was not entitled to receive credits because the statute authorizing such credits did not apply where the dependent elected to receive death benefits based on age rather than the maximum number of weeks.[66] According to the court, O.C.G.A. section 34-9-13(e)[67] provides for deductions for past payments made to injured employees.[68] In doing so, the legislature specifically mentioned those dependents who had elected the maximum number of weeks, while any mention of age dependents was absent.[69] Therefore, the court held that the legislature did not

60. 269 Ga. App. 390, 604 S.E.2d 248 (2004).
61. *Id.* at 390-91, 604 S.E.2d at 249-50.
62. *Id.* at 392, 604 S.E.2d at 250.
63. *Id.* at 393, 604 S.E.2d at 251.
64. O.C.G.A. § 34-9-265(d) (2004).
65. *Id.*; *Hughes*, 269 Ga. App. at 393, 604 S.E.2d at 251.
66. *Hughes*, 269 Ga. App. at 392-93, 604 S.E.2d at 251.
67. O.C.G.A. § 34-9-13(2) (2004).
68. *Id.*; *Hughes*, 269 Ga. App. at 392, 604 S.E.2d at 250.
69. *Hughes*, 269 Ga. App. at 392, 604 S.E.2d at 250.

intend for an employer to receive a credit when the surviving spouse elected to receive death benefits based on age.[70]

F. Exclusive Remedy

Efforts to avoid the exclusive remedy doctrine continued during this survey period. The long trend of avoiding any weakening of the doctrine also continued. In *Eudy v. Universal Wrestling Corp.*,[71] Sidney Eudy was a wrestler who performed under the name "Sid Vicious." In performing a move choreographed by his employer World Championship Wrestling ("WCW"), he suffered a serious injury that rendered him unable to continue wrestling. Following the injury, WCW paid him a reduced wage and ultimately terminated his employment contract with ninety days notice. Eudy brought a number of claims against WCW, including breach of contract and negligent infliction of emotional distress. Upon the defendant's motion, the trial court granted summary judgment in favor of WCW on most of the claims.[72]

Eudy's employment contract with WCW provided that, should Eudy be unable to perform because of incapacity, WCW could pay Eudy a reduced rate and could terminate his employment after thirty days.[73] Regarding Eudy's claim on appeal that he should receive full pay because he was coerced into performing the dangerous move, the court of appeals ruled that the contract provided for the contingency that he might become injured and unable to wrestle; therefore, the contract controlled.[74] Eudy also argued that the jury should decide whether he was an independent contractor or an employee, but he failed to raise this argument at the motion for summary judgment.[75] Thus, the court refused to consider this issue on appeal.[76]

Eudy contended that the trial court erred in holding that the exclusive remedy provisions of the Act barred his tort claims, arguing these claims fell within the willful misconduct exception. However, the employment contract between Eudy and WCW provided that, so long as the employer maintained workers' compensation insurance, the wrestler agreed to accept those benefits as his sole remedy if he was injured.[77] Thus, even though the employee argued that his claims fell within the willful

70. *Id.*, 604 S.E.2d at 251-52.
71. 272 Ga. App. 142, 611 S.E.2d 770 (2005).
72. *Id.* at 142-43, 611 S.E.2d at 772.
73. *Id.* at 144, 611 S.E.2d at 772.
74. *Id.* at 144, 145, 611 S.E.2d at 773, 774.
75. *Id.* at 145-46, 611 S.E.2d at 774.
76. *Id.*
77. *Id.* at 146, 611 S.E.2d at 774.

misconduct exception to workers' compensation immunity, the court of appeals ruled that the contractual provision foreclosed the employee's tort claims.[78]

The application of the exclusive remedy to a joint venture was explored in *Jones v. Macon Soils, Inc.*[79] The plaintiff's husband died in the course of his employment after falling from a defective boom truck owned by his employer, Macon Water Authority. The plaintiff recovered workers' compensation benefits from the husband's employer. Later, she filed suit in tort against Macon Soils, a subsidiary of the employer, on the grounds that Macon Soils was also partially liable because it was engaged in a joint enterprise with the employer and had an ownership interest in the boom truck through joint insurance with the employer.[80]

The court of appeals held that, assuming the subsidiary was a joint venturer, the Act provided the sole remedy against the subsidiary and precluded tort claims.[81] The court cited *Seckinger & Co. v. Foreman*,[82] which held that because one joint venturer is immune from tort liability to the employees of its joint venturer, the joint venturers are also liable for workers' compensation benefits of each other's employees.[83] Thus, by alleging that Macon Soils was a joint venturer with Macon Water Authority, the plaintiff effectively argued for the preclusion of her own tort claims.[84]

In *Longuepee v. Georgia Institute of Technology*,[85] the employee worked in the School of Biology at Georgia Institute of Technology ("Georgia Tech"), which provided a parking space for the employee about three blocks from the building where she worked.[86] Georgia Tech operated a bus which could have taken her to her building, but she chose to walk to work "for personal health reasons."[87] While walking to work after parking in the employer-owned parking lot, the employee was injured when she was struck by a vehicle owned and operated by Georgia Tech. The employee and her husband sued Georgia Tech for personal injury and loss of consortium, but the trial court granted

78. *Id.*
79. 270 Ga. App. 298, 606 S.E.2d 316 (2004).
80. *Id.* at 298-99, 606 S.E.2d at 317.
81. *Id.* at 300, 606 S.E.2d at 318.
82. 252 Ga. 540, 314 S.E.2d 891 (1984).
83. *Jones*, 270 Ga. App. at 300, 606 S.E.2d at 318.
84. *Id.*
85. 269 Ga. App. 884, 605 S.E.2d 455 (2004).
86. *Id.* at 884, 605 S.E.2d at 457.
87. *Id.* at 885, 605 S.E.2d at 457.

summary judgment for the employer, finding that the Act covered the injury and operated as the exclusive remedy.[88]

On appeal, the employee argued that she was on a personal mission while injured, and thus the Act should not apply. She claimed that the "parking lot exception," which renders an injury compensable when it occurred as the employee was going to or coming from a parking facility owned and operated by the employer, does not apply because she chose to walk for health reasons rather than ride the Georgia Tech bus.[89] The court ruled that the facts did "not establish that [the employee] deviated from employment related ingress to work from the parking facility and was on a purely personal mission at the time of the accident."[90] Because the injury that the employee suffered occurred during ingress from an employer-owned parking facility, it was compensable under the Act.[91] Therefore, the court concluded that the Act was the employee's exclusive remedy, and summary judgment was properly granted in favor of her employer on her tort claims.[92]

Choice of law was addressed in *Dowis v. Mud Slinger Concrete, Inc.*[93] An employee of a Missouri corporation was accidentally injured while on the job in Georgia. He filed a workers' compensation claim in Missouri, and the employer paid benefits under Missouri law. The employee then attempted to sue the company and its president under Georgia tort law. The trial court applied the rule of *lex loci delicti* to determine the applicable substantive law and held that the exclusive remedy provision of the Act precluded the tort claim. [94]

On appeal, the employee argued that the trial court improperly applied the Act under the conflicts of law rule of *lex loci delicti*. The employee claimed that the Missouri workers' compensation law, which does not bar a tort action against the employer, should apply.[95] The court of appeals stated that Georgia substantive law was correctly applied, as the injury occurred in Georgia, and wrote, "[w]here a nonresident employee, hired by a foreign corporation, is injured in Georgia, arising out of and in the scope of the employment, Georgia will apply its own substantive law, whether or not the Georgia Workers' Compensation law was invoked to pay . . . ."[96] Receiving the actual

88. *Id.* at 884, 605 S.E.2d at 456.
89. *Id.* at 885, 605 S.E.2d at 457.
90. *Id.* at 885-86, 605 S.E.2d at 457.
91. *Id.* at 886, 605 S.E.2d at 457.
92. *Id.*, 605 S.E.2d at 458.
93. 269 Ga. App. 805, 605 S.E.2d 615 (2004).
94. *Id.* at 805, 605 S.E.2d at 616-17.
95. *Id.* at 806, 605 S.E.2d at 617.
96. *Id*.

benefits under a more liberal workers' compensation law did not override the exclusive remedy provision of Georgia workers' compensation law.[97]

The employee additionally argued that drug use by co-workers contributed to the accident, and Georgia's public policy in favor of a drug-free workplace should override the exclusive remedy policy.[98] The court began its analysis of this argument by stating that such an exception would be extremely narrow, given the circumstances of this case, and would not generally advance a public policy of a drug-free work environment.[99] The court held that there was nothing to indicate Georgia's drug-free workplace statute was intended to supersede the exclusive remedy policy when the two conflicted.[100] Moreover, criminal sanctions are better designed and more efficacious in advancing the drug-free workplace public policy.[101] The Georgia Supreme Court has granted writ of certiorari.[102]

G. Illegal Aliens

The court of appeals issued two decisions during the survey period that further illuminate the rights of illegal aliens to workers' compensation benefits under the Act.

The first case, *Continental PET Technologies, Inc. v. Palacias*,[103] concerns whether an illegal alien can be considered an employee under O.C.G.A. section 34-9-1(2),[104] and therefore subject to coverage under the Act.[105] The facts were undisputed that Palacias had been in the United States illegally since 1994, and she had used fraudulent documents to secure her position as a janitor for Continental PET Technologies, Inc. ("Continental").[106] When she was subsequently injured on the job, her illegal employment status was discovered, and the employer contested the workers' compensation claim, arguing that federal law making it unlawful to employ an illegal alien made any employment contract between Palacias and Continental void. Continental further argued that, as an illegal alien, Palacias could not meet the

97. *Id.*
98. *Id.* at 807, 605 S.E.2d at 618.
99. *Id.*
100. *Id.* at 808, 605 S.E.2d at 618.
101. *Id.*
102. Dowis v. Mud Slingers, Inc., 2005 Ga. LEXIS 84 (Oct. 24, 2005).
103. 269 Ga. App. 561, 604 S.E.2d 627 (2004).
104. O.C.G.A. § 34-9-1 (2004).
105. *Continental*, 269 Ga. App. at 561, 604 S.E.2d at 629.
106. *Id.*

definition of "employee" under O.C.G.A. section 34-9-1(2) and was not entitled to benefits under the Act.[107]

The court of appeals first rejected Continental's argument that federal law preempts the Act with regard to illegal aliens.[108] On this subject, the court reiterated its ruling in *Wet Walls v. Ledezma*[109] that "'there is no express preemption or directly conflicting law' that would preclude Georgia from awarding workers' compensation benefits to an illegal alien."[110] The court went on to elaborate that the provisions of the Immigration Reform and Control Act of 1986 ("IRCA")[111] addressed the hiring of undocumented aliens, but "do not purport to intrude into the area of what protections a state may afford these aliens."[112] The court also cited a Connecticut supreme court decision holding that the goal of IRCA to reduce the hiring of illegal aliens would be subverted by allowing employers to avoid workers' compensation liability for illegal aliens.[113]

The court of appeals similarly rejected Continental's argument that Palacias could not be considered an employee as defined under the Act, given her fraudulent inducement of the employment contract by presenting forged identification papers.[114] In addressing this issue, the court noted the definition of employee in O.C.G.A. section 34-9-1(2)—"'*every person in the service of another* under any contract of hire or apprenticeship,'"—and concluded that "every person" would necessarily include illegal aliens.[115]

In her concurrence, Judge Miller emphasized the intent of the original Workers' Compensation Act[116] passed in 1920 to broadly define the term "employee" to include minors "even though working in violation of any child labor law . . . ."[117] Judge Miller concluded: "From the moment this legislation was enacted, the General Assembly anticipated that employers might hire illegal workers and intended that such

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107. *Id.*

108. *Id.* at 562, 604 S.E.2d at 630.

109. 266 Ga. App. 685, 598 S.E.2d 60 (2004); *see also* H. Michael Bagley et al., *Workers' Compensation*, 56 MERCER L. REV. 479 (2004).

110. *Continental*, 269 Ga. App. at 562, 604 S.E.2d at 630 (quoting *Wet Walls*, 266 Ga. App. at 687, 598 S.E.2d at 63).

111. 8 U.S.C. §§ 1101-1537 (2000).

112. *Continental*, 269 Ga. App. at 562-63, 604 S.E.2d at 630.

113. *Id.* at 563-64, 604 S.E.2d at 630-31 (citing Dowling v. Slotnik, 712 A.2d 396, 410-11 (Conn. 1998)).

114. *Id.* at 565, 604 S.E.2d at 631.

115. *Id.* at 564, 604 S.E.2d at 631 (quoting O.C.G.A. § 34-9-1(2)).

116. 1920 Ga. Laws 167, 161.

117. *Continental*, 269 Ga. App. at 565-66, 604 S.E.2d at 632 (Miller, J., concurring) (quoting 1920 Ga. Laws 167, 168).

workers be covered by its workers' compensation law."[118] Furthermore, Judge Miller noted that employers should not be allowed the benefit of excluding workers' compensation coverage for illegal workers who have already provided the benefit of their services and for whom the employer's workers' compensation insurance has presumably been included in their underwriting and premium calculation.[119]

In the case of *Earth First Grading v. Gutierrez*,[120] decided two months after *Continental,* the court of appeals reviewed the effect of illegal alien status on an employee's right to continuing benefits based upon an inability to find employment.[121] Gutierrez was injured while working for Earth First Grading ("Earth First"), where he procured employment by presenting fraudulent identification documents. Gutierrez received temporary total disability benefits and medical treatment, but his disability benefits were suspended on October 8, 2001 based upon a normal-duty work release from his authorized treating physician. Gutierrez never returned to work for Earth First, but he worked for two weeks in February 2002 for another company sweeping construction sites for up to nine hours per day. When the work ran out at that job, Gutierrez found another job in May 2002 working at a nursery where he worked until he left for reasons unrelated to his alleged physical problems. In June 2002 Gutierrez filed a request for a hearing with the Board seeking reinstatement of his temporary total disability benefits from October 2001. This request was based in part upon an independent medical examination he obtained in February 2002, which concluded that the back injury restricted his activities.[122]

During the discovery phase, Earth First learned of Gutierrez's illegal status, and of the fradulent nature of the documents he presented to obtain employment in August 2000. At the hearing, Earth First presented some of the same arguments the employer asserted in *Continental*, namely that federal law preempted Gutierrez's entitlement to benefits, and his status as an illegal alien precluded him from being deemed an employee for purposes of the Act.[123] After rejecting these arguments as having been decided by *Continental,*[124] the court of appeals turned to Earth First's arguments that Guiterrez's presentation

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118. *Id.* at 566, 604 S.E.2d at 632 (Miller, J., concurring).
119. *Id.* (Miller, J., concurring).
120. 270 Ga. App. 328, 606 S.E.2d 332 (2004).
121. *Id.* at 328, 606 S.E.2d at 332.
122. *Id.*, 606 S.E.2d at 333.
123. *Id.* at 328-29, 606 S.E.2d at 333-34; *Continental*, 269 Ga. App. at 561, 604 S.E.2d at 627.
124. *See Continental*, 269 Ga. App. at 561, 604 S.E.2d at 627.

of fraudulent documents to obtain employment constituted willful misconduct under O.C.G.A. section 34-9-17.[125] Earth First argued that Gutierrez's status as an undocumented worker was analogous to a line of cases holding that an employee who is incarcerated upon conviction of a crime is not entitled to disability benefits because he cannot meaningfully accept a job even if it were offered.[126] The court rejected the employer's willful misconduct argument under its previous holding in *Dynasty Sample Co. v. Beltran*,[127] determining that there was no causal connection between Gutierrez's presentation of fraudulent employment documents and his subsequent on-the-job injury.[128]

The court also rejected Earth First's argument that, much like an incarcerated employee, Gutierrez could not meaningfully accept an offer of employment because his status as an illegal alien made it illegal, under federal law, for him to be employed.[129] The court noted that the employee had been awarded benefits from the date of suspension in October 2001 until he returned to work on February 1, 2002, and it was not until after this period of time that the employer learned about Guiterrez's illegal employment status.[130] Therefore, the court concluded that Gutierrez still might have "meaningfully" accepted employment from Earth First because the employer had yet to learn about his status as an illegal alien, even though he would have been committing a crime under federal law to accept such an offer of employment.[131] The court of appeals was also bound by the Board's conclusion that the employee was disabled from October 2001 through February 2002.[132] The Board based its decision on the opinion of the employee's independent medical examiner, despite the contrary opinion of the authorized treating physician in October 2001 that Gutierrez was capable of performing unrestricted work activity.[133]

To the extent there was any question remaining, the court's decision in *Continental* establishes that illegal aliens are covered under the Act, even if their employment was fraudulently obtained.[134] The decision in *Earth First* goes further and holds that an employee's status as an

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125. O.C.G.A. § 34-9-17 (2004); *Earth First*, 270 Ga. App. at 330, 604 S.E.2d at 334-35.
126. *Earth First*, 270 Ga. App. at 331, 606 S.E.2d at 335.
127. 224 Ga. App. 90, 479 S.E.2d 773 (1996).
128. *Id.* at 92, 479 S.E.2d at 775; *Earth First*, 270 Ga. App. at 330-31, 604 S.E.2d at 335.
129. *Earth First*, 270 Ga. App. at 331, 604 S.E.2d at 335.
130. *Id.* at 328, 331, 604 S.E.2d at 333, 335.
131. *See id.* at 331, 604 S.E.2d at 335.
132. *Id.* at 332, 604 S.E.2d at 336.
133. *Id.*
134. *Continental*, 269 Ga. App. at 566, 604 S.E.2d at 627.

illegal alien does not necessarily preclude a resumption of benefits under O.C.G.A. section 34-9-104,[135] at least before the employee's illegal status is discovered.[136] These holdings, along with the court's prior decisions in *Dynasty Sample* and *Wet Walls*, create the seemingly anomalous result of allowing a worker who fraudulently obtained employment to receive the benefit of workers' compensation coverage.[137] Perhaps as much as anything, these decisions reflect the court's concerns with the ever-increasing flow of immigrant workers into Georgia's work force.

H. Independent Contractors

O.C.G.A. section 34-9-2(e)[138] provides that a person is an independent contractor, rather than an employee, if he or she: (1) is a party to a contract that intends to create an independent contractor relationship; (2) is given the right to exercise control over the time, manner, and method of the work to be performed; and (3) establishes a set price per job or per unit basis, rather than on a salary or hourly basis.[139] The issue of whether a worker is an independent contractor or an employee who is covered by the Act is inherently a fact-sensitive issue, as exemplified by the court of appeals in *Atlas Construction Co. v. Pena*.[140]

Atlas Construction Company was an intermediate contractor on a construction project. Atlas hired the Pena brothers as vinyl siding subcontractors. While the court noted that there was evidence upon which to conclude that Pena was an independent contractor, there was also evidence to support the Board's determination that Pena was an employee for the purposes of workers' compensation coverage.[141] This evidence included testimony from Pena and his brother that they received directions from Atlas on the manner of performing the work, and on the time during which the work was to be performed. Testimony also showed that Pena's brother sometimes acted on behalf of Atlas during job site meetings and for delivery of supplies to Atlas.[142] Although the evidence was in dispute, the court concluded that there

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135. O.C.G.A. § 34-9-104 (2004 & Supp. 2005).

136. *Earth First*, 270 Ga. App. at 328, 606 S.E.2d at 332.

137. *Dynasty Sample*, 224 Ga. App. 90, 479 S.E.2d 773; *Wet Walls*, 266 Ga. App. 685, 598 S.E.2d 60.

138. O.C.G.A. § 34-9-2(e) (2004).

139. *Id.*

140. 268 Ga. App. 566, 602 S.E.2d 151 (2004).

141. *Id.* at 567, 602 S.E.2d at 152.

142. *Id.*

was sufficient evidence to uphold the Board's determination under the "any evidence" rule,[143] and the Board's decision should be affirmed.[144]

I. "Positional Risk Doctrine" and "Ingress and Egress"

Three cases came before the court of appeals this year concerning the basic "arising out of" and "in the course of" rule. The elements of the positional risk doctrine were discussed in two of these cases. All three cases dealt with situations that arose before the employee had actually started working.

Johnson v. Publix Supermarkets[145] was a case in which a Publix cashier injured her leg while "hurrying down a store aisle" about thirty minutes before the store closed.[146] The stipulated facts showed that Johnson "was walking quickly and looking ahead for items left on the floor, as all Publix employees were encouraged to do . . . ."[147] The court concluded that the injuries were compensable because if Johnson had not been working, she would not have been hurrying through the aisles.[148] This constituted a causal connection to her employment through the positional risk doctrine.[149]

The case of *Chaparral Boats, Inc. v. Heath*[150] attempted clarification of the positional risk doctrine, which is invoked in some circumstances to satisfy the requirement that an injury arise out of the employment, and can apply when the cause of the injury has nothing to do with the employee's usual duties. Under this theory,

> for the injury to be compensable it is only necessary for the claimant to prove that his work brought him within range of the danger by requiring his presence in the locale when the peril struck, even though any other person present would have been injured irrespective of his employment.[151]

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143. *Id.* (citing Tommy Nobis Ctr. v. Barfield, 187 Ga. App. 394, 396, 370 S.E.2d 517, 518 (1988); Echo Enters. v. Aspinwall, 194 Ga. App. 444, 445, 390 S.E.2d 867, 868 (1990)).

144. *Id.*

145. 256 Ga. App. 540, 568 S.E.2d 827 (2002). The case was physical precedent only because less than a majority of the full court decision fully concurred in the result. GA. APP. R. 33(a)

146. *Johnson*, 256 Ga. App. at 540, 568 S.E.2d at 828.

147. *Id.*

148. *Id.* at 542, 568 S.E.2d at 829.

149. *Id.*

150. 269 Ga. App. 339, 606 S.E.2d 567 (2004).

151. Nat'l Fire Ins. Co. v. Edwards, 152 Ga. App. 566, 567, 263 S.E.2d 455, 455-56 (1979).

Furthermore, under the positional risk doctrine it is not necessary that the danger causing the harm to the employee be specifically work-related.[152]

The primary issue in *Chaparral Boats* was whether the employee's pre-existing knee injury, aggravated as she was walking across Chaparral's premises to clock in for work, was compensable under the Act.[153] Beginning with the fundamental proposition that to be compensable under the Act, an injury must arise out of and be in the course of employment,[154] the court reiterated its many previous holdings that these two phrases are not synonymous.[155] As there was no dispute that Heath was in the course of employment because her knee injury occurred in a place where she was reasonably expected to be in the performance of her duties, the focus of the decision was on whether the injury arose out of Heath's employment.[156]

The court of appeals in *Chaparral Boats* specifically undermined the court's interpretation in *Johnson* of the positional risk doctrine, concluding that, since its origination in the case of *National Fire Insurance Co. v. Edwards*,[157] the doctrine had been misconstrued.[158] In disapproving the discussion of the positional risk doctrine in *Johnson,* the court clarified that the positional risk doctrine

> does not mean that every injury which occurs while an employee is located somewhere at work necessarily arises out of the employment. Where the injury would have occurred regardless of where the employee was required to be located, and results from a risk to which the employee would have been equally exposed apart from any condition of the employment, there is no basis for finding a causal connection between the employment and the injury, and no basis for compensation under the positional risk doctrine.[159]

Returning to the evidence at hand, the court noted that "Heath was simply walking at a pace of her own choosing when she felt popping and

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152. *Id.* at 568, 263 S.E.2d at 456.

153. *Chaparral Boats*, 269 Ga. App. at 339, 606 S.E.2d at 568. Although the court ultimately concluded that Heath's original injury was not compensable, it affirmed the finding that Heath sustained compensable subsequent injury. *Id.*

154. O.C.G.A. § 34-9-1(4) (2004).

155. *Chaparral Boats*, 269 Ga. App. at 340, 606 S.E.2d at 569. *See generally* Lee v. Middleton Logging Co., 198 Ga. App. 585, 402 S.E.2d 536 (1991); McElreath v. McElreath, 155 Ga. App. 826, 273 S.E.2d 205 (1980).

156. *Chaparral Boats*, 269 Ga. App. at 340, 606 S.E.2d at 569.

157. 152 Ga. App. 566, 263 S.E.2d 455 (1979).

158. *Chaparral Boats*, 269 Ga. App. at 350, 606 S.E.2d at 576.

159. *Id.* at 343, 606 S.E.2d at 571.

pain in her knee."[160] This injury did not establish a causal connection to her employment because her pace, whether fast or slow, "was a risk to which she was equally exposed apart from her employment."[161] Therefore, the court specifically disapproved the decision in *Johnson* as misconstruing both the positional risk and idiopathic injury doctrines.[162]

The issue in *Collie Concessions, Inc. v. Bruce*[163] was whether a temporary pedestrian crosswalk was part of the employer's premises for purposes of workers' compensation coverage.[164] Lillie Bruce had been hired to work as a cashier for Collie Concessions at the Masters Golf Tournament. To get to work, Bruce rode with friends who parked their car at a house on the corner of Cherry Lane and Berckman Road, using a pass the tournament director had given Collie Concessions for its employees. Collie did not own, maintain, or control the parking area where Bruce parked.[165] Bruce got out of the car and walked to a temporary pedestrian crosswalk, which had been set up to allow people to enter Gate 7, where she was required to enter to begin working. She was struck by a car while walking in the temporary crosswalk.[166]

Bruce filed a claim against Collie Concessions, arguing that (1) her period of employment would have allowed a reasonable time to come and go from the parking lot, and her injury occurred during this time; and (2) she was injured on her employer's premises, contending that the temporary crosswalk was part of Collie Concessions' property. The ALJ denied her claim, finding that her injury occurred when she was going to work and did not fall within the exception allowing a reasonable time for ingress and egress from the place of work while on the employer's premises. Furthermore, the ALJ found that the parking lot exception did not apply because the lot was not a part of the employer's premises. The appellate division agreed with the ALJ, but the superior court reversed, finding that (1) the temporary crosswalk should be treated no differently than other parts of the tournament grounds, and (2) that the

160. *Id.* at 344, 606 S.E.2d at 571-72.

161. *Id.*

162. *Id.* at 345-48, 606 S.E.2d at 572-74.

163. 272 Ga. App. 578, 612 S.E.2d 900 (2005).

164. *Id.* at 578, 612 S.E.2d at 900.

165. *Id.* at 579, 612 S.E.2d at 902. The general rule is an injury that occurs when an employee is traveling to or from work is not covered. This rule is known as the "ingress and egress" rule. Connell v. Head, 253 Ga. App. 443, 444, 559 S.E.2d 73, 75 (2002). There is an exception, however, if the injury occurs in a parking lot that is owned, controlled, or maintained by the employer. Tate v. Bruno's Foods, 200 Ga. App. 395, 396, 408 S.E.2d 456, 457 (1991).

166. *Collie Concessions*, 272 Ga. App. at 579, 612 S.E.2d at 902.

tournament grounds were the employer's premises for purposes of workers' compensation coverage.[167]

The court of appeals noted that the parking lot was not owned, controlled, or maintained by Bruce's employer.[168] Collie Concessions was simply allotted a number of spaces in the lot, which were given to employees on a first come, first served basis. Therefore, the lot was not part of Collie Concessions premises.[169] The court also noted that while some past cases may have given the impression that a claim is within the exception when the parking lot is maintained or controlled by the employer, "a careful review of those cases shows that the control or maintenance of the lot must exist in conjunction with the ownership or lease thereof to support a finding that the parking lot exception applies."[170] In *Collie Concessions*, there was no ownership or lease, and the court held that mere control of the lot would not be enough to fall within the exception.[171]

The court also rejected the superior court's idea "that the 'temporary pedestrian crosswalk was part of the employer's premises [because] it was constructed for use only during the week of the Masters and was not present during any other time of the year.'"[172] The crosswalk was on a public street, and control by Collie Concessions or Augusta National could not be established by the fact that the crosswalk had been specially constructed for the Masters and would be in place for only a short time.[173] The court went on to state that the positional risk doctrine[174] would not be applicable to this scenario because Bruce was on her way to work and was not yet on the premises of her employer, even though the employer designated a particular time to come to work and a particular route or portal to use.[175]

A third case addressing similar issues was also decided this term. In *Hill v. Omni Hotel at CNN Center*,[176] a hotel employee was injured when she tripped and fell in the food court and mall area of the CNN

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167. *Id.* at 579-80, 612 S.E.2d at 902.

168. *Id.* at 582, 612 S.E.2d at 904. The Author suspects the court of appeals took this case to determine if any of the exceptions to the ingress and egress rule should be expanded.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 583, 612 S.E.2d at 904.

173. *Id.*

174. *See National Fire*, 152 Ga. App. 566, 263 S.E.2d 455; *see also Chaparral Boats*, 269 Ga. App. 339, 606 S.E.2d 567.

175. *Collie Concessions*, 272 Ga. App. at 584-85, 612 S.E.2d at 905.

176. 268 Ga. App. 144, 601 S.E.2d 472 (2004).

Center. Hill had ridden a MARTA train to the CNN Center. Though four entrances to the CNN Center existed, Hill entered the building through the door closest to the MARTA station. She tripped over a rolled up carpet just inside the door near a fast food restaurant, which was about 100-200 yards from the escalator she would have taken to access the Omni Hotel. The area where she fell was not owned, controlled, or maintained by the Omni Hotel.[177]

The ALJ awarded benefits, finding that under the general rule, she had a reasonable time to enter her work place. Because her injury occurred on the employer's premises, it should be covered. The ALJ relied on *DeHowitt v. Hartford Fire Insurance Co.*,[178] a case where the employee was injured when he proceeded through one of two entrances into a multi-tenant building, of which his employer was one tenant.[179] The ALJ determined

> that *DeHowitt* was more on point than any other case in Georgia and interpreted the holding in that case to be that an employee's injury sustained while ingressing into the employer's office is compensable, even if the employer occupies only a part of the building and there is more than one way through the building to the employer's location.[180]

The appellate division reversed, however, declining to extend the employer's premises to the food court and mall area of the CNN Center, primarily because the Omni Hotel did not own, maintain, or control the area where the employee was injured.[181] The appellate division relied on *Tate v. Bruno's, Inc./Food Max*,[182] a case that arose when an employee was injured in a parking lot that was used by the public.[183] Because the lot was not owned, maintained, or controlled by Tate's employer, a grocery store, the court determined that the injury was not compensable.[184] The appellate division also distinguished *DeHowitt* by noting that there were only two businesses in the building in that case, while in Hill's case, the CNN Center had numerous tenants and multiple entrances, and the principal entrance to the Omni Hotel was through the main lobby, rather than through the CNN Center.[185]

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177. *Id.* at 144, 601 S.E.2d at 473.
178. 99 Ga. App. 147, 108 S.E.2d 280 (1959).
179. *Id.* at 148, 108 S.E.2d at 282.
180. *Hill*, 268 Ga. App. at 145, 601 S.E.2d at 473.
181. *Id.*
182. 200 Ga. App. 395, 408 S.E.2d 456 (1991).
183. *Hill*, 268 Ga. App. at 147, 601 S.E.2d at 474 (citing *Tate*, 200 Ga. App. at 396, 408 S.E.2d at 457).
184. *Id.*, 601 S.E.2d at 475 (citing *Tate*, 200 Ga. App. at 397, 408 S.E.2d at 458).
185. *Id.* at 145, 601 S.E.2d at 473.

The employee appealed, arguing that parking lot cases should not be extended to cover an injury that occurred inside a building.[186] However, the court of appeals concluded that the appellate division's findings were appropriate and agreed with the board that the food court and mall area of the CNN Center was more analogous to the shopping center parking lot than to the situation described in *DeHowitt*.[187] The court pointed out that the issue is really whether the employer owned, controlled, or maintained the area of injury so as to make it a part of the employer's premises.[188]

J. Litigation Expenses

In a case concerning an accepted claim, *Minter v. Tyson Foods, Inc.*,[189] the ALJ determined that the employee was entitled to a resumption of her temporary total disability ("TTD") benefits because Tyson Foods had not offered Minter suitable work. Instead, Tyson only offered her a job that exceeded her restrictions from her job injury, which was tantamount to terminating her because of her work injury.[190] The ALJ cited to the principle in *Padgett v. Waffle House, Inc.*[191] that when the employee is terminated from employment because of a job injury, she does not have to look for work suitable to her restrictions.[192] The ALJ found, in the alternative, that if the employee had a burden to look for work in the community suitable to her restrictions, then under *Maloney v. Gordon County Farms*[193] she had in fact made a diligent effort to find work elsewhere but was unable to find work suitable to her restrictions. Under either of these scenarios, the ALJ found that the employee was entitled to a resumption of her TTD benefits.[194] The ALJ also assessed attorney fees at twenty-five percent of the employee's benefits, plus an additional one-time attorney fee of $3000, and litigation expenses against the employer or its insurer.[195]

The employer appealed, and the appellate division affirmed the award of benefits but struck the portion of the award for the $3000 attorney fee and the litigation expenses. On appeal, the superior court affirmed the

186. *Id.* at 148, 601 S.E.2d at 475.
187. *Id.* at 147-48, 601 S.E.2d at 475.
188. *Id.* at 148, 601 S.E.2d at 475.
189. 271 Ga. App. 185, 609 S.E.2d 137 (2004).
190. *Id.* at 186, 609 S.E.2d at 139.
191. 269 Ga. 105, 498 S.E.2d 499 (1998).
192. *Minter*, 271 Ga. App. at 187 n.5, 609 S.E.2d at 140 n.5.
193. 265 Ga. 825, 462 S.E.2d 606 (1995).
194. *Minter*, 271 Ga. App. at 186, 609 S.E.2d at 139.
195. *Id.*

appellate division, but then determined the case should go back to the Board for further determinations regarding the award of TTD benefits and for application of the *Padgett* and *Maloney* principles.[196] The court of appeals determined that the ALJ's award was supported by the evidence, and the superior court erred in sending the case back to the ALJ for further findings.[197] The court also determined that the appellate division did not err in finding a $3000 fee excessive and agreed that the litigation expenses should not have been awarded by the ALJ because the statute allowing for such expenses, O.C.G.A. section 34-9-108(b),[198] was enacted in 2001, and the employee's injury occurred in 1999.[199] The statute was determined to create a substantive right, rather than a procedural right, and thus was not to be given a retroactive application.[200]

K. Sick Leave Credit

Glisson v. Rooms To Go[201] illustrates the importance of proving the elements of certain statutory features. The employee sustained a work-related injury to her shoulder and was ultimately assessed a five percent permanent partial disability rating. Unaware that she was entitled to receive workers' compensation benefits, the employee used more than seven weeks of her accumulated vacation, personal leave, and sick leave. She later requested a hearing seeking temporary total disability ("TTD") benefits for this time. The ALJ found that while she was entitled to benefits for that period, her employer, pursuant to O.C.G.A. section 34-9-243,[202] should be allowed a credit for the leave time that she used.[203] The appellate division reversed the employee's award, and the superior court affirmed.[204]

In the initial inquiry as to whether the employee was entitled to TTD benefits based on her compensable injury, the court of appeals declared that an employee who foregoes "leave benefits in lieu of receiving workers' compensation benefits sustains an economic injury."[205] The court concluded that the appellate division mistakenly characterized the

196. *Id.* at 187, 609 S.E.2d at 139.
197. *Id.* at 188, 609 S.E.2d at 140.
198. O.C.G.A. § 34-9-108(b) (2004).
199. *Minter,* 271 Ga. App. at 188-89, 609 S.E.2d at 140-41.
200. *Id.* at 189, 609 S.E.2d at 141 (citing Polito v. Holland, 258 Ga. 54, 55, 365 S.E.2d 273, 273 (1988)).
201. 270 Ga. App. 689, 608 S.E.2d 50 (2004).
202. O.C.G.A. § 34-9-243 (2004).
203. *Glisson*, 270 Ga. App. at 689-90, 608 S.E.2d at 51.
204. *Id.* at 690, 608 S.E.2d at 51.
205. *Id.* at 691, 608 S.E.2d at 52.

employee's use of her leave time as an award, thus shifting the burden to the employee to prove a subsequent change in condition for entitlement to TTD benefits.[206] Therefore, the employee was held to have suffered an economic injury and was entitled to TTD benefits.[207]

The court next considered whether the employer was entitled to receive credit for the employee's use of her leave time.[208] The employer argued that payment of the employee's salary during her disability should be credited against any payment of benefits as a "wage continuation plan" pursuant to O.C.G.A. section 34-9-243.[209] The court ruled that, because the employer failed to provide evidence that the employee was paid under an employer-funded wage continuation plan or that she was paid her regular wages during that period, the employer was not entitled to a credit.[210]

In a separate opinion, Judge Ruffin concurred with the decision as it applied to the employee's receipt of TTD benefits, but dissented with respect to the refusal to grant the employer credit for payments to the employee.[211] He argued that the employee, not the employer, bore the burden of proof, and the employee should not be entitled to a windfall of receiving her regular wages and TTD benefits.[212] Judge Mikell, joined by Judge Andrews, wrote a dissenting opinion arguing that the employee did not show she was economically disabled by using her leave time, which would entitle her to TTD benefits.[213]

L. Subrogation

In *Harrison v. CGU Insurance Co.*,[214] the court of appeals continued dealing with a set of facts that had originally reached the court in 2002.[215] Douglas Harrison was catastrophically injured in a work-related automobile accident. Harrison and his wife filed a negligence claim against the tortfeasor, Sabel Industries. The negligence claim was settled for $4.5 million, $1 million of which was placed in an escrow account. Before settlement, CGU Insurance Company ("CGU"), which was paying the workers' compensation claim, gave notice to the parties of its subrogation rights. The plaintiff filed a motion to confirm the

206. *Id.* at 690-91, 608 S.E.2d at 52.
207. *Id.* at 692, 608 S.E.2d at 52.
208. *Id.*
209. O.C.G.A. § 34-9-243; *Glisson*, 270 Ga. App. at 692, 608 S.E.2d at 53.
210. *Glisson*, 270 Ga. App. at 692, 694, 608 S.E.2d at 53, 54.
211. *Id.* at 695, 608 S.E.2d at 55 (Ruffin, P.J., dissenting).
212. *Id.* at 697, 608 S.E.2d at 56 (Ruffin, P.J., dissenting).
213. *Id.* at 700, 608 S.E.2d at 57 (Mikell, J., dissenting).
214. 269 Ga. App. 549, 604 S.E.2d 615 (2004).
215. CGU Ins. Co. v. Sabel, 255 Ga. App. 236, 564 S.E.2d 836 (2002).

settlement, add CGU as a defendant to the case, and dissolve the workers' compensation lien. In the meantime, CGU filed a motion to intervene, which was granted.[216]

The trial court held an evidentiary hearing on whether CGU would be permitted to recover on its subrogation lien. After the hearing, the court granted a directed verdict for the plaintiffs and entered an order on July 27, 2001.[217] The court determined that "CGU did not carry its burden of proving that Douglas Harrison was fully and completely compensated for his injuries . . . [and] that CGU had not proved which portion of the settlement was attributable to Mrs. Harrison's consortium claim."[218] As of the date of the Order, CGU had paid over $212,000 on the workers' compensation claim and was still paying. The July 27 order dismissed CGU's subrogation claim, dissolved its lien, and provided that while approximately $212,000 could remain in the escrow account, the remaining $787,660 should be "released instanter" to the plaintiffs.[219]

CGU appealed the trial court's order on August 14, 2001, contending that the trial court erred by finding that CGU had not proven full and complete compensation and that it was erroneously required to prove the value of the wife's consortium claim. CGU also argued that it had a lien against future workers' compensation benefits not yet paid to Douglas Harrison. CGU paid court costs on August 31, 2001. It did not release the $787,660 that the trial court's order had stated should be turned over to the plaintiffs.[220]

As a result, on September 10, 2001, the Harrisons filed a motion to cite CGU for contempt because CGU failed to comply with the court's disbursement order, and for attorney fees and litigation expenses based on CGU's alleged frivolous and groundless refusal to release the $787,660 still in the escrow account.[221] In the meantime, on May 2, 2002, in *CGU Insurance Co. v. Sabel*,[222] the court of appeals affirmed the trial court's ruling, which found that some evidence supported the finding that CGU had not proved that Douglas Harrison was fully and completely compensated.[223] The court of appeals in that case also concluded that CGU did not have a right to assert a lien for future

216. *Harrison*, 269 Ga. App. at 549-51, 604 S.E.2d at 616-17.
217. *Id.* at 551, 604 S.E.2d at 617.
218. *Id.* at 550, 604 S.E.2d at 617.
219. *Id.* at 551, 604 S.E.2d at 617-18.
220. *Id.* at 552, 604 S.E.2d at 618.
221. *Id.*
222. 255 Ga. App. 236, 564 S.E.2d 836 (2002).
223. *Harrison*, 269 Ga. App. at 552, 604 S.E.2d at 618.

workers' compensation benefits not yet paid to Douglas Harrison and remanded the case to the trial court for further action.[224]

The trial court then denied the motion for civil contempt filed by the plaintiffs.[225] In its order, the trial court noted that because CGU properly appealed its original order and filed court costs, the trial court lost jurisdiction of the case, and thus had no authority to order CGU to release the $787,660. The trial court further noted that, in light of the controversy over CGU's lien being against future benefits, which would have amounted to more than CGU had paid in workers' compensation benefits to date, CGU did not have to release the $787,660 in the escrow account. The trial court went on to deny the motion for attorney fees and expenses of litigation, noting that although CGU ultimately failed on appeal, the issues CGU had appealed were not, as the plaintiffs claimed, frivolous to the point that no court could reasonably consider upholding or enforcing CGU's position. The court of appeals had issued a rather lengthy opinion on just those very issues.[226]

The second appearance of the case at the court of appeals, styled *Harrison v. CGU Insurance Co.*, strictly concerned whether the trial court properly denied the civil contempt motion. The plaintiffs contended that the filing of the notice of appeal did not relieve CGU of obeying the trial court's order to immediately disburse the $787,660 being held in the escrow account.[227] However, the court of appeals stated that it agreed with the trial court's reasoning for denial of the civil contempt motion and agreed that the trial court was not authorized to enforce the disbursement of the funds while the case was on appeal.[228]

A second case on subrogation dealt with a completely different procedural issue. In *Janet Parker, Inc. v. Floyd*,[229] the issue was whether two separate suits in two separate courts, one filed by the employee and one filed by the employer or its insurer, could proceed against the tortfeasor.[230] The facts showed that a car driven by William Floyd was rear-ended by a truck driven by Ronald Waits and owned by Waits' employer, Janet Parker, Inc. ("JPI"). Floyd's employer, Healthfield, Inc., and its workers' compensation carrier, TIG Insurance Company ("TIG"), paid workers' compensation benefits to Floyd. In the

224. *Id.* at 550, 604 S.E.2d at 617.
225. *Id.* at 554, 604 S.E.2d at 618.
226. *Id.* at 551, 604 S.E.2d at 617-18.
227. *Id.* at 549, 604 S.E.2d at 616.
228. *Id.* at 555, 604 S.E.2d at 620.
229. 269 Ga. App. 59, 603 S.E.2d 485 (2004).
230. *Id.* at 59, 603 S.E.2d at 486.

first year after the accident, Floyd did not file any sort of lawsuit against the tortfeasor.[231] In the second year, Healthfield, Inc. and TIG filed a subrogation action in their own names in superior court against Waits and JPI to recover the benefits they had paid to Floyd. They did not seek to recover all of Floyd's damages and did not include Floyd in their case. Shortly thereafter, Floyd and his wife brought their own suit in state court to recover damages and loss of consortium. In the meantime, the two-year statute of limitations expired.[232]

JPI then filed a motion to dismiss the state court suit, arguing that the first suit filed by Healthfield, Inc. and TIG in superior court divested Floyd and his wife of the right to file their own suit. The state court did not grant the motion to dismiss, but instead directed the Floyds to intervene in the superior court case, which they did. Healthfield, Inc. and TIG then objected to the Floyds' intervention in the superior court case, and the superior court found that the Floyds' motion to intervene was not filed in a timely manner.[233]

Thus, the Floyds were left with their case in state court. The state court then denied JPI's motion to dismiss the Floyds' suit and also denied a motion for summary judgment filed by JPI. JPI filed a motion for interlocutory appeal, which was granted.[234]

The court of appeals reviewed the case and determined that the superior court erred in finding that the Floyds' motion to intervene in the superior court case was not timely, even though their motion to intervene was filed after the two-year statute of limitations had expired.[235] Additionally, the court held that Healthfield, Inc. and TIG had not actually asserted the Floyds' cause of action in their superior court suit because they did not file in Floyd's name and did not seek to recover all of his damages.[236] Healthfield, Inc. and TIG sought recovery of only their own payments. Thus, the court of appeals concluded that the Floyds were not asserting two actions in the courts

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231. "O.C.G.A. section 34-9-11.1 (c) authorizes the employee to bring suit against a third party tortfeasor at any time within the applicable two-year statute of limitation." *Id.* at 60, 603 S.E.2d at 486. During the first year after the accident, the employee is the only one who can bring the suit. *Id.* In the second year after the accident, if the employee fails to bring the suit, "the employer or such employer's insurer may but is not required to assert the employee's cause of action in tort, either in its own name or in the name of the employee." *Id.* (quoting O.C.G.A. § 34-9-11.1(c) (2004)).

232. *Janet Parker*, 269 Ga. App. at 59, 603 S.E.2d at 486.

233. *Id.* at 60, 603 S.E.2d at 487.

234. *Id.* at 59, 603 S.E.2d at 486-87.

235. *Id.* at 60, 603 S.E.2d at 487. *See* Payne v. Dundee Mills, 235 Ga. App. 514, 510 S.E.2d 67 (1998).

236. *Janet Parker*, 269 Ga. App. at 61, 603 S.E.2d at 487.

at the same time for the same cause of action against the same party.[237]

JPI then argued that it should not be required to simultaneously defend the superior court action filed by Healthfield, Inc. and TIG, while also defending the state court action filed by the Floyds, because it would incur greater legal fees and would face potentially inconsistent results.[238] The court of appeals agreed with that argument and noted that joinder provided the proper remedy to address this situation.[239] The court of appeals then affirmed the state court's denial of JPI's motion for summary judgment and remanded the case to the state court to allow mandatory joinder of Healthfield, Inc. and TIG in the state court suit.[240]

237. *Id. See* O.C.G.A. section 9-2-5(a), which prohibits a plaintiff from prosecuting two actions in the courts at the same time for the same cause of action and against the same party. O.C.G.A. § 9-2-5(a) (1981 & Supp. 2005).

238. *Janet Parker*, 269 Ga. App. at 61, 603 S.E.2d at 487.

239. *Id*. at 62, 603 S.E.2d at 488.

240. *Id.*