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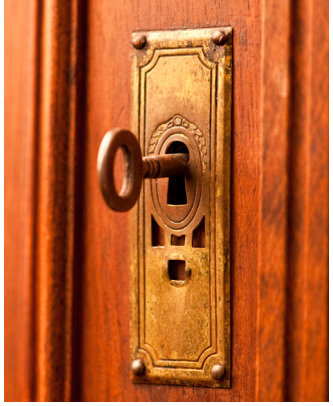

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The Reality of The *Rycroft* Defense

By: Dustin S. Thompson

A questionable injury. A subsequently revealed pre-existing condition. The feeling of being taken advantage of. This pattern happens frequently and leaves employers/insurers wanting vindication, which often leads to the assertion of the *Rycroft* defense. The next step in this pattern, however, can be the failure to properly assert *Rycroft's* meticulous factors and consequently being saddled with the claim. To avoid falling into this trap, it is imperative to understand the essential factors needed to successfully assert the *Rycroft* defense and whether it is suitable for your particular claim.

In *Georgia Electric Co. v. Rycroft*, 259 Ga. 155, 378 S.E.2d 111 (1989), the court used a three-factor test to determine whether a misrepresentation by an employee can be used to bar workers' compensation benefits. To effectively assert this defense, all three elements must be satisfied: (1) the employee knowingly and willfully made a false representation of his physical condition; (2) the employer relied upon the false representation; and (3) there is a causal connection between the false representation and the injury. *Rycroft* at 114.

Employers/insurers can satisfy the first element by showing verbal or written misrepresentation. However, as a practical matter, the odds of satisfying the first element will be much greater with evidence of a written misrepresentation. This type of misrepresentation is most commonly obtained by employers through the use of post-offer questionnaires. In utilizing post-offer questionnaires, employers will want to be careful to comply with the various regulations under the ADA.

To meet the second element, it is vital to have employer witnesses who are willing to testify at the hearing about the claimant's responses and the employer's substantial reliance on them in its hiring or placement decision. This usually requires, at minimum, the individual who hires employees to testify at the hearing. While most employers are able to produce misrepresentations on a post-offer questionnaire and witnesses to verify the same, the *Rycroft* defense most often fails because the third prong is not appropriately met.

The third element has shown to be the most difficult to satisfy since *Rycroft's* inception. It is not enough for employers/insurers to argue a causal connection between the misrepresentation and current injury exists because the claimant would not have been employed, and thus, would not have been injured, if he had not misrepresented his pre-existing condition. The court, in *Capital Atlanta, Inc. v. Carroll*, 213 Ga. App. 214, 44 S.E.2d 592 (1994), reasoned if this kind of causal connection was sufficient, satisfying the second prong of reliance would be tantamount to establishing the third prong of causal connection, which would render it unnecessary. *Id.* at 593-94. Instead, to satisfy the third prong, the court will focus on whether the injury resulting from the work accident was *considerably worse* than it would have been if the pre-existing condition were not present. *Gordon County Farm v. Cope*, 212 Ga. App. 812, 44 S.E.2d 896 (1994). Accordingly, to establish the third prong, it is imperative to obtain medical evidence establishing the claimant's pre-existing condition, and more importantly, opinions from the treating physician or an independent medical examiner, the current injury is considerably worse due to the undisclosed pre-existing condition.

While it is difficult to establish each prong, the *Rycroft* defense can be available to employers/insurers who practice diligence in the hiring process by having employees complete post-offer questionnaires, making knowledgeable representatives available to testify at the hearing, and are able to obtain favorable medical evidence. Without each of these factors, the *Rycroft* defense will leave employers/insurers searching for vindication, so be certain you have the necessary evidence before asserting it.

For more information on this topic, contact Dustin Thompson at 404.888.6214 or at dustin.thompson@swiftcurrie.com. ■

Case Law Update

By: Jeff K. Stinson
(with contributions provided by: Alex Ficker, Marc Sirotkin, Mark Irby and Brad Holcombe)

***Chandler Telecom, LLC v. Burdette* (Supreme Court of Georgia S16G0595).**

As we reported at our annual Workers' Compensation Seminar in October 2016, in *Chandler Telecom, LLC v. Burdette*, the Georgia Court of Appeals examined the definition and scope of the "willful misconduct" defense. Pursuant to O.C.G.A. § 34-9-17(a), an employer/insurer can assert this affirmative defense to bar a claim entirely where the preponderance of the evidence establishes the claimant's misconduct was both "willful" and the proximate cause of the injury. This is one of the few exceptions carved by statute to our otherwise "no fault" workers' compensation system. What made *Burdette* particularly significant to employers/insurers was the misconduct alleged involved violations of the employer's specific rules of safety and conduct.

In *Burdette*, the employer's policies prohibited employee-technicians from descending a cell phone tower by a controlled descent, a technique similar to rappelling. Adrian Burdette, a recently rehired technician was instructed to *climb* down the tower on the day of his accident, per company safety policy. However, Burdette ignored this instruction and chose to perform a controlled descent despite his supervisor's repeated warnings not to do so moments before Burdette descended. He fell and suffered severe injuries. The employer denied the claim by asserting Burdette's actions rose to the level of willful misconduct. The Trial Division agreed, and barred the claim. The Appellate Division affirmed. The Superior Court failed to timely consider the appeal, which affirmed the Award by operation of law. The Georgia Court of Appeals reversed by finding Burdette's actions did not rise to the level of "willful" as that term was defined by the Georgia Supreme Court nearly a century ago. The Court of Appeals found willful misconduct required actions of a "quasi criminal nature" and cited to a prior case in which it found "mere violations of instructions, orders, rules, ordinances and statutes, and the doing of hazardous acts where the danger is obvious, do not, without more, as a matter of law, constitute willful misconduct." *Wilbro v. Mossman*, 207 Ga. App. 387 (427 S.E.2d 857) (1993). Thus, despite the warnings, Burdette's violation of his employer's rules was not willful misconduct.

The Supreme Court granted certiorari to review this decision and has now reversed the Court of Appeals and remanded the case for further factual findings. The Supreme Court found the Court of Appeals misapplied the definition of "willful misconduct" from prior decisions in *Carroll* because willful misconduct is not limited to "criminal or quasi-criminal" actions. Rather, willful misconduct means the intentional doing of something either with the knowledge that it is likely to result in injury or with the wanton and reckless disregard of its probable consequences. Consequently, the *intentional* violation of employer safety rules *can* constitute willful misconduct where the violation was done with the knowledge it is likely to result in injury or with wanton and reckless disregard of its probable consequences. (In a footnote, the Supreme Court emphasized the legislature's previous removal of reference to violations of employer rules and regulations from O.C.G.A. § 34-9-17(a) did not remove such violations from consideration as willful misconduct.) However, as the State Board did not make such a finding regarding Burdette's violation, the case was remanded back to the trial level to allow for this determination. Thus, the outcome of this case remains uncertain.

Although this is a favorable decision for employers and insurers, it is important to remember successfully asserting a "willful misconduct" defense involves a difficult burden of proof. Negligence and even gross negligence on the part of an employee is not enough. The action must rise to the level of being intentional to the extent the employee knows and understands the rule, but violates it anyway despite the likelihood it will result in injury or with reckless disregard of its other probable consequences. To ensure this understanding is established, we recommend conducting regular safety meetings in which workers are repeatedly educated about the rules and regulations related to safety and the consequences of not adhering to them. This will serve to strengthen a potential willful misconduct defense if an employee chooses to intentionally violate such safety rules.

***McDuffie v. Ocmulgee EMC*, 789 S.E.2d 415 (Ga. Ct. App. 2016).**

In *McDuffie*, the claimant's right knee injury was initially accepted as compensable, but the claimant was subsequently terminated when Ocmulgee EMC discovered that he lied about his pre-existing condition and permanent work restrictions during the application process. The employer also suspended indemnity benefits at that time, but then recommenced when additional surgery was recommended. The claimant's benefits were subsequently suspended again when two of the treating doctors opined the claimant had returned to his baseline status, which included sedentary restrictions.

The claimant requested a hearing seeking reinstatement of his benefits. The Board denied his request for benefits and its decision was upheld on appeal to the Appellate Division and the superior court.

The claimant appealed to the Court of Appeals alleging, in part, there was no evidence that Ocmulgee EMC had suitable employment available for him. The court affirmed the decision in part, but, in a troubling decision for employers and insurers, agreed with the claimant's arguments regarding the lack of a job offer, and thus, remanded the case to the State Board for additional findings of fact. The court held Ocmulgee EMC "could

Don't Get Backed Over: Navigating Your Way Through the Parking Lot Exception

By Emily J. Truitt

If an employee slips and falls on spilled water inside the retail store where she is employed, absent some extenuating circumstances, any resulting workers' compensation claim will likely be deemed compensable by the State Board. Would the same outcome occur if the employee instead slipped and fell on some sludge and ice while walking towards or into that same retail store to commence her shift? Answering this question requires some fact-specific analysis. One must first determine how Georgia courts treat and define the concepts of "ingress" and "egress," and from there, analyze the lesser known extension of those concepts, the "parking lot exception."

Generally, an employee is not acting within the course of her employment while traveling to and from work. However, Georgia courts have created what is known as the "ingress and egress rule." The rule promulgates that where an employee is injured "while still on the employer's premises in the act of going to or coming from his or her workplace," she remains within the course of employment, and therefore, is covered by the Workers' Compensation Act in the event of an injury, absent any other defense available to the employer. *Hill v. Omni Hotel at CNN Center*, 268 Ga. App. 144, 147 (2004). The rule is predicated on the rationale that until the employee has departed the premises, she has not started traveling a route of her own choosing, whereby disconnecting from her employment.

To illustrate, in *Peoples v. Emory University*, 206 Ga. App. 213 (1992), the employee, while traveling to work on a bicycle, and after passing one employer-owned building on his way to another building, was injured. The accident site was on a street owned by the employer (Emory) and patrolled by their police, although usually open to travel by the public. The Court of Appeals held that because it was uncontroverted that when injured, the employee was "traveling a path dictated by his job," and the employer "owned the street upon which [the] claimant was injured," the fact the site was "open to public use" was irrelevant, and the claim was deemed compensable.

Consequently, it is well-settled under the law that when an employer owns the premises on which the employee is injured in an ingress/egress situation, a finding of compensability can result, absent extenuating circumstances. However, the "parking lot exception" can effectively permit compensation where an employee is traveling to or from a parking lot owned, controlled or maintained by the employer, and therefore, the actual location and site of the accident does not necessarily need to be on employer-owned property.

In *Longuepee v. Georgia Institute of Technology*, 269 Ga. App. 884 (2004), an employee parked three blocks from her work in an employer-owned and controlled parking lot. While crossing a public street, she was struck by a vehicle. The court of appeals held her accident was within the course of her employment because she was injured while "[heading] directly to work from the parking facility on a route which required her to cross the street." The court deemed it irrelevant she could have taken a different route to work, thereby precluding her need to be on the public street. Long-settled ingress/egress concepts, therefore, were extended to include travel to and from parking lots, even where an employee is injured on a public road over which the employer has no control.

A determination as to compensability in all ingress/egress situations is especially fact-intensive. Begin the analysis by asking the threshold question of: Does the employer own, control or maintain the premises or parking lot on which the injury was sustained? From there, and should the issues become complicated, contact your Swift Currie attorney.

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not suspend McDuffie's workers' compensation benefits based upon a change in condition for the better without showing McDuffie could return to work as a result of that change *and* that EMC offered McDuffie suitable work." They further stated that if the claimant was not offered suitable light duty work, the employer would have to continue paying the claimant income benefits.

This decision is potentially troubling as it appears to create an additional requirement in order to prove a change in condition for the better: that the employer has light duty work available for the employee. This decision is contrary to the well-settled principle that an employer and insurer are only responsible for an employee's condition until such time as the employee returns to their pre-injury baseline and arguably would impose an additional requirement upon employers and insurers in change in condition cases.

This case is currently on appeal to the Georgia Supreme Court.

Wills v. Clay County, 793 S.E.2d 432 (Ga. Ct. App. 2016).

In *Wills*, Bobby Wills won a bid to work on a construction project involving the renovation of a community gymnasium in Clay County, Georgia. The final contract did not require workers' compensation insurance for work on the project.

Wills hired Johnnie Brown and two other men to help complete the project. Wills, Brown and the other two men had an unwritten agreement that if they got hurt on the job they would be responsible for their own medical bills. While working on the project, Brown slipped off of the roof, injuring his leg.

Brown filed claims against Wills and Clay County, alleging the county was his statutory employer. The Board awarded Brown benefits from Wills, but denied his claim against Clay County, finding it was not a statutory employer. The decision was upheld by the Appellate Division and the superior court.

The Court of Appeals affirmed. Wills argued he was not subject to the Act because he did not have at least three employees regularly in service, as required by O.C.G.A. § 34-9-2(a)(2). While he acknowledged he had three employees working on the gymnasium project, he argued that they were not "regularly in service." The court relied on prior precedent and stated there was no requirement that the employer constantly or continuously have three or more employees; the fact Wills was in the practice of hiring additional employees when needed to complete a project rendered him subject to the Act.

Wills also argued the prior decisions were in error as they did not find Clay County to be a statutory employer. The court disagreed finding Clay County was the owner and had no direct control over Wills and his employees. They therefore were not a statutory employer.

There is nothing particularly new about this decision, but it reaffirms the criteria for establishing a statutory employment relationship, and also affirms an employer must not *always* have three or more employees to be subject to the Act.

For more information on this topic, contact Jeff Stinson at 404.888.6207 or at jeff.stinson@swiftcurrie.com.

Events

Webinar: First Party Basic Training — Power in the Policy
April 19, 2017
1:00 - 2:00 pm EST

Webinar: 2017 GA WC Case Law and Legislative Update
May 10, 2017
1:00 - 2:00 pm EST

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