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Workers' Compensation

by H. Michael Bagley*
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Katherine D. Dixon***
and
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For the second year in a row, the survey period passed without dramatic legislative changes to Georgia's Workers' Compensation Act ("the Act"). Georgia's appellate courts, however, were active once again in examining the exclusive remedy doctrine and interpreting the Act's subrogation provisions.

I. LEGISLATION

As it has virtually every year this decade, the 1999 Georgia General Assembly made a number of amendments to the Act. This legislation marks the sixth consecutive year that legislation was passed based upon a package drafted under the direction of the Chairman of the State Board of Workers Compensation ("the Board"), Judge Harrill Dawkins. The following changes in the Act became effective July 1, 1999:

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A. Appeal of Decisions

Previously, the Act was silent regarding the right of a party to cross-
appeal following an appeal by another party of a decision of an
administrative law judge. This was clarified with a provision specifying
that an appellee may institute a cross-appeal by filing notice of the
action within thirty days of the notice of the award by the administra-
tive law judge.²

B. Self-Insured Employers

Although the Board has been empowered to issue certificates relating
to self-insurance for some time,³ the Act was silent on the issue of
whether this included the right to review the self-insured status of an
employer following merger or acquisition.⁴ This amendment allows the
Board to review the status of a self-insured employer after its involve-
ment in a merger or acquisition.⁵ The Board will determine whether
the employer continues to meet the self-insurance requirements of the
Official Code of Georgia Annotated ("O.C.G.A.") section 34-9-121.⁶

C. Appointment of Guardian for Minor or Incompetent Claimant

Until 1996 the Board was vested with broad authority to appoint
guardians for minors and incompetents who were claimants in the
workers' compensation system.⁷ The Board, however, was not vested
with the authority or the funding for the necessary personnel to insure
that these guardians performed their duties properly. In this setting the
1996 legislature removed all Board authority and referred all issues of
guardianship under the Act to the probate court in the county of
residence of the minor or legally incompetent person.⁸ This resulted in
delays that were unacceptable in a system designed to react quickly.
Therefore, this year the Board was again vested with the authority to
appoint guardians for minors or legally incompetent persons, in limited
circumstances and for periods of limited duration.⁹ The circumstances
include the following: (1) the receipt and administration of income
benefits for a period not to exceed fifty-two weeks; (2) the compromise

². Id. § 34-9-103.
³. Id. § 34-9-127.
⁴. Id. § 34-9-127.
⁵. Id. § 34-9-127(b).
⁶. Id.
⁹. Id. § 34-9-226 (Supp. 1999).
and termination of any claim and the receipt of any sum paid in
settlement where the net settlement amount approved by the Board does
not exceed $25,000; and (3) in the event the minor or incompetent person
does not have a duly appointed guardian, the Board may appoint a
temporary guardian ad litem for a period not to exceed fifty-two weeks,
to institute or defend an action under the Act. The fifty-two-week
periods may be renewed or extended by order of the Board.

D. Claims for Reimbursement

The legislature clarified the Board’s authority to order a reimburse-
ment of an overpayment of indemnity benefits to a claimant. The
request for reimbursement must be made within two years from the date
of the overpayment.

E. Indemnity Benefits

The legislature increased the rate for temporary total disability
(“TTD”) benefits from a maximum of $325 a week to $350 a week. The
minimum TTD benefit payable is now $35 a week. The maximum rate for temporary partial disability (“TPD”) benefits was increased
from $216.67 a week to $233.33 a week.

F. Compensation for Work-Related Death

The provisions dealing with compensation in the event of a work-
related death have needed clarification for some time. The legislature
deleted the language referencing the payment of reasonable expenses for
the employee's last sickness in a death case, as the payment of these
benefits was required elsewhere in the Act. Arguably the language
had created the unintended result of limiting the expenses related to the
employee’s last sickness to the maximum allowable for burial. The
amount payable for burial expenses was increased from $5,000 to
$7,500.

10. Id. § 34-9-226(b).
11. Id. § 34-9-226(b)(3).
12. Id. § 34-9-245.
13. Id.
14. Id. § 34-9-261.
15. Id.
16. Id. § 34-9-262.
17. Id. § 34-9-265(b).
18. Id.
II. EXCLUSIVE REMEDY

The attack on the exclusive remedy provisions of the Act continued during this survey period, including two significant decisions from the Georgia Supreme Court. In *Flint Electric Membership Corp. v. Ed Smith Construction Co.*, a construction company employee who was injured when he came into contact with a high voltage line brought a negligence action against the power-line owner. The power-line owner sought indemnification from the injured worker's employer pursuant to the High Voltage Safety Act. The employer successfully raised the exclusive remedy provision of the Act to obtain summary judgment in the indemnity action at the superior court level. On appeal, the supreme court reversed the lower court and all earlier decisions supporting the lower court. The court found that the indemnity action was not barred by the exclusive remedy provision of the Act because it was not an action by an injured employee "on account of" a work-related injury, but rather a contractual indemnity action. This clearly creates a very limited exception to the exclusive remedy.

The Supreme Court of Georgia articulated a potentially broader exception to the exclusive remedy with its decision in *Potts v. UAP-GA. AG CHEM., Inc.*, which once again creates the possibility of civil actions against employers and insurers based upon circumstances related to the handling of medical treatment in workers' compensation claims.

In *Potts* the employee became ill after cleaning chemicals for his employer. Treatment was initiated for suspected chemical poisoning, but one doctor discontinued the treatment stating that he had been reassured by a representative of the employer that the employee could not have possibly been exposed to any chemicals at work. The employee eventually died, and his survivors filed a workers' compensation claim for dependency benefits asserting that the deceased employee "was exposed to toxic and poisonous materials and died as a result of

23. 270 Ga. at 465, 511 S.E.2d at 161-62.
25. See id.
26. Id. at 14, 506 S.E.2d at 102.
The survivors also brought a wrongful death action in the Superior Court of Fulton County against the employer and its branch manager, alleging fraud and intentional infliction of emotional distress based primarily upon the representations allegedly made to medical providers regarding the absence of any exposure to chemicals at work.\textsuperscript{28}

The superior court granted summary judgment in the civil action for the employer and branch manager based upon the finding that the exclusive remedy of the Act extends to intentional misconduct by the employer done off the work site and at times that the employer is not engaged in any work activity.\textsuperscript{29} The court of appeals affirmed.\textsuperscript{30} On certiorari, the supreme court reversed, finding that any damages resulting from fraud do not arise out of and in the course of employment if they result from intentional misconduct by the employer subsequent to the physical injuries that gave rise to the original workers' compensation claim.\textsuperscript{31} Thus, the specter of civil litigation spawned out of workers' compensation claims again raises its head and warrants a review of the doctrine of exclusive remedy.

A. Background

The exclusive remedy doctrine functions as the most fundamental premise of the workers' compensation system and precludes an employee injured by an accident arising out of and in the course of his employment from pursuing a civil liability claim against the employer or the employer's workers' compensation insurance carrier.\textsuperscript{32} The very origin of workers' compensation was based upon a quid pro quo: employers established a system providing employees with income benefits and medical care without issues of fault if employees relinquished the common law right to sue in tort for injuries on the job. The controlling factor for determining whether the exclusive remedy doctrine applies is whether the Act covers the parties and the event.

Historically, the judicially recognized exceptions to the exclusive remedy doctrine have been strictly limited to seven specific circumstances which are: (1) purely personal intentional acts,\textsuperscript{33} (2) the "dual

\textsuperscript{27} 227 Ga. App. 841, 844, 490 S.E.2d 432, 434 (1997).
\textsuperscript{28} Id. at 842-44, 490 S.E.2d at 433-34.
\textsuperscript{29} 270 Ga. at 15, 506 S.E.2d at 102.
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 16-17, 506 S.E.2d at 103.
\textsuperscript{33} When co-employees, the employer, or third parties direct willful and intentional acts against a nonparticipating victim for purely non-work-related personal reasons, resulting
persona” doctrine; (3) failure to provide workers’ compensation insurance; (4) property damage; (5) negligent inspection; (6) indemnity agreements; and (7) fraud. These exceptions to the exclusive remedy doctrine have developed to deal rationally and consistently with matters either outside of the workers’ compensation system or to draw a distinct line for circumstances lying on the periphery.

The Georgia Supreme Court has specifically denied civil actions for delay in payment of medical benefits. In *Doss v. Food Lion, Inc.*, the supreme court found that an independent cause of action in tort for the intentional delay of medical treatment in a workers’ compensation claim was “inconsistent with the public policy behind the statutory scheme,” thereby barring the viability of any tort action on that theory. Therefore, the supreme court specifically reversed *Zurich*
American Insurance Co. v. Dicks, in which the court of appeals reached a contrary conclusion. The court specifically addressed the issue of public policy and pointed out that the exclusive remedy provision was "the bedrock of the workers' compensation system" because it was the "quid pro quo for workers receiving a guaranty of prompt benefits for work-related injuries without regard to fault or common law defenses and without the delay inherent in tort litigation." The court further articulated the reality that workers' compensation "has never been intended to make the employee whole—it excludes benefits for pain and suffering, for loss of consortium, and it provides a cap on wage benefits.

Despite the requirement of "injury by accident," it is unquestionable that the Act provides remedies for intentional physical injuries. Early in the development of the law interpreting the exclusive remedy, the courts expanded the term "accident" to incorporate physical injuries caused by the intentional conduct of an employer arising out of and in the course of employment.

Furthermore, in Southwire Co. v. Benefield, a case which is difficult to distinguish from Potts, the employee alleged that the employer and company doctor had intentionally withheld knowledge of the employee's exposure to lead poisoning in the work place, thereby preventing him from getting proper medical treatment and aggravating the effects of the poisoning. The court reasoned that because lead poisoning was an occupational disease and compensable under the Act, workers' compensation was the exclusive remedy. The court specifically rejected the trend in other jurisdictions that permits employees to pursue tort actions for fraudulently concealing the nature of an injury caused by hazardous materials in the work place. Significantly, the court limited the employee's remedy to the Act even though the employee incurred greater physical harm due to the employer's alleged intentional conduct.

44. 267 Ga. at 313, 477 S.E.2d at 578.
45. Id.
46. Id.
49. Id. at 418, 361 S.E.2d at 525.
50. Id. at 418-19, 361 S.E.2d at 525-26.
51. Id.
52. Id.
a special concurring opinion, Judge (now Justice) Benham noted that the court was "powerless" to change the rule; the change must come from the legislature.\textsuperscript{53} In \textit{Potts}, however, Justice Benham was among the majority.\textsuperscript{54}

\textbf{B. Fraud: a Broader Exception?}

As indicated above, fraud has been an exception to the exclusive remedy, but it is an exception that has historically been reserved for the fraudulent inducement to settle.\textsuperscript{55} The decision in \textit{Potts} specifically excepts from the exclusive remedy bar fraud "committed by the employer or a co-employee where the tortious 'act is not an accident arising out of and in the course of employment and where a reasonable remedy for such conduct is not provided by the Workers' Compensation Act."\textsuperscript{56}

On March 3, 1999, the court of appeals addressed the applicability of \textit{Potts} under the facts of \textit{Dove v. Sentry Insurance}.\textsuperscript{57} The employee experienced a work-related injury and committed suicide within four months due to a prescription drug overdose. Initially, the employee's widow instituted a workers' compensation claim for death benefits. The parties ultimately settled this matter.\textsuperscript{58}

Thereafter, the employee's widow filed a tort action against the employer's insurance company. The complaint alleged wrongful death, pain and suffering, and punitive damages stemming from the insurer's refusal to pay for additional testing recommended by the treating physicians. According to the complaint, these actions were intentional and caused the employee's death. The insurance company moved for summary judgment, which was granted.\textsuperscript{59}

The court of appeals affirmed the grant of summary judgment, finding that the widow's cause of action was controlled by \textit{Doss}.\textsuperscript{60} In \textit{Doss} the supreme court specifically held that an independent cause of action based upon an employer's intentional delay in authorizing medical treatment is not available.\textsuperscript{61} Relying on \textit{Potts}, the court determined that an action was permitted outside the Act only if the employer or its insurer committed fraud or another intentional tort, causing death,"and

\begin{footnotesize}
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\item \textsuperscript{53} Id. at 420, 361 S.E.2d at 526 (Benham, J., concurring specially).
\item \textsuperscript{54} 270 Ga. at 17, 506 S.E.2d at 103.
\item \textsuperscript{55} See, e.g., Griggs v. All-Steel, 209 Ga. App. 253, 433 S.E.2d 89 (1993).
\item \textsuperscript{56} \textit{Potts}, 270 Ga. at 16, 506 S.E.2d at 103 (quoting Griggs, 209 Ga. App. at 257, 433 S.E.2d at 92).
\item \textsuperscript{57} 236 Ga. App. 754, 756, 513 S.E.2d 289, 290 (1999).
\item \textsuperscript{58} Id. at 754, 513 S.E.2d at 289.
\item \textsuperscript{59} Id. at 754-55, 513 S.E.2d at 289.
\item \textsuperscript{60} Id. at 756, 513 S.E.2d at 290.
\item \textsuperscript{61} Id. (citing \textit{Doss}, 267 Ga. at 312, 477 S.E.2d at 577).
\end{itemize}
\end{footnotesize}
then only if 'the tortious act was not an accident arising out of and in
the course of employment, and where a reasonable remedy for such
conduct is not provided by the Workers' Compensation Act.'\textsuperscript{62}

III. SUBROGATION

The Georgia Court of Appeals addressed three cases on subrogation
this year, and all three demonstrate that the outcome of the seemingly
"simple" process of asserting a subrogation lien under O.C.G.A. section
34-9-11.1 is never simple.

In the first subrogation case, \textit{Payne v. Dundee Mills, Inc.},\textsuperscript{63} the
claimant did not file his own suit but filed a motion to intervene in an
action filed by the employer against the tortfeasors that allegedly caused
the claimant's work-related injury. The claimant was originally injured
on March 21, 1995, when sulfuric acid escaped from a tank at his
employer's plant, and was paid workers' compensation benefits. On
March 21, 1997, the employer filed an action under O.C.G.A. section 34-
9-11.1\textsuperscript{64} against the contractors that allegedly caused the claimant's
injuries. The claimant received notice of the action after the expiration
of the statute of limitations. After the claimant attempted to intervene,
the employer dismissed its complaint. The trial court then denied the
claimant's motion to intervene, noting that the original action had been
dismissed.\textsuperscript{65}

Although the right to intervene is dependent upon whether the motion
to intervene is timely, such a finding is entrusted to the sound discretion
of the trial court.\textsuperscript{66} "Where the motion to intervene appears before a
final judgment, where the rights of the intervening parties have not been
protected, and where the denial of intervention would dispose of the
intervening parties' cause of action, intervention should be allowed."\textsuperscript{67}
Although it was not clear when the employer notified the claimant of the
subrogation complaint, the claimant moved to intervene before any
judgment was rendered and before the employer dismissed its com-
plaint.\textsuperscript{68} Therefore, the court of appeals found that because (1) denial
of the claimant's motion to intervene would have barred the claimant's

\textsuperscript{62} Id. (quoting Potts, 270 Ga. at 16, 506 S.E.2d at 103).
\textsuperscript{65} 235 Ga. App. at 514, 510 S.E.2d at 68.
\textsuperscript{66} Id. at 515, 510 S.E.2d at 68 (quoting AC Corp. v. Myree, 221 Ga. App. 513, 515, 471
S.E.2d 922, 925 (1996)).
\textsuperscript{67} Id. (citing Allgood v. Georgia Marble Co., 239 Ga. 858, 239 S.E.2d 31 (1977); Kubler
v. Goerg, 197 Ga. App. 667, 399 S.E.2d 229 (1990)).
\textsuperscript{68} Id.
independent tort claim against the contractors, (2) the motion to intervene would not prejudice the employer, and (3) the employer failed to protect the claimant's interests before dismissing, the superior court abused its discretion in denying the motion to intervene. The case was remanded to the trial court to allow the claimant to intervene.

In *North Brothers v. Thomas*, the outcome was more favorable for the employer. Seeking to recoup payments under the Act, the employer intervened in the plaintiff-employee's negligence action against the tortfeasor. North Brothers, the employer, intervened in the case and contended that it had paid TTD benefits and over $60,000 in medical benefits. The jury returned a special verdict finding for plaintiff and awarding him $25,000 in medical expenses, zero for lost wages, and $25,000 for pain and suffering. The trial judge entered an order finding that plaintiff had not been fully and completely compensated for all his economic and noneconomic losses and denied and dissolved North Brothers' subrogation lien.

North Brothers appealed, and the court of appeals found that the trial court had been correct on the issue of the pain and suffering portion of the verdict. Because North Brothers paid no sums for pain and suffering, it was not entitled to recoup any money from that portion of the verdict. The court of appeals found, however, that North Brothers could recoup sums awarded to plaintiff for medical expenses. Because plaintiff had no outstanding medical expenses or other medical claims, the court determined that he had been fully and completely compensated for his medical expenses.

The third case was *Homebuilders Ass'n of Georgia v. Morris*, a case that addressed the employer's right to present certain evidence at trial in the unusual posture of a case proceeding to trial after settlement with the tortfeasor. In *Homebuilders* plaintiff was working on a construction crew and was injured when a truss gave way, causing him to fall ten feet to the ground. When plaintiff filed a civil suit against the truss designer, Georgia Mountain, alleging breach of warranty and negligent design, the employer, Homebuilders, properly intervened in the case. Plaintiff settled his dispute against Georgia Mountain for $200,000, and

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69. Id.
70. Id.
72. Id. at 839-41, 513 S.E.2d at 252-53.
73. Id. at 841-42, 513 S.E.2d at 253-54.
74. Id.
75. Id. at 842, 513 S.E.2d at 254.
76. Id.
Georgia Mountain was dismissed from the suit. This left plaintiff and Homebuilders as the only parties.\textsuperscript{78}

Before trial, plaintiff alleged that Homebuilders' subrogation claim was essentially a nullity because he had not been "fully and completely compensated" by the settlement with Georgia Mountain. To resolve the issue, the judge allowed the case to proceed to trial with only plaintiff and Homebuilders as parties.\textsuperscript{79}

On the day of trial, plaintiff filed a motion in limine to prevent Homebuilders from introducing evidence of his contributory or comparative negligence or assumption of the risk. The trial court granted the motion based on O.C.G.A. section 34-9-11.1(b) which does not permit consideration of such evidence. The case proceeded to trial, and the jury returned a special verdict awarding plaintiff \$924,902 in damages. The trial court entered judgment on the verdict, ordering Homebuilders, the intervener, take nothing from the settlement funds.\textsuperscript{80}

Homebuilders appealed, arguing that the court abused its discretion in granting the motion in limine because had Georgia Mountain remained a party, it would have been allowed to present to the jury evidence of contributory/comparative negligence and assumption of the risk. Homebuilders alleged that because it now stood in the shoes of the tortfeasor, the jury should have heard that evidence.\textsuperscript{81} The appellate court found that Homebuilders did not stand in the shoes of the tortfeasor.\textsuperscript{82} A workers' compensation insurer's subrogation rights are derived from O.C.G.A. section 34-9-11.1, not from general tort law principles, and the Act specifies that an employer/insurer is entitled to proceeds only after the employee is fully and completely compensated.\textsuperscript{83} The Act gives only one direction to the court for determining whether an employee has been fully and completely compensated: to consider both the workers' compensation benefits and the amount of the employee's recovery against the third party.\textsuperscript{84} The court of appeals found that the trial court properly considered only the amount of workers' compensation benefits plaintiff received and the amount of his settlement in determin-

\textsuperscript{78} \textit{Id.} at 194-95, 518 S.E.2d at 195-96.
\textsuperscript{79} \textit{Id.} at 195, 518 S.E.2d at 196.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.} at 195-96, 518 S.E.2d at 196.
\textsuperscript{82} \textit{Id.} at 196, 518 S.E.2d at 196.
\textsuperscript{83} \textit{Id.} (citing O.C.G.A. § 34-9-11.1(b)).
\textsuperscript{84} \textit{Id.} (citing O.C.G.A. § 34-9-11.1(b)). O.C.G.A. section 34-9-11.1(b) states in pertinent part that benefits paid shall "only be recoverable if the injured employee has been fully and completely compensated."
ing whether he had been fully and completely compensated for his losses. 85

IV. CASES

A. Appeals

On more than one occasion since 1992, the Georgia Court of Appeals has stated that there is no appeal to the superior court from a decision of the Board other than a decision granting or denying compensation. 86 This year, that proposition was once again affirmed in GAC, MFG/Processing v. Busbin. 87

In Busbin the employee put forth his evidence at the hearing before the administrative law judge ("the ALJ"). Without presenting its case, the employer requested a directed verdict, arguing that there was no evidence to support the employee's claim of an accident arising out of and in the course and scope of his employment. The ALJ denied the employee's claim without hearing any evidence from the employer. On appeal, the appellate division held that the employee's evidence established a prima facie case, and the claim was remanded to the ALJ to take the employer's evidence. The employer appealed the appellate division's order to remand the case, and the superior court affirmed the remand. 88

The court of appeals held that the superior court should have declined review of the case, citing to well-settled law:

Nowhere in our [workers' compensation] statute is there provision for an interlocutory appeal . . . . [O]nly a final award, order, judgment, or decision of the board is subject to appeal to the superior court . . . . [T]he Workers' Compensation Act makes no provision for an appeal to the superior court from a decision by the full board other than one which grants or denies compensation. 89

Thus, the court reminds workers' compensation practitioners that there is no interlocutory appeal under O.C.G.A. section 34-9-105. 90

85. 238 Ga. App. at 197, 518 S.E.2d at 197.
88. Id.
89. Id. (citations and punctuation omitted).
B. Arising Out of and In the Course of Employment

Whether an injury arises out of and in the course of employment is often a very fact-specific inquiry. Though there was no radical change to existing law, two cases this year provided different factual twists on the doctrines of "continuous employment" and "going to and coming from work."

In the first case, *Boyd Brothers Transportation Co. v. Fonville*,\(^91\) the employee, Fonville, was hired to drive tractor-trailers. After undergoing an orientation session in Alabama at the employer's headquarters, Fonville returned home to North Carolina to await assignment to a trainer and was placed on the company's payroll. When work with a trainer in North Carolina was not forthcoming, Fonville requested permission to go to the employer's terminal in Georgia, where there was an increased opportunity for assignment. Fonville stayed in temporary lodging provided by the employer, remained on the payroll, and waited for an assignment, but did no actual work besides parking one trailer. Fonville was to start an assignment with a trainer on October 6, 1995. On the evening of October 5th, Fonville left his lodging, walked to a nearby convenience store to buy food, and was hit by a car while walking back.\(^92\)

The employer contended that going to get food was a personal mission and that the injury was therefore not compensable. The ALJ, however, applied the doctrine of continuous employment to find the claim compensable. The appellate division, superior court, and the court of appeals all affirmed the application of the doctrine.\(^93\) The court of appeals noted that the scope of a traveling employee's employment was broader than that of an ordinary employee.\(^94\) The employee had to eat and stay in Georgia out of necessity and in furtherance of the employer's business.\(^95\) Even though the employee was not actually required to be in Georgia awaiting assignment, his presence there was found to be of mutual benefit to him and the company, he would be trained as a driver sooner as opposed to later.\(^96\) The court found noteworthy that, but for the accident, the employer would have benefitted from Fonville's presence at the Georgia terminal.\(^97\)

\(^92\) Id. at 721-23, 516 S.E.2d at 573-74.
\(^93\) Id. at 722-23, 516 S.E.2d at 574.
\(^94\) Id. at 722, 516 S.E.2d at 574.
\(^95\) Id. at 722-23, 516 S.E.2d at 574.
\(^96\) Id.
\(^97\) Id. at 723, 516 S.E.2d at 574.
In the second case to address whether an accident arose out of and in the course of employment, *Mark the Mover v. Lancaster*,\(^9\) the employee, Lancaster, was in an accident while driving to work one morning. He was an office worker who sometimes delivered furniture, using either a company van or his own van. When his vehicle became inoperable, Lancaster started walking to work. Lancaster later borrowed the company owner’s (his son-in-law’s) personal vehicle for transportation while Lancaster’s van was being repaired. On the date of accident, Lancaster was eating breakfast at a restaurant when he received a page. Unable to contact the employer, Lancaster drove toward work, but was in an accident and seriously injured.\(^9\)

The appellate court upheld the Board’s denial of Lancaster’s claim.\(^10\) The general rule, the court noted, is that injuries en route to and from work are not compensable.\(^10\) The court further noted that there are exceptions to the general rule, such as when the employer furnishes transportation to the employee as an incident of employment or when the employee is on call and is reimbursed for transportation.\(^10\) The Board had found, however, and the court of appeals agreed, that neither exception applied to Lancaster.\(^10\) In the first place, the employer’s van was not provided to Lancaster as an incident of his employment but as a personal favor by his son-in-law so that Lancaster could get his own van fixed.\(^10\) Second, even if Lancaster had previously been an on-call employee when he used his own vehicle, that ended when Lancaster began walking to work and did not resume when he borrowed transportation.\(^10\) Finally, the court pointed out that the employee admitted that he would have been driving to work at the time of the accident even if he had not been paged.\(^10\) Driving to work was not a work-related activity; therefore, the accident did not fall into any exception to the general rule of noncompensability.\(^10\)

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\(^9\) Id. at 319-20, 506 S.E.2d at 674.
\(^10\) Id. at 320-21, 506 S.E.2d at 675.
\(^10\) Id. at 320, 506 S.E.2d at 674.
\(^10\) Id.
\(^10\) Id.
\(^10\) Id.
\(^10\) Id.
\(^10\) Id., 506 S.E.2d at 674-75.
\(^10\) Id., 506 S.E.2d at 675.
\(^10\) Id., 506 S.E.2d at 674-75.
C. Burden of Proof

Determining which party carries the burden of proof can, under certain factual scenarios, be tricky. In Dan Vaden Chevrolet v. Mann, the proper placement of the burden of proof regarding entitlement to TTD benefits was at issue. The employee, Mann, had a history of prior back problems, including two back surgeries. On February 22, 1996, Mann suffered an on-the-job lower back strain while moving a safe. Mann continued working after the accident but was hospitalized in March 1996 for both his back and for nonrelated health problems. At that point, Mann filed a claim for TTD benefits. The Board placed the initial burden of proof upon the employee and found that he met his burden regarding the claim for benefits from March 6 through 27, 1996, but failed to show the injury was work-related after that period. On appeal, the appellate division placed the burden of proving a change in condition for the better upon the employer in order to terminate the employee's benefits. According to the court of appeals, shifting the burden to the employer in this manner was erroneous. The court began its analysis from the premise that “[a]n employee has the initial burden of proving a disabling work-related injury entitling him to workers’ compensation benefits.” The court acknowledged that in a change in condition case, the burden might be shifted to the employer to prove that the employee is not entitled to continuing benefits after the employee has met his burden of proving an initial period of disability. This was not a change in condition case, however, because the employee’s condition had never been established by the payment of any benefits. Consequently, the employee carried the full burden of proof with respect to his entitlement to ongoing TTD benefits.

D. Catastrophic Injury

One of the most notable workers' compensation decisions of the year is Cobb County School District v. Barker. In this case the Georgia
Supreme Court ruled for the first time on the constitutionality of the 1992 version of O.C.G.A. section 34-9-200.1(g)(6). In Barker the employer challenged the constitutionality of the statute, claiming that it required the ALJ to adopt as conclusive on the issue of catastrophic injury, a determination made in another forum where the employer had no opportunity to be heard on the matter.

Following the rule in Georgia that an act of the General Assembly should be interpreted so as to render it constitutional, if possible, the court found that the former section 34-9-200.1(g)(6) did not create such a conclusive presumption. First, the court noted that nothing in subsection (g)(6) specifically states that an award of Social Security benefits is "conclusive" with regard to catastrophic injury. The court stated that an award of Title II or Title XVI Social Security benefits cannot be presumed to qualify an employee for catastrophic workers' compensation status because the underlying condition that forms the basis of the Social Security award might not meet the definition of "injury" found in the Act, while a catastrophic injury must. The court concluded subsection (g)(6) is not a conclusive presumption, but a rebuttable presumption that the employee suffered a catastrophic injury.

In light of the above ruling, the ALJ clearly is not required to accept the decision of the Social Security Administration. Instead, he or she must make an independent determination not only that the workers' compensation injury meets the Social Security Administration's standard of what is a disability, but also that the injury alleged to be catastrophic falls within the coverage of the Act. In other words, if the Social Security award was based upon an injury or condition that was not compensable under the Act, then the claim should not be found to be catastrophic for workers' compensation purposes.

117. 1992 Ga. Laws 1958 (amended 1995). That Code section defined "catastrophic injury" to include "Any other injury of a nature or severity as has qualified or would qualify an employee to receive disability income benefits under . . . Title XVI of the Social Security Act." Id.
118. 271 Ga. at 36, 518 S.E.2d at 128.
119. Id. at 37-38, 518 S.E.2d at 128-29.
120. Id. at 38, 518 S.E.2d at 129.
123. 271 Ga. at 38-39, 518 S.E.2d at 130 (citing O.C.G.A. § 34-9-1(4)).
124. Id. at 39, 518 S.E.2d at 130.
125. Id.
126. See id.
E. Change in Condition

Each year the often complicated law regarding change in condition is fleshed out by the appellate courts, case by case. *Waycross Molded Products, Inc. v. McKelvin*127 discussed two aspects of change in condition: the employee's burden of proof and change in condition versus new accident.

McKelvin injured his back on January 11, 1995, and income benefits were paid. The employer eventually suspended payment of benefits based upon a normal duty release from the treating physician, and the employee reported back to work. Before McKelvin actually began to work, however, he was terminated for reasons unrelated to his injury. The following year McKelvin injured his back again moving a sofa at home and was placed on work restrictions once again. McKelvin then sought reinstatement of his income benefits.128

The court of appeals' first question was whether McKelvin had sustained a new injury or simply undergone a change in condition for the worse from his previous injury.129 The employer argued that the couch-moving incident was a new accident not related to McKelvin’s employment, which terminated their responsibility for the back problems. The ALJ disagreed finding that the employee's back was aggravated by ordinary wear and tear from his everyday life, that it was related to the on-the-job injury of 1995, and that he had undergone a change in condition for the worse.130 The court of appeals held that this determination was a question of fact for the Board, and the ALJ's findings in that regard would not be overturned on appeal.131

The second determination for the court of appeals was whether, pursuant to *Maloney v. Gordon County Farms*,132 McKelvin was required to prove he made a good faith and diligent search for suitable employment with another employer even though he had not actually commenced working for the employer after the accident and before his termination.133 The court began its analysis by citing the central concern of the decision in *Maloney*, that the employee only receive benefits if the economic change in condition for the worse is proximately

128. Id. at 46-47, 505 S.E.2d at 827.
129. Id. at 47, 505 S.E.2d at 828.
130. Id., 505 S.E.2d at 827-28.
131. Id., 505 S.E.2d at 828.
133. 234 Ga. App. at 47, 505 S.E.2d at 828.
caused by the injury.\textsuperscript{134} The fact that McKelvin had not actually begun to work before being fired was not a material distinction with regard to placing a Maloney burden upon him.\textsuperscript{135} He had been released to return to work by the treating physician.\textsuperscript{136} Instead, the crucial inquiry was whether his economic change was due to the injury.\textsuperscript{137} Proving a diligent search for other employment was, therefore, part of the employee's burden of proof if he sought additional income benefits.\textsuperscript{138} The court remanded the case to the Board to determine whether McKelvin met his burden of proving that the injury was the proximate cause of his economic situation.\textsuperscript{139}

In the second change in condition case this year, \textit{Wal-Mart Stores, Inc. v. Harris},\textsuperscript{140} the court of appeals addressed the issue of whether an employee can turn down suitable full-time employment, accept a job elsewhere that is only part-time, and then claim entitlement to TTD and TPD benefits. Harris was injured and placed on light duty restrictions. Her employer, Wal-Mart, made a suitable position available to her, on a full-time basis, with no resulting wage loss. After working in the position for only two hours, she walked off the job claiming she could not perform and did not return. Several months later, however, Harris took a part-time position as a sitter for an elderly woman that was within her physical restrictions.\textsuperscript{141}

The ALJ determined that Harris was not entitled to total disability benefits for the several months she was unemployed because she had unjustifiably refused light duty employment. The ALJ also held that Harris was entitled to partial disability benefits based upon the fact that she was earning lower wages in her part-time job. The employer appealed this second determination.\textsuperscript{142}

In reversing the award of partial disability benefits, the court of appeals pointed out that Wal-Mart had offered suitable light duty employment that was never retracted.\textsuperscript{143} The intent of O.C.G.A. section 34-9-240 was not to allow an employee to reject full-time light duty work that gives no loss in wages, in favor of a similar position that

\begin{flushleft}
134. \textit{Id.} at 47-48, 505 S.E.2d at 828.
135. \textit{Id.} at 48, 505 S.E.2d at 828.
136. \textit{Id.}
137. \textit{Id.}
138. \textit{Id.}
139. \textit{Id.}
141. \textit{Id.} at 401-02, 506 S.E.2d at 909-10.
142. \textit{Id.}
143. \textit{Id.} at 402, 506 S.E.2d at 910.
\end{flushleft}
is part-time work for less money. The court stated the employer is not required to subsidize a loss of income resulting from the employee's own choosing. The clear import of the decision in *Harris* is that the Board is to look at diminution of earning capacity in a change in condition case and not merely factual diminution in earnings.

A third change in condition case, *Cox v. Pic-N-Save B.F.L. Corp.*, involved an effort to suspend benefits based upon a change in condition for the better. Cox had been injured and was receiving TTD since 1992. He owned an interest in a barbeque take-out prior to his injury but expanded the business and took a more active role in its day-to-day operations after he was out of work on total disability. The Georgia Self-Insurers' Guaranty Trust Fund ("GSIGTF") took over the file following the employer's bankruptcy and terminated benefits based upon an actual return to work. In support of its position, the GSIGTF had surveillance which showed Cox engaged in such activities as waiting on customers, cooking food, stocking supplies, and doing paperwork.

In holding that the employee's benefits should be reinstated, the court noted that the superior court was constrained by the any evidence rule, and that the Board's findings had to be construed in the light most favorable to the prevailing party, in this case, the employee. It appears, however, that the court of appeals may have preferred a different outcome. Not only did the court note that "[t]he evidence in this case could support a finding that Cox had returned to work," but it pointed out that the private investigator contradicted Cox in his testimony regarding the extent of his involvement in the barbeque business. Nevertheless, the court was bound to follow the Board's determination on the credibility issue.

### F. Evidence

Two cases issued during the survey period were of interest with regard to evidentiary matters in workers' compensation cases. The first, *Lastinger v. Mill & Machinery, Inc.*, involved the use of a misdemeanor conviction for possession of marijuana as part of the employer's

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144. Id., 506 S.E.2d at 909-10 (citing O.C.G.A. § 34-9-240).
145. Id.
147. Id. at 12, 507 S.E.2d at 850.
148. Id. at 13, 507 S.E.2d at 850.
149. See id.
150. Id.
151. Id. at 12, 507 S.E.2d at 850.
152. Id. at 13, 507 S.E.2d at 850.
evidence in asserting an intoxication defense under O.C.G.A. section 34-9-17(b). While at work, Lastinger fell several feet and injured himself when a metal plate broke off from a conveyor belt. A drug test performed at the emergency room where Lastinger was treated produced evidence of marijuana and cocaine in Lastinger’s blood. Lastinger admitted using drugs five days before the injury but denied being impaired by drugs on the day of his injury. The employer introduced into evidence a certified copy of Lastinger’s 1994 misdemeanor conviction for marijuana possession.

The Board determined that the presumption of intoxication provided for in O.C.G.A. section 34-9-17(b) applied to the facts of this case and that Lastinger had not rebutted this presumption in part because his testimony was impeached by his prior misdemeanor conviction. The court of appeals reversed, however, based upon a supreme court decision finding that “a misdemeanor conviction for possession of marijuana is not a crime of moral turpitude, and thus may not be used to impeach a witness.” Because the misdemeanor conviction was the sole basis for the Board’s finding that Lastinger’s testimony had been impeached, the court of appeals rejected the employer’s argument that admission of the misdemeanor marijuana conviction was harmless error. The case was remanded to redetermine if Lastinger’s testimony would have been impeached without evidence of the misdemeanor conviction. While proof of a conviction for prior drug use may be relevant in some cases in which the intoxication defense is raised, it is clear that a misdemeanor conviction for marijuana possession cannot be used as impeachment because the courts have established that this is not a crime of moral turpitude.

An evidentiary issue peculiar to workers’ compensation is the admissibility of accident reports that employers are required to fill out and file with the Board after knowledge of an on-the-job injury. The Act specifically prohibits the use of such accident reports as evidence “against any employer in any action at law brought by any employee for the recovery of damages or in any proceedings under this chapter.”

156. Id. at 431, 512 S.E.2d at 328.
157. Id. (citing O’Neal v. Kammin, 263 Ga. 218, 430 S.E.2d 586 (1993)).
158. Id.
159. Id.
160. See id. at 430-31, 512 S.E.2d at 328.
162. Id. § 34-9-61(b).
In *Mays v. Farah U.S.A., Inc.*, the question arose whether an employer's First Report of injury that was filed with the Board could be used in a wrongful death action based on a vehicular collision involving two employees and resulting in one's death. The trial court excluded the First Report of injury from evidence, and the court of appeals affirmed. Quoting the express provisions of O.C.G.A. section 34-9-61(b), the court of appeals found that the First Report of injury could not be used in any "action at law." 

G. Malpractice

A case with an outcome that might surprise many is *McMann v. Mockler.* Though not a workers' compensation case, this claim for legal malpractice, breach of contract, breach of fiduciary duty, breach of implied contract of good faith and fair dealing, and fraud arose out of a workers' compensation case. McMann filed this claim alleging that her attorney, Mockler, failed to file an appeal from the ALJ's denial of her workers' compensation case. The attorney filed a motion for summary judgment, which was granted by the trial court. On review, the court of appeals affirmed the granting of summary judgment on all grounds.

The court began by citing the essential elements which must be proved for a professional malpractice action:

"(1) A legal duty to conform to a standard of conduct . . .; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and, (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty." 

In particular, the court noted that in a legal malpractice case there must be proof that the attorney's negligence proximately caused the client's harm. When the negligence alleged is an attorney's failure to appeal, the plaintiff can establish the requisite causal relationship by

164. Id. at 1, 510 S.E.2d at 869.
165. Id. at 2, 510 S.E.2d at 870.
167. Id. at 279, 281, 503 S.E.2d at 895, 897.
168. Id. at 279-80, 281, 503 S.E.2d at 895-96, 897.
169. Id. at 282, 503 S.E.2d at 898.
170. Id. at 280, 503 S.E.2d at 896 (quoting Whitehead v. Cuffie, 185 Ga. App. 351, 352, 364 S.E.2d 87, 89 (1987)).
171. Id. (quoting Whitehead, 185 Ga. App. at 352, 364 S.E.2d at 89).
showing that the appellate court would have reversed the lower court’s ruling and a favorable outcome would have resulted.\textsuperscript{172}

Applying those legal principles to the facts before it, the court of appeals held that McMann presented insufficient evidence of causation.\textsuperscript{173} She failed to include a record of the workers’ compensation proceedings in her claim for malpractice.\textsuperscript{174} Thus, the trial court assumed that the ALJ’s findings were supported by the record, and therefore, the award would have been affirmed upon appeal.\textsuperscript{176} Failure to appeal something that would have been unsuccessful or frivolous is not, the court pointed out, harmful to the client.\textsuperscript{176} Because there was no harm from the alleged professional malpractice, summary judgment was appropriate.\textsuperscript{177}

\section{Overpayment of Benefits}

In \textit{Bahadori v. National Union Fire Insurance Co.},\textsuperscript{178} a case that was discussed in last year’s Survey,\textsuperscript{179} the Georgia Supreme Court granted certiorari to determine which statute of limitations applied to an employer’s claim for reimbursement of disability benefits paid to the claimant when he was working.\textsuperscript{180} The claimant was injured in 1989 when he worked for Sizzler. He recovered and went to work for another employer. He sought benefits in 1992 and 1993, which were paid by Sizzler. Subsequently, the employer learned that the claimant was actually working during the time he claimed to be unable to work in both 1992 and 1993. The employer filed for a hearing in February 1995, seeking to controvert the 1993 claim and to recoup benefits paid for the 1992 claim. The claimant withdrew his 1993 claim and contested Sizzler’s action to be reimbursed for the 1992 benefits, arguing that adjudication of overpayment issues could only take place in conjunction with a change in condition hearing.\textsuperscript{181} The court of appeals determined that the Board could hear an action for overpayment in cases

\begin{itemize}
\item\textsuperscript{172} \textit{Id.} (quoting \textit{Jaraysi v. Soloway}, 215 Ga. App. 531, 532, 451 S.E.2d 521, 522 (1994)).
\item\textsuperscript{173} \textit{Id. at 281, 503 S.E.2d at 896.}
\item\textsuperscript{174} \textit{Id.}
\item\textsuperscript{175} \textit{Id.}
\item\textsuperscript{176} \textit{Id.}
\item\textsuperscript{177} \textit{Id.}
\item\textsuperscript{178} 270 Ga. 203, 507 S.E.2d 467 (1998).
\item\textsuperscript{180} 270 Ga. 203, 507 S.E.2d at 468-69.
\item\textsuperscript{181} 230 Ga. App. at 52-53, 505 S.E.2d at 23-24.
\end{itemize}
other than a change in condition case and that a four-year statute of limitations applied.\textsuperscript{182}

The supreme court agreed with the claimant that the legislature drafted O.C.G.A. section 34-9-104(d)(2)\textsuperscript{183} narrowly and that the wording of the statute was intended to limit claims for overpayment to change in condition cases only.\textsuperscript{184} Thus, because the statute of limitations in change in condition cases is two years, the court of appeals erred in holding that any other statute of limitations applied.\textsuperscript{185} In addition, the supreme court stated that the employer's argument that the statute of limitations should have been tolled due to the claimant's fraud had to be supported by evidence, and the court remanded the case to the Board for further findings.\textsuperscript{186}

I. Psychological Injury

After several years of significant appellate activity in the area of compensability of psychological claims, there has been a much needed calm. No new ground was broken this year. However, the old rule that a psychological injury must be related to or caused by an actual physical injury in order for it to be compensable was reaffirmed by the court.

In \textit{Bibb County v. Short},\textsuperscript{187} an employee claimed that while his physical injury had healed, he suffered ongoing psychological problems that resulted in total disability. Short was a security guard at Lake Tobesofkee and was sent to the lake during a period of flooding in an effort to help prevent damage. A steel door fell on his foot and fractured two toes. After he was released to return to work without restrictions, Short experienced increasing anxiety and depression, and his work attendance became erratic. He threatened his employer, abused alcohol, and eventually obtained disability retirement. Short also sought reinstatement of benefits, claiming that his psychological disability, resulting from the injury to his toes, was a change in condition for the worse.\textsuperscript{188}

The ALJ rejected Short's claim, concluding that there was not sufficient evidence to support a finding that the employee's psychological disability and problems were, in fact, causally related to his toe injury. The superior court, on the other hand, found that there was medical

\begin{itemize}
  \item 182. \textit{Id.} at 53-55, 505 S.E.2d at 24-25.
  \item 184. 270 Ga. at 204, 507 S.E.2d at 469-70.
  \item 185. \textit{Id.} at 204-05, 507 S.E.2d at 470.
  \item 186. \textit{Id.} at 207, 507 S.E.2d at 470.
  \item 188. \textit{Id.} at 291, 518 S.E.2d at 484-85.
\end{itemize}
evidence to support the relationship between the toe injury and the psychological problems, entitling the employee to benefits.\textsuperscript{189} The court of appeals reversed the superior court, stating that it was bound by the any evidence standard of review.\textsuperscript{190} There was evidence, upon which the Board had relied, to show that the compensable foot injury neither precipitated nor contributed to Short's psychological problems.\textsuperscript{191} The claim for disability benefits was therefore properly denied by the Board, and that decision should not have been overturned by the superior court.\textsuperscript{192}

\textbf{J. Statute of Limitations}

In \textit{Gann v. Poe},\textsuperscript{193} the court of appeals addressed the issue of whether the statute of limitations precludes receipt of benefits when a claimant fails to file a claim within one year.\textsuperscript{194} Charles Gann was injured on December 11, 1995, while working as a groundsman at a junkyard. The employer did not have workers' compensation coverage and paid no medical or income benefits to the claimant. More than one year after the injury, the claimant asserted a claim for benefits. There was conflicting evidence with regard to how many employees worked for the junkyard, but the superior court found that even if the employer had the requisite number of employees to require him to maintain workers' compensation coverage,\textsuperscript{195} Gann's claim was barred by the statute of limitations in O.C.G.A. section 34-9-82.\textsuperscript{196} The claimant argued that because he had been forced to seek his own medical treatment and the employer did not maintain a panel of physicians, the statute of limitations had not run. The claimant urged the court to apply \textit{Georgia Institute of Technology v. Gore},\textsuperscript{197} which held that for statute of limitations purposes, the admitted failure to maintain a posted panel renders medical treatment received by the

\begin{footnotesize}
\textsuperscript{189} Id. at 292, 518 S.E.2d at 485.
\textsuperscript{190} Id. (quoting Owens-Brockway Packaging v. Hathorn, 227 Ga. App. 110, 111, 488 S.E.2d 495, 496 (1997)).
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{194} Id. at 139, 512 S.E.2d at 1.
\textsuperscript{195} O.C.G.A. section 34-9-2(a) (1998) provides that the Act is not applicable to any employer "that has regularly in service less than three employees in the same business."
\textsuperscript{196} 236 Ga. App. at 139, 512 S.E.2d at 1. O.C.G.A. section 34-9-82 provides for a statute of limitations of one year unless the employer provides for remedial treatment or pays weekly benefits. Then the statute of limitations is one year from the last remedial treatment or two years after the last payment of weekly benefits. O.C.G.A. § 34-9-82 (1998 & Supp. 1999).
\end{footnotesize}
employee on account of the injury to be remedial treatment furnished by the employer.\textsuperscript{198} However, in Gann, because the evidence was contradictory and it was not clear that the employer was subject to the Act, there was no "admitted" failure to comply with the Act, so Gore did not apply.\textsuperscript{199} The court of appeals determined that the superior court properly ruled the claim was time-barred.\textsuperscript{200}

K. Statutory Employer

The court addressed two cases dealing with the statutory employer provisions of the Act. In Greg Fisher, Ltd. v. Samples,\textsuperscript{201} the owner of a carpentry business, Samples, was hired by Greg Fisher, Ltd. ("Fisher") to do framing work on a building project. Samples had purchased workers' compensation coverage for his employees but had exemptions himself from coverage. After he was hurt and learned that he could not file a claim against his own coverage, Samples filed a claim against Fisher. The ALJ found the claim was not compensable, determining that Samples was an independent contractor and also that as a sole proprietor, he had not affirmatively elected to be covered under his own company's workers' compensation coverage. The claimant appealed, asserting that O.C.G.A. section 34-9-124(b)\textsuperscript{202} stops insurers from asserting any defenses as to coverage.\textsuperscript{203}

The court of appeals noted that the Board had already made findings of fact based on the evidence that Samples was an independent contractor and a sole proprietor who had not elected to be covered under his own policy and that because there was evidence to support these findings, the court did not have any authority to substitute itself as the fact-finding body in lieu of the Board.\textsuperscript{204} Even so, the court addressed Samples's argument that the language of O.C.G.A. section 34-9-124 would defeat Fisher's contentions that its policy did not cover Samples.\textsuperscript{205} Because Samples did not elect to be covered as an employee under his own company's policy, he remained in the status of owner and

\begin{itemize}
  \item \textsuperscript{198} 236 Ga. App. at 139-40, 512 S.E.2d at 1-2 (citing Gore, 167 Ga. App. at 359, 306 S.E.2d at 338).
  \item \textsuperscript{199}  Id. at 140, 512 S.E.2d at 2.
  \item \textsuperscript{200}  Id.
  \item \textsuperscript{201} 238 Ga. App. 825, 520 S.E.2d 280 (1999).
  \item \textsuperscript{202}  O.C.G.A. section 34-9-124(b) (1998) provides in pertinent part, "an insurer who issues to an employer subject to this chapter a policy of compensation insurance covering an employee or employees ordinarily exempt from its provisions shall not plead the exemption as a defense."
  \item \textsuperscript{203} 238 Ga. App. at 825-26, 828, 520 S.E.2d at 281.
  \item \textsuperscript{204}  Id. at 827, 520 S.E.2d at 282.
  \item \textsuperscript{205}  Id. at 828, 520 S.E.2d at 282.
\end{itemize}
employer, and the language of section 34-9-124 applies only to employees, not to an employer. 206

In Warden v. Hoar Construction Co., 207 the spouse of a deceased employee filed a wrongful death action against a general contractor for the death of her husband. Leonard Warden was working for Fulton Roofing, a subcontractor of Hoar Construction ("Hoar"), when he fell through a roof. He died from his injuries and was paid workers' compensation benefits by Fulton Roofing. His widow filed suit against Hoar for wrongful death. The trial court granted summary judgment to Hoar, and the widow appealed to the Supreme Court of Georgia, arguing that the court's interpretation of the exclusive remedies statute in Wright Associates v. Rieder 208 was erroneous and violated due process. 209

The court had held in Rieder "that an injured employee of a subcontractor could not maintain a tort action against the principal contractor, even when the principal contractor did not pay workers' compensation benefits." 210 The court reasoned in Rieder that the principal contractor should receive tort immunity because it was liable to pay benefits under O.C.G.A. section 34-9-8. 211 If tort liability depended on the actual payment of benefits, then the general contractor who required subcontractors to carry insurance would be liable in tort whereas the general contractor who did not require insurance would escape tort liability. 212 In revisiting this issue in Warden, the court noted once again that its interpretation of the exclusive remedy provision was reasonably related to a legitimate legislative purpose and therefore, did not violate due process. 213 Additionally, because the legislature had not amended the Act to overturn the tort immunity granted to general contractors under Rieder, the court upheld summary judgment in Warden. 214

206. Id., 520 S.E.2d at 282-83.
209. 269 Ga. at 715, 507 S.E.2d at 429.
210. Id. at 716, 507 S.E.2d at 429-30 (citing Rieder, 247 Ga. at 496, 277 S.E.2d at 41).
212. 269 Ga. at 716, 507 S.E.2d at 430 (citing Rieder, 247 Ga. at 496, 277 S.E.2d at 41).
213. Id. at 718, 507 S.E.2d at 431.
214. Id. at 717-18, 507 S.E.2d at 430-31.