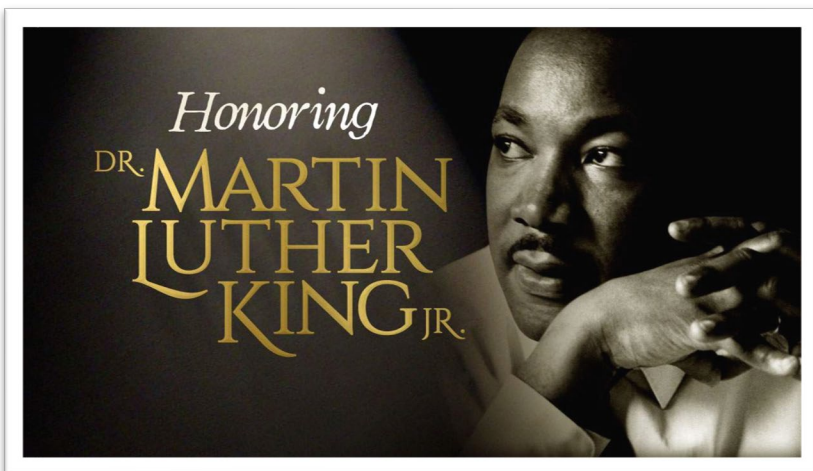


# A Claims scene

A publication of the Atlanta Claims Association  
January 2023



More than 50 years after his assassination in 1968, Dr. Martin Luther King Jr. is remembered as an activist, a prominent leader in the civil rights movement, a pioneering historical Black figure, and a wordsmith. His impact is still felt today as his daughter carries on his legacy and we continue to look to him for strength when the fight for racial equality seems unending. Throughout his years of public service, the Nobel Peace Prize winner wrote and delivered speeches—the most notable being his 1963 "I Have a Dream" address—that provided wisdom that still holds true today.

**"If you can't fly then run, if you can't run then walk, if you can't walk then crawl, but whatever you do you have to keep moving forward."**



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# *Letter from The President Jennifer Sweat*

Happy New Year ACA Family:

WOW!! I can't believe we are already in January. How quickly the time has flown. I hope everyone was able to survive the cold snap we had last month, and no one had busted pipes. If you did, hopefully, it wasn't too much damage. We all know how filing those insurance claims can be! Lol.

Now that the holidays are over, most everyone should be back in the swing of things full force. Did anyone make New Year's resolutions? If you did, great... I hope you are sticking with them, but if you haven't just remembered all a resolution is, is a promise to yourself for a constant or a change. It does not matter if you have broken them, what matters is you have the desire to continue to try.

January 16<sup>th</sup>, is a day to honor, Dr. Martin Luther King Jr. What a great leader who had the desire in his heart to seek change. Please take a moment to remember him, and the changes he was able to inspire throughout his life and nonviolent protests.

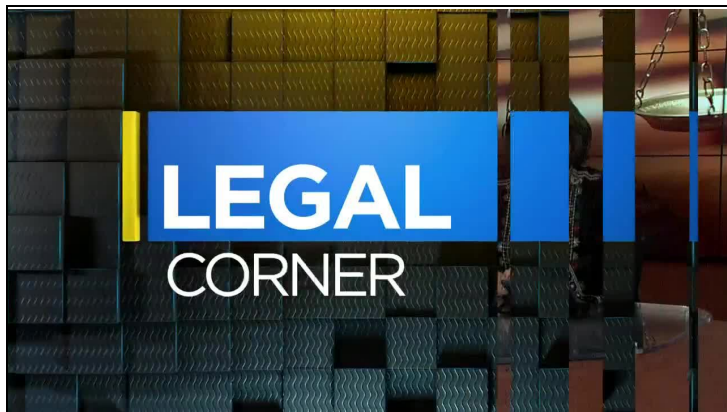
Membership – please remember if you have not already done so. Please renew your ACA membership. It is for the calendar year.

Our upcoming events - ACA annual Education Conference. This is 100 years of the ACA. You do NOT want to miss this event. It will be held at Villa Christina on 04/13/2023. We also have the June golfing tournament, please save the date for this event as well. It is set for June 19<sup>th</sup>, 2023. Be on the lookout for more information on both of these wonderful events.

If you or someone you know, wants to help with the ACA as a board member, Director, or Chair committee member, please let me know.

As always, wishing the ACA family a safe and healthy 2023.

Jennifer Sweat  
President  
Atlanta Claims Association



# Intoxication, Fights and Deviations in Georgia Workers' Comp Claims

By Attorney K. Martine Cumbermack and Attorney Alexis N. Herring  
Swift, Currie, McGhee & Hiers, LLP

The foundation of the Georgia Workers' Compensation Act (the Act) is to provide medical and wage loss benefits to injured workers in a no-fault system without having to undergo the rigors of filing a lawsuit and navigating the legal system.

In exchange, an injured workers' remedies under the law are limited and absent in rare circumstances; it is the exclusive remedy available against an employer when seeking recovery for injury or even death arising out of or in the course of employment. In exchange for the limitation in remedies available to an injured worker, the employer gives up many of the affirmative defenses that may be available in traditional tort actions.

Although it is a no-fault system, when a claim's compensability is in question, the employee carries the burden of proof when filing a claim for benefits. That burden requires the injured worker to prove their injury arose out of and in the course of employment.

The Act also provides defenses for an employer when an injured worker engages in misconduct, the conduct arises out of unlawful behavior or is, in fact, outside the course and scope of employment. O.C.G.A. § 34-9-17 specifically provides, "no compensation shall be allowed for an injury or death due to the employee's willful misconduct, including intentionally self-inflicted injury, growing out of their attempt to injure another or the willful failure or refusal to use a safety appliance or perform a duty required by statute." See O.C.G.A. § 34-9-17(a).

Willful misconduct is defined in this regard as including all conscious or intentional violations of law or rules of conduct, obedience to which is not discretionary, as distinguished from inadvertent, unconscious, or involuntary violations. *Home Indem. Co. v. White*, 154 Ga. App. 225, 227, 267 S.E.2d 846, 848 (1980).

This article will explore willful misconduct defenses in Georgia related to injuries that may have been caused by employee intoxication or fighting, as well as defenses when an injury stems from an employee deviating from the scope of their job responsibilities.

## Willful Misconduct: Intoxication

Asserting an intoxication defense under O.C.G.A. § 34-9-17(b) creates a shifting of burdens between employer and employee. While O.C.G.A. § 34-9-17 generally places the initial burden upon the employer, there is an exception when the employee tests positive for alcohol and drugs, as shown by chemical analysis of the employee's blood, urine, breath, or other bodily substance.

Specifically, O.C.G.A. § 34-9-17(b) provides where testing has been performed demonstrating an employee has 0.08 grams of alcohol or greater in his blood within three hours of the time of the alleged accident, or where an employee has any amount of marijuana or controlled substance in his blood within eight hours of the alleged accident, or when the employee unjustifiably refuses to submit to a reliable, scientific test, there will be a rebuttable presumption the accident and injury or death were caused by the consumption of alcohol or by the ingestion of marijuana or the controlled substance.

This rebuttable presumption that the injury or death was caused by the consumption of alcohol or controlled substance effectively relieves the employer of meeting the “proximate cause” element of their defense – at least until the employee rebuts the presumption.

The burden then shifts to the employee to rebut this presumption by proving: (1) he did not ingest the alcohol or illicit drug; (2) if he did, he was not intoxicated; (3) if he did ingest the alcohol or illicit drug, he was not intoxicated at the time of the work accident; (4) that the accident was not proximately caused by his intoxication; or (5) if he refused testing, it was justified because the proposed testing was not a reliable, scientific test to be performed pursuant O.C.G.A. § 34-9-415. See *Kissiah & Lay’s Workers’ Compensation Law*, pp. 515.

The claimant has the burden of showing by “clear, positive, and uncontradicted evidence” that the use of alcohol or controlled substances was not the cause of the injury.

Each case is fact-specific, though generally speaking, the employee may rebut the presumption in cases where the accident would have occurred whether or not the employee was intoxicated.

Accordingly, even with a valid positive drug test or a refusal, it is good practice for the employer, and their defense counsel, to assume the employee may be able to **rebut the presumption, resulting in a** shifting of the burden back. Thus, the employer should prepare to prove the employee’s intoxication was the proximate cause of the on-the-job injury.

## Willful Misconduct: Fights

Georgia expressly excludes intentional acts by the employee and acts derived from matters personal to the employee from being compensable. Determining whether a fight arose out of or in the course of employment is not always clear and requires a thorough examination of the facts.

Of course, the burden of proof is on the employer if the employer is asserting an “aggressor defense.” Conversely, the burden of proof would be on the employee to prove the injury arose out of or in the course of employment.

Where an employee’s on-the-job injury is the result of his or her attempt to injure another, workers’ compensation benefits may be barred under O.C.G.A. § 34-9-17(a). Furthermore, an employee’s injuries sustained while fighting with a co-worker are not compensable when the employee is the aggressor. Additionally, an injury caused by the willful act of a third person directed against an employee for reasons personal to the employee is not an injury that arises out of and in the course of employment. *City of Atlanta v. Shaw*, 179 Ga. App. 148, 149, 345 S.E.2d 642, 642–43 (1986).

However, injuries sustained by the victim of an assault while at work may be deemed compensable if the fight stems from the employee’s work duties. *State v. Purmort*, 143 Ga. App. 269 (1977) Additionally, the Georgia Court of Appeals has interpreted “aggressor” as not just the one who initiated the physical altercation, but also as the individual who precipitated the altercation by using so-called fighting words, threats, or even abusive language. *Kimbro v. Black & White Cab Co.*, 50 Ga. App. 143, 177 S.E. 274 (1934) and *U.S. Fid. & Guar. Co. v. Giddens*, 102 Ga. App. 576, 116 S.E.2d 883 (1960).

## Injuries Not Arising Out of or in the Course of Employment: Deviation

Unlike willful misconduct defenses, when an employee suffers an injury while deviating from the scope of employment, an employer can deny on the grounds it did not arise out of or in the course of employment. The employee then bears the burden of proof.

Arising out of employment requires a causal connection between the accident and the employee's job duties. *Continental Cas. Co. v. Caldwell*, 55 Ga. App. 17, 189 S.E. 408 (1936). In the course of employment refers to when an accident occurs within the period of the employment, at a place where the employee reasonably may be in the performance of the employee's duties and while the employee is fulfilling those duties engaged in something accidental thereto. See O.C.G.A. § 34-9-1; *New Amsterdam Cas. Co. v. Sumrell*, 30 Ga. App. 682, 118 S.E.786 (1923).

The court of appeals, *General Accident Fire & Life Assurance Corp. v. Prescott* found that an employee's injury does not arise out of and in the course of his employment when he breaks the continuity of his employment for a personal mission and is injured before bringing himself back into the scope of his employment.

The courts have since taken the length and nature of the deviation into consideration when determining if an accident is compensable.

The court of appeals has defined a "slight deviation" as "an act so closely connected with the master's affairs that even though the employee may derive some benefit from it, it may nevertheless be fairly regarded as arising out of and in the course of employment," in *Lewis v. Chatham Cty. Savannah Metro. & Planning Comm'n.*, 217 Ga. App. 534, 458 S.E.2d 173 (1995).

In contrast, where an employee has deviated from his employment for reasons wholly unrelated to the job, any injury sustained while the deviation persists is not compensable.

## Conclusion

Employers should be proactive on the front end to help set up for the best defense, no matter which one the employer may need to assert. Having systems already in place for swift and thorough investigation of accidents, proper implementation of alcohol and drug screens, and securing evidence including written statements of any relevant witnesses will set up an employer for success no matter what defense may be asserted.

Along with that, it is essential that employers understand the law relevant to these potential defenses, so the right information is secured early on. When in doubt, employers can contact their insurers or defense counsels who are able to advise on what processes or procedures they should have in place, if not already, depending on their industry.

# WELCOME NEW MEMBERS

December 20<sup>th</sup> - January 11<sup>th</sup>

- ❖ Alex Kinzinger - Hall Booth Smith, PC
- ❖ Ashley Rudolph - Bovis, Kyle, Burch & Medlin
- ❖ Bill Wright - Exam Works Compliance Solutions (ECS)
- ❖ Jacquelyn P. Ricketson - Safehaven
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- ❖ Patsy Nickle - Safehaven
- ❖ Zane Kinney - Astinel Security & Forensics

# Webinars of Interest

## WEBINAR: Be Mine, Be Ethical

02/14/2023 | 1:00 pm – 2:00 pm EST

Attorneys [Kelly Chartash](#), [Lauren Meadows](#) and [Kori Wagner](#) of Swift Currie will host this litigation webinar on February 14, 2023, from 1-2 p.m. Eastern.

We all investigate and evaluate claims every day. In this webinar, attorneys will discuss some best practices to use when investigating claims and cases in the coverage and liability context with a focus on the ethical considerations involved and the interplay with how the information obtained through investigations is used to evaluate coverage and defend litigated claims.

The webinar will offer one **ethics** continuing education credit for attendees registered with the Georgia Department of Insurance.

[Click here to register.](#) Instructions to join webinar will be emailed to registrants closer to the date of the program.

## Upcoming Webinars and Legal Corner Articles

Does your company have an upcoming webinar of interest to the membership of the Atlanta Claims Association that you would like to share?

Do you have an article of interest for Legal Corner?

If so please let us know at: [Admin@AtlantaClaimsAssociation.com](mailto:Admin@AtlantaClaimsAssociation.com) or contact the newsletter chair, Jamaal Wilson, at: [Jamaal\\_Wilson@pmagroup.com](mailto:Jamaal_Wilson@pmagroup.com)



## Save The Date



**ACA Annual Educational Conference**  
**Back to The Future:**  
**A Journey Through 100 Years of the ACA**  
**April 13th, 2023**  
**Hyatt Regency Atlanta Perimeter at Villa Christina**

For more information, and for sponsorship opportunities, please contact the Educational Conference Chair, Jesse Parker, at: [jparker@synergyinsurance.com](mailto:jparker@synergyinsurance.com)





# Membership 2023



**Become a member and help the Atlanta Claims Association celebrate our 100th year in 2023!** Membership runs a full calendar year from January until December. Membership for 2022 ended Dec. 31st, 2022. Make sure you renew for 2023 in order to continue your membership.

## Membership includes:

- Special Events free for members
- Online Webinars with CE credit
- Networking
- Joining a committee
- Being a valued member of a well-recognized and respected group of claim professionals!

## [MEMBERSHIP](#)

For more information or assistance, please contact the ACA Membership Chair,  
Tracey Reid at: [tracey@trimedmgmt.com](mailto:tracey@trimedmgmt.com)

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