

1-2020

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### Recommended Citation

Bagley, H. Michael and Ward, J. Benson (2020) "Worker's Compensation," *Mercer Law Review*. Vol. 71 : No. 1 , Article 20.

Available at: [https://digitalcommons.law.mercer.edu/jour\\_mlr/vol71/iss1/20](https://digitalcommons.law.mercer.edu/jour_mlr/vol71/iss1/20)

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# Workers' Compensation

by H. Michael Bagley\*

and J. Benson Ward\*\*

## I. INTRODUCTION

The 2018–2019 survey period featured important legislative changes as well as interesting decisions of the appellate courts addressing workers' compensation issues on such wide-ranging topics as scheduled break exceptions, the Insolvency Pool, and occupational diseases.<sup>1</sup>

## II. LEGISLATIVE UPDATE

The legislative package drafted by the Advisory Council of the State Board of Workers' Compensation passed through both legislative chambers and effects multiple changes in the Workers' Compensation Act.<sup>2</sup> The statutory maximum for Temporary Total Disability benefits under O.C.G.A. § 34-9-261<sup>3</sup> increased from \$575 to \$675 for injuries occurring after July 1, 2019, and the statutory maximum for Temporary Partial Disability benefits under O.C.G.A. § 34-9-262<sup>4</sup> increased from \$383 to \$450 per week for injuries occurring after July 1, 2019. The maximum compensation payable to a surviving spouse in the event of a death claim under O.C.G.A. § 34-9-265(d)<sup>5</sup> similarly increased to \$270,000.

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1. For an analysis of workers' compensation during the prior survey period, see H. Michael Bagley & J. Benson Ward, *Workers' Compensation, Annual Survey of Georgia Law*, 70 MERCER L. REV. 289 (2018).

2. O.C.G.A. §§ 34-9-1–34-9-432 (2019).

3. O.C.G.A. § 34-9-261 (2019).

4. O.C.G.A. § 34-9-262 (2019).

5. O.C.G.A. § 34-9-265(d) (2019).

The legislative changes created notable exceptions such as the 400-week cap on medical treatment in non-catastrophic claims.<sup>6</sup> Effective July 1, 2019, an injured worker that is not catastrophically injured will be entitled to limited medical benefits beyond the 400-week cap to the extent that prosthetic devices, spinal cord stimulators, and certain durable medical equipment may require maintenance or repair where such durable medical equipment “was originally furnished within 400 weeks of the date of injury or occupational disease.”<sup>7</sup> “Durable medical equipment” is defined as “an apparatus that provides therapeutic benefits, is primarily and customarily used to serve a medical purpose, and is reusable and appropriate for use in the home,” and includes “wheelchairs, beds and mattresses, traction equipment, canes, crutches, walkers, oxygen, and nebulizers.”<sup>8</sup> “Prosthetic device” is defined as “an artificial device that has, in whole or in part, replaced a joint lost or damaged or other body part lost or damaged as a result of an injury or occupational disease arising out of and in the course of employment.”<sup>9</sup>

This amendment became effective July 1, 2019, but, as worded, purports to apply to all injuries that are not catastrophic which arose on or after July 1, 2013, and consequently, it is retroactive in application.<sup>10</sup> This raises an interesting question, as “generally statutes prescribe for the future and that is the construction to be given unless there is a clear contrary intention shown.”<sup>11</sup> However, “where a statute governs only procedure of the courts, including the rules of evidence, it is to be given retroactive effect absent an expressed contrary intention.”<sup>12</sup> Retroactive effect is also given to statutes affecting the remedy only, rather than the right to which the remedy attaches.<sup>13</sup> “In order to decide whether [a] statute should be given prospective or retrospective effect, the statute must be examined to determine whether it is substantive in nature or” is procedural in nature.<sup>14</sup> Arguably this amendment does “not [deal] with the compensability of claims but [rather] with the scope of the remedy” for claims already deemed to be

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6. O.C.G.A. § 34-9-200 (2019).

7. O.C.G.A. § 34-9-200(a)(3)(A)(i) (2019).

8. O.C.G.A. § 34-9-200(a)(3)(B)(i) (2019).

9. O.C.G.A. § 34-9-200(a)(3)(B)(ii) (2019).

10. O.C.G.A. § 34-9-200(a)(2) (2019).

11. *Polito v. Holland*, 258 Ga. 54, 55, 365 S.E.2d 273, 273 (1988).

12. *Id.*

13. *Pritchard v. Savannah St. & Rural Resort R.R. Co.*, 87 Ga. 294, 298–99, 13 S.E. 493, 495 (1891); *Glover v. Colbert*, 210 Ga. App. 666, 668, 437 S.E.2d 363, 364 (1993).

14. *Barnes v. City of Atlanta Police Dep’t*, 219 Ga. App. 139, 141, 464 S.E.2d 609, 611 (1995); see also *Glover*, 210 Ga. App. at 669, 437 S.E.2d at 365.

compensable, and under this argument the effect would be remedial and possibly allow for retroactive effect.<sup>15</sup>

### III. INTOXICATION AND DRUG TESTING

In *Lingo v. Early County Gin, Inc.*,<sup>16</sup> the Georgia Court of Appeals evaluated whether the employer met the requirements to trigger the rebuttable presumption of intoxication.<sup>17</sup> The claimant worked at a cotton gin company, directing drivers “into a loading dock area where he would then assist in unloading modules of unginned cotton onto a platform.”<sup>18</sup> When a truck, lacking a functional back-up beeper, reversed into the loading dock, the claimant failed to see or hear the truck and was crushed against the dock, incurring multiple injuries requiring hospitalization.<sup>19</sup> The employer sent a lab technician “to the hospital to obtain a urine sample” from the claimant for a post-injury drug test; however the claimant was undergoing surgery so “the technician was not [allowed] in the operating room,” and instead she told an operating room nurse of her need for a sample and the nurse returned with a urine sample.<sup>20</sup> The technician did not have “first-hand knowledge of who collected the sample,” which returned to show the presence of cannabinoid metabolites.<sup>21</sup>

Based on the drug test results, the employer denied the claim on grounds that under O.C.G.A. § 34-9-17(b)<sup>22</sup> it was entitled to the rebuttable presumption that the injury was caused by the claimant’s illegal marijuana use and intoxication.<sup>23</sup> The administrative law judge (ALJ) found that the employer was unable to rely on the statute’s rebuttable presumption because it did not offer proof of who obtained the sample or otherwise establish that initial link in the chain of custody, ruled that the employer was otherwise unable to prove intoxication to bar the claim, and awarded the claimant benefits.<sup>24</sup> The Appellate Division of the State Board of Workers’ Compensation (the Appellate Division) reversed, holding that the “defect in the chain of

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15. *Barnes*, 219 Ga. App. at 141, 464 S.E.2d at 611.

16. 346 Ga. App. 92, 816 S.E.2d 54 (2018), *cert. denied*, 2019 Ga. LEXIS 27 (Ga. Jan. 7, 2019).

17. *Id.* at 92, 816 S.E.2d at 56.

18. *Id.* at 93, 816 S.E.2d at 56.

19. *Id.* at 93, 816 S.E.2d at 56–57.

20. *Id.* at 93, 816 S.E.2d at 57.

21. *Id.* at 93–94, 816 S.E.2d at 57.

22. O.C.G.A. § 34-9-17(b) (2019).

23. *Lingo*, 346 Ga. App. at 92, 816 S.E.2d at 56.

24. *Id.* at 95, 816 S.E.2d at 57.

custody went to the weight of the evidence” and not to its admissibility, and held that the employer could “avail itself of the [statute’s] rebuttable presumption and that” the claimant did not rebut the presumption that the “injuries were caused by his use of marijuana,” and the superior court affirmed the Appellate Division’s decision.<sup>25</sup>

The court of appeals ruled that the lab technician’s absence from the collection of the specimen, and the employer’s inability to show that the sample was taken by a person who was authorized under O.C.G.A. § 34-9-415(d)<sup>26</sup> to collect a sample, prevented the employer from triggering the rebuttable presumption of intoxication in O.C.G.A. § 34-9-17(b).<sup>27</sup> The court observed that chain of custody issues in a criminal context are different from those in a workers’ compensation claim, and inapplicable.<sup>28</sup> Accordingly, as the requirements for O.C.G.A. § 34-9-17(b)’s rebuttable presumption were not met, the court “vacate[d] the order of the superior court and remand[ed] to the Appellate Division for” a determination as to whether the employer had otherwise carried its burden of proving that the claimant was intoxicated and the intoxication caused the accident.<sup>29</sup> In a special concurrence, Judge Bethel noted that the failure to fully comply with O.C.G.A. § 34-9-415’s requirements should go to the weight of the drug test evidence and not its admissibility.<sup>30</sup>

#### IV. INGRESS—EGRESS ON SCHEDULED BREAKS

The court of appeals issued two decisions during this survey period addressing the intersection of the ingress and egress rule and the regularly scheduled break exception.

In *Frett v. State Farm Employee Workers’ Compensation*,<sup>31</sup> the claimant worked as an insurance claims associate and had mandatory unpaid daily lunch breaks, which were on a staggered schedule, and during the scheduled breaks the associates logged out of the phone system and could do as they pleased, including leaving the office for lunch. On the day in question, when the claimant’s scheduled lunch break began, she walked to the employer’s breakroom to microwave her food. She slipped on water and fell while she was in the breakroom, injuring herself. The Appellate Division denied her workers’

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25. *Id.* at 95, 816 S.E.2d at 57–58.

26. O.C.G.A. § 34-9-415(d) (2019).

27. *Lingo*, 346 Ga. App at 96–97, 816 S.E.2d at 58–59.

28. *Id.* at 97, 816 S.E.2d at 59.

29. *Id.* at 98, 816 S.E.2d at 59.

30. *Id.* at 98–99, 816 S.E.2d at 60 (Bethel, J., concurring).

31. 348 Ga. App. 30, 821 S.E.2d 132 (2018).

compensation claim because it occurred while she was on a scheduled lunch break.<sup>32</sup>

The ALJ found that the claim was compensable and awarded benefits, based on a prior court of appeals decision, *Rockwell v. Lockheed Martin Corp.*,<sup>33</sup> which held that while injuries occurring during a regularly scheduled break are generally not compensable, injuries occurring on the employer's premises during periods of reasonable "ingress and egress" to and from those premises are compensable.<sup>34</sup> The Appellate Division "reversed the ALJ's award, concluding that [the] injury did not arise out of her employment because it occurred [during her] 'regularly scheduled break'" while "[she] was leaving to attend to 'a purely personal matter[.]'" and the superior court affirmed.<sup>35</sup>

The issue facing the court of appeals was whether the ingress and egress rule would serve as an exception to the general application of the regularly scheduled break exclusion.<sup>36</sup> The scheduled break exception originates from a 1935 Georgia Supreme Court decision,<sup>37</sup> and the rule is based on the idea that an injury does not arise out of the employment, but rather out of an employee's individual pursuit, when it occurs during a regularly scheduled break time when the employee is free to use the time as the employee so chooses.<sup>38</sup> The scheduled break exception applies even when the injury occurs within working hours and on the employer's premises.<sup>39</sup> On the other hand, the ingress and egress rule allows for the employee to have a reasonable time to enter or leave the employer's premises "on the rationale that until the employee has departed the premises, he has not started traveling a route of his choosing wholly disconnected with his employment."<sup>40</sup> The court of appeals noted that in its decision in *Rockwell*, it applied the ingress and egress rule "to an employee leaving for a scheduled lunch break," when "[t]he employee fell while traveling across a walkway on

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32. *Id.* at 30, 821 S.E.2d at 133–34.

33. 248 Ga. App. 73, 545 S.E.2d 121 (2001).

34. *Frett*, 348 Ga. App. at 30, 821 S.E.2d at 134; *Rockwell*, 248 Ga. App. at 73, 545 S.E.2d at 122.

35. *Frett*, 348 Ga. App. at 30–31, 821 S.E.2d at 133–34.

36. *Id.* at 31, 821 S.E.2d at 134.

37. *Ocean Accident & Guar. Corp. v. Farr*, 180 Ga. 266, 178 S.E. 728 (1935).

38. *Frett*, 348 Ga. App. at 31–32, 821 S.E.2d at 134–35.

39. *Id.* at 33, 821 S.E.2d at 135.

40. *Id.* at 34, 821 S.E.2d at 136 (quoting *Hill v. Omni Hotel at CNN Ctr.*, 268 Ga. App. 144, 147, 601 S.E.2d 472, 474 (2004)).

her way to a parking lot” because she was in the process of leaving her employer’s premises when the injury occurred.<sup>41</sup>

The court noted that the case law at “the intersection of the ingress and egress rule [and] the scheduled break rule [has led to] anomalous and arbitrary results” and conflicting decisions.<sup>42</sup> The court of appeals deferred to the existing Georgia Supreme Court precedent laid down in *Farr* and disapproved of the previous court of appeals holdings that improperly diluted the regularly scheduled break exception by refusing to apply the exception to situations of ingress or egress—the court concluded that “any decision to apply the ingress and egress rule to the scheduled break exception” should be made by the supreme court.<sup>43</sup> Accordingly, the court ruled that the claimant’s “injury did not arise out of her employment” because it occurred while she was engaged in an individual pursuit while on a scheduled lunch break during which time “she was free to do as she pleased.”<sup>44</sup> The court observed that future litigants would be best served by creating a bright-line rule and eliminating the guesswork created by conflicting decisions—until the supreme court rules on the issue, the ingress and egress rule does not apply to the scheduled break exception.<sup>45</sup>

Similarly, while *Frett* was pending before the court of appeals, the case of *Daniel v. Bremen-Bowden Investment Company*<sup>46</sup> also went before the court of appeals, essentially on the same issue involving the collision of the ingress and egress rule and the scheduled break exception.<sup>47</sup> In that case, the claimant “left her work station for her regularly scheduled lunch break,” during which time she was free to spend her time as she wished, and was walking down a public sidewalk to the company-owned parking lot when she tripped and fell, injuring herself.<sup>48</sup> The ALJ relied upon *Rockwell* to find that the ingress and egress rule rendered the injury during the scheduled break compensable.<sup>49</sup> The Appellate Division reversed, concluding that the “injury did not arise out of her employment because it occurred while

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41. *Id.* at 35, 821 S.E.2d at 136–37 (citing *Rockwell*, 248 Ga. App. at 73–74, 545 S.E.2d at 121).

42. *Id.* at 35, 821 S.E.2d at 137.

43. *Id.* at 36, 821 S.E.2d at 137.

44. *Id.*

45. *Id.*

46. 348 Ga. App. 803, 824 S.E.2d 698 (2019).

47. *Id.* at 803, 824 S.E.2d at 699.

48. *Id.*

49. *Id.* at 803–04, 824 S.E.2d at 699.

she was on a regularly scheduled break,” and the superior court affirmed.<sup>50</sup>

The court of appeals observed the parallel but separate lines of decisions involving the scheduled break exception and the ingress and egress rule, which the court similarly traced in the *Frett* decision, before observing that “during the pendency of the [present] appeal the [court of appeals] disapproved *Rockwell*” and related decisions to hold in *Frett* that the ingress and egress rule does not render compensable injuries that occur while the employee is leaving and returning to work on a regularly scheduled lunch break.<sup>51</sup> Under *Frett*'s new bright-line rule, the Appellate Division's decision was affirmed.<sup>52</sup>

#### V. INSOLVENCY POOL

The claimant in *Georgia Insurers Insolvency Pool v. Dubose*<sup>53</sup> was injured in a car accident arising out of and occurring in the course of her employment.<sup>54</sup> In addition to filing a workers' compensation claim, the claimant also filed a claim against the other driver's automobile liability policy and against two uninsured/underinsured motorist coverage policies, and all of those claims settled. She also filed claims under two personal disability policies, one of which was denied and the other of which paid her monthly benefits.<sup>55</sup>

Approximately two years after the accident, her employer's workers' compensation insurance company was placed into liquidation and the Georgia Insurers Insolvency Pool (the Pool) took over responsibility for the administration of her claim.<sup>56</sup> The Pool then filed a declaratory judgment action, seeking a ruling:

[T]hat the exhaustion provision of the Georgia Insurer's Insolvency Pool Act (the Pool Act)<sup>57</sup> . . . required that any proceeds that [the claimant] received from other solvent insurance carriers (including settlements from the automobile liability insurance . . . and her own uninsured/underinsured policies, as well as benefits received under

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50. *Id.*

51. *Id.* at 805, 824 S.E.2d at 700.

52. *Id.*

53. 349 Ga. App. 238, 825 S.E.2d 606 (2019).

54. *Id.* at 238, 825 S.E.2d at 608.

55. *Id.* at 240, 825 S.E.2d at 609.

56. *Id.* at 239–40, 825 S.E.2d at 609.

57. O.C.G.A. § 33-36-14 (2019).



[the claimant's] disability policy) should reduce her claim against the Pool by the full amounts received.<sup>58</sup>

“The trial court denied the Pool’s motion for summary judgment, holding that [the exhaustion provision contained in] O.C.G.A. § 33-36-14(a) limited ‘the offset to money recovered for lost wages and medical expenses,’ that is limited it to “claims that could be made under the [Georgia Workers’ Compensation Act].”<sup>59</sup> Both parties appealed, with the Pool arguing that its offset should not be so limited, and the claimant arguing that the Pool was entitled to no offset at all.<sup>60</sup>

In its appeal, the Pool argued that its offset should not be limited to amounts received by the claimant specific to lost wages and medical expenses, as the Pool’s “obligations do not arise . . . until the amounts owed under the workers’ compensation claim exceed the amount paid out by all other solvent insurers, regardless of” whether the solvent policies provided workers’ compensation insurance coverage or other insurance coverage.<sup>61</sup> The court of appeals observed that the “Pool is a non-profit legal entity created by the Georgia General Assembly” to provide “a limited safety net for insurers that experience liquidation.”<sup>62</sup> Part of this limited safety net is delineated in the Pool Act’s exhaustion provision, O.C.G.A. § 33-36-14, which requires a claimant “to exhaust certain sources of insurance coverage before seeking any payment of his or her claim from the” Pool.<sup>63</sup> The exhaustion provision provides in pertinent part as follows:

[A]ny person having a claim against a policy . . . issued by an insolvent insurer, which claim is a covered claim and is also a claim within the coverage of any policy issued by a solvent insurer, shall be required to exhaust first his or her rights under such policy issued by the solvent insurer. The policy of the solvent insurer shall be treated as primary coverage and the policy of the insolvent insurer shall be treated as secondary coverage and his or her rights to recover such claim under this chapter shall be reduced by any amounts received from the solvent insurers.<sup>64</sup>

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58. *Dubose*, 349 Ga. App. at 238, 825 S.E.2d at 608.

59. *Id.* at 238–39, 825 S.E.2d at 608.

60. *Id.* at 239, 825 S.E.2d at 608.

61. *Id.* at 240, 825 S.E.2d at 609 (emphasis omitted).

62. *Id.* at 241, 825 S.E.2d at 609.

63. *Id.* at 241, 825 S.E.2d at 610.

64. *Id.* at 241–42, 825 S.E.2d at 610 (quoting O.C.G.A. § 33-36-14(a) (2019)).

The issue before the court involved the definition of the term “claim” contained in the statute.<sup>65</sup> The Pool argued that the claimant’s “personal injury and disability claims arose from the same” accident and therefore “the Pool’s obligation for workers’ compensation benefits should be offset by [the claimant’s] recovery under the other, solvent, insurance policies.”<sup>66</sup> Whereas, the claimant argued that the “claim should be interpreted more narrowly to include only ‘claims for the types of damages that are the Pool’s responsibility’”—such as workers’ compensation benefits—and “her workers’ compensation claim [was] not a ‘claim within the coverage’ of the other solvent policies.”<sup>67</sup> This is “because it is not under an insurance policy that covers the same liability and risks that are covered by the policies of the solvent insurers,” and so at least a portion of her settlement proceeds from the “solvent insurers involve damages not available under the workers’ compensation system” and are not subject to the offset.<sup>68</sup>

In addressing this issue, the court of appeals cited to decisions from other states addressing insolvent insurance companies, which “support the Pool’s contention that the coverage provided by [a] solvent carrier does not have to be the exact same type of coverage provided by the insolvent carrier”—that is, that in determining the meaning of “claim” in the exhaustion provision there was no distinguishing between a workers’ compensation claim and a tort claim.<sup>69</sup> The court held that “O.C.G.A. § 33-36-14(a) does not require the policies of the solvent and insolvent carriers to provide identical coverage,” and so the automobile liability insurance policy and uninsured/underinsured motorist policies were primary to the Pool coverage as they paid claims within the coverage of the policies arising from the accident; therefore, “the Pool [was] entitled to offset the amounts recovered from the GEICO automobile liability policy and the State Farm uninsured/underinsured motorist policies.”<sup>70</sup>

The court then held that the exhaustion provision “allows the Pool to offset claims that are ‘within the coverage of any policy issued by the solvent insurer,’” and the trial court incorrectly limited the offset to amounts specifically received for lost wages and medical expenses.<sup>71</sup> The policies from the solvent insurer and insolvent insurer do not need to

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65. *Id.* at 241, 825 S.E.2d at 610.

66. *Id.* at 242, 825 S.E.2d at 610.

67. *Id.*

68. *Id.*

69. *Id.* at 243–44, 825 S.E.2d at 611–12.

70. *Id.* at 240, 825 S.E.2d at 609.

71. *Id.* at 245–46, 825 S.E.2d at 612 (emphasis omitted).

provide the same type of coverage and the amounts paid by the solvent carrier do not have to be at issue under the insolvent carrier's policy.<sup>72</sup> Therefore, because the claimant's "automobile liability policy and . . . uninsured/underinsured motorist coverage arise from the automobile collision from which her workers' compensation claim arose," the Pool was entitled to an offset for the money that the claimant received under these policies.<sup>73</sup> The record in the case was unclear as to whether payments received under the disability policy compensated the claimant for losses that were related to the automobile collision, and so the court remanded the case for the trial court's analysis of those payments and whether any such claims are within the coverage of the disability policies pursuant to O.C.G.A. § 33-36-14(a).<sup>74</sup>

## VI. EVIDENCE IN SEEKING CATASTROPHIC DESIGNATION

The court of appeals evaluated the sufficiency of the evidence submitted in a request for "catastrophic" designation in *McCrary v. Employee's Retirement System Of Georgia*.<sup>75</sup> The claimant in that case worked for several years as a customer service specialist, which required her to take incoming calls, type up information, and enter data into a computer system.<sup>76</sup> "During the course of her employment . . . , [her] right hand became swollen and painful," and the claimant received treatment and two surgeries in 2011 but still "could not type or use her right hand very well."<sup>77</sup> The claimant did not return to work due to her lingering pain "and was terminated for [failure] to return to work when asked."<sup>78</sup> She twice applied for Social Security Disability Income Benefits but was denied both times.<sup>79</sup> In 2015, her authorized treating physician issued an opinion that the claimant's disability was permanent and she was "unable to type for any length of time," and her claim was accepted as compensable and benefits were paid.<sup>80</sup>

The claimant later requested designation of her injury as "catastrophic," which was contested by the employer.<sup>81</sup> At the hearing before the ALJ, the claimant tendered a doctor's report from 2012,

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72. *Id.* at 246, 825 S.E.2d 612–13.

73. *Id.* at 246–47, 825 S.E.2d at 613.

74. *Id.* at 247, 825 S.E.2d at 613.

75. 349 Ga. App. 466, 825 S.E.2d 896 (2019).

76. *Id.* at 466, 825 S.E.2d at 897.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 467, 825 S.E.2d at 897.

which opined that the claimant would “probably never be able to return to work with any reasonable function of the right upper extremity. At best, the patient could return to work with no use of the right upper extremity on a permanent basis.”<sup>82</sup> She “also tendered a November 2012 functional capacities evaluation (FCE) report, in which the examiner found her to be ‘employable in a [s]edentary physical demand level, but the job must not require more than 30% use of her right upper extremity during the workday.’”<sup>83</sup> Further, her vocational expert testified that the claimant “was unable to do any work for which she[] [was] qualified that exist[ed] in substantial numbers.”<sup>84</sup> However, on cross-examination, the claimant’s vocational expert testified the claimant could return to work if she was able to perform a job without using her right upper extremity, that it was unlikely for a “high school educated and computer literate [person] to find a job in the metropolitan Atlanta area” with no use of her dominant hand, and that he did not consider that any advanced computer technologies might make the claimant employable.<sup>85</sup>

“The ALJ found that the [claimant did not] carry her burden of proving that she sustained a catastrophic injury as defined in O.C.G.A. § 34-9-200.1(g)(6)(A),” and the Appellate Division made some modifications to the “findings of fact and conclusions of law . . . but adopted the ALJ’s conclusion that the [claimant] had failed to demonstrate a catastrophic injury,” and the superior court affirmed.<sup>86</sup>

On appeal, the court of appeals evaluated the Appellate Division’s and ALJ’s weighing of the evidence and testimony, and noted that “the weight and credibility of witness testimony remains solely within the purview of the ALJ and the Board.”<sup>87</sup> The court concluded that evidence existed in the record which supported the ALJ discounting the testimony of the claimant’s vocational expert, based in large part on the expert’s agreement that the claimant could return to work if she was able to perform a job without using her right hand.<sup>88</sup> The claimant also contended that it was error for the ALJ and Appellate Division to consider her testimony regarding her two denied Social Security Disability applications.<sup>89</sup> The court disagreed, as ample other ground

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82. *Id.*

83. *Id.* at 467, 825 S.E.2d at 897–98.

84. *Id.* at 467, 825 S.E.2d at 898.

85. *Id.*

86. *Id.* at 467–68, 825 S.E.2d at 898.

87. *Id.* at 470–71, 825 S.E.2d at 900.

88. *Id.* at 471, 825 S.E.2d at 900.

89. *Id.* at 472, 825 S.E.2d at 900.

existed to support the ALJ's and Appellate Division's finding of no catastrophic injury, including the expert witness testimony and medical records.<sup>90</sup> Moreover, the Social Security Administration's decisions were testified to by the claimant, and "the ALJ and the [Appellate Division] based their . . . decisions on [her] failure to present credible evidence that there were no jobs for her in the national economy."<sup>91</sup> Thus, since "[t]he [Social Security Administration's] decisions were not relevant to that issue," the court concluded that there was no error in affirming the decision of the Appellate Division.<sup>92</sup>

#### VII. EXCLUSIVE REMEDY

The plaintiff in *Savannah Hospitality Services, LLC v. Scriven*<sup>93</sup> sued his employer for denying him medical care for injuries he sustained in a car accident while driving a company vehicle.<sup>94</sup> He "alleg[ed] that he was employed by both" Savannah Hospitality Services and Southeastern Airport Services, Inc. on the date of accident "as a maintenance worker and airport shuttle driver," and so Savannah Hospitality Services moved for summary judgment on the grounds that workers' compensation provided the plaintiff's exclusive remedy, including for any claim that the employer's conduct exacerbated the plaintiff's injuries.<sup>95</sup> The trial court denied the motion and did not address the exclusive remedy argument.<sup>96</sup>

On appeal, the court of appeals observed the well-settled law that the Georgia Workers' Compensation Act is the exclusive remedy for an injured worker with respect to any claims against his employer.<sup>97</sup> "[T]he parties dispute[d] whether [the plaintiff] was acting in the scope of his employment at the time he was injured;"<sup>98</sup> the court disposed of those arguments by summarily concluding that the undisputed evidence showed that the injury occurred in the course of the employment and arose out of the employment due to the causal connection between his job and exacerbation of the injury because of the employer's alleged denial of access to care.<sup>99</sup> The court noted that the relevant inquiry was

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90. *Id.* at 471–72, 825 S.E.2d at 900.

91. *Id.* at 473, 825 S.E.2d at 901.

92. *Id.*

93. 350 Ga. App. 195, 828 S.E.2d 423 (2019).

94. *Id.* at 195, 828 S.E.2d at 424.

95. *Id.* at 196–97, 828 S.E.2d at 424–25.

96. *Id.* at 196–97, 828 S.E.2d at 425.

97. *Id.* at 197, 828 S.E.2d at 425.

98. *Id.* at 198, 828 S.E.2d at 426.

99. *Id.* at 198, 828 S.E.2d at 426–27.

the aggravation of the plaintiff's injuries by his "employer's alleged negligence in 'failing to provide access to medical insurance' information and precluding his seeking a medical opinion."<sup>100</sup> Because "the injury arose out of and in the course of [the] employment, the [Georgia Workers' Compensation] Act applied, and [the plaintiff's tort] claims against [his employer] were barred."<sup>101</sup>

In *JCG Farms of Alabama, LLC v. Morgan*,<sup>102</sup> the plaintiff brought a tort suit against JCG Farms, the owner and controller of a chicken feed manufacturing plant where the claimant worked and was injured in an explosion.<sup>103</sup> The plaintiff was employed by JCG Foods, and both JCG Foods and JCG Farms are companies "in a complex corporate structure of their parent company, Koch Foods," and the two entities operate separately. The plaintiff moved for "partial summary judgment as to JCG Farms' . . . exclusive remedy defense, . . . argu[ing] that JCG Farms admitted in [discovery] that it was not the [plaintiff's] employer."<sup>104</sup> After addressing a discovery dispute, in which the trial court refused to allow JCG Foods to contradict information and documents indicating that JCG Farms was the plaintiff's employer and not JCG Foods, the court of appeals concluded that sufficient evidence existed to support the trial court's ruling; therefore, the court of appeals affirmed the decision granting the plaintiff's motion for partial summary judgment as to JCG Farms' defense that the exclusive remedy provision barred the case.<sup>105</sup>

#### VIII. ATTORNEY'S FEES

In *A. Garcia Trucking & Produce, LLC v. Sandoval*,<sup>106</sup> the claimant worked as a delivery truck driver and, in October 2014, incurred an injury to "his lower back and right leg while lifting a 50-pound box."<sup>107</sup> He allegedly reported the injury to his supervisor and was told by the supervisor to go home and rest. After the claimant missed two to three weeks of work, he was treated at a local clinic, and returned to work up until March 2015, at which time he could no longer work due to pain. The company accountant testified that during the summer prior to the October 2014 injury, she had been giving the claimant injections with

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100. *Id.* at 198, 828 S.E.2d at 426.

101. *Id.* at 200, 828 S.E.2d at 427.

102. 348 Ga. App. 629, 824 S.E.2d 87 (2019).

103. *Id.* at 629, 824 S.E.2d at 88.

104. *Id.* at 629–30, 824 S.E.2d at 88–89.

105. *Id.* at 632–33, 824 S.E.2d at 89–90.

106. 349 Ga. App. 319, 826 S.E.2d 146 (2019).

107. *Id.* at 321, 826 S.E.2d at 147.

medicine from Mexico for back pain. Additionally, the employer presented testimony that the claimant informed the employer prior to starting employment that he had back problems, and disputed any notice of an accident or injury that occurred in October 2014.<sup>108</sup>

The ALJ found that the claimant proved an October 2014 accident and injury, and that the employer had actual notice of the injury.<sup>109</sup> The ALJ awarded assessed attorney's fees based upon the employer's unreasonable defense that the claimant did not give notice of his injury, and "awarded penalties based on [the employer's] failure to controvert [the] claim within 21 days of" notice of injury.<sup>110</sup> The Appellate Division agreed as to the compensable injury and notice, but held that attorney's fees were not warranted in light of conflicting evidence and testimony. The superior court applied a *de novo* standard of review and reversed the Appellate Division's decision on attorney's fees.<sup>111</sup>

On appeal, the court of appeals observed that the Appellate Division's evaluation of "[w]hether an employer has unreasonably defended against a claim is a factual determination [that is] subject to the 'any evidence' standard of review," and not a *de novo* standard of review.<sup>112</sup> The superior court emphasized the untimely controvert; however "the ALJ awarded attorney[s] fees based on [the employer's] unreasonable defense" and not a late controvert, and the Appellate Division did not address the untimely controvert in concluding that the employer's defense was not unreasonable.<sup>113</sup> Accordingly, the superior court erred in reversing the Appellate Division's decision.<sup>114</sup>

#### IX. STANDARD OF REVIEW/OCCUPATIONAL DISEASE

In *McKenney's, Inc. v. Sinyard*,<sup>115</sup> the court dealt with a claim for occupational exposure to asbestos that led to a diagnosis of mesothelioma. The claimant began working as a pipefitter in 1978 and worked for *McKenney's* from 1986 to 1989, subsequently working for other employers.<sup>116</sup> He was diagnosed with mesothelioma in 2014 and filed suit in Illinois state court naming more than eighty defendants, including "companies and owners of premises where he worked . . . but

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108. *Id.* at 321, 826 S.E.2d at 147–48.

109. *Id.* at 322, 826 S.E.2d at 148.

110. *Id.*

111. *Id.* at 322–23, 826 S.E.2d at 148–49.

112. *Id.* at 323, 826 S.E.2d at 149.

113. *Id.* at 324, 826 S.E.2d at 149.

114. *Id.*

115. 350 Ga. App. 260, 828 S.E.2d 639 (2019).

116. *Id.* at 261, 828 S.E.2d 642.

he did not name McKenney's as a defendant," before dismissing without prejudice and filing a Georgia workers' compensation claim against McKenney's.<sup>117</sup> McKenney's argued that, as "it was not [the claimant's] employer when he was last injuriously exposed to asbestos," under O.C.G.A. § 34-9-284,<sup>118</sup> it should not be liable.<sup>119</sup> That statute provides in pertinent part:

Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease and the insurance carrier, if any, by whom the employer was insured when such employee was last so exposed under such employer shall alone be liable therefor, without right of contribution from any prior employer or insurance carrier.<sup>120</sup>

The claimant presented "evidence that he was injuriously exposed to asbestos while working for McKenney's," medical evidence that the asbestos exposure during this period caused his mesothelioma, and testimony that "he never [subsequently] worked with asbestos-containing materials or disturbed asbestos."<sup>121</sup>

The ALJ found "that despite 'abundant' evidence of his injurious exposure to asbestos with McKenney's, [the claimant] failed to carry his burden of proving" that McKenney's was his employer when he was last injuriously exposed to asbestos.<sup>122</sup> "The ALJ found that [the claimant's] allegations of injurious exposure to asbestos after his time with McKenney's, as raised in the Illinois lawsuit, were admissions *in judicio* and therefore conclusive and binding against him," or "[a]lternatively . . . could be used against [him] as admissions against interest," such that "the preponderance of evidence showed [his] last injurious exposure to asbestos occurred after his time with McKenney's."<sup>123</sup> "The ALJ also found that there was 'evidence to support a finding that [the claimant] was injuriously exposed to asbestos while working'" subsequent to his job with McKenney's.<sup>124</sup> The Appellate Division affirmed the ALJ's denial of the claim on grounds "that [the claimant] did not carry his burden to prove McKenney's . . .

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117. *Id.*

118. O.C.G.A. § 34-9-284 (2019).

119. *McKenney's*, 350 Ga. App. at 261, 828 S.E.2d at 642.

120. O.C.G.A. § 34-9-284.

121. *McKenney's*, 350 Ga. App. at 262, 828 S.E.2d at 642.

122. *Id.* at 262, 828 S.E.2d at 643.

123. *Id.*

124. *Id.*



was his employer of last injurious exposure to asbestos,” though it modified some of the ALJ’s findings.<sup>125</sup> The superior court reversed, ruling in favor of the claimant.<sup>126</sup>

The superior court stated that it had applied the “any evidence” standard to the [Appellate Division’s] factual findings and construed the evidence in the light most favorable to McKenney’s, but because the appeal related solely to a contention that the [Appellate Division] erroneously applied the law to the undisputed facts, the superior court would conduct a *de novo* review to determine whether the Board applied the wrong legal standard to the evidence.<sup>127</sup>

The superior court ruled that the employer presented insufficient evidence to establish that the claimant had later exposures to asbestos as the employer “did not offer any expert opinion testimony to rebut [the claimant’s expert’s] affirmative causation testimony, and . . . failed to establish that any later exposure to asbestos was sufficiently meaningful . . . to serve as legal causation of [the] mesothelioma.”<sup>128</sup> The superior court also ruled:

that mere evidence of exposure to asbestos, in the absence of competent expert opinion . . . to establish [that] the exposure was sufficiently meaningful to serve as a cause of the disease, failed to meet the required legal standard to prove any later exposure was an alternate cause . . . or amounted to an injurious exposure.<sup>129</sup>

Before the court of appeals, the employer argued “that the superior court applied [an] incorrect standard of review,” as the employer “was not required to produce its own expert to rebut [the claimant’s expert] opinion testimony, and the [Appellate Division’s] finding that [the claimant] failed to prove the identity of his employer of last injurious exposure [was] supported by some evidence.”<sup>130</sup> The court of appeals first held that some competent evidence existed to support the Appellate Division’s finding that the claimant failed to meet his burden of proving that McKenney’s was his last employer when he was last injuriously exposed to asbestos, as the claimant’s Illinois lawsuit

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125. *Id.* at 263, 828 S.E.2d at 643.

126. *Id.* at 264, 828 S.E.2d at 644.

127. *Id.*

128. *Id.*

129. *Id.* at 264–65, 828 S.E.2d at 644.

130. *Id.* at 265, 828 S.E.2d at 644.

included allegations of exposure to asbestos with subsequent employers.<sup>131</sup>

Accordingly, “the [Appellate Division’s] decision must be upheld unless it affirmatively appears that [it] committed an error of law,” and the court of appeals determined that there was no error of law, as it determined that the allegations in the claimant’s Illinois lawsuit—that “[the claimant] was exposed to ‘great amounts’ of asbestos after his time with McKenney’s . . . [which] caused his mesothelioma”—satisfied the standard of causation evidence as it was “not incompetent or speculative merely because it [was] not expert opinion evidence.”<sup>132</sup> The court further ruled that the employer “was not required to provide its own expert on the issue of the employer of last injurious exposure,” as toxic tort causation requirements are not categorical requirements in workers’ compensation claims.<sup>133</sup> As the Appellate Division’s findings were not based on erroneous legal theories and were “supported by some evidence, the superior court erred in reversing [the award].”<sup>134</sup>

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131. *Id.* at 267, 828 S.E.2d at 646.

132. *Id.* at 270–71, 828 S.E.2d at 648.

133. *Id.* at 271, 828 S.E.2d at 648.

134. *Id.* at 273, 828 S.E.2d 649–50 (quoting *JMJ Plumbing v. Cudihy*, 319 Ga. App. 158, 163, 735 S.E.2d 148, 153 (2012)).

