Mercer Law Review

Volume 65
Number 1 *Annual Survey of Georgia Law* Article 21

12-2013

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Recommended Citation

Bagley, H. Michael and Ward, J. Benson (2013) "Workers' Compensation," *Mercer Law Review*: Vol. 65: No. 1, Article 21.
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol65/iss1/21

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Workers' Compensation

by H. Michael Bagley*
and J. Benson Ward**

The 2012-2013 survey period featured notable decisions of the appellate courts in a wide range of areas along with legislation impacting the Workers' Compensation Act[1] in several important areas, including a 400-week cap on medical benefits.[2]

I. LEGISLATION

In what may have been a first, the legislative package drafted by the Advisory Committee of the State Board of Workers' Compensation (the Board) passed through both legislative chambers without a dissenting vote, notwithstanding some significant changes in the Workers' Compensation Act.[3]

Perhaps the most noteworthy legislative change was made to section 34-9-200 of the Official Code of Georgia Annotated (O.C.G.A.)[4] concerning the return of a cap on medical benefits.[5] There had previously been a $5000 monetary cap on the employer's liability for medical expenses, unless additional expenditures were authorized by the Board, and that cap was not deleted by the legislature until 1985.[6] For accidents

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1. O.C.G.A. ch. 34-9 (2008 & Supp. 2013).
2. Ga. H.R. Bill 154, Reg. Sess., 2013 Ga. Laws (codified at O.C.G.A. § 34-9-200 (Supp. 2013)). For an analysis of Georgia workers' compensation law during the prior survey period, see H. Michael Bagley & J. Benson Ward, *Workers' Compensation, Annual Survey of Georgia Law*, 64 MERCER L. REV. 341 (2012).
3. Ga. H.R. Bill 154 § 1.
4. O.C.G.A. § 34-9-200 (2008 & Supp. 2013).
5. *Id.*
6. Ga. H.R. Bill 424 § 3, Reg. Sess., 1985 Ga. Laws 727.

occurring after July 1, 2013, that are not designated as catastrophic injuries pursuant to O.C.G.A. § 34-9-200.1(g),[7] the employer's liability for medical expenses terminates at the end of 400 weeks from the date of injury.[8] There is no similar cap for injuries occurring before July 1, 2013.[9]

The statutory penalty for the late payment of medical expenses contained in O.C.G.A. § 34-9-203[10] was modified to reduce the time period required for payment of mileage expenses to fifteen days from the receipt of charges and reports required by the Board.[11] Penalties are triggered if "not paid when due."[12] Thus, penalties are the same whether for mileage or other medical expenses that are not timely paid.[13] However, the "due date" is different for mileage expenses and all other medical expenses.[14] The due date is a period that runs from the time of receipt of charges and reports required by the Board until an outer limit by which time the payment "shall be paid within."[15] The period is fifteen days for mileage and thirty days for all other medical expenses.[16] Therefore, the due date is any point during the fifteen-day period for mileage, and thirty days for all other medical expenses, thus the penalties are triggered for mileage expenses if they are not paid within forty-five days from receipt, and for all other expenses, sixty days from receipt.[17] However, if the defense to late payment penalties is that the documentation required by the Board was not received, the defense is waived unless submitted in writing within fifteen days for mileage expenses and within thirty days for all other medical expenses.[18]

Since 1992, the Workers' Compensation Act has contained a provision designed to facilitate an employee's return to work on a trial basis following an injury.[19] According to this provision, where the employee is released to work with restrictions imposed by an authorized treating physician, the employer tenders a job suitable for those restrictions, and

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7. O.C.G.A. § 34-9-200.1(g) (2008 & Supp. 2013).
8. O.C.G.A. § 34-9-200(a)(2).
9. O.C.G.A. § 34-9-200(a)(1).
10. O.C.G.A. § 34-9-203.
11. *Id.*
12. O.C.G.A. § 34-9-203(c)(3).
13. O.C.G.A. § 34-9-203(c)(1).
14. *Id.*
15. *Id.*
16. *Id.*
17. O.C.G.A. § 34-9-203(c)(3).
18. O.C.G.A. § 34-9-203(c)(2).
19. O.C.G.A. § 34-9-240 (2008 & Supp. 2013).

the employee attempts to return to work but is unable to perform the proffered job for more than fifteen days, the employer is required to immediately reinstate benefits.[20] If the employee does not attempt the proffered job, then the employer is allowed to terminate benefits unilaterally with submission of required documentation.[21] This provision tended to promote "drive-by" returns to work, where employees would briefly attempt the proffered job primarily to avoid unilateral suspension of benefits. In 2013, the legislature redefined what constitutes an attempt of the job needed to trigger the fifteen-day trial period with the requirement that the employee attempt the proffered job for either "eight cumulative hours or one scheduled workday, whichever is greater."[22] The failure to achieve those minimums is equivalent to a refusal to attempt the proffered job, and benefits may subsequently be suspended unilaterally.[23]

In the midst of the legislature's fiscal conservatism during the recessionary economy, there were no increases in the maximum benefits for either temporary, total disabilities (TTD) or temporary, partial disabilities (TPD) since 2007.[24] For all injuries occurring after July 1, 2013, the maximum weekly income benefit for temporary, total disability was increased from $500 to $525,[25] and the maximum weekly income benefit for temporary, partial disability was increased from $334 to $350.[26]

II. AUTHORIZATION TO RELEASE MEDICAL INFORMATION

In *Arby's Restaurant Group, Inc. v. McRae*,[27] the Georgia Supreme Court unanimously reversed the Georgia Court of Appeals and ruled that the Board acted within its discretion by ordering a claimant to either sign a limited authorization to release medical information or have her case removed from the hearing calendar.[28] The supreme court determined that an employer or insurer may seek relevant protected

20. O.C.G.A. § 34-9-240(b)(1).
21. *Id.*
22. *Id.*
23. *Id.*
24. Ga. H.R. Bill 424, Reg. Sess., 2007 Ga. Laws 616; Ga. H.R. Bill 434, Reg. Sess. (2007), § 6 (unenacted).
25. O.C.G.A. § 34-9-261 (2008 & Supp. 2013).
26. O.C.G.A. § 34-9-262 (2008 & Supp. 2013).
27. 292 Ga. 243, 734 S.E.2d 55 (2012). *See also* Bagley & Ward, *supra* note 2, at 344-45.
28. *Id.* at 243, 247, 734 S.E.2d at 56, 58.

health information through informal, oral communications with a treating physician.[29]

The supreme court held that O.C.G.A. § 34-9-207(a)[30] unambiguously provides that once an employee initiates a workers' compensation claim, that employee waives any privilege with respect to medical records and information related to that claim.[31] The court of appeals previously limited this disclosure of medical records and information to tangible documents.[32] However, the supreme court ruled that this position is not supported by the language of the statute; accordingly, O.C.G.A. § 34-9-207(a) includes oral communications.[33]

The supreme court also declined to apply decisions involving medical malpractice, such as *Baker v. Wellstar Health System, Inc.*,[34] to workers' compensation cases.[35] The court expressly observed that the legislature has designed Georgia's workers' compensation system to provide an efficient and streamlined process for obtaining medical care and income benefits within a no-fault system, and that allowing equal access to all relevant medical information furthers this policy and intent.[36] The court urged parties in a workers' compensation claim to act reasonably and within the parameters of privacy protections afforded to health information unrelated to the work related injury.[37] It also emphasized the Board's role as a gatekeeper in resolving disputes arising over this issue.[38]

III. THE *MALONEY* BURDEN

In *Brown Mechanical Contractors, Inc. v. Maughon*,[39] the court of appeals returned to the framework set out in *Maloney v. Gordon County Farms*[40] to examine whether a claimant conducted a diligent job search sufficient to justify payment of indemnity benefits.[41] The court affirmed the Board, which had reversed the award and finding of the Administrative Law Judge (ALJ) that a claimant who had contacted

29. *Id.* at 244-47, 734 S.E.2d at 56-58.
30. O.C.G.A. § 34-9-207(a) (2008 & Supp. 2013).
31. *McRae*, 292 Ga. at 244, 734 S.E.2d at 56.
32. *Id.*
33. *Id.* at 245, 734 S.E.2d at 57.
34. 288 Ga. 336, 703 S.E.2d 601 (2010).
35. *McRae*, 292 Ga. at 246, 734 S.E.2d at 57.
36. *Id.* at 246-47, 734 S.E.2d at 58.
37. *Id.* at 247, 734 S.E.2d at 58.
38. *Id.*
39. 317 Ga. App. 106, 728 S.E.2d 757 (2012).
40. 265 Ga. 825, 462 S.E.2d 606 (1995).
41. *Brown Mech. Contractors, Inc.*, 317 Ga. App. at 107, 728 S.E.2d at 758.

more than one hundred employers over the six-month period leading up to his hearing date, after being laid off for reasons unrelated to his compensable shoulder injury, had made a diligent search for work.[42] The Board relied on several facts in finding that the claimant's job search was not diligent, including the following: the claimant's 110 searches were made over 144 "work days," an average of less than once per day; the claimant failed to follow up with twenty-two employers; the claimant went periods of eighteen and twenty-seven consecutive days without searching; the claimant lost two offered positions because of a purported need for surgery that had not been previously scheduled; and despite employment history in managerial and sales positions, the claimant sought physical-labor jobs and avoided retail jobs.[43]

The court of appeals framed the issue for review as one involving whether the Board's findings of fact and conclusions of law were supported by the "any evidence" standard, and subsequently determined that there was some evidence in the record to support the Board's conclusion that the job search was not diligent.[44] The court was not persuaded by evidence that the claimant had three job offers retracted after his injury was disclosed.[45]

IV. CHANGE IN CONDITION CONTRASTED WITH A FICTIONAL NEW ACCIDENT

The court of appeals and the supreme court had opportunities this year to clarify the ever-evolving tension between a change in condition and a fictional new accident. In *Scott v. Shaw Industries, Inc.*,[46] the claimant injured her right foot in 1996 while working as a carpet inspector, resulting in a partial amputation and several months of unemployment, during which time she received TTD benefits. She returned to work at a desk job, but the foot prosthetic she wore as a result of the initial injury caused knee pain and an altered gait. She underwent bilateral knee surgery in 1997 and returned to work at her desk job where she worked over the next twelve years despite progressively worsening knee pain. In September 2009 her treating physician took her out of work completely.[47]

The claimant argued that she was entitled to TTD benefits under the fictional-new-injury doctrine as of the date in 2009 when she was taken

42. *Id.*
43. *Id.*
44. *Id.* at 106, 109, 728 S.E.2d at 758, 760.
45. *Id.* at 111, 728 S.E.2d at 761.
46. 291 Ga. 313, 729 S.E.2d 327 (2012).
47. *Id.* at 313-14, 729 S.E.2d at 328-29.

out of work completely. The employer argued that the claimant's inability to work was merely a result of a change in condition for the worse, barring her claim for TTD benefits on the basis that the statute of limitations had expired.[48] The ALJ awarded the claimant TTD benefits, the Board and Superior Court of Bartow County each affirmed, but the court of appeals reversed.[49]

The supreme court reviewed the controlling case of *Central State Hospital v. James*[50] and its framework for distinguishing between a fictional new accident and a change in condition.[51] The court applied the third scenario set out by the court in *James*—where an employee undergoes a change in condition when he is awarded benefits and returns to his employment performing his ordinary job duties, but as a result of wear and tear of ordinary life and the performance of his normal duties and not a specific work incident, his condition gradually worsens to the point that he can no longer continue his ordinary work.[52]

In *Scott*, the court determined that the claimant had been awarded compensation as a result of her initial foot injury in 1996, returned to work in a new position that did not require strenuous activity, and subsequently developed knee and gait problems due to the wear and tear of ordinary life. The court held that this gradual worsening constituted a change in condition for the worse, and not a new accident.[53] Consequently, the claim was barred by the statute of limitations, which the court determined began to run as of the date of the initial foot injury.[54]

The court of appeals addressed the same issue in *Evergreen Packaging, Inc. v. Prather*,[55] but reached a different conclusion.[56] In that case, the claimant suffered a back injury in 2002 while working as a forklift operator responsible for loading trucks with milk and juice cartons, and the claimant received indemnity and medical benefits before returning to work for the employer. Almost three years after returning to work, the claimant was transferred to a different position making and cleaning plates used in the employer's printing presses. Although this job required significant physical activity, including lifting up to fifty pounds

48. *Id.* at 314, 729 S.E.2d at 329.
49. *Id.*
50. 147 Ga. App. 308, 248 S.E.2d 678 (1978).
51. *Scott*, 291 Ga. at 314-15, 729 S.E.2d at 329.
52. *Id.* (quoting *James*, 147 Ga. App. at 309-10, 248 S.E.2d at 679).
53. *Id.* at 315, 729 S.E.2d at 329.
54. *Id.*
55. 318 Ga. App. 440, 734 S.E.2d 209 (2012).
56. *Id.* at 440, 734 S.E.2d at 210.

and bending to the floor, it was somewhat less strenuous than his prior work as a forklift operator.[57]

The claimant continued to work, despite progressively worsening pain, but when the job duties changed in 2008 to require further bending, his problems increased. In 2010 his treating physician deemed the condition an exacerbation of his 2002 injury caused by work-related activity. The ALJ held that the claimant sustained a new injury on February 26, 2010, because of having to bend further, and awarded TTD benefits; the Board and Superior Court of Clarke County affirmed.[58] The court of appeals determined that the facts did not fit the third *James* scenario (described above), which involved subsequent work that may aggravate a condition and result in a new injury even when there is no new accident.[59] To distinguish a change in condition from a fictional new accident, the court considered the "intervention of new circumstances."[60] Here, based on the claimant working a different job that caused him to bend over further, which increased back problems, sufficient evidence existed to support a determination that a fictional new accident had occurred.[61]

V. EXCLUSIVE REMEDY

Georgia courts addressed the exclusive remedy provision in several holdings during the survey period. In *Carr v. Fedex Ground Package System, Inc.*,[62] an employee of J. Wigg Trucking, Inc. (J. Wigg Trucking), an entity with a contract to provide trucking services to FedEx Ground Package System, Inc. (FedEx), was injured in a fight with a FedEx employee on FedEx property. The employee's wife sought and received workers' compensation benefits on the employee's behalf from J. Wigg Trucking, and subsequently filed a personal injury action against FedEx, alleging multiple tort claims for negligence. Summary judgment was granted for FedEx on the grounds that FedEx was a statutory employer immune to tort liability.[63]

The appellant argued that the statutory-employer doctrine did not apply because FedEx was not the employee's statutory employer. The appellant relied on language in FedEx's contract with J. Wigg Trucking

57. *Id.* at 440-41, 734 S.E.2d at 210-11.
58. *Id.* at 442, 734 S.E.2d at 211-12.
59. *Id.* at 443, 734 S.E.2d at 212 (quoting *James*, 147 Ga. App. at 309-10, 248 S.E.2d at 679).
60. *Id.* at 444, 734 S.E.2d at 213.
61. *Id.* at 444, 734 S.E.2d at 212-13.
62. 317 Ga. App. 733, 733 S.E.2d 1 (2012).
63. *Id.* at 733-34, 733 S.E.2d at 2-3.

providing that J. Wigg Trucking was an independent contractor and would keep its own workers' compensation coverage.[64] The court of appeals rejected this argument, stating that J. Wigg Trucking's status as an independent contractor did not preclude a statutory-employment relationship between FedEx and the employee.[65] Further, the court determined that parties cannot contract around the obligations of the Workers' Compensation Act, and specifically, no contract language would relieve FedEx from its obligation as a statutory employer.[66]

The appellant further argued against the application of the statutory-employment doctrine on the grounds that FedEx was not a contractor under the definition of O.C.G.A. § 34-9-8(a)[67] because FedEx was not operating under contracts that existed when it contracted with J. Wigg Trucking.[68] The court of appeals disagreed and determined that the package-delivery work the employee performed for J. Wigg Trucking was pursuant to shipping and delivery contracts FedEx had with FedEx's customers.[69] Because J. Wigg Trucking contracted with FedEx to perform a portion of the work necessary to be done for FedEx to "fulfill[] subsequently-arising contracts" between FedEx and its customers, FedEx was a "contractor" for purposes of statutory employment.[70] Accordingly, the exclusive remedy provision barred the action for personal injuries.[71]

The supreme court addressed the application of the exclusive remedy provision in *Smith v. Ellis*[72] in its discussion of whether it should overrule *Ridley v. Monroe*,[73] a court of appeals case that held that the exclusive remedy provision of O.C.G.A. § 34-9-11(a)[74] barred a claim against a co-employee in a tort action following an O.C.G.A. § 34-9-15-(b)[75] settlement.[76] In *Smith*, the claimant and a coworker met on work property to practice shooting guns for personal enjoyment, and the claimant was accidently shot in the leg. Both employees were fired, and the claimant filed a workers' compensation claim that was settled on a no-liability basis. The claimant then sued the coworker for negligence,

64. *Id.* at 735, 733 S.E.2d at 3-4.
65. *Id.* at 734-35, 733 S.E.2d at 3-4.
66. *Id.* at 735-36, 733 S.E.2d at 4.
67. O.C.G.A. § 34-9-8(a) (2008).
68. *Carr*, 317 Ga. App. at 737, 733 S.E.2d at 5.
69. *Id.* at 738, 733 S.E.2d at 5.
70. *Id.* at 738-39, 733 S.E.2d at 6.
71. *Id.*
72. 291 Ga. 566, 731 S.E.2d 731 (2012).
73. 256 Ga. App. 686, 569 S.E.2d 561 (2002).
74. O.C.G.A. § 34-9-11(a) (2008).
75. O.C.G.A. § 34-9-15(b) (2008 & Supp. 2013).
76. *Smith*, 291 Ga. App. at 567, 731 S.E.2d at 732.

and when summary judgment was granted in favor of the coworker on the basis of the exclusive remedy provision, the employee appealed on the grounds that the coworker was a third-party tortfeasor and not a co-employee.[77]

The supreme court first examined *Ridley*, and then held that the claimant would be barred from suing his coworker in tort for the same injury for which he had already entered into a Board-approved settlement with his employer.[78] While the exclusive remedy provision did not apply to an injury that was not compensable under the Workers' Compensation Act, the fact that the settlement was approved by the Board, albeit on a no-liability basis, represented an award of the Board.[79] The court reasoned that a no-liability settlement required an employer to compensate the employee for the alleged injury, triggering the protection against a subsequent tort suit even though the injury may not actually have been deemed compensable under the Workers' Compensation Act.[80] The supreme court held that *Ridley* was correctly decided, and that the same right-and-remedy logic that prohibits an employee from seeking an additional remedy against his employer under O.C.G.A. § 34-9-15(a)[81] prohibits an employee from seeking such a remedy under O.C.G.A. § 34-9-15(b).[82] Thus, when a settlement has been approved by the Board, it constitutes a complete and final disposition of all claims against the employer and its employees on account of the injury, regardless of whether the settlement was on a no-liability basis.[83]

In *Vratsinas Construction Co. v. Chitwood*,[84] the court of appeals applied the exclusive remedy doctrine to a personal injury claim brought by an employee of a subcontractor against the subcontractor's general contractor, and held that the tort claim was barred.[85] The plaintiff was an employee of a subcontractor hired by the general contractor. After sustaining an electric shock and subsequent injuries to multiple body parts, the employee did not file a workers' compensation claim, but instead filed a lawsuit in the State Court of Fulton County against the

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77. *Id.* at 567-68, 731 S.E.2d at 732-33.
78. *Id.* at 567, 731 S.E.2d at 732.
79. *Id.* at 569, 731 S.E.2d at 733.
80. *Id.* at 571, 731 S.E.2d at 735.
81. O.C.G.A. § 34-9-15(a) (2008 & Supp. 2013).
82. *Smith*, 291 Ga. App. at 573-74, 731 S.E.2d at 736-37; *Ridley*, 256 Ga. App. at 689, 569 S.E.2d at 564.
83. *Smith*, 291 Ga. App. at 566, 731 S.E.2d at 731; *Ridley*, 256 Ga. App. at 686, 569 S.E.2d at 561.
84. 314 Ga. App. 357, 723 S.E.2d 740 (2012).
85. *Id.* at 357, 723 S.E.2d at 741.

general contractor, alleging negligent failure to maintain a safe work site. The general contractor moved for summary judgment, arguing that the plaintiff's exclusive remedy was workers' compensation benefits, and appealed the trial court's denial of its motion.[86]

The court of appeals cited O.C.G.A. § 34-9-8(a) for the proposition that a general contractor becomes the statutory employer of the employees of any subcontractors hired by the general contractor.[87] The court further observed that O.C.G.A. § 34-9-11(a) provides that the rights granted to employees in the Workers' Compensation Act supercede all other rights of the employee, including those at common law.[88] Because it was undisputed that the general contractor was the statutory employer of the plaintiff, the general contractor was immune to tort claims brought by the employee.[89]

On the other hand, in *PHF II Buckhead LLC v. Dinku*,[90] the court of appeals recognized that a company that contracts out certain services to another company is not the statutory employer of the other company's employees.[91] In *Dinku*, the claimant was an employee of the parking services company hired by the operator of a hotel, PHF Buckhead LLC (PHF). When Dinku was hurt on the job, he filed suit against PHF for failure to maintain reasonably safe premises.[92] The court held that unlike a relationship between a general contractor and subcontractor, where the general contractor owes a duty of performance to the property owner and employs the subcontractor to that end, a mere property owner does not owe a duty of performance to a third party and thus, pursuant to O.C.G.A. § 34-9-8,[93] the property owner cannot be a principal contractor.[94] Because PHF did not owe a duty of performance to a third party with regard to the work done by Dinku (or Dinku's direct employer), PHF was not the statutory employer of Dinku, and the exclusive remedy doctrine did not bar the suit.[95]

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86. *Id.* at 358, 723 S.E.2d at 741-42.
87. *Id.* at 358, 723 S.E.2d at 742 (citing O.C.G.A. § 34-9-8(a)).
88. *Id.* at 358-59, 723 S.E.2d at 742 (citing O.C.G.A. § 34-9-11(a)).
89. *Id.*
90. 315 Ga. App. 76, 726 S.E.2d 569 (2012).
91. *Id.* at 80, 726 S.E.2d at 572-73.
92. *Id.* at 77, 726 S.E.2d at 570.
93. O.C.G.A. § 34-9-8 (2008).
94. *Dinku*, 315 Ga. App. at 79-80, 726 S.E.2d at 572.
95. *Id.* at 80, 726 S.E.2d at 572-73.

In *Archer Western Contractors, Ltd. v. Estate of Pitts*,[96] the supreme court vacated *Estate of Pitts v. City of Atlanta*,[97] a 2011 court of appeals decision.[98] These cases involved a construction worker who was struck and killed by a vehicle driven by the employee of another subcontractor on the project. The decedent's estate recovered a judgment against the subcontractor who employed the vehicle's driver, but the judgment was not satisfied due to a lack of insurance. The estate then brought suit against the City of Atlanta and several construction companies on the project because the companies breached contractual duties in their subcontracts that required each subcontractor to carry a minimum of $10 million in automobile-liability insurance.[99]

The defendants argued, among other things, that the exclusive remedy provision barred the estate from seeking damages. The court of appeals held that because the injury for which the estate sought damages was not a physical injury, but rather the loss of access to insurance coverage due to the alleged breach of contract, the exclusive remedy provision did not apply and would not bar the claim for breach of contract.[100] The supreme court, in a lengthy opinion, concluded that the court of appeals misapplied, or failed to apply, certain fundamental principles of contract law in considering the cases.[101]

The supreme court determined that the deceased employee was not an intended beneficiary of every promise contained in the contracts, and thus the court of appeals drew its conclusion about the extent to which the employee was an intended beneficiary too broadly.[102] The supreme court also took issue with the court of appeals ruling on the contractor's duty to ensure that lower-tier subcontractors carried insurance outside of the "Owner's Controlled Insurance Program."[103] Ultimately, the court did not reach the exclusive remedy question because it concluded that questions of fact remained.[104] The supreme court vacated the decisions and remanded the cases with instructions for the court of appeals to determine, among other issues, any contractual promises of

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96. 292 Ga. 219, 735 S.E.2d 772 (2012).

97. 312 Ga. App. 599, 719 S.E.2d 7 (2011), *vacated* Archer W. Contractors, Ltd. v. Estate of Pitts, 292 Ga. 219, 735 S.E.2d 772 (2012), *remanded to sub nom.* Estate of Pitts v. City of Atlanta, 323 Ga. App. 70, 746 S.E.2d 698 (2013).

98. *Archer W. Contractors, Ltd.*, 292 Ga. at 230, 735 S.E.2d at 781.

99. *Id.* at 220, 735 S.E.2d at 774-75; *see also Estate of Pitts*, 312 Ga. App. at 599-600, 719 S.E.2d at 9-10.

100. *Estate of Pitts*, 312 Ga. App. at 606, 719 S.E.2d at 16-17.

101. *Archer W. Contractors, Ltd.*, 292 Ga. at 226, 735 S.E.2d at 776-77.

102. *Id.* at 226, 735 S.E.2d at 778.

103. *Id.* at 229, 735 S.E.2d at 780.

104. *Id.* at 230, 735 S.E.2d at 781.

which the employee was a beneficiary and the applicability of the exclusive remedy provision to claims for breach of any contractual promises of which the decedent might have been an intended beneficiary.[105]

VI. UNEXPLAINED DEATH AND THE REBUTTABLE PRESUMPTION

In *Wilkinson County Board of Education v. Johnson*,[106] the court of appeals remanded a claim to the ALJ for further consideration of whether an employee's death was the result of the employment exacerbating a preexisting medical condition.[107] The employee, a high-school principal who had significant health issues including hypertension and obesity, was taken from his school to the hospital by ambulance after he reported sweating, pain, and elevated blood pressure. He was found to have suffered an acute aortic dissection and underwent emergency surgery, but died five days later. The autopsy identified his cause of death as ischemic bowel complication of the aortic dissection.[108]

The ALJ denied his widow's claim, finding that she failed to show that the employee's aortic dissection was attributable to his job performance.[109] The ALJ further ruled that the claimant was not entitled to the presumption that the employee's death arose "out of and in the course of his employment" because he was not found dead in a location where he could be reasonably expected to be engaged in the performance of his job duties.[110] The Board approved, but the Superior Court of Wilkinson County reversed, finding error in the ALJ's conclusion that there was no presumption simply because the employee was not found dead at his place of employment. The superior court reasoned that because the incident resulting in the employee's death occurred at a time and place when he was performing the job, the presumption applied, and the ALJ should have considered whether the employee's death was an aggravation of a preexisting condition.[111]

The court of appeals stated that the presumption that a death arose out of employment—when an employee is found dead in a place where he might be reasonably expected to perform his duties—applies only

105. *Id.*
106. 317 Ga. App. 565, 732 S.E.2d 765 (2012).
107. *Id.* at 565, 732 S.E.2d at 766-67.
108. *Id.* at 566-67, 732 S.E.2d at 767-68.
109. *Id.* at 567, 732 S.E.2d at 768.
110. *Id.* at 568, 732 S.E.2d at 768.
111. *Id.* at 568-69, 732 S.E.2d at 768.

when the death is unexplained.[112] Because modern medicine often provides at least an immediate cause of death, the court noted that only the precipitating causative factor (and not the immediate causative factor) must be unexplained in order for the presumption to apply.[113] Otherwise, probative evidence on the issue of causation must be submitted.[114] The court also clarified that this rule regarding the presumption also applies when the immediate cause of death arises from internal and physical factors, as opposed to external and non-physical factors.[115]

Accordingly, the court held that the ALJ and the Board misinterpreted the law by concluding that the unexplained-death presumption did not apply because the employee died at the hospital and not a place where he reasonably could be expected to perform his job, because the law has been expanded to include employees who become ill at the place of employment and subsequently die at a hospital.[116] The court also determined that the superior court made an improper finding of fact when it substituted its finding that the employee's job performance caused his death, when neither the ALJ nor the Board had made that finding, and further misinterpreted the law by applying the presumption when there was no underlying finding concerning whether the precipitating cause of the employee's death was unexplained.[117] Accordingly, the court of appeals remanded the case to the ALJ to determine if the unexplained-death presumption applied by determining whether: (1) the incident causing the employee's death occurred in a time and place he reasonably might be expected to perform his job; and (2) the precipitating cause of his death was unexplained.[118]

VII. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT AND DEVIATION FOR PERSONAL PURSUIT

In *Dixie Roadbuilders, Inc. v. Sallet*,[119] the court of appeals addressed a variety of workers' compensation issues, ultimately within the exclusive remedy context.[120] In *Sallet*, the employee left work without permission and went to a nearby convenience store where he was shot

112. *Id.* at 569, 732 S.E.2d at 769.
113. *Id.*
114. *Id.* at 570-71, 732 S.E.2d at 769.
115. *Id.* at 569, 732 S.E.2d at 769.
116. *Id.* at 570, 732 S.E.2d at 769-70.
117. *Id.* at 570, 732 S.E.2d at 770.
118. *Id.* at 570-71, 732 S.E.2d at 770.
119. 318 Ga. App. 228, 733 S.E.2d 511 (2012).
120. *Id.*

during the course of a robbery and eventually died from his wounds. The evidence showed that the employer either owned or leased the convenience store.[121] Without notice to the employee's children (all adults), the employer filed a claim with its workers' compensation insurer, who thereafter voluntarily paid the funeral expenses and, pursuant to O.C.G.A. § 34-9-265(f),[122] made payment to the Board.[123]

The employee's children filed a wrongful death suit against the employer, claiming that it failed to use reasonable care for the safety of its customers in the maintenance of the convenience store premises.[124] The employer moved for summary judgment based on the exclusive remedy doctrine, arguing that the employee's death arose out of and in the course of his employment, which the State Court of Ware County denied and the court of appeals considered on interlocutory review.[125]

The court held that a genuine issue of material fact existed concerning whether the employee had left work for the day when he went to the store, as contended by the plaintiffs, or whether he intended to return to work, as argued by the employer.[126] Even had he intended to return to work, his trip to the store may have been on a deviation from work constituting a personal errand. The court held that case-law precedent did not mandate a holding that, because the employee's break was unscheduled, he could not have been on a personal pursuit, when the injury occurred off work premises.[127] The court also declined to hold as a matter of law that the employee was subject to the employer's control when he went to the store.[128]

Lastly, the court rejected the employer's argument that the plaintiffs were estopped from arguing the inapplicability of the Workers' Compensation Act after accepting workers' compensation benefits in the form of payment for the funeral services because the payments were made without the knowledge or consent of the plaintiffs.[129] The court held that even if the plaintiffs could be said to have accepted the benefits

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121. *Id.* at 229, 733 S.E.2d at 513 ("The Dixie Express store is associated with Dixie Roadbuilders, [Inc.] but the relationship between the two entities is unclear from the evidence.").

122. O.C.G.A. § 34-9-265(f) (2008) (requiring employers or insurers to pay one-half of all benefits due or $10,000, whichever is less, to the Board in the case of a compensable death claim where there are no eligible dependents).

123. *Sallet*, 318 Ga. App. at 230, 733 S.E.2d at 513.

124. *Id.* at 228, 733 S.E.2d at 512.

125. *Id.*

126. *Id.* at 231-32, 733 S.E.2d at 514.

127. *Id.* at 234, 733 S.E.2d at 516.

128. *Id.* at 233, 733 S.E.2d at 515.

129. *Id.* at 235, 733 S.E.2d at 516.

(which they did not know came from the insurer), the acceptance would not be inconsistent with the assertion of a tort claim.[130]

In *Stokes v. Coweta County Board of Education*,[131] the court of appeals also addressed a deviation-from-employment issue.[132] The claimant, a school custodian, was responsible for unlocking the school's parking-lot gate. On the day of her injury, upon unlocking the gate, she turned to see her vehicle rolling away from her, and ran after her car in an attempt to stop it. In so doing, she severely injured her foot, which was subsequently amputated. While the ALJ awarded benefits, the Board concluded that the claimant had deviated from her employment on a personal mission to save her own personal property. The Superior Court of Coweta County affirmed.[133] The court of appeals, however, determined that the Board misapplied the law in determining that there was a deviation from the course of employment when the claimant chased after her car.[134] The court emphasized that the claimant was performing her employment duties when the car began to roll, and that but for her fulfillment of her job requirements, the accident would not have happened.[135] Her actions, therefore, did not constitute a deviation from her employment.[136]

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130. *Id.* at 236, 733 S.E.2d at 517.
131. 313 Ga. App. 505, 722 S.E.2d 118 (2012).
132. *Id.* at 510, 722 S.E.2d at 122.
133. *Id.* at 507, 510, 722 S.E.2d at 120-22.
134. *Id.* at 510, 722 S.E.2d at 122.
135. *Id.* at 510, 722 S.E.2d at 122-23.
136. *Id.* at 510-11, 722 S.E.2d at 123.

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