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THE FIRST REPORT

WORKERS' COMPENSATION INSIGHTS FALL 2019

2019 CASE LAW UPDATE

BY: THEA NANTON-PERSAUD

The past year has produced some important and noteworthy Court of Appeals and Supreme Court decisions. The cases cover a breadth of topics including lunch breaks, ingress/egress, average weekly wage, and continuous employment, among other issues. The following article summarizes a few of the more pertinent cases, as well as their impact at the employment, adjusting, and claim defense levels.

***Frett v. State Farm Employee Workers' Compensation et al.*, 348 Ga. App. 30 (2018) & *Daniel v. Bremen-Bowden Investment Co.*, 824 S.E.2d 698 (2019).**

Perhaps the most significant cases this past year were *Frett v. State Farm and Daniel v. Bremen-Bowdon Investment Co.* This pair of cases created a new bright-line rule regarding whether the ingress/egress exception for compensability applies to scheduled breaks.

> "Supreme Court of Georgia will review *Frett* in 2020.

In *Frett*, the employee worked as an insurance claims associate for State Farm. Each workday, Frett had a mandatory, unpaid 45-minute lunch break. An automated system scheduled staggered lunch breaks to ensure enough associates were available to handle calls. Frett was free to do as she pleased on her break and could leave the office for lunch if she wished. Frett was not expected nor asked to perform work for her employer during her lunch break.

On the date of the incident, Frett logged-out of the phone system at her assigned time and walked to the breakroom where she microwaved her food. As Frett started to exit the breakroom to take her lunch outside the building, she slipped on water and fell. It was undisputed Frett was still inside the breakroom when she fell. A manager assisted Frett to her feet and instructed her to complete an incident report. Frett then took her lunch outside to eat on a bench, as planned, but was in pain and left work early.

The administrative law judge (ALJ) awarded Frett temporary total disability (TTD) benefits and medical treatment arising from her fall, applying the ingress/egress exception and holding she was egressing to her lunch break at the time the injury occurred.

The Appellate Division of the State Board reversed the ALJ's award, concluding Frett's injury did not arise out of her employment because it occurred while she was on a "regularly scheduled break." According to the Full Board, the fact Frett was in the process of leaving and still on State Farm's premises at the time of the injury did not change the outcome, as Frett was leaving to attend to "a purely personal matter."

The Superior Court affirmed the Appellate Division and held the claimant's injury did not arise out of her employment because it occurred while she was on a "regularly scheduled break."

The Court of Appeals then held the extension of the ingress/egress rule to cover situations in which the employee is injured while leaving for or returning to work from a regularly scheduled break was improper. Frett's claim therefore was denied, but the Court of Appeals noted these issues were ripe for Supreme Court review, as that Court had not again analyzed the "scheduled break rule" following the creation of the ingress/egress exception. Accordingly, the Supreme Court has now accepted the Frett case for review and oral arguments are expected to heard in February 2020. It is likely the *Bremen-Bowdon* case (below) will follow similar suit.

***Daniel v. Bremen-Bowdon Investment Co.*, 824 S.E.2d 698 (2019).**

This case represented the first application of the newly created bright-line rule established by *Frett*. Daniel

was employed as a seamstress at Bremen-Bowdon Investment Co. Each day, she parked her vehicle in a lot owned by the employer, but in order to get to and from the lot she was required to walk down a public sidewalk and across a street. On July 22, 2016, Daniel left her work station to begin her regularly scheduled lunch break and planned to drive home. She was permitted to leave the workplace and engage in whatever activities she wished during this break. As she walked to her car, Daniel tripped on the sidewalk and sustained an injury.

In reviewing the case, the Court of Appeals applied the holding in *Frett*, and concluded because Daniel's injury occurred while she was egressing from the Employer's property during a regularly scheduled lunch break, her injury was not compensable.

It is likely the *Bremen-Bowden* case will also be reviewed at the Supreme Court level. Regardless, in their current form, these two cases again seem to establish and solidify a new bright-line rule; namely, that the ingress/egress exception for compensability does not apply to injuries sustained while leaving for or returning to work from a regularly scheduled break.

***Ware County Board of Education et al. v. Taft*, A19A0617 (June 24, 2019).**

This case involved the calculation of the average weekly wage (AWW) where the claimant worked and earned all of his salary over only a portion of the year (220 days) however, he pro-rated his pay to be spread and received across the entire year so he would continue to receive equal weekly pay installments during periods when he was not actively working.

Taft worked as a custodian for the Board of Education. On June 15, 2016, he slipped on a waxed floor and injured his right shoulder. He began receiving total temporary disability (TTD) benefits in the amount of $207.61 per week, based on an AWW of $311.39. This calculation was derived from his pro-rated, equal pay amounts received on a weekly basis. Taft contended this calculation was incorrect, since in the 13-weeks preceding his accident, he was actually working and earning higher pay than was actually paid to him on the above pro-rata basis. Under his calculations, and by referencing the actual hours worked and pay earned in the weeks preceding his accident, he argued he would be entitled to a higher AWW.

The administrative law judge (ALJ) held the calculation of the AWW, using the pro-rated, equal amounts of pay received was appropriate, and as such, the claimant was not entitled to an increased AWW. The Appellate Division reversed, holding the actual amounts of pay earned in the 13-weeks preceding Taft's accident (which included some portions of pay that otherwise were withheld, deferred and ultimately received by Taft at later dates on a pro-rata basis), should be utilized in calculating the AWW. The Superior Court affirmed the Appellate Division and ultimately the Court of Appeals likewise affirmed. It held the AWW calculation should consider Taft's actual earnings during the 13-weeks preceding his accident, regardless of the fact all of that income, under his pro-rated pay structure, was not actually paid and received by him during that period of time. Accordingly, it held Taft was entitled to a higher AWW under the circumstances.

Again, these are just a few of the impactful holdings issued by the Court of Appeals in the past year. For a full summary of the cases, or to discuss further the implications of those summarized above, please contact a Swift Currie attorney.

AN EMPLOYEE OR NOT AN EMPLOYEE: THAT IS THE QUESTION

BY: DUSTIN THOMPSON

The following scenario may sound familiar. A work accident has occurred but the injured worker is characterized as an "independent contractor" rather than an "employee." From this characterization, the claim is controverted based on no employee/employer relationship. However, after further investigation and discovery, the facts indicate the injured worker may in fact be viewed under the Workers' Compensation Act as an employee, rather than an independent contractor. Presumably, the employer has since lost control of the medical treatment and the claim's value has significantly increased, based upon the original claim denial. Consequently, it is imperative to make the correct distinction between an independent contractor and employee.

The Act defines an employee as any 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." The character of the work being done, *not* the contract of employment, is determinative of this question.

Georgia case law further provides that a person shall qualify as an independent contractor and *not* an employee if that person meets the following criteria:

(1) is a party to a contract, written or implied, which intends to create an independent contractor relationship;

(2) has the right to exercise control over the time, manner, and method of the work to be performed; **and**

(3) is paid on a set price per job or per unit basis, rather than on a salary or hourly basis.

Whether an injured worker meets each of these criteria is a question of fact to be determined by the ALJ on a case-by-case basis. When investigating whether an actual independent contractor relationship exists, first ask whether there is a contract defining the worker as an independent contractor, or at minimum, whether there is evidence of conversations between the employer and worker indicating as much. A written contract will be persuasive to the Court, but not dispositive. Although a written contract may initially establish a worker as an independent contractor, the relationship may morph into employment status over time. This first factor is rather self-explanatory, but the second factor is the most litigated element of the independent contractor test.

Georgia courts have found the cardinal rule to be applied in determining whether a relationship is employment or independent contractor is whether the employer has the right to control and direct *the time, manner, and means of executing the work*, as distinguished from the right to require certain definite results. The control test is not based upon whether the employer did in fact control and direct the individual in work, but whether the employer had the right to do so from its relationship with the individual.

The right to control the time of the work means the right to control the hours of the work. The right to control the method and manner of the work means the right to instruct an individual in every detail as to exactly how he is to go about performing the work to be done. Courts have historically looked to several factors to determine who controlled the manner and method of the work. These factors include who furnishes the tools and equipment for the work to be performed, whether the individual has a right of control over his own employees, whether the business of the individual is separate and distinct from the employer's business and whether the individual is free to work for other individuals rather than having to work exclusively for the employer.

Finally, to be considered an independent contractor, the worker must have been paid on a set price per job or a per unit basis, rather than a salary or hourly basis.

Considering these factors, ask the following questions when investigating the compensability of an accident where a worker is alleged to be an independent contractor:

(1) Is there a written contract indicating the individual is an independent contractor? If not, is there evidence of discussions between the parties about the worker being an independent contractor?

(2) Who controlled the hours the individual worked? Did he have the ability to set his own schedule? Did he have to request permission to take breaks or miss work? Was the individual free to work for other individuals?

(3) Who instructed the individual about the work to perform? Were these instructions related to the details of the project or only the desired finished product?

(4) Who provided the tools and equipment used by the individual to perform the work?

(5) Did the individual have an ability to hire his own employees?

(6) How was the individual paid?

> "Independent contractor status is determined on a case-by-case basis.

Although the answers to these questions are not all-encompassing nor absolutely determinative of whether an independent contractor or employee relationship exists, they should provide a basis for making a compensability decision at the outset of a claim and allow employers to avoid the pitfalls of a misclassified "independent contractor." Swift Currie attorneys are available and happy to help you assess a worker's status in the context of workers' compensation claims, as well as unemployment and wage and hour suits.

THE NOT-SO-HAPPY HOUR: WHEN DOES AN INJURY DURING A WORK SOCIAL EVENT LEAD TO A COMPENSABLE CLAIM?

BY: MARK IRBY

It is a Friday afternoon before a long holiday weekend. Fred from Accounting has had a long day crunching numbers. Fred worked through lunch and all he could think about was the leftover ziti at home. After all, pasta is always better the second day for some reason. He also cannot stop thinking about the new Star Wars movie that is premiering later that evening. He plans to heat up his delicious ziti before heading to the movie where he will then order a large popcorn and pour M&Ms in the bucket for extra flavor. Sounds like the perfect night for Fred. That is when this story takes a hard turn.

About five minutes before Fred turns off his computer for the day, Boss Bob shows up at his desk. Bob tells him he should "strongly" consider attending a charity bowling event the company is hosting that evening. Bob tells Fred if he does not go to the event, they may lose an important client that will be in attendance. Fred is flustered and takes a moment to think of a possible excuse. Yet, ultimately, Fred does not want to disappoint his boss. He is also worried Bob may factor this into the decision of whether to promote him to Head of Accounting, a position that will become vacant next Spring when Susie Q retires.

> "Did the employer derive a substantial benefit from the activity?

Fred reluctantly agrees to attend the bowling event. They meet the client at the event and Fred is really in the "zone" with his bowling. He is rolling strikes (while still thinking about the fate of Chewbacca and Han Solo), and really connecting with the client. His confidence is starting to blossom when he decides to try a new bowling ball. As he steps to the line, Fred turns to Bob and the client and exclaims, "I am the king of the world!" One second later, the ball slips out of his hand jarring his shoulder and landing on his foot. It did not help that he had a hot dog with all the fixings in the other hand. Condiments were splattered all over the bowling lane and his clothes. It was a new low for poor Fred.

Fred's shoulder was in excruciating pain, and he could not put any weight on his foot. The panel physician diagnosed him with a torn rotator cuff requiring surgery and a broken left foot. Bob does not want to pay for this treatment. He thinks Fred should have to foot the bill under his group health insurance because he was bowling and having a good time. Yet, the Georgia courts may have other ideas.

The general rule for compensability of injuries occurring during company social events was most recently set forth in *Pizza Hut of America v. Hood*, 198 Ga. App. 112 (1990). The factors Georgia courts consider to determine if an injury arose out of and in the course of the employment are: 1) whether the injury occurred on the employer's premises during a lunch or recreation period as a regular incident of employment; 2) whether employee participation was expressly or implicitly required by the employer; or 3) whether the employer derived a substantial benefit from the activity beyond mere improvement in employee health or morale.

In the *Pizza Hut* case, Pizza Hut was sponsoring a picnic for its employees and their families when an employee drowned in a lake during the picnic. Pizza Hut argued for the Workers' Compensation Act to apply as the exclusive remedy for the employee's family to avoid being sued outside of the Act. Specifically, Pizza Hut argued the picnic was more than a morale and health booster for employees, but also had the purpose of promoting their new traditional hand-tossed pizza and recruiting and maintaining employees. The court found no evidence in the record that Pizza Hut made any effort to promote a new product at the picnic and found the only possible benefit was to improve employee health and morale. Ultimately, the court held there was no evidence in the record that Pizza Hut made any effort at the picnic to promote a new product and the only possible benefit Pizza Hut derived was improvement in employee morale and health. Thus, the court found the death did not fall under the Act.

As for poor old Fred, Boss Bob would point to the fact the event occurred outside the work premises and after work hours. Yet, that may be all Bob has going for him. Fred felt he was required to go

as the threat of losing the client loomed over his head. Moreover, Fred believed he would be passed over for a promotion opportunity if he chose to go to the new Star Wars flick instead. The employer also sponsored the bowling event and paid for the entire occasion. Of course, Fred's employer certainly derived a direct benefit from his attendance since it likely helped retain the client's business. Thus, this accident has all the makings of a compensable claim, much to Boss Bob's chagrin.

So, how could Bob have handled this situation differently to change the outcome? First, he could have simply never pressured Fred to attend the event. It could have merely been advertised around the office as an event open to employees. Boss Bob telling Fred they may lose the client also brought in elements #2 and #3 from the *Pizza Hut* case by implicitly requiring his attendance and also giving the employer a derived benefit from his attendance. As soon as Boss Bob approached Fred at his desk and mentioned losing the client, he not only deprived Fred of his perfect Star Wars evening, he also brought the potential for a compensable work injury into play. A true sliding doors moment for Fred and Boss Bob, and something to think about when employers are planning a company social event and trying to increase employee attendance.

EVENTS

Webinar: Petition for Medical Treatment -- A Complete Overview of the Process, Utility and Best Practices for Avoiding Pitfalls
Dec. 10, 2019
1-2 p.m. ET

Webinar: From Demand to Resolution — An Overview of Evaluating Third-Party Claims and Coverage Issues
Dec. 11, 2019
1-2 p.m. ET

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