

## **OVERVIEW OF RECENT TRENDS IN GEORGIA WORKERS COMPENSATION LAW**

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Since the last publication of this newsletter, there has been a great deal of activity in the Supreme Court and Court of Appeals in the workers' compensation area. Cases have dealt with constitutional issues, subrogation issues, exclusive remedy issues, jurisdictional issues, and other areas.

Code Section 34-9-17(b) provides that if an injured employee is found to have marijuana or a controlled substance in his or her body within eight hours of an accident, there is a rebuttable presumption that the use of the marijuana or controlled substance caused the accident. There is an exception for use of a controlled substance pursuant to a lawful prescription when the substance is taken in accordance with the prescription. In Kendricks v. Hollingsworth Concrete Products, 274 Ga. 210 (2001), the distinction between legal and illegal use of a controlled substance was challenged as a violation of the equal protection clause of the state and federal constitutions. This challenge was rejected. The supreme court stated that the distinction in code section 34-9-17(b) did not involve a suspect classification. For that reason, the issue was whether there was a rational basis for the distinction and whether the classification furthered a legitimate governmental interest. The court pointed out that if a controlled substance is taken pursuant to a lawful prescription, the physician gives advice with respect to taking the prescription and controls the dosage and duration of the use of the substance. Furthermore, there are regulations controlling the activities of the pharmacist dispensing the substance. Therefore, there is a rational basis for the distinction between legal and

illegal use of a controlled substance. Further, there is a legitimate governmental interest in promoting workplace safety and productivity which is advanced by providing adverse consequences for illegal (but not legal) use of controlled substances. Also, because the presumption applicable to illegal drug use is rebuttable, as opposed to conclusive, the distinction between the consequences of legal and illegal drug use does not violate equal protection.

There have been four cases in the subrogation area the first of these is Hammond v. Lee, 244 Ga. App. 865 (2000). In that case, the employee was injured in a compensable automobile accident and filed a third-party action against the driver of the other vehicle. Travelers Insurance Company, the employer's workers' compensation insurer, intervened in the third-party action and filed a subrogation lien. After the jury returned a special verdict setting forth specific amounts of damages for past medical expenses, past lost wages, and pain and suffering, the trial court entered judgement allowing a subrogation lien to be applied to all categories of damages. After the employee filed a motion for a new trial, the trial court removed the subrogation lien from the damages awarded for pain and suffering because the workers' compensation law does not provide any remedy for this category of damages. The lien remained applicable to past medical expenses and past lost wages. The court of appeals affirmed in part and reversed in part. The court of appeals pointed out that the evidence which Travelers presented indicated that Travelers had paid more in medical expenses in the workers' compensation claim than the jury awarded in the third-party action. For that reason, the employee had been fully and completely compensated for this category

of damages, and a subrogation lien was properly applied to this category. The court of appeals also pointed out that the evidence demonstrated as a matter of law that the combination of workers' compensation benefits paid and damages awarded for past lost wages did not equal the actual amount of wage loss. For that reason, the employee had not been fully and completely compensated for this category of damages, and a subrogation lien should not have been applied to this category.

The next subrogation case was Anthem Casualty Insurance Company v. Murray, 246 Ga. App. 778 (2000). In that case, as in Hammond v. Lee, supra, the employee was injured in a compensable automobile accident and filed a third-party action against the driver of the other vehicle. In this case, the jury returned a general verdict in favor of Murray, and did not breakdown the amount of damages awarded for various categories. There was then a second trial on the subrogation lien at which the issue was whether the employee had been fully and completely compensated for all economic and non-economic losses. The employee demonstrated that it is sometimes dangerous to be accessibly agreeable by stipulating that he had been fully and completely compensated for all damages. Despite the stipulation, the trial court entered a summary judgement dismissing the subrogation lien. The court of appeals reversed. The court of appeals pointed out that it is exceedingly difficult, if not impossible, to determine whether a plaintiff has been fully and completely compensated for any category of damages if a jury returns a general verdict. In this case, however, the employee's stipulation that he had been fully and completely compensated created a genuine issue of material fact. That stipulation constituted some evidence which would authorize although it did not

demand, the findings that the employee had been fully and completely compensated so that a subrogation lien could be applied to his recovery of damages in his third-party action.

The third subrogation case involved apportionment of attorney's fees. The case of Simpson v. Southwire Company, 249 Ga. App. 406 (2001), involves yet another compensable motor vehicle accident. The employee collected workers' compensation benefits from Southwire, his employer, and filed a third-party action. Southwire intervened to prosecute a subrogation lien. Southwire hired independent counsel to pursue the subrogation lien. The third-party action was settled immediately prior to trial, and Southwire was unsuccessful in proving that the combination of settlement proceeds and workers' compensation benefits paid fully and completely compensated the employee for all economic and non-economic losses. For that reason, Southwire's subrogation lien failed. Southwire nevertheless attempted to have the attorney's fees generated by the settlement apportioned. The trial court did allow an apportionment, but the court of appeals did not. The court of appeals held that Southwire was not entitled to apportionment of the attorney's fees based on negotiation of the settlement of the third-party action. The only apportionment to which Southwire would have been entitled would have been for fees based on successful prosecution of a subrogation lien.

In Johnson v. Comcar Industries, 252 Ga. App. 625 (2001), the injured employee was involved in an automobile collision in Georgia. The employee collected workers' compensation benefits under the laws of the State of Virginia. The employee did not

collect any benefits under the laws of the State of Georgia. The employee then filed a personal injury action in Georgia against Johnson, the driver of the other vehicle. The workers' compensation insurer sought to impose a subrogation lien on the recovery in the personal injury action. The trial court refused to dismiss the subrogation lien, but the court of appeals reversed. The court of appeals noted that code section 34-9-11.1 provided that a subrogation lien applied to workers' compensation benefits paid pursuant to Georgia law. Because no benefits were paid pursuant to Georgia law in this case, there could be no subrogation lien.

There were two exclusive-remedy cases decided in the period covered by this article. The first of these was Kaplan v. Pulte Homes, 245 Ga. App. 286 (2000). In that case, Kaplan worked as a cabinet installer in a subdivision under construction. He was a sole proprietor and an independent contractor who was not an employee of anyone. Kaplan purchased workers' compensation insurance to cover himself while he was working on projects such as the one where he was injured. He suffered a slip and fall injury when he fell on ice which was allegedly created by the negligence of another subcontractor working in the subdivision. He collected workers' compensation benefits pursuant to his personal insurance policy, and filed a third-party action against the allegedly negligent subcontractor and Pulte, the general contractor. The third-party defendants moved for summary judgement based on their allegations that Kaplan's exclusive remedy was the workers' compensation law. The trial court agreed, but the court of appeals did not. The court of appeals pointed out that Kaplan was an independent contractor and was not an employee of anyone. For that reason, no one

(subcontractor or general contractor) had any potential liability to Kaplan to pay workers' compensation benefits. If no potential defendant had any liability for workers' compensation benefits, there was no reason to allow any potential defendant to have immunity from tort liability. The fact that Kaplan had purchased his own workers' compensation insurance policy made no difference in the outcome of this case because that policy was a separate agreement between Kaplan and his insurer. Kaplan himself (and none of the potential defendants) had paid the premiums.

The other exclusive-remedy case is Betts v. Medcross Imaging Center, 246 Ga. App. 873 (2000). Although the plaintiffs based their claim on alleged intentional infliction of emotional distress, and this category of claims is normally not subject to an exclusive-remedy defense, the exclusive-remedy defense was successful in this case. The defense is usually not successful because the workers' compensation law does not provide any coverage for psychological injuries which result from purely psychological causes. The defense succeeded in Betts because the cause of the psychological distress was not purely psychological. Plaintiffs argued that their emotional distress resulted from the employer's intentional refusal to provide proper shielding, thus exposing the employee to excessive dosages of radiation. The emotional stress resulted from fear of the consequences of exposure. The trial court and the court of appeals held that the exposure to radiation was a physical event and the fear experienced by the employee was an emotional consequence of this physical event. This combination of circumstances is covered under the workers' compensation law, and is therefore subject to an exclusive-remedy defense.

There were several cases, which answered questions, which needed to be answered. In Hitchcock v. Jack Wiggins, Inc. d/b/a Wiggins Paint and Body Shop, 249 Ga. App. 845 (2001), the question was whether a corporation which would have had enough employees to be subject to the workers' compensation law except for the fact that all the employees had exempted themselves from coverage as permitted by code section 34-9-2.1 immediately became subject to the law when it hired one non-exempt employee. Jack Wiggins, Inc. would have been subject to the law except for the fact that all of the corporation's employees chose to exempt themselves from coverage under the workers' compensation law. The Corporation later hired Mr. Hitchcock, who did not and could not legally exempt himself. After Mr. Hitchcock suffered what appeared to be a compensable injury, his employer defended on the basis that it was not subject to the law. The employer argued that it did not become subject to the law until it hired at least three non-exempt employees. The Trial and Appellate Divisions rejected this argument, but the superior court accepted it. The court of appeals agreed with the Trial and Appellate Divisions. The court of appeals held that the plain meaning of code section 34-9-2 was that a corporation or limited liability company which was not subject to the law because all of its employees had exempted themselves from coverage became subject to the law as soon as one non-exempt employee was hired.

The case of McCarty v. Delta Pride, 247 Ga. App. 734 (2001), involves an occupational disease claim. In that case, McCarty was hired in Georgia to work on a project installing an irrigation system at a fruit plantation in the Central American Nation of Belize. As a necessary incident of this work, the employee and his coworkers had to

make certain preparations while they were in Georgia. These preparations included acquiring the necessary equipment to complete the project and loading it into vans for the journey to Belize. After completing these preparations, the employee and his coworkers drove to Belize (which is possible if one can find and use the Pan American Highway). The employee spent approximately six weeks in Belize. He spent this time on employer's plantation. During this six-week period, the employee contracted malaria. Malaria is virtually never contracted in the United States, but is a common occurrence in Belize. Upon his return to Georgia, the employee filed a workers' compensation claim based on an occupational disease. The employer defended on the basis that the employee's malaria was not an occupational disease covered under the worker's compensation law. The evidence in the claim indicated a causal connection between the employee's working conditions in Belize and his malaria. The evidence also indicated that malaria was not a disease to which the employee would have had a substantial risk of exposure outside of his employment in Belize. The issue in the claim was whether malaria is an ordinary disease of life to which the general public is exposed. It is an ordinary disease of life in Belize to which the general public of that nation is exposed, but it is not an ordinary disease of life in Georgia to which the general public of this state is exposed. The administrative law judge denied the employee's claim because malaria is an ordinary disease of life in Belize. The Appellate Division reversed, holding that the ordinary diseases of life referred to in the Georgia Workers' Compensation Law are ordinary diseases of life in Georgia. The superior court agreed with the administrative law judge, but the court of appeals agreed with the Appellate

Division. The court of appeals agreed with the Appellate Division's holding that the legislature did not intend to make the scope of ordinary diseases of life so broad as to include ordinary diseases of life anywhere on the planet to which the general public of the world is exposed. Ordinary diseases of life are ordinary diseases of life in Georgia to which the general public of Georgia is exposed. Malaria is not such a disease and is covered under the workers' compensation law. The employer also defended this claim on the grounds that McCarty was hired to perform services exclusively outside Georgia. The Appellate Division rejected this contention because the employee was required to make certain necessary preparations prior to leaving Georgia as a necessary incident of the work done in Belize. For this reason, the work was not exclusively performed outside Georgia. After spending most of its time dealing with the issue regarding ordinary diseases of life, the court of appeals summarily agreed with the Appellate Division on this issue.

Code section 34-9-264 governs claims for benefits based on hearing loss due to exposure to harmful noise. One of the provisions of this code section is the requirement that a claim not be filed until at least six months have elapsed since the employee was last exposed to harmful noise. The issue involved in Woodgrain Millwork/Windsor Wood Windows v. Millender, 250 Ga. App. 204 (2001), was the effect of a filing which was made less than six months after the employee ceased to be exposed to harmful noise and discovery continued and the hearing was held far more than six months after the employee ceased to be exposed to harmful noise.

In that case, the employee was a forklift driver who worked in an extremely noisy environment. The employer provided protective devices which would remove employees from exposure to harmful noise. The employee did not wear protection on one ear so that he might hear and understand instructions relayed to him through a radio on his forklift. The employer condoned, if it did not instigate, this practice. The employee ceased to work for the employer, and filed a claim for workers' compensation benefits based on noise-induced hearing loss less than six months later. Discovery continued after the claim was filed, and the hearing was not held until more than one year after the employee ceased to work for the employer. At the hearing, the employer contended that the employee's claim was barred by the statute of limitation found in code section 34-9-82. The employer contended that the original filing was premature and therefore not valid. Inasmuch as no other claim was filed, the employer contended that the claim was time-barred. The administrative law judge, the Appellate Division, and the superior court did not agree. They all held that the premature filing became valid when discovery continued and the hearing was held more than six months after the employee ceased to be exposed to harmful noise. The court of appeals pointed out that the purpose of requiring the filing of a claim for benefits based on noise-induced hearing loss to be delayed for at least six months after the employee ceased to be exposed to harmful noise was to allow the employee's condition to stabilize. The court held that this purpose was served even if the original claim was filed less than six months after the employee ceased to be exposed to harmful noise if discovery continued and the hearing was held more than six months after the employee ceased to

be exposed to harmful noise. By the time discovery was completed and a hearing was held, the employee's condition would have stabilized. Therefore, the filing which was originally premature ripened into a valid filing as soon as six months elapsed after the employee ceased to be exposed to harmful noise. The court of appeals also held that the employer was not entitled to contend that the claim was barred by the employee's failure to use protective devices when the employer condoned, if it did not instigate, this practice. Finally, based on the "any evidence" rule, the court of appeals held that there was sufficient evidence in the record to establish that the noise level to which the employee was exposed was harmful. For all these reasons, the employee had a valid claim for workers' compensation benefits based on noise-induced hearing loss.

The question involved in Shepherd Center v. Williams, 251 Ga. App. 560 (2001), was what the employer needs to prove in order to establish that it relied on false representations in an employment application. In that case, the employee had suffered a number of back injuries before he applied for employment with the Shepherd Center. After he received a conditional offer of employment, he was asked to fill out a medical history form. This form contained questions with respect to prior back injuries. The employee denied that he had any such injuries. He was hired and was assigned fairly heavy work duties. He suffered two accidents which aggravated his previous back condition. When he filed workers' compensation claims based on these accidents, the employer began investigating and discovered the existence of his previous back injuries. At the hearing, the employer contended that the employee's claim was barred pursuant to Georgia Electric Company v. Rycroft, 259 Ga. 155 (1989). That case held

that a claim was barred if the employer could prove three things: (1) a willful and knowing misrepresentation of a physical condition on an employment application; (2) the employer relied on the misrepresentation in making the hiring decision; and (3) there was a causal connection between the misrepresentation and the employee's injury. In this case, there was little, if any, doubt that the employer established the existence of the first and third elements. The question was whether the employer had demonstrated that it substantially relied on the employee's misrepresentation in making its hiring decision. The employer's evidence did not demonstrate that it would not have hired the employee had he made a truthful disclosure of his previous injuries. The employer demonstrated that it would have made a further investigation of his medical condition if it had received truthful information and would have based the hiring decision on the results of that further investigation. The administrative law judge and the Appellate Division held that the employer had established a sufficient reliance on the employee's misrepresentation. The superior court disagreed, but the court of appeals reversed. The court of appeals held that an employer did not have to prove that it would not have hired the employee if there had been a truthful revelation of the employee's physical condition. It was sufficient to show that, had there been a truthful statement, the employer would have made a further investigation of the employee's physical condition, and would have based the hiring decision on the results of that investigation.

The law has continued to evolve in the area of application of child support liens to workers' compensation benefits. The latest evolution is Cromer v. Denmark, 273 Ga. 290 (2001). In that case, the employee settled his workers' compensation claim with a

liability stipulation. In a separate proceeding to determine his liability for child support, the issue was whether the proceeds of the settlement should be included in calculating his gross income. The Trial Court held and the supreme court agreed that the portion of settlement proceeds attributable to income benefits was to be included in gross income for the purpose of calculating the employee's liability for child support. The supreme court stated that the portion of the settlement attributable to attorney's fees was not to be included. The supreme court did not state, but logic would appear to dictate, that the portion of settlement proceeds attributable to the employee's medical expenses should not be included in gross income. It remains to be seen whether the same rules apply to the proceeds paid pursuant to a no-liability settlement.

In 1996, the General Assembly amended code section 34-9-1(4) to require that the evidence which proves that a heart attack or stroke is attributable to the performance of the ordinary duties of employment must include medical evidence. There have now been two cases dealing with the sufficiency of the medical evidence. In Phillips Correctional Institute v. Yarbrough, 248 Ga. App. 693 (2001), the employee worked as a correctional officer. He began manifesting the symptoms of a heart problem shortly after reporting to work and after having walked up and down a number of flights of stairs to deliver meals to inmates. He was taken to a hospital and died the same day. The cause of death was a heart attack. There was conflicting medical evidence in the record. One doctor stated that there was absolutely no connection between the duties the employee performed and his heart attack. Another doctor stated that the performance of the employee's work duties was a contributing precipitating

factor in his heart attack. The administrative law judge and the Appellate Division found the doctor who stated that the performance of the duties of employment was a contributing precipitating factor to be more persuasive. The superior court affirmed. The court of appeals reviewed the record and applied the 1996 amendment to code section 34-9-1(4) and the "any evidence" rule to determine that the administrative law judge and the Appellate Division were authorized to give more weight to one piece of conflicting medical evidence than to another. Because there was some medical evidence to support the findings of the Trial and Appellate Divisions, the decision was upheld.

The evidence was different in Aflac, Inc. v. Hardy, 250 Ga. App. 570 (2001). In that case, the employee had what was admitted to be an extremely stressful job. The employee requested a transfer to a less stressful position, but this request was denied. The employee remained under pressure to quickly produce an increasing amount of work while at the same time maintaining accuracy. The employee eventually suffered a heart attack. One piece of medical evidence in the record stated unequivocally that there was no connection between employee's job stress and her heart attack. The only medical evidence in the record which could be interpreted as favorable to the employee stated that job stress could aggravate symptoms of underlying disease. The medical evidence did not state that job stress did aggravate the underlying heart disease, nor did it state that job stress played a precipitating role in bringing about the heart attack. Based on consideration of all the facts and circumstances in this case, the administrative law judge and the Appellate Division found employee's heart attack

compensable. The superior court affirmed, but the court of appeals reversed. The court of appeals pointed out that it is extremely difficult to distinguish between stress which causes the symptoms of underlying disease to manifest themselves and stress which causes a heart attack to occur. The court of appeals stated that, at best, the employee's medical evidence might have established that stress caused symptoms to manifest themselves. This evidence was not sufficient to establish that stress precipitated this particular heart attack. Therefore, pursuant to the 1996 amendment to code section 34-9-1(4), the evidence was not sufficient to support a finding that the performance of the ordinary duties of employment precipitated employee's heart attack.

Another case involving the sufficiency of evidence is Mix v. Allied Ready Mix, 248 Ga. App. 261 (2001). In that case, the employee suffered a compensable injury and received total disability benefits for a period of time. He then returned to work. The issue in the case was the extent, if any, of his permanent partial disability. The evidence in the record contained two permanent partial disability ratings. One doctor gave the employee a 5% permanent partial disability rating based on his reading of his findings and the American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition. Another doctor, also based on his findings and his interpretation of the American Medical Association Guides, gave the employee a 15% permanent partial disability rating. The administrative law judge awarded the employee permanent partial disability benefits based on a 10% rating. The Appellate Division adopted, but the superior court, reversed. The superior court found that there was no evidence in the record to support a 10% rating. The court of appeals reversed. The

court of appeals held that the finding made by the administrative law judge and the Appellate Division fell within the range of the evidence. Even though there was not a medical report in the record which stated that the employee had a 10% permanent partial disability rating, the court of appeals held that the evidence in the record would have supported a rating of not less than 5% nor more than 15%. A 10% rating falls within this range, and was supported by the evidence.

The case of Stevedoring Services of America v. Collins, 247 Ga. App. 149 (2000), contained interesting facts and rulings of law. That case involved a dispute as to the identity of a deceased employee's dependents. The contenders were the deceased employee's mother and his alleged illegitimate daughter. The child's mother had been separated from her ex-husband but was not officially divorced from him when she began living with the deceased employee. The child was born more than nine months after her mother began living with the deceased employee but prior to the time the divorce from her mother's ex-husband became final. The deceased employee supported the child and acknowledged to at least one lifelong friend that the child was his. The child's mother always contended that the deceased employee was the father. Despite these facts, the deceased employee's mother relied on the strong presumption that a child born during wedlock was the child of the husband. If the deceased employee was the father, the child was a total dependent and his mother, a partial dependent at best, was entitled to no benefits. In addition to the testimony of witnesses the record in this claim contains a report of a paternity test which purported to establish that the deceased employee was indeed the father. The administrative law judge and

the Appellate Division found that the deceased employee was the father. The superior court reversed, holding that neither the administrative law judge nor the Appellate Division had properly stated the evidentiary standard by which they made their determination. The court of appeals reversed. The court of appeals did state that there was a strong presumption that a child born during wedlock was the child of the husband. This presumption can only be overcome by clear and convincing evidence, which must include evidence of lack of access. The court of appeals held that the testimony in this case was clear and convincing, that the evidence did demonstrate lack of access, and, that the testimony was sufficient to establish that the child was the daughter of the deceased employee.

Under these circumstances, there was no need to articulate the evidentiary standard which was applied because the record conclusively demonstrated that clear and convincing evidence did exist. The court of appeals reached this conclusion without the benefit of the paternity test evidence. The court of appeals ruled that this report was inadmissible. The court of appeals noted that the identity of the person signing the report of the results of the paternity test could not be determined. The written signature was not legible, and the printed names on the report listed a physician, a biologist who held a Ph.D. degree and two others. The report would have been admissible if the physician had signed it, but not otherwise. The court of appeals held that a report signed by a biologist, even one who holds a Ph.D. degree, is not a medical report contemplated under code section 34-9-102(e)(2) because biologists do not practice medicine. This holding may well be the most important ruling in this case, but it

does appear to be limited to the particular facts of this case. Most psychologists whose reports are tendered in evidence before the Board hold Ph.D. degrees. Until it is ruled otherwise, it would appear that these reports continue to be admissible because psychologists do practice a form of medicine. It would appear that reports from physical therapists would also be admissible because they render medical services.

It is now well settled in the workers' compensation law that injuries which occur while an employee is on a scheduled lunch or rest break during which the employee is free from any control by the employer are not compensable. It has also become well settled that the employee is allowed a reasonable time for ingress and egress around a scheduled break during which the employee remains under the coverage of the workers' compensation law. For many years, the cases which applied the ingress and egress rule to the scheduled break rule involved cases in which the injury occurred while the employee was returning from a scheduled break. Although it appeared that logic would dictate that the rule would be the same if the injury occurred while the employee was leaving to begin a scheduled break during a reasonable time for egress, there was no case to that effect. Such a case now exists, but it is not the result of a workers' compensation claim. In Rockwell v. Lockheed Martin Corporation d/b/a Lockheed Aeronautical Systems, 248 Ga. App. 73 (2001), the employee suffered a slip and fall injury as she was leaving employer's premises to begin a scheduled break. Based on her contention that her slip and fall was caused by employer's negligent maintenance of its premises the employee filed a personal injury action. The employer defended on the grounds that the employee's exclusive remedy was a workers' compensation claim.

The court of appeals agreed. In the process of doing so, the court of appeals specifically stated that an employee was allowed a reasonable time for ingress and egress surrounding a scheduled break during which any injury which occurred would be compensable. The court specifically ruled that the employee's exclusive remedy was a workers' compensation claim when her injury occurred at the beginning of her scheduled break during a reasonable time for egress from the premises.

As a general rule, injuries which occur while the employee is going to or coming from work are not compensable. There are certain exceptions to this rule, i.e., the employer furnishes transportation to and from work as an incident of employment, the employer requires or allows the doing of special tasks beneficial to the employer during the journey, or the injury occurs between the employer's premises and a parking lot owned, maintained or furnished by the employer for use by employees. The case of Harrison v. Winn Dixie Stores, Inc., 247 Ga. App. 6 (2000), represents an application of the general "going to and coming from" rule to a unique set of circumstances. The employee usually worked at a Winn Dixie Store at one location. After he completed working his scheduled shift at that location, his manager asked him to work an extra shift at another location. The employee clocked out at the first location, and would have clocked in and received a new employee number and identification badge upon arrival at the other location. Unfortunately, he did not arrive at the second location because he was involved in a serious automobile accident while traveling between the two locations. The administrative law judge found that the "going to and coming from" rule controlled the outcome of this case. The administrative law judge found that the employer did not

furnish the employee transportation from one location to the other and did not reimburse the employee for his transportation expenses during the journey. The administrative law judge also found that the special task exception did not apply because the employee did not have any special task to perform during the journey but only at the end of the journey. For all of these reasons, the administrative law judge denied the claim. The Appellate Division, the superior court, and the court of appeals affirmed. It would appear that the fact that employee had clocked out before he left his original employment location and would have received a new employee number and identification badge when he clocked in at the second location makes this case unique. It would appear that this case is distinguishable from other cases in which employees travel from one employer work site to another during their work day without clocking out or completing a work shift at one location and beginning a new and different shift at another location.

The issue involved in the case of City of Atlanta v. Arnold, 246 Ga. App. 762 (2000), was the effect of voluntary retirement in a case in which the employee had the burden of proving a change in condition for the worse. The employee in that case was a City of Atlanta police officer who suffered a compensable injury. After a period of total disability, he was released to return to light duty work and actually did return to a light duty job. He performed this work for a period of time, and then voluntarily retired. The employee did not contend that he retired because he was unable to perform his work duties because of his compensable injury. There was no medical evidence to this effect. Nevertheless, the administrative law judge and the Appellate Division found that

he underwent a change in condition for the worse at the time he retired. The superior court affirmed, but the court of appeals reversed. The court of appeals pointed out that the employee retired at a time when he was actually working. Therefore, the employee had the burden of proving a change in condition for the worse. The court of appeals stated that voluntary retirement, without more, does not automatically establish a change in condition for the worse. There must also be some indication that the retirement occurred because of the employee's inability to perform the work due to the compensable injury. He did not present any medical evidence to this effect. He did not present any evidence of a diligent but unsuccessful job search following his retirement from the police department. Under these circumstances, it could not be said that he had demonstrated a change in condition for the worse. It should be noted that cases in which there is evidence of disability, an unsuccessful job search, or both will be distinguishable from this decision. In fact, the Appellate Division has distinguished it twice. In one case, there was medical evidence to indicate that the employee was no longer capable of doing any work at the time the employee retired. In the other case, there was credible lay testimony to this effect.

The cases of Georgia-Pacific Corporation v. Ivey, 250 Ga. App. 181 (2001), and Thurmond v. Ivey, 250 Ga. App. 181 (2001), deal with the question of whether an employer which has a policy against illegal drug use but has not been certified as a drug-free workplace is entitled to use violation of the anti-drug policy as a defense to an unemployment claim. The court of appeals held that the employer was entitled to use violation of its policy against illegal drug use as a defense to a claim for unemployment

benefits even though the employer had not been certified as a drug-free workplace. The court of appeals pointed out that the reward for being certified, as a drug-free workplace is a reduced premium for workers' compensation insurance. The consequence of a failure to be certified is disqualification for a reduced workers' compensation insurance premium. Failure to be certified as a drug-free workplace does not deprive an employer of the right to use violation of a company policy against illegal drug use as a defense to a claim for unemployment. It would appear that the same reasoning would apply to allow an employer to defend a workers' compensation claim based on the rebuttable presumption found in code section 34-9-17 (b)(2) regardless of whether the employer has been certified as a drug-free workplace.

Employers and insurers frequently utilize the services of private investigators in workers' compensation claims. The cases of Association Services, Inc. v. Smith, 249 Ga. App. 629 (2001), and Association Services, Inc. v. Pierce, 249 Ga. app. 629 (2001), demonstrate that investigators and those who hire them can subject themselves to tort actions if the investigators are excessively aggressive in performing their work. In those cases, a servicing agent hired an investigator to perform surveillance on a person who was receiving workers' compensation benefits. In performing the surveillance, the investigator obtained a video tape of a woman watering plants and performing other gardening activities which would have been inconsistent with the alleged restrictions of the workers' compensation claimant. The claimant contended that the woman on the tape was her sister, and it subsequently was determined that the two sisters looked sufficiently alike that it was possible that the woman on the tape was not the claimant.

The two sisters also contended that the investigator could not have obtained the surveillance tape without trespassing on the claimant's property. For this reason, the two sisters filed separate tort actions. Each plaintiff sought damages for intrusion upon seclusion, conspiracy to intrude on seclusion, false light invasion of privacy, defamation, conspiracy to commit criminal conduct, and RICO violations. The defendants (the investigator and the servicing agent) filed motions for summary judgement. Both plaintiffs dismissed their RICO actions before the Trial Court ruled on the summary judgement motion. Smith also dismissed her defamation claim. The Trial Court granted summary judgement to defendants on the false light invasion of privacy and conspiracy to commit criminal conduct claims and as to Pierce's defamation claim. The Trial Court denied summary judgement with respect to the claims of intrusion upon seclusion and conspiracy to intrude upon seclusion. All parties appealed. The court of appeals affirmed. The court of appeals ruled that the documentation before the Trial Court established the existence of genuine issues of material fact with respect to whether there had been an intrusion upon seclusion and in a conspiracy to intrude upon seclusion. The same documentation demonstrated as a matter of law that there was no genuine issue of material fact as to whether there had been a false light invasion of privacy in this case, a conspiracy to commit criminal conduct in this case, or defamation with respect to Pierce. Therefore, the Trial Court correctly granted partial summary judgement and allowed the trial to go forward on the intrusion upon seclusion and conspiracy to intrude upon seclusion claims.

Code Section 34-9-104(a)(1) defines a change in condition as a change in the earning capacity, physical condition, or status of an employee or other beneficiary which occurs at some time after the earning capacity, physical condition, or status was last established by award or otherwise. Code Section 34-9-104(d)(1) provides that a subsequent award may determine that a change in condition has occurred as of the date the event occurs despite the retroactive effect of such a determination. The case of Aldrich v. City of Lumber City, 273 Ga. 461 (2001), deals with an apparent conflict between the two statutes. In that case, the employee sustained his original injury while he was employed as a police officer with the city of Lumber City in 1989. The city disputed this claim, and, after a hearing, the administrative law judge found that the claim was not compensable. The Appellate Division reversed this determination in an award which was issued in May of 1991. Following the issuance of the Appellate Division's award, the City of Lumber City began paying benefits to the employee. Unbeknownst to anyone, the employee began working for the City of Alamo as a police officer in February of 1991. The City of Lumber City and the City of Alamo were both self-insurers for workers' compensation purposes, and both used the same servicing agent. At some point after May of 1991, the employee sustained a second compensable injury while working for the City of Alamo. The adjuster handling the second claim recognized the employee's name, and made an investigation. That investigation revealed that the employee was receiving workers' compensation benefits for total disability from the City of Lumber City while he was working for the City of Alamo. The City of Lumber City immediately suspended payment of income benefits

and requested a hearing to obtain an order directing the employee to reimburse income benefits to which he was not entitled. The administrative law judge and the Appellate Division used the provisions of code section 34-9-104(d)(1) to determine that employee under went a change in condition for the better in February 1991 when he began working for the City of Alamo. For this reason, the administrative law judge and the Appellate Division ordered the employee to reimburse the City of Lumber City for all income benefits which he had received since February 1991. The administrative law judge and the Appellate Division rejected the employee's contention that he could not be ordered to reimburse any income benefits received prior to May of 1991 when the original award which found his first claim to be compensable was issued. The superior court affirmed. The court of appeals also ultimately affirmed. The court of appeals held that the employee's return to work with the City of Alamo occurred after the record closed following the original hearing. It was therefore a subsequent event which could form the basis of a change in condition regardless of the retroactive effect of such a determination. This holding was based on application of the provisions of code section 34-9-104(d)(1). The supreme court disagreed. The supreme court held that the retroactive effect of code section 34-9-104(d)(1) was not unlimited. The supreme court held that code section 34-9-104(a)(1) provided that a change in condition could only occur after a condition had been established by award or otherwise. If a condition is established by award, it cannot be established any earlier than the date of the first award which determines that the condition exists. Code section 34-9-104(d)(1) then allows a change in condition to be found as of the date it occurs, regardless of the

retroactive effect of such a determination, as long as the change in condition is found to have occurred after the date of the first award which originally established the condition which is later found to have changed.

While the case of Aldrich v. City of Lumber City, supra, dealt with when a claim is established as compensable by award, the case of Smith v. Mr. Sweeper Stores, 247 Ga. App. 726 (2001), deals with when and how a claim is established as compensable otherwise. In that case, the employee sustained a compensable injury in 1990. She never missed any time from work, but did receive medical treatment over the years. The employer/insurer paid for the medical treatment for many years, but eventually became convinced that the injury-resultant condition had resolved itself so that the medical treatment was no longer related to the injury. The employer/insurer controverted liability for further medical treatment for this reason. The employee requested a hearing. A major issue at the hearing was placement of the burden of proof. The administrative law judge treated the case as an all-issues case in which the employee had the burden of proof. The administrative law judge then found that the employee had failed to carry the burden of proving that her current medical treatment was related to the original injury. The Appellate Division, the superior court, and the court of appeals agreed with the administrative law judge. The court of appeals held that a claim is established as compensable by a means other than an award only when income benefits are paid. Payment of medical expenses alone, regardless of the duration of the payment, does not establish a claim as compensable. If no income

benefits have been paid at the time of the first hearing in a claim, the claim is an all-issues claim in which the employee has the burden of proving entitlement to benefits.

The case of Holliday v. Jacky Jones Lincoln Mercury, 251 Ga. App. 493 (2001), deals with hearing procedures. In that case, the original hearing request listed temporary total disability and temporary partial disability income benefits among the items which the employee was seeking. It did not list permanent partial disability income benefits. At the beginning of the hearing, the administrative law judge framed the issue to be tried by stating that the purpose of the hearing was to determine whether the employee was entitled to temporary total disability benefits, temporary partial disability benefits, or any benefits at all. During the hearing, evidence was admitted which indicated that a permanent partial disability existed. The administrative law judge found that the employee was not entitled to temporary total disability or temporary partial disability income benefits, but did find that he was entitled to income benefits for permanent partial disability. The Appellate Division affirmed. The superior court accepted the employer's contention that it did not have proper notice that entitlement to permanent partial disability benefits would be an issue at the hearing and was deprived of due process when the administrative law judge decided that issue. The superior court therefore reversed the decision of the Appellate Division. The court of appeals agreed with the superior court. The court of appeals noted that the employee had the first opportunity to notify the employer that permanent partial disability benefits would be an issue at the hearing so that the employer could prepare to defend this issue when the hearing was originally requested. The employee did not indicate on his hearing

request that he was seeking permanent partial disability benefits. The court of appeals held that the administrative law judge's statement at the beginning of the hearing that the issues involved were whether the employee was entitled to temporary total disability benefits, temporary partial disability benefits, or any benefits at all was not sufficient to give the employer notice that employee's entitlement to permanent partial disability income benefits would be an issue at the hearing. The court of appeals did rule that the violation of due process in this hearing did not forever foreclose the issue of employee's entitlement to permanent partial disability benefits. The court of appeals ordered the case to be remanded so that a hearing could be held on the issue of employee's entitlement to permanent partial disability benefits after employer was given proper notice that this issue would be the subject of the hearing and an opportunity to defend this portion of the claim.

It has always been the holding of the Board that a contingent that a claim is barred by the running of a statute of limitation is an affirmative defense. Board Rule 82 provides that such a defense is waived if it is not asserted at or before the first hearing in a claim. Board Rule 82 is coordinated with code section 34-9-82, which contains the statute of limitation for all-issues claims. In Baugh-Carroll v. Hospital Authority of Randolph County, 248 Ga. App. 591 (2001), the Court of Appeals upheld this principle and even expanded it. In that case, the employee suffered an original compensable injury and received income benefits for a period of time. She then returned to work, and later alleged a change in condition for the worse. She did not file her request for additional income benefits until more than two years had elapsed since the last payment

of benefits for temporary total disability or temporary partial disability had actually been made. Employer attempted to contend that the claim was barred by the provisions of the statute of limitation but based this contention on the provisions of code section 34-9-82. Code section 34-9-82 has no application to a change in condition claim. The statute of limitation for a change in condition claim is found in code section 34-9-104(b). The administrative law judge ruled that no contention that the claim was barred pursuant to the statute of limitation in code section 34-9-104(b) had been made, and that that defense was waived. The administrative law judge then found in favor of employee on the merits of the claim. The Appellate Division adopted the award of the administrative law judge. The superior court reversed, holding that the claim was time-barred as a matter of law. The court of appeals reversed the judgement of the superior court. The court of appeals held that any defense based on the running of the statute of limitation is an affirmative defense. The court further stated that this holding applied to code section 34-9-82 and code section 34-9-104 with equal force. The court further stated that the provisions of Board Rule 82, which merely restated the general civil law, applied with equal force to statute of limitation defenses based on code section 34-9-104. In this particular case, the employer based its contention that the employee's claim was time-barred on the wrong statute of limitation. Because there was no contention that the claim was time-barred pursuant to the proper code section, the court of appeals agreed with the administrative law judge and the Appellate Division that the affirmative defense was waived.

Prior to 1990, code section 34-9-104 had provided that a claim for additional income benefits based on a change in condition had to be filed within two years after the last payment of income benefits due pursuant to code chapter 34-9 was made. This provision led to the development of a body of case law which held that the time for filing a claim for additional income benefits did not begin to run as long as any income benefits remained potentially due. The case of City of Pulan v. Hodge, 251 Ga. App. 500 (2001), is the most recent addition to this body of case law. It also is another indication of why the legislature amended code section 34-9-104 in 1990. In the Hodge case, the employee suffered his original injury in 1989. He last received income benefits not later than 1992. The medical evidence at that time indicated that he had not reached maximum medical improvement. He filed his first claim for permanent partial disability benefits in 1999. The employer contended that the claim for permanent partial disability benefits was time-barred. The administrative law judge and the Appellate Division agreed. The superior court and the court of appeals did not agree. The court of appeals pointed out that income benefits for permanent partial disability are not payable until the employee's condition has reached maximum medical improvement. Because the medical evidence at the time income benefits were last paid indicated that the employee's condition had not reached maximum medical improvement, income benefits for permanent partial disability remained potentially due at that time. Therefore, the statute of limitations for filing a claim for additional income benefits had not begun to run. The only holding of the Hodge case which has application to current law is its reaffirmation of the requirement that a condition must have reached maximum medical

improvement before income benefits for permanent partial disability can be awarded. The 1990 amendment to code section 34-9-104 provides that a claim for additional income benefits for temporary total or temporary partial disability must be filed within two years of the date the last payment of income benefits for temporary total or temporary partial disability was actually made. A claim for additional benefits for permanent partial disability must be filed within four years of the date the last payment of income benefits for temporary total or temporary partial disability was actually made. Although the court of appeals in the Hodge opinion may not appear to recognize this amendment as being as substantial as it is, it should be clear that the 1990 amendment eliminated the "potentially due" concept from the workers' compensation law. Because the original injury in the Hodge case occurred in 1989, any holdings in that case have no effect on the post-1990 law. It should further be noted that Judge Andrews concurred in the judgement only. Therefore, according to the rules of the court of appeals, this case is not binding precedent. It has only the persuasive effect which future courts see fit to give it.

Until the case of Murph v. Maynard Fixture Craft, Inc., 252 Ga. App. 483 (2001), reached the court of appeals, it appeared that the employee had a claim for which no one was responsible. Murph worked for a sole proprietor refrigeration sub-contractor doing installation of refrigeration equipment at a construction site. This immediate employer did not have three employees regularly in service. The refrigeration installation work was being done pursuant to a contract with Maynard. Maynard had a contract with the owner of the premises to install refrigeration equipment. Maynard was

a Tennessee corporation which had no employees regularly in service in Georgia, and hired a sub-contractor to do the actual work. This sub-contractor was Murph's immediate employer. As a part of the agreement with the owner of the premises, Maynard promised to obtain insurance coverage for itself and all the sub-contractors working on the property. Workers' compensation insurance was specifically mentioned as one class of coverage which Maynard agreed to provide. Maynard purchased a workers' compensation insurance policy in order to carry out its obligation under its agreement with the owner of the premises. Maynard also agreed to require all sub-contractors to furnish proof of insurance coverage, including workers' compensation insurance coverage, but did not fulfill this agreement with respect to Murph's immediate employer. (One reason for this failure could be the fact that the immediate employer was not subject to the worker's compensation law.) At the time of Murph's injury, the owner of the premises had no contract with anyone else to perform work on the premises. A franchise agreement to place and ice cream store on the premises later came into existence. Of course, the installation of refrigeration equipment was essential to performing the franchise agreement. Murph suffered a serious injury while performing work for his immediate employer and filed a claim against Maynard and the owner of the premises as statutory employers. The administrative law judge dismissed both alleged statutory employers from the claim. The administrative law judge held that the owner of the premises was not its own general contractor because it did not owe any other entity a contractual duty to perform any work on the premises at the time of Murph's injury. The administrative law judge also dismissed Maynard because Maynard

did not have any employees in Georgia and was therefore not subject to the Georgia workers' compensation law. The Appellate Division and the superior court affirmed. The court of appeals affirmed in part and reversed in part. The court of appeals agreed that the owner of the premises was not a statutory employer at the time of Murph's injury. The owner did not become its own general contractor and a potential statutory employer until it assumed a contractual duty to another entity. This event did not occur until after Murph's injury. Therefore, the owner of the premises was not Murph's statutory employer at the time of his injury, although it could have been his statutory employer had the injury occurred later. The court of appeals reversed the dismissal of Maynard from the claim. The court of appeals pointed out that if an employer which is not subject to the workers' compensation law nevertheless obtains insurance coverage pursuant to the workers' compensation law, the employer is estopped to contend that it is not subject to the law. The court of appeals pointed out that Maynard had agreed with the owner of the premises to obtain workers' compensation insurance coverage to cover all sub-contractors and their employees working on the construction project. The court of appeals held that this agreement was intended to benefit Murph and all others similarly situated. The court further held that Murph was a third-party beneficiary of the workers' compensation insurance policy which Maynard obtained. Maynard was therefore required to provide workers' compensation coverage to Murph whether it was subject to the Georgia workers' compensation law or not. The court of appeals ordered the case to be remanded for a decision on the merits of Murph's claim against Maynard and its insurer as a statutory employer.

If legal gymnastics were an Olympic sport, the case of Marine Port Terminals, Inc. v. Dixon, 252 Ga. App. 340 (2001), would win a gold medal. In that case, the employee suffered what would appear to be a compensable injury. While he was receiving medical treatment for that injury, the employer requested that he submit to a drug test. The employer contended that employee refused to submit to the drug test. Employee contended that he was unable (not unwilling) to submit to the drug test because a panic attack rendered him unable to urinate. At the hearing, the employer/insurer did not present any evidence that the drug test was or would have been performed in compliance with the procedures set forth in code section 34-9-415. The administrative law judge made no finding as to whether there had been a refusal to submit to the drug test or as to whether the refusal, if any, was justified. Instead, the administrative law judge ruled that because there was no evidence that the drug test would have complied with the requirements of code section 34-9-415, there was no rebuttable presumption that the employee's injury was caused by alcohol or marijuana intoxication or improper use of a controlled substance as set forth in code section 34-9-17 (b)(3). The Appellate Division and the superior court affirmed. The court of appeals reversed. The court of appeals quoted directly from the Supreme Court's decision in Georgia Self-Insurers Guaranty Trust Fund v. Thomas, 269 Ga. 560 (1998), that a drug test had to be performed in compliance with the procedures set forth in code section 34-9-415 before refusal to submit to that drug test would create a rebuttable presumption that alcohol, marijuana, or illegal drug use caused an injury. The court of appeals then proceeded to hold that the supreme court did not really mean what it said or say what it

really meant in Thomas, supra. The court of appeals held that strict compliance with the procedural requirements of code section 34-9-415 was required only if a drug test was actually performed. There was no requirement that there be an indication that these requirements would have been complied with if a test is not performed. This holding overlooks the fact that code section 34-9-17(b)(2) deals with a situation in which a drug test is performed and code section 34-9-17(b)(3) deals with a situation in which a drug test is not performed due to the employee's allegedly unjustified refusal to submit to the test. This holding also overlooks the fact that code section 34-9-17(b)(2) does not refer to or incorporate the requirements of code section 34-9-415 while code section 34-9-17(b)(3) does refer to and incorporate these requirements. The court of appeals held that the procedural requirements of code section 34-9-415 are relevant to code section 34-9-17(b)(3) only to the extent that it is alleged that failure to comply with these procedures justified a refusal to submit to a drug test. Examples cited by the court of appeals are in excessive invasion of the employee's privacy or an improper demand that the employee pay for the drug test. This holding gives an exceedingly narrow application to code section 34-9-415 even though it appears that the supreme court intended to give that same code section a broad application. Based on its holdings, the court of appeals remanded the case to the Board for further findings of fact and conclusions of law as to whether there was an unjustified refusal to submit to a drug test, whether a rebuttable presumption was created, and whether that presumption was rebutted. Although the court of appeals did not so state, a necessary prerequisite to these findings will be a determination of whether there was a refusal (unwillingness as

opposed to inability) to submit to a drug test. Although it is impossible to predict whether the supreme court will grant certiorari if requested to do so, it is your author's opinion that a further review of this decision is more likely than not if a request is made. It now appears that certiorari was not requested in this case.

In Russell Morgan Landscape Management, Inc. v. Velez-Ochoa, 252 Ga. App. 549 (2001), the employee sustained a compensable injury in 1995 and was paid benefits until 1997. The employer suspended payment of income benefits in August of 1997 based on an alleged failure to comply with medical treatment. An evidentiary hearing was held in January of 1999. The evidence presented at that hearing disclosed that employee had been able to return to work without restrictions since August of 1997. The evidence at the hearing disclosed that there had not been a failure to comply with medical treatment. The WC-2 Form which gave employee notice of suspension of benefits in 1997 did not contain the information which normally appeared on the back of such a form regarding the procedure to challenge a suspension of benefits, was not accompanied by a medical report from the authorized treating physician showing that the employee was released to return to work without restrictions, and did not provide for the payment of a 10-day notice prior to suspension of benefits. The administrative law judge found that, based on the evidence presented at the hearing, the employer had established that the employee underwent a change in condition for the better in August of 1997 and found that the employer committed technical violations of Board Rules in its method of giving notice of suspension of benefits. The administrative law judge imposed civil penalties and a small amount of assessed attorney's fees for these

violations and also ordered payment of an additional ten days of benefits. The Appellate Division found that employer's violations of Board Rules amounted to a legally improper suspension of benefits and ordered benefits to be paid until the date of the hearing before the administrative law judge. The superior court allowed the Appellate Division's decision to become affirmed by operation of law. The court of appeals also affirmed the Appellate Division's decision. The court of appeals pointed out that the provisions of Board Rules 221(i)(1) and 221(i)(4) which employer violated were designed to assure procedural due process to an employee whose benefits were unilaterally suspended. The court of appeals stated that the Appellate Division made an even-handed application of the law in finding that the original reason for suspension did not exist and, because of employer's violation of rules designed to assure procedural due process, in allowing benefits to be suspended at the time of the hearing before the administrative law judge. This time was chosen because it was the first time the employee could fairly be said to have notice of the actual reason for suspension of his benefits and an opportunity to present his side of the case.

The Supreme Court of Georgia has now spoken on the issue of whether code sections 34-9-221(d) and 34-9-221(h) are separate and distinct. They are. Both sections deal with the times within which an employer/insurer may controvert liability for a claim without penalty. Failure to comply with each subsection has different consequences, however. Code section 34-9-221(d) applies when an employer/insurer choose to controvert liability in a claim in which no income benefits have been paid. Under these circumstances, the employer/insurer must give notice that the claim is

controverted within 21 days after receiving knowledge of the alleged injury. Failure to file a notice to controvert within the time provided by this code section does not deprive the employer/insurer of the right to present whatever defenses it may have to the claim. The employer/insurer are subject to the imposition of penalties and assessed attorney's fees if their defenses are not successful. The court of appeals had so held in Raines & Milam v. Milam, 161 Ga. App. 860 (1982). The supreme court has also now so held in Meredith v. Atlanta Intermodal Rail Services, S.Ct. No. SO2A0167, decided February 5, 2002. The supreme court further held that the employer/insurer does not have to pay all income benefits which accrue from the time of the alleged injury until the filing of the late notice to controvert in order to be allowed to present defenses to the claim. In so holding, the supreme court also distinguished the provisions of code section 34-9-221(h) and the case of Cartersville Ready-Mix v. Hamby, 224 Ga. App. 116 (1996). Code section 34-9-221(h) deals with the times within which claims can be controverted after payment of income benefits has begun. Once payment of income benefits has begun, the Hamby decision, supra, requires that all income benefits which have accrued prior to the time the claim is controverted, including penalties if applicable, must be paid. Failure to pay all accrued income benefits under these circumstances deprives the employer/insurer of the right to controvert the claim. The supreme court noted that its interpretation of these separate and distinct code sections as having separate and distinct consequences for failure to comply might present an unfair result, but the court was unwilling to interpret distinct code sections as having similar consequences.

The case of ABB Management Services, Inc./Georgia Kaolin v. Lord, Ct. App. No. A01A2083, decided March 1, 2002, deals with the ways in which a change in condition for the better can be demonstrated. In that case, the employee sustained a compensable injury in 1984 and began receiving income benefits at that time. In 1999, his employer sought to suspend payment of his income benefits based on a change in condition for the better. The employer presented evidence which showed that the employee had entered into a partnership with his daughter to own and operate two convenient stores. The employee's name appeared on applications for business licenses and bank loans. There was also videotape surveillance evidence showing the employee taking out trash, stocking shelves with merchandise, waiting on customers, and helping customers carry the purchases to their vehicles. The employee attempted to counter this evidence with the contention he was merely an investor in the business and received no pay for any work he may have done in the business. After a hearing, the administrative law judge found that the evidence which employer presented was sufficient to demonstrate a change in condition for the better. The Appellate Division affirmed, but the superior court reversed. The court of appeals granted discretionary appeal and reversed the judgement of the superior court. The court of appeals pointed out that a change in condition for the better could be demonstrated by a showing of an actual return to work, by evidence of a medical release to return to work without restrictions, or by other evidence of an ability to work. The administrative law judge and the Appellate Division had held that the evidence in this case fell into the third category. Under the "any evidence" rule, the superior court was required to accept the findings

that employee was more than a passive investor in the business and that the activity he performed demonstrated an ability to work. Therefore, the superior court was required to hold that the employer had demonstrated a change in condition for the better. In many similar cases, the employee would have been entitled to payment of income benefits for temporary partial disability after it was demonstrated that he was no longer totally disabled, but in this case the change in condition occurred so long after the original injury that the time period during which benefits for temporary partial disability could be paid had long ago expired.

The case of Connell v. Head, 253 Ga. App. 443 (2002) deals with an exclusive remedy defense in a tort action. The validity of the defense depends on whether the accident in question arose out of and in the course of the injured employee's employment. Head, a cafeteria worker, and Connell, a school bus driver, were both employed by the Cartersville City Schools. Head had signed out at the end of her work shift and proceeded to her car in the parking lot. As she was exiting the employer's parking lot, she collided with a school bus driven by Connell. Head contended that the collision was caused by Connell's negligence. The collision occurred on a street which was owned and controlled by the employer, even though the public was allowed to use the street even during school hours. Connell moved for summary judgment, contending that Head's exclusive remedy was the workers' compensation law. The trial court denied Connell's motion, but the court of appeals reversed. The court of appeals held that Head's accident and injuries did indeed arise out of and in the course of her employment. The court of appeals pointed out that this accident occurred on school

property while Head was within a reasonable time for egress from her work location. The court of appeals stated that the employer's premises included any property owned, controlled or maintained by the employer. This property could include a street, even if the public is allowed to use the street. Therefore, Head's accident fell within an exception to the general rule that accidents which occur while an employee is traveling to and from work are not compensable. Because an exception applied, Head's accident was compensable, and her exclusive remedy against her employer and Connell, an employee of the same employer, was the workers' compensation law.

The case of Conex Freight Systems v. Georgia Insurance Insolvency Pool, Ct. App. No. AO1A2429, decided March 1, 2002, deals with how an insured qualifies for coverage with the Pool. Conex, a California Corporation and resident of that state, leased property in Georgia. That property consisted of land and buildings. The buildings included office space and warehouse space. Conex carried various categories of insurance on the land and buildings, their contents and the people who worked in the buildings. Those categories of insurance included liability and workers' compensation. The insurer which provided coverage to Conex became insolvent. Conex filed a declaratory judgment action, seeking a determination that it qualified for coverage with the Pool. The trial court found that Conex did not qualify for coverage because it was not a resident of Georgia. The court of appeals agreed with this holding, but ruled that it was not totally dispositive of the case. For purposes of coverage with the Pool, an insured can be a resident of only one state. Because Conex was clearly a resident of California, it could not also be a resident of Georgia. Nevertheless, there are

other ways to qualify for coverage with the Pool. One of these ways is to have an insurable interest in property permanently located in Georgia. The property which Conex leased was clearly permanently located in Georgia. The lease which Conex held on that property gave it an insurable interest in the property. Therefore, Conex did qualify for coverage with the Pool despite the fact that it was not a resident of Georgia.

In 1979, the court of appeals adopted the positional risk doctrine for the purpose of determining whether an accident and injury arose out of an employee's employment for workers' compensation purposes. That doctrine provides that an accident arises out of the employment if the employment requires the employee to be in the place where the danger occurs and brings the employee within the range of the danger. National Fire Insurance Company v. Edwards, 152 Ga. App. 566 (1979). That doctrine has now been reaffirmed and given a broad application in an exclusive-remedy case. In DeKalb Collision Center, Inc. v. Foster, Ct. App. No. AO1A1955, decided March 11, 2002, the employer hired a contractor to erect a brick facade and plant shrubs on the employer's premises. A dispute arose as to the price the employer should pay for the work the contractor did. When the employer refused to pay the price the contractor demanded, the contractor and his employees came to the employer's premises and began to attempt to demolish the brick facade. When the owner and some supervisory personnel attempted to stop the destruction, they were attacked. Foster and other employees of DeKalb Collision Center attempted to intervene in order to protect the physical integrity of the premises and the lives of their co-workers. Foster was injured in the fight, and died as a result of those injuries. His survivors filed a wrongful death action against the

contractor and his employees as well as against DeKalb Collision Center and its employees. The case against the contractor and his employees was settled before trial. The trial jury returned a verdict against DeKalb Collision Center and its employees. The trial court denied DeKalb Collision Center's motions for directed verdict and judgement notwithstanding the verdict based on a contention that tort claims were barred by the exclusive-remedy provisions of the workers' compensation law. The court of appeals agreed with DeKalb Collision Center. The court of appeals stated that Foster's injury and death arose out of and in the course of his employment. In the process of reaching that conclusion, the court of appeals clearly stated that the question of whether the injury and death arose out of employment was to be resolved by application of the positional risk doctrine. That doctrine provides that an injury arises out of employment if the employee's employment requires the employee to be in the place where the danger occurs and brings the employee within the range of the danger. The court of appeals pointed out that this doctrine had been the law since 1979, if not before. The court also pointed out that any case, even one decided after 1979, which appears not to recognize this doctrine is not accurate and should not be followed. The court pointed out that Foster's employment required him to be at the place where the danger of being injured in the fight involved in this case occurred and brought him within the range of that danger. Foster's injury and death also arose in the course of his employment because he was in a place where he might reasonably be expected to be in the course of his employment and was doing something incident to that employment at the time he was injured. The court of appeals held that attempting to protect the premises from physical

destruction and attempting to protect co-workers from injury are acts which are incident to employment. Because Foster's injury and death arose out of and in the course of his employment, his survivors' exclusive remedy against DeKalb Collision Center and its employees was the benefits provided by the workers' compensation law.

The case of Satilla Regional Medical Center v. Corbett, Ct. App. No. AO1A2224, decided March 12, 2002, is of procedural interest. In that case, the administrative law judge and the Appellate Division found that the employee had not proved entitlement to benefits. This decision was based, at least in part, on consideration of various medical reports. Neither the administrative law judge nor the Appellate Division specifically mentioned every medical report in their decisions. The superior court reversed the decision of the Appellate Division. The superior court ruled that all the medical evidence had not been considered and remanded the case directly to the administrative law judge for reconsideration in light of all medical evidence. The court of appeals granted discretionary appeal. The court of appeals ruled that the decision of the superior court was procedurally defective for several reasons. First, the superior court had no authority to remand a case directly to an administrative law judge. If the case is to be remanded to an administrative law judge, the Appellate Division is the entity which should remand the case to the administrative law judge. Second, it was not necessary to specifically mention every piece of evidence in order to be deemed to have considered all the evidence. The record in this case contained no evidence that all the medical evidence had not been considered. Third, the findings of the administrative law

judge and the Appellate Division were supported by evidence in the record and should have been affirmed pursuant to the "any evidence" rule.

Although the court of appeals acknowledged the existence and applicability of the "any evidence" rule, the result was different in Rheem Manufacturing Company v. Jackson, Ct. App. No. AO2A0073, decided March 26, 2002. In that case, the main bone of contention was the amount of the employee's average weekly wage. At the hearing before the administrative law judge, it was clear from the evidence presented that the employee had not worked in the type of employment in which she was injured for the same or another employer for substantially the whole of 13 weeks immediately preceding her injury. There was no testimony, documentation, or stipulation that there was not a similar employee of the same employer who had worked in that type of employment during substantially the whole of 13 weeks immediately preceding employee's injury. There was evidence of employee's hourly rate of pay. After the close of the evidence, the administrative law judge requested that the parties supply information which would enable him to calculate the employee's average weekly wage. The employee submitted a post-hearing brief which contained the statement that there was no similar employee whose earnings could be used to calculate the employee's average weekly wage. The employer did not dispute this statement, but also did not agree with it. The administrative law judge found that the first and second methods of calculating an average weekly wage found in code section 34-9-260 could not be applied and based his finding as to the employee's average weekly wage on her hourly rate of pay times 40 hours. The Appellate Division adopted the award of the

administrative law judge, and the superior court affirmed. The court of appeals granted discretionary appeal and reversed. The court of appeals ruled that there was no evidence that there was not a similarly-situated employee whose earnings could be used to calculate employee's average weekly wage. There was no testimony, documentation, or stipulation with respect to this issue in the record of evidence presented at the hearing before the administrative law judge. The statement in employee's post-hearing brief was not sufficient to constitute "any evidence" for this proposition. Therefore, the case had to be remanded to the Appellate Division so that it could be remanded to the administrative law judge to hold an evidentiary hearing on the issue of whether there was a similarly-situated employee so that a proper calculation of employee's average weekly wage could be made.

The case of Jones County Board of Education v. Patterson, Ct. App. No. A02A0674, decided April 25, 2002, arises in the context of the any evidence rule. In that case, Patterson worked full-time as a vice principal at a school in Jones County. He also performed maintenance on a part-time basis in the Jones County school system. He injured himself while performing maintenance work. His maintenance work and his work as a vice principal were treated as concurrent dissimilar employment. He received benefits based strictly on his earnings from his maintenance job. These benefits continued to be paid for a number of years. Patterson eventually found a job as a principal at an elementary school in another county. He worked more hours and earned more money in that job than he had in his two previous concurrent dissimilar jobs combined. The Jones County Board of Education requested a hearing to

determine that Patterson had undergone a change in condition for the better. The evidence presented at that hearing showed that Patterson was not taking any pain medication to treat the symptoms of his injury, that he was not seeking medical treatment for that injury except at the direction of the employer, and that he had been released to return to medium-duty maintenance work. A vocational expert also testified that there were 21 part-time maintenance jobs available in the geographic area which were within Patterson's medical restrictions and abilities. Patterson testified that some of these jobs looked interesting to him, but that he did not have the time or energy to pursue them because of the demands placed on him by his full-time employment. Based on this evidence, the administrative law judge and the Appellate Division found that Patterson had undergone a change in condition for the better. The superior court reversed for reasons which the court of appeals did not enumerate. The court of appeals reversed the judgement of the superior court. The court of appeals strongly stated that the evidence in this record clearly supported the findings made by the administrative law judge and the Appellate Division. The court of appeals further stated that the superior court should have affirmed the Appellate Division's decision based on the any evidence rule. It should be noted that the evidence in this case limited itself to Patterson's part-time employment, and made only tangential reference to his full-time concurrent dissimilar employment. It should also be noted that, because this is an any evidence case, it is highly likely that any holdings in this case will be limited to the particular unique facts of this case.

The case of WAGA-TV, Inc. v. Yang, Ct. App. No. A02A0434, decided May 31, 2002, also deals with the issue of change in condition. In that case, Yang was employed by WAGA as a camera operator. He was injured while filming a high school football game in 1986. He returned to work with WAGA on a limited basis and received temporary partial disability benefits. In 1991, his position was eliminated and he was laid off along with a number of other people. At that time, the employer increased his benefits to total disability benefits. After being laid off, Yang began performing work for his own video production company. He performed a great deal of work for the corporation, and traveled extensively on behalf of the corporation. He was the sole owner of the corporation, and his wife, the bookkeeper, was the only other employee of the corporation. Although the corporation had large gross revenues, Yang contended that it made no profit, and even contended that he had to make loans out of his personal assets to the corporation in order for the corporation to remain in business. In 1998, the employer requested a hearing in order to demonstrate a change in condition for the better and to obtain authorization to suspend payment of total disability benefits. Based on the evidence of the extent of Yang's activities, the revenues created by the corporation, and the lack of corporate profits, the administrative law judge found that Yang had undergone a change in condition from total disability to temporary partial disability. Based on the fact that Yang was making loans out of his personal assets to keep the corporation in business, the administrative law judge, in the exercise of his discretion, did not order Yang to reimburse the employer for the difference between the total disability benefits he had received and the temporary partial disability benefits to

which he was actually entitled. The administrative law judge did allow the difference between total and temporary partial disability benefits to act as a credit against any future liability for disability benefits. The Appellate Division affirmed, but the superior court reversed. The superior court cited Smith v. Lockheed-Georgia Company, 185 Ga. App. 869 (1988) for the proposition that total disability benefits remained payable in spite of Yang's ability to work because of the lack of profit from his business. Smith, supra, does not stand for this proposition. That case held that a change in condition had been demonstrated when the employee started a business following his injury. The extent of the economic disability was measured by the net income not the gross receipts, of the business. The superior court thus misapplied Smith. The court of appeals reversed the judgement of the superior court. The court of appeals ruled that the 1978 amendment to what is now code section 34-9-104 changed the definition of a change in condition. Prior to that time, at least since 1968, a change in condition had been defined as solely and economic change based on an employee's ability to work or continue to work for the same or another employer or inability to work or continue to work for the same or another employer. In 1978, the concept of wage-earning capacity was added to the definition. The court of appeals stated that there is a distinction between the ability to work and the ability to earn. It was clear that Yang had the ability to work. The issue in this case was whether he had the ability to earn. Based on the evidence presented, the court of appeals ruled that the administrative law judge and the Appellate Division properly ruled that Yang had an ability to earn but did not have an ability to make a profit. Therefore, the administrative law judge and the Appellate

Division correctly ruled that Yang underwent a change in condition from total disability to temporary partial disability. In reaching this conclusion, the court of appeals held that Smith v. Lockheed-Georgia Company, supra, did not apply to this case. The only obvious distinction between the two cases is that the business in Yang was incorporated, while the business in Smith was not. Both cases involved injuries which occurred after the 1978 change in the definition of a change in condition. The issue in both was how to determine the extent of temporary partial disability. Both cases based this determination on net income, not gross receipts.

In Ridley v. Monroe, Ct. App. No. A02A0243, decided July 2, 2002, the court of appeals issued a landmark decision in the exclusive-remedy area. In that case, plaintiff was a passenger in a car driven by a co-worker (the defendant). They were involved in a collision and plaintiff was injured. Although they were on a scheduled lunch break at the time, plaintiff originally contended that she was performing a work-related errand at the time and that the collision was therefore compensable. The employer originally controverted the claim, but eventually the claim was settled with a no-liability stipulation. The Board award approving the no-liability stipulation recited that the parties had agreed that this claim was not covered by workers' compensation law and denied the claim. Money did change hands, however. The payment was made pursuant to a separate document, a covenant not to appeal the award denying the claim. Plaintiff then filed this tort action against defendant. Defendant moved for summary judgment based on the exclusive-remedy provision of the workers' compensation law. The trial court granted summary judgment. On appeal, the majority of the court of appeals

affirmed. The majority held that even though the workers' compensation claim was settled on a no-liability basis, payment was nevertheless made and that payment was plaintiff's exclusive remedy. The majority ruled that payments made pursuant to any kind of workers' compensation settlement, liability or no-liability, were payments made pursuant to the workers' compensation law and were therefore subject to the exclusive-remedy provisions of that law. The majority pointed out that the amendment to code section 34-9-15 effective July 1, 2000 authorized the Board to approve no-liability settlements. The majority further noted that when the legislature enacted this amendment, it made no provision exempting payments made pursuant to a no-liability settlement from the exclusive-remedy provisions of the workers' compensation law. The majority stated that if such an exemption were to be made, the legislature would have to make it. Two judges dissented. They pointed out that the 2000 amendment merely codified procedure which had been in place for many years. They further pointed out that an award approving a no-liability settlement recites that the claim is denied. The dissenters stated that such an award is a ruling that the claim is not covered under the workers' compensation law. Claims not covered under the workers' compensation law are not subject to the exclusive-remedy provision of that law. Therefore, the dissenters would have ruled that a claim which is settled on a no-liability basis is not subject to the exclusive-remedy provision of the workers' compensation law. Although it is impossible to predict how the supreme court would rule on a request for certiorari, it would appear to be highly likely that such a request will be made in this case.

The case of Johnson v. Publix Super Markets, Ct. App. No. A02A0428, decided July 16, 2002, is a major landmark decision with regard to whether an injury arises out of employment. In that case, employee worked as a cashier. Shortly before closing time, she received permission from her supervisor to retrieve personal items from the rear of the store. She locked her register but did not close it out so that she could serve customers if the need arose. As she was returning from the rear of the store, she was hurrying to reach her register and was checking to see that the aisle was clear of obstructions (as she had been trained to do by employer) when she slipped, fell, and broke her leg. Although the floor was of terrazzo construction, all the testimony in the record indicated that the floor at the location where employee fell was not wet, slick, or rough. The evidence also did not indicate that there was any object on the over which employee might have tripped. Employee filed a workers' compensation claim which employer/insurer controverted. The only issue in the claim was whether employee's accident and injury arose out of (it was stipulated that they arose in the course of) her employment. The administrative law judge found that employee's accident and injury arose out of her employment. This finding was based at least in part on a finding that terrazzo floors are slick. The Appellate Division affirmed, but the superior court reversed. The superior court ruled that there was no evidence in the record to support the findings of the administrative law judge. especially the finding that terrazzo floors are slick. The court of appeals granted discretionary appeal and reversed by a 9-3 vote. A six-judge majority wrote an opinion which expanded the positional risk doctrine. The majority began by pointing out that it is possible to take judicial notice of facts which are

undisputed and of common knowledge. They also stated that the determination that terrazzo floors are slick is not such an undisputed fact which is of common knowledge and could not be judicially noticed. Although this holding would appear to support the judgement of the superior court, the majority went on to state that it was not relevant whether the floor where employee fell was slick or not. The majority stated that employer/insurer appeared to be treating this claim as an idiopathic (cause unknown) fall. Employer/insurer cited cases which held that idiopathic falls did not arise out of an employee's employment and were not compensable. Cases specifically mentioned were Borden Foods, Inc. v. Dorsey, 112 Ga. App. 838 (1965) and Prudential Bache v. Moore, 219 Ga. App. 847 (1995). The majority stated that Borden Foods, Inc. v. Dorsey, supra, was based in large part on a holding that in order to arise out of employment, an accident and injury had to result from a risk peculiar to the employment. A risk peculiar to the employment was required in order to find that there was a causal connection between the working conditions and the accident and injury so that the accident and injury could be said to arise out of employment. This peculiar-risk doctrine was specifically rejected by a unanimous court of appeals in National Fire Insurance Company v. Edwards, 152 Ga. App. 566 (1979). That case dealt with an injury resulting from the collapse of a wall of a building caused by a tornado. In that case, the court of appeals adopted as the law of Georgia the positional risk doctrine. Under that doctrine, an accident and injury arose out of employment if the employee's employment required the employee to be in the place where the danger manifested itself at the time the danger manifested itself and brought the employee within range of

the danger. The Edwards specifically overruled two prior peculiar-risk decisions, and stated that any other case which was inconsistent with the positional risk doctrine was also overruled. There may have been a question as to whether the Edwards case was to be applied narrowly or broadly, but that question was resolved in DeKalb Collision Center v. Foster, 254 Ga. App. 477 (2002). The majority held that Foster called for a broad application of the positional risk doctrine. Under this broad application, the employee's employment in Johnson required her to be in the place where the danger of a slip and fall manifested itself at the time the danger manifested itself and brought her within range of that danger. Therefore, her accident and injury arose out of her employment even though any member of the general public similarly situated would have been exposed to the same danger. The majority specifically overruled Prudential Bache v. Moore, supra, because it relied on Borden Foods, Inc. v. Dorsey, supra, a peculiar-risk case, and was therefore itself a peculiar-risk case. The majority also pointed out that Borden Foods, Inc. v. Dorsey, supra, had been overruled by National Fire Insurance Company v. Edwards, supra, even though it was not specifically mentioned in the Edwards case. The majority also interpreted United States Casualty Company v. Richardson, 75 Ga. App. 496 (1947), which might appear to be an idiopathic-fall case, as a positional risk case. It thus appears that so-called idiopathic falls are now compensable under the positional risk doctrine. Three judges concurred in the judgement only. Three other judges dissented. The dissenters stated that even under the positional risk doctrine, there had to be some causal connection between an employee's working conditions and the employee's accident and injury in this case, in

which the floor on which the employee slipped and fell was not wet, slick, or rough and there was no object over which the employee tripped, there was no such causal connection demonstrated by the record in this case. The dissenters stated that there was certainly no evidence in the record to support a finding that terrazzo floors are in and of themselves slick. This fact was certainly not so undisputed and of such common knowledge that it could be judicially noticed. The dissenters considered the finding that terrazzo floors are slick to be essential to the administrative law judge's determination that employee's accident and injury arose out of her employment. The dissenters therefore believed that the superior court correctly ruled that there was no evidence in the record to support the decision of the administrative law judge and the Appellate Division and correctly reversed that decision. Once again, although the outcome of an application for certiorari is impossible to predict, it would appear highly likely that such an application will be filed in this case.