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Workers' Compensation

by H. Michael Bagley*

J. Benson Ward**

The 2019–2020 survey period again featured decisions from the Georgia Court of Appeals over an interesting array of workers' compensation topics including: robberies, misrepresentations, calculation disputes, and various potential employment situations.[1] There was no legislation of significance during the period.

I. ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT

Kil v. Legend Bros., LLC,[2] offers insight into unique circumstances presented in going to and coming from work, as well as where the home is a situs of employment. The claimant worked as a restaurant manager and lived with the owner of the restaurant, and each day after work the two spent time at home reviewing sales, receipts, and inventory. One night after closing the restaurant, the owner drove the claimant and a coworker home, and on arriving in the garage they were approached by three men who demanded at gunpoint a bag of money. When the attackers noticed that the claimant had a gun, they fled but shot at the claimant, hitting him in the forearm. The claimant was hospitalized for more than two weeks and underwent multiple surgeries. The claimant requested workers' compensation benefits, and the employer denied his claim on grounds that the gunshot wound did not arise out of the course of employment.[3]

The Administrative Law Judge (ALJ) determined that the injury arose out of and in the course of the claimant's employment under the

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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*, 71 MERCER L. REV. 345 (2019).

[2] 350 Ga. App. 680, 830 S.E.2d 245 (2019) (cert. denied Jan. 27, 2020).

[3] *Id.* at 681, 830 S.E.2d at 247.

continuous employment doctrine because the claimant was still acting in his job as a manager at the time of the shooting, as a result of his obligation to review the day's receipts and inventory with the owner each night at home.[4] The Board affirmed the finding of a compensable accident, not under the continuous employment doctrine, but on grounds that the accident occurred in the course of his employment because the claimant was with the owner and planning on continuing to work at home.[5] Further, the Board ruled that the injury arose out of the employment because the circumstances of the robbery demonstrated that the perpetrators had specifically targeted the men due to their connection to the restaurant and expectations of them carrying money home from the restaurant, thus, "the robbery would not have occurred but for the circumstances of [the claimant's] employment, and it is apparent that there is a causal connection between the conditions under which the employment was performed and the resulting injury."[6] The employer appealed to the Clayton Superior Court, which reversed the Board, concluding that the injury did not arise out of the employment because it occurred as the claimant arrived home from the restaurant, and he would have had to return home after work regardless of the scope of his job.[7] Furthermore, the court noted he was not a traveling employee.[8] Moreover, the superior court noted that the claimant was shot because he was carrying a gun, which the superior court observed was unrelated to his duties for the employer.[9]

On appeal, the Georgia Court of Appeals first concluded that the Board did not err in ruling that the injury occurred in the course of the employment.[10] While the general rule in Georgia is that injuries occurring while an employee travels to and from work are outside the course of employment, the claimant's specific job responsibilities and unique circumstances in living with the owner and reviewing accounts each night at home provided sufficient facts for the Board to determine that the claimant was in the course of continuing to perform his job duties as manager.[11] The men did not take any personal detours on the way home and were in the process of performing their final job duties of

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[4] *Id.*

[5] *Id.* at 682, 830 S.E.2d at 247–48.

[6] *Id.*

[7] *Id.*

[8] *Kil*, 350 Ga. App. at 682, 830 S.E.2d at 247–48.

[9] *Id.*

[10] *Id.* at 683, 830 S.E.2d at 248.

[11] *Id.* at 683, 830 S.E.2d at 248–49 (citing *Avrett Plumbing Co. v. Castillo*, 340 Ga. App. 671–72, 798 S.E.2d 268 (2017)).

reviewing receipts.[12] Additionally, the court noted that the claimant was with the owner in possession of job-related paperwork to resume their work at home.[13] Accordingly, "under the unique circumstances of this case," the court determined that the Board did not err in determining that the injury occurred in the course of the employment.[14]

The court then turned to the issue of whether the accident arose out of the employment, and determined that sufficient factual evidence existed to support the Board's finding that the injury arose out of the claimant's work.[15] The specific circumstances of the case, including the robbers apparently specifically targeting the men due to their connection to the restaurant and the likelihood that the men would return home late at night with money from the restaurant, supported a finding of a causal connection between the nature of the claimant's employment and the robbery.[16] The court of appeals disagreed with the superior court's conclusion that the claimant was equally exposed to the risk because he would return home regardless of his job. This conclusion did not accord with the Board's finding that the claimant's presence in the garage at the time of the robbery was a direct result of his job responsibilities; that is, the court noted that the issue was whether the claimant's job responsibilities were the proximate cause of his injury. Here, the court noted that some evidence existed to support the Board's findings.[17] The court reversed the superior court and affirmed the Board's rulings as they were supported by some evidence.[18]

In *Smith v. Camarena*,[19] the court of appeals explored the parameters of the "ingress/egress rule" in public parking from the perspective of a civil defendant attempting to utilize the exclusive remedy of the Workers' Compensation Act[20] as a defense.[21] The employee was shot and killed in the parking lot outside the grocery store where she was employed, and her mother and her estate brought a tort suit against the store and its owners and managers. The deceased employee clocked out as the store was closing, left the store, and walked into the parking lot to talk with a

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[12] *Id.* at 683, 830 S.E.2d at 248–49.

[13] *Kil*, 350 Ga. App. at 683, 830 S.E.2d at 248 (citing *Amedisys Home Health, Inc. v. Howard*, 269 Ga. App. 656, 658, 605 S.E.2d 60 (2004)).

[14] *Id.* at 683, 830 S.E.2d at 249.

[15] *Id.*

[16] *Id.* at 684, 830 S.E.2d at 250.

[17] *Id.* at 684–85, 830 S.E.2d at 249–50 (citing *Sturgess v. OA Logistics Svcs., Inc.*, 336 Ga. App. 134, 138-39, 784 S.E.2d 432 (2016); *Cartersville City Schools v. Johnson*, 345 Ga. App. 290, 296-97, 812 S.E.2d 605 (2018)).

[18] *Kil*, 350 Ga. App. at 685, 830 S.E.2d at 250.

[19] 352 Ga. App. 797, 835 S.E.2d 712 (2019).

[20] O.C.G.A. §§ 34-9-1–34-9-432 (2019).

[21] *Smith*, 352 Ga. App. at 797, 835 S.E.2d at 713.

coworker who was sitting in a parked car with the coworker's husband. The employer did not own or control the parking lot, which was owned and controlled by the store's landlord, served multiple businesses in the shopping center, and was open to the public. While the two women were talking in the parking lot, two men approached, pointed a gun, and demanded their purses. At this time the grocery store's assistant manager saw the robbery in progress as he was leaving the store and confronted the robbers. The assistant manager also had a firearm, and he and the robbers exchanged gunfire. The robbers fled but the employee was shot in the gunfire and subsequently died.[22]

The defendants in the civil suit moved for summary judgment, arguing that the case was barred by the Workers' Compensation Act's exclusive remedy provision, O.C.G.A. § 34-9-11(a),[23] because the injury was compensable under the Act. The trial court granted summary judgment based on the exclusive remedy provision, and the plaintiffs appealed. The plaintiffs argued that the shooting might have arisen out of employment, but it did not occur in the course of the employment, because the deceased employee was shot after work at "a location that was not owned, maintained, or controlled by her employer."[24]

The court of appeals observed that whether an injury occurs in the course of employment depends on whether the injury took place during the period of employment at a location where the employee reasonably would be in the performance of her duties or whether the injury occurred during a time when the employee is off duty, free to do as she pleases, and not performing any job duties.[25] While the deceased employee was off duty at the time of the shooting, the defendants argued that the claimant was still in the course of her employment because of the ingress/egress rule, which generally provides that an employee's period of employment ordinarily includes a reasonable time before and after work for the employee to enter and leave the place of work while on the employer's premises.[26] Ordinarily, an injury that occurs in a parking lot owned and maintained by the employer will be deemed to have occurred on the employer's premises for purposes of the ingress/egress rule.[27] However, as noted by the court of appeals, the key distinction is whether the parking lot is owned, controlled, and maintained by the employer;

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[22] *Id.* at 797–98, 835 S.E.2d at 714.

[23] O.C.G.A. § 34-9-1(a) (2020).

[24] *Smith*, 352 Ga. App. 798–99, 835 S.E.2d at 714.

[25] *Id.* at 799, 835 S.E.2d at 714–15 (citations omitted).

[26] *Id.* at 799, 835 S.E.2d at 715 (citing *Peoples v. Emory Univ.*, 206 Ga. App. 213, 424 S.E.2d 874 (1992)).

[27] *Smith*, 352 Ga. App. 799, 835 S.E.2d at 715. (citing *Tate v. Bruno's, Inc./Food Max*, 200 Ga. App. 395, 408 S.E.2d 456 (1991)).

where the parking lot is not owned, controlled, nor maintained by the employer, then the parking lot is not part of the employer's premises and the ingress/egress rule should not apply.[28] Because the parking lot was neither owned, controlled, nor maintained by the employer, an issue remained as to whether the defendants could show that the injury occurred in the course of the employment, and thus the court of appeals reversed the summary judgment decision.[29] The court distinguished the defendants' arguments that the positional risk doctrine supported summary judgment (on grounds that the employment brought the deceased employee within the range of the danger),[30] because this doctrine addresses whether an injury arose out of the employment, not whether it occurred in the course of the employment.[31]

II. STANDARD OF REVIEW

In *Hartford Casualty Insurance Co. v. Hawkins*,[32] the court of appeals reiterated the Board's fact-finding prerogative, in the context of a claimant reaching maximum medical improvement and returning to full duty work status.[33] The claimant had an accident at work in October 2015 when she tripped backwards and fell to the floor, but she did not immediately seek medical treatment. The employer did not have a proper posted panel of physicians at the time of the accident, but one of the owners talked with its insurer after the accident and compiled a panel of physicians and authorized treatment with a physician selected from the panel by the claimant. The claimant presented for her initial visit with the authorized treating physician (ATP) with complaints of neck, arm, shoulder, and lower back pain. The ATP found no significant acute findings, and following testing, placed the claimant on light duty work restrictions and referred the claimant to his partner for further shoulder treatment. The shoulder doctor found no sign of a rotator cuff tear and kept the claimant on work restrictions per the ATP. A little over one year after the date of accident, the claimant told the employer that she needed a light-duty job. A pain management physician recommended light-duty work restrictions in February 2017, and the employer fired the claimant in March 2017, in part because she could not perform her regular job.[34]

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[28] *Smith*, 352 Ga. App. 799, 835 S.E.2d at 715. (citing *City of Atlanta v. Spearman*, 209 Ga. App. 644, 434 S.E.2d 87 (1993)).

[29] *Smith,* 352 Ga. App. at 800–02, 835 S.E.2d at 715, 717.

[30] *Id.* at 800, 835 S.E.2d at 715–16 (citing *DeKalb Collision Ctr., Inc. v. Foster*, 254 Ga. App. 477, 480, 562 S.E.2d 740, 743–44 (2002)).

[31] *Id.*, 835 S.E.2d at 716

[32] 353 Ga. App. 681, 839 S.E.2d 230 (2020).

[33] *Id.* at 681, 839 S.E.2d 232.

[34] *Id.* at 681–82, 839 S.E.2d at 232–33.

The claimant underwent a functional capacity evaluation (FCE) in May 2017 where she was assessed as having given a self-limiting effort. The FCE provider opined that "unless an objective medical reason exists that would preclude return-to-work," the claimant "should be returned to work."[35] The claimant returned to her shoulder doctor, who opined that she remained symptomatic and so she was kept on light duty work restrictions. The employer sent the claimant for an independent medical evaluation (IME) in May 2017, after which the IME doctor opined that the claimant was capable of regular duty, full-time work, and required no further medical treatment for her on-the-job injury. The claimant returned to the ATP in June 2017, where the ATP noted left shoulder dysfunction but had no further treatment to offer and deferred any work restrictions to the shoulder doctor. In August 2017, after being presented with the claimant's deposition testimony and surveillance, the shoulder doctor opined that the claimant had reached maximum medical improvement and had no work restrictions, and no further medical treatment of her upper extremity was necessary. The claimant changed her ATP and underwent an IME with a doctor of her choice, and her IME doctor opined that she required further medical treatment and needed light duty work restrictions from her injury.[36]

The claimant requested compensation for her October 2015 injury, and also alleged a fictional new accident for her last date worked in March 2017. The claimant sought to have her IME doctor designated as her new ATP. At a hearing, the ALJ found that the claimant had a compensable 2015 injury as well as a compensable new accident in March 2017. However, the ALJ found that the claimant's injuries had resolved as of August 2017, when her shoulder doctor opined that she could return to regular duty work and needed no further treatment. The ALJ thus awarded income benefits from the date of her termination until the date the shoulder doctor returned her to full duty work status, but denied her requests to change ATP and for further treatment.[37] On appeal, "[t]he Board adopted the ALJ's [hearing award] in its entirety."[38] The Fulton Superior Court reversed, finding that the employer failed to have a valid panel of physicians and had a right to a change of physicians, and based on the claimant's IME report, she still required work restrictions and further medical care. The superior court also reversed the Board's finding that an assessment of attorney's fees was not warranted based on its

[35] *Id.* at 682, 839 S.E.2d at 233.

[36] *Id.* at , 839 S.E.2d at 233.

[37] *Hartford Cas. Ins. Co.*, 353 Ga. App. at 683–84, 839 S.E. at 234.

[38] *Id.* at 684–85, 839 S.E.2d at 234.

finding that State Farm illegally denied the claimant a change of physician.[39]

The court of appeals observed that the superior court was not authorized to disregard or reweigh the evidence, as that is the Board's province.[40] Instead, on appeal, the court evaluated whether some evidence exists to support the Board's finding.[41] Because medical evidence existed to support the Board's findings that the work-related injuries had resolved as of August 2017, the superior court erred in reversing the Board's finding.[42] Similarly, the court ruled that the superior court erred when it reversed the Board's denial of the claimant's request to change ATP notwithstanding the Board's determination that no additional medical treatment was required, because evidence existed to support the Board's finding that the claimant's injuries had resolved as of August 2017, and the claimant was not entitled to a change of physician.[43] Lastly, the court of appeals held that the superior court erred in concluding that the claimant was automatically entitled to a change of physician because the record supported the Board's determination that the employer acted based on reasonable grounds; thus the superior court's award of attorney's fees was reversed.[44]

In *Burch v. STF Foods, Inc.*,[45] the court addressed the Board's factfinding role in the context of a claimant's termination of employment.[46] The claimant, an employee at a Wendy's restaurant, reported multiple injuries while performing his job, including injuring his upper back moving a pot of chili and straining his eyes and upper back/shoulder area after trying to lift a trash bag, both occurring in January 2013. He was treated at a clinic, where he was told to take off work for three days and then work light duty for a week. In June 2013 he aggravated his existing back/shoulder injuries and a stack of boxes fell on him in November 2013. The employer fired the claimant in December 2013 for insubordination related to his continuing to lift items at work. The claimant filed a hearing request seeking temporary partial disability (TPD) benefits from January 2013 through his firing date in December 2013, temporary total disability (TTD) benefits from his firing in December 2013, and medical expenses.[47]

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[39] *Id.* at 685, 839 S.E.2d at 235.

[40] *Id.* at 685–86, 839 S.E.2d at 235.

[41] *Id.* at 686, 839 S.E.2d 235.

[42] *Hartford Cas. Ins. Co.*, 353 Ga. App. at 686, 839 S.E. at 235.

[43] *Id.* at 686–88, 839 S.E.2d 235–36.

[44] *Id.* at 688, 839 S.E.2d 236–37.

[45] 353 Ga. App. 172, 836 S.E.2d 573 (2019) (reconsideration denied (Nov. 14, 2019)).

[46] *Id.* at Ga. App. 172–73, 836 S.E.2d at 574–75.

[47] *Id.* at 173, 836 S.E.2d at 575.

The ALJ found that the claimant had injured himself at work in January and November 2013, for which he was entitled to medical treatment; however the ALJ denied his request for TPD benefits because he had no wage loss during the time period sought. The Judge found that the claimant's termination for insubordination was related to his injuries and reduced work capacity, such that he was awarded TTD benefits. The Board upheld the award of medical benefits, but found that the primary cause of his termination was insubordination and not work-related injuries or limitations, and so reversed the award of TTD benefits. The Coffee Superior Court affirmed the Board's decision on grounds that it was supported by evidence in the record.[48]

The claimant argued on appeal that the Board should not have reversed the ALJ's finding that he was terminated for reasons connected to his work injury; he argued that the termination was based on insubordination due to his injuries and his need for light-duty work. However, the Board found that the proximate cause of the termination was his insubordination, not "the injuries nor the need for light duty, which were indirect causes at best."[49] The court of appeals noted the "any evidence" standard of review on appeal and observed that the proximate cause of a claimant's "termination is a factual determination reserved for the . . . Board."[50] Because some evidence existed to support the finding that the proximate cause of the claimant's firing was insubordination and thus he did not stop working as a result of his injuries, the court of appeals held that the superior court did not err in affirming the Board's award.[51]

III. APPLICATION MISREPRESENTATIONS AND VOIDING A POLICY

In *Grange Mutual Casualty Co. v. Bennett*,[52] the court of appeals addressed whether alleged misrepresentations in an application for insurance would allow an insurer to void a policy of workers' compensation insurance *ab initio* after the insurer decided to cancel the policy.[53]

The employer, a construction company that primarily dealt with greenhouse repairs and maintenance services, engaged its insurance agent to obtain a new policy of workers' compensation insurance. There was a dispute between the employer and its agent regarding the insurance application process, including whether the employer signed a

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[48] *Id.* at 173–74, 836 S.E.2d at 575–76.

[49] *Id.* at 174–75, 836 S.E.2d at 576.

[50] *Burch,* 353 Ga. App. at 176, 836 S.E.2d at 577.

[51] *Id.* at 176–77, 836 S.E.2d at 577.

[52] 350 Ga. App. 608, 829 S.E.2d 834 (2019) (cert. denied Jan. 13, 2020).

[53] *Grange*, 350 Ga. App. at 611, 829 S.E.2d at 836.

blank application or reviewed a completed application. The facts show that the application contained inaccurate information, including classifying the construction company's work as janitorial in nature and as reflecting that the employer did not perform work outside of Georgia whereas the business operated in thirty states. After the employer reported to the insurer that an employee was injured in another state, the insurer audited the business operations and its underwriter later testified that the insurer would not have issued the policy if the application correctly reflected that the employer operated in thirty states and had employees working at heights above fifteen feet. Following deliberation, the insurer declined to void the policy *ab initio* for misrepresentations in the application and instead sent the business a cancellation notice.[54]

On the day before the policy was scheduled to cancel, the claimant was injured in an accident out of state and filed a workers' compensation claim. At the hearing before the ALJ, the insurer argued that the policy did not cover out-of-state work injuries, that the employer's owner did not advise the insurer of the employer's need for multi-state coverage, and that the insurer would not have issued the policy if it had received an accurate description of the employer's business operations. The ALJ rejected these arguments and found that the policy covered the claimant's injury. The ALJ ruled that, had the insurer wanted to limit coverage to only accidents in Georgia, it was required to amend or endorse the policy with that limitation; however, the current policy agreed to pay workers' compensation claims under the laws of Georgia, and under Georgia law out-of-state injuries can be compensable.[55] In its appeal to the Board, the insurer argued that the policy was void pursuant to O.C.G.A. § 33-24-7[56] due to application misrepresentations, however the Board upheld the ALJ's decision.[57]

On appeal before the Hall Superior Court, the court remanded to the Board to determine whether the policy was void for application misrepresentations. On remand, the Board ruled that the insurer waived the application misrepresentation defense by not raising the issue before the ALJ; however, the Board also ruled that the insurer did not prove the merits of voiding the policy under O.C.G.A. § 33-24-7, as the misrepresentations were deemed inadvertent and non-material, and the Board was unpersuaded by the insurer's argument that it would not have

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[54] *Id.* at 609–10, 829 S.E.2d at 835–36.

[55] *Id.* at 610, 829 S.E.2d at 836.

[56] O.C.G.A. § 33-24-7 (1982).

[57] *Grange*, 350 Ga. App. at 610–611, 829 S.E.2d at 836.

issued a multi-state policy. The superior court then affirmed the Board's order, and the insurer appealed that decision.[58]

The insurer argued before the court of appeals that it sufficiently raised the application misrepresentation defense before the ALJ, and that the Board misapplied O.C.G.A. § 33-24-7; however, the court did not reach these arguments.[59] Instead, the court ruled that the insurer waived its application misrepresentation defense well before the ALJ hearing.[60] The court of appeals noted that the insurer essentially had two options after discovering inaccurate information in the application (i.e., potential application misrepresentation)—it could either promptly rescind the policy or cancel the policy.[61] The court held that the insurer waived its defense that the application misrepresentation voided the policy when, once it discovered the inaccurate information in the application, the insurer opted to cancel coverage instead of promptly rescinding the policy.[62] The court of appeals likened the case to *Loeb v. Nationwide Mutual Fire Insurance Co.*,[63] where after learning of alleged material misrepresentations on an insurance application the insurer canceled the insurance policy instead of rescinding the policy and returning the premiums, and so the policy was not later deemed void *ab initio* for purposes of denying a claim.[64] The court disagreed with the insurer that the matter before the court was indistinguishable from *American Resources Insurance Co. v. Conner*,[65] as the insurer sought to argue that the application misrepresentations "undermine[d] the validity of the entire policy, not just [an endorsement or] a portion of the policy."[66]

IV. STANDARD OF PROOF—STROKE

The case of *Henry County Board of Education v. Rutledge*[67] saw the court of appeals again evaluate the proper legal standard for determining whether a stroke was compensable.[68] The claimant alleged that he sustained a work-related stroke, which the employer contested. The claimant, a bus driver for the school system, saw steam or smoke coming out of the dashboard and then apparently passed out and "was taken to

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[58] *Id.* at 611, 829 S.E.2d at 836.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 611–12, 829 S.E.2d at 836–37 (citations omitted).

[62] *Grange*, 350 Ga. App. at 612, 829 S.E.2d at 837.

[63] 162 Ga. App. 561, 292 S.E.2d 409 (1982).

[64] *Grange*, 350 Ga. App. at 612, 829 S.E.2d at 837.

[65] 209 Ga. App. 885, 434 S.E.2d 737 (1993).

[66] 350 Ga. App. at 613, 829 S.E.2d at 838.

[67] 354 Ga. App. 643, 839 S.E.2d 684 (2020) (reconsideration denied Mar. 19, 2020).

[68] *Henry County*, 354 Ga. App at 643, 839 S.E.2d at 685.

the hospital, where it was determined that he had suffered a stroke."[69] The claimant argued that "his exposure to smoke on the bus was either an aggravating factor or precipitating cause of his stroke," and the employer contended that the stroke was caused by factors unrelated to the job including possibly hypertension, diabetes, and his inability to monitor his glucose for a month due to a broken monitor.[70]

The case first resulted in the ALJ and Board finding that the stroke was not caused by the claimant being on the bus; however, the Henry Superior Court remanded the case to the Board to evaluate whether being on the bus contributed to or worsened the stroke, and the case was remanded to the ALJ to make such additional findings.[71] On remand, the ALJ noted conflicting evidence of medical causation, and found that the claimant "met his burden to show that his work duties and an incident at work significantly contributed" to the stroke and therefore it was compensable.[72] The Board disagreed with the ALJ's evaluation of the medical evidence and reversed, finding insufficient evidence to show an aggravation injury.[73] The superior court in turn again vacated the Board's decision and remanded for a specific finding as to whether there was an aggravation.[74]

On appeal, the court of appeals observed that O.C.G.A. § 34-9-1(4)[75] provides that an "injury" under the Act does not include several medical conditions including strokes unless it is shown by a preponderance of competent and credible evidence—including medical evidence—that the stroke was attributable to the performance of the work.[76] The court observed that the Board's decision addressed whether the stroke was an aggravation injury due to the claimant's exposure to the substance on the school bus, and the Board had rejected the claimant's argument that exposure to the substance on the bus contributed to or worsened his preexisting condition.[77] Accordingly, in evaluating whether the claimant's exposure on the bus contributed to or aggravated his injury, the Board applied the proper legal framework and the correct standard of proof, so there was no basis for the superior court to vacate the Board's decision.[78]

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[69] *Id.* at 643, 839 S.E.2d at 686.

[70] *Id.* at 643–44, 839 S.E.2d at 686.

[71] *Id.* at 644, 839 S.E.2d at 686.

[72] *Id.*

[73] *Henry County*, 354 Ga. App at 644, S.E.2d at 686.

[74] *Id.*

[75] O.C.G.A. § 34-9-1(4) (2020).

[76] *Henry County*, 354 Ga. App. at 645, 839 S.E.2d at 686–87.

[77] *Id.* at 645, 839 S.E.2d at 687.

[78] *Id.* at 645–46, 839 S.E.2d at 687.

V. STATUTORY EMPLOYMENT

Mullinax v. Pilgrim's Pride Corporation[79] involved a truck driver for Mountain Milk Hauling, a business which contracted with Pilgrim's Pride Corporation (Pilgrim's), to transport grown chickens from farms to designated locations. Pilgrim's had also contracted with Garren Benton Hall to raise Pilgrim's chickens on his farm, and with Rising, Inc. to catch the chickens at farms and load them into cages. The truck driver was at Hall's chicken farm in the early morning hours while Rising employees were catching chickens, when one of his coworkers attempted to operate a forklift that was left with a key in its ignition by a Rising employee. The coworker was not authorized to use the forklift and, while reversing the forklift, he ran over the truck driver, who died.[80]

The deceased employee's wife filed a civil suit against Pilgrim's Pride (the chicken manufacturing company), Rising, Inc. (the company that contracted with Pilgrim's to catch and load the chickens for transport), and Garren Benton Hall (the owner of the farm where the accident occurred).[81] The widow also filed a workers' compensation claim against Mountain Milk. Pilgrim's moved for summary judgment in the civil suit on grounds that it was the statutory employer of the deceased employee and therefore the exclusive remedy provision barred Pilgrim's from tort liability, and the trial court granted summary judgment to Pilgrim's on those grounds.[82] The Plaintiff argued on appeal that Pilgrim's should not be deemed a statutory employer because a fact issue remained as to whether Pilgrim's exercised control over the farm and Pilgrim's was the owner of the enterprise.[83]

The court of appeals first observed that Pilgrim's was a principal contractor under O.C.G.A. § 34-9-8(a),[84] as it contracted with Mountain Milk to transport chickens in order to fulfill Pilgrim's own contracts with its customers.[85] The court pointed out that Pilgrim's ownership of the chickens did not preclude it from being a principal contractor.[86] The court then noted that the accident occurred on a chicken farm where Pilgrim's had undertaken to execute work through a subcontractor, Mountain Milk, thus meeting the statute's condition that statutory employment required the injury to occur on or about "the premises on which the

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[79] 354 Ga. App. 186, 840 S.E.2d 666 (2020).

[80] *Id.* at 186–87, 840 S.E.2d at 670–71.

[81] *Id.* at 186, 840 S.E.2d at 670.

[82] *Id.* at 187, 840 S.E.2d at 671.

[83] *Id.* at 188, 840 S.E.2d at 671.

[84] O.C.G.A. § 34-9-8(a) (2020).

[85] *Mullinax*, 354 Ga. App. at 189, 840 S.E.2d at 672.

[86] *Id.* at 189, 840 S.E.2d at 672 (citing *Patterson v. Bristol Timber Co.*, 286 Ga. App. 423, 649 S.E.2d 795 (2007)).

principal contractor has undertaken to execute work or which are otherwise under his control or management."[87] The court of appeals likened the situation to that found in *American Mutual Liability Insurance Co. v. Fuller*,[88] where the principal contractor entered into a hauling contract with the Plaintiff's employer to transport poultry from Georgia to New Jersey and the Plaintiff was injured on a highway, and in that case the court stated that because the contract "contemplated the hauling of . . . freight on the highways . . . the highways were 'premises' on which the principal contractor has undertaken to execute work."[89] In the present case, Pilgrim's had a contract with the decedent's employer for the hauling of Pilgrim's chickens from specific farms to specific Pilgrim's locations, thus for purposes of that work Hall's chicken farm was the premises on which Pilgrim's had undertaken to execute work. Because Pilgrim's was a principal contractor under O.C.G.A. § 34-9-8(a) and because Hall's chicken farm constituted premises on which Pilgrim's undertook to execute work, Pilgrim's was the decedent's statutory employer and so immune from tort liability under the exclusive remedy provision.[90]

Rising, Inc. also argued that it should be immune from tort liability under the Act on grounds that it was involved in a joint venture with the other defendants including Pilgrim's, as one joint venturer is immune from tort liability to its joint venturer's employees.[91] However, the court noted that an issue of fact remained as to whether a joint venture existed.[92] The contract between Pilgrim's and Rising provides that the agreement is not intended to create a joint venture, and Rising did not show evidence that it had a right to direct and control the conduct of the employees of the other defendants or Mountain Milk's employees.[93] The court thus reversed a grant of summary judgment to Rising on joint venture grounds.[94] The court similarly declined to agree with Hall's argument that it was involved in a joint venture, as the contract disclaimed any joint venture and there was no evidence showing that Hall could direct and control the conduct of any other party's employees.[95]

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[87] *Id.* at 189–90, 840 S.E.2d at 672–73 (quoting O.C.G.A. § 34-9-8 (d)).

[88] 123 Ga. App. 585, 181 S.E.2d 876 (1971).

[89] *Mullinax*, 354 Ga. App. At 190, 840 S.E.2d at 673 (quoting *American Mutual*, at 587–88, 181 S.E.2d at 878).

[90] 354 Ga. App. 190–91, 840 S.E.2d at 673.

[91] *Id.* at 194–95, 840 S.E.2d at 675–76.

[92] *Id.* at 195, 840 S.E.2d at 676.

[93] *Id.*

[94] *Id.* at 195, 840 S.E.2d at 676.

[95] *Mullinax*, 354 Ga. App. at 199, 840 S.E.2d at 678.

VI. EMPLOYEE OR INDEPENDENT CONTRACTOR

In *Estes v. G&W Carriers, LLC*,[96] a wife and her husband were tractor-trailer drivers who worked for the employer as a team, rotating driving responsibilities on their trips. On a cross-country trip hauling a load of carpet where the husband was driving and the wife was in the sleeping compartment of the tractor-trailer, the husband wrecked the truck and the wife was injured. The wife brought a civil suit against the employer, alleging that her husband's conduct caused the accident and that his liability could be imputed to the employer.[97] The employer moved for summary judgment on grounds that the action was barred by the exclusive remedy provision and on grounds that the action was barred by O.C.G.A. § 34-7-21's[98] provision that "the employer shall not be liable to one employee for injuries arising from the negligence or misconduct of other employees about the same business," and the trial court granted summary judgment.[99]

On appeal, the plaintiff argued that the issue of whether she was an independent contractor or an employee was a fact issue for the jury.[100] The court of appeals disagreed, noting that there was no issue of fact on the employment issue.[101] The employer hired the husband and wife, had authority over their tractor trailer, handled the tractor trailer's operating costs, maintenance, and inspections, and was responsible for assigning trips, and drivers could only decline a load under certain limited circumstances.[102] Because the employer had the right to control the time, manner and method of the plaintiff's work, "the fact that [it] issued its workers International Revenue Services Form 1099[s] . . . and did not withhold taxes" did not change the workers' status as employees.[103] Because the plaintiff was an employee of the defendant, the court of appeals ruled that the plaintiff's claims were barred by the exclusive remedy provision and summary judgment was proper.[104]

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[96] 354 Ga. App. 156, 840 S.E.2d 486 (2020).

[97] *Id.* at 156, 840 S.E.2d at 487.

[98] O.C.G.A. § 34-7-21 (2019).

[99] *Estes*, 354 Ga. App. at 156, 840 S.E.2d at 487 (quoting O.C.G.A. § 34-7-21).

[100] *Id.* at 156, 840 S.E.2d at 487.

[101] *Id.*

[102] *Id.* at 158, 840 S.E.2d at 488.

[103] *Id.* at 159, 840 S.E.2d at 489 (quoting *Boatright v. Old Domionion Ins.*, 304 Ga. App. 119, 122, 695 S.E.2d 408, 412 (2010)).

[104] *Estes*, 354 Ga. App. at 159, 840 S.E.2d at 489.

VII. BORROWED SERVANT DOCTRINE

In *Sprowson v. Villalobos*,[105] the court ruled that the employee of a business using the services of a temporary help contracting firm cannot be held liable in tort to a temporary employee injured while assigned to the defendant's employer.[106]

Waste Pro USA, Inc. entered into a contract with True Blue Enterprises, Inc. d/b/a Labor Ready Southeast, Inc., under which Waste Pro USA paid Labor Ready for providing temporary employees to perform work under the direction of Waste Pro USA. Labor Ready assigned the Plaintiff to work for Waste Pro of South Carolina, Inc., and he was injured while working on a truck owned by Waste Pro USA and driven by an employee of Waste Pro of South Carolina. The Plaintiff filed a civil suit against multiple Waste Pro entities and the driver of the truck, and also received workers' compensation benefits from Labor Ready. The trial court granted summary judgment dismissing the Waste Pro entities but found that the plaintiff was not barred by the exclusive remedy provision from suing the truck driver.[107]

The court noted that in Georgia, a "borrowed servant is [considered] an employee of the same employer of any regular employee of the borrowing employer."[108] An individual is a borrowed servant where "(1) the special master had complete control and direction of the [individual] for the occasion; (2) the general master had no such control; (3) and the special master had the exclusive right to discharge the servant."[109] The undisputed evidence in the present case showed that all three prongs of the borrowed servant test were met, as the contract between Labor Ready and Waste Pro USA reflected that Waste Pro USA was responsible for supervising the temporary employees and that Waste Pro USA could request for Labor Ready to remove employees with poor performance.[110] Because all elements of the borrowed servant test were met, the Plaintiff was an employee of the same employer as the truck driver under O.C.G.A. § 34-9-11(a).[111] Therefore, the defendant driver could not be held liable in tort.[112]

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[105] 355 Ga. App. 279, 841 S.E.2d 453 (2020).

[106] *Id.* at 279–80, 841 S.E.2d at 454–55.

[107] *Id.* at 280, 841 S.E.2d at 455.

[108] *Id.* at 281, 841 S.E.2d at 455 (quoting *Underwood v. Burt*, 185 Ga. App. 381, 382, 364 S.E.2d 100, 102 (1987)).

[109] *Sprowson,* 355 Ga. App. at 281, 841 S.E.2d at 455–56 (quoting *Stephens v. Oates*, 189 Ga. App. 6, 7, 374 S.E.2d 821, 822 (1988)).

[110] *Sprowson*, 355 Ga. App. at 282, 841 S.E.2d at 456.

[111] *Id.* at 282–83, 841 S.E.2d at 456.

[112] *Id.*

The court disagreed with the plaintiff's argument that the case of *Long v. Marvin M. Black Co.*,[113] precluded immunity.[114] *Long* involved an injured employee of a subcontractor and an alleged tortfeasor who was an employee of the principal contractor, where under such employment circumstances the two individuals were not deemed employees of the same employer, and that case did not involve the borrowed servant doctrine.[115] The court also found unpersuasive the plaintiff's argument that, if the defendant truck driver's employer could be considered the plaintiff's statutory employer under O.C.G.A. § 34-9-11(c),[116] as the statute included temporary help contracting firms, the two men were no longer employees of the same employer.[117] However, the court of appeals stated that the borrowed servant doctrine provides an additional and alternative path, beyond the statutory employer option, for the two men to be considered employees of the same employer.[118] Under the facts of the case, the court ruled that the defendant truck driver was immune from tort liability under the exclusive remedy provision.[119]

VIII. AVERAGE WEEKLY WAGE

In *Ware County Board of Education v. Taft*,[120] the Ware Superior Court returned to the issue of determining an employee's average weekly wage (AWW), specifically whether to use actual prorated pay or the amount earned over the pay period to include amounts deferred and paid out later.[121]

The claimant worked for the Board of Education as a custodian on a school-year schedule of 220 days; however, his pay was prorated and spread over a full calendar year. He incurred a compensable accident in June 2016 and begun receiving TTD benefits, but contended that he was entitled to additional benefits on grounds that the AWW calculation was incorrect. The ALJ and Board found that the claimant's contract "required that he be paid $9.20 per hour for a 40-hour work week," that he work 220 days during the school year, and that "his total compensation was $16,192.00 disbursed in equal monthly installments of $1,349.33 throughout a 12-month year."[122] These amounts were not in

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[113] 250 Ga. 621, 300 S.E.2d 150 (1983).

[114] *Sprowson*, 355 Ga. App. at 283, 841 S.E.2d at 456.

[115] 355 Ga. App. at 283, 841 S.E.2d at 456–57.

[116] O.C.G.A. § 34-9-11(c) (2020).

[117] *Sprowson*, 355 Ga. App. at 283–84, 841 S.E.2d at 457.

[118] *Id.* at 284, 841 S.E.2d at 457.

[119] *Id.* at 285, 841 S.E.2d at 458.

[120] 350 Ga. App. 848, 830 S.E.2d 326 (2019).

[121] *Id.* at 848, 830 S.E.2d at 327.

[122] *Id.* at 849, 830 S.E.2d at 327.

dispute, nor was it disputed that the claimant worked substantially the whole of the thirteen weeks immediately preceding the accident. He worked a total of fifty-nine days during that period, or eleven weeks and four days. Thus, under O.C.G.A. § 34-9-260(1),[123] the claimant's AWW "shall be one-thirteenth of the total amount of wages earned in such employment during the 13 weeks."[124] The Board found that the AWW should be calculated by multiplying the claimant's contractual hourly rate of $9.20 by fifty-nine, eight-hour days, and then divide by thirteen, for an AWW of $334.03. Thus, the Board calculated the AWW not by his actual gross wages during the thirteen-week period, "but by including the amounts that were deferred and paid out over the full calendar year."[125]

On appeal, the employer argued that the claimant's AWW "should be calculated based upon what he actually was paid during the 13 weeks immediately preceding the injury."[126] In other words, the employer argued that the actual gross wages during the thirteen weeks should determine the AWW, which would be $334.03. The claimant argued that the statutory language total amount of wages earned in O.C.G.A. § 34-9-260(1) means his earnings for actual time worked, that is the contractual rate of hourly pay at eight hours per day for the fifty-nine days worked.[127]

The court of appeals noted that the Georgia Supreme Court has determined that a plain and ordinary reading of a statute should be afforded when considering the statute's meaning.[128] While the term "wage" in the statute has been defined, the court stated that the term "earned" was undefined.[129] The court observed that that the claimant "earned $334.03 gross weekly wages by working 40 hours at his contractual hourly rate of $9.20 for 59 days within the 13-week period, [however] a portion of those earnings were withheld, and [] later paid on a pro-rated basis over 12 months," so that there would be no pay gaps over the course of a year.[130]

The court concluded that the claimant had earned his contractual rate of pay once he had actually performed the work for which he was being paid, regardless of when that pay was received, and so the statutory term "wages earned" should focus on when the claimant earned the money

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[123] O.C.G.A. § 34-9-260(1) (2020).

[124] *Ware Cnty.*, 350 Ga. App. at 849, 830 S.E.2d at 328 (quoting O.C.G.A. § 34-6-260 (1)).

[125] *Ware Cnty.*, 350 Ga. App. at 849, 830 S.E.2d at 328

[126] *Id.* at 850, 830 S.E.2d at 328.

[127] *Id.* at 850, 830 S.E.2d at 328.

[128] *Id.* (citing *Deal v. Coleman*, 294 Ga. 170, 172–173, 751 S.E.2d 337 (2013)).

[129] *Ware Cnty.*, 350 Ga. App. at 851, 830 S.E.2d at 328–29.

[130] *Id.* at 851, 830 S.E.2d at 329.

under his contract, regardless of when he received that money.[131] The court of appeals therefore upheld the Board's determination of the $334.03 AWW as the amount that the claimant actually earned during the thirteen-week period, even if some of those earnings were withheld for payment at later dates.[132]

[131] *Id.* at 851, 830 S.E.2d at 329.

[132] *Id.*