

GEORGIA'S WORKERS' COMPENSATION LAW: ARE LIMITATIONS ON DEATH BENEFITS TO FOREIGN, NONRESIDENT DEPENDENTS CONSTITUTIONAL? *BARGE-WAGENER CONSTR. CO. V. MORALES*<sup>1</sup>

I. FACTS

Jose Antonio Morales, age 31, was employed by Barge-Wagener Construction Company and worked at a construction site in Atlanta, Georgia.<sup>2</sup> Morales, a Mexican citizen, was a legal resident of the United States and was employed under a valid work visa.<sup>3</sup> His wife, Julia, and his two young sons, Juan and Daniel, were citizens and residents of Mexico.<sup>4</sup> Morales earned an average weekly salary of \$450, before United States and Georgia income taxes,<sup>5</sup> which he used to support his family in Mexico.<sup>6</sup> On September 19, 1990, Morales fell twenty-two stories to his death when a scaffold at a construction site gave way.<sup>7</sup> In accordance with Georgia's Workers' Compensation Statute,<sup>8</sup> Barge-Wagner and its insurer, the Argonaut Insurance Company, were required to provide up to \$5,000 for Morales' burial costs.<sup>9</sup>

However, the Georgia statute permits a maximum payment of \$1,000 as compensation to the dependents of a deceased employee if the dependents are not citizens or residents of the United States or Canada.<sup>10</sup> Thus, Barge-

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<sup>1</sup> 429 S.E.2d 671 (Ga. 1993), *cert. denied*, 114 S. Ct. 579 (1993).

<sup>2</sup> Bill Rankin, *Court Endorses \$1,000 Limit on Death Benefit Restriction on Foreigners; Called Discriminatory but Legal*, ATLANTA CONST., May 29, 1993, at B1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Jose A. Morales, State Bd. of Workers' Comp., State of Georgia, Cl. No. 451-93-5853 (March 13, 1992) [hereinafter Order of the A.L.J.].

<sup>6</sup> Rankin, *supra* note 2, at B1.

<sup>7</sup> Katie Wood, *Comp Law Discriminates, But That's OK*, FULTON COUNTY DAILY REP., May 27, 1993, at 1, 2 [hereinafter *Comp Law Discriminates*].

<sup>8</sup> GA. CODE ANN. § 34-9-265 (1993).

<sup>9</sup> *Id.* See *infra* note 10.

<sup>10</sup> GA. CODE ANN. § 34-9-265(b)(5) (1993). The statute provides:

(b) If death results instantly from an accident arising out of and in the course of employment or if during the period of disability caused by an accident death results proximately therefrom, the compensation under this chapter shall [include] . . . (1) . . . the reasonable expenses of the employees' last sickness and burial expenses not to exceed \$5,000.00

Wagener and its insurer paid only \$1,000 to the surviving Morales family. Had the Morales dependents been citizens or residents of the United States or Canada, they would have received up to \$100,000 for their loss.<sup>11</sup> This amount would include weekly benefits for Mrs. Morales until age 65, and for Juan and Daniel until they reached age 18 or graduated from high school or college.<sup>12</sup> Incredibly, if Morales' family had violated the United States immigration laws and illegally resided with him in this country at the time of his death, they would have received the full protection and benefit of the Georgia Workers' Compensation statute.<sup>13</sup>

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. . . . (5) If the employee leaves dependents who are not citizens or residents of the United States or the Dominion of Canada at the time of the accident, the amount of compensation shall not in any case exceed \$1,000.00.

*Id.*

The statute was originally enacted in 1920. *See* 1920 Ga. Laws, 187-88, § 38. At that time, the maximum benefit for burial expenses was \$100, and the minimum dependency benefit for United States and Canadian citizens and residents was \$10 a week for 300 weeks, or a total of \$3,000. This amount has since increased to \$100,000. *See* GA. CODE ANN. § 34-9-265(d) (1993). However, the benefit to non-Canadian, nonresident families of alien workers killed on the job has remained the same since 1920: \$1,000. *Id.* Since Georgia does not maintain a legislative history for its statutes, no justification is available for the legislature's decision to set this discriminatory limit on death benefits payable to non-resident alien decedents. Nor has any rationale been given for the exemption of aliens who are citizens or residents of Canada. *See* Brief for Petitioner at 18, *Morales v. Barge-Wagener Constr. Co.*, 114 S. Ct. 579 (1993) (No. 93-432) [hereinafter Brief for Petitioner].

<sup>11</sup> GA. CODE ANN. § 34-9-265(b)(2) (1993). Georgia Code section 34-9-261, which sets out compensation for total disability, provides that upon death the employer shall pay . . . to the employee a weekly benefit equal to two-thirds of the employee's average weekly wage but not more than \$250.00 per week nor less than \$25.00 per week . . . . The weekly benefit under this Code section shall be payable for a maximum period of 400 weeks.

GA. CODE ANN. § 34-9-261 (1993).

<sup>12</sup> *Court OKs Georgia Cap on Alien Death Benefits*, ATLANTA CONST., Nov. 30, 1993, at A1 [hereinafter *Court OKs Georgia Cap.*].

<sup>13</sup> Brief for Petitioner, *supra* note 10, at 18. *See also* *De Ayala v. Florida Farm Bureau Casualty Ins. Co.*, 543 So. 2d 204, 207 (Fla. 1989) (construing a statute similar to Georgia's, the Florida Supreme Court found that a "benefit that is unavailable to [nonresident] petitioners [would be] . . . available to [foreign] workers [who] . . . are in this country illegally"); *cf.* *Plyer v. Doe*, 457 U.S. 202 (1982) (holding that the Fourteenth Amendment of the U.S. Constitution was designed to protect all within the boundaries of a State, including aliens unlawfully present).

The Morales family hired local counsel and challenged the restrictive statute, but lost the case before the Georgia State Board of Workers' Compensation.<sup>14</sup> The decision was overturned on appeal to the Fulton County Superior Court, where the Court held that the statute violated the equal protection clause of the Georgia Constitution.<sup>15</sup> On May 24, 1993, the Georgia Supreme Court reversed the Superior Court's decision, upholding the Board of Workers' Compensation ruling.<sup>16</sup> On November

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<sup>14</sup> Order of the A.L.J., *supra* note 5, at 25A. At the Board Hearing, the Morales family claimed that Georgia Code section 34-9-265(b)(5) violated their equal protection rights under both the Georgia and U.S. Constitutions. The Administrative Law Judge clearly supported the Morales' position, holding in his opinion that he felt they would eventually prevail since there was "no apparent rational basis for the legislature to distinguish between citizens of Canada and citizens of any other country that might be working in the United States." *Id.* However, since the board did not have the authority to declare a statute unconstitutional, the judge was forced to award the Morales family the sum of \$1,000 in accordance with § 34-9-265. *Id.*

<sup>15</sup> *Barge-Wagener Constr. Co. v. Morales*, 429 S.E.2d 671, 672 (Ga. 1993). The Georgia Constitution provides, "[N]o person shall be denied equal protection of the laws." GA. CONST. art I, § 1, ¶ 1. In reversing the Board decision, the Superior Court held that alienage is a suspect classification and that the respective statutes discriminated based upon alienage. *See* Brief for Petitioner, *supra* note 10, at 14A. Applying a strict scrutiny standard, the Superior Court held that the statute infringed too greatly upon fundamental rights granted by the Georgia Constitution, and held the statute unconstitutional. The court did not find it necessary to reach the merits of the Morales family's claim under the U.S. Constitution. *Id.*

<sup>16</sup> *Barge-Wagener Constr. Co.*, 429 S.E.2d at 674. The Court found Georgia's Workers' Compensation Statute constitutional, holding that the protections of the Georgia and U.S. Constitutions do not extend to non-resident foreigners. *Id.* at 673. "[While the statute] surely discriminates against Mr. Morales' family in Mexico, . . . it is not unlawful." *Id.* The Court focused on two issues: first, whether the rights of the decedent or his non-resident dependents in Mexico were at stake; and secondly, whether Georgia's statute violated the pertinent party's rights under the Georgia Constitution. *Id.* at 672. In reaching its conclusion that the payment of death benefits affected no right of the decedent, the Court distinguished between burial benefits, which belonged to the decedent's estate, and death benefits, which belonged to the beneficiaries. *Id.* The Court stated

The death benefits are intended to compensate the beneficiaries for their injury, which is the loss of support resulting from the death of the deceased worker. This is not merely the survival of the rights of the deceased; the rights to death benefits do not accrue until the death of the worker.

*Id.* Further, the Court found that the equal protection clause of the U.S. Constitution does not extend to nonresident aliens. This holding is based on a U.S. Supreme Court ruling in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Johnson*, the Court distinguished between aliens residing within the jurisdiction of the United States, and those residing outside U.S.

29, 1993, the Supreme Court of the United States denied certiorari, allowing the Georgia statute and the Board ruling in the Morales case to stand.<sup>17</sup>

## II. LEGAL BACKGROUND

Workers' compensation statutes of many other states have discriminatory classification schemes similar to the Georgia provision, albeit to varying degrees.<sup>18</sup> Recent court decisions construing these statutes have focused primarily on whether the benefits vest in the decedent or the surviving family, and then on the constitutionality of any limitation on benefits.<sup>19</sup> There has been little support for the distinction between Canadian and all other nonresidents that is often found in these statutes.<sup>20</sup>

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boundaries, stating that "it is an alien's presence within its territorial jurisdiction that gives the Judiciary the power to act." *Johnson*, 339 U.S. at 770-71.

<sup>17</sup> *Morales v. Barge-Wagener Constr. Co.*, 114 S. Ct. 579 (1993). See also *Court OKs Georgia Cap*, *supra* note 12, at A1.

<sup>18</sup> Brief for Petitioner, *supra* note 10, at 7, 17. For a comparison of the Georgia statute to the statutes of other states, see Rankin, *supra* note 2, at B1 (citing Brief for Appellee, *Morales v. Barge-Wagener Construction Co.*, 429 S.E. 2d 671 (Ga. 1993)). Thirty-seven states make no distinction between dependents residing in the United States and those not residing in the United States; four states reduce death benefits to all nonresident dependents (of these four states, two reduce the benefit to 50%, one state reduces the benefit to 60%, and one reduces the death benefit to \$750.00); six states provide the same benefits to nonresident, non-Canadian dependents but allow insurers to pay in a lump sum discounting between 4% and up to sometimes 50% for illegible interest; and two states provide 50% of the normal death benefits to nonresident, non-Canadian dependents. *Id.*

<sup>19</sup> See *Alvarez Martinez v. Indus. Comm'n*, 720 P.2d 416 (Utah 1986); *De Ayala v. Florida Farm Bureau Casualty Ins. Co.*, 543 So. 2d 204 (Fla. 1989); *Jalifi v. Indus. Comm'n*, 644 P.2d 1319 (Ariz. App. 1982); *Jurado v. Popejoy Constr. Co.*, 853 P.2d 669 (Kan. 1993); *Pedrazza v. Sid Fleming Const., Inc.*, 607 P.2d 597 (N.M. 1980). Since there is currently no treaty with Mexico extending the same workers' compensation rights of U.S. citizens to Mexican nationals, no Supremacy Clause issue exists. See ARTHUR LARSON, *WORKMEN'S COMPENSATION LAW*, § 63.50, n.36 (1994).

<sup>20</sup> It has been suggested that the United States and Canada have traditionally shared a unique relationship, both economically and politically, that is unlike that shared with any other foreign nation. Brief for Respondent, *Morales v. Barge-Wagener Constr. Co.*, 114 S. Ct. 579 (1993) (No. 93-432) [hereinafter Brief for Respondent]. However, this view has been vigorously rejected in some jurisdictions. See *De Ayala*, 543 So. 2d at 207 ("What possible state purpose would justify giving a benefit to nonresident Canadians that it denied Mexicans? . . . [this Court] can discern no rational basis for the distinction drawn between the northern border and the southern one by this statute").

## A. General Policy

The workers' compensation system is based on an exchange: an employee gives up the right to sue an employer for workplace injuries in exchange for assured benefits.<sup>21</sup> The purpose of these benefits is social in nature; they exist in order to provide support and prevent poverty for injured employees and their dependents.<sup>22</sup> Based upon the social aspect of these benefits, workers' compensation statutes have generally been liberally interpreted in order to give the employee the greatest possible protection.<sup>23</sup> Liberal interpretation is consistent with the overall goal of removing the financial burden of workplace injury and disability from employees and ultimately placing these costs upon industries and consumers.<sup>24</sup>

Additionally, ease of administration of employees' benefits has been a consideration. Workers' compensation statutes with an overall pattern of discrimination towards nonresident aliens have been justified not due to "any desire to discriminate but . . . [due to] the awkward problem of proof and continuing administration that is unavoidably present in these cases."<sup>25</sup>

## B. Vesting of Death Benefit Rights

### 1. Rights of Surviving Dependents

Death benefits under workers' compensation statutes have generally been held to belong to the surviving dependents and not to the deceased.<sup>26</sup> As

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<sup>21</sup> LARSON *supra* note 19, at § 1.10.

<sup>22</sup> *Id.* at § 1.20.

<sup>23</sup> See *Int'l Mercantile Marine Co. v. Lowe*, 93 F.2d 663, 665 (2nd Cir. 1938).

<sup>24</sup> *Id.* See LARSON, *supra* note 19, at § 1.00.

<sup>25</sup> LARSON, *supra* note 19, at § 63.50. See also *Catelli v. Bayonne Assoc.*, 3 N.J. Super. 122, 65 A.2d 617 (1949). In that case, the decedent's mother in Italy claimed dependency, and the court was forced to send the case back for additional findings which involved facts that had to be investigated in Italy. These facts included the monthly living costs of the mother, the value of support provided to the mother by her daughter, and the value of the lira at certain relevant times. LARSON, *supra* note 19, at § 63.50, n.35. *But see* *Frontiero v. Richardson*, 411 U.S. 677 (1973) ("there can be no doubt that 'administrative convenience' is not a mere shibboleth, the mere recitation of which dictates constitutionality").

<sup>26</sup> LARSON, *supra* note 19, at § 64.00. This section provides:

The dependent's right to death benefits is an independent right derived from statute, not from the rights of the decedent. Accordingly, death benefits are not affected by compromises or releases executed by

such, many court decisions have held that rights to such benefits must be asserted by the surviving dependents, not by the deceased.<sup>27</sup> However, these leading cases, construing the death benefit as a property right of the surviving dependents, have for the most part resulted in a more favorable benefit for these dependents, not a reduction or strict limitation.<sup>28</sup>

Such was the result in *International Mercantile Marine Co. v. Lowe*, 93 F.2d 663 (2nd Cir. 1938). There, an injured longshoreman, who was paid compensation totaling \$6,375 for a period of over seven years following his job-related injuries, eventually died as a result of those injuries. His wife sought a death benefit, in accordance with statute, of \$10.50 a week up to a maximum of \$7,500. The employer sought to limit the entire benefit paid to *both* the longshoreman and his widow to \$7,500. The U.S. Court of Appeals for the Second Circuit definitively held that the "amount to which the widow or next of kin is entitled is for their exclusive benefit and is entirely separate and distinct from the compensation for disability allowed the employee."<sup>29</sup>

However, separating the death benefit from the decedent's rights was clearly intended to gain the most favorable benefit paid to the surviving wife.<sup>30</sup> Such a beneficial result for the survivors also exists in other cases

decedent, or by an adverse holding on decedent's claim, or by claimant's failure to claim within the statutory period.

*Id.* See *Int'l Mercantile Marine Co.*, 93 F.2d at 664 (according to the Court of Appeals, "[T]he amount to which the widow or next of kin is entitled is for their exclusive benefit and is entirely separate and distinct from the compensation for disability allowed the employee.")

<sup>27</sup> See *Int'l Mercantile Marine Co.*, 93 F.2d at 663 (1938); *Madera Sugar Pine Co. v. Indus. Accident Comm'n*, 262 U.S. 499 (1923); *A.O. Smith Corp. v. Indus. Comm'n*, 485 N.E.2d 335 (Ill. 1985); *Sizemore v. State Workmen's Compensation Comm'r*, 219 S.E.2d 912 (W. Va. 1975); *Rosander v. Copco Steel & Eng'g Co.*, 429 N.E.2d 990 (Ind. App. 1982).

<sup>28</sup> See *infra* note 31.

<sup>29</sup> *Int'l Mercantile Marine Co.*, 93 F.2d at 664-65.

<sup>30</sup> As the Second Circuit itself stated:

Compensation statutes are liberally construed. As the Supreme Court has said, in *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414: "Such [workers' compensation] laws operate to relieve persons suffering . . . [from workplace injury] of a part of the burden and to distribute it to the industries and mediately to those served by them. . . . [These laws] are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results."

*Id.* at 665.

supporting the separation of death benefits from decedent's rights.<sup>31</sup>

## 2. *Rights of Decedent*

Although courts generally interpret workers' compensation death benefits as property of surviving dependents, some jurisdictions have held that these benefits attach to the resident alien decedent, and not to the nonresident alien dependents.<sup>32</sup> Thus the benefits award is subject to clear federal constitutional protection, where the equal protection clause will be applied with strict scrutiny.

In *De Ayala v. Florida Farm Bureau Casualty Insurance Co.*,<sup>33</sup> the decedent died as a result of a motor vehicle accident which occurred in the course of his employment with a Florida company. The decedent had lived and worked in the United States for over twenty-five years, providing support for his wife and six minor children, all of whom were Mexican residents and citizens.<sup>34</sup> The Florida workers' compensation statute, which was almost identical to the present Georgia statute, limited death benefit payments to foreigners to \$1,000.<sup>35</sup>

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<sup>31</sup> See *A.O. Smith Corp. v. Indus. Comm'n*, 485 N.E.2d at 335 (Ill. 1985) (holding that the death benefit level should be determined at the higher rate in existence as of the time of death, not the time of employee's injury nine years earlier); *Sizemore v. State Workmen's Compensation Comm'n*, 219 S.E.2d at 912 (W. Va. 1975) (holding that an amendment to a statute extending the payment of death benefits to an employee dying from injury from six years after injury to ten years after injury applied, even though it was enacted after the employee's original injury, since the death benefits are separate from the decedent's injury rights).

<sup>32</sup> See *infra* note 36 and accompanying text; *Jurado v. Popejoy Constr. Co.*, 853 P.2d 669 (Kan. 1993).

<sup>33</sup> 543 So. 2d 204 (Fla. 1989).

<sup>34</sup> *Id.*

<sup>35</sup> FLA. STAT. ch. 440.16 (1983). The statute provides:

compensation under this chapter to aliens not residents (or about to become residents) of the United States or Canada shall be the same in amount as provided for residents except that dependents in any foreign country shall be limited to surviving spouse and child or children, or if there be no surviving spouse or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of 1 year prior to the date of the injury, and except that the deputy commissioner may, at the deputy commissioner's option, or upon the application of the insurance commissioner's option, or upon the application of the insurance carrier, commute all future installments of

The nonresident dependents challenged the statute. The Florida Supreme Court found that the deceased worker's estate owned the rights to the resulting death benefits under the statute.<sup>36</sup> According to the court, "[O]ne of the primary benefits that an employee works for is the satisfaction and well-being of providing for his or her family."<sup>37</sup> Thus, the statute unconstitutionally discriminated against resident aliens and their families, since the decedent, as a resident alien, was protected under the Florida Constitution.<sup>38</sup>

#### D. Constitutionality and Equal Protection

The Fourteenth Amendment of the United States Constitution guarantees equal protection of the law.<sup>39</sup> Alienage has been construed as a suspect classification under equal protection analysis.<sup>40</sup> In order to withstand a Fourteenth Amendment equal protection challenge, state statutes which discriminate on the basis of alienage must advance a compelling state interest by the least restrictive means available.<sup>41</sup>

However, whether nonresident aliens are entitled to the protection of the United States Constitution is uncertain. Recently, the Kansas Supreme Court struck down a death benefits statute similar to the Georgia provision.<sup>42</sup> In

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compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the deputy commissioner, and provided further that compensation to dependents referred to in this subsection shall in no case exceed \$1,000.

*Id.* Effective July 1, 1987, section 440.16(7) has been amended to provide a \$50,000 cap on death benefits to nonresident alien dependents other than Canadians. FLA. STAT. ch. 440.16(7) (1987).

<sup>36</sup> *De Ayala*, 543 So. 2d at 206.

<sup>37</sup> *Id.*

<sup>38</sup> The Florida Supreme Court remanded the case for proceedings consistent with its holding that the Florida Statute, to the extent it provided reduced benefits for Florida workers with nonresident alien dependents not living in Canada, was unconstitutional.

<sup>39</sup> U.S. CONST. amend. XIV, § 1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

<sup>40</sup> *Graham v. Richardson*, 403 U.S. 365, 372-73 (1971). "[C]lassifications based upon alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." *Id.* at 372-73.

<sup>41</sup> *Id.* at 376; *Bernal v. Fainter*, 467 U.S. 216 (1984).

<sup>42</sup> *Jurado v. Popejoy Constr. Co.*, 853 P.2d 669 (Kan. 1993).

extending U.S. Constitutional rights to nonresident aliens, the court stated that

Although the benefit limitation applies only to dependents who are nonresident aliens, to suggest that this makes it a classification based upon residence is disingenuous. Nonresident United States citizens are entitled to the same benefits as resident citizens and resident aliens. The statute's disparate treatment of these two classes of nonresidents is solely based on alienage. Simply because the statute does not similarly discriminate against resident aliens does not make it any less an alienage classification . . . [the statute] creates and treats differently a class of employees based on the alienage of the employees' dependents; it is a legislative classification based upon alienage.<sup>43</sup>

In contrast, the United States Supreme Court has held that federal constitutional rights arise from either citizenship or presence within the territorial jurisdiction.<sup>44</sup> A distinction is made for aliens who are residents; they receive constitutional guarantees of equal protection because they are subject to the laws of the jurisdiction and have protections commensurate with their association with and obligations to the jurisdiction.<sup>45</sup> The Equal Protection Clause is construed as extending to persons "subject to the laws of a State."<sup>46</sup> For example, the Arizona Supreme Court has found that the State Legislature's awarding of death benefits to nonresident dependents potentially creates state constitutional rights for the dependents. It stated in *Jalifi v. Industrial Commission of Arizona* that the "petitioner [dependent] is conferred some benefits by the Arizona State Legislature, which may provide the requisite nexus to bring her within the purview of the equal protection

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<sup>43</sup> *Id.* at 676.

<sup>44</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990). The Court held that aliens who are not present within the territory of the United States simply do not have the benefit of fundamental U.S. constitutional protections. *Id.*

<sup>45</sup> *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 369 (1889); *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>46</sup> *Pylar v. Doe*, 457 U.S. 202, 215 (1982).

clause."<sup>47</sup> Additionally, authority exists to support the view that nonresident aliens subject to the laws of a state are entitled to equal protection rights.<sup>48</sup>

### III. ANALYSIS

The Georgia Supreme Court's decision to uphold the Georgia statute providing a \$1,000 death benefit to nonresident, non-Canadian alien beneficiaries implicates several important policy issues. First, are the basic principles behind workers' compensation statutes advanced by the statute? Secondly, what purpose is being served by the Georgia Supreme Court's holding? Finally, what are the resulting effects of such a law on employment and workplace safety? Based on the analysis of these questions, it is clear that the Georgia Supreme Court was incorrect in upholding code section 34-9-265, in light of the discriminatory nature of provision (b)(5) of the statute.

#### A. *Vesting of Death Benefits*

The Georgia Supreme Court held that the benefits due via workers' compensation upon the death of an employee are property of the surviving dependents, not the deceased employee.<sup>49</sup> It based its decision on both statutory language and case law precedent.<sup>50</sup> The Court found that the legislature intended the rights to death benefits to vest in the dependents.<sup>51</sup> The Court contrasted death benefits with sickness and burial expenses, stating, "[T]he sickness and burial expenses are not like death benefits; they are for the benefit of the decedent's estate. As such, these payments are a

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<sup>47</sup> 644 P.2d 1319, 1321 n.2 (Ariz. Ct. App. 1982). Although the Arizona Supreme Court eventually upheld the statutory limit on death benefits, it based its holding on the difficulties of proof and administration arising because the dependents lived outside the United States. *Id.* at 1322. However, the U.S. Supreme Court has well established that administrative inconvenience does not survive the strict scrutiny standard awarded to equal protection cases involving suspect classifications. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973). *See also* Brief for Petitioner, *supra* note 10, at 19-20.

<sup>48</sup> *See, e.g., Alegria v. United States*, 945 F.2d 1523 (11th Cir. 1991).

<sup>49</sup> *Barge-Wagener Constr. Co.*, 429 S.E. 2d at 672.

<sup>50</sup> *Id.* The Court stated, "Our analysis begins with an examination of the statute." *Id.*

<sup>51</sup> *Id.* at 673.

property right of the decedent employee."<sup>52</sup> The death benefits under workers' compensation were held to be analogous to the right of recovery under the wrongful death statute,<sup>53</sup> a right which has been construed as vested in the surviving family.<sup>54</sup>

The Georgia Supreme Court's view has been supported by other jurisdictions.<sup>55</sup> However, these cases can be distinguished from the present case, since their holdings that death benefits are a property right of the surviving dependents have generally resulted in a more favorable benefit for the surviving dependents.<sup>56</sup> Obviously, such was not the result for the Morales family in *Barge-Wagener*. Additionally, the *Barge-Wagener* holding frustrates the general policy of affording employees the greatest possible protection by liberally construing workers' compensation statutes.<sup>57</sup>

Furthermore, as noted by the dissent in *Barge-Wagener*, death benefits under workers' compensation laws can reasonably be held to be rights derived from the deceased worker.<sup>58</sup> In finding the majority's analogy to the wrongful death statute "fatally flawed,"<sup>59</sup> the dissent stated that

[t]he benefits which flow from the workers' compensation system are benefits afforded to the worker in exchange for giving up the right to seek redress for injuries suffered on the job. . . . One of the primary benefits that an employee

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 672. For the text of Georgia's wrongful death statute, see GA. CODE ANN. § 51-4 (1993). Although based on an actionable tort upon the decedent, under the Georgia wrongful death statute such an action is not a property right of the decedent's estate. See Boggan v. Boggan, 243 S.E.2d 664 (Ga. App. 1978).

<sup>54</sup> Dixon v. Ross, 94 S.E.2d 86 (Ga. App. 1956).

<sup>55</sup> See *supra* note 27.

<sup>56</sup> See *supra* notes 26-31 and accompanying text.

<sup>57</sup> See *De Ayala*, 543 So. 2d at 207. The Florida Supreme Court noted that this liberal construction is no less applicable because "a worker's wife and children are aliens living some place other than Canada." *Id.* at 207. Larson, a leading authority on death benefits, states, "[T]he dependent's right to death benefits is an independent right derived from statute, not from the rights of the decedent." LARSON, *supra* note 19, at § 64.00. However, Larson's interpretation results in greater protection for survivors' benefits: "Accordingly, death benefits are not affected by compromises or releases executed by decedent, or by an adverse holding on decedent's claim, or by claimant's failure to claim within the statutory period." *Id.* at § 64.00.

<sup>58</sup> *Barge-Wagener Constr. Co.*, 429 S.E. 2d at 674 (Benham, J. dissenting).

<sup>59</sup> *Id.* at 674.

works for is the satisfaction and well-being of providing for his or her family . . . . We [the dissenting judges] do not perceive this case as hinging on the constitutional rights of the surviving dependents, but on the constitutional rights of the worker, now deceased. . . . This case concerns whether a worker who happens to have dependents residing out of the country is entitled to the same fruits of his or her labor as any other worker, including the same insurance benefits where the state has required those benefits to be provided. It thus is immaterial that petitioners happen to be nonresident aliens, since they have standing in this context as his beneficiaries.<sup>60</sup>

Based upon the reasoning in contra holdings, as well as the general purpose of workers' compensation laws, the Georgia Supreme Court's ruling is certainly "incongruous"<sup>61</sup> and "harsh",<sup>62</sup> as well as inherently unfair, in its limitation of the Morales family's death benefit to \$1,000.<sup>63</sup> The severity of the holding is not only inconsistent with cases such as *International Mercantile Marine Co.*, but in fact directly contravenes the spirit of those decisions.

### B. Constitutional Issue

If the death benefit rights under Georgia Code section 34-9-265(b)(5) are perceived as belonging to the resident alien decedent, then the statute clearly violates the equal protection guarantees of both the Georgia and United States Constitutions.<sup>64</sup> Further, even if analyzed under the holding of the Georgia Supreme Court that these death benefits belong to the surviving dependents, there is still support for finding that the equal protection rights of the Morales family were violated.

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<sup>60</sup> *Id.* at 675.

<sup>61</sup> See *supra* note 30.

<sup>62</sup> *Id.*

<sup>63</sup> "I think it's the *Dred Scott* decision for the Hispanic community." *Comp Law Discriminates*, *supra* note 7, at 2 (quoting Atlanta lawyer John F. Sweet).

<sup>64</sup> The majority opinion in *Barge-Wagener Constr. Co.* conceded that the equal protection clause extends to resident aliens. 429 S.E.2d at 673.

The Georgia Supreme Court should have found that the protection of the U.S. and Georgia Constitutions extends to the Morales family. Paralleling the reasoning of the Arizona Supreme Court in *Jalifi*,<sup>65</sup> the Morales family has the requisite nexus with Georgia due to the \$1,000 benefit conferred upon them by the workers' compensation statute. The Moraleses, who have foregone their rights under tort law by accepting what the Georgia Legislature provides under the Workers' Compensation Statute, are clearly "subject to" the laws of Georgia. As such, they should be accorded the appropriate constitutional rights in relation to the Georgia laws to which they are subject. Under the U.S. Supreme Court holding in *Pyle v. Doe*,<sup>66</sup> these rights would include the right to equal protection of the laws, which the Georgia workers' compensation statute clearly violates.

### C. Public Policy Considerations

The discriminatory effects of Georgia Code section 34-9-265(b)(5) are potentially devastating. The Florida Supreme Court in *De Ayala* found that the existence of a similarly discriminatory statute could "conceivably encourage some employers to selectively place aliens in the riskiest areas of their businesses . . . [since] liability to nonresident survivors would be minimal if such a worker died."<sup>67</sup> Similarly, the dissent in *Barge-Wagener* found that

a likely result of the majority's holding in this case is that employers may with impunity derive considerable savings by skimping on safety precautions because it will be more economical to hire Mexican nationals with nonresident families for the most hazardous jobs, and let them die, than it would be to institute proper safety procedures. Such a result is totally at odds with the intent of the Workers' Compensation Act.<sup>68</sup>

These concerns are especially valid regarding alien workers in the United States, many of whom have left their families behind in native countries in

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<sup>65</sup> 644 P.2d at 1319. See *supra* note 47 and accompanying text.

<sup>66</sup> 457 U.S. at 202. See *supra* note 46 and accompanying text.

<sup>67</sup> 543 So. 2d at 207, n.7.

<sup>68</sup> *Barge-Wagener Constr. Co.*, 429 S.E.2d at 676.

dire economic situations. These workers are desperate for employment of any kind, and often come to the United States with rudimentary English language skills and lack even a basic understanding of the United States judicial process in general and of workers' compensation in particular. As a result, alien workers routinely place themselves in life-threatening work situations, totally oblivious to the results should they be injured or die.<sup>69</sup> Thus, policy concerns regarding workplace safety, as well as basic humanitarian concerns, demand that the discriminatory provision of Georgia's Workers' Compensation Statute be struck down. As the dissent concluded in *Barge-Wagener*, "[W]hile we are bound to uphold the laws, we are not bound to do so without giving thought to matters of policy and justice, neither of which would be served by creating a 'throw-away' class of workers."<sup>70</sup>

#### IV. CONCLUSION

The provision of Georgia's Workers' Compensation Statute limiting death benefits to nonresident, non-Canadian alien survivors of deceased workers clearly discriminates based upon alienage and violates the equal protection guarantees of both the Georgia Constitution and the United States Constitution. As such, it should be repealed as unconstitutional. Death benefits under workers' compensation statutes were designed to provide a form of social insurance for employees and their families. As a resident alien, Jose Morales' protection and rights under the Georgia Constitution extended to his nonresident alien family in regard to those benefits. Additionally, since the benefits were statutorily derived, the Morales family was clearly subject to the laws of Georgia and deserving of the protection of Georgia's laws, including the Equal Protection Clause. Finally, public policy concerns regarding workplace safety demand that Georgia Code section 34-9-265(b)(5) be held unconstitutional.

*Peter J. Diskin*

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<sup>69</sup> See Roberto Suro, *Immigrants Crowd Labor's Lowest Rung: Life on the Minimum Wages Series*, WASH. POST, Sept. 13, 1994, at A1.

<sup>70</sup> *Barge-Wagener Constr. Co.*, 429 S.E.2d at 676.