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Timing Is Everything in Applying the Continuous Employment Doctrine

By Matthew Pittman, Timothy A. Raimey, Jr. October 14, 2016

By the end of the 2016 calendar year, we should see at least one opinion from the Court of Appeals that may or may not provide some limitation to the ever-expanding scope of the continuous employment doctrine following a closely-decided 4-3 opinion by the Georgia Supreme Court in 2007. *See Ray Bell Cons. Co. v. King*, 281 Ga. 853, 642 S.E. 2d 841 (2007). Whether the Georgia Supreme Court will review the doctrine again in 2017 to provide further clarification to the already fact-specific, and sometimes puzzling, doctrine of continuous employment is yet to be determined. However, where *Ray Bell* and much of the previous case law has focused on the general proximity requirement and whether the actions of a claimant deviated from such to determine whether or not the employee falls within the scope of the doctrine, a 2012 Court of Appeals decision, *Medical Center, Inc. v. Hernandez*, should provide some guidance for the Courts and State Board to focus their attention when determining whether an employee falls within the doctrine. The scope of this doctrine is something employees, employers, and insurers should keep an eye on as the traditional 40-hour work weeks and typical office jobs continue to evolve along with technological advances and socio-economic values and principles. Providing a more specific standard as to *when* the continuous or "traveling" employee is covered by the doctrine would resolve some of confusion following the 2007 *Ray Bell* decision.

Ray Bell involved a Florida resident hired to work as a superintendent for a construction project in Jackson, Georgia and was provided housing in Fayetteville, Georgia by the employer. Death benefits were sought after he was killed in a motor vehicle accident on a Sunday while driving a vehicle provided by the employer. As the dissent points out, but the majority makes no reference to, it was undisputed that the decedent was also on sick leave for a knee injury at the time of the accident and was returning home from helping his mother move furniture to storage in Alamo, Georgia when the accident occurred. Conversely, the majority relies on the factual findings from the State Board which determined the decedent had concluded a personal mission in an employer-provided vehicle and was returning to either the job site or his employer-provided home when the accident occurred. *Ray Bell*, 281 Ga. at 854-55. The majority opinion does not discuss whether the claimant was on-call, worked weekends, or traveled home on weekends. *Id.*

The particular findings from the State Board that the claimant was either returning to work or returning to his employer-provided home are the limited factual findings the Supreme Court relied on when concluding the accident arose out of and in the course of his employment under the continuous employment doctrine. *Id*. at 855. Arising out of refers to causation and in the course of refers to the time, date, and circumstances of the employment. *Id*. In addressing the "in the course of employment" requirement, the Court provides that the rule to apply is whether "the period of employment is at a place where the employee may reasonably be in the performance of his duties and while he is fulfilling those duties or engaged in something incidental thereto." *Id*.

Despite this rule, neither the majority or dissent identify specific facts as to whether the employee was required to work on Sundays by his employment contract, required to stay in Georgia on the weekends, whether he was an on-call employee, or whether the work week had begun or ended when the accident occurred. While the dissent identifies facts that establish the claimant was on sick leave and performing a personal mission at all times on a Sunday, its legal analysis does not discuss the timing of the accident but instead focuses on the general proximity case law and whether the accident arose out of his employment. Alternatively, the facts used by the majority in *Ray Bell* place the claimant in the course of employment as he was in an employer-provided vehicle traveling to either employer-provided housing or the job site when the accident occurred. Perhaps the majority and dissent may have found more common ground had they analyzed the timing element in the continuous employment doctrine, such as the Court of Appeals did in *Medical Center, Inc. v. Hernandez,* 319 Ga. App. 335 (2012).

In *Hernandez*, two employees died in an auto accident on their way to work in Columbus, Georgia on a Monday morning. The two employees would stay in Columbus, Georgia during the work week and then return home to Savannah, Georgia on the weekends. There was no dispute that the two decedents fell within the doctrine during the actual work week and likely this accident would have been found compensable had they arrived at the job site and started the work week. Further, the Court of Appeals decided that the two decedents were likely within the general proximity of the job site when the accident occurred. The distinguishing fact that the Court of Appeals applied in its decision, which held that the doctrine did not apply to the decedents, was that the work week had not yet started for them when the accident took place as the employees had not yet reached the job site on a Monday morning on their way from Savannah to Columbus. *Hernandez,* 319 Ga. App. at 337. As such, the accident did not arise out of and in the course of their employment under the continuous employment doctrine, as required under *Ray Bell*.

The two-part rule we can take away from *Hernandez* after *Ray Bell* to determine whether an employee should fall within the continuous employment doctrine is as follows: (1) the injury must occur in the general proximity of employment; and (2) at a time when the employee was employed to be in that proximity. *Id*. The takeaway from *Hernandez* is that continuous employment only extends to employees during periods of time when the job offered by the employer requires the injured worker to be away from home. In *Ray Bell*, the decedent lived in Florida but was required to stay and live in metro Atlanta. In effect, his work week did not end as the continuous-employment doctrine is concerned because he was required to live in employer provided housing and was possibly traveling back to his job site.

The decision in *Hernandez* is also consistent with prior rulings from the appellate courts in Georgia. *See, e.g. United States Fidelity, etc. Co. v. Navarre*, 147 Ga. App. 302 (1978); *McDonald v. State Highway Department*, 127 Ga. App. 171 (1972); *Mayor, etc. of Savannah v. Stevens*, 278 Ga. 166 (2004). In *Navarre* and *McDonald*, both employees were injured after the work week had started and held to fall within the doctrine. *Id*. Alternatively, in *Stevens* an off-duty police officer was held not to fall within the doctrine in an accident on her way to work because she was not an on-call 24-7 employee despite the opinion acknowledging that a police officer is responsible for enforcing the law while in city limits at all time. 278 Ga. at 167. The distinguishing facts among all these cases, including *Ray Bell* and *Hernandez*, as to whether someone falls under the continuous employment doctrine is whether or not that employee's employment contract requires them to be in the general proximity of where the accident occurred.

Going forward, expect trial and appellate courts to examine closely not only whether the claimant was in

the general proximity of his or her employment when an accident takes place, but the requirements of the employment contracts as to when the employee is expected to be away from his permanent residence for work-related reasons. As such, practitioners should also focus their discovery and application of the facts to where the accident took place and whether he or she was expected to be there as a condition of his or her employment. Additionally, practitioners should focus on what were the terms of the contract of employment, details of compensation, and the hours of service a particular employee was expected to work, including whether they were on-call 24/7, whether they worked after hours, whether they worked weekends, and whether they were expected to remain in the general proximity on weekends. Taking all of these facts together, the trier of fact should then find whether or not the employee was in a place *and time* at the employer's benefit when the accident took place to determine whether the employee falls within the continuous employment doctrine.