STATE BAR OF GEORGIA 1964 ®

WORKERS' COMPENSATION LAW

Section Newsletter

Summer 2014

Elizabeth Costner and Kevin Gaulke, editors

Ethics, Schmethics

By Kevin O. Skedsvold. Skedsvold & White LLC

If Ethics is supposed to be aspirational, perhaps we are aiming too low. The standards, ethical considerations and directory rulings tend to give us the bare minimum for what is considered acceptable behavior. Seriously though, is anyone satisfied with minimally acceptable behavior? I've long considered ethics, in study and in theory to be less important than professionalism. One can be ethical but not professional but it is much more difficult to be professional and not ethical. Professionalism requires more, expects more, demands more and after all, shouldn't we WANT more for ourselves, our clients and the Worker's Compensation Section?

I will be the first to admit that I have from time to time violated the same thoughts espoused herein and have lived to regret it. We all know that this is a small section of the bar and that the toes we step on today may very well be attached to the foot kicking our tails tomorrow. That, in and of itself, has served as both positive and negative reinforcement to sometimes guide our conduct. I admit, as would most of us in candid moments, that from time to time adrenaline, irritation or a misplaced zeal to win has led us astray from the people that we think we are, the attorneys that we thought we would be in our practices. In our worst moments, are we the paradigm of propriety or do we more closely resemble the stereotypes that have given our profession a bad name?

There is no way to avoid the opposing party having a potentially negative opinion of you as the attorney. After all, your duty is not to look out for their best interests. It is to protect the interests of your own client. But what about the other attorney? What is Opposing Counsel's opinion of you as an attorney, an advocate and more importantly as a person? In his 1965 classic "Positively 4th Street", Bob Dylan put it this way:

> *I wish that for just one time, you could stand inside my shoes. And just for that one moment, I could be you*
>
> *Yes, I wish that for just one time, you could stand inside my shoes. You'd know what a drag it is to see you*

None of us really wants to know what others think of us as the revelation would be too damaging to over inflated senses of self-worth. But maybe that's exactly the medicine that we need to make us the attorneys we thought that we would be. Is your call always screened? Does Opposing Counsel require everything from you to be in writing? Are you the serial recipient of Motions to Compel? If so, maybe it's you. Maybe your conduct has given your brothers and sisters at the bar reason to doubt your integrity. Then again, if every attorney you encounter is a charlatan, every opposing party a liar, maybe it's you. To paraphrase a TV character: "If you meet a jerk first thing in the morning, it's okay, you just met a jerk. If you meet jerks all day, you're the jerk." The answer has to lie in looking first to ourselves for the part that we played in whatever the unpleasant encounter. This is not introspection for purposes of self-justification. No, it's calm, honest and dispassionate analysis of where did I, NOT SOMEONE ELSE, go wrong and how could I have handled that better.

Think of "the list" that you have in your mind, on the back of your office door, or on the digital lists that we share with our colleagues. Are you on that list? Do you deserve to be? In this regard, let's look past the times that we've gotten our tails handed to us when the evidence just didn't go our way. Probably not so ironically, one of my worst days in Court was also one in which the advantage of time and a clearer view from the rearview mirror demonstrated was a just result. You see, my client had decided that everything that he told me in discovery and in hearing preparation was just no longer valid. Perhaps it was the Judge looking at him, maybe it was the solemnity of the oath, or maybe it was the question posed in the right way by Claimant's Counsel. Whatever it was, my client chose that moment to actually tell the truth. If the technology for time travel or teleporting me from the Courtroom existed, I would have left him sitting there to encounter the understandable wrath of the Judge who was asked to decide what was a textbook case of a clearly compensable injury. I got my head handed to me, and deservedly so. Was Counsel to blame for this? Certainly not. He did his job well and kicked the butt that needed kicking. What I had done, though, was to give that attorney pause to doubt

my credibility. Did he know that the witness had lied to me or was I part of the problem? The answer lies in the context. Only by taking everything into account (prior cases, behavior on this case) can one make that call. Usually, it's the small things: Did I turn over all of the evidence, was I cooperative or was every encounter just another opportunity for a dodge. The professional governs himself taking care of the small details so that the larger questions never arise.

Ignore too the times when a hardball litigation tactic of the opposing counsel worked to your disadvantage. Was Counsel's move illegitimate or was it just effective? Did he cross the line or did he simply use the rules and the evidence to his advantage and that of his client? Take for example, the surveillance used to great effect at damaging your client's case and credibility at the hearing. You've spent time and emotional capital preparing the case and all of that work is down the drain by virtue of the private investigator who shows up at the hearing. You might deserve to be mad, at someone, but is it really appropriate to be angry at the other attorney when you never bothered to ask for it? If you never served discovery, the fault lies elsewhere, not with the attorney who used legitimate evidence to the benefit of his client. In these days of uncertainty and acrimony concerning matters of immigration status can claimant's counsel blame defense counsel when his client is arrested? Would your answer and your opinion of Opposing Counsel change if you knew that the State Board's Fraud and Investigation Division instructed counsel to say nothing about the impending arrest?

If you think about it, in the ***sturm und drang*** of a busy practice when client demands, client expectations and personal finances are at stake, it's a wonder that we are not at each others throats more often. When egos and sometimes misplaced senses of "justice" or "fairness" are involved, it is difficult to separate unprofessional conduct from an unsatisfactory (from our perspective) outcome.

In his article from last year's newsletter, G. Robert Ryan Jr. implored those of us in the defense bar to remember that the "claimant is not your enemy. They are a person." Robert is correct that too often we tend to forget the humanity of the other person and, in our zeal, lose ourselves. That admonition though, applies throughout. Scarcely have I met an employer whose first impulse was to ignore the injured worker. Notice here that I did NOT say never. As a defense attorney I have had the privilege of representing people who know their businesses well but know very little about the worker's compensation system. In the Worker's Compensation System, it would seem that the Bench and bar assume that employers have more sophistication than the workers they employ when it comes to complying with the worker's compensation act. I have seen, however, that an excellent mechanic, building contractor or even a physician, is not necessarily the best businessperson or record keeper. If the Employer is uncooperative with an opposing attorney, consider that it may be your approach. More than likely though, the problem lies in the reputations that we've built for ourselves. With ubiquitous advertisements all telling "the little guy" that Insurance Companies have hundreds of lawyers looking out for them, maybe we've set up our clients and the system for something that is adversarial when it doesn't need to be. We've made the task more difficult by virtue of competition for representation and then are genuinely surprised when cooperation is hard to come by.

In truth, many of my first time clients have no more knowledge of worker's compensation than the people they employ. For Claimant's counsel to assume pernicious motives is perhaps a bridge too far. Likely, the Employer is simply doing his best to run a business and isn't really out to get your client, his employee. Employers feel no less mugged by this system than the injured workers they employ. The adversarial nature of the system seems destined to foster mistrust. As soon as that employer receives a letter from claimant's counsel, he's "being sued" by the person he took to the doctor, the guy that may still be working, the guy that may have been a longtime friend. Your letter may very well have been innocent enough, may have avoided any overt threats but it is intimidating and in truth is usually meant to be. If your client is all of a sudden out of a job, or not actively working, as soon as you have filed your entry of appearance, maybe we should consider that our approach was wrong. I do not suggest that by getting involved, Counsel has done anything wrong. Those of us who swim these sometimes fetid waters understand that the Worker's Compensation system is completely opaque to the average worker. The injured worker who is not paid for the first week of disability, is asked to treat with someone from a list not of his making and someone who is suddenly receiving calls from Adjusters and Nurses that they've never met is dealing with his own issues of confusion and intimidation. On the Employer side of things, then, we too need to rethink or refine our own approaches.

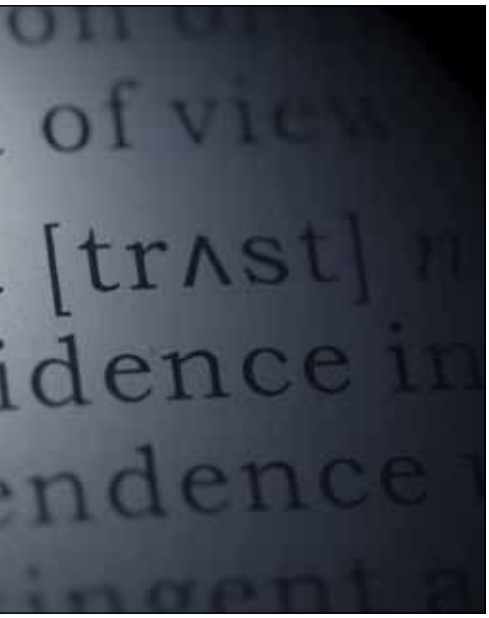
Much of the confusion, much of the problems with misperception can be alleviated by simple human compassion. As defense attorneys, we need to make clear to our clients that the existence of a claim is no reason to forego the simple courtesies that our parents and our faiths have taught us from our earliest days. Is your worker injured? It's okay to apologize. For someone whose identity is found in his work, being suddenly disabled and detached from

the familiar environment can be disconcerting. A well placed call, a card, or even a meal or two delivered to the injured worker helps them to remember the connection, and avoid the feeling of being cast aside after an injury. For the Claimant attorneys, are your predispositions infecting your client's view of their employment relationship? If the Employer attempts to contact your client, to check in on them, send them a card or deliver a meal, what is your reaction? Is the Employer being kind or do you consider that the Employer is "checking up" on your client? Your reaction will influence your client's reaction. Is your first reaction building trust in the system or cynicism. The true professional is neither naïve nor reflexively suspicious. The true professional accepts that kindness exists and waits for dishonesty to reveal itself.

Building Trust in Your Relationshps with Opposing Counsel

Face it, some people are busy, some are lazy and some are just plain uncooperative. Some attorneys work hard for their clients and some just work for advantage. The only way to know is to risk being taken for advantage. How your opposition responds to your trust tells you much about them, and you would do well to understand that lesson. In one encounter with an opposing party, no discovery had been served and counsel did not understand the employer's defense to his client's claim. In an effort to resolve the matter, the case was laid out for counsel to demonstrate that willful misconduct should bar the claim. Counsel did not, however, use the information as an attempt to resolve but instead used the information to "work around the tight spots" in an attempt to craft testimony more favorable to his position. Lesson learned: Counsel is not to be trusted and accommodations made are only to my disadvantage and that of my clients.

On the other side of the ledger, sometimes your own client is less than candid. In one such claim, Counsel for the injured worker had taken all of the right steps. Discovery was served and discovery was answered based upon information provided by the Employer and Insurer. In reviewing the discovery responses with the injured worker prior to the deposition, Counsel noticed that the evidence provided supported the Employer's defense but that the evidence itself was incomplete. Knowing that there was other information available to the Employer, and suspecting that this information was not provided to the Employer's Counsel, Claimant's counsel suggested to Employer's Counsel that perhaps a conversation needed to be held with a certain employee and not just the owner. This suggestion was a gesture that did not need to be made and, if it had not been made, a trap would have been set, only to be sprung at trial. Counsel taking the risk to suggest that maybe there was more to the story resulted in an accurate assessment of the evidence and the case was quickly resolved. Counsel and her client would have been perfectly justified in holding that evidence until trial at which time Defense Counsel and client would have been supremely embarrassed. Instead, sacrificing what certainly would have been an exhilarating courtroom experience (for one of us at least) Counsel risked surrendering her advantage. Ethically, Counsel would have been justified in letting the evidence unfold with all of its attendant consequences. Professionally, Counsel worked WITH her adversary and her client was rewarded with a reasonable outcome that did not require months upon months of delay and litigation. We might ultimately have arrived at the same point through diligent investigation but the injured worker would have been required to wait for the conclusion of the investigation and maybe the outcome of trial.



It's no accident that in the world of diplomacy, that attention is paid first to insignificant details. While we mock the idea of arguing over the shape of the negotiating table, or the seating chart, small confidence building measures are important. We are, after all, products of our experiences. We have to be comfortable that our adversary has the same, or at least complimentary, goals in mind and we have to be convinced of our adversary's good faith. We cannot expect to be Professional in large matters if we have not formed our wills and developed the habits of professionalism on matters of less consequence.

How then do we do that? First, be friendly and collegial with opposing counsels. For those counsels receptive to collegial dealings, you've started on a better path, developing your reputation and laying the groundwork for cooperation. For those counsels not receptive, you might be able to change their behavior but at the minimum, being friendly messes with their minds. From a selfish perspective, collegial dealings are important. We will all need a favor sooner or later so we are all well advised to be in the business of granting favors. Whether those favors are discovery extensions, concessions to postponements or some other gesture, we can make the accommodations and still be faithful to our client's respective positions. Professionalism, collegiality, has its own rewards in what it does for us.

That same impulse, though, can translate into more professional behavior in dealing with the opposing PARTY. It's a lot harder to smile at Counsel and then growl at his client. Clients of all stripes find it difficult to reconcile an attorney that is friendly with opposing counsel and their own attorney's fealty to that case. The

simple explanation for them is the best, "I will see that attorney again. I will see this Judge again. I need to be on my best behavior. "You can still vigorously pursue your case but your professional obligations require something more than transactional behavior.

Professionalism and the Next Generation

The Workers' Compensation Section of the bar is indeed unique. More than many other sections, we have the occasion to see the same people time and again over the course of our careers. If we've spent that career with no regard for the health of the section, then we will have left the system worse than we found it.

For those of us who remember the early days of our career, we can recall the discomfort, uncertainty or absolute terror that our next move will demonstrate to our bosses or clients the truth that we have absolutely no idea what we are doing. Compensating for that sensation results, in many instances, in false bravado or aggression for the sake of appearances. If your biggest fear is being taken for advantage, the natural response is to give no quarter and to bark at everything that moves in front of you. This is not to denigrate the skills and acumen of some very intelligent younger attorneys. Instead, it is intended as caution for the younger members that you are building your reputation with each phone call, deposition, and document that you should have given but did not.

Those attorneys who have been in this practice long enough owe a duty to the section and to its younger members not to make their jobs more difficult. A few years ago, a younger attorney with my firm was sent to take a deposition. Opposing counsel was experienced and with the depth and breadth of that experience, should have known that this younger attorney was simply doing the job that this attorney had been asked to do. In responding impatiently and rudely to this younger attorney, the more experienced Counsel gave the wrong example. Is this the way that the younger attorney is to behave? Is this the way the practice is conducted? Counsel was probably coloring inside the lines of the ethics of his profession but his conduct was by no means professional. By inattention or by design, this older attorney undercut the very collegiality of the section that he professed to favor. We cannot expect to improve the system if we ourselves are not willing to mind our manners.

From the Chair

By John Blackmon

June 30 marked the end of my tenure as chair. John Christy will take over and has already begun work on the October seminar. The remaining members are Jim Long, Kelley Benedict, Gregg Porter, Elizabeth Costner, Kevin Gaulke and Lee Bennett. John will name a new member within the next month or so.

I want to thank Hon. Nicole Tifverman, Shari Miltiades and Matt Walker for their work on the St. Simons seminar last year. It was excellent.

If there is one thing I will remember from this year, it will be the death of Jo Stegall, a member of the Executive Committee. The last time I saw Jo was in October of last year at St. Simons. John Christy and I had chance to talk with him about the General Practitioner Seminar that was held in March. Jo was in charge so we discussed some topics. By December he was putting it together but had to take a leave of absence shortly thereafter. Hon. Beth Lammers and Kelley Benedict stepped in and took over. The program was so good that attendance doubled. Jo passed away the same week it was held. A lot of his ideas went into the program and I am sure he would have been delighted with the outcome. My thanks to Judge Lammers and Kelley for their hard work.

Our section is one of the largest in the Bar and we typically take in more money (dues) than we spend. We put on the two seminars yearly and have hosted cocktail hours at the Bar's Midyear meeting. There is more we can do so I encourage you to make suggestions to members of the committee. One area may be the newsletter. We cut it down to once a year because of the work involved. This is a good opportunity for those who want to write articles on workers' compensation topics or for that matter other subjects that may be of interest to members. Some articles in the past were so good that a lot of us kept them in our research files. Earlier this year the Bar sent out inquiries to the various sections to see if we were interested in writing "how to practice" books. That would be a big task, but if a group of individuals have any interest in taking it on, we can check and see about getting it done. Bottom line – make suggestions and get involved.

Gregg Porter will be soliciting nominations for the 2014 Distinguished Service Award. Typically we ask for these in June and have a deadline of July 31. If you make a nomination, please provide details about the person setting forth why they deserve the award.

Finally, I want to tip my hat to my predecessor, Gary Kazin. Even though he is a sole practitioner, Gary spent a lot of time on committee matters and left things in tiptop shape.

Chairman's Corner

By Hon. Frank R. McKay

As spring has arrived and the sun is out, it is a great time to reflect over my first year as Chairman of the Board.

As we speak, the Board is conducting its annual regional educational seminars across Georgia. Our first seminar was April 2, in Dalton, and was a tremendous success. The Public Education Committee of the Advisory Council chaired by Sy Jenkins, has worked diligently to develop an entertaining and educational program.

With over 100 attendees, representing business, medical, insurance and legal fields, we are excited for our upcoming programs in Augusta, Gainesville, Savannah, LaGrange and Jonesboro. I encourage you and your clients to attend.

In addition to our regional seminars, we are currently making final preparations for our Annual Seminar at the Atlanta Hyatt Regency on Aug. 25- 27. Our Steering Committees have been working throughout the year on our program. We are especially excited this year because we anticipate having some outstanding speakers, including Coach Vince Dooly and Amie Copeland. In addition, we will hold "live" Appellate Division oral arguments. We will be sending out shortly and posting on our website, the program and registration information.

These seminars are important because statewide Georgia is seeing economic development under the Governor's initiatives in the form of record numbers of new jobs due to existing business expansion and new business location. In November 2013 Georgia was designated the number one state in the nation to do business by the leading authority on business site selection. The stability and fairness of our workers' compensation system plays a vital role in economic development and that is good for everyone.

Generally, the last legislative session could be described as a quick one where only critical legislation was introduced due to the primaries being scheduled earlier in this election year. Under these circumstances, we did not have any workers' compensation legislation this year. However, even though there was no legislation this year concerning workers' compensation, the legislative committee of the Advisory Council continues to discuss legislative issues and has been monitoring a number of cases in the appellate courts. Of note, on April 7, 2014, oral arguments were held by the Supreme Court of Georgia in the *MARTA v. Reid* case. The issue presented in this case is whether the Georgia Court of Appeals erred in ruling that a claim for late-payment penalties made more than two years after the last payment of income benefits (in this case close to ten years after the fact) is not barred by the statute of limitations under O.C.G.A. §34-9-104(b). We anticipate a decision sometime later in 2014.

Going From The Bench To Private Practice

By Rick Thompson

When Elizabeth Costner asked me to prepare an article for the Section Newsletter on this topic, my initial reaction was that I did not have much to offer that would be interesting to read. But I have been asked by several people how I have handled the transition so there must be some element of curiosity.

My answer in summary, is that moving back into private practice has been wonderful and extremely busy in a very short period of time. I must hasten to add that my partner, Nathan Levy and our capable associates and staff at Levy & Thompson have made the transition quite comfortable. As most Section members are aware we have satellite offices throughout South Georgia and, in addition, I am fortunate to be called upon by Section members to conduct private mediations throughout the state of Georgia.

I cannot overemphasize the amount of satisfaction I have received by returning to my first love of helping individuals and business entities solve problems, which is what everyone in private practice does for his/her client on either side of the fence. Being able to speak directly with attorneys and their clients in a mediation setting in an effort to resolve a case prior to hearing is especially rewarding and is obviously a perspective an ALJ never has the opportunity to do in the context of a hearing. That is why I encouraged ALJ's to serve occasionally as mediators during my term as Chairman. Several ALJ's took advantage of that opportunity and have continued to assist the ADR unit.

Another aspect of returning to private practice that I enjoy is the chance to travel the state of Georgia and make new acquaintances throughout the course of representing employers. Recently, I was assigned to represent a company that provides tours throughout a South Georgia wilderness and I can't wait to interview witnesses prior to the hearing. I hope I don't fall prey to the alligators although I bet some readers of this article may wish otherwise.

In summary, I would simply add that my tenure as Chairman was quite rewarding and the great staff of SBWC accomplished some notable successes: publishing Awards, and expedited approval of Stipulations, to name a few. But the return to private practice in a Section of the State Bar with great lawyers and colleagues is much more gratifying and exciting than I had anticipated. Life is good and getting better.

The Rules and Medical Committees of the Advisory Council made a number of recommendations to the Board in 2013. Of particular importance, effective Jan. 1, 2014, under Board Rule 104, when serving a Form WC-104 upon an employee and their attorney, this form now has to be filed with the Board on the front end. In addition, Board Rule 240(c) was amended to reflect the statutory change in O.C.G.A. §34-9-240(b)(2) regarding a good faith attempt by an employee when offered a light-duty job. Finally, on the medical front, on May 1, 2014, an updated Medical Fee Schedule will be available. This is a culmination of a lot of work by a lot of people which is greatly appreciated by the Board.

As a practicing lawyer for over 20 years, I valued the Board's foresight in going paperless with ICMS in 2005. I enjoyed being able to view a file, along with filing documents instantly. ICMS revolutionized the practice of workers' compensation. To this end, when I first became Chairman, I noticed our technology infrastructure was aging. Further, this older infrastructure was leading to unreliable and extremely slow performance for our users.

Over the past year, under the steady guidance of our executive director, Delece Brooks, we hired a number of technical experts to assist us in modernizing our infrastructure. This included upgrading outdated hardware and "virtualizing" our environments. With these upgrades, for both our internal and external uses, we have achieved a reliable, real time work environment for everyone. In addition, the processing time of EDI filings has improved by close to 50 percent. These recent upgrades in technology will also assist the Board with the development and upcoming implementation of ICMS-II, which we anticipate will be in 2015. I am extremely proud of Delece and all the Board staff in the progress they made in stabilizing and improving ICMS for all users.

Under my leadership, the Board's performance will continue to be our main goal. In 2013, we had a tremendous year. Below are some of the highlights:

- The goal for our Trial Division led by Chief Judge David Imahara is to issue awards within 60 days of the hearing. In 2013, our Hearing Division issued approximately 700 awards, averaging 51 days, with 91 percent being issued within 60 days. In addition, the Hearing Division disposed of approximately 16,000 hearing requests, averaging 113 days from the date of filing to the date of disposition. As I hear about crisis in other states, whether it be taking a long time to get to hearing or in receiving a decision, I am extremely pleased with these efficient numbers.
- In 2013, the Appellate Division led by Doug Witten issued approximately 600 awards in 2013, with over 90 percent being issued in 90 days or less.
- The Settlements Division led by David Kay approved 14,500 stips in 2013. This was an increase by 4 percent over 2012. Of the settlements submitted, over 94 percent were approved in 10 days or less.

Finally, our ADR section led by Hon. Janice Askin had a great year in 2013. The ADR section conducted over 2,200 mediations, with close to 90 percent resolving the pending issues. Our ADR judges issued approximately 550 orders. When I first started practicing law over 22 years ago, ADR was in its infancy. Many thought ADR was not needed and would not work. At the same time, it was not uncommon to try 5 or 6 cases per month. Today, due to the tremendous success of ADR, we see less cases being tried and more cases being mediated, or issues sent through ADR for resolution. The ADR section has consistently provided parties in our workers' compensation system with quicker resolution and arguably more satisfying results, which in turn has reduced time and costs for our workers' compensation system.

As you can see, the Board is running extremely efficiently. We have an exciting year ahead of us, and I look forward to a successful year in 2014.

Judge McKay was appointed Chairman of the State Board of Workers' Compensation on March 1, 2013, by Governor Nathan Deal. Prior to becoming Chairman and the Presiding Judge of the Appellate Division, McKay was a partner in the Gainesville firm of Stewart, Melvin & Frost where he concentrated his practice primarily in workers' compensation.

2013-14 Workers' Compensation Law Section Officers:

John Blackmon Jr., *chair*
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Kevin Gaulke, *secretary*
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Kelly Alyne Benedict, *treasurer*
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The Law Office of Gary M. Kazin

Mediation: How Do I Make This Thing Work?

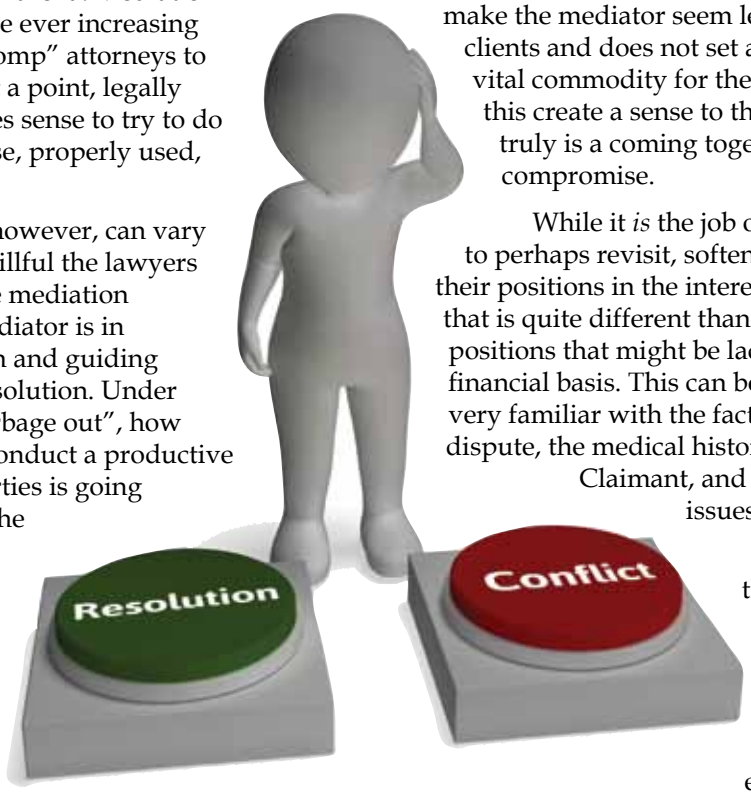
By Burt Tillman, Tillman & Associates - Mediated Dispute Resolutions, LLC

What it takes to increase your chances of a successful mediation –Observations from the field.

Why bother?

I think it's accurate to state that in this day and time, this is not a question we'll often get from practitioners in the workers' compensation arena. Mediation has in recent years become the ever increasing "go to" tool used by "work comp" attorneys to resolve those cases that are at a point, legally and medically, where it makes sense to try to do so. This has happened because, properly used, it works!

How *effective* that tool is, however, can vary widely depending on how skillful the lawyers are in bringing the case to the mediation table and how skillful the mediator is in taking what she or he is given and guiding the process to a successful resolution. Under the theory of "garbage in, garbage out", how prepared the mediator is to conduct a productive conversation between the parties is going to be in direct proportion to the comprehensive effort the attorneys have gone to in preparing the case *and their clients* for mediation.



After nearly 50 years in practice, my father's mainstay was always that "the three most important things a litigator brings to the table are preparation, preparation and preparation." While often our client's mediations are not in litigated cases, per se, nonetheless, we have to remember that to the *client*, this *is* their day in Court and we owe them the same degree of complete preparation to ensure a successful outcome for them as we would bring to any other context. With the agony and expense saved by mediation, it is arguably even *more* important in the mediation context.

One key initial point I like to make is that used most effectively, the mediation is <u>not</u> the place to *start* a serious discussion about the financial exposures and legal realities of the case with our clients nor with the other side. The best practice for insuring a healthy dialogue at mediation is for the attorneys to have at least vetted their initial positions, ideas, problems and quandaries in real phone conversations *prior* to mediation so that the issues are "narrowed", if you will, and areas of agreement and disagreement have been identified, massaged even a little and, hopefully, conveyed to the mediator. This takes knowledge of your case and a willingness for each side to converse with opposing counsel in a manner that touches the strengths and the weaknesses of a case without the need for mere posturing.

This might ensure that the mediator is not put in the position of having to immediately tackle and wrestle to the ground rigidly proposed arguments or implausibly set expectations of either party that are perhaps lacking in solid support. That kind of arm twisting early on can make the mediator seem less than neutral to both clients and does not set an atmosphere of trust, a vital commodity for the mediator to have. Nor does this create a sense to the parties that the mediation truly is a coming together with the intent to compromise.

While it *is* the job of the mediator to get parties to perhaps revisit, soften or take a fresh look at their positions in the interest of reaching compromise, that is quite different than needing to deconstruct positions that might be lacking in factual, legal or financial basis. This can be avoided by all sides being very familiar with the facts of the case, even those in dispute, the medical history and present status of the Claimant, and the law controlling the legal issues, if any, that are in play.

If that process of becoming this familiar with the case starts, in essence, with counsel sitting down at the mediation table and scanning his or her file to glean these essential elements, the chance of reaching a viable compromise is decreased if only because the proper discussions have clearly not been had with the client who is then going to be unfamiliar with the risks they face and the reasons to settle. Not a good sign.

Preparing the Clients:

Positive benefits of settlement:

Whether it be the employer/insurer or the claimant, our clients on both sides need to understand in general the good reasons a workers' compensation case should be settled and specifically why this *particular* case might need to be settled. For all, settlement by mediation gives certainty of outcome and removes the case from the variable and uncertain winds of judicial decision, whim or bias.

For employer/insurers, settlement brings finality and a chance to have capped their financial exposure. It allows the company's human and financial resources to be employed elsewhere and in other endeavors.

The same finality gives the claimant and his or her family final resolution of what has often been an arduous physical, emotional and financial hardship, a huge psychological boon. They will receive a lump sum of money that is certain and can be planned around. It gives the claimant the chance to evaluate his or her situation and move forward, now in charge of their own medical choices and able to live life without feeling trapped in a system that is not necessarily designed to serve their individual interests. They can look to other aspects of their life that do not focus on the work related injury and the sequelae from it.

Preparing the Claimant:

Most workers' compensation claimants have truly never been down this road before and have no idea what to expect. Any idea they do have is likely to be based on a personal injury model and will be grossly inaccurate for purposes of evaluating the exposures *and* the settlement potential in the case. A claimant must first understand that this is *not* a lawsuit, but a claim under an insurance policy (even if it is a litigated claim under the policy).

Further, this is an insurance policy that insures some very specific things but *only* those things. That is three types of income benefits, medical benefits and a potential for vocational rehabilitation services. It does not address how much the disparity between their pre-injury wage was and the comp rate might be (And in those cases where the wage is really high, even the max comp rate often leaves a large gap.). This can be a very sore spot to a Claimant who's just hearing this at a mediation. In fact, the workers' comp system does not address financially or otherwise a host of life affecting consequences of a serious injury. This is a mind boggling revelation to most workers' compensation claimants.

We must make it clear just what the covered benefits *are* and what they *are not*. Once that is done, we must cover with them what the past accrued income benefits might be, if any, touching also on the possibility of assessed fees and penalties, *if those are appropriate.* Without going beyond a layman's level of comprehension, touch on the concepts of TTD, TPD and PPD with them. Then going forward, paint a realistic picture of what the future income benefits exposure might look like.

Look at the medical picture as well. Talk with your client about what those projected costs might be, what the fee schedule is and explain what their options are if they do settle the case. Again, what we are doing here is trying to set realistic expectations by giving the injured worker some basic knowledge of the elements of financial exposure involved in a worker's compensation case that will control the conversation at mediation.

It does not have to be an exhaustive treatise on the subject, but if we can educate these individuals as to what they are doing and walking into, then they don't have to reset unfounded expectations that are not based on the realities of the case and the workers' compensation law. This is truly essential to a successful outcome at mediation.

This does *not* mean that the injured worker's attorney is not an advocate for maximizing the value of the individual case. But, if we have to contend with acute emotional disappointment that could have been avoided, trust issues can arise even between attorney and client and the likelihood of success is greatly reduced. How is this avoided? By the attorney *knowing* how these elements play out on the stage of the case that is being mediated and having educated his or her client.

Is it a CAT case? Very well. Is it a case that may not be CAT now, but one in which the insurer is likely going to have to acknowledge that potential in it's evaluation? Fine. But be ready to present that in a cogent and convincing manner. Have the medical data that would be relied on. Do the calculations of what that exposure could mean both on the income side and on the medical side. Have some sense of the percentage of possible victory and *be realistic* about it. This will not only convince your client that you know what you are doing, it could convince the insurer and sway them.

Is it a 350 week case? Great. All well and good. Do the math. Use Comp Tools or some similar program and be ready to demonstrate that exposure *and* the present value reduction of that exposure both to the insurer and to your client.

Mediations *do* function sometimes to reset or at least shift the mindset of the defense attorney *and* of the insurance adjuster. But a mediator cannot do that out of whole cloth. The attorney for the Claimant has to make that case in a clear and cogent manner. That is done by staying grounded in a knowledgeable reality of the case and presenting it in a believable form. It's not done in a one paragraph e-mail submitting a demand for $350,000.

Be sure the Claimant understands the concept of "present value reduction" and *always* present to the Claimant the expected counter arguments of the Insurer. Again, we are talking here about bringing a client to the table that understands what to expect and is minimally surprised. THAT will assure client control and a practical decision process governing the outcome rather than an emotional one.

Preparing the Insurance Company client:

The issues facing the attorney in working with an adjuster are different, of course, but very similar in many ways as well. Though the defense attorney is working with a knowledgeable client as to how the workers' compensation system works and what the elements of exposure represent, it is still generally required for the attorney to submit a case evaluation to the adjuster setting out his or her analysis of those exposures which will form the basis of the ultimate authority that will be granted for the case.

This evaluation will, again, be only as good as the work the attorney puts into it. It is important that the best case as well as the worst case scenario be presented

and the middle ground as well. Educate the adjuster, who likely has way too many files and may tend to knee jerk his or her own evaluation, with the medical situation as it truly appears and with an analysis of any legal arguments that are going to be relevant to the discussion and the potential long term outcome of the case. Give them cases, recent Board rulings, etc. Delineate their exposures for them.

Just as with educating the claimant as referenced above, give your adjuster a *realistic* view of the case and don't be afraid to tell them what that is even if you think it's news they don't want to hear. Give them the good, the bad and the ugly. Now's the time.

Again, one does not have to lose the advocative edge in order to also recognize alternate outcomes in a case. The adjuster, if doing their job, needs and wants your counsel and advice. If we get too locked into our role as advocate and are blind to a complete analysis of possible outcomes, we have, like in the case of the uninformed Claimant, failed to set proper expectations that will have to be then dealt with and potentially changed at mediation. This is not a comfortable situation and dangerous to the success of the mediation.

That is the thing that might undermine your adjuster's confidence in you. What is important is for the attorney to really know the case and the risks involved and be willing to acknowledge those, even in the heat of being a strong advocate, to see the case negotiated to the best possible position for his or her client. This done, a well informed and knowledgeable mediator can help you get there.

Preparing the Mediator: Listening, the Key to Success

Well informed and prepared counsel are able to give the mediator their true prospective on the case. This defines the playing field for the mediator and helps her or him to define the potential areas of viable compromise in order to guide a productive conversation about the case. The mediator is not, or should not be, a number carrier. In this digital age, we can do that from the shower if necessary!

A mediator is there to listen to a deeper prospective on the relative positions of the parties and to guide that conversation in a manner that will encourage the parties to evaluate the other side's position, in contrast to their own, in order to shape a compromise that all can live with. It's not always possible to get it done, but handled correctly, it is probable.

That probability is greatly enhanced by having knowledgeable and prepared attorneys, informed clients and a mediator that can potentially even add to or amplify points in the analysis that might help balance the respective interests in a manner that can result in a successful outcome. Sometimes those pivotal points might not even be the ones that either side was focused on at the outset.

The winning ticket:

The real key to the actual mediation, once all of the work is done, the analysis presented, the clients informed and the expectations set is *listening*. All parties to a case simply want to be heard. This is particularly true, of course, for the Claimant who has been injured, might feel the system or the insurer hasn't done what they should have for him (even if they have per the law and their own good intentions) and they simply need a forum to say what it feels like on their end.

If a mediation starts with the good manners of a welcoming and acknowledging defense counsel, no matter what the exigencies of the litigation and battles between the lawyers may have been to that point, this will go a long way toward setting the stage for a successful conversation.

In the workers' comp world, we do see some grievous and life changing injuries. Most of us as lawyers will never experience such a thing, particularly at the hands of our work. We learn early on in our careers that medicine is a much more limited science than we'd grown up believing and that there simply is not, in fact, a medical "fix" for every situation.

A measure of compassion and simple respectfulness, even in contentious cases, will have an immeasurable effect on creating the good will that will move the case to a successful conclusion. It's the old adage, "people do business with their friends" that is at play. Quite true in my observation.

Parties need mediation. I've seen that both from the side of being a party and being a mediator. As stated above, a civil discussion can flesh out salient points that may well have not even been the point of focus of either side in the beginning but which become determinative in the course of the mediation.

The workers' compensation system is greatly served by mediation and viable settlement of cases. Judicial resources are not squandered on unnecessary hearings, motions and sometimes ego driven combat. Those resources are then reserved for those cases that simply need to be heard, those cases that even prepared experts cannot bridge the remaining gap in their positions on or which have initial issues that must be resolved even by a court of higher resolution before the case is either established or terminated.

What we do with our mediation practice is crucial to our doing the job we were hired to do as attorneys. When it's done, it truly works to the best advantage of all involved. To quote my much younger colleagues (and that would be just about all of them…), when it's done right, it's all good.

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The Basics of Judicial Notice

By Hon. Jerome J. Stenger

Judicial notice in workers' compensation cases can be taken for granted, just because it is usually so easily done. However, it is helpful to remember that there are some procedures and restrictions that should be followed.

We start with the Evidence Code, which as we all know was amended in January 2013 to basically adopt the Federal Rules of Evidence. Judicial notice is found at O.C.G.A. §24-2-201. For convenience, the section is quoted in its entirety:

Judicial notice of adjudicative facts:

(a) This Code section governs only judicial notice of adjudicative facts.

(b) A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:

(1) Generally known within the territorial jurisdiction of the court; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) A court may take judicial notice, whether or not requested by a party.

(d) A court shall take judicial notice if requested by a party and provided with the necessary information.

(e) A party shall be entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, such request may be made after judicial notice has been taken.

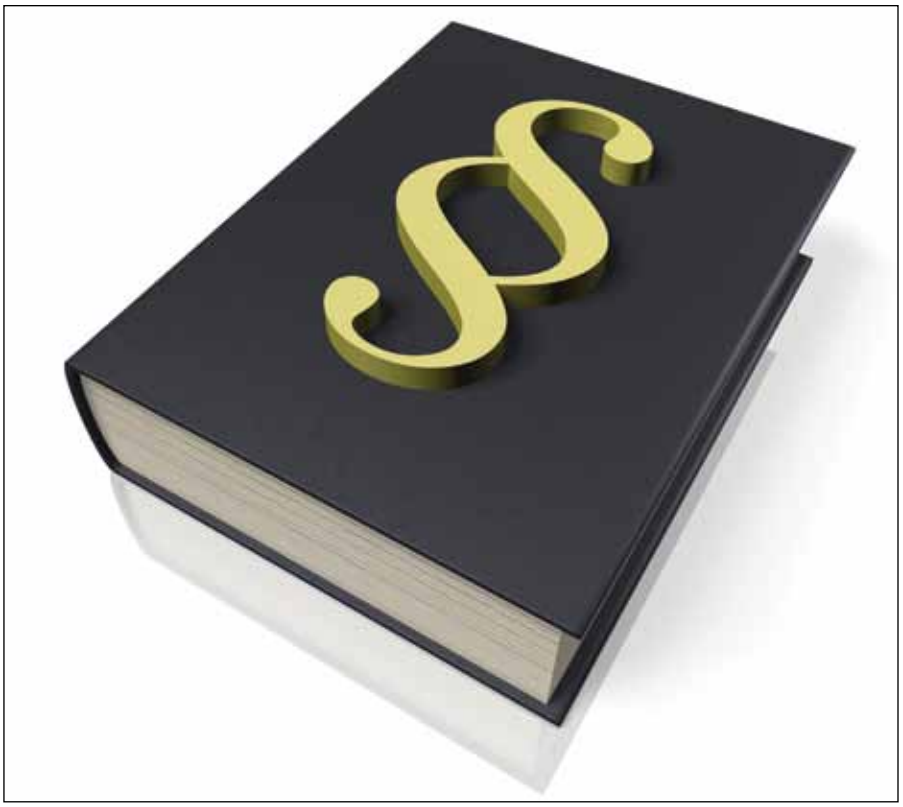
(f) Judicial notice may be taken at any stage of the proceeding.

(1) In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed

(2) In a criminal proceeding, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

To break it apart, and rephrase for clarity, the statute states that a tribunal may take judicial notice whether or not requested by a party. O.C.G.A. § 24-2-201(b). Also, a judge "shall take judicial notice if requested by a party and provided with the necessary information." O.C.G.A. § 24-2-201(d). Furthermore, a party must be given an opportunity to be heard on the judicial notice request. O.C.G.A. § 24-2-201(e). Also, and interestingly, judicial notice may be taken at any stage of the proceeding. O.C.G.A. § 24-2-201(f). By "interestingly," it might be asked if, in our workers' compensation cases, judicial notice might even be requested post-hearing, after the record of evidence has closed. I won't comment one way or the other here, except to cite the case of *Moffitt Constr., Inc. v. Barnes*, 263 Ga. App. 175, 587 S.E.2d 293 (2003). In that case, the claimant attempted to tender a new medical record at the Appellate Division, one from an exam that the ALJ had even ordered. The Appellate Division denied entry of the record. The Court of Appeals held that it was error for the Superior Court to remand the case so that the Board could consider the doctor's report as "newly discovered evidence." "On appeal a compensation case may not be remanded to the Board for newly discovered evidence." *Id. at p. 177*. The Superior Court may consider only "the competent evidence in the record."

Two of our most familiar evidence treatises explain judicial notice well. Taking only a few highlights, "[a] adjudicative facts are ordinary facts that are relevant at trial." *See* Milich, Georgia Rules of Evidence, §4:2 (2013-2014 Edition). "The purpose of allowing judicial notice of adjudicative facts is economy." *Id*. "The oldest and plainest ground for judicial notice is that the fact is so commonly



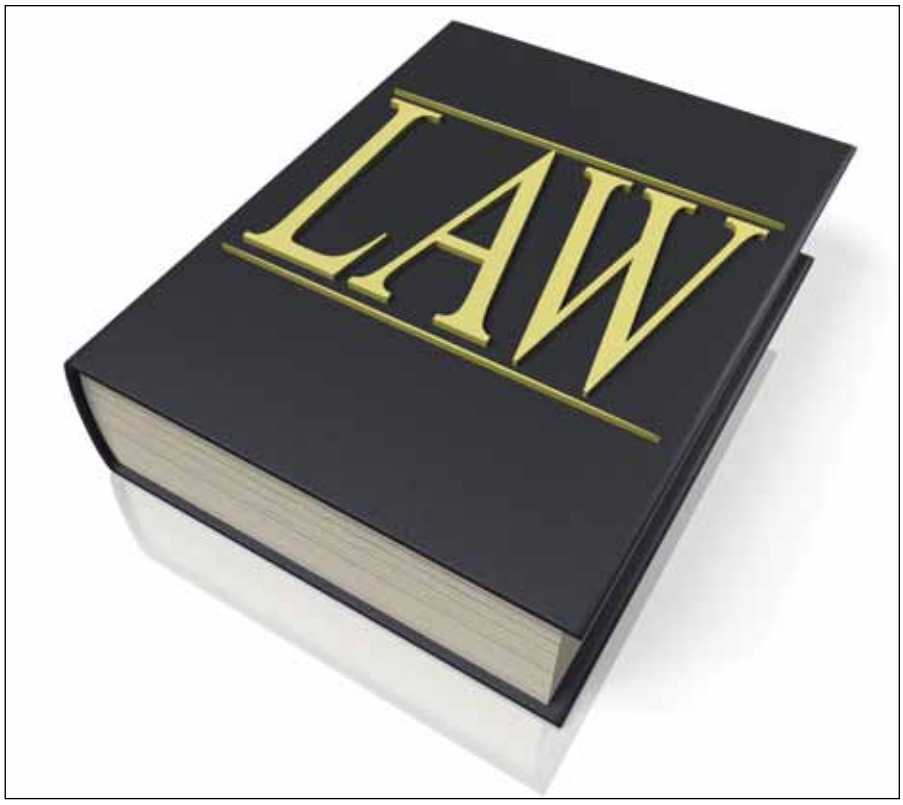
known in the community as to make it unprofitable to require proof and so certainly known as to make it indisputable among reasonable men." *McCormick on Evidence*, §329 (5th ed. 1999).

The case law, as well, helps explain. Now, it might be asked whether the old case law has been completely superseded by the new statute. The new act itself assures us: "Except as modified by statute, the common law as expounded by Georgia courts shall continue to be applied to the admission and exclusion of evidence and to procedures at trial." O.C.G.A. § 24-1-2(e). In fact, the statute's preamble goes on to acknowledge that the General Assembly, in enacting the new code, considered Federal case interpretation of the Federal Rules of Evidence. Professor Milich offers that pre-change case law can still be helpful if the issue is the same under the old and new rules. *See Milich, supra*, §1:3.

To that end, on helpful case states that "[j]udicial notice is intended to eliminate the need for formal proof as to: (1) matters which the general public has common knowledge of; (2) facts which are readily ascertainable by reference to some reliable source, and are beyond dispute; and (3) matters which are in the special province of the judge." *Graves v. State,* 269 Ga. 772, 774; 504 S.E.2d 679, 681 (1998). Also, a judge may not take judicial notice of facts that are only within that judge's own personal knowledge. *In the Interest of S. M.*, 169 Ga. App. 364, 312 S.E.2d 829 (1983). Hence, the "knowledge of the general public" requirement.

Another important thing to remember is the manner in which judicial notice is raised, whether by the judge or by the attorneys. The case of *Coosa Baking Co. v. Williams*, 165 Ga. App. 313, 299 S.E.2d 145 (1983) has been cited as authority[1] for the Board having power, on its own motion, to notice items in its own files. However, that decision noted the Board's judicial notice only in passing, making no comment on its way to its ultimate ruling on the main issue. It made no comment, for example, on whether the Board did this on its own or whether instead a party requested it. A better statement for this principle is found in the case of *Boaz v. K-Mart Corporation*, 254 Ga. 707, 334 S.E.2d 167 (1985), which did hold that it was proper for an ALJ to take judicial notice, on the ALJ's own motion, of evidence from a previous hearing, and which held that a trial court may take judicial cognizance of records on file in its own court, citing *Petkas v. Grizzard*, 252 Ga. 104, 312 S.E.2d 107 (1984). It was noted in *Boaz* that the ALJ had announced the judicial notice on the record and that neither side had objected. Along those lines, *see Graves v. State, supra* (overruled in part on other grounds, *Jones v. State*, 272 Ga. 900 (2000)), where it was held that judicial notice of facts should not be taken unless it is announced on the record, so that all parties are given opportunities to be heard on the matter. A full quote from *Graves* is helpful because the explanation is well stated:

> [If] a trial court intends to take judicial notice of any fact, it must first announce its intention to do so on the record, and afford the parties an opportunity to be heard regarding whether judicial notice should be taken. The reasons for requiring such a rule have been well stated by the United States Supreme Court in *Garner v. Louisiana* [, 368 U.S. 157, 173-174; 82 S.Ct. 248 (1961)]:
>
> "Unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon. Moreover, there is no way by which an appellate court may review the facts and law of a case and intelligently decide whether the findings of the lower court are supported by evidence where that evidence is unknown. Such an assumption would be a denial of due process."



To the extent that *In the Interest of G. G.*, 177 Ga. App. 639 (341 S.E.2d 12) (1986) and *Walker v. McLarty*, 199 Ga. App. 460 (405 S.E.2d 294)(1991) state otherwise, they are hereby disapproved.

The Federal Rules require that a trial judge notify parties that she is taking judicial notice of an adjudicative fact, and provide them an opportunity to be heard [See Fed. R. Evid. 201(e)]; Wright & Graham, *Federal Practice & Procedure: Evidence*, §§ 5107,

5109], and we see no reason to require anything less in the courts of this State. In addition to the reasons discussed in *Garner*, *supra*, so long as a trial court need not announce an intention to take judicial notice, it might appear that reviewing courts could resort to judicial notice to legitimize an otherwise flawed decision, despite the absence of evidence that judicial notice actually was taken.

For all of these reasons, we conclude that in future cases, trial courts are required to announce on the record an intention to take judicial notice, and to give the parties an opportunity to be heard on whether judicial notice should be taken.

Graves at 269 Ga. 775, 504 S.E.2d 682.

Indeed, the comp Act itself says that, when an ALJ is thinking of taking judicial notice of something, the non-requesting party must be "provided an opportunity to contest the material noticed." O.C.G.A. §34-9-102(e)(1). The new evidence code, at O.C.G.A. §24-2-201(e), likewise states that a party must be given an opportunity to be heard on the judicial notice request. In their treatises, McCormick and Milich concur. *McCormick on Evidence*, §333 (4th ed. 1992) and Milich, *Georgia Rules of Evidence*, §4:2. As for whether a tribunal *must* take judicial notice on its own motion, the *Petkas* case went on to state that though a judge was authorized to take discretionary judicial notice, a judge is not required to do so. The judge may instead choose to let the parties present evidence on the issue. O.C.G.A. §24-2-201(d) states that a tribunal "shall take judicial notice *if requested by a party* and provided with the necessary information." This section is therefore also saying, conversely, that a judge is not required to take judicial notice when it is *not* asked for. On this point, *see Reserve Life Ins. Co. v. Peavy*, 98 Ga. App. 268, 105 S.E.2d 465 (1958), in which it was also held that a tribunal is not required to judicially notice its own files, or any other "matters not brought to its attention in some appropriate manner," but then added that the better practice is for a party to, "in point of form, make a request for it."

In workers' comp hearings, the time judicial notice is most often requested is when the parties ask for notice of Board filings. As a practical matter, the parties should consider what might happen if the case is appealed to the Superior Court level, when a record is printed by the Board and transmitted to the Court's clerk. If the only evidence in the record is a mention in the hearing transcript, a judicially noticed filing might get lost in the shuffle. Therefore, as well as asking for judicial notice of a document's date of filing, it might be helpful to also tender a copy of the actual document itself. That way, it's better assured that it is made a part of the record that is eventually sent to Superior Court.

Endnotes

1 By me, for one, though I can't exactly remember where it was found--perhaps in an old code annotation.

2 Petkas specifically overturned the rule stated in *Glaze v. Bogle*, 105 Ga. 295, 31 S.E. 169 (1898), which held that a court cannot take judicial notice of matters in its own record, that a party must present formal proof.

Tips From an ALJ

By Hon. Leesa A. Bohler

After listening and watching for sixteen years while other attorneys litigated their Workers' Compensation issues before me as an Administrative Law Judge, I hope I learned some things which I have now put into practice. I was asked to write about how my experience on the bench has assisted me upon my return to the practice of law. This question should probably be addressed to the Administrative Law Judges before whom I have had the pleasure of trying cases since my return to practice four years ago. Those jurists may wonder if I learned anything at all! Below are a few of the things I hope I learned.

Be prepared

During a hearing, it becomes obvious to everyone in the courtroom, including your client, when you have not done your homework properly. I was amazed at the number of attorneys who questioned witnesses at hearings with a blank legal pad, or nothing at all, in front of them. Very few were successful with this "off the cuff" approach. While it is not necessary to write out every question, at least prepare an outline for each witness and follow it. In the alternative, use a legal pad with some writing on it or a typed page to give the appearance of being prepared.

Theory

A succinct, organized presentation of your case will prevent frustration for the judge, your client, yourself, and the appellate courts. I recommend preparing a theory of the case for every claim and tailoring each question and document to prove that theory. If it does not support your theory of the claim, leave it out.

Cross Examination

Many attorneys have forgotten the basic trial practice rule from law school about never asking a question on cross examination without knowing the answer. In fact, some attorneys appear to be conducting discovery during cross examination. The most effective cross exam I observed was when opposing counsel asked the witness specific leading questions to discredit or challenge the witness on three to five main points and sat down.

Remember that there will be a hearing transcript, so the evidence only needs to be presented once. Repetitive, cumulative evidence is unnecessary and shall be excluded by the judge per Board Rule 102.

Biased witnesses

Unless a family member was an eyewitness to the accident or has specific information about the compensability of the claim, do not call a family member as a witness. Some attorneys apparently feel they must put the party's spouse, fiancé, or mother on the witness stand as a "before and after witness" or to simply counter the number of opposing witnesses, maybe at the urging of their client. Explain to your client instead that the sheer number of witnesses does not win or lose a claim. Biased witnesses can actually harm your case. Many witnesses unintentionally impeach their own loved ones during cross exam about their extracurricular activities.

Save it for the jury

While Workers' Compensation evidentiary hearings are not required to be boring, there is no need for theatrics or displays of emotion by counsel, parties, or witnesses in front of the judge. Most often, counsel appeared to be showing off for the client by overzealous advocacy. Instead, I suggest explaining to clients before the hearing about how ALJ is an experienced jurist who is accustomed to hearing such claims and emotional outbursts have no place in the hearing process. You should remind your client and witnesses that the ALJ is the finder of fact and jury, so you will never argue with the judge or disregard instructions from the bench. Tell your client that this does not mean you are not being an advocate, but are acting appropriately in the bench trial setting.

Post Hearing Briefs

Be mindful of the fact that your brief is your closing argument. Make it persuasive, but also be sure to include correct citations to the transcript and exhibits, as well as the law.

When I was a judge, I never read exhibits that were not referenced in a post-hearing brief. Some attorneys placed hundreds of pages of medical records into evidence, but failed to cite to a single page. Your brief should make the judge's job simpler. I recommend using an Award written by your ALJ on a similar issue in another claim as your guide. Awards can be obtained by judge name using the search engine from the published awards section of the Board website: www.sbwc.ga.gov

Respect the system

Last but not least, if you lose a claim you felt was a clear winner, just file your appeal. Resist the urge to blast the ALJ as too liberal or too conservative to your client and/or anyone else who will listen. Remember that you are the one who presented the evidence. It may not be your fault you lost, but the ALJ can only review the evidence presented and decide the claim based upon the preponderance of the competent and credible evidence. Judges are human and do make mistakes, which is the reason appellate courts exist.

Recent Appellate Court Decisions in Workers' Compensation

By By K. Mark Webb, Swift, Currie, McGhee & Hiers, LLP

There have been several important Court of Appeals of Georgia decisions since the last newsletter was published. The cases span a range of topics, including change of physicians, issue waiver at hearing, assessed attorneys fees, notice, the change in condition statute of limitations, average weekly wage calculation, Form WC-240 actions, and Form WC-104 actions.

Change of Physicians

***Mei Yu Zheng v. New Grand Buffet, Inc. et. al.*, 321 Ga. App. 308, 740 S.E.2d 302 (2013)**

Decided March 20, 2013, reconsideration denied April 10, 2013.

In *Mei Yu Zheng v. New Grand Buffet, Inc.*, the Court of Appeals confirmed an employee is not entitled to unilaterally change physicians to a non-panel physician where the employer is providing the claimant with medical care. The employee was receiving medical and income benefits from the employer. However, the employee commenced a course of unauthorized care with Dr. Delgado on Aug. 3, 2010, who referred the claimant to other physicians. Thereafter, on Aug. 24, 2010, an authorized physician, Dr. Armstrong, issued a prospective regular-duty work release indicating she would be capable of regular-duty work so long as certain tests were favorable at her next appointment, scheduled for Aug. 31, 2010. The employee did not return to Armstrong for the Aug. 31, 2010, appointment and the employer suspended the employee's income benefits in connection with the prospective work release.

The employee disputed she underwent a change in condition for the better and sought a recommencement of income benefits, payment of medical expenses incurred with her new physicians, and a change of physicians to one of her new physicians on the argument that the employer did not have a posted panel of physicians. The employee also requested a late penalty and an assessment of attorney fees.

Following a hearing, the ALJ found the employer's unilateral suspension of income benefits was procedurally improper, since it was based on a "prospective" work release, such that the employer was ordered to recommence income benefits to the employee. The ALJ also held that, from a substantive perspective, the employee had not undergone a change for the better in her condition. However, the ALJ held that, because the employer was providing the employee appropriate medical treatment, the employee was not entitled to unilaterally change physicians to one of her new physicians without board approval and the employer was therefore not liable for the employee's medical expenses incurred in connection with her unauthorized course of care. Furthermore, the ALJ found the employer had complied with Georgia law insofar as its panel of physicians and the employee had never asked the employer if she could see a different physician. Given the employer's compliance with Georgia law insofar as its panel of physicians, the ALJ denied the employee's request for a change of physicians to one of her new physicians and held the employer should first have the opportunity to offer the employee treatment with another physician of the employer's choice.

Both parties appealed to the Appellate Division, which adopted the ALJ's award. Thereafter, the employee appealed to the superior court within the 20-day deadline under O.C.G.A. § 34-9-105(b). The employer then filed what it felt to be a cross-appeal outside the twenty-day deadline. The superior court did not issue a ruling, such that the Board's ruling was affirmed by operation of law.

The Court of Appeals upheld the ruling of the Board, holding that, regardless of whether the employer had a posted panel of physicians, the employee was not entitled to unilaterally change physicians without approval of the Board since the employer was providing the employee medical care. The Court noted there had been no refusal of care on the part of the employer, the employee commenced care with Delgado while still under the care of Armstrong and, at that time, the employee did not advise the employer of her election to treat with Delgado. The Court ruled that, because the employer was providing the employee medical care, the employee's options were to ask her employer to change her treating physician or to petition the Board for approval to change. The Court of Appeals also found no error with the finding of the Board that the employer had a posted panel of physicians. The Court of Appeals further held it lacked jurisdiction to hear the employer's appeal regarding suspension of income benefits since the employer did not appeal to the superior court within the twenty-day deadline and since, unlike O.C.G.A. § 34-9-103(a) and O.C.G.A. § 5-6-38(a), O.C.G.A. § 34-9-105(b) does not give an appellee additional time to file a cross-appeal to the superior court.

Issue Waiver At Hearing

***Cho v. Mountain Sweet Water, Inc.*, 322 Ga. App. 400, 745 S.E.2d 663 (2013)**

Decided June 25, 2013.

In *Cho v. Mountain Sweet Water, Inc.*, the Court of Appeals considered whether an employee waived his right to assessed attorney fees. The employee sought benefits from an uninsured employer, who denied the employee was an employee for purposes of the Act. Within the

employee's hearing request, boxes were checked indicating assessed attorney fees were being sought pursuant to O.C.G.A. § 34-9-108(b)(1), (2), and "other." Within the "other" box, the employee wrote, "uninsured employer subject to additional penalties and fees." The Board responded to the hearing request by not only scheduling a hearing, but also issuing an order requiring the employer to submit evidence of compliance with O.C.G.A. § 34-9-120, 121 and 126, or show why it should not be subject to penalties for failing to comply with those provisions. At the hearing, the employee argued he was entitled to attorney fees "due to the employer's alleged bad faith in refusing the claim and denying his employee status." However, the employee apparently did not argue for fees based upon the employer's lack of insurance at the hearing or within his post-hearing brief.

The ALJ found the employee was an employee for purposes of the Act and awarded benefits, but denied the claim for assessed attorney fees, noting the claim was defended on reasonable grounds pursuant to O.C.G.A. § 34-9-108(b)(1). The ALJ noted in the beginning of the award one of the issues was assessment of fees under O.C.G.A. § 34-9-126, but the award did not address attorney fees under O.C.G.A. § 34-9-126(b). The employee requested an amended award to address the issue concerning attorney fees under O.C.G.A. § 34-9-126(b). The ALJ held the employee waived his claim for fees pursuant to O.C.G.A. § 34-9-126(b), since the employee had not raised the issue at the hearing. The Appellate Division adopted the ALJ's award and the superior court did not issue a ruling within the twenty-day deadline, such that the Board's ruling was affirmed by operation of law.

The Court of Appeals reversed the ALJ's finding of waiver of fees pursuant to O.C.G.A. § 34-9-126(b), and remanded the case for consideration of the employee's claims for attorney fees under O.C.G.A. §§ 34-9-108(2) and 34-9-126(b). The Court of Appeals stressed the employee's hearing request stated each of the three grounds for assessed attorney fees, that the Board acknowledged fees were being sought pursuant to O.C.G.A. § 34-9-126(b) by issuing a show cause order prior to the hearing. Further, the Court noted the employee's attorney "presented argument seeking attorney fees at the hearing." The Court of Appeals held that, under the foregoing circumstances, the finding of waiver was improper.

"Change in Condition" Statute of Limitations

***Reid v. Metropolitan Atlanta Rapid Transit Authority*, 323 Ga. App. 523, 746 S.E.2d 779 (2013)**

Decided July 16, 2013, reconsideration denied July 29, 2013, certiori granted Jan. 6, 2014.

In *Reid v. Marta*, the Court of Appeals addressed the meaning of a "change in condition" of an employee while deciding whether the two-year statute of limitations found in O.C.G.A. § 34-9-104 (b) barred a request for statutory late payment penalties, which were admittedly due to the employee many years earlier. The employee received temporary total disability benefits off and on from October 1999 through June 2002, at which time temporary total disability benefits were suspended in connection with his return to work. During May of 2010, he sought statutory late payment penalties for 12 weeks' worth of temporary total disability benefits paid during the foregoing period of time. The employer did not dispute the benefits were untimely paid, but asserted the employee was barred from recovering the penalties based upon the two-year statute of limitations under O.C.G.A. § 34-9-104 (b). The State Board and superior court found the prior payment of income benefits by the employer constituted a "condition," and that the employee's subsequent request for benefits, which were owed but never paid, was a request for "additional" benefits as a result of a change in condition. Therefore, the Board and superior court denied the employee's request for penalties on the basis of the two-year change in condition statute of limitations.

In a departure from prior decisions establishing the applicability of the change in condition statute of limitations to cases where income benefits have been paid and in seeming divergence with the 1990 statutory changes to O.C.G.A. § 34-9-104 aimed at eliminating the uncertainty of the payment obligation standard, the Court of Appeals disagreed with the lower courts' findings, and found a request for statutory late payment penalties did not constitute a "change in condition" action that would be subject to the two-year statute of limitations found in O.C.G.A. § 34-9-104 (b), and reversed the lower courts' rulings. *See City of Poulan v. Hodge*, 275 Ga. 483, 569 S.E.2d 499 (2002)(discussing the application of the payment obligation standard under the pre-1990 version of O.C.G.A. § 34-9-104). The Court of Appeals reasoned the employee was not seeking to recover penalties because of a change in his physical or economic condition and was not seeking modification of a prior calculation of amounts owed or modification of a prior ruling, but was instead seeking payment of an amount owed to him as a matter of law based upon an "initial" claim for benefits, such that the change in condition statute of limitations was not applicable. While the Court of Appeals' decision in *Reid* could have implications outside the limited context of a claim for late payment penalties, the case has been appealed to the Supreme Court of Georgia, which unanimously accepted certiorari. Oral arguments were held during April of 2014, but a decision has not, as yet, been issued.

Assessed Attorney Fees

***Heritage Healthcare of Toccoa et al. v. Ayers*, 323 Ga. App. 172, 746 S.E.2d 744 (2013)**

Decided July 16, 2013, certiorari denied Nov. 4, 2013.

In the *Heritage Healthcare* case, the issue before the ALJ was whether the employee was entitled to assessed attorney fees and litigation expenses. While the ALJ

denied the employee's claim for fees and expenses, the Appellate Division found the employee was entitled to them pursuant to both O.C.G.A. § 34-9-108(b)(1) and (b)(2). Litigation expenses were awarded pursuant to O.C.G.A. § 34-9-108(b)(4). The Appellate Division awarded the employee a lump sum as *quantum meruit* fees based upon income benefits received for a period of time prior to the hearing, but did not award attorney fees on a continuing add-on basis, despite the contingency fee contract of the employee's attorney, which provided for 25 percent of weekly benefits awarded. The employee appealed to the superior court, which held the employee was entitled to a continuing add-on fee relating to future income benefits and remanded the case for entry of a corrected award.

The Court of Appeals affirmed the superior court's ruling and held the Appellate Division erred in awarding the employee less than the amount provided for within the contingency fee contract of the employee's attorney. The court based its ruling on the fact that there was no evidence within the record to rebut the presumption that the continuing add-on fee did not represent the reasonable value of the services of the employee's attorney, so as to justify the tailoring of the assessment of fees to a lump sum. Citing to Board Rule 108, the Court of Appeals emphasized the presumption that "any attorney fee contract which provides for a fee no greater than 25 percent of the recovery of weekly benefits, absent compelling evidence to the contrary, shall be deemed to represent the reasonable fee of the attorney."

Notice

***McAdoo v. Metropolitan Atlanta Regional Transit Authority*, Case A13A2304, 2014 WL 929189**

Decided March 11, 2014, reconsideration denied April 3, 2014.

In the *McAdoo* case, the Court of Appeals addressed whether the employee should be denied benefits for failing to satisfy the notice requirement under O.C.G.A. § 34-9-80. Over the course of his 22-year employment with the employer as a bus driver, the employee had gone out of work multiple times due to diabetes complications. He began to experience low back pain during May 2010, with resultant symptoms in his right lower extremity. His supervisor became aware he was compensating for his symptoms by utilizing his left foot to operate the brakes on his bus and instructed him to obtain treatment, telling the employee that it was not safe to drive with his left foot. He initially sought care with his family physician, who then referred him to a neurologist. Both physicians filled out disability forms indicating the employee's symptoms were not work related. The employee went out of work on Oct. 17, 2010. During December of 2010, on his application for short-term disability benefits, which he submitted to the employer, the employee indicated his problems were work related.

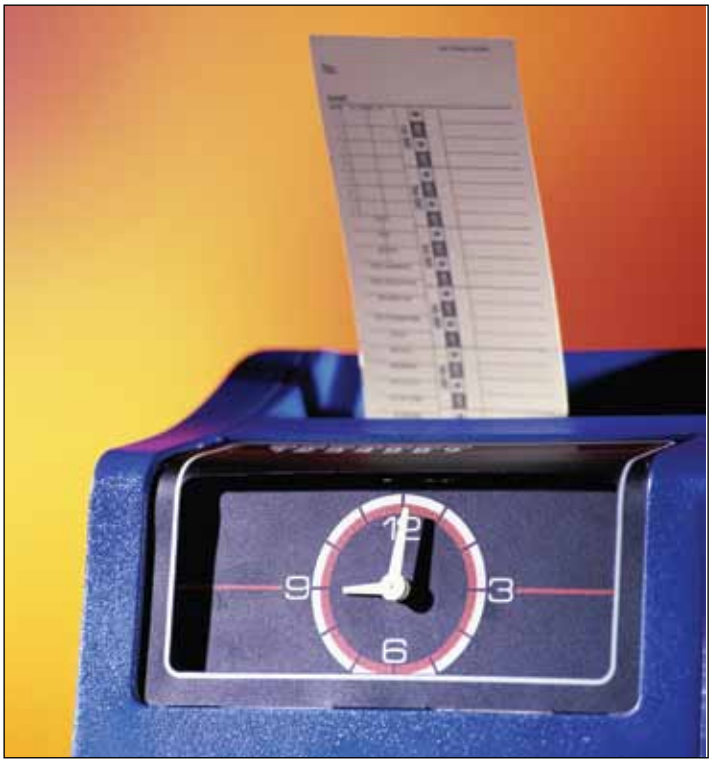
The Board found the claim compensable and determined the employee satisfied the notice requirement by way of the December 2010 application for short-term disability benefits, which was submitted to the employer. Moreover, the Board held that, even if it could be said the employee had not provided sufficient or timely notice, he was reasonably excused from giving notice since he did not receive an affirmative diagnosis that the radiating pain in his right leg was caused by an injury to his lower back until April 2011 and the employer was not prejudiced thereby. The employer appealed to the superior court, which found the employee went out of work in connection with his diabetes and that neither the employer nor the employee could have presumed differently. The superior court reversed the ruling of the Board, finding that the employee's notice that he was leaving work for diabetes-related reasons was insufficient to satisfy the notice requirement since such notice would not prompt the employer to investigate the circumstances surrounding the stop from work.

The Court of Appeals reversed the ruling of the superior court. The Court noted the Board had correctly concluded the required notice need not show the injury arose out of the employment. Here, the employer knew the employee was missing work due to his leg and this was sufficient. Moreover, the Court of Appeals found there was evidence in the record to support the Board's finding that the employee demonstrated a reasonable excuse for not giving timely notice and the employer was not prejudiced by the failure, such that the superior court erred by reversing the Board's award.

Average Weekly Wage

***Cho Carwash Property, LLC et al. v. Everett*, Case A13A1855, 2014 WL 841301**

Decided March 5, 2014.



In the *Cho Carwash Property* case, the Court of Appeals of Georgia dealt with a dispute over the computation of the employee's average weekly wage when applying the "full time weekly wage" formula outlined under O.C.G.A. § 34-9-260(3). The employee was hired as a lube technician and had been working for the employer for three days at the time of his on-the-job injury. Testimony from the employee and the owner of the employer varied as to the number of hours the employee was supposed to work. The employee testified he was hired as a full-time employee and was supposed to work six days per week from the time the car wash opened until it closed, which he placed at 8 a.m. - 7 p.m. He testified he had worked a full day his first day, but was cut short the second day because business was slow due to rain. The owner of the employer testified the employee was hired as a part-time employee, that he was still in training at the time of his on-the-job accident, that lube technicians were usually scheduled to work four days per week from 10 a.m. to 4 p.m. with a 30 minute lunch break, and that the car wash was open Monday through Saturday from 8 a.m. - 6 p.m.

In computing the employee's "full time weekly wage," the ALJ relied upon the testimony of the employer that the employee was supposed to work four days per week and that the car wash was open from 8 a.m. - 6 p.m., but relied upon the employee's testimony that he was supposed to work from the time the car wash opened until it closed. The ALJ therefore multiplied 9.5 hours by four days to arrive at the number of hours the employee was supposed to work each week, which resulted in an increased average weekly wage. The employer appealed, arguing the ALJ applied the statute incorrectly by relying on the employee's training schedule and that no evidence supported the calculation. However, the Appellate Division and superior court affirmed the ruling. Likewise, the Georgia Court of Appeals affirmed, holding that, in computing the employee's "full time weekly wage," the ALJ could rely on a mixture of testimony from the employer and employee with regard to the number of days and hours the employee was supposed to work. As a mixture of the testimony was sufficient under the "any evidence" standard of review, the Court affirmed.

Board Rule 240 and Trial Return to Work

***Technical College System of Georgia v. McGruder*, Case A13A2353, 2014 WL 1097967**

Decided March 21, 2014.

In *Technical College System of Georgia v. McGruder*, the court examined the waiver provision within Board Rule 240(c)(i). After sustaining a compensable injury, the employee returned to work in a light-duty clerical position on Sept. 8, 2009 based on a job offer pursuant to O.C.G.A. § 34-9-240. Later, on Sept. 17, 2009, the employee ceased work due to medical conditions unrelated to her back injury. The employer did not recommence temporary total disability benefits and the employee sought a recommencement of benefits from her stop from work forward. Following a hearing, the ALJ denied the employee's request for a recommencement benefits, finding the light-duty position offered by the employer was suitable; the employee stopped working for reasons unrelated to her work injury; and Board Rule 240(c)(i), which results in a waiver of the defense to the suitability of the light-duty position during the period of time benefits are not reinstated, was invalid since it exceeded the Board's rule making authority by affecting the employer's substantive rights. The Appellate Division vacated the ALJ's award and remanded, holding Board Rule 240(c)(i) did not improperly shift the burden of proof or affect the employer's substantive rights.

Following a second hearing, the ALJ found the employee was, from a procedural standpoint, entitled to a recommencement of temporary total disability benefits from her stop from work through the date of hearing, that the employer's failure to automatically recommence temporary total disability benefits resulted in a waiver of the defense of suitability of employment through the date of hearing, and that, from a substantive standpoint, the employer had not met its burden of proving a change in condition. In addition, the ALJ determined that, while the employee stopped working for reasons unrelated to her work injury, her physician released her to light-duty by November 2010 and light-duty work was admittedly no longer available with the employer by October 2010. The Appellate Division and superior court affirmed.

The employer appealed, arguing the application of the waiver provision within Board Rule 240(c)(i) amounted to an impermissible shift of the burden of proof where the employee stopped working for reasons unrelated to the work injury. However, utilizing the framework laid out in *Mulligan v. Selective HR Solution*, Inc. 289 Ga. 753, 716 S.E.2d 150 (2011), which dealt with the forfeiture provision under Board Rule 205, the Court of Appeals affirmed the ruling

of the Board. Citing to the *Mulligan* case, the Court noted the waiver provision under Board Rule 240(c)(i) did "not abrogate the threshold mandate that [benefits paid to an injured employee are for] compensable injuri[ies]…" and held the waiver provision did not shift the burden of proof to the employer since the waiver provision applies only to an employer's defense against its obligation to reinstate income benefits for a compensable injury that it is already required to pay prior to offering the light-duty position. In this manner, the Court of Appeals made clear that, where an employee receiving income benefits returns to work for at least eight cumulative hours or one scheduled workday, but fails to work more than 15 working days, the employer-insurer are legally obligated to automatically recommence income benefits, regardless of the reasons for which the employee ceased work.

Form WC-104 Conversion

***Metropolitan Atlanta Regional Transit Authority v. Thompson*, Case A13A2304, 2014 WL 1243828**

Decided March 27, 2014.

In this Court of Appeals case, the Court considered whether the employer improperly reduced temporary total benefits to temporary partial disability benefits pursuant to O.C.G.A. § 34-9-104(a)(2), when the employer counted a period of time the employee spent working a light-duty job at regular pay towards the 52 weeks of consecutive light-duty capability required under the statute. The employer provided the employee a light-duty job at normal pay. Before the employee started working in the light-duty program, and while still on temporary total disability benefits, the employer served the employee notice under Board Rule 104 that her benefits would be reduced to temporary partial disability if she remained released to light-duty work for 52 consecutive weeks. The employee worked in the transitional light-duty program for one year. After one year, the employer withdrew the light-duty work, and the employee was no longer able to work for the employer since she remained under restrictions. Temporary total disability benefits were commenced, but five months later the employer unilaterally converted the employee from temporary total disability benefits to temporary partial disability benefits pursuant to the Form WC-104 Notice that had been served on the employee prior to her return to work.

Citing to the legislative intent behind O.C.G.A. 34-9-104(a)(2), the Court of Appeals upheld the lower Courts' decisions, and found the employer improperly counted the period of time the employee was working a light-duty job at regular pay toward the 52-week requirement, and therefore improperly converted the benefits to temporary partial disability benefits. The Court instructed the employer to recommence temporary total disability, reasoning the statute to reduce benefits intended only to count the weeks an employee was not working, but had been released to light-duty work, as the purpose behind the statute is to provide incentive for non-working employees to return to work. While the outcome of this case appears to have hinged largely upon interpretation of legislative intent, as opposed to a literal reading of the statute, and while the Court looked to persuasive authority in settling the issue, the Court also upheld an award of assessed attorney fees against the employer, noting there was some evidence to support the assessment of fees since the employer's actions violated the "purpose and spirit of the statute."

In This Issue

Ethics, Schmethics 1

From the Chair 4

Chairman's Corner 5

Going From The Bench To Private Practice 5

2013-14 Workers' Compensation Law Section Officers: 6

Mediation: How Do I Make This Thing Work? 7

The Basics of Judicial Notice 10

Tips From an ALJ 13

Recent Appellate Court Decisions in Workers' Compensation 14