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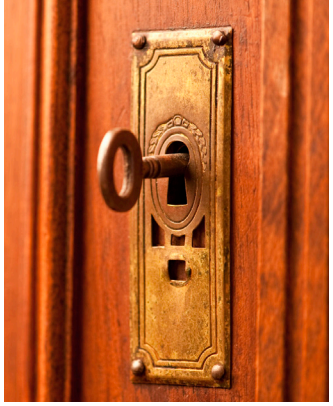

The 1st Report
A Workers' Compensation Update
Spring 2018
Timeless Values. Progressive Solutions.

Exceptions to the Alabama WC Act's Exclusivity Provisions

By: Carl (Trey) Dowdey, III

The Alabama Workers' Compensation Act (the Act) provides employees the exclusive remedy for work-related injuries. In turn, these exclusivity provisions generally shield employers from employee tort or other causes of action. However, there are some recognized exceptions to these exclusivity provisions that can expose employers (or co-employees) to significant liability. Recognizing and avoiding such exceptions should be an integral part of any employer's operational analysis, risk assessment, and strategy to minimize legal exposure.

These general workers' compensation exclusivity provisions are codified as follows.

> Ala. Code §25-5-52 provides:
> [e]xcept as provided…, no employee…nor the personal representative, surviving spouse…shall have a right to any other method, form, or amount of compensation or damages for an injury or death…by an accident or occupational disease proximately resulting from…his or her employment.
>
> Ala. Code §25-5-53 also states:
> [t]he rights and remedies… shall exclude all other rights and remedies…, at common law, by statute, or otherwise on account of injury, loss of services, or death…[and] [e]xcept as provided…, no employer shall be held civilly liable for personal injury to or death of the employer's employee…whose injury or death is due to …[a work-related] accident or… occupational disease.

While employers (including "general" and "special employers") are generally protected by these exclusivity provisions, Alabama has recognized several exceptions which can snare unwary employers.

The first exception is the Dual Capacity Doctrine, where an employer "may become liable in tort to his…employee if he occupies, in addition to his capacity as an employer, a second capacity that confers on him obligations independent of those imposed on him as employer." A. Larson, The Law of Workers' Compensation § 72.80. Alabama recognized the Dual Capacity Doctrine in *Therrell v. Scott Paper Co.*, 428 So.2d 33, 34-37 (Ala. 1983). This doctrine typically involves employers who design, build, maintain and/or repair equipment that injures their employee.

A second exception to the Act's exclusivity provisions involves retaliatory discharge. Specifically, Ala. Code §25-5-11.1 states:

> [N]o employee shall be terminated…solely because the employee…instituted or maintained any action against the employer to recover workers' compensation benefits….

In short, an employer may not terminate an employee who has made a workers' compensation claim without a legitimate business reason. Otherwise, an employer may face lost wage damages, mental anguish and punitive damages. (In 2017, a Montgomery County jury awarded a *$1,900,000.00 retaliatory discharge verdict*).

As part of a third category of exceptions for intentional conduct, Alabama courts have also held that intentional, fraudulent or deceitful acts by the employer can remove an employer's exclusivity shield protections, exposing the employer to tort liability (clear and convincing evidence required). *Lowman v. Piedmont Executive Shirt Mfg. Co.*, 547 So.2d 90 (Ala. 1989). *See also Busby v. Truswal Sys. Corp.*, 551 So. 2d. 322 (Ala. 1989) (sexual harassment not within exclusivity protections). Likewise, Alabama courts have recognized the tort of outrage as to an insurance company's intentional actions that are "so severe that they rise to the level of outrage." *American Road Service v. Inmon*, 394 So.2d 361 (Ala. 1981). The tort of outrage requires proof of intentional infliction of emotional distress or that emotional distress would likely result from the actor's conduct, and that the conduct was extreme and outrageous, causing severe distress. *Moore v. Spiller Furn.*, 598 So.2d 835, 836 (Ala. 1992). In *Continental Casualty Insurance Co. v. McDonald*, 567 So.2d 1208 (Ala. 1990), the Alabama Supreme Court declined to reverse a *$750,000.00*

jury award, where an injured employee established that the insurance carrier intentionally delayed payment on medical bills and prescriptions to force a lower settlement.

The fourth type of exception to Alabama's exclusivity provisions involves co-employee claims. While co-employees are generally immune from negligence under Alabama's exclusivity provisions, an injured employee can maintain a cause of action against a co-employee for willful or intentional acts. *Williams v. Price*, 564 So.2d 408 (Ala. 1990).

Alabama courts have also held that the exclusivity provisions do not preclude a fifth category of claims: a minor's tort claims for injuries sustained while in utero, during the mother's employment (as the minor is a non-employee). *Namislo v. Akzo Chems*., 620 So.2d 573 (Ala. 1993).

Recently, there have also been several unsuccessful attempts to circumvent Alabama's exclusivity provisions via breach of contract theories. In *Austin v. Providence Hosp.*, 155 So.3d 1028 (Ala.Civ.App. 2014), an injured employee reached terms to settle her medical benefits, contingent on Medicare's (*and the trial court's*) approval of a Medicare Set-Aside. Medicare approved, but before the trial court's approval, the employee died and the case was dismissed. The plaintiff's counsel appealed, arguing that the settlement was an enforceable contract. The Court of Civil Appeals ultimately declined to address this argument, given that this position was not briefed. (Notably, had the trial court already approved the settlement *before* the employee's death, it is unclear if this breach of contract argument would have prevailed). Likewise, with a similar breach of contract argument by a deceased employee's estate, the Court of Civil Appeals rejected same, as that workers' compensation settlement had also not been approved before the employee's death. *Tate. Liberty Mut. Ins. Co.*, 185 So.3d 468 (Ala.Civ.App. 2015).

Similarly, employers, insurance carriers and adjusters should be aware of recent efforts to avoid state workers' compensation laws via federal law with The Racketeer Influenced and Corrupt Organization Act (RICO). In *Brown v. Cassens Transp. Co.*, 675 F.3d 946 (6th Cir. 2012), the Sixth Circuit held that Michigan's workers' compensation remedy was not exclusive with regard to RICO violations alleged (a "pattern of racketeering activity" to procure fraudulent medical opinions and deny workers' compensation benefits, with benefits being deemed "property" under RICO). *Brown*, however, was overruled a year later by *Jackson v. Sedgwick Claims Management Services, Inc.*, 731 F.3d 556 (6th Cir. 2013) (en banc). In *Jackson*, the Sixth Circuit held that alleged racketeering activity leading to loss or diminution of benefits an employee expects to receive under the workers' compensation scheme did not constitute injury to "business or property" under RICO. 731 F.3d at 562-63.

In closing, employees' counsel are well versed with these five categories of recognized exceptions in Alabama and will seek to avoid the Act's exclusivity provisions to instead recover tort damages. No doubt, employees' counsel will continue to push the envelope to create new, judicially-recognized categories if possible. As such, employers should be on guard and equally aware of these exceptions and tactics to create new classes of exceptions, utilizing a risk assessment strategy and plan to proactively avoid exposure outside of the Act's exclusivity protections.

For more information on this topic, contact Trey Dowdey at 205.314.2409 or at trey.dowdey@swiftcurrie.com.

Pick Your Battles: Deciding When to Deny a Fight Case

By: Emily J. Truitt

Common sense suggests if you punch a coworker while on-the-job, the medical bills resulting from your broken wrist should not be covered under workers' compensation. Even though Georgia's workers' compensation system is characterized as a no-fault system, there exist scenarios where "fault" matters.

In cases involving a physical altercation or fight among co-workers, two inquiries can help determine if fault will bar a claimant's right to benefits. First, why did the fight transpire (was it the result of purely personal issues, or connected to the employment situation), and second, who would be considered the aggressor of said fight?

Under Georgia's workers' compensation system, even if an employee is able to satisfy his burden in proving an accident and injury occured, the employer is still entitled to raise what is known as an "affirmative defense." Under such scenario, the claim is not necessarily being defended on the grounds the accident did not occur as alleged, but instead, that the accident should not be deemed compensable. In Georgia, one such affirmative defense is known as the "willful misconduct defense." The legislature codifies this particular defense under O.C.G.A. § 34-9-17(a), which reads:

> No compensation shall be owed for an injury or death due to the employee's willful misconduct, including [an] intentionally self-inflicted injury, or growing out of his or her attempt to injure another, or for the willful failure or refusal to use a safety appliance or perform a duty required by statute.

Condensed in O.C.G.A. § 34-9-17(a) are various subsections to the willful misconduct defense, but for the purposes of this article, we address the narrower language referencing injuries "growing out [an employee's] attempt to injure another," or what the lay person may refer to as the "fight defense." It is this Code section where the legislature describes in "legalese" the common sense notion referenced above.

Where a fight between co-workers arises from a purely personal or non-work-related issue, any resulting injuries will not be deemed compensable. In *Atlanta v. Shaw*, 179 Ga. App. 148 (1986), Shaw engaged in a fight with a co-worker, and the question addressed by the Court was not whether Shaw started the fight, but whether the fight was the result of issues entirely personal in nature. The Court held, "although the evidence [was] conflicting as to whether it was [Shaw] or her co-worker who initiated the physical fight, it is uncontroverted that the verbal disagreement between the two which led to the fight concerned their use of [Shaw's] telephone for their respective personal calls." Thus, it was immaterial to determine who started the fight, as both employees were fighting due to an entirely personal reason.

The compensability analysis will also involve a determination as to who is identified as the aggressor. While the case of *Am. Fire & Cas. Co. v. Gay*, 104 Ga. App. 840 (1961), actually involved what was described as a "horseplay" incident, the undisputed evidence depicted the claimant (Gay) as the "aggressor," information which the Court deemed to be critical to their analysis. It therefore re-affirmed an "aggressor's" claim would not be compensable, and ruled in favor of the employer.

Given the fact "fight cases" are inherently fact sensitive, the most prudent course of action will be to interview and obtain written statements from those involved, as well as from all witnesses, in an effort to gather information critical to the compensability analysis. If the fight or physical altercation seemingly has no connection to the employment scenario, or the individual claiming injury can be identified as the aggressor, an employer will have strong grounds upon which to base a claim denial. And, if the compensability analysis still remains unclear, your Swift Currie attorneys will be ready and willing to advise on these matters and assist you in making a decision whether to accept or deny the case.

For more information on this topic, contact Emily Truitt at 404.888.6220 or at emily.truitt@swiftcurrie.com.

Case Law Update

By Joanna L. Hair
(with contributions by Marion H. Martin and C. Blake Staten)

The past year has produced some important and noteworthy Court of Appeals and Supreme Court decisions. The cases cover a breadth of topics including the willful misconduct defense, change in condition issues and related burdens placed upon employers/insurers, continuous employment and traveling employees, among other issues. The following article summarizes some of the more pertinent cases, as well as their impact at the employment, claims adjusting and defense levels.

***The Avrett Plumbing Co. v. Castillo*, 798 S.E.2d 268 (Ga. Ct. App. 2017); *Kendrick v. SRA Track, Inc.*, 801 S.E.2d 911 (Ga. Ct. App. 2017).**

In 2017, two Court of Appeals decisions — *The Avrett Plumbing Company v. Castillo* and *Kendrick v. SRA Track, Inc.* — narrowed and re-affirmed the scope of Georgia's doctrine of continuous employment.

In *Castillo*, the employee worked for an Augusta-based company. Because he did not live in Augusta, the employer provided him with a hotel room to stay in during the work week. Although Castillo did not work weekends, the employer allowed him to stay in the hotel room on weekends. On a Sunday in Augusta, while on a personal errand, Castillo broke his ankle.

The ALJ held Castillo was a continuous employee and entitled to benefits, because he "was required by his employment to live away from home while working." The Appellate Division reversed. The Superior Court reversed the Appellate Division, finding the claimant "decided to be present in Augusta on Sunday afternoon to prepare for work on Monday."

The Court of Appeals held Castillo was not entitled to workers' compensation benefits. The Court held since there was some evidence to support the Appellate Division's findings that Castillo was not present in Augusta at the time of his injury for an employment-related reason, the Superior Court should have affirmed the Board's denial of the claim.

Similarly, in *Kendrick*, the employee lived in Georgia, but repaired railroad tracks around the Southeast. He was scheduled to begin work on a Monday morning in Alabama. The Sunday before he was to report for work, Kendrick drove his motorcycle from his home in Georgia to a motel near the job site, where he planned to spend the night. On the way, he was injured in a motorcycle accident.

Kendrick's claim was denied by the ALJ and the Appellate Division, on the basis the accident did not arise out of and in the course of his employment, and he was not a continuous employee at the time of the injury. The Superior Court affirmed.

The Court of Appeals first held the employee's injury did not arise out of and in the course of his employment because

he had not yet engaged in his employment at the time of the accident. It cited to the general rule that injuries while travelling to and from work are not compensable. The Court then rejected Kendrick's argument that his injuries were covered by the continuous employment doctrine. It noted, although he was required to lodge and work in Alabama during the work week, and would be covered as a continuous employee once the work week had begun, he had returned to Georgia for the weekend and was neither back in the general proximity of the employment, nor injured during a time he was employed. (Note: The appeal also considered whether O.C.G.A. §34-9-221(h) defines "compensation" as to include medical benefits. Swift Currie attorneys submitted an amicus curiae brief arguing the section does not, and the Court of Appeals agreed, declining to bar an employer's controvert under O.C.G.A. § 34-9-221 where only medical benefits had been paid.)

Castillo and *Kendrick* emphasize the importance of decreasing the likelihood of an employee coming into continuous employment: do not allow an employee to remain over the weekend; do not reimburse mileage for travel to and from the job site, or have employees on the clock for such trips; and set out clear policies for what the job entails and does not entail.

Ocmulgee EMC v. McDuffie, 806 S.E.2d 546 (Ga. 2017).

As noted in Swift Currie's 2017 Case Law Update, *McDuffie v. Ocmulgee EMC* appeared to represent a drastic (and concerning) departure from settled case law. 789 S.E.2d 415 (Ga. Ct. App. 2016). The claimant's injury was initially accepted as compensable, but the claimant was terminated when the employer learned he had previously lied about a preexisting condition and permanent work restrictions. His benefits were suspended but then recommenced when he underwent surgery. The employer/insurer suspended TTD benefits after the claimant's ATP opined the claimant had returned to baseline. McDuffie requested a hearing seeking reinstatement of his benefits. The ALJ and Appellate Division denied his claim. The Superior Court affirmed.

The Court of Appeals affirmed the Board on the issue of whether McDuffie had returned to his baseline condition. However, the Court went on to hold the ALJ should have made a finding about whether the employer/insurer met their burden of proving suitable work was available to McDuffie. The Court of Appeals vacated part of the judgment and remanded the case to the Board for further findings on the availability of suitable employment.

Fortunately, since our last update, the Supreme Court reversed the Court of Appeals' decision. The Court held an employer did not have to show the availability of suitable employment to justify suspension of workers' compensation benefits once the employee has been returned to baseline. The Supreme Court reinstated previous case law that an employer need only show an employee has returned to baseline to suspend benefits in an aggravation of a preexisting condition case.

Premiere Elevator Co., Inc./SOI et al. v. Edwards, 799 S.E.2d 588 (Ga. Ct. App. 2017).

In *Premiere Elevator Co., Inc./SOI et al. v. Edwards*, the employer/insurer filed a motion to dismiss. The ALJ denied the employer/insurer's motion via interlocutory order. The employer/insurer appealed to the Appellate Division, which affirmed the denial of the motion to dismiss. The Superior Court affirmed.

The Court of Appeals cited to O.C.G.A. § 34-9-105(b), regarding appeals to the superior court, noting the statute prescribes only a final decision of the board is subject to appeal to the superior court. Moreover, the Workers' Compensation Act makes no provision for an appeal to Superior Court from a decision by the Appellate Division other than a decision granting or denying compensation. Consequently, there was no right to appeal at this time, and the Superior Court lacked jurisdiction to make a decision. The judgment was vacated and the case remanded to the Board.

For more information on this topic, contact Joanna Hair at 404.888.6243 or at joanna.hair@swiftcurrie.com.

Events

4th Annual Women's Event
"Rising Strong: Facing Workplace Challenges with Resilience and Integrity"
April 18, 2018
7:45 - 10:25 am
Davio's Northern Italian Steakhouse
Approved for 2 ethics hours of CE Credit

Workers' Compensation Luncheon
"Free Advice: The Doctors Are In"
May 16, 2018
Maggiano's Cumberland
Pending approval for 2 general hours of CE Credit

Many Swift Currie programs offer CE hours for insurance adjusters. To confirm the number of hours offered, for more information on these programs or to RSVP, visit www.swiftcurrie.com/events.

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The First Report is edited by Mark Webb, Crystal Stevens McElrath and Blake Staten. If you have any comments or suggestions for our next newsletter, email mark.webb@swiftcurrie.com, crystal.mcelrath@swiftcurrie.com or blake.staten@swiftcurrie.com.