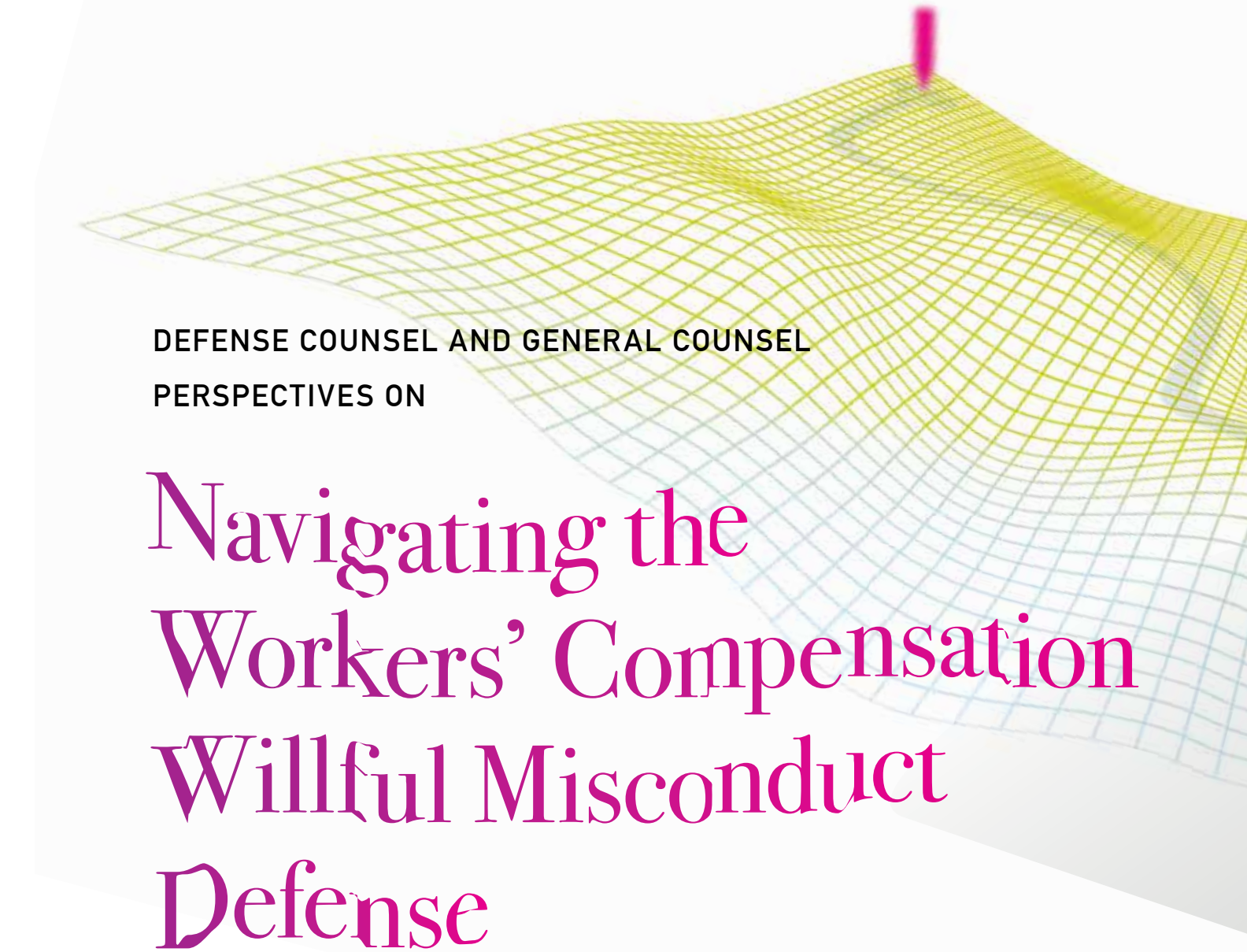
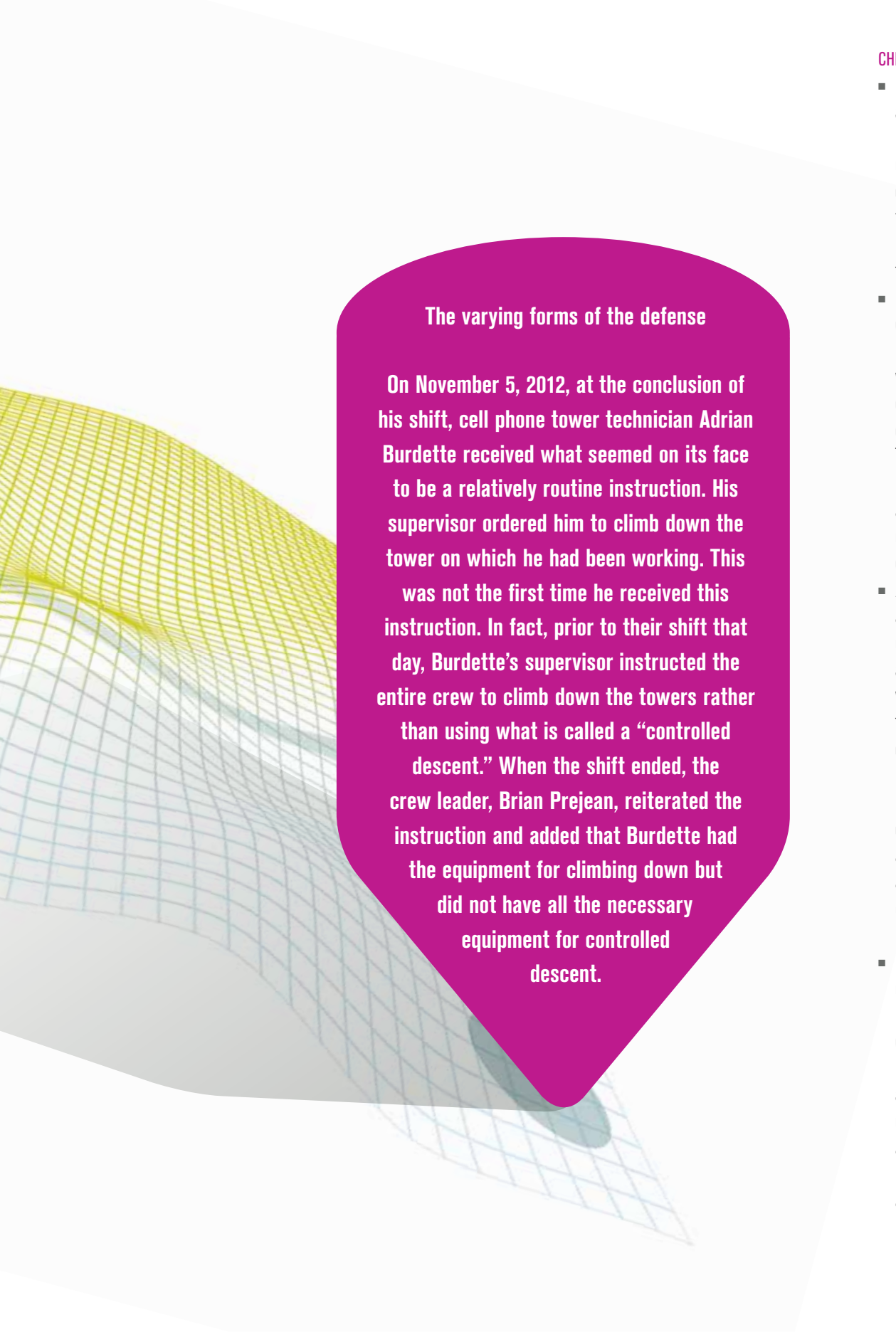


DEFENSE COUNSEL AND GENERAL COUNSEL PERSPECTIVES ON

Navigating the Workers' Compensation Willful Misconduct Defense

By Christopher Lee, Crystal Stevens McElrath, and Blake Staten



The varying forms of the defense

On November 5, 2012, at the conclusion of his shift, cell phone tower technician Adrian Burdette received what seemed on its face to be a relatively routine instruction. His supervisor ordered him to climb down the tower on which he had been working. This was not the first time he received this instruction. In fact, prior to their shift that day, Burdette's supervisor instructed the entire crew to climb down the towers rather than using what is called a "controlled descent." When the shift ended, the crew leader, Brian Prejean, reiterated the instruction and added that Burdette had the equipment for climbing down but did not have all the necessary equipment for controlled descent.

CHEAT SHEET.

- *The defense.* Many US states provide for a willful misconduct defense, where employers can apportion or share the responsibility for an on-the-job accident if the action is considered to be "willful misconduct."
- *Physical condition.* A company can defend itself when an employee willfully misrepresents or conceals their physical condition to an employer. The case of *Georgia Electric Co. v. Rycroft* holds that a false statement in an employment application can bar certain benefits.
- *A safe environment.* When an employer creates an environment that emphasizes safety and adequately warns employees of the risks of disobeying or disregarding safety protocols, an employer may not only avoid or reduce on-the-job injuries, but also preserve its ability to assert the willful misconduct defense for preventable injuries that do occur.
- *Beyond the handbook.* To emphasize important safety policies that cannot be covered in an employee handbook, conduct regular safety meetings where employees are educated about the rules and regulations regarding safety and the consequences of not adhering to them.

This resulted in an exchange between Burdette and Prejean in which Burdette insisted he could use controlled descent — a skill required by the employer for emergency situations — and had indeed done so numerous times in the past. However, there was a hitch: Burdette previously misrepresented his ability to perform the skill. Ultimately, Burdette performed a controlled descent and injured himself in the process. He then applied for workers' compensation benefits under Georgia law.

The ensuing case went all the way to the Georgia Supreme Court and ultimately redefined the "willful misconduct" defense, an area of the law with which both employers and employees should be familiar with. Willful misconduct is a broad term used to encompass a number of behaviors that, if engaged in by an employee, can bar a claim for injury, no matter how severe. This article will discuss a number of those behaviors, as well as the evolution of the defense and some recent major developments on the topic among the courts. The hope is that both employers and employees will gain a better understanding of the defense through the information provided, and will be able to identify exactly the type of conduct that not only can result in severe injury on-the-job, but will also bar an employee from receiving medical treatment and/or lost-time benefits to which they otherwise may have been entitled.

Workers' compensation law varies by state, but many US states, coast-to-coast, provide for a willful misconduct defense. While the authors of this article practice in Georgia and will drill down on Georgia's Workers' Compensation Act, it is worthwhile to spend some time taking a nationwide look at similar, and dissimilar systems, where the strategies may be employed. California, for example, is generally known to be a very employer-friendly state. There, willful misconduct allows employers to apportion or share the responsibility for an on-the-job accident. Labor Code Section 4551, in pertinent portion states, "Where the injury is caused by the serious and willful misconduct of the injured employee, the compensation otherwise recoverable therefore shall be reduced one-half." Although the statute's application is very fact specific, it provides valuable leverage in settlement negotiations. Alabama has a statute that provides willful misconduct defenses to indemnity only (§ 25-5-51). In Alabama,

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either party can request a jury pursuant to § 25-5-81(a)(2) when a willful misconduct defense is asserted. The judge then addresses all the other issues/defenses in the case.

More similar to Georgia, Tennessee has a statute that establishes the defenses of willful misconduct and willful failure to use a safety device. There, the affirmative defenses of willful misconduct, willful failure to use a safety device, and willful failure to follow a safety rule/instruction require the employer to establish that there was an applicable policy or rule and: (1) the employee's actual, rather than constructive notice of the rule; (2) the employee's understanding of the dangers involved in violating the rule; (3) bona fide enforcement of the rule by the employer prior to the incident at issue; and (4) the employee's lack of a valid excuse for their violation of the rule. The burden on employers in Tennessee certainly requires a number of preemptive human resources best practices — including intentionally crafted safety policies, regular safety training, and consistent enforcement of safety standards.

As it pertains to Georgia law, O.C.G.A. § 34-9-17(a) provides "no compensation shall be allowed for an injury or death due to [an] employee's willful misconduct[.]" Specifically, that statute also addresses injuries and death resulting from intoxication of an employee by alcohol, marijuana, or a controlled substance, and codifies the elements required for the defense. If the amount of alcohol in the employee's system within three hours of the time of the alleged accident is 0.08 grams or greater, then there arises a rebuttable evidentiary presumption that the accident and injury were a result of the employee's consumption of alcohol. Similarly, this same presumption arises if any amount of marijuana or a controlled substance (as defined under separate provisions of Georgia law) is found in the employee's system within eight hours of the accident, as it also does if an employee unjustifiably refuses to submit to a test to determine the presence of any of the above substances in their system. If any of the following conditions are met, then the burden falls upon the employee to prove by clear and convincing evidence that the accident and injury would have still occurred regardless of the ingestion of alcohol, marijuana, or a qualifying controlled substance.

For instance, assuming an employee was intoxicated on the job, if they were injured by a ceiling fan that spontaneously fell while they walked across a warehouse floor, the fact finder still must be convinced the accident and injury would not have occurred but for the intoxication.

Given the above timing requirements of three and eight hours, as it pertains to the age of any positive test result for alcohol or drugs, both employers and employees are often left wondering what impact, if any, is afforded by a positive test result falling outside of the applicable time window. While an employer would not be entitled to the above evidentiary presumption, it would still retain the right to raise an intoxication defense, but conversely, it would now retain the evidentiary burden to prove the accident and injury would not have occurred but for the intoxication. In most cases, this is a more difficult burden to carry but depending upon circumstances, an employer may still be compelled to pursue the defense. This would especially be the case if there are available eye-witnesses willing to testify to the employee's demeanor

and perceived intoxicated state in the moments preceding the accident. However, and regardless of whether an employer is entitled to the presumption outlined under O.C.G.A. § 34-9-17, analysis should always be given to the facts of each particular case. For instance, assuming an employee was intoxicated on the job, if they were injured by a ceiling fan that spontaneously fell while they walked across a warehouse floor, the fact finder still must be convinced the accident and injury would not have occurred but for the intoxication. Under such facts, any intoxication defense seemingly would be quite weak, whereas conversely, a different result would likely be reached if that same intoxicated employee sustained an injury after taking a turn too sharply on a forklift and struck a support beam in that same warehouse. Reasonable minds would agree the intoxication likely played a direct role in the latter scenario when compared to the former.

Many states have statutory bars against recovery where intoxication can be proven. California Labor Code Section 3600(a)(4) allows an employee to recover benefits "Where the injury is not caused by the intoxication by alcohol or the unlawful use of a controlled substance of the injured employee." As in Georgia, a positive drug test in Louisiana creates a presumption that the employee was intoxicated at the time of the accident, and it is also presumed that the intoxication was a cause of the accident. The burden then shifts to the claimant to prove that the intoxication played no causative role in the accident.

In North Carolina, N.C.G.S. § 97-12(1) states "no compensation shall be payable if the injury or the death to the employee was proximately caused by: his intoxication, provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee…." N.C.G.S § 97-12 further defines "intoxication" and "under the influence" as "the employee shall have consumed a sufficient quantity of intoxicating beverage or controlled substance to cause the employee to lose the normal control of their bodily or mental faculties, or both, to such an extent that there was an appreciable impairment of either or both of these faculties at the time of the injury. A result consistent with "intoxication" or "being under the influence" from a blood or other medical test conducted in a manner generally acceptable to the scientific community and consistent with applicable state and federal law, if any, shall create a rebuttable presumption of impairment from the use of alcohol or controlled substance." Again, once the employer presents competent evidence that the impairment was a proximate cause of the accident, the burden shifts to the employee to rebut the presumption of impairment or show that impairment was not a contributing proximate cause of the accident. Likewise, in Illinois, a positive alcohol screen shifts the burden to the employee to prove the intoxication was not the cause of the injury suffered. So, indeed, across the nation, employers can often use some type of affirmative defense where an employee's willful intoxication may have caused the alleged injury.

A company can also defend itself when an employee willfully misrepresents or conceals their physical condition to an employer. The case of *Georgia Electric Co. v. Rycroft* holds that a false statement in an employment application can serve as a bar to benefits if certain conditions are met. The employee must have knowingly and willfully made a false representation about their physical condition, the employer must have relied upon the false representation and this reliance must have been a substantial factor in the employer's hiring decision, and there must have been a causal connection between the false representation and the injury. All conditions must be

satisfied for the defense to be viable. Accordingly, and assuming an employee concealed information pertaining to a pre-existing lower back injury, should the evidence shows that the employer would have still assigned the claimant to the work in question, regardless of whether it were aware of the condition or not, a "*Rycroft*" defense would not be available, as the second element above would not be satisfied. Similarly, if the medical evidence shows the pre-existing condition had no impact on and did not increase the likelihood of the employee's sustaining of the new at-work injury, a causation problem would exist. A *Rycroft* defense, therefore, can be somewhat tenable at times. Regardless, all employees should recognize that a failure to provide truthful and full disclosure during the hiring process can have its consequences and often results in the employer's retaining of a defense to what otherwise may have been a compensable injury and resulting workers' compensation claim.

An employee can also be barred from receiving workers' compensation benefits under Georgia law where the injury is the result of a fight among coworkers. O.C.G.A. § 34-9-1 requires an employee's injury to be the result of an accident arising out of and in the course of employment. It, therefore, is generally held that injuries sustained during a fight or physical altercation among employees are not the result of an "accident." However, an injury resulting from a fight can be compensable if the fight had a direct connection to some employment situation and the injured employee seeking compensation was not the aggressor.

To illustrate, consider a situation in which two employees fight at work over a mutual romantic interest. This altercation, while occurring on the employer's premises, clearly has no connection to the employment situation. Now consider an altercation driven by one employee not performing their duties on the assembly line and another employee, who, as a result, must work overtime and perform the roles of both individuals. The second situation could lead to a different compensability analysis if the altercation results in injuries.

When an employer creates an environment that highlights safety and adequately warns employees of the risks of disobeying or disregarding safety protocols, an employer may not only avoid or reduce on-the-job injuries, but also preserve its ability to potentially assert the willful misconduct defense for preventable injuries that do occur.

An employee's willful failure to adhere to or to perform a duty required by statute can also result in a bar to benefits for what otherwise could be a compensable injury and claim. Importantly, however, this defense does not automatically apply in every situation. For instance, it often is not viable under circumstances where an employee is injured while simply driving in excess of posted speed limits or in violation of certain traffic rules. Pertinent Georgia case law, including the decision reached in *Travelers Ins. Co. v. Gaither*, requires a conscious or intentional violation of definite law, as compared to inadvertent, unconscious, or involuntary violations. The violation must be the *proximate cause* of the injury. For example, if an employee was injured after rear-ending another vehicle on the road and was driving five to 10 miles-per-hour over the speed limit, the fact that they were speeding will not automatically serve as a defense to any claim for injury, especially if it is proven the collision would have occurred even if the claimant was driving

Finally, HR departments should create an environment that encourages open dialogue and regular communication on issues of safety. Employees should know that your organization values workplace safety and should feel empowered to voice any legitimate concerns they have.

within or under the speed limit. Again, for the defense to apply, the employer must not only prove a willful violation of a statute, but also establish the element of proximate cause.

Chandler v Burdette: A deeper dive

Particularly as it relates to an employee's willful violation of an employer's safety guidelines and policies, Georgia courts have spent the last two years considering the definition and scope of the willful misconduct defense. Let us now take a closer look at *Chandler Telecom, LLC v. Burdette*. In that case, the company's policy was to use controlled descent only in rescue situations. Burdette had previously misrepresented his training on controlled descents. At the conclusion of its shift, Burdette's crew lead reminded him to climb down the tower. Burdette advised that he wanted to use controlled descent. The crew lead reminded him they did not have the proper equipment for controlled descent and the supervisor would be very upset if Burdette did not climb down the tower. After several additional warnings and instructions against using controlled descent instead of climbing down the tower, Burdette attempted a controlled descent and injured his ankle, leg, and hip.

At the trial level, the ALJ found Burdette was barred from receiving workers' compensation benefits, because by attempting a controlled descent in defiance of his superiors' instructions, he engaged in willful misconduct within the meaning of O.C.G.A. § 34-9-17. The State Board of Workers' Compensation affirmed the ALJ's decision on appeal. Burdette appealed to the US Superior Court, which failed to hear the case within the requisite time limit, thereby affirming the lower rulings by operation of law.

The US Court of Appeals then heard the appeal but disagreed with the lower rulings denying the case. In finding the accident compensable, the Court of Appeals held Burdette's actions did not rise to the level of "willful" as that term was defined by the Georgia Supreme Court nearly a century ago because its interpretation of the law was that the employee's behavior had to rise to the level of actions of a "quasi criminal nature." Willful misconduct, per the Court of Appeals, could not be mere violation of instructions, orders, rules, ordinances and statutes, or even the doing of hazardous acts where the danger is obvious. The court's interpretation of *Aetna Life Insurance Co. v Carroll*, 169 Ga. 333 (1929), has long been accepted to indicate that mere violation of a rule, or even a statute, will not bar an employee's recovery under the Workers' Compensation Act. Indeed, many defense attorneys would likely confirm the longstanding consensus that few actions will rise to the level of "quasi criminal," making it difficult for an employer to gain much leverage from the willful misconduct defense.

The Supreme Court has now reversed the Court of Appeals' legal analysis of the willful misconduct defense, finding the Court misapplied the definition of "willful misconduct" originally set out in *Carroll* because willful misconduct is not limited to "criminal or quasi-criminal" actions. Rather, willful misconduct should include the intentional violation of a safety rule when the prohibited action was done/taken either with the knowledge that

it is likely to result in injury or with the wanton and reckless disregard of its probable consequences. The lower courts in this case had not made specific findings regarding Burdette's knowledge of risk, or his intent at the time of his violation of policy and instruction, so the Supreme Court instructed that the case be remanded back to the Board to allow for this determination. For now, the outcome of this case remains uncertain.

In its current posture, the *Burdette* ruling is encouraging for employers, general counsel, and defense counsel. When an employer creates an environment that highlights safety and adequately warns employees of the risks of disobeying or disregarding safety protocols, an employer may not only avoid or reduce on-the-job injuries, but also preserve its ability to potentially assert the willful misconduct defense for preventable injuries that do occur. Of course, the willful misconduct defense will continue to entail a high burden of proof. Negligance and even gross negligence on the part of an employee is not enough. The action must rise to the level of being intentional to the extent that the employee knows and understands the rule but violates it despite the likelihood it will result in injury or with reckless disregard of its other probable consequences. However, again, proactive leadership and an emphasis on safety can lay the foundation for a willful misconduct defense years before the defense becomes necessary.

There are several steps employers can take to create a workplace culture where employees understand the importance of safety and the risks associated with failure to adhere to necessary safety protocols. It is in this type of environment that an employee who violates procedures will be found to have done so with knowledge of likely injury or wanton and reckless disregard for probable consequences.

Certainly, the foundation is laid by drafting a safety policy, for inclusion in employee handbooks, which clearly emphasizes the priority that the company places on safety. The employee handbook should broadly state the importance of safety, then identify a few major violations that are clearly prohibited — such as intoxication at work, failure to wear proper safety equipment, etc. Here is an example of such a policy:

The company is committed to ensuring we have a safe environment for our team members and our customers. Safety is everyone's concern and should be at the forefront in everything you do. We will give safety the primary importance in every aspect of planning and performing any work activities. Safety violations will be taken very seriously and team members who violate safety rules may be subject to discipline up to and including termination.

The policy should clearly state that such safety violations will result in disciplinary action. The employer must consistently follow through with the forewarned disciplinary action. Note that if safety violations are only documented and disciplined when an injury actually occurs, the disciplinary action may be considered retaliation for the reporting of the injury. Rather, management should be trained to document and discipline any failure to wear proper safety equipment, and regardless of whether an injury occurs.

Employers should not attempt to use handbooks to spell out every possible safety violation. Chandler Telecom's employee handbook likely did not specifically delineate the company prohibition against controlled descents. Such a policy would have been too narrow and specific. There is a balance to be struck in drafting employee handbooks, and employers should consult employment counsel when doing so. Employers must fairly and consistently enforce every policy in their handbook. Thus, too many policies in a handbook can actually

cause more problems than they solve for employers.

To emphasize all the important safety policies that cannot realistically be covered in an employee handbook, conduct regular safety meetings wherein employees are repeatedly educated about the rules and regulations related to safety and the consequences of not adhering to them. These meetings can be tailored to address the specific hazards unique to various job sites or divisions of a company. Moreover, these meetings allow for verbal reinforcement of policies that employees might otherwise skim over when flipping through their handbook at orientation. In-person safety meetings with tailored content are where the "Burdettes" are made aware that management does not want workers attempting controlled decent on a particular job. Thus, they will serve to strengthen a potential willful misconduct defense if an employee chooses intentionally to violate such safety rules.

Without running afoul of OSHA's discouragement of retaliatory incentive programs, companies may not only use a handbook to outline safety policies but also to incentivize extraordinary efforts to create a safe workplace. For example, companies may recognize and reward employees who participate in optional "extra credit" safety training and those who report near misses. When it comes to the willful misconduct defense, in particular, how a company handles a near miss can be paramount. Indeed, the point of documenting a near miss and educating employees on the consequences that could have been is to ensure employees understand and avoid the probable consequences of unsafe behavior. An employee who then violates policy anyway will arguably have done so with wanton and reckless disregard of the probable consequences and any resultant injuries may not be the responsibility of the employer.

Finally, employers should train management to pay attention to safety concerns — from detecting signs of intoxication and administering drug tests, to identifying policy violations and documenting near misses. In *Burdette*, the employer's defense rested largely on the crew lead who repeated the superintendent's instructions and adamantly warned Burdette against violating the safety protocol. For an employer, the employees often are their most valuable resource. Protecting the workforce often requires empowering the workforce to protect itself.

Business and HR tactics for emphasizing safety

Responsibility for creating and fostering a culture of safety, the precursor to a willful misconduct defense, frequently begins and ends within an organization's human resources department. While some larger organizations, along with those operating in high-risk environments, may consider retaining a safety professional, HR departments often take on that role within smaller organizations and those operating within low-hazard environments. Of course, many such departments are preoccupied with hiring, firing, payroll, and benefits, or simply lack basic safety knowledge. However, the savvy HR department should proactively seek to educate itself on safety issues, and carve out time to regularly focus on those issues. Such training might include, but is certainly not limited to, collaborating with safety professionals to learn safety basics, looking outward and emulating other successful HR departments, or even training HR professionals to understand the connection between occupational safety and workers' compensation — including how to fill out OSHA injury reports properly. The key to this education component is being reflective and self-aware as a department. In other words, knowing what you do not know will allow your department to identify weaknesses and to focus on those weaknesses going forward.

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Once educated on the subject, a proactive HR department should take an active role in training, educating, and maintaining a safety-conscious workforce. This could be as rudimentary as developing basic policies and curricula, or it might include expanding existing safety training programs to incorporate regularly scheduled safety meetings or annual training of existing employees — to include both supervisors and management. Perhaps such training could incorporate hands-on elements, which may confirm that employees are internalizing the training material being taught. A proactive HR department should also keep safety in mind when making hiring decisions, as right-minded employees will positively contribute to a safety-conscious workplace.

Finally, HR departments should create an environment that encourages open dialogue and regular communication on issues of safety. Employees should know that your organization values workplace safety and should feel empowered to voice any legitimate concerns they have. Your employees are the ones in the field and on the front lines and they can be valuable resources, if you are willing to listen. Furthermore, open and regular communication is a great way to identify those "near misses" and "close calls" that are often red flags for serious underlying and perhaps unidentified safety issues. Bringing these issues to light and incorporating them into regular safety meetings may prevent serious workplace injuries and could ultimately be incorporated into a potential willful misconduct defense. Therefore, employees should be acknowledged for their contributions to safety and should never fear reprisal for expressing concerns.

Putting it all together

Clearly, asserting an affirmative defense based on an employee's misconduct truly begins before an employee is ever hired. Drafting clear employee handbook policies, establishing discerning hiring practices, participating in employee training, and consistently disciplining safety violations regardless of the occurrence of a work injury are all necessary steps in creating a culture of safety. It is in this culture that it becomes apparent an employee has willfully violated a safety rule, either with the knowledge that their action is likely to result in injury or with the wanton and reckless disregard of its probable consequences. As a result, the employee's willful misconduct may be a total bar to a workers' compensation claim.

This "total bar to recovery," illustrates an affirmative defense, not just as a strategy for winning over and against an individual employee, but rather as a way to ensure employers and their collective workforces win at creating safe workplaces. One of the shared goals of the Workers' Compensation Act — including this willful misconduct defense — and of OSHA and of this article is to keep employees gainfully employed in suitable/safe positions. Thus, much of the onus falls on the employer. However, an employer who takes seriously the responsibility to protect its employees is also protecting itself so that when an employee bucks the protections provided by their employer, the employer is not without recourse. By following the aforementioned strategies, an employer avoids injuries to its employees and minimizes the "soft" costs of lost time claims — like decreased productivity or strain on the workforce — as well as "hard" costs like the insurance and litigation expenses resulting from avoidable, if not fraudulent, claims. **ACC**