WORKERS' COMPENSATION LAW

Section Newsletter

Spring 2020

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Chairman's Corner

By Frank R. McKay, Chairman and Chief Appellate Court Judge, SBWC

This article was originally going to be about the Centennial Anniversary of the Georgia Workers' Compensation Act that was legislatively enacted in 1920. Then COVID-19 hit our country and shut down our state. A Judicial Emergency was issued, and everything changed. The Workers' Compensation Bar has adapted, and the State Board of Workers' Compensation has continued to operate. On March 17, April 7, and May 12, 2020, the Board followed the Supreme Court of Georgia's declaration of "Judicial Emergency" and issued Orders extending all filing deadlines and tolling all statute of limitations through June 12, 2020.

Although in person court appearances have been postponed, the Board's administrative law judges continue to be busy with conference calls and issuing orders on motions, change of physician requests, petitions for medical treatment and requests for approval of attorney fee contracts, and have finalized details for remote evidentiary hearings via video conferencing.

Appellate Division

The Appellate Division took historic steps to hold oral arguments remotely via video conferencing with the first one held on April 16. The Zoom platform was used, and all three Appellate Judges and the lawyers appeared from remote locations. It was very successful with positive feedback received from the appellant and appellee attorneys. This is consistent with the guidance of the Supreme Court of Georgia which also announced the unprecedented use of video conferencing before our state's highest court.

Hearing Division

The Hearing Judges have now finalized the details for temporarily conducting hearings by secure video conference during the COVID-19 crisis and are ready to hear from lawyers and parties who would agree to voluntarily have their case heard in a virtual conferencing format. This service is be available in claims where all parties and the ALJ agree the issue(s) to be tried are appropriate for the videoconferencing platform. Where all agree, the parties and ALJ will enter a consent order that sets the date and time of the remote hearing and instructs the parties to expect call-in/login details from the ALJ's office for a pre-trial technology check to work out any technical details and a link for the hearing. Those details will include a link to the videoconference that the attorneys can forward to their clients and witnesses. The parties will consent to the remote hearing in lieu of the "place of hearing" provision in OCGA 34-9-102(b). Documentary evidence shall be exchanged between the parties and sent to the ALJ at least 2 business days before the hearing. (A link for transmitting the evidence will be provided to the attorneys by the ALJ's office). The order also has instructions for audio and video evidence as well. Witnesses will be sworn in by the ALJ, and a court reporter will be virtually present for all aspects of the hearing. Through videoconference, the judges can sequester witnesses and provide opportunities for client consultation, discussion among lawyers, and side-bar conferences. Board Rule 102(A)(2) prohibiting recording of hearings without appropriate protocol is also reiterated in the consent order. Finally, the consent order has an attachment with best practices that addresses such issues as professionalism, ensuring good internet connectivity, impeachment documents that are not exhibits, tutorials available through the videoconferencing platform, and the possible use of an interpreter. Attorneys for the parties in an appropriate case should contact the presiding ALJ's assistant for further information and instructions. We hope this method will provide relief to those parties needing adjudication of issues and claims during this unprecedented time.

We are pleased to announce that pursuant to this new process, on May 19, 2020, Judge Johnny Mason held the Board's first ever remote evidentiary hearing by video conferencing. The parties, witnesses, attorneys, and court reporter were all remote and the exhibits were tendered remotely. As mentioned above, all the judges at the Board are available for a remote video conferencing hearing at the request of the parties.

Settlement Division

The Settlement Division is continuing to work and process settlement stipulations at full capacity. For the

entire month of March 2020, the Board received and processed 1,406 stipulations; that is only 6% fewer than received in March 2019.

Managed Care and Rehabilitation Division

The MCR Division continues to address all filed forms as usual. All rehabilitation conferences have been converted to teleconferences.

Alternative Dispute Resolution Division

The ADR Division adapted quickly to virtual mediations using a video conferencing platform or by telephone conference. The use of the Zoom videoconference platform has proved popular with the attorneys representing the parties and with our mediators. Please contact the ADR Division to schedule a virtual mediation.

Conclusion

The Centennial year of our shared workers' compensation system is not starting out the way any of us could possibly have imagined. However, Georgia has led the nation in technology advancements with its ICMS online filing system and now continues to evolve during a time of national crisis to provide solutions to keep our workers' compensation system running smoothly. I send a personal thank you to the judges and employees of the Board for their hard work and collaboration to find solutions to maintain our high level of customer service. With their help and the help of our stakeholders, Georgia will continue to be a model system for others to follow.

Frank McKay
Chairman State Board of Workers' Compensation

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A Look at Occupational Disease and COVID-19

By Rahul Sheth, Bovis, Kyle, Burch & Medlin, LLC, rsheth@boviskyle.com

COVID-19 claims have started in other states and in the Federal workers' compensation system, although we do not know of any in Georgia, yet. Can COVID-19 claims be held compensable under Georgia workers' compensation law?

We are celebrating the 100-year anniversary of the Georgia Workers' Compensation Act ("the Act"), the drafting of which has been called "The Grand Bargain." When the Workers' Compensation Act was first enacted, occupational diseases were not covered. Only occupational injuries. Prior to May 1, 1946, the Act did not allow an injured worker to collect benefits for an occupational disease, and thus it did not afford the employer the exclusive remedy defense for tort immunity. Effective May 1, 1946, the Act was amended to narrowly allow four types of occupational diseases to qualify for workers' compensation benefits: poisoning by certain agents, disease condition caused by x-ray or radioactive substance exposure, asbestosis, and silicosis. In 1971 this was amended to include a catch-all provision.

In 1986, the Georgia legislature overhauled the occupational disease statutes to what we currently know, including the elimination of the Medical Board, which required the State Board to refer any medical issue in an occupational disease case to it, and the overhaul allowed for the recovery of TPD benefits in addition to TTD and PPD. However, the authors of the current statutes likely did not contemplate a worldwide pandemic such as COVID-19.

By now, we have all heard and been affected by this pandemic with many of us trying to alter the way we work, telework, meet with clients, and litigate cases. Aside from workers' compensation, there are other avenues available for a worker who may contract COVID-19, such has FMLA or Families First Coronavirus Response Act ("FFCRA") recently passed by the U.S. Congress. However, what options are available to a worker who alleges that he or she contracted COVID-19 while at work? Diseases can be considered in two different ways when bringing a workers' compensation claim. Generally, occupational injuries are those that arise out of and occur in the course and scope of employment. However, the occupational disease statutes place a much higher burden of proof on the injured worker.[1] For this reason, there may be disputes as to whether contracting COVID-19 is an occupational injury or disease.

When a disease is one that results from the "unusual, sudden, and unexpected exposure to an injurious risk at work," it is a compensable injury under the Act if it is not the result of conditions incidental to the work being performed.[2] On the other hand, where the disease results from the usual, gradual, and expected exposure to an injurious risk at work, it will be treated as an occupational disease.[3] However, the courts have treated diseases similar in kind (not scale) to COVID-19 as "occupational diseases" governed by O.C.G.A. § 34-9-280 et. seq., despite the fact that the exposure to the virus may not have been unusual, sudden, or unexpected.[4]

If COVID-19 is classified as an occupational injury rather than disease, the standard for the injured worker will be much lower. However, if the courts classify it as an occupational disease, an injured worker must prove that the disease arose out of and in the course of the particular trade, occupation, process, or employment in which the employee is exposed to such disease, provided that the employee (or his or her dependents) first prove all of the following:

(A) A direct causal connection between the conditions of work and the disease;

(B) The disease followed as a natural incident of exposure by reason of the employment;

(C) The disease is not of a character to which the employee may have had substantial exposure outside of the employment;

(D) The disease is not an ordinary disease of life to which the general public is exposed; and

(E) The disease must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence.[5]

The last two prerequisites seem to flow from the "peculiar risk" doctrine and will likely be the factors upon which most claims hinge in an occupational disease scenario. Where an EMT contracted hepatitis B (an infectious viral disease), he failed to prove that it was an occupational disease when the evidence established that hepatitis B is of a character to which the EMT may have had unknowing and substantial exposure outside of his employment and it is an ordinary disease of life to which the general public is exposed.[6] Similar to hepatitis B, COVID-19 is classified as a viral disease by the World Health Organization.[7] The difficulty an injured worker will have alleging that COVID-19 is a compensable occupational disease lies in the fourth prong regarding the exposure of the general public and the third prong regarding substantial exposure outside of the employment. As of May 22, 2020, Georgia has 41,218 confirmed cases of COVID-19, and the number continues to rise. There is an argument to be made that during a mandatory "shelter-in-place," that the general public is not exposed to the virus, as they should be sheltering in place. However, even in a mandatory "shelter-in-place," individuals are allowed to go to grocery stores, pharmacies, exercise in public, visit certain beaches, etc., such that the general public is still exposed to the virus.

Additionally, for a worker to recover income benefits in an occupational disease claim, he or she would have to show disablement which the Code defines as being actually disabled to work due to the occupational disease.[8] Further, when an employee's disability is the product of his or her employment circumstances and circumstances unrelated to his or her employment, the amount of benefits are apportioned.[9]

Whether and to what extent COVID-19 claims are going to be held compensable will depend on the facts of each specific case and the applicable state law. On March 5, 2020, Washington state's Department of Labor and Industries changed its policy related to workers' compensation coverage for healthcare workers and first responders, such that these types of workers will receive coverage for medical testing, treatment expenses if the worker becomes ill or injured, and provide indemnity payments for workers who cannot work if they are sick or quarantined.[10]

Around April 14, 2020, the Illinois Workers' Compensation Commission adopted evidentiary rules for "COVID-19 First Responder[s] or Front-Line Worker[s]" to have a rebuttable presumption that their exposure to COVID-19 during a COVID-19-related state of emergency arose out of and in the course of their employment and causally connected to the hazards or exposures of their employment.[11] "COVID-19 First Responder or Front-Line Worker" was further defined to include police, fire personnel, EMTs, paramedics, health care providers, correction officers, and "crucial personnel" which work in stores that sell groceries, medicine, and hardware supplies, food, beverage, and cannabis production and agriculture, organizations that provide charitable and social services, gas stations and businesses needed for transportation, financial institutions, "critical trades," mail, post, shipping, logistics, delivery, and pick-up services, educational institutions, laundry services, restaurants for consumption off-premises, supplies to work from home or for essential businesses and operations, transportation, home-based care and services, residential facilities and shelters, professional services, day care centers for exempt employees, hotels and motels, funeral services, and critical labor union functions.[12]

On April 7, 2020, Gov. Tim Walz of Minnesota signed MN HF 4537 providing employees on the front lines of the COVID-19 pandemic a rebuttable presumption that they contracted a workers' compensation occupational disease if they become ill with COVID-19.[13] Minnesota's definition of a front-line worker is much more narrow than Illinois', as it only includes first responders, certain health care workers, and child care providers who care for children of the designated individuals.[14] Minnesota's bill also requires proof of a positive test result or documentation of a diagnosis by a certified medical provider.[15]

It is unclear how the Georgia courts will treat exposure to COVID-19 as a work injury or occupational disease at this time. However, regardless of whether it's considered an injury or a disease, a worker will certainly have a difficult burden in proving that the exposure occurred at work and that it is compensable. With the spread of the virus to more and more people, it will become more of a disease of ordinary life, which is likely not to be covered by the Act, absent a statutory exception. But keep in mind that the FFCRA contains a number of provisions intended to relieve the logistical and financial burden of COVID-19 on qualifying employees, with certain tax relief to certain affected employers. The

FFCRA created the Emergency Paid Sick Leave Act ("EPSLA") which may apply to employees of covered employers to the extent that the employee is unable to work (or telework) because the employee was advised by a health care provider to self-quarantine due to COVID-19, the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis, or the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, among other categories. If an employee falls into one of these categories, he or she may be entitled to paid sick leave. For more information on the FFCRA visit www.dol.gov/agencies/whd. Additionally, NCCI reports that under general health insurance, at least 10 states have issued mandates for coverage of COVID-19 testing and treatment, which "could have the impact of limiting claim activity in the [workers' compensation] market" in some cases.[16]

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Endnotes

1. O.C.G.A. § 34-9-280 et. seq.
2. *Hopkins v. Employers Mut. Liab. Ins. Co.*, 103 Ga. App. 579 (1961).
3. *Nowell v. Employers Mut. Liab. Ins. Co.*, 93 Ga. App. 288 (1956).
4. *Fulton-DeKalb Hosp. Auth. v. Bishop*, 185 Ga. App. 771 (1988) (finding hepatitis B to be an occupational disease); McCarty v. Delta Pride, 247 Ga. App. 734 (2001) (finding malaria to be an occupational disease)."
5. O.C.G.A. § 34-9-280.
6. *Bishop*, 185 Ga. App. 771.
7. https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it
8. O.C.G.A. § 34-9-280(1).
9. O.C.G.A. § 34-9-285.
10. https://www.ncci.com/Articles/Pages/Insights-COVID19-WorkersComp.aspx
11. https://www2.illinois.gov/sites/iwcc/news/Documents/13APR20-Emergency_Amendment_Only-50IAC9030_70.pdf
12. *Id.*
13. https://www.house.leg.state.mn.us/dflpdf/a7308a83-b58d-4578-93b1-1ac3f8475906.pdf
14. *Id.*
15. *Id.*
16. https://www.ncci.com/Articles/Pages/Insights-COVID19-WorkersComp.aspx

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Fast Train to Georgia's Changes: Considerations for Workers' Compensation as a Result of COVID-19

By Meredith L. Knight

Doctors' offices, claimants, attorneys, employers, and insurers have been scrambling to figure out how to move forward with medical care and other common workers' compensation issues in light of COVID-19. The changes slowly making their way through our system have now accelerated at a rapid pace. As we adapt to social distancing while we simultaneously work, see patients and serve clients, we can predict some of the changes and issues they pose as a result of COVID-19, with the most obvious issues discussed below.

Telehealth

For claimants who have already sustained a compensable injury, many medical facilities are accepting follow-up appointments via telemedicine. In workers' compensation, this is an appointment method in which a video appointment occurs between a claimant and the authorized treating physician. Telemedicine is not new; however, the workers' compensation system has never experienced a need for such appointments in the past. To move medical forward we have had to throw our skepticism aside and accept the simple reality that, if we want claimants to continue seeing the doctor during COVID-19, many must do so virtually. A number of practitioners and attorneys are uncomfortable with a medical appointment where a doctor cannot physically manipulate an injured body part. Nonetheless, patients who are coming close to the end of their medical care and physical therapy patients who are able to perform a home-exercise program now use telemedicine as a viable option.

Based on the cost of medical care, transportation, and scheduling conflicts, telemedicine is one change that is here to stay after COVID-19's social distancing mandates are over. The question will simply revolve around the frequency with which it is applied. In speaking with a number of physicians, physical therapists, and nurse practitioners, we have found that patients seeing medical providers for a follow-up may not need the literal "hands-on" touch that a new patient may require for a diagnosis, even for the determination of work restrictions. Nonetheless, an in-person assessment of a patient cannot be replaced completely. Physical therapists are professionals who watch for correct form and posture, and instruct as to the use of special equipment. They work on muscle groups, dealing with inflammation and inflexibility usually requiring a good deal of manipulation. Many claimants are successful with a home-exercise program, but a physical therapist's contact cannot be completely replaced. In the workers' compensation arena, too much gray area exists for telehealth to be the new normal.

Telehealth may not be effective for the long run due to the fact that our statutes do not address "examinations" that are not "in person." For example, a light duty release and return to work under O.C.G.A. § 34-9-104 requires an examination within 60 days of filing the WC-104 form. It is unclear as to whether a telehealth conversation satisfies this important requirement. The same goes for a full duty release and job offer pursuant to O.C.G.A. §§ 34-9-240 and 221. Attorneys will interpret these statutes to their benefit on both sides. There will be no clear rule to instruct attorneys on these points until a Board or Court of Appeals case defines the parameters of "examinations" and the requirements for job offers based on work releases procured via telemedicine.

Full duty releases and pain management will probably be the most challenged components of telemedicine in the future. Immediate concerns include the privacy of a secured connection between the doctor and patient; the ability for another party to be present without the doctor's consent or knowledge; and the ability to record the videoconference without consent of the participants. Signed expectation forms and releases will be necessary for regular telemedicine appointments in order to protect both the doctor and the patient. Some HIPAA-compliant software applications exist to serve this end, but there is no guarantee every Claimant has a smartphone or the technological ability to run such programs. This will make WC-PMT conference calls on missed appointments interesting: will the Judge ask the

Claimant to attend a telehealth appointment, or will a claimant use technology as the excuse for not attending? After COVID-19, telemedicine will probably need to be consented to by all parties, who then must accept the consequences instead of combatting the examinations' results.

Permanent Impairment Ratings and Waddell's Testing

Continuing the above, only time will tell how far telehealth can go. In the future we could see permanent impairment ratings issued via telehealth. This sounds too virtual to be true, but it is not a new idea. Further, at the end of March 2020, a number of health organizations, including the American Medical Association, supported a Telehealth Initiative website to guide physicians into telehealth and navigate difficult issues. With telehealth being a vital part of our system due to COVID-19, the impairment rating issue is forthcoming.

The problems are obvious, such as the difficulty in assessing passive and active range of motion over video. The AMA lists range of motion as an important criterion in determining impairment. This criterion seems to demand physical contact. Further, Waddell's signs cannot be assessed, including the distraction test. Defense attorneys want to see the tests properly administered, and claimant's attorneys want to see their clients passing these tests without qualification. Both sides could easily question an impairment rating or a perceived Waddell's sign interpreted over video. This is a questionable change for both sides, and we all have good reason to be wary.

Teleworking and on the Job Injuries

The most obvious accelerated change brought forth by COVID-19 is the number of individuals working from home, or "teleworking." Before mandatory social distancing, other states already experienced an influx of injury claims brought by teleworkers. The Georgia Court of Appeals has not addressed teleworking for over 15 years, (see Amedisys v. Howard, 269 Ga.App. 656, 2004), but Florida, California, New York and Colorado are seeing significant action on this topic. The advent of VPNs, advanced electronic document production and retention, cloud servers, and electronic infrastructure allows a significant number of employees to telework. The ability to define what it is to "telework" and how an employee does so will be vital to how these cases are ultimately decided in Georgia. It appears the "what, how and when" of the teleworking set-up was a deciding factor in Howard.

To that end, a handful of employers in Georgia anticipated problematic legal issues and designed specific teleworking agreements. Configurations can include a designated work area in the employee's house, with pictures provided to the employer or even an in-home inspection by the employer. Agreements can set forth designated work and break hours, and warn of software that can track a mouse or keypad remaining idle for a certain period of time. Other agreements go as far as to define what will not be considered work time, such as running personal errands or tasks that require an employee to "punch out;" and production output standards.

COVID-19 pushed many employers into teleworking without these protections in place, so we expect to see a number of teleworking injury claims filed in the near future. The challenges in defending these claims include a lack of witnesses, lack of control over the employee's work habits, and the unknown work environments that the aforementioned teleworking agreements seek to avoid. Willful misconduct is difficult to measure with teleworkers. When one is at home, O.C.G.A. § 34-9-17 will be difficult to apply and monitor.

The Georgia Workers' Compensation Act does not contemplate a section of its code to be designated for teleworkers; however, with the thousands of employees forced into teleworking as a result of COVID-19, litigation is coming down the pipeline. Employers pushed into teleworking can rest assured that it is not too late to follow up with employees working from home and design a telework agreement right now that fits their workforces. Regardless, teleworking is here to stay, and COVID-19 is the catalyst for those who were slow to start. There is nothing like "learning-as-you-go." Indeed, here we are.

Light Duty Work

One positive development from the COVID-19 surge in teleworking is how normalized the teleworking set up will become. One prediction for the future revolves around light duty releases, including claimants who can otherwise work, but need to take medications that cause drowsiness. Instead of driving to work just to fall asleep on the job, the claimant can be set up to safely work from home. Certain employees and job positions will be better suited to teleworking on light duty than others.

Monitoring productivity will be important to ensure

work is being performed and completed properly for light-duty work-from-home claimants. Additionally, teleworking on light duty could be a great transitional tool for the 15-day trial period in O.C.G.A. §34-9-240, and to slowly bring injured workers back into the facility. An electronic system or even work that can be taken home and uploaded means the possibilities for light duty accommodations are endless.

Presently, there is no case law discussing the refusal of a light duty position based on the fear of catching a pandemic disease in Georgia. We can anticipate the possibility that such a case will be heard in the near future.

Videoconferencing Mediations and Depositions

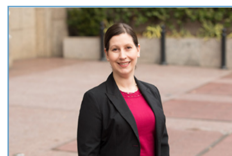
For years, scheduling a mediation meant the gathering of at least two attorneys, a claimant, and a mediator together in the same place. Distances were travelled. Friends and co-workers were affected. With COVID-19, this is no longer the case. The use of videoconference mediations has increased significantly. One month into social distancing, I received more requests for videoconference mediations than I have actually performed over the course of my entire career.

Sometimes negotiations are tense, so the possibility of leaving as soon as the fight-or-flight instinct arises could mean more failed mediations. The option of "hanging up" on the mediation defeats the purpose of trying to come together to negotiate a settlement or agree on a new doctor. When in person, leverage can be gained and assessed. Over video, meaning can be lost in translation. For claimants seeking closure, a video conference may not satisfy. This is not to say video-mediations are inherently ineffective or will never happen after COVID-19. If the attorneys and mediator have a good working relationship with each other, it is likely that these conferences will become slightly more common, but realistically, nothing beats a face-to-face meeting.

The same goes for video conference-style depositions. A number of governing court reporting bodies only recently gave court reporters the ability to swear in a witness over video, and were forced to do so solely for the purposes of COVID-19 social distancing. It will be considerably difficult for a plaintiff's attorney to control and prepare a witness if they are not in the same room together. Solidarity is an effective tool, and oftentimes is the only way a deposition is completed. Controlling the witness and objecting in time to prevent an answer on the record may be difficult for the attorney defending the deposition, especially where the connection is not perfect. Interpreters have a difficult time working through telephonic and video-depositions, and oftentimes rely on in-person interactions. The awkward interruptions that occur over videoconference and telephonic conversations could break the flow of the deposition to the detriment of both parties, the court reporter and the interpreter.

The problem with unseen parties being present during the deposition is a real concern, as is the option for a deponent to "read" answers. The attorneys would lose the ability to review and question the information the deponent is using. Finally, while court reporters are well-trained professionals, the possibility of stenographic errors arises, for example, when a connection is lost and not all of the parties are aware of the "short-circuit." Some people keep talking, not knowing they have been cut-off. As a result, there will likely be more video-depositions once COVID-19 over, but there is no replacement for taking depositions "the old fashioned way."

Overall, the immediate and permanent changes resulting from COVID-19 on how we "do" comp are the ones that were already in the works. Embracing the world of electronic working and medicine is just the beginning. The future is wide open, and we are already on the train. The ideal situation is that the changes we are seeing now will serve to improve our system, instead of burdening it with impractical methods meant for emergency situations like COVID-19.



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Idiopathic Injuries in Georgia Where are we now?

By Shari S. Miltiades, Shari S. Miltiades, P.C.

In 2018, the Court of Appeals attempted to clarify the definition of "idiopathic" injury in Cartersville City Schools v. Johnson, 345 Ga. App. 290 (2018, cert. denied). This article will provide some historical background on idiopathic injuries, will review the Johnson case, and will address subsequent decisions in idiopathic cases by various Administrative Law Judges and by the Appellate Division.

Before the Johnson case, it was extremely difficult for a claimant to overcome an idiopathic defense. In Chaparral Boats, Inc. v. Heath, 269 Ga. App. 399 (2004), benefits were denied to an employee who was walking across her employer's premises to clock in when she felt a pop in her knee. She did not trip or fall as the result of a workplace condition and she did not encounter any object. The Court concluded that her injury did not arise out of her employment because she had only engaged in the effort of walking, a risk she was equally exposed to away from her employment. In St. Joseph's Hospital v. Ward, 300 Ga. App. 845 (2009), benefits were denied to a nurse who turned and felt a pop in her knee. As in Heath, the Court held that standing and turning were not risks unique to the employment, but were risks to which she was equally exposed apart from her employment. In Chambers v. Monroe County Board of Commissioners, 328 Ga. App. 403 (2014), benefits were denied to a worker who injured her knee while standing up from her desk at the request of her employer. Because the employee presented no evidence that she slipped, tripped, fell, or came into contact with any object or hazard that increased her risk of injury, her claim was deemed idiopathic. Clearly, the idiopathic defense was a very solid defense.

All of this changed on October 7, 2014, when Celia Johnson, a fifth grade teacher, injured her left knee while moving from her desk to a position in the front of her classroom to use a "smart board". The ALJ awarded benefits, finding a causal connection between the condition of Ms. Johnson's employment and her injury. He specifically found that she was moving quickly in front of her students, that the configuration of her desk and other furniture in the room required her to turn sharply, and that she had to navigate a very narrow space between her desk and another table in order to reach her destination. The ALJ found that these factors created a risk and caused a danger that was peculiar to her work environment.

The Appellate Division reversed, determining that because she did not come into contact with any object that increased her risk of injury nor did she lose her balance, her injury was idiopathic. The Appellate Division decision included a stinging dissent from Judge Harrill L. Dawkins. Judge Dawkins considered his dissent "the most important decision I have ever written because it goes to the essence of the workers' compensation system". He described an idiopathic event as one "with an unknown and unexplained cause or one whose cause is exclusively attributable to the person with no external contributing factors. It is generally a spontaneous event, which is very personal to the victim. For an injury to be compensable, causation must be established. If the causation is incidental to the character of the employment, then the injury should be compensable." While someone can walk and twist his leg as easily in carrying out his job duties as he could away from work, if the activity he is performing is incidental to his employment at the time of the injury, the injury should be compensable, according to Judge Dawkins. The Superior Court reversed the Appellate Division and in 2018, the Court of Appeals weighed in. The Court of Appeals (seemingly taking up a challenge from Judge Dawkins) concluded that just because an employee can be exposed to a hazard outside of work, the same exposure at work does not render a claim non-compensable. To hold otherwise would render virtually any case in which an employee is walking, turning or standing while performing his or her job non-compensable. To determine compensability, the focus should be on the causal link between the injury and the work-related condition or activity. To prevail, an employee must show that the injury was either caused by activity the employee engaged in as part of his or her job, or resulted from

some special danger of the employment. Therefore, the Court found that the movements and behaviors required of Ms. Johnson as a classroom teacher were sufficient to prove a causal link between her injury and her work conditions.

Since that time, several cases have been heard by Administrative Law Judges and the Appellate Division that have relied on the Johnson case.

In early 2017, a secretary injured her left knee walking up steps while going to clock in to her job. The employer/self-insured argued first that the employee had not yet clocked in, and second, that the injury was not caused by a work risk and was therefore idiopathic. The ALJ awarded benefits finding that the injury resulted from a hazard connected to employment, which was the hazard of walking up steps leading to the office. Since it was the employer's property, the ingress/egress rule also applied. The decision was affirmed by the Appellate Division in 2019.

In May, 2017, an office administrator was injured when she propped open a door, using a binder to stop the door. When the binder failed, she tried to re-secure the binder and fell on to her left side. The employer argued (among other things) that the accident either was from an unknown cause, was the result of a personal health problem, or was idiopathic. The ALJ determined that the binder that she used to secure the door did create a risk associated with work and could therefore reasonably have caused a compensable injury. Ultimately, however, the ALJ denied the claim based on some inconsistencies in how the accident happened. An appellate decision was not

available at the time of publication, but this decision is a reminder that in all cases, witness credibility is of utmost importance.

In December, 2017, a custodian was injured when she was exiting her car and heard her left leg pop. At the time, she was receiving medical treatment for a prior compensable injury to her right knee, and she contended that the left knee injury was a superadded injury. The employer argued that the left knee injury could not have been superadded because it was a specific accident. The employer also argued that since she was just exiting her car, the injury was idiopathic. She was in the employer's parking lot getting out of her car when the injury occurred. The ALJ agreed that the left knee injury had no causal connection to the employment because she was simply getting out of her car to go into work and the claim was denied. The decision was affirmed by the Appellate Division in January, 2019.

In July, 2018, an employee of a residential facility for men with addiction suffered a tragic injury while walking between buildings on the employer's property. The employee was walking down a path when he hit something and fell forward. The path had loose dirt, exposed roots, and rocks. When he fell, his knee gave way, resulting in a dislocation that resulted in an amputation of his leg. The employer contended that the claim was idiopathic and also that the injury was the result of a pre-existing medical condition. The Administrative Law Judge awarded benefits, finding that the path on which the employee was walking was incidental to his employment and he was in the scope of his employment when he was injured. The Judge noted that the existence of underlying medical conditions that could have contributed to his fall are not dispositive of the fall being idiopathic. The decision was affirmed by the Appellate Division in 2019.

In December, 2016, a paraprofessional was injured while walking through a parking lot toward her school. The parking lot was unlit and the employee testified that she thought she fell on a rock. In November, 2018, she was hurt again when she sat on a chair that broke, injuring several body parts including her knee. The

2018 injury was accepted as medical only. The 2016 injury was controverted on the grounds that it did not arise out of and in the course of employment because the rock that she tripped on was something that she could have been exposed to outside of work just as easily as in the parking lot. In awarding benefits, the ALJ relied on Johnson, finding that a causal connection did exist between the employment and the injury and that just because the employee could have been exposed to a hazard outside of work did not render her injury non-compensable. The Judge specifically found that the rock the claimant tripped on was a hazard of her employment. No appellate decision was located for this case.

In April, 2019, a custodian was injured while cleaning a bank. She was walking between rooms when she slipped and fell in an area where the floor transitioned from tile to wood. The employer contended that the injury was idiopathic because the

claimant did not specifically know what caused her to fall. The ALJ found that the employee credibly established a causal connection between her injury and the workplace activity that she was performing in furtherance of her job duties. In this case, the Judge not only awarded benefits, it is the only case found to date in which assessed attorney's fees and litigation expenses were assessed against the employer. The ALJ found that there was no evidence to contradict the employee's description of what happened and that the case factually was almost identical to the Johnson case. No appellate decision has been reported.

The decisions post-Johnson suggest that Judge Dawkins' wish in his dissent several years ago may have come true with a clearer definition of "idiopathic". Significantly, however, in every case reviewed by the author, the facts of the accident were meticulously set out by the prevailing party. This suggests that while the idiopathic standard may be less cumbersome, an
employee must still work hard to meet his or her burden of proof.

Navigating Death Benefits in Georgia Workers' Compensation

By Christopher Gifford, Benjamin Gerber and Thomas Holder

Navigating death claims can be one of the most challenging aspects of a workers' compensation practice. In addition to addressing the normal issues that arise in claims, attorneys must take into account the human tragedy aspect of these cases. The workers' death is an incredible loss for their family and friends and no amount of compensation will adequately replace what has been lost. While the family cannot be truly made whole, if attorneys have a strong working knowledge of how death claims function, the process runs more smoothly and some of the burden can be taken off of the family.

The first thing that must be considered when an individual loses their life due to a work-related accident is whether or not they are covered by the statute. In other words, if they had not died, would their injury have been compensable under Georgia law.

In Georgia, the requirements are:

1. The employer must be subject to the Act. There must be at least 3 employees, or the employer must avail themselves under the statute by having coverage and electing to use it.
2. The injury (in this case death) must occur in the scope and course of the deceased employee's work or as a result of their work.
3. There must be jurisdiction in Georgia. The simple test for jurisdiction is

   1) if the injury took place in Georgia or the contract was signed here in Georgia,

   2) if the injured party is a resident of Georgia, and

   3) the work to be done was not to be performed exclusively out of the state.
4. There is not an affirmative defense, such as intoxication, which would exclude an otherwise compensable injury from being denied.

If these standards are met, then a workers' compensation death case can be brought under Georgia law (34-9-265).

Payment of Compensation for Death Resulting from Injury (O.C.G.A. §34-9-265)

O.C.G.A § 34-9-265 provides:

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, the compensation under this Chapter shall be as follows:

- *The employer shall, in addition to any other compensation, pay the reasonable expenses of the employee's burial not to exceed $7,500. If the employee leaves no dependents, this shall be the only compensation.*
- *The employer shall pay the dependents of the deceased employee, who are wholly dependent on his/her earnings for support at the time of injury, a weekly compensation equal to the compensation which is provided for in O.C.G.A. §34-9-261 for total incapacity.*
- *If the employee leaves dependents only partially dependent on his/her earnings for their support at the time of his/her injury, the weekly compensation for these dependents shall be in the same proportion to the compensation for persons wholly dependent; as the average amount contributed weekly by the deceased's weekly wage at the time of his/her injury.*
- *When weekly payments have been made to an injured employee before his/her death, compensation to dependents shall begin on the date of the last of such payments; but the number of weekly payments made to the injured employee under Code Section 34- 9-261, 34-9-262, or 34-9-263 shall be subtracted from the maximum 400-week period of dependency of a spouse provided by Code Section 34-9-13, and in no case shall payments be made to*

dependents except during dependency.

- *The total compensation payable under this section to a surviving spouse as a sole dependent at the time of death and where there is no other dependent for one year or less after the death of the employee shall in no case exceed $270,000.*
- *If there are no dependents in a compensable death case, the insurer or self-insurer shall pay the State Board of Workers' Compensation one-half of the benefits which would have been payable to such dependents or $10,000.00, whichever is less. All such funds paid to the Board shall be deposited in the general fund of the state treasury. If after such payment has been made, it is determined that a dependent or dependents qualified to receive benefits exist, then the insurer or self-insurer shall be entitled no reimbursement by refund for money collected in error.*

Workers' Compensation Death Benefits for Surviving Loved Ones

There are 2 types of benefits that the dependents of a deceased worker can receive: temporary total disability benefits and burial expenses.

<u>Burial Expenses</u>

Burial expenses are addressed in O.C.G.A. 34-9-265(b)(1). This section states that the dependents of the deceased shall receive reasonable burial expenses not to exceed $7,500. If there are no dependents, this is the only compensation that shall be received by the deceased.

<u>Temporary Total Disability Benefits</u>

Outside of burial expenses, only dependents can recover benefits when an individual dies on the job. The benefits available are also prescribed in O.C.G.A. 34-9-265. This section states that the dependents shall be entitled to different types of benefits depending on when the death happened.

If the death occurred instantly as a result of an on-the-job injury, the dependents shall be eligible for benefits under O.C.G.A. 34-9-261. This means that the calculation of benefits is the same as for a non-lethal on the job injury. The workers' compensation rate is calculated the same, and the maximum amount that a dependent can receive is $675 per week. If the death occurs after the injury but as a result of the injury, then the beneficiaries can receive indemnity benefits (minus what has already been paid).

Who is Eligible for Workers' Comp Death Benefits in Georgia?

There are 2 main types of beneficiaries: primary and secondary beneficiaries. The amount of compensation owed to different classes of dependents differs greatly. Therefore, what has to be defined in the instance of a death is who the dependents are and what class they fall into.

A dependent is a person who relied upon the deceased employee in order to maintain their standard of living. This is a question of fact and not a question of law, and needs to be determined by the evidence. A dependent can be, but doesn't have to be, a relative of the deceased.

Primary Beneficiaries

O.C.G.A. 34-9-13(b) states that:

The following people shall be conclusively presumed to be the next of kin wholly dependent for support upon the deceased employee:

(1) A wife or husband, except if the wife and husband were living separately for a period of 90 days immediately prior to the accident.

(2) A child of the employee if:

(A) The child is under 18 or enrolled full time in school

(B) The child is over 18 and is physically incapable of earning a livelihood; or

(C) The child is under the age of 22 and is a full time student or the equivalent in good standing enrolled in a postsecondary institution of higher learning.

<u>Dependent Children</u>

Dependent children are eligible for weekly benefits to be administered by a guardian or trustee, up until the age of 18 (or 22 years old if they remain enrolled in school). Once they have reached one of these milestones, their entitlement to indemnity benefits ceases. They cannot continue to receive indemnity benefits, even if they remain out of work as a result of their parent's untimely death. The only

exception to this rule is if the child is incapable of earning a living due to a disability.

The first category of child dependents is **legitimate natural minor children**. These individuals are first in line and can receive benefits even if they weren't actually dependent on the deceased worker. Legitimation can be proved via a birth certificate or a court order. An **adopted** child would be considered a legitimate child if there is an actual legal adoption and termination of the natural parent's status.

The second category of child dependents is **step children**. A step child is a child who is from a previous marriage. They are considered dependents of the deceased; however, there's a catch. If there are legitimate natural children, the natural children are considered primary beneficiaries and entitled to all of the temporary total disability benefits. Step children are only able to receive indemnity benefits if there are no primary beneficiaries, even if they were in fact dependent on the deceased.

An example of this scenario would be if a father had a child who didn't live with him, but had a new spouse and her children did live with him. Even though he was the breadwinner of the family, if he didn't legally adopt his step children, then his legitimate child would receive the workers' compensation benefits — not his step children. After his child reached the age of 18 (or 22 if they were in college), only then would the surviving spouse be eligible for benefits, which we will now explore.

Dependent Spouses

Spouses are treated differently. Surviving spouses are entitled to indemnity benefits if they were dependent on the deceased. The first requirement to prove that one was a spouse is a valid marriage certificate. Cohabitation and/or calling each other husband or wife does not qualify. There has to be an actual marriage with a marriage certificate. Common law marriage is also not considered when determining who is a spouse for workers' compensation purposes. In fact, common law marriage was outlawed in Georgia starting in 1996.

A surviving spouse is entitled to benefits for up to 400 weeks or up to age 65 (whichever is greater). If the accident occurred after July 1, 2019, the maximum recoverable by a surviving spouse is $270,000. However, if the deceased worker received indemnity benefits before their passing, these amounts can be subtracted from the total owed the surviving spouse.

There are some limitations on a surviving spouse though. Benefits to a surviving spouse will cease if they surviving spouse does one of the following three things:

1. Gets remarried.
2. Enters into a meretricious relationship. This is defined in O.C.G.A. 34-9-13(e) as a relationship where parties of the opposite sex live together continuously and openly in a relationship akin to marriage. This can include the sharing of living expenses while living together or sharing residences.
3. Dies.

Secondary Beneficiaries

Secondary beneficiaries are individuals who were dependent on the deceased, but who are neither a spouse nor a child. They must demonstrate that they were dependent on the deceased for at least 3 months prior to the deceased's fatal accident. This is a question of fact and can be demonstrated through evidence.

O.C.G.A. 34-9-265(b)(3) states that if the secondary beneficiary was only partially dependent on the deceased, then they will only receive indemnity benefits in conjunction with that amount. For example, if the deceased paid for his parents rent in the amount of $100 per week, but that was *all* he paid for, then the surviving parents will only receive $100 weekly — even if the deceased workers' compensation rate was greater than that amount.

Intentional Death and Workers' Compensation

Another consideration that's important to understand is if the death of the injured worker was caused by an intentional act of the employer. In such cases, there shall be a penalty added to the weekly benefits paid to the employee of 20%, not to exceed $20,000.

O.C.G.A. 34-9-265 (e) defines "intent" as:

"(I)f the employer had actual knowledge that the intended act was certain to cause such injury and knowingly disregarded this certainty of injury."

An example of this may occur when an employee complains of the failure of a safety device and the employer makes them do the job anyway, and the

worker dies as a result of the failed safety device.

What if there are no dependents?

Georgia code also considers what to do when a person dies without dependents. If an individual doesn't have dependents at the time of their death, then the employer/insurer must pay the State Board of Workers' Compensation $10,000 or half of the amount that they would have owed their dependents, whichever is less.

If, after such payment is made, it is determined that a dependent or dependents qualified to receive benefits exist, then the insurer or self-insurer shall be entitled to reimbursement by refund for moneys collected in error.

Every death case is different and there are a number of considerations that must be taken into account that based on the specific facts of each claim and there is no one size fits all approach. In order to provide effective representation, it is necessary to have a strong working knowledge of the statutes addressing death benefits in order to apply the facts of the particular case accurately.

Christopher Gifford has been practicing law for more than nine years, during which time he has worked exclusively in the field of worker' compensation. For the first five years of practice, he represented employers and insurance companies where he gained extensive knowledge and insight into how work injury claims are handled from the other side.

Now, Chris dedicates 100% of his practice to help injured workers and employees. For the last four years, he has used his unique experience representing both employee and employer-side interests to serve the hardworking people of Atlanta, Athens and throughout the state of Georgia.

The X's and O's of Controlling Medical: Analysis of Hartford Cas. Ins. Co. v. Hawkins (2020)

By Ryan G. Prescott, Sutton Law Group, rgp@sutton-law-group.com

"Shall we play a game?" (War Games). A seemingly innocent question asked by WOPR to David Lightman, played by Matthew Broderick. Fans of the movie know this led to a computer bent on initiating Global Thermonuclear War, but ultimately realizing there are no winners through the simple game of Tic-Tac-Toe. Much the same, whether the Panel and Authorized Treating Physician issues are handled like Thermonuclear War or Tic-Tac-Toe, no one wins. There are losses to be found everywhere when it becomes gamesmanship.

It's no secret among workers' compensation practitioners that the Authorized Treating Physician (ATP) can influence the outcomes and settlement values of cases greatly. In many ways, the ATP is the first judge to issue rulings in your claim. For that reason, many involved in the workers' compensation system place intense focus on that factor. The focus is to assert their physician into the claim. Perhaps the focus should be on inserting a trusted physician into the claim. One side may not trust Dr. Noah Juan Canwork and Dr. Alli S Fullduty (please note, no attempt is made to identify any particular doctor, the writer was simply fabricating Dr. No One Can Work and Dr. All is Fullduty), so they don't count.

The rules of the game set by statutes and board rules are not complex. OCGA § 34-9-200 (a) requires an employer to furnish the injured employee with medical treatment which "shall be reasonably required and appear likely to effect a cure, give relief, or restore the employee to suitable employment," and OCGA § 34-9-201 (b) (1) allows the employer to satisfy that requirement by posting a valid panel of physicians. Not all do. And we could further explore the multitude of issues that can be raised and argued even when a panel is posted, but the ability to return to society appears within reach and I don't want to keep you cooped up reading all that.

For this article, it is enough to know another basic rule is that if the employer "fails to provide any of the procedures" for selection of physicians as set forth in OCGA § 34-9-201 an employee may select any physician to treat the work injury. Further, if an employer terminates medical benefits, the employee is entitled to select any doctor and make the employer pay for it if the employee proves the treatment was reasonable and necessary as a result of the work accident. Similar to Tic-Tac-Toe, your opponent's next move is easily predictable when we engage in gamesmanship on these issues, and no one wins. An analysis of the recently issued Hartford Cas. Ins. Co. v. Hawkins, 353 Ga. App. 681, 839 S.E.2d 230 (2020) makes this point.

As always, several pages of a Court of Appeals' decision cannot encompass the multiyear dealings and interactions between the attorneys, employee and employer/insurer. Us readers never know what offers were rejected or what circumstances impacted the course of the claim. Perhaps each side agreed on a doctor and that doctor then refused to treat and no additional agreement could be reached. Thus, the below analysis is in no way an analysis on the strategic handling of a claim by any attorney, employee or employer/insurer. It is simply to illustrate how certain courses of action result in no winners and add little to no impact for a claim.

Hawkins involved a type of chicken-or-egg-argument. Which comes first? An employee's right to a one-time ATP change or the employee's burden of proving medical treatment continues to relate to the compensable work injury? In Hawkins the employee tripped and fell in October 2015. The employer did not have a valid panel, but it compiled one after the incident and authorized treatment with one of the freshly listed doctors.

This is the first X on the board. We don't know if the X was explained to the employee or not. But hindsight eventually plays into all perception. As you will see, this employee is later terminated by the employer. If that terminated employee then learns the treating doctor was handpicked by the employer, after the injury, and she was never told she actually

could pick whoever she wanted as her doctor, how much trust remains? How much trust can employee's attorney tell her she should have in that ATP under those circumstances? Again, we do not know what all was known and when, but if that first X is perceived as gamesmanship, the game continues. Conversely, if an employee late reports an injury and seeks treatment with his personal physician despite a panel, how much trust will an employer have in that process? Back to Hawkins.

After starting treatment with the post-accident panel doctor, the employee treated with the ATP and referral physicians for one and a half years. She continued to complain of problems and limitations and was ultimately terminated in March 2017 with one of the reasons being she "couldn't do as much of the work as we would have liked."

There is a whole slew of X's and O's that may have been played in the lead up and decision to terminate. Was the quoted termination rationale cleverly vague or innocently vague as to whether that inability to do as much work as wanted was caused by the work injury?

An FCE then done in May 2017 showed the employee had "demonstrated abilities" in the light-duty category, but the evaluator qualified that with the opinion that employee "gave a self-limited effort," and that the results of the FCE did not reflect her true capabilities. Moreover, the FCE evaluator stated that "unless an objective medical reason exists that would preclude return-to-work," employee "should be returned to work."

Again, we do not know the origin of this FCE evaluator and how much trust both sides would have in these findings. Was the FCE evaluator picked by the ATP? Unilaterally selected and scheduled by the insurer? Depending on the circumstances, this is another X or O on the board. Either way, the game did not end with a FCE finding the employee gave self-limited effort.

Following the FCE, the referral physicians felt restrictions remained appropriate despite the evaluator's thoughts. Alas, more vague circumstance. Did the employee no-show the ATP visit and only go to the referral physician due to insight on the physicians' expected response to the FCE? Depending on the circumstances, this is yet another X or O on the board. But the game was far from over.

The employer/insurer obtained an IME that found employee was capable of a "return to regular duty and full-time work" and that no further medical treatment was necessary in connection with the work injury.

Was the employer/insurer IME doctor credible or trusted by the employee side? Confirmation bias is a powerful psychological force that easily changes employer apples into employee oranges. If the employee already felt tricked by the employer getting an ATP designation based on a post-accident panel, does anyone really expect the employee side to put any stock in the IME? Confirmation bias will cause the employee to perceive the IME as just another trick.

This applies to both sides. If the IME physician is one extremely well-known to the other side, the opposing attorney on the case likely tells the client the opinion does not matter weeks before the appointment. Both sides in this game have a list of doctors whose opinions are completely worthless and non-influential to the other side. That is a good amount of time and money spent to push parties further apart.

True injuries and fakers don't need hired guns for IMEs. Any decent physician should do. And if the hired gun is used, the response is predictable. "They're like nuclear warheads. They have theirs, so I have mine" (Other People's Money). The next line in the movie is just as applicable, but substantially less printable.

In the next series of moves in Hawkins, the ATP then found in June 2017 that there was left shoulder dysfunction with "subjective neuropathic symptoms of the left upper extremity," but he had no further treatment to offer and would defer disability to the referral physician. The employer/insurer then utilized inconsistencies between the employee's deposition testimony and activities captured on surveillance. How surveillance is handled and disclosed will always impact the trust between attorneys and parties. We do not know the specifics in this case, but the outcome of surveillance video is disclosed.

In August 2017 the referral physician changed course and opined that employee's "complaints of pain and disability of her left arm are inconsistent with [her] physical activities as depicted in the video surveillance," that employee had reached maximum medical improvement for the work injury and

required no further treatment. Employee countered with her one-time physician change request. Employer/Insurer responded with a controvert.

Note, this is different from the case prior, Starwood Hotels & Resorts v. Lopez, 346 Ga. App. 137, 813 S.E.2d 792 (2018). In Lopez, the employer had a valid panel. Thus, the employer move was to file a WC-14 hearing request, seeking a determination as to whether it was still liable for benefits. Specifically, the Board highlighted in Lopez that the employer/insurer "did not controvert medical treatment, nor did it otherwise deny any request by [employee] for additional treatment or obstruct any attempt by [employee] to get additional treatment from an authorized provider." The risk of fully controverting in Lopez was eliminating panel control. In Hawkins, without a controlling panel, there was less downside to an outright controvert of all medical treatment. A similar analysis applies at the start of questionable claims when the employer has no panel and the employee is asking to treat with a nuclear warhead. Back to Hawkins.

Next move, Claimant has an IME (with a doctor different than her one-time change request), who provided treatment options and concluded that, absent further treatment, employee was "[c]apable of sedentary or desk work only." A hearing was held where employee sought TTD from the October 2015 incident or, alternatively, based on a fictional new injury as of her termination in March 2017. Employee also sought designation of her IME physician as the ATP.

The Administrative Law Judge ("ALJ") found that employee did have a fictional new injury in March 2017 from worsening due to continued work and she was entitled to TTD as of that date. The ALJ, however, then found employee's work-related injuries resolved as of August 2017 when her treating physicians found her capable of returning to unrestricted work and opined that no further medical treatment was required for her work-related conditions. Most importantly, the ALJ did not find employee's testimony about her continued pain to be credible based in part on her own observations during the duration of the five-hour hearing, in which employee "did not fidget, grimace or exhibit any other behaviors which would suggest that she was in pain." Accordingly, the ALJ concluded TTD was only owed March 2017 to August 2017 and further denied the ATP request. The Board adopted the ALJ's order in its entirety.

As is often the case, this became a reported Court of Appeals decision because the superior court reversed the decisions of the Board and ALJ. Specifically, the superior court found that because employer had no panel, the employer was required to authorize the ATP change request made before the controvert. Relying on Board Rule 201 (c), the superior court concluded that the employer's lack of a valid panel of physicians automatically bestowed onto the employee the right to a unilateral change of physician. Interestingly, and perhaps the biggest take away from Hawkins was that the Court hinted that it "is arguable that Board Rule 201 (c) is invalid because it enlarges the substantive rights of claimants." Wright v. Overnite Transp. Co., 214 Ga. App. 822, 824 (2) (449 SE2d 167) (1994); see also, MARTA v. Reid, 282 Ga. App. 877, 883 (3) (640 SE2d 300) (2006) (holding that the State Board has power to make rules, but cannot enlarge, reduce, or otherwise affect the substantive statutory rights of the parties).

Continuing down that Board Rule 201 road, the superior court added that the ALJs finding that the work injury resolved was error because Claimant's IME disagreed. On a roll at that point, the superior court also reversed the Board's denial of assessed attorney fees because employer/insurer "illegally denied [employee] her statutory right to a change of physician by controverting all medical treatment after she timely asserted this right." The Court of Appeals reversed the superior court.

Following prior precedent, Hawkins reasserted that the employee always has the burden of proving that the medical services she is seeking are directly related to a work-related injury. See Smith v. Mr. Sweeper Stores, 247 Ga. App. 726, 728 (1) (544 SE2d 758) (2001). It further upheld the "any evidence" deference given the Board on factual findings with respect to the finding that her work-related injuries had resolved as of August 2017. Thus, the Board acted within its discretion in denying additional medical treatment. See Williams v. West Central Ga. Bank, 225 Ga. App. 237, 238 (483 SE2d 607) (1997) ("The [B]oard has broad discretion under the standards set forth in OCGA § 34-9-200 (a) to determine what medical treatment the employer and insurer will be required to furnish to an injured employee.").

Consequently, after several years, multiple IMEs, FCE, additional treatment, deposition, surveillance, etc., the employee received 5 months of TTD and case

over. Who won?

There was no winner in Hawkins, only the ability to argue who lost least. For all that posturing, an experienced person using hindsight can easily make the argument that only one basic fact controlled the outcome. The employee lost credibility with the only non-planted physician and the Judge. The ATP was a doctor off a post-accident panel. ATP found no more treatment necessary in June 2017. Disregarded. The defense IME was likely selected solely by the employer/insurer. Defense IME said injury resolved March 2017. Disregarded. Employee IME was likely selected solely by the employee. Employee IME said continuing injury. Disregarded.

But the referral physician, selected as a specific referral from the ATP, who did not fully accept the FCE on its face, but later felt surveillance evidenced an employee who was not credible, concluded the work injury resolved in August 2017. The Judge saw similar reasons to question credibility and not coincidentally used the referral physician's opinion for when the work injury resolved. Is it even much in dispute what evidence was the most trusted?

Trusted evidence often wins cases or best allows parties to reach a compromise of mutual disappointment. Many decisions are made on either path: how medical treatment is initially handled, what is explained to the employee, how much say or trust the other side has in treating physicians and even IME physicians, when and how to disclose surveillance, etc. Once evidence in a claim loses trust from either side, recovery is difficult. After that, confirmation bias and other bias we all subconsciously cling too will cause completely different interpretation of the same facts.

Everyone spends time and money and has losses of some manner even though many of those X's and O's rarely factor into the ALJ decision. Sometimes that approach is inevitable because we cannot control clients or the other side. But each side has great reason for doing its best to avoid reasons to distrust its actions and evidence and that should be our first thought when presented with the question of "Shall we play a game?"

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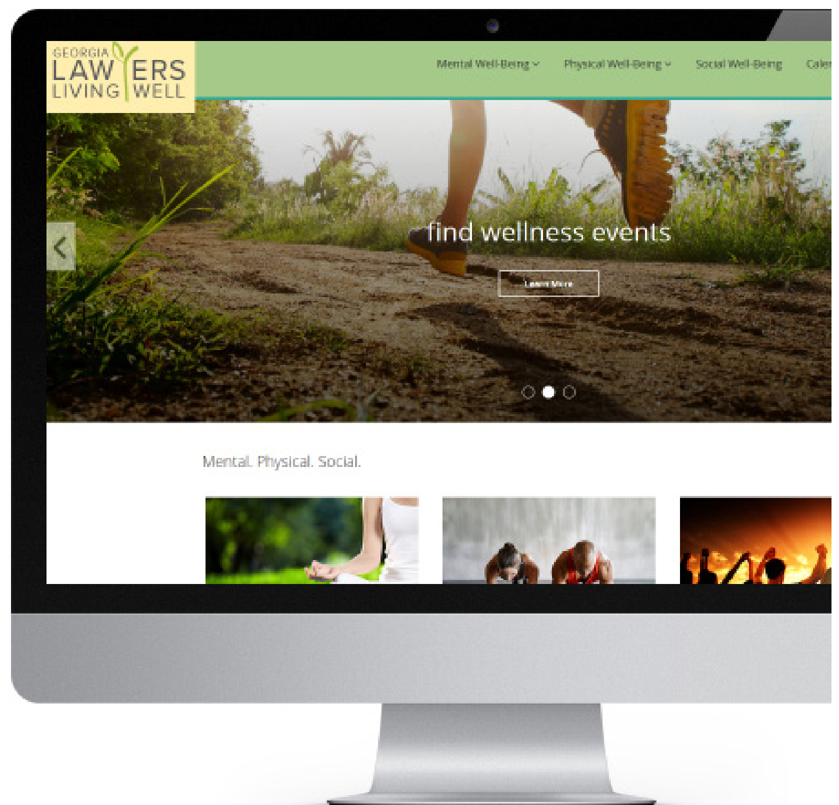

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