STATE BAR OF GEORGIA 1964

WORKERS' COMPENSATION LAW SECTION NEWSLETTER

Spring 2004 • Staten Bitting, Editor

Workers' Compensation Case Law Update

By E. Lee Southwell III

There have been two cases dealing with the application of the statute of limitation in code section 34-9-104(b).

The first of these is *Stephenson v. Roper Pump Company*, 261 Ga. App. 131 (2003). In that case, employee suffered an injury in 1992 and was last paid any kind of income benefits in 1995. He returned to work for a different employer and ceased to work for that employer in 2000. He filed a claim against Roper Pump Company, claiming a change in condition for the worse. Hearings were scheduled but postponed; no actual hearing was ever held. The employer/insurer did not controvert the claim until June 2001. At that time, the employer/insurer controverted on two grounds: The claim was barred by the statute of limitation in code section 34-9-104(b) and new accident with a subsequent employer. Based on employer/insurer's motion, the administrative law judge entered summary judgement in favor of employer/insurer on the statute of limitation issue.

On appeal, the Appellate Division, the superior court and the court of appeals affirmed. The court of appeals pointed out that the plea of the statute of limitation is an affirmative defense which must be raised at or before the first hearing. Even though multiple hearings had been scheduled and postponed, no hearing had ever been held. Therefore, employer/insurer's plea of the statute was timely. Furthermore, the court of appeals held that code section 34-9-221(h) did not deprive the employer/insurer of the right to controvert this claim because they did not do so in a timely fashion.

By its literal terms, code section 34-9-221(h) applied only when income benefits are being paid. No income benefits were being paid in this claim at the time the employee requested the hearing or at the time the notice to controvert was filed. No such benefits had been paid since 1995. The court of appeals refused to expand code section 34-9-221(h), which limits the time within which a claim can be controverted when income benefits are being paid, to cover any claim in which income benefits had ever been paid even if they were not being paid at the time the notice to controvert was filed. The court of appeals held that code section 34-9-221(d) applied when income benefits were not being paid and did not act as a statute of limitation on the right to controvert a claim. It merely subjected the employer/insurer to sanctions if a timely notice of controvert was not filed and if employer/insurer did not prevail on the merits.

Therefore, employer/insurer's notice to controvert this claim was legally sufficient to allow them to dispute liability in this claim, even though it was not timely filed. The most important holding in this case is that code section 34-9-221(h) only applies when income benefits are being paid at the time a claim is being controverted, and does not apply when income benefits are not being paid.

The second case involving the statute of limitations in a change in condition case is *Trent Tube v. Hurston*, 261 Ga. App. 525 (2003). In that case, employee had received income benefits for a period of time. While he was receiving income benefits, the employer sought to return him to work pursuant to the procedures under code section 34-9-240. The employee did return to work and attempt to perform

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Chairman's Corner

by Douglas A. Bennett

It has been an honor and a pleasure to serve as the Chairperson of the Workers' Compensation Section of the State Bar of Georgia for 2003-2004. I turn over the reigns to Emily George in June. I know Emily will do her usual excellent job in leading the Section the next year.

I commend the Executive Committee members of the Section who have made my job so easy: Emily George, Luanne Clarke, Bob Wharton, Staten Bitting, Tim Hanofee and Ann Bishop. Emily did an excellent job with the newsletter last year, and has turned it over to the capable hands of Staten Bitting, who continues in that tradition. Luanne Clarke put together an excellent program for the Seminar for the General Practitioner, which was held on April 22.

We have decided to forego holding a meeting and luncheon of the Section at the annual State Bar meeting, which will be held this year in the Orlando, Florida area. We will present this year's Distinguished Service Awards at the annual ICLE Workers' Compensation Law Institute in St. Simon's, which will be held this year October 7-9. The Distinguished Service Awards will be presented on Thursday evening between the traditional cocktail party and the Kids' Chance dinner. We hope this will result in an increase in participation, and therefore, make the award that much more meaningful. Ballots for the award will be sent out in the very near future.

I want to particularly thank Joe David Jackson and Susan Sadow for their hard work in putting together an excellent program at the 2003 ICLE Workers' Compensation Law Institute Seminar. The program was outstanding. I look forward to the 2004 seminar, which will be chaired by Nicole Tifverman and Joe Leman.

It is anticipated that the Book, titled *A History of Workers' Compensation in Georgia*, will be ready for publishing in the fall of 2004. All profits from the sale of the book will benefit Kids' Chance, Inc. I would like to thank Mark Gannon, past Section Chairperson, for his vision and perseverance in seeing this project through to completion. We hope that lawyer and law firm donations will help underwrite the cost of publication, and ask that all checks be made payable to the Kids' Chance Book Project, and sent to Kid's Chance, Inc., P.O. Box 623, Valdosta, Georgia, 31603-0623. The sponsorships will be acknowledged in the book.

Finally, I would like to thank the members of the Section for making my job so easy and rewarding. I believe without question that we have the best Section in the State Bar. I look forward to seeing all of you at the annual seminar.

Save the Date!

I.C.L.E.'s Annual Workers' Compensation Law Institute

October 7-9

Sea Palms Golf & Tennis Resort — St. Simons Island

Registration forms and an agenda will be available at www.iclega.org.

2003-2004 Officers of the Workers' Compensation Law Section

Douglas A. Bennett, Chair

H. Emily George, Chair-elect

Thomas W. Herman, Immediate Past Chair

Staten Bitting, Editor

KIDS' CHANCE Inc. Chatroom

by Cheryl G. Oliver

Kids' Chance is thriving! That's both good news and bad news. The bad news, of course, is that workplace accidents continue to occur and the good news is that our scholarship program continues to restore hope to the children of Georgia's seriously injured workers.

Our 2003 scholarship disbursements totaled more than $169,000, a 45 percent increase over 2002! This year we have already approved three new applicants with one application pending and we expect the number of applications to increase dramatically throughout the year. Six of our scholars graduated with college degrees in 2003, 11 moved on to higher education armed with high school diplomas and two earned degrees from technical colleges. The rest advanced toward their educational goals. As of March 24 we have awarded 370 scholarships since 1988! We are deeply grateful for the support of the Workers' Compensation Law Section, our official sponsors.

We plan to host the second national Kids' Chance meeting later this year, probably in Savannah. We have so many exciting events planned for this year. (Please refer to the calendar on page 10.)

You can share our pride in the progress our agency has made because you've been an integral part of making it happen. As founder and Chairman of the Board Bob Clyatt has said, "Many, many after we have gone from this earth, your efforts will continue to enrich the lives of the children that the Kids' Chance program reaches. Their success in achieving their goals will positively affect our world for generations to come."

Thank you for continuing to partner with us as we offer families a lifeline through education.

Another Recent Update to Case Law

by Staten Bitting

After Lee Southwell's excellent recent case summary was prepared, the Court of Appeals issued another decision that warrants mention. In *Wet Walls, Inc. v. Ledezma*, A04A0284; A04A0285, the court was asked to rule that an employer is not required to pay temporary total disability benefits to a non-citizen who is incapable of working in the United States due to an illegal status. The injured employee was incarcerated, allowing the employer to suspend TTD. The employee was released from prison and was deported due to his illegal status. He requested recommencement of TTD. The Board award reinstated TTD.

The employer appealed, arguing that the rationale in the United States Supreme Court case of *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 122 SC 1275, 152 LE2d 271 (2002) should apply. *Hoffman* held that "awarding back pay to illegal aliens runs counter to the policies underlying [the Immigration Reform and Control Act of 1986] (IRCA) which prohibits employment of illegal aliens in the United States." The employer also cited *Dynasty Sample Co. v. Beltran*, 224 Ga. App. 90, 479 SE2d 773 (1996) to support its contention that it should not be required to pay temporary total disability benefits to an injured employee not authorized to work in the United States.

The court in *Ledezma* noted that the question of whether there is a conflict between the IRCA and a state's workers' compensation statutes is one of first impression in Georgia. The decision did not turn on this question, however. The court concluded that implicit in the employer's argument is the contention that the injured employee is capable of returning to work in some capacity. Because the Board found that the employee remained totally disabled after TTD was suspended, the Court of Appeals rejected the employer's arguments. The court also rejected an equal protection argument on the same basis.

In a footnote in *Ledezma*, it is noted that the employer supplemented its brief after filing the appeal asserting a new basis for denying the claim. The employer cited *Gonzalez v. Department of Transportation*, A03A1975 (February 13, 2004), arguing that an alien who resides in a foreign country could not bring suit in Georgia. The court declined to consider this argument because it was not raised in the preceedings before the Board and was asserted for the first time on appeal.

A Look At Another Jurisdiction

A recent article in the Florida Bar News reminds us that we are privileged to practice workers' compensation law in Georgia. In Florida, there is now an intra-governmental dispute as to whether the Division of Administrative Hearings has the authority to promulgate procedural rules for workers' compensation cases or whether that authority is in the exclusive jurisdiction of the Florida Supreme Court. The Florida Workers' Compensation Act has undergone substantial changes in recent years to both substance and procedure. Despite these changes, and additional proposed changes, the article notes that Florida has some of the highest rates for workers' compensation insurance in the country, but some of the lowest payouts to injured employees. It was noted that one of the primary problems is that lawyer compensation for injured employees has been tied to the value of results, making it difficult to handle matters such as medical benefit issues.

News from the Board

by Hon. Carolyn C. Hall

LEGISLATION

The 2004 workers' compensation bill (HB 1278) (a copy may be obtained by visiting http://www.legis.state.ga.us) comes from the State Board of Workers' Compensation Advisory Council's Legislative Committee. This committee is comprised of leaders from all aspects of workers' compensation—the insurance industry, labor, medical community, legal community, small business, and business communities.

While the Advisory Council's Legislative Committee met on a number of occasions and discussed a number of issues, the committee came to a consensus on two amendments to O.C.G.A. § 34-9-226 concerning the appointment of guardians in workers' compensation claims. Guardians are appointed in workers' compensation claims when an employee suffers an injury resulting in death, usually leaving behind minor children, and when an injured employee, himself/herself, become legally incapacitated to handle their affairs.

Under the Probate section of the code, O.C.G.A. § 29-5-1, the Board has the power to appoint guardians in workers' compensation claims for receipt of workers' compensation benefits. Currently, under O.C.G.A. § 34-9-226(a), the probate court of the county of such minor or legally incapacitated person is permitted to appoint the guardian. HB 1278 allows the Board to accept an order from any other court of competent jurisdiction outside Georgia to appoint a guardian.

In addition, the Board currently has the power to appoint "temporary guardians" in cases that are settled for less than $25,000. HB increases this amount to $50,000. This bill should pass.

A bill was introduced to do away with the SITF. This is HB 1579. This is not a bill from the Board's advisory council. This bill calls from the SITF to cease accepting claims for injuries occurring as of June 30, 2008. The SITF will continue to pay claims until Dec. 31, 2020. Finally, it calls upon the SITF to complete an actuarial study on the SITF's unfunded liability by Jan. 1, 2005. This bill has passed both houses.

NEW AT THE BOARD

Over the last year, the Board began e-mailing reset notices of hearings before ALJs to just attorneys in an attempt to be more efficient and save money. This is only for attorneys who have filled out a consent form. This form is available from Doris Faulk at (404) 656-7772 or from our web site at www.sbwc.georgia.gov.

In addition, the Appellate Division has begun sending out notices of oral argument via email to the attorneys in an appeal. This is also only for attorneys who have filled out a consent form.

We are in the process of evaluating bids from vendors for an integrated claims management system, and should shortly be making a decision on which vendor we will use. After selection, as we design our system, we welcome assistance from the workers' compensation legal community.

Scholarship Honors Memory of L. Clifford Adams

It is a noble thing to honor the memory of a friend. Vidalia lawyer Hugh McNatt lost his best friend, Atlanta attorney L. Clifford Adams, when Cliff died of pancreatic cancer in 2003. A long-time supporter of Kids' Chance, Inc., Hugh saw an opportunity to honor Cliff's memory in a superbly meaningful way – by establishing a Kids' Chance scholarship endowment bearing Adams' name. The L. Clifford Adams/Kids' Chance scholarship is now well-funded with more than $111,000 as of March 31.

Through events including Bird Suppers in 2003 and 2004 and the Uvalda Golf Classic at Waterfall Country Club in Clayton last fall, the many friends of Cliff Adams have reached and surpassed the goal of $100,000 to fund the scholarship in perpetuity. These are restricted funds which will be invested with the earnings going to a deserving student for an annual scholarship. This year's recipient is Buck Bryan, a sophomore at Georgia Tech, majoring in mechanical engineering

Kids' Chance has been blessed, since its 1988 inception, with people who volunteer their time and give of their resources to ensure that the children of Georgia's seriously injured workers are empowered to reach educational goals that otherwise might be beyond their reach.

We're deeply grateful to Hugh McNatt and to the myriad contributors to the Cliff Adams Scholarship Fund. It is a wonderful way to honor the memory of a fine man and we feel sure Cliff would be pleased to know how generously people have responded to Hugh's idea. Thank you all.

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the job, but ceased to work in less than 15 working days. Employer/insurer immediately recommenced payment of income benefits, and sought a determination that the employee had unjustifiably refused suitable employment. After a hearing, the administrative law judge determined that the employee had indeed refused to accept suitable employment without justification. Therefore, the employer/insurer were authorized to suspend payment of income benefits as of the date of reinstatement. After this award was issued, the employer/insurer immediately suspended payment of income benefits. After all appeals were exhausted, the employee filed a subsequent hearing request, seeking determination that he had undergone a change in condition for the worse. The employer/insurer contended that the subsequent claim for a change in condition for the worse was time-barred. The administrative law judge, the Appellate Division, the superior court and the court of appeals did not agree. They all applied the plain language of code section 34-9-104(b), which states that a request for more income benefits pursuant to code section 34-9-261 (temporary total disability) or code section 34-9-262 (temporary partial disability) must be filed within two years of the date income benefits under either of these code sections were actually paid. The court of appeals took note that this language was enacted in 1990 and that it replaced previous language that required a claim for additional benefits based on a change in condition to be filed within two years after the last payment of income benefits due under code chapter 34-9.

In the *Hurston* case, the employer/insurer argued that the time for filing the subsequent claim for a change in condition for the worse should have run from the date that they were authorized to suspend payment of income benefits, not from the date when they actually did suspend payment of income benefits. No court agreed with this position. The court of appeals pointed out that employer/insurer's argument ran counter to the plain language of code section 34-9-104(b). The court of appeals held that it did not matter when entitlement to income benefits ceased. The time for filing a request for more income benefits based on a change in condition for the worse began to run at the time payment of income benefits was actually last made. The court stated that prior to 1990, it might have been argued that the time for requesting a subsequent change in condition for the worse began to run from the last date of entitlement regardless of the last date of the actual payment, but such an argument cannot be made based on the language of the current statute. If the 1990 amendment had not been passed, this case would be a great source of fear for attorneys representing employees. It should be noted that all though the court of appeals did say that an argument could have been made, the court did not say that the argument would have been successful.

The case of *Jered Industries, Inc. v. Pearson*, 261 Ga. App. 373 (2003) is, in essence, little more than an any evidence case. The ultimate issue in that case was employee's injury was catastrophic. The applicable definition of a catastrophic injury was the one in effect between 1992 and 1995; i.e., a disability of a nature and severity which had qualified or would qualify the employee to receive disability income benefits pursuant to Title II or Supplemental Security Income benefits pursuant to Title XVI of the Social Security Act.

In the *Pearson* case, the administrative law judge determined that the employee's injury was not catastrophic, despite the fact that the employee had three back surgeries and had been awarded Social Security disability benefits retroactive to the date in 1998 when he ceased working. The administrative law judge based his decision on evidence from a functional capacities evaluation which indicated that the employee was capable of at least sedentary, if not light duty, work along with other evidence which the court of appeals did not specify. The Appellate Division affirmed the decision of the administrative law judge, but the superior court reversed. The court of appeals reversed the judgment of the superior court, holding that there was evidence in the record which authorized the administrative law judge and the Appellate Division to make the factual findings which they made. The court of appeals reaffirmed the principle set forth in *Cobb County School District v. Barker*, 235 Ga. 71 (1999), that a decision of the Social Security Administration created at most a rebuttable presumption of catastrophic status. The administrative law judge and the Appellate Division determined that the employer/insurer had rebutted the presumption in this case. The superior court should have affirmed that determination based on the any evidence rule.

The case of *Mayor & Aldermen of the City of Savannah v. Stevens*, 261 Ga. App. 694 (2003), is yet another case dealing with the apparently expanded scope of employment which applies to law enforcement officers. In that case, Stevens had been a patrol officer earlier in her career, but at the time of her accident and injury she was assigned to administrative duties. She was injured in a motor vehicle collision while driving her personal vehicle. The collision occurred within one block of her assigned duty station. At the time of the collision, Stevens was in uniform and armed. Her police radio was turned on, and she was available to answer any call for help. The evidence in the record indicated that all Savannah police officers are expected to render assistance to other officers when assistance is requested, to render assistance to the public when requested, and to react to any criminal or suspicious activity which they see, regardless of whether they are technically on or off-duty. The evidence in the record further indicated that Stevens had rendered assistance to a merchant in

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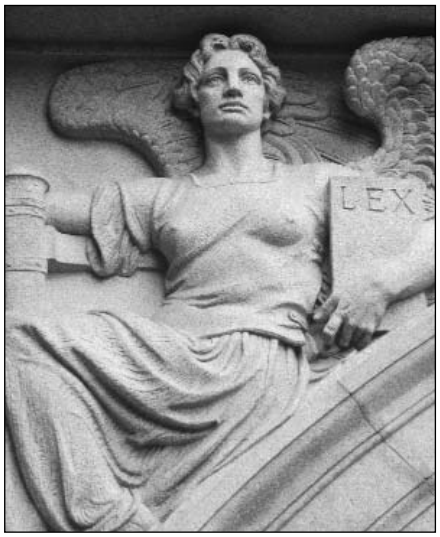
apprehending shoplifters while she was in a store during off-duty hours. The evidence further indicated that Stevens had responded to radio calls for assistance, even when she was technically off-duty, and had done so in her personal vehicle when she believed that a marked police vehicle would frighten off criminals while and unmarked vehicle would not.

Based on all this evidence, the administrative law judge and the Appellate Division found that Stevens' accident and injury arose out of in the course of her employment. The superior court and the court of appeals affirmed. The court of appeals stated that it does appear that law enforcement officers have a wider course of employment than other employees, although it cannot be said that they are always on-duty. The court of appeals further stated that each case stands on its unique facts and that great deference should be shown to the Board's (administrative law judges and Appellate Division) expertise and ability to apply the law to each unique set of facts. Based on this principle and the any evidence rule, the court of appeals held that this case was properly deemed to be compensable.



The case of *Shaw Industries, Inc. v. Shaw*, 262 Ga. App. 586 (2003) deals with the method of calculating income benefits for temporary partial disability. In that case, employee suffered a compensable injury and was paid temporary total disability benefits for a period of time. She then returned to work with employer, but was not able to earn as much money after her injury as before. The employer admitted that some of the loss of income was related to employee's injury, but contended that some of the time she missed, during which work suitable to her medically-imposed restrictions was available, was the result of reasons personal to the employee and unrelated to the injury. The administrative law judge and the Appellate Division did not allow the employer to add the earnings which employee would have had if she had not missed work for reasons unrelated to the injury to the earnings to which she did have while she was at work.

This holding was based on the case of *West Point Pepperell, Inc. v. Green*, 148 Ga. App. 625 (1979). In that case, the employer sought to base the employee's entitlement to temporary partial disability benefits on the difference between her earnings after she returned to work suitable to her injury-resultant condition and the amount she would have earned had she been performing regular-duty work and had she not been injured. The court of appeals rejected this method of calculation, stating that the proper method of determining entitlement to temporary partial disability benefits was the difference between the employee's actual earnings at the time of her injury and the amount she was able to earn after the injury. In the *Shaw* case, the court of appeals granted discretionary appeal to review the superior court's affirmance of the Appellate Division's decision. The court of appeals reversed the decision of the superior court. The court of appeals held that the *Shaw* case was distinguishable from *West Point Pepperell, Inc. v. Green*, supra. The court of appeals noted that the reduction in earnings which the employee in *Green* would have had had she not been injured and if she had been performing regular duty work at the time she returned to restricted work was the result of factors common to every employee in the plant regardless of whether any such employee had suffered a compensable injury or not. Under these circumstances, it was proper not to consider what employee's earnings would have been after her return to work had she not been injured.

The facts in *Shaw* were deemed to be different and distinguishable. Some of Shaw's loss of earnings was the result of factors personal to her, and unrelated to her compensable injury. It was proper to use the earnings employee would have had during the time when she was not at work for reasons personal to her and unrelated to her compensable injury in calculating her earnings for the purpose of determining entitlement to temporary partial disability benefits. The court of appeals noted that Board Rule 262 once had specifically made such a provision, but that it did not do so now. Nevertheless, the court of appeals held that the principles set forth in *Shaw* were correct. It thus appears that a loss of earnings which results from factors common to every employee in the business, regardless of whether any such employee has had a compensable injury or not, is not relevant in determining the extent of temporary partial disability. Earnings lost for reasons personal to the employee and unrelated to the employee's injury are relevant in making that calculation.

The case of *Mechanical Maintenance, Inc. v. Yarbrough*, Ct. App. No. A03A0850, decided Oct. 24, 2003, is another case dealing with the statute of limitation in change in condition cases. In fact, this case is a landmark in that area. In this case, the employee suffered a compensable injury in 1995. He received temporary total disability benefits for a period of time, then returned to work. He was supposed to be under medical restrictions, but restricted duty work was not available, therefore, he returned to his former work, which was beyond his restrictions. He was last paid temporary total disability income benefits in January 1997. He ceased working in May 1997

after at least two events which could easily have constituted new accidents. The employer and its insurer for the 1995 injury date paid the employee permanent partial disability benefits until August 1999. Employee filed two hearing requests. One requested determination of a change in condition for the worse based on the 1995 injury. The other requested a determination of all issues based on a new accident in 1997 when a subsequent insurer covered employer. Both of these hearing requests were filed in 2000. The administrative law judge found that employee suffered a new accident in 1997, but that that claim was time-barred. The administrative law judge further ruled that even if the disability subsequent to May 1997 could be considered a change in condition for the worse, that claim was also time-barred. The administrative law judge ruled that the first insurer's payment of permanent partial disability benefits had no effect on the claim against the second insurer. He further ruled that the payment of permanent partial disability benefits did not affect the statute of limitations in code section 34-9-104(b). The Appellate Division reversed. The Appellate Division ruled that the employee underwent a change in condition for the worse.

Based on dicta in *Mickens v. Western Probation & Detention Center*, 244 Ga. App. 268 (2000), the Appellate Division held that the payment of permanent partial disability benefits did prevent the statute of limitation in code section 34-9-104(b) from running. This holding was made despite the fact that, unlike code section 34-9-82, code section 34-9-104(b) provides that a claim for income benefits pursuant to code section 34-9-261 or 34-9-262 (temporary total or temporary partial disability, respectively) must be filed within two years of the time the last payment of income benefits pursuant to code section 34-9-261 or 34-9-262 was actually made. Payments pursuant to code section 34-9-263 were omitted from the list. (Code section 34-9-82 makes no distinction as to any category of income benefits. It merely makes reference to "weekly benefits.") The superior court affirmed the Appellate Division, but the court of appeals reversed. The court of appeals stated that code section 34-9-82 and code section 34-9-104(b) contained language which rendered those sections clearly distinguishable. The court further interpreted *Mickens* as recognizing that distinction, although *Mickens* had widely been interpreted not to recognize the distinction. The court of appeals ruled that payment of permanent partial disability benefits will extend the time for filing an all-issues claim pursuant to code section 34-9-82, but that payment of the same category of benefits will not extend the time for filing a claim for benefits based on a change in condition pursuant to code section 34-9-104(b).

The case of *ATE Health Systems, Inc. v. Adams*, Ct. App. No. A03A1043, decided Oct. 27, 2003, deals with application of the lunch break exception and determination of whether a break is scheduled. Employee was involved in a training session prior to being assigned to a state prison infirmary as a nurse. The leader of the training session stated that he generally broke for lunch at approximately the same time every day during the three day session. The exact time when the lunch break occurred depended on the number of questions asked at the end of the morning session. The training leader also stated that he started the break somewhat early on the first day to allow trainees some extra time to find a place to eat. Employee and several of her classmates went to a restaurant off the prison premises. While there, the employee slipped, fell, and injured her knee. Two days later, she had knee surgery. Although employer did not have positions available for her she returned to work as an emergency room nurse three weeks later. Her claim involved three weeks of income benefits and the medical expenses associated with her knee surgery. The administrative law judge, the Appellate Division, and the superior court held that the claim did not fall within the lunch break exception. They held that the break was not a scheduled one, and that the exception therefore did not apply. The court of appeals majority disagreed. The court of appeals majority interpreted the evidence as demonstrating that the morning session was scheduled to end at a certain time and that the afternoon session was scheduled to begin at a certain time. The majority further interpreted the evidence as demonstrating that breaks were taken at approximately the same time every day during the training session. The majority stated that these facts required the conclusion that the break was a scheduled one. The majority distinguished this case from cases in which breaks were taken only when a workload would allow, and were not necessarily taken even at approximately the same time every day. This case was also distinguishable from cases in which an employee was subject to recall to work even when on a lunch break.

Dissenting judges pointed out the evidence in the *Adams* case was also capable of the interpretation that a break was not taken until all questions were answered and that breaks were not taken at the same time every day. The dissenters therefore stated that the evidence was also reasonably capable of the interpretation that the break on which employee was injured was not a scheduled one. The dissenters pointed out that if the evidence was equally reasonably capable of the interpretation taken by the majority and by the administrative law judge and the Appellate Division, the evidence would authorize a finding either way. Under these circumstances, the dissenters stated that the decision of the administrative law judge and the Appellate Division should have been affirmed pursuant to the any evidence rule.

The case of *Union City Auto Parts v. Edwards*, Ct. App. No. A03A1278, decided Oct. 27, 2003, deals with aggravation of an incisional hernia. In that case, the employee, among other things, had an incisional hernia (rupture at site of previous surgery) prior to his alleged compensable accident. It

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was determined that that accident aggravated the employee's pre-existing incisional hernia. Following a hearing, the administrative law judge, in accordance with existing case law, ruled that the employee was entitled to income benefits for his period of disability but was not entitled to medical expenses for treatment of his pre-existing incisional hernia. The Appellate Division affirmed, but noted that it could be argued that the 1996 amendment to code section 34-9-1(4), which codified the general law with regard to aggravation of pre-existing conditions, had superseded and overruled prior case law. The superior court reversed the Appellate Division holding that such a legislative overruling had occurred and that the general law with regard to aggravation of pre-existing conditions now applied to aggravation of pre-existing hernias. The court of appeals discretionary appeal and reversed. The court of appeals stated that the 1996 amendment did indeed codify previous law. The court of appeals pointed out that that previous law did not include aggravation of pre-existing hernias within the general rule regarding aggravation of pre-existing conditions. The reason for the difference was code section 34-9-266, which requires that a compensable hernia must, among other things, not have existed prior to the accident which is alleged to have caused the hernia. The court stated that the law with regard to aggravation of incisional hernias was the same as that for aggravation of any other kind of hernia.

The question which the court of appeals did not answer and which remains unanswered, is wither an incisional hernia which follows and results from surgery designed to treat another condition is the same as any other hernia or is a super added injury. It would appear that an incisional hernia which results from surgery for another condition is a compensable consequent of medical treatment, but that issue remains to be decided.

The case of *Brown Trucking Company v. Rushing*, Ct. App. No. A03A2311, decided Feb. 18, 2004, deals with the rights of employees of owner-operators under the workers' compensation law. In that case, Brown Trucking Company had a contract with Norfolk Southern Railway to perform work on the railroad's premises. As a part of that contract, Brown hired Rushing's employer to supply trucks and drivers. Rushing's employer was an owner-operator. Rushing was injured when a train struck the truck he was driving while he was performing work on behalf of his employer under Brown's contract on the railroad's premises.

Rushing first made his claim against his immediate uninsured employer. When that employer did not pay the claim, Rushing filed a claim against Brown as a statutory employer. Brown denied liability on the basis that Rushing's employer was an owner-operator and therefore independent contractor as a matter of law. Brown further contended that employees of the independent contractor by operation of law were also independent contractors not covered by the workers' compensation law. The administrative law judge rejected these contentions. The administrative law judge found that Rushing was performing activities which were a part of the subject matter of the contract between Brown and Norfolk Southern. The administrative law judge further found that the accident occurred on the premises where the contract was to be performed. The administrative law judge also found that the exemption for owner-operators did not extend to employees of owner-operators. Therefore, the administrative law judge found that Brown was Rushing's statutory employer. The administrative law judge also awarded Rushing assessed attorney's fees on two grounds. He found that Brown had defended the claim without reasonable grounds and had failed to file a timely notice to controvert without reasonable grounds.

On appeal, the Appellate Division found that Brown had not defended the claim without reasonable grounds but otherwise affirmed, including retaining assessed attorney's fees based on an unreasonable violation of code section 34-9-221. The Appellate Division's decision was deemed affirmed by operation of law at the superior court level. The court of appeals granted discretionary appeal. The court of appeals affirmed the decision of the Appellate Division. The court of appeals pointed out that the 1991 amendment to code section 34-9-1(2) which defines owner-operators as independent contractors made no reference to employees of owner-operators. The court of appeals noted that code section 34-9-1(2), which contains the definition of an employee under the workers' compensation law, made reference to a large number of groups. Employees of owner-operators were not among the groups mentioned. The court of appeals said that failure to include employees of owner-operators among the groups mentioned in code section 34-9-1(2) created a stronger inference that the General Assembly intended to exclude employees of owner-operators from the exemption from coverage for owner-operators than would have been created had no groups been specified.

The court of appeals further distinguished Tennessee and Alabama cases which did hold that employees of owner-operators are not employees of common carriers. In both states, the exemption applies to common carriers as employers, not to owner-operators as employees. This distinction makes a large difference. On the issue of assessment of attorney's fees, the court of appeals reaffirmed the principle that a contention that a particular worker is not an employee is a ground for filing a notice to controvert, not an exemption from the duty to file a notice to controvert. The court went on to say that the evidence in the record in this case established an unreasonable violation of code section 34-9-221 and supported the assessment of attorney's fees based on such a violation.

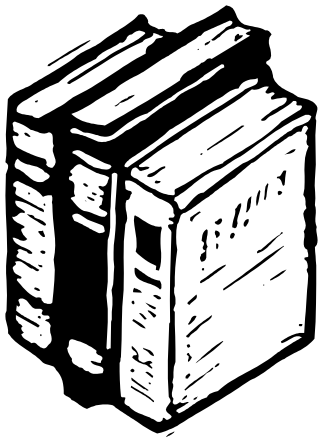
Leaping into the 21st Century:

Foreward from *The History of Workers' Compensation in Georgia*

by Jan Pogue

In the spring of 2001, a case came before the Georgia courts that would test much more than just the legal expertise of all those dealing with workers' compensation law in the state. It would test the ingenuity of the courts, the willingness of attorneys on opposing sides to work together, and the usefulness of technology in a world more comfortable dealing with aching backs and injured hands.

The case involved a man who had suffered a systemic breakdown after a chemical exposure that led among other problems to cardiac and respiratory failures. He was forced to live in a "clean" environment and only on the coast – and to remain near his doctor, a specialist in chemical sensitivities. Although he claimed catastrophic injury, he couldn't travel to Atlanta to plead his case or sit in any public place for a hearing without facing serious health ramifications.



Administrative Law Judge Carl W. McCalla III, who had been on the bench just over a year, realized there was no legal precedence for what he was about to do – and for what he would be asking both the defense and plaintiff's attorneys to do. As a compromise, he took the hearing out of the regular courtroom on the seventh floor of the Southern Company Center in downtown Atlanta, relocating it to a facility that could accommodate videoconferencing. The injured worker was permitted to remain in a hospital facility near his home and with his treating physician. Judge McCalla conducted the hearing with a live-feed of the employee from that remote site, with very little delay in the relay. The worker's physician and rehabilitation supplier also testified from there.

There were issues that every judge must deal with, magnified here by the circumstances: impeachment and authentification of evidence, and a client's right to confer privately with his attorneys. Scanning, email and fax capabilities cut down on some of the paper challenges – though when documents were referenced without forewarning or were needed for impeachment and then tendered into evidence, McCalla found himself caught off-guard.

"I think," McCalla said months later, "that this is the wave of the future . . . an extremely economical way to try a case involving out-of-state parties and witnesses. I'd call it a success."

Of the 43,000 cases brought that year before the branch of the courts that handle workers' compensation, the case stood out for both the difficulty of hearing it – and because of the sensitivity that went into deciding it.

In the nearly 100 years since the world began to acknowledge that both workers and employers needed protection in cases involving on-job injuries, the law – and those practicing and overseeing it – has gone from the simple to the complicated, from the obvious to the unconceivable. Today, lawyers on both sides of the cases must be conversant in medical and psychological idiom. Judges are called upon to evaluate testimony that may be filtered through interpreters dealing with speakers of Russian, Spanish and Japanese. Clients may be victims of injuries unheard of in years past by pieces of equipment that may be common to only a single industry. Employers are regulated – some argue over regulated — by federal and state laws that can impact the bottom line in a most definitive fashion.

The law that started out as "the great tradeoff" because both sides had to give up something is at once a fluid, complicated animal, and a body of work complicated and ever changing—what Atlanta attorney Mark S. Gannon calls "a no-fault system created out of whole cloth."

In Georgia, that translates into 1,200 lawyers and about 25 administrative law judges plowing fields that may have never been plowed. It involves some of the most hands-on cases in the world—cases of people hurt, lives turned upside down, businesses faced with growing costs of doing the jobs that need to be done in the best possible fashion.

"Sometimes," says Emily George, a lawyer in Forest Park who handles only claimants, "you feel a little like a social worker."

How and why the practice of workers' compensation has grown from a tiny part of the legal system to one that annually dispenses more money than all the other courts combined in just over 80 is the story of a just and noble legacy, the history of workers' compensation law in the world, the nation and in Georgia.

And it begins just as the world was slipping into the modern era we call the Twentieth Century.

2004 KIDS' CHANCE Events

Event	Date	Contact
Kids' Chance Fun Fest *Rockmart*	June 5	Gloria Cook 800-848-1989 gcook@medservco.com
Annual Board Retreat Dauset Trails Nature Center *Jackson* www.dausettrails.com	July 24	Kids' Chance Office 229-244-015 kids300@bellsouth.net
Bowling Tournament Jac's Lanes *Valdosta*	August	Linda Ray 229-559-7108 rays12@bellsouth.net
Golf Tournament Heritage Golf Club *Norcross*	Sept. 20	Carole Reich 770-642-7810 creich@caduceus24-7.com
ICLE Dinner/Auction Sea Palms Resort *St. Simons Island*	Oct. 7	Kathryn Bergquist 404-264-1500 kbergquist@gmal.com
Fun Run Emory Lullwater Park *Atlanta*	October	Gregg Porter 404-521-1282 gmp@savellwilliams.com
UAW Bowling Tourney Embassy Lanes Forest Park Honorary Chair: Gov. Roy Barnes	Nov. 6	Bo Marlowe (UAW #882) 404-762-0377 Bo_mar@hotmail.com

From the Settlement Division

by Roslyn Ramsey

We are busy. Each year the examiners in the Settlement Division of the State Board review and process over 10,000 stipulated settlements, 500 lump sum and advance requests and 1,000 Subsequent Injury Trust Fund reimbursement agreements. In order to assist us in promptly and efficiently processing settlement stipulations, please keep in mind the primary reasons why proposed settlements are rejected. They include, in no particular order, the following:

- Unresolved attorney lien claims.
- Unresolved child support lien claims.
- Failure to itemize attorney expenses.
- Failure to include a copy of the contract for attorney's fees.
- Failure to include recent medical information.
- Failure to include the throwaway sheet in a no-liability settlement.
- Failure to include the attorney affidavit (WC-15) in a no-liability settlement.
- Placing the dollar amount of the settlement in the no-liability settlement.
- Failure to provide for the employer/insurer to guarantee payment in the event of third-party failure to pay or default in a structured settlement.
- The insertion of a provision in the stipulation that requires employee to indemnify the employer/insurer against Medicare or other lien claims.

If you will take care to avoid these problems as you negotiate your settlement and prepare the settlement documents, it will save time in the approval process. The Settlement Division provides "how to assistance" while you are in the process of preparing your settlement package for submission to the Board. If you have a question concerning one of the terms of a proposed settlement or as to the documentation, discuss this with us before you submit the package. Please remember to include the proper number of 9x12 envelopes and sufficient copies of settlement documents for each party and for each date of incident.

Sponsor *The History of Workers' Compensation in Georgia*

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Cheryl Oliver
Executive Director
Kids' Chance, Inc.
P.O. Box 623
Valdosta, Georgia 31603-0623

The Sponsorship Levels are*:

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Attention All Section Members!

The State Bar needs your e-mail address!

The Workers' Compensation Law Section wants to be able to send you section-related information such as meeting notices and newsletters in a fast and efficient manner.

If you have not yet submitted your address to the Bar's Membership Department, you may do so online or by e-mailing it to membership@gabar.org.

The Bar year is coming to a close!

Don't forget to renew your Workers' Compensation Law Section membership when you pay your dues for 2004-2005!

WORKERS' COMPENSATION LAW

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