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Workers' Compensation

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The June 1, 2020 through May 31, 2021 survey period was notable for a limited number of appellate decisions—which included an impactful decision from the Georgia Supreme Court overruling decades of prior precedent—and no legislation.[1]

I. SCHEDULED LUNCH BREAK EXCEPTION

For eighty-five years, Georgia courts have found that an accident occurring during an employee's scheduled lunch break may not have arisen out of the employment, and therefore would not be compensable, because a lunch break is a personal matter unrelated to the employer's work.[2] During the survey period, in *Frett v. State Farm Employee Workers' Compensation*, the Georgia Supreme Court overruled *Ocean Accident & Guarantee Corp. v. Farr*, and its progeny, to hold that an injury occurring on an employer's premises during an ordinary, unpaid lunch break was compensable.[3]

The claimant in *Frett* slipped and fell while on a scheduled lunch break inside the employer-provided breakroom.[4] It was undisputed that the claimant was free to do as she pleased on her break, including leaving the office, though she was on the employer's premises when the injury occurred.[5] She filed a workers' compensation claim, which the employer

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1. For an analysis of last year's workers' compensation law during the Survey period, *see* H. Michael Bagley, Workers' Compensation, 72 MERCER L. REV. 349 (2020).
2. Ocean Acc. Guarantee Corp. v. Farr, 180 Ga. 266, 178 S.E.2d 728 (1935).
3. 309 Ga. 44, 844 S.E.2d 749 (2020).
4. *Id.* at 45, 844 S.E.2d at 751.
5. *Id.* at 44, 844 S.E.2d at 751.

denied based on the scheduled lunch break exception.[6] The Administrative Law Judge (ALJ) found that the claim was compensable and awarded benefits, based on a prior court of appeals decision, *Rockwell v. Lockheed Martin Corporation*,[7] which held that, while injuries occurring during a regularly scheduled break are generally not compensable, injuries occurring on the employer's premises during periods of reasonable "ingress and egress" to and from those premises are compensable.[8]

The Appellate Division of the State Board of Workers' Compensation (Appellate Division) reversed the ALJ's award, concluding that the injury did not arise out of the employment because it occurred during her regularly scheduled break while she was leaving to attend to a purely personal matter, and the superior court affirmed.[9] The Georgia Court of Appeals noted the potential conflict between the ingress and egress rule and the regularly scheduled break exception.[10] However, it deferred to the existing Georgia Supreme Court precedent laid down in *Farr*, and ruled that the claimant's injury did not arise out of her employment because it occurred while she was engaged in an individual pursuit while on a scheduled lunch break during which time she was free to do as she pleased. [11]

The supreme court noted that the analysis of whether an injury occurred "in the course of" employment generally focuses on the nature of the employee's activity at the time of the injury. This includes injuries sustained when engaged in the performance of the employee's assigned work as well as when engaged in activities "incidental" to the assigned work, with such incidental activities including ingress and egress to the place of work while on the employer's premises and attending to personal needs, such as eating a meal or using the restroom.[12] The accident in *Frett* occurred when the claimant was preparing to eat lunch while on her employer's premises which the court concluded was an incidental activity and thus the injury occurred in the course of employment.[13] The

6. *Id.* at 44, 844 S.E.2d at 750.

7. 248 Ga. App. 73, 545 S.E.2d 121 (2001).

8. Frett v. State Farm Emp. Workers' Comp., 348 Ga. App. 30, 30 821 S.E.2d 132, 134 (2018), *rev'd*, 309 Ga. 44, 844 S.E.2d 749 (2020), *vacated,* 358 Ga. App. 138, 854 S.E.2d 347 (2021).

9. *Frett*, 309 Ga. at 45, 844 S.E.2d at 751.

10. For a detailed discussion of the 2018 Georgia Court of Appeals decision, *see* H. Michael Bagley & J. Benson Ward, *Workers' Compensation*, *Annual Survey of Georgia Law*, 71 MERCER L. REV. 345, 348–51 (2019).

11. *Frett*, 348 Ga. App. at 32, 821 S.E.2d at 135.

12. *Frett*, 309 Ga. at 46–47, 844 S.E.2d at 752.

13. *Id.* at 48, 844 S.E.2d at 753.

lack of payment during a lunch break or the freedom to do personal tasks at the time of the injury is not dispositive, and those factors may be more significant in closer cases where the nature and timing of the activity have a tenuous connection to the usual work hours or work-related activities.[14]

Turning to the "arising out of" the employment requirement for a compensable claim, the court briefly explained that an injury during a scheduled lunch break on the employer's premises can arise out of employment when a reasonable person would perceive a causal connection between the conditions under which the employee works and the resulting injury.[15] Because the claimant was injured when she slipped and fell on a wet floor in a breakroom on her employer's premises, the court determined that a causal connection existed between the injury and the conditions of employment and so the injury arose out of her employment:

> It is undisputed that [the claimant, an insurance claims associate] was injured when she slipped and fell on the wet floor of the breakroom on her employer's premises. It logically follows that her injury was causally connected to the conditions under which she worked, and her injury, therefore, 'arose out of' her employment.[16]

In reaching such a conclusion, the court did not adhere to the principle of *stare decisis*, and instead reexamined and overruled *Farr*, noting apparent inconsistencies in case law decisions resulting from the holding in *Farr*.[17] In *Frett*, the court considered the reasoning in *Farr* to be unsound and noted that the claimant in *Farr* tripped and fell on steps at his work site, while engaged in an activity incidental to his employment (preparing to eat lunch), and such accident was not unrelated to the claimant's work.[18] Subsequently, in *Frett v. State Farm Employee Workers' Comp.*, the Georgia Court of Appeals vacated its earlier decision and adopted the Georgia Supreme Court's decision as their own.[19]

II. STATUTORY EMPLOYMENT AND EXCLUSIVE REMEDY PROVISION

In *Brack v. CPPI of Georgia, LLC*,[20] the Georgia Court of Appeals addressed the issue of whether a general contractor was a statutory

14. *Id.* at 48–49, 844 S.E.2d at 754.
15. *Id.* at 49, 844 S.E.2d at 754.
16. *Id.* at 50, 844 S.E.2d at 755.
17. *Id.* at 62, 844 S.E.2d at 762–63.
18. *Id.* at 53, 844 S.E.2d at 756.
19. 358 Ga. App. 138, 854 S.E.2d 347, 348 (2021).
20. 357 Ga. App. 744, 849 S.E.2d 521 (2020).

employer under O.C.G.A. § 34-9-8,[21] and therefore immune from tort liability in the pending civil suit pursuant to O.C.G.A. § 34-9-11,[22] in the context of a subcontractor's employee maintaining portable toilets on a construction site.[23]

CPPI entered into a construction management-at-risk contract to build a school, and CPPI contracted with Tony's Jons to provide portable toilets for the construction site.[24] The plaintiff was hired through a temporary placement agency to work for Tony's Jons to deliver the portable toilets and to clean and maintain them. He was injured while pumping out a portable toilet and filed a civil suit against CPPI for negligence and damages for pain and suffering, medical expenses, and lost wages.[25]

CPPI moved for summary judgment, in part on grounds that it was a statutory employer of the plaintiff under O.C.G.A. § 34-9-8, and therefore under O.C.G.A. § 34-9-11, the plaintiff's exclusive remedy was through a workers' compensation claim. [26] The trial court granted summary judgment for CPPI on grounds that it had tort immunity pursuant to O.C.G.A. § 34-9-11.[27]

On appeal, the plaintiff argued that he was not a statutory employee of CPPI, and therefore he was not barred by the exclusive remedy provision, O.C.G.A. § 34-9-11, from suing CPPI as a third-party tortfeasor.[28] The court noted that the contract between CPPI and Tony's Jons was not solely to deliver the portable toilets, but also included routine servicing and cleaning of the portable units, and thus the contract was not confined to the delivery of goods.[29] Because CPPI's contract to build the school obligated CPPI to provide a safe workplace, the court held that the cleaning and maintaining of the portable toilets on the site by Tony's Jons for the use of the CPPI's employees was in furtherance of the subject matter of CPPI's construction management-at-risk contract. Accordingly, the court held that CPPI was a principal contractor and the statutory employer of the plaintiff and therefore had tort immunity under the exclusive remedy provision.[30]

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21. O.C.G.A. § 34-9-8 (2021).
22. O.C.G.A. § 34-9-11 (2021).
23. *Brack*, 357 Ga. App. at 746, 849 S.E.2d at 523 (2020).
24. *Id.* at 744–45, 849 S.E.2d at 522.
25. *Id.* at 745, 849 S.E.2d at 522.
26. *Id.* at 745, 849 S.E.2d at 522–23.
27. *Id.* at 745, 849 S.E.2d at 523.
28. *Id.* at 746, 849 S.E.2d at 523.
29. *Id.* at 748, 849 S.E.2d at 524.
30. *Id*. at 748–49, 849 S.E.2d at 525.

In a dissent, Judge Colvin observed that a party's mere provision of an ancillary service "at a construction site does not transform the contractor obtaining the benefit of that good or service into a 'statutory employer'" under the Worker's Compensation Act (the Act).[31] Judge Colvin opined that Tony's Jons was not providing a substantial service to CPPI as to the subject matter of the construction management-at-risk contract (towards the building of the school).[32]

III. EMPLOYMENT AND EXCLUSIVE REMEDY PROVISION

In *Stalwart Films LLC v. Bernecker*,[33] a stuntman's parents brought a wrongful death suit against a film studio and the producers of the television series *The Walking Dead*.[34] The decedent worked as a stuntman on the show and died after falling from a height on a choreographed stunt that went wrong.[35] After the defendants' motions for summary judgment and directed verdict were denied, the jury returned a verdict for the plaintiffs, and the defendants appealed.[36]

The primary issue before the court involved the defendants' argument that the decedent was an employee of the film studio, and therefore the suit was barred by the Act's exclusive remedy provision.[37] The decedent was a member of the Screen Actor's Guild; the studio controlled the time, method, and manner of the decedent's work, and the court noted that the studio's issuance of an IRS Form 1099 to the decedent did not create a jury question as to employment.[38] While the stuntman could request minor changes in the stunt, or refuse to perform the stunt, this stunt was choreographed as part of a larger scene; the stuntman was directed as to exactly how to act; and he was expected to perform on a specific day at the specific time the director called for the scene.[39]

The court was not persuaded that the existence of other agreements between the film studio and other employees impacted the employment relationship between the stuntman and the studio, given that the studio controlled the time, method, and manner of the decedent's work.[40] Similarly, the court noted that, to the extent the stuntman had a personal

31. *Id.* at 749, 849 S.E.2d at 525 (Colvin, J., dissenting).
32. *Id.*
33. 359 Ga. App. 236, 855 S.E.2d 120 (2021).
34. *Id.* at 236, 855 S.E.2d at 121.
35. *Id.* at 237, 855 S.E.2d at 122.
36. *Id.* at 237, 240, 855 S.E.2d at 122, 124.
37. *Id.* at 240, 855 S.E.2d at 124.
38. *Id.* at 240–41, 855 S.E.2d at 124–25.
39. *Id.* at 241, 855 S.E.2d at 125.
40. *Id.* at 241–42, 855 S.E.2d at 125.

loan-out company, this fact would show that the decedent was a borrowed servant and would not alter the conclusion of an employment relationship with the studio at the time of the accident.[41] Because the deceased stuntman was an employee of the film studio, the plaintiffs' tort claims against the film studio were barred by the Act's exclusive remedy provision, O.C.G.A. § 34-9-11, and thus the tort claims against the other defendants—the stuntman's coworkers—were similarly barred.[42]

IV. *RES JUDICATA* AND MEDICAL BURDEN OF PROOF

In *Trejo-Valdez v. Associated Agents,*[43] the Georgia Court of Appeals addressed the doctrine of *res judicata* in the context of medical treatment requested over the course of a claim, and in so doing addressed the "burden of proof" for evaluating the requested treatment.[44]

The claimant injured his back at work and underwent back surgery.[45] Shortly thereafter, his authorized treating physician (ATP) recommended either a spinal cord stimulator or a second back surgery, and the claimant chose the latter. Despite the two surgeries, the claimant continued to report pain and problems, and his ATP again recommended a spinal cord stimulator. Multiple other doctors examined the claimant, some of whom opined against there being any basis for the stimulator and others who opined that the claimant might benefit from one. Subsequently, the ALJ issued an order designating a new doctor as ATP and denied the claimant's request for authorization of a spinal cord stimulator "at this time." The new ATP later also recommended a spinal cord stimulator (a trial stimulator), which the employer denied on grounds that it was not reasonably medically necessary and on grounds that the stimulator should be denied pursuant to *res judicata*.[46]

The ALJ ruled that the employer bore the burden of proof that the proposed treatment was not compensable, as it contended that it was not reasonable and necessary, holding that the doctrine of *res judicata* did not preclude the claimant's request in light of changed circumstances in the claim over the passage of time, and found that the stimulator trial was reasonable.[47] On appeal, the Appellate Division affirmed the ALJ's decision; however, the superior court reversed on grounds that *res*

41. *Id*. at 242, 855 S.E.2d at 125.
42. *Id*.
43. 357 Ga. App. 461, 850 S.E.2d 863 (2020).
44. *Id*. at 461, 850 S.E.2d at 864.
45. *Id*. at 462, 850 S.E.2d at 865.
46. *Id*. at 462–63, 850 S.E.2d at 865.
47. *Id*. at 463, 850 S.E.2d at 865.

judicata prevented retrial of a previously tried issue and that the burden of proof was erroneously placed on the employer.[48]

The court of appeals addressed the *res judicata* issue first, noting that the doctrine applies to workers' compensation claims.[49] That is, the doctrine applies, and is binding only as to the facts in issue and events existing at the time of the judgment, and the court found that the issues decided by the ALJ in the judge's first order were not identical to the issues before the ALJ in the hearing on appeal. The court pointed to the additional medical treatment and subsequent opinions with the new ATP, as well as a slightly different treatment modality requested, as support that the request was not identical and therefore not barred by *res judicata*.[50] Accordingly, a party may be permitted to readdress a medical issue where there has been a new ATP and subsequent treatment.[51] The court also ruled that the ALJ properly placed the burden of proof on the employer, as it controverted medical treatment on grounds that the treatment was not reasonably necessary.[52] The court thus reversed the superior court to affirm the Appellate Division's award.[53]

48. *Id*. at 463–64, 850 S.E.2d at 866.

49. *Id*. at 465, 850 S.E.2d at 867.

50. *Id.* at 466–67, 850 S.E.2d at 868.

51. *Id.* at 467, 850 S.E.2d at 868.

52. *Id*. at 467–68, 850 S.E.2d at 868–69; State Board of Workers' Compensation Rule 205(d)(1).

53. *Trejo-Valdez*, 357 Ga. App. at 469, 850 S.E.2d at 869.