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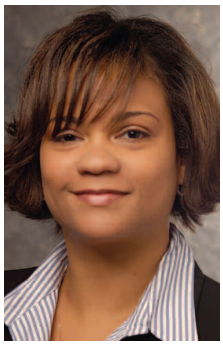

The Ingress/Egress Rule: A Refresher

By K. Martine Nelson

In Georgia, the general rule is that accidents occurring while employees are traveling to and from work do not arise out of and in the course of employment, and thus are not compensable under the Georgia Workers' Compensation Act. O.C.G.A. § 34-9-1. *Tate v. Bruno's, Inc.*, 200 Ga. App. 395, (1991). However, under the "ingress and egress rule," when an employee is injured on the employer's premises, while in the act of going to or coming from his or her work place, the injury may be compensable. The ingress/egress rule is predicated on the rationale that until an employee has departed the employer's premises, he has not started traveling a route of his choosing which is wholly disconnected from his employment.

Under *Peoples v. Emory*, 206 Ga. App. 213 (1992), the ALJ concluded that the period of employment generally includes a reasonable time for ingress to and egress from the place of work while on the employer's premises. For purposes of the ingress/egress rule, an employer's premises is real property owned and maintained or controlled by the employer. In the case of *Harrison v. Winn Dixie*, 247 Ga. App. 6 (2000), the "parking lot" extension of the ingress/egress rule was explained. Specifically, an injury was deemed compensable when the employee was injured going to or from a parking facility owned, controlled or maintained by the employer. It is insufficient if the parking lot or premises on which the employee was injured was regularly used by employees, or even leased by the employer for use by its employees. Rather, the parking facility must be under the employer's control or ownership in order for the parking lot extension of the ingress/egress rule to apply.

In *Hill v. Omni Hotel* 268 Ga. App. 144 (2004), the court denied a claim for benefits where the employee was injured in a mall area approximately 100 to 200 yards from an escalator that provided access to the employer's hotel entrance. In that case, the Georgia Court of Appeals held that the entry used by the employee was just one of multiple entrances to the mall, and the employee was not required to walk through the mall to access the hotel, as the hotel had its own entrance through the motor lobby. The mall area provided access to a number of restaurants, shops and other businesses for both the public and mall employees. The hotel did not own, control or maintain the food court/mall area where the employee fell, and it was therefore not part of the employer's premises. The fact that the employee fell inside a building was not dispositive, as whether the employer owned, controlled or maintained the area of injury determines whether the location was on the employer's premises.

In a subsequent case, *Longuepee v. Georgia Institute of Technology*, 269 Ga. App. 884 (2004), the court barred a personal injury claim filed by an employee who was struck by a company owned vehicle, on a public street, while walking to work from a parking area. The court instead applied the exclusive remedy doctrine and found that the claimant was injured within the course and scope of her employment, as the employer owned and operated the parking facility where the claimant parked, ingress to work from the parking facility was a necessary incident of the employee's employment, and the injury the claimant suffered during the ingress had its origin and a risk associated with the employment. In the *Longuepee* case, the court noted that in order for the parking lot exception to apply, the parking facility need not be directly adjacent to the employee's place of work, nor does it matter that the employee was injured on a public street.

More recently, in March 2005, the Court confirmed the definition of "parking lot owned, controlled, or maintained by the employer," by declining to award benefits to an employee who was injured crossing a street on the way to her job, from a parking lot leased by the employer for use by the employee during a golf tournament. *Collie Concessions v. Bruce*, 272 Ga. App. 578 (2005). In the *Collie* case, a careful review of previous parking lot cases revealed that the employer must

own or lease the parking lot, as well as control or maintain it, in order to support a finding that the injury was compensable. Neither the special purpose of the crosswalk, nor its brief duration, gave ownership and control of the street to the employer, and the claim was therefore denied.

In short, it appears the line of cases following the *Omni* decision have been consistent in identifying where the parking lot exception would apply with regard to the ingress and egress rule under the Act. In dealing with cases involving employees injured while traveling from their vehicles to their place of employment, we must be cognizant of the parking facility in which the employee is regularly allowed to park, who owns, controls and maintains that facility, and whether or not the period of employment generally includes reasonable time for the employee to ingress or egress from the parking facility to work. Accordingly, if an injury occurs on premises owned, controlled and maintained by an employer, it will likely be deemed compensable under the ingress/egress rule.

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Employee vs. Independent Contractor: A Trick or Treat Distinction

By Russell R. Thomson

For an injured worker to recover under the Georgia Workers' Compensation Act, he or she must establish that an employee-employer relationship exists with the defendant in his or her workers' compensation claim. Under the Georgia Workers' Compensation Act, an employee is defined as "every person in the service of another under any contract of hire or apprenticeship, written or implied, except a person whose employment is not in the usual course of the trade, business, occupation, or profession of the employer...." O.C.G.A. § 34-9-1(2). Sometimes, however, what stands between an injured worker and a defendant is not an employee-employer relationship, but rather an independent contractor relationship. Generally, the Georgia Workers' Compensation Act does not allow recovery for injuries suffered by an independent contractor. O.C.G.A. § 34-9-1(2); O.C.G.A. § 34-9-2(d), (e).

The Georgia Workers' Compensation Act identifies six types of individuals who can be statutorily anointed with the status of independent contractor as opposed to an employee. The first five categories of individuals are fairly specific in nature, whereas the sixth category of individuals could most properly be described as a "catch-all" provision. An independent contractor is defined as follows: (1) A person who has a written contract as an independent contractor, and is a buyer and reseller of product; (2) A person who has a written contract as an independent contractor and provides an agricultural service; (3) A person who stands as an "owner-operator" as defined by O.C.G.A. § 40-2-87; (4) A carrier performing services including the transport, assembly, delivery or distribution of printed materials, and maintenance of the facilities and equipment used to perform these tasks for a publisher or distributor of printed materials, if there is a written contract signifying the independent contractor status. This category further requires that payment to the carrier is based on the number of deliveries accomplished, that the publisher exercises no control over the carrier beyond setting the area or route of delivery and that the contract does not prevent the carrier from performing the same services for another publisher or distributor; and (5) Persons with written contracts as an independent contractor, who work as licensed real estate salespersons or associate brokers.

There are no other highly detailed independent contractor relationships laid out within the Georgia Workers' Compensation Act. That does not, however, mean that an individual who does not fall into one of the aforementioned five categories automatically stands as an employee and not an independent contractor. We must turn to what could be most aptly described as the independent contractor catch-all provision, which presents itself under O.C.G.A. § 34-9-2(e). This provision of the Georgia Workers' Compensation Act specifies that an individual or entity shall still stand as an independent contractor if all of the following criteria are met: (1) the individual or entity stands as party to a written or implied contract that intends to create an independent contractor relationship; (2) the individual or entity in question has the right to exercise control

over the time, manner and method of the work to be performed; and (3) the individual or entity in question receives payment via a set price per job or on a per unit basis, not via a salary or hourly method.

In addition to the three factors which are laid out under the catch-all provision in O.C.G.A. § 34-9-2(e), there are a number of other factors which can be helpful in determining whether one is dealing with an employee-employer relationship or an independent contractor relationship. Some of these factors deal with time. Where an injured individual has only labored for a relatively brief period of time, as opposed to an extended period of time, an independent contractor relationship is thought to be more highly indicated. Where the injured individual sets his or her own hours, rather than the alleged employer dictating the hours, the likelihood of an independent contractor relationship is greater. Where the relationship between the injured individual and the alleged employer has a defined beginning and end, the chances of the relationship being an independent contractor relationship are increased.

Some additional factors look to the circumstances of the injured individual. These indicators of an independent contractor can include: work demanding a substantial level of skill; an individual with his or her own set of tools and equipment; an individual with a business separate and distinct from the business of the alleged employer; an individual exercising the right of control over his or her own employees, instead of the alleged employer exercising this right of control; and, an individual is free to work elsewhere and is not exclusively tied to the alleged employer.

Finally, the manner of compensation can be indicative of an independent contractor relationship. For example, if an alleged employer must add pay if he or she wishes to add work, or the alleged employer does not withhold taxes from the payments made to the injured individual, the individual in question may be an independent contractor.

An independent contractor determination is extremely fact sensitive. The factors discussed above merely provide basic guidance, with no one factor holding unassailable influence over the determination. The status of the injured individual is a question of fact to be determined from the particular circumstances of the case at hand. *American Fire & Cas. Co. v. Davidson*, 116 Ga. App. 255 (1967). Where doubt exists as to whether an injured individual is an employee or an independent contractor, the Georgia Court of Appeals has held that the doubt should be resolved in favor of the injured individual. *Fidelity & Cas. Co. of N.Y. v. Wyndham*, 87 Ga. App. 198 (1952), *rev'd on other grounds*, 209 Ga. 592 (1953). The Georgia Workers' Compensation Act further bolsters this position in O.C.G.A. § 34-9-23 which states, "This chapter shall be liberally construed only for the purpose of bringing employers and employees within the provisions of this chapter and to provide protection for both."

Clearly, it is always a good idea to evaluate whether an injured individual qualifies as an independent contractor, as such a status would completely preclude an alleged employer's responsibility for workers' compensation benefits.

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When Claimants Lie: The Rycroft Defense

By M. Kathryn Rogers

Although this may come as a surprise, sometimes claimants lie about their past medical conditions. This can also be referred to as "omitting," "stretching the truth," "conveniently forgetting" or, as the courts prefer, "willfully misrepresenting" certain facts. How is an employer/insurer to protect themselves in such situations? Depending on the circumstances of your case, you may be able to utilize the Rycroft Defense as a bar to workers' compensation benefits.

The Rycroft Defense is the result of a 1989 Georgia Supreme Court ruling in *Georgia Elec. Co. v. Rycroft*, 259 Ga. 155, 378 S.E.2d 111. The claimant applied for a job with Georgia Electric Company and, as part of Georgia Electric's hiring procedure, completed a written application which included questions regarding the prospective employee's medical history, including prior back problems, previous workers' compensation claims, past disability benefits, prior surgeries

or surgical recommendations and any lost time due to illness or injury. Despite undergoing a lumbar fusion as part of a prior workers' compensation claim, the claimant answered "no" to all of these questions and was hired. Predictably, while working at Georgia Electric, the claimant fell, re-fractured his low back and filed a workers' compensation claim. On review, the Georgia Supreme Court determined that steps needed to be taken in order to protect employers from fraud when the employer relies on a "willful misrepresentation" made by the employee regarding his physical condition, and the employee subsequently sustains an injury causally connected to the willful misrepresentation. As a result, the Rycroft Defense was established.

The Rycroft Defense requires the presence of three key elements in order to bar an injured employee's claim for workers' compensation benefits:

1. The employee must have knowingly and willfully made a false representation as to his physical condition;
2. The employer must have relied upon the misrepresentation *and* this reliance must have been a substantial factor in the hiring; and
3. There must have been a causal connection between the false representation and the injury.

In order to meet the first element of the Rycroft Defense, the claimant must be aware of a prior injury or condition, but chooses not to disclose that condition. If the claimant is truly unaware of a pre-existing condition, then Rycroft is not available. The claimant's misrepresentation can be oral or written. However, if you base a Rycroft Defense on pre-hire oral questioning, rather than a written application, a court may determine that the oral questioning was insufficient to establish claimant knowledge and willful nondisclosure. *See Saunders v. Bailey*, 205 Ga. App. 808, 423 S.E.2d 688 (1992). Therefore, a written statement is preferable.

In order to meet the second element of the Rycroft Defense, the employer must have relied upon the claimant's willful misrepresentation *and* the reliance must have been a substantial factor in hiring. For example, where a prospective employee completes an application for a job requiring heavy labor and admits to prior back problems, the employer would likely require a medical examination to confirm the extent of any back issues. If the results confirm a history of ongoing back problems, that person probably would not be hired. However, if that prospective employee denies any prior back problems in his application, the employer may hire the individual for a labor intensive job, assuming the individual is physically capable of performing the work. If the employer can prove that the claimant would not have been hired if the questions regarding his prior medical history had been answered truthfully, the second prong of the Rycroft Defense is met.

In establishing the third element of a Rycroft Defense, the employer/insurer is not required to show that the employee's pre-existing condition *caused* the subsequent on-the-job injury. However, they must show a *causal connection* between the misrepresented condition and the subsequent on-the-job injury. For example, when an employee lies about a prior knee injury and later suffers an on-the job injury to that knee, but the treating physicians agree that the prior knee injury had completely resolved at the time of the accident, there is no causal connection between the misrepresentation and the subsequent injury. Therefore, Rycroft is not available as a valid defense. *See Capital Atlanta v. Carroll*, 213 Ga. App. 214, 444 S.E.2d 502 (1994). Similarly, if an illegal alien presents forged citizenship documents in order to obtain employment and later suffers a work injury, unless the employer/insurer can show that the claimant's illegal status somehow contributed to his work injury, Rycroft will not be available. *See Dynasty Sample v. Beltran*, 227 Ga. App. 90, 479 S.E.2d 773 (1996).

What can an employer/insurer do to help establish a successful Rycroft Defense? Most importantly, do not underestimate the importance of a post-hire medical inquiry. This is most effective in the form of a written questionnaire which is completed, signed and dated by the employee. Also, incorporate a review of these questionnaires into the standard hiring procedure. Not only can reviewing these questionnaires reveal potential issues for further investigation, but by making such a review standard procedure, it also helps establish employer reliance on this document (and the misrepresentations in it) in the hiring of the claimant. Following these steps will help ensure that if a Rycroft situation presents itself, you are able to take advantage of this valuable defense.

For more information on this topic, please contact Kathy Rogers at 404.888.6203, or kathy.rogers@swiftcurrie.com.

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