



WORKERS' COMPENSATION LAW

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John Christy, editor

Section Newsletter

Third Part (TORT) Claims In Connection With Workers' Compensation Claims And The Changing Workplace

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Introduction

As the American business and the workplace continue to change, workers' compensation attorneys are faced with correspondingly more complex factual and legal issues to unravel. In an effort to further reduce labor and other expenses, American businesses have increasingly moved away from traditional employer-employee relationships by outsourcing their labor, maintenance, and other needs to third parties. For example, it is not uncommon to find that the individuals working in a plant, performing the most fundamentally necessary job related to the livelihood of the manufacturer, are in fact not the traditional W-2 employees of the manufacturer but are in fact the W-2 employees of another corporation. Likewise, it is not uncommon to find that the maintenance of the machinery in the manufacturing plant has been outsourced to a third party company. Similarly, under some circumstances, insurance companies are heavily involved in decisions that impact people working in the plant.

When representing a catastrophically injured worker or the family of a worker who has been killed, given the financial limitations of the workers' compensation process, it is vitally important to determine whether third party claims

exist under tort doctrines. Given the ever changing American workplace, as well as applicable law, the identification of potential tort claims has never been more important and potentially more available. Due diligence requires such an analysis. Even the most successful result in the workers' compensation system for a catastrophically injured worker or the family of a deceased worker, will be a hollow victory if a viable third party claim is overlooked. In today's climate, an attorney representing an injured worker or the family of a deceased worker must make sure he cannot be criticized later for failing to identify a potential third party claim. However, the identification of third party tort claims may be difficult without investigation and knowledge of applicable law.

This paper will hopefully provide some guidance as to when, where and how to look for third party claims, as well as provide some helpful discussion on related legal issues.

The success of any third party claim arising from a work related injury or death of course begins with identifying facts that can lead to potential third party defendants. An attorney must conduct an initial interview with the injured worker or family of the deceased worker or co-worker with

Comments From the Chairman

By Joseph T. Leman

Historically, our Section has set the bar on congeniality and professionalism. Again, our 2008 seminar was extremely well attended and the presentations were educational and entertaining. On behalf of the section, I thank all those who attended and especially Steve K. Fain, Joe Stegall, Alex Wallach and Steve Harper for making the event a success.

Early in the 20th Century, labor and management created this social contract called Workers' Compensation and all of us are stewards of this magnificent system. I have been honored to serve as your Chair and will continue to work diligently with my colleagues in the Bar to further the Workers' Compensation system in Georgia.

The 2009 Workers' Compensation Law Institute Seminar will be held at the Sea Palms from Oct.15 - 17. Also, Cliff Perkins will be chairing the Workers' Compensation for the General Practitioner seminar on Feb. 26, at the State Bar. Please mark your calendars. **WC**

an open mind to potential third party claims and with a desire to gather all information that may lead to a third party claim. A wise, experienced trial lawyer once said "The first thing a good lawyer does is get the facts. The second thing a good lawyer does is get the rest of the facts."¹ The success of a third party claim often depends on a very thorough knowledge of the facts and law well before any lawsuit is filed.

There are a number of sources of information available to an attorney to potentially identify third party tort claims for a seriously injured worker. A systematic review of online information or available documents from these sources could shed light on the viability of a potential third party tort claim. Sources of information include, but are not limited to, (1) OSHA; (2) Alcohol Tobacco & Firearms (ATF); (3) Chemical Safety Board; (4) Mining Safety Board; (5) National Traffic Safety Board (NTSB); (6) Federal Aviation Administration (FAA); (7) Georgia Public Service Commission; (8) Federal Railroad Administration (FRA); (9) Georgia Department of Transportation (GDOT); (10) United States Department of Transportation; (11) Federal Highway Safety Administration; (12) United States Consumer Products Safety Commission. There are of course many other governmental and non-governmental sources. Tremendous amounts of information are now available on the internet that may help identify third party claims such as product liability claims, automobile defect claims, premises owners, plant inspectors, or defective roadways.

Potential Third Party Claims

While space does not allow an exhaustive list of all potential third party claims arising in the context of the workplace, outlined below are several potential third party claims that an attorney representing an injured worker or the family of a deceased worker may encounter.

Claims arising from Automobile Wrecks including Road Defects

or Road Construction Claims and Uninsured Motorist Claims

One of the most common third party tort claims for an injured worker involves those claims arising from automobile wrecks. An attorney representing the injured worker should consider not only the liability and insurance coverage of the at fault driver but also all possible sources of uninsured motorist (UM) coverage for the injured worker. See O.C.G.A. § 33-7-11 (Georgia Uninsured Motorist Act). Identification of liability coverage and uninsured motorist coverage can be a very complex factual and legal challenge. For example, more than one liability insurance policy may apply such that liability coverages can be "stacked". Stacking of liability coverage can occur when a defendant tortfeasor that has liability insurance that covers his own automobile is liable for injuries arising from his operation of a vehicle that he does not own and is insured under a separate policy of insurance. See, e.g. Georgia Mutual Ins. Co. v. Rollins, Inc., 209 Ga. App. 744 (1993). Certain states allow intrapolicy stacking of liability coverage. Thus, if the at fault driver has an available liability insurance policy issued by a state other than Georgia, then intrapolicy stacking of liability coverage should be considered. Likewise, excess or umbrella liability coverage may exist for the at fault driver.

Generally, the UM coverage evaluation is more difficult. An injured worker may have UM coverage available from the policy insuring the vehicle he was driving or occupying or from any vehicle, including motorcycles, that the client owns or from any vehicle in the client's household that may be owned by a relative that lives with the client. See O.C.G.A. § 33-7-11(b)(1); Rainey v. State Farm Mutual Auto Ins. Co., 217 Ga. App. 618 (1995). If the injured worker was driving or riding in a vehicle owned by his employer, the employer's automobile insurance policy may have UM coverage available for the injured worker. See, e.g., Chastain v. U.S.F.&G., 199 Ga. App. 86 (1991). Remember UM coverage may also be found on an umbrella or excess policy and may be written on homeowner's

policies. See e.g. Abroahams v. Atlantic Mutual Ins. Agency, 282 Ga. App. 176 (2006). The injured worker may pyramid or stack the UM coverage of all available policies and recover to the extent of his damages. O.C.G.A. § 33-7-11 (b)(1)(D)(ii); Georgia Farm Bureau Mutual Auto Ins. Company v. State Farm Mutual Auto Ins. Company, 255 Ga. App. 166 (1985). Even if the injured worker tells you that he does not have UM coverage, investigate otherwise. Often, clients do not understand UM coverage and do not know what they have.

As of July 1, 2009, Georgia law no longer requires the UM coverage to be "offset" by the liability coverage. See O.C.G.A. § 33-7-11(b)(1)(D)(ii) (I), Ga. Laws 2008, p. 1192, § 1. Prior to the enactment of new legislation during the 2008 legislative session, Georgia law only allowed the recovery of UM insurance coverage if the UM coverage exceeded the liability coverage. Effective January 1, 2009, Georgia recognizes two types of UM coverage and both must be offered to insureds on an optional basis. They are "reduction" UM coverage and "excess" UM coverage. O.C.G.A. § 33-7-11 (b) (1)(D)(ii)(I) and (II). Under "reduction" coverage, the UM is reduced by the amount of the recovery from the at fault motorist's liability coverage. This is referred to as liability coverage set off. Under the "excess" coverage, there is no reduction or set-off by the at fault motorist's liability coverage and all available UM can be stacked on top of the liability coverage available from the at fault driver.

Additionally, in any car wreck case involving catastrophic injuries or death, claims related to road condition or road construction should be considered. Such evaluation always needs to be carefully considered when a car wreck occurs in a construction project or construction zone. There are numerous standards, rules, and regulations that apply to the government and the contractors responsible for the work in the construction zone. The liability of contractors, all entities involved with the construction project and/or the Georgia Department of Transportation should be considered. See e.g.,

Department of Transportation v. Brown, 267 Ga. 6 (1996); Brown v. All-Tech Investment Group, Inc., 265 Ga. App. 889 (2004).

Providers of Alcohol/Dram Shop Claims

Individuals and businesses can be liable for injuries arising from automobile wrecks or other events, if that individual or business sells or furnishes or serves alcohol to a minor or to a person in a noticeable state of intoxication. See O.C.G.A. § 51-1-40 (b) (2008). Dram Shop cases have many twists and turns and require a thorough acquisition of facts and a comprehensive review of applicable law.

Premises Liability and Negligent Security Claims

Increasingly, the employer does not own or solely occupy the premises of an injured worker's place of work. As a consequence, an injured worker may have claims against the owner of the premises or an entity that may jointly occupy the premises with the injured worker's employer. See generally O.C.G.A. §53-3-1; Yoho v. Ringier of America, Inc., 207 Ga. App. 233 (1993). The owner or occupier of a premise is liable for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe. Young v. Richards Homes, Inc., 271 Ga. App. 382 (2005). The owners of the premises may have a duty, under a contract, to keep the premises in safe repair or repair certain equipment associated with the premises. See Flagler v. Salvage, 258 Ga. 335 (1988) (Out of possession landlord has a duty to repair premises consistent with lease agreement). Likewise, the owner may have actual or constructive knowledge of a dangerous condition existing on the premises. Johnson v. Loy, 23, Ga. App. 431 (1998) (Where an out of possession landlord has parted with possession and right of possession, the landlord owner remains liable to third parties for injury when the owner knows or should have known of a dangerous or hazardous condition). The owner, therefore, has a duty to abate that dangerous condition. Having acquired actual or constructive knowledge of a premises related hazard, the owner or occupier may be subject to the additional duty to warn invitees or others foreseeably on the premises of such hazards. American Golf Comp. v. Manley, 222 Ga. App. 7 (1996). However, this rule may be subject to the "superior knowledge" rule such that an owner has no duty to warn of dangers that are open and obvious. Smith v. Housing Authority of City of Athens, 212 Ga. App. 503 (1994).

If a premises' owner voluntarily undertakes certain measures for the protection of patrons, such as security, it must exercise ordinary care in doing so. Law's Corp., Inc v. Haskins, 261 Ga. 491 (1991); Walker v. MARTA, 226 Ga. App. 793 (1997). Cases have held that an owner's duty to keep his premises safe is nondelegable, unless the owner has completely surrendered possession and control. Stephens v. Clairmont Center, Inc., 230 Ga. App. 793 (1998). This duty

may be derived from knowledge of prior criminal acts or from the foreseeability of the particular act in question. Sturbridge Partners v. Walker, 267 Ga. 785 (1997).

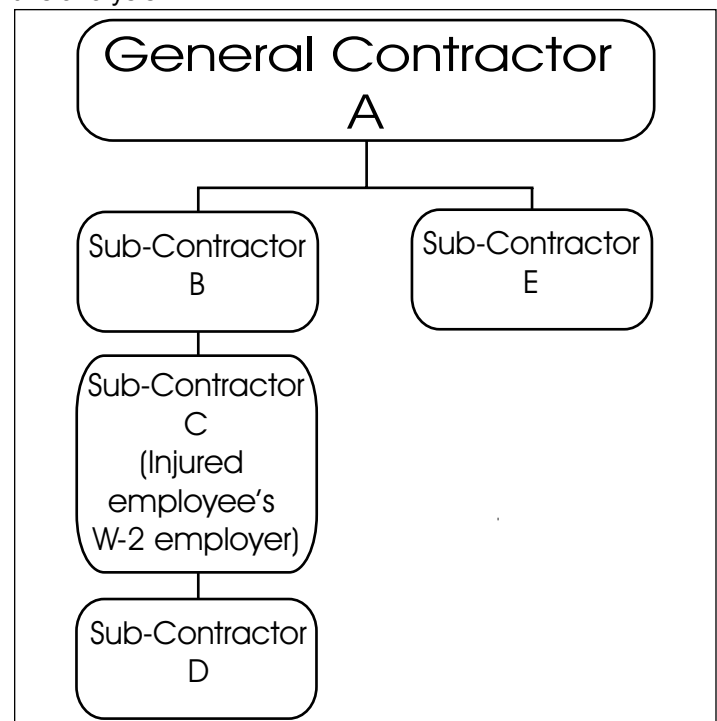
Construction Claims

Claims arising at construction sites present a complex analysis for potential third party claims. Normally, there are multiple contractors working on the construction site. The analysis of potential third party claims for construction site injuries can well apply to an analysis of potential third party claims in other context given the changing workplace. As an initial matter, an attorney representing an injured employee must consider the "statutory employer" law.

Statutory Employer

A statutory employer is a company which does not directly employ the injured worker but is still deemed to be an employer of the injured worker under the worker's compensation statute. Statutory employers include: (a) "up the chain" contractors; (b) companies utilizing the services of a "temporary help contracting firm" as defined by O.C.G.A. § 34-8-46 and (c) companies using the services of an "employee leasing firm" as defined by O.C.G.A. § 34-8-32. See O.C.G.A. § 34-9-11 (c) (2008).

As an initial analysis, if an injured employee could collect worker's compensation benefits from an entity, regardless of whether he actually collects those benefits, then the injured employee is barred from pursuing tort claims against that entity. O.C.G.A. § 34-9-8 (a). Importantly, this bar only works "up the chain" and applies to no other party. The "up the chain" contractors are considered statutory employers of the injured worker. *Id.* The below illustration may help to illustrate this analysis:



The injured employee would have no tort claims against A, B and C. But he could have tort claims against D and E and its responsible employees because D and E are not "up the chain" from the employee and thus are not statutory employers of the injured employee.

As to the temporary help situation, if your client was injured on the job as a result of the negligence of a company A employee but your client was provided to company A through a temporary agency, then your client may not be able to sue company A. See *Preston v. Georgia Power Co.*, 227 Ga. App. 449 (1997).

There is an exception to the statutory employer bar. If your client is not a borrowed servant of the statutory employer, then your client can bring a tort claim against the statutory employer's direct employees. See *Rothrock v. Jeter*, 212 Ga. App. 85 (1994); *Cleveland Elec. Contractors v. Craven*, 167 Ga. App. 274 (1983). This exception exists because of the language used in O.C.G.A. § 34-9-11(c) ("no employee shall be deprived of any right to bring an action against a third party tortfeasor, other than an employee of the same employer"). This exception only applies to individual employees who are independent contractors or the employees of independent contractors and not to borrowed servants. Once an individual becomes a borrowed servant of another, then the worker's compensation bar applies to prevent third party claims since there is no legal distinction between that individual and a regular employee.

Borrowed Servant Doctrine

The requirements for the borrowed servant doctrine to apply are: (1) the special master had complete control and direction of the servant for the occasion; (2) the general master had no such control, and (3) the special master had the exclusive right to discharge the servant. See *Tim's Crane & Rigging, Inc. v. Gibson*, 278 Ga. 796 (2004); *Six Flags Over Georgia v. Hill*, 247 Ga. 375 (1981). Absent a controlling contract, the application of the borrowed servant

doctrine is fact intensive. *Id.*; *Howard v. J.H. Harvey Company, Inc.*, 239 Ga. App. 677 (1999). The factual focus is on the time the injury occurred. *Id.*

For example, in applying the first test, the Georgia Supreme Court has held that the special or borrowing master have complete control and direction only for the occasion at issue. *Id.* The concern is not whether the individual was always under the control and direction of the borrowing master but whether he was on the occasion when the injury occurred. *Id.* Likewise, under the third element, the special or borrowing master only needs to have the exclusive right to discharge the servant for the particular work being performed at the time of the accident as opposed to all further work. *Jarrard v. Doyle*, 164 Ga. App. 339 (1982).

Additionally, in an order for a borrowed servant to be precluded from suing the special master in tort there must be notice to and assent by the borrowed servant as to the special relationship. *Southern Railway Co. v. Hand*, 216 Ga. App. 370, 371 (1995). It is not necessary that the borrowed servant be on notice of and give his assent to the legal consequences of the special relationship where he has notice of the necessary facts and assents to perform the work at the direction and under the control of the special master. *Six Flags Over Georgia, Inc.*, 247 Ga. at 377.

Importantly, the Georgia Supreme Court has apparently held that the borrowed servant doctrine can be established, as a matter of law, based on the express terms of a contract that an injured employee's employer may enter with another entity. In *Tim's Crane & Rigging, Inc. v. Gibson*, the Georgia Supreme Court held that a worker was a borrowed servant where the contractual language explicitly sets forth each requirement of the borrowed servant doctrine. 278 Ga. 796 (2004). There, a general contractor leased a crane from *Tim's Crane & Rigging, Inc.* *Id.* A certified crane operator, employed by *Tim's Crane & Rigging, Inc.*, delivered the crane to the general contractor, and operated it. *Jeff Gibson*, who was temporarily employed with

the general contractor, was guiding a load to the ground when the crane passed near an electrical line resulting in his being shocked. *Gibson* filed suit against *Tim's Crane & Rigging, Inc.* alleging that his injuries resulted from the negligence of the crane operator. *Tim's Crane & Rigging, Inc.* filed a motion for summary judgment arguing that the crane operator, by the express terms of its contract with the general contractor, was a borrowed servant of the general contractor; and thus, it could not be held liable for the alleged negligence of the crane operator. The trial court granted the motion. The Court of Appeals held that it must look to the evidence to determine whether the three prongs of the borrowed servant doctrine were met and reversed the trial court. *Gibson v. Tim's Crane & Rigging, Inc.*, 266 Ga. App. 42, 44 (2004).

However, the Georgia Supreme Court reversed the Court of Appeals, and held that the contract between *Tim's Crane & Rigging, Inc.* and the general contractor explicitly sets forth each requirement of the borrowed servant doctrine. *Tim's Crane & Rigging, Inc.*, 278 Ga. at 796. The Court noted, "The contract between the parties is controlling as to their responsibilities thereunder." *Id.* Thus, *Tim's Crane & Rigging, Inc.* was entitled to summary judgment on the basis that its crane operator was considered a borrowed servant at the time of the incident. *Id.*

Product Liability Claims and Other Claims Related to Machinery

In the workers compensation context, an attorney handling a claim for a catastrophically injured employee or the family of a deceased employee, will often find that the employee received injuries while working on or around a piece of machinery that caused some traumatic amputation or other trauma to the employee. In such a situation an attorney must consider potential product liability claims, such as defective design, manufacture, assembly, testing or failure to warn or misrepresentation. See O.C.G.A. § 51-1-11.

The Georgia Supreme Court has outlined the test for whether a product is defective in terms of risk-utility analysis. *Banks v. ICI Americas, Inc.*, 264 Ga. 732 (1994). There are three principal basis of recovery in product liability actions: negligence, breach of warranty and strict liability.

Like any other claim, actions for damages based on product liability are governed by statutes of limitations. For personal injury actions based on negligence or strict liability related to product liability a two-year statute of limitations applies. See. O.C.G.A § 9-3-33. However, there is an additional limitation that an attorney representing an employee injured by a product of any kind must consider as soon as he is retained. This is the statute of repose and it functions in addition to the statute of limitations. O.C.G.A. § 51-1-11 (b)(2). This statute of repose is a complete ban to strict liability and negligence actions filed more than 10 years after the date of the first sale or use or consumption of the products, regardless of when the injury occurred. Thus, an injured employee's time to file a case could be much less than two years. The statute of repose does not apply to claims based on failure of the manufacturer to warn of product related damage. *Daniels v. Bucyrus-Erie Corp.*, 237 Ga. App. 828 (1999).

An attorney must also consider negligent refurbishment claims. Such claims are a way to potentially get around the statute of repose. In many workplaces, equipment is being utilized that is considerably older than ten years. The equipment however may have been "refurbished" by an entity who did not originally manufacture the equipment. The refurbishment may have been conducted negligently or not performed in accordance with safety standards in effect at the time of the refurbishment.

In short, when representing an employee who has been seriously injured by machinery, an attorney must consider all possible product liability claims, as well as other claims addressed below.

Negligent Inspection/Negligent Maintenance / § 324A Second Restatement of Tort Claims

The potential for third party tort claims related to § 324A of Second Restatement of Torts, such as negligent inspections, negligent maintenance or negligent performance of other duties assumed by contract or otherwise for an employee has expanded greatly because of the changing American workplace. For example, it is not uncommon for an injured worker's employer to allow various insurance companies to inspect the workplace equipment and premises in order to perform loss prevention surveys. These inspections may be performed negligently. It is not uncommon for an employer to contract with an outside company to perform maintenance or repair work on equipment. This maintenance or repair work may be negligently performed.

The Georgia Supreme Court established the legal duty in tort, owed by operation of law, for negligent performance of an undertaking when the Court specifically adopted the

Restatement 2d Torts § 324A: "Liability to Third Person for Negligent Performance of Undertaking." *Huggins v. Aetna Casualty & Surety Co.*, 245 Ga. 248, 264 S.E.2d 191 (1980); See also, *Lee v. Petty*, 123 Ga. App. 201, 210 S.E.2d 383 (1974); *Winslett v. Twin City Fire Insurance Co.*, 141 Ga. App. 143, 232 S.E.2d 638 (1977); *Beam v. Omark Industries Inc.*, 143 Ga. App. 142, 237 S.E.2d 607 (1977); *Argonaut Insurance Company v. Clark*, 154 Ga. App. 183; 267 S.E.2d 797 (1980); *Housing Authority v. Famble*, 170 Ga. App. 509, 317 S.E.2d 853 (1984).

In *Huggins*, the Georgia Supreme Court held: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a)his failure to exercise reasonable care increases the risk of such harm, or (b)he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

245 Ga. at 249 (quoting the Restatement 2d Torts § 324(A)).

The "primordial ingredient" of Section 324(A) claims is liability resulting from failure to exercise reasonable care in some undertaking by one who has undertaken to render services. *Housing Auth. of Atlanta v. Famble*, 170 Ga. App. 509, 524, 317 S.E.2d 853 (1984). Section 324(A)(a)(b) and (c) provide separate, distinct claims. *Huggins*, 245 Ga. at 249; *Rust International v. Greystone*, 133 F.3d 1378 (11th Cir. 1998) (applying Georgia law).

(1) §324A(a)

Under §324A(a), a party who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person, is subject to liability to the third person for physical harm resulting to the third person from the undertakers failure to exercise reasonable care to protect his undertaking if his failure to exercise reasonable care increases the risk of harm. A risk is increased "when a non hazardous condition is made hazardous through the negligence of a person who changed this condition or caused its condition to be changed." *Howell v. United States*, 932 F. 2d 915 (11th Cir. 1991) (applying Georgia Law).

(2) 324A(b)

Under § 324A(b), as adopted by Georgia Courts, a separate legal duty is imposed, by operation of law, where a party, gratuitously or for consideration, undertakes to perform a duty owed by the other, then the party undertaking the duty must exercise reasonable care if it is foreseeable that the undertaken duty is necessary for the protection of third persons. See *Huggins*, supra. Even trivial and technical actions regarding an undertaking are sufficient to make a party liable in tort to a third person for the negligent performance of an undertaking. Restatement 2d Torts § 324A, comment f, adopted as law in Georgia in *Huggins*, 245 Ga. at 248.

An example of a potential third party tort claim arising in the workplace involving Georgia's adoption of § 324A(b) of the Second Restatement of Torts, arises when a company is hired to inspect equipment that may have the potential for explosion, the inspection is negligently conducted, an explosion occurs and an employee is injured. It was certainly foreseeable to the company performing the inspection that its undertaken duty was necessary for the protection of the third persons like an employee at the plant. Often, the inspecting company's own policies, procedures and documents help prove foreseeability.

(3) 324A(c)

Under Section 324A(c), an individual employees' reliance on a third party's undertaking implicates a tort duty under § 324A(c). *Universal Underwriters Ins. Co. v. Smith*, 253 Ga. 588, 322 S.E.2d 269, 272 (1984); *Smith v. University Underwriters Ins. Co.*, 752 F.2d 1535, 1537-38 (11th Cir. 1985). For example, an individual employee may have relied on an outside maintenance company to properly inspect and repair the machinery that injured him. Reliance also may be shown by evidence of a change of position by the employer who no longer required its employees to perform certain activities as a result of the third party's inspections or work. *Phillips v. Liberty Mutual Ins. Co.*, 813 F.2d 1173, 1175 (11th Cir. 1987) (applying Georgia law). Reliance may be proven by circumstantial evidence. *Id.*

Medical Malpractice Claims and other Claims related to Medical Treatment

Unfortunately, there are instances when the already injured worker does not receive proper medical care. Currently, an "action for medical malpractice" is defined, in pertinent part, by statute as "any claims for damages resulting from the death or injury to any person arising out of health, medical, dental or surgical service, diagnosis, prescriptions, treatment or care."

O.C.G.A. § 9-3-70, 9-11-8(a). Not only physicians, but dentists, chiropractors, psychiatrists, pharmacists, optometrists, ophthalmologists, nurses and emergency medical technicians are subject to tort liability for medical malpractice. Of course, the essential element of medical malpractice claim is the breach of duty to exercise the requisite degree of care and skill. *Copeland v. Houston Co. Hospital Authority*, 215 Ga. App. 207 (1994).

Furthermore, an injured worker may receive some defective medical device or defective medicine. An attorney representing an injured worker must consider such claims if the injured worker has an unexpected or adverse outcome following medical treatment.

Direct Action Against Employers and Fellow Employees

There are situations where the injured worker can sue his employer and his fellow employees. The Georgia Courts have repeatedly held that when an employee suffers a non-physical, psychological injury because of his employer's actions, whether from wrongful arrest, false imprisonment, defamatory conduct or infliction of emotional distress, the Worker's Compensation Act does not bar such tort claims. See e.g., *Oliver v. Wal-Mart*, 209 Ga. App. 703 (1993) (manager falsely accused employee of stealing); *Miraliakburi v. Pennicooke*, 254 Ga. App. 156 (2002) (Burger King employee was not allowed to leave premises even though child had been seriously injured at school); *Vojnovic v. Brants*, 272 Ga. App. 475 (2005) (employee sued employer for malicious prosecution). Often, in such cases, punitive damages can be pursued because of the intentional conduct by the employer or fellow employee. See O.C.G.A. § 51-12-5.1.

Georgia Rule of Professional Conduct 1.1

Because of the expense and complexity of many third party claims, a lawyer representing an injured worker or the family of a deceased

worker should consider Georgia Rule of Professional Conduct 1.1 that provides in pertinent part:

A lawyer shall provide competent representation to a client. Competent representation...means that a lawyer shall not handle a matter, which the lawyer knows or should know to be beyond the lawyer's level of competence without associating another lawyer who the original lawyer reasonably believes to be competent to handle the matter in question. Competence requires the legal knowledge, skill, thoroughness and preparation reasonable necessary for the representation. **WC**

Mr. Clark's practice focuses on representing severely injured individuals or the families of persons killed through negligence.

He is named in the "Best Lawyers in America". He is a member of the American Board of Trial Advocates and a Master in the Bootle Inn of Court. He is an adjunct professor at Mercer Law School where he graduated cum laude. He is President-Elect of the Georgia Trial Lawyers Association. He is President of the Macon Bar Association. He is a member of the President's Club of the American Associate of Justice. He has been repeatedly named as a "Super Lawyer" by Atlanta Magazine.

He was a law clerk for the Honorable Jack T. Camp, United States District Court, Northern District of Georgia. He was a Mercer Law Review editor and member of the Brainerd Currie Honor Society. He graduated summa cum laude from The Citadel and was a former officer in the United States Army.

He has lectured and made many presentations to lawyers at Continuing Legal Education seminars.

(Endnotes)

1 Harry L. Cashin, Jr., Atlanta, Georgia

Housing Needs Within Georgia Workers' Compensation

Deborah G. Krotenberg, Esq.
SBWC Division Director, Managed Care & Rehabilitation

Within a catastrophic claim, one of the most difficult issues to address is the need for accessible housing. While it is too complex to thoroughly explore in this article, I will highlight the important aspects to properly approach this issue. Readers are advised to refer to the current Housing Checklist attachment located on the Managed Care & Rehabilitation Division's web page on the Board's website, www.sbcw.georgia. In addition, a committee of dedicated catastrophic rehabilitation suppliers has been updating this information, and it is anticipated that the new Housing paper will be on the website at the beginning of 2009.

In Rule 200.1(a)(5)(ii), the Board clearly establishes that housing is a potential legitimate rehabilitation need, and the catastrophic rehabilitation supplier is charged with addressing and coordinating the provision of same:

An Independent Living Plan encompasses those items and services, including housing and transportation, which are reasonable and necessary for a catastrophically injured employee to return to the least restrictive lifestyle possible. [emphasis added]

Given the vast differences among "catastrophic" claims, this Rule is necessarily vague.

For the Managed Care & Rehabilitation Division, the two guiding principles for housing are safety and accessibility. Parties need to know exactly what functions an injured employee can perform independently. Can they perform activities of daily living? Can they move freely and independently into and out of their home as well as in the community? It takes several experts to reach a reasonable conclusion.

The catastrophic rehabilitation supplier usually looks to the authorized treating physician to



initiate this decision making process. The authorized treating physicians are always asked to give an opinion as to whether or not a catastrophically injured employee can safely and independently perform the relevant functions. If they can only perform some of those functions, or if the physician is not sure whether they can perform those functions, the physician usually involves a physical therapist or an occupational therapist who can further evaluate the employee. These professionals look at many issues: the functional capacities of the employee, their needs for assistance with mobility and daily activities, the housing occupied by the employee before their injury, and the current housing needs of the employee (including the family constellation of the employee). These professionals will consider future needs as well as current needs. Is the employee using a wheelchair? Will they

potentially need a wheelchair? What is the turn radius of the chair? Is the chair manual or powered? What is the combined weight of the employee and the chair? What are the employee's ramping needs, as well as specialized kitchen and bathroom needs? Is a lift system needed? What about the need for an attendant or assistance with house keeping and organization? These questions and many other important ones are included in the aforementioned Housing Checklist.

These assessments enable the parties to cross the threshold of need, but leave open "reasonable and necessary" and "least restrictive lifestyle possible." As attorneys on both sides of the aisle, you can appreciate the vast amount of "grey" area these terms create, especially as they are balanced with each other. For example: an employee requires 24/7 nursing care. It will cost a lot more

to modify his home and provide around the clock private nursing care than it would to place him in a nursing facility. His family wants him home. I am sure you can recognize the arguments on both sides. Of course, additional specifics of the employee's awareness of his surroundings, ability to interact, prognosis, etc. would also play a large factor in the analysis. To argue for or against housing options, it is imperative that your development of evidence to support your position is centered on these terms.

While the employer/insurer is required to provide "accessible" housing, clearly those above mentioned terms vary on what satisfies that burden on a case by case basis. While it does not automatically equate to the purchase or building of a new home, it does not eliminate it as a possibility either. In evaluating the above mentioned terms, parties must assess the options:

What options will provide for both accessibility and safety needs? The catastrophic rehabilitation supplier plays a major role in obtaining the experts' opinions and providing the research of the various options.

Of those available options, why is one choice preferable over the others? Among many considerations:

- Type of housing relative to prior living arrangements
- Location as it impacts the employee's choice

- Cost considerations as it impacts feasibility
- Independence

Family [While housing is geared towards the employee's needs, their family's needs cannot be absolutely ignored.]

Obviously, the expert opinions of the treating physicians, involved occupational therapist and/or physical therapist specialists, contractors, and real estate agents play a significant role in shaping the answers of the individual employee's housing needs.

The potential housing solutions are as varied as the options. The parties are strongly encouraged to work toward an agreement as opposed to proceeding to court. Rarely does one side "win" in court on these issues. This will require an "open mind" especially geared towards thinking "outside of the box." It will require compromise from absolute positions, but can be accomplished when the parties realistically work toward what should be the common goal: providing the employee with his/her rehabilitation needs in the most cost-effective manner possible. The keys to a win-win resolution are: proactivity in addressing housing needs early on; the ability to compromise; and communication amongst the parties and the catastrophic rehabilitation supplier. As always, the Rehabilitation Division stands ready to help the parties achieve this goal. **WC**

Editor's Corner

By John Christy

As the incoming editor of the Workers' Compensation Section Newsletter, I would like to tell you a little about myself. My law practice is located at 909 Ball Street in Perry. I am a solo practitioner and concentrate in the areas of Workers' Compensation and Personal Injury law. I began my practice of law in Dublin, Ga. in 1982 and I have been privileged to represent both defense and plaintiff's interests. In doing so, I have witnessed the frustration of both the employer who believes that employees are not due the benefits they seek as well as that of injured workers who have not been compensated for their work-related injuries and who often cannot provide basic needs for themselves and their families. My hope is that during my tenure as editor of this newsletter, you will find beneficial information, no matter which side of the you represent. In closing, I would like to say a sincere thank you to our contributors, Joseph T. Leman, John Christopher Clark, Deborah G. Krotenberg, H. Clifton Cobb, Craig R. White, John G. Blackmon and Neil C. Thom. I appreciate the time and consideration that went into their articles and look forward to working with more of you in the future. The next issue of the newsletter will be published in June and any submissions would be welcomed. Please send your proposed topics to me at jdchristy@mindspring.com. John

A special thanks to the

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Illegal Immigration and the WC-240 Process, an Employer/Insurer Perspective

By H. Clifton Cobb
Senior Staff Attorney, The Hartford

A great part of being an American is that we are all immigrants from many countries. That truly makes us a great nation. We cherish the community of differences in culture and people, and use this strength to continue to build our country into a better nation. It also helps prepare us for future challenges in a world economy. However, it does not come without a price. The building of America has been and continues to be with great cost. Our history of immigration includes the struggles of every immigrant into this country and prompts us to continually debate controls on immigration. The current challenges of controlling illegal immigration into the United States has been a subject of great concern and one in which we must find solutions on a national level.

Illegal immigration is also felt closer to home in Georgia as numerous employers are faced daily with workers' compensation claims from illegal immigrants. While many employers comply with federal and state law that include the requirement of documenting that their workers are legally in this country, some employers do not. Some illegal immigrants provide fraudulent identification to their employers and some have very little identification. In Georgia, illegal immigrant employees have the same "employee" status as legal resident immigrants and U.S. citizens. The Georgia courts do not distinguish the different legal statuses of an employee in this country when an employee is hurt at work. If the work injury is otherwise within the course and scope of employment, that illegal immigrant employee enjoys the right to file and maintain a workers' compensation claim against the employer.

The right to file and maintain a Georgia workers compensation case by an illegal immigrant employee

has been the subject of much debate and judicial decision in Georgia. In the case of *Earth First Grading v. Gutierrez*, 270 Ga. App. 328; 606 S.E.2d 332 (2004) (cert denied 2005), the Georgia Court of Appeals held that an illegal alien who presented fraudulent documents to secure his job was not disqualified from receiving TTD (temporary total disability income) benefits under O.C.G.A. § 34-9-261 as he was still an "employee" as defined by the Georgia Workers' Compensation Act. The court further stated that federal law does not preempt Georgia law on the question of whether or not an illegal alien may receive workers' compensation benefits for employment. This is a decision that

is troublesome for employers and insurers of employers for workers compensation. This is true in light of the U.S. Supreme Court decision in the case of *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137; 122 S. Ct. 1275 (2002) which held the National Labor Relations Board did not have the authority to award back pay to an undocumented alien employee who was not legally authorized to work in the United States, as any back pay award was not consistent with federal immigration policy.

If the illegal immigrant employee is out of work due to his work injury and is receiving TTD benefits, the employer and insurer's efforts are focused on returning that employee to



work so TTD benefits can be suspended. If the authorized treating physician (“ATP”) provides a “full duty” work release, income benefits being received under O.C.G.A. § 34-9-261 can be suspended. However, if the work status given is for “light duty” work with restrictions, the employer and insurer must prove the employee has the ability to work and there is work available. The employer may have “light duty” work available (work that is within the work restrictions given by the ATP) and make a formal “offer of employment” pursuant to O.C.G.A. § 34-9-240 (“the WC-240 process”). If the employee returns to work in this “light duty” job offered then workers’ compensation income benefits may be suspended. If the “light duty” job involves a requirement to drive and if that employee cannot obtain a Georgia driver’s license due to the illegal immigrant status, the Georgia appellate courts have held the employer could suspend income benefits as the inability to perform the work was not related to a physical inability sustained from the work accident (see *Martines v. Worley & Sons Construction*, 278 Ga. App. 26 (2006)). In *Martines*, the employee had no U.S. credentials and could not prove he had a legal right to be in the U.S. The *Martines* court held the lack of proof by the employee is not an excuse to work on a WC-240 offer of employment. The *Martines* case is an interesting departure from the decision in *Gutierrez* and the WC-240 process, as the decision provides the employer/insurer with the right to unilaterally suspend income benefits. The normal “WC-240” process would require the employee to return to work and attempt the “light duty” job for some period of time. If the employee could not perform the work for 15 days, TTD benefits must be reinstated. The burden would then be on the employer/insurer to prove the employee did not make a good faith attempt to perform the work in order to suspend income benefits while continuing to pay income benefits. The process of determining whether the employee made a good faith attempt to work could take many months after initiating the review process by filing a WC-14 request for hearing and after the appellate process had ended.

The *Martines* decision discussed the process of determining when income benefits can be suspended on the basis of offering suitable employment under the WC-240 process, and cited the case of *City of Adel vs. Wise*, 261 Ga. 53; 401 SE2nd 522 (1991). In the *City of Adel* case the employer/insurer has the burden of satisfying a two prong test: (1) proving the suitability of work within the employee’s physical work restrictions, and (2) that the employee’s refusal to work was not justified. If the *Martines* decision allows an employer/insurer to unilaterally suspend benefits due to the employee not being able to prove his/her legal status in the U.S. as a requirement to perform the “light duty” job for the employer, whether it is driving a car for the employer or solely to support an I-9 form that the employer is required by federal law to have before an employee works, then it is logical to inquire about that employee’s legal status in the U.S. to defend against the employer/insurer having to pay income benefits. This would include the discovery

process in litigation and should allow inquiry without the employee being able to use his/her 5th amendment privilege to self-incrimination. An employee who has no legal right to be in the U.S. typically asserts his/her 5th amendment privilege in a deposition or written discovery and their attorney instructs them not to answer questions concerning “legal status” in the U.S. The *Martines* decision should then have a significant impact on the discovery process and require the employee to answer questions on “legal status” in the U.S. This would then allow the employer/insurer to challenge an employee’s right to refuse suitable employment under the WC-240 process. Logically, an employer/insurer may not have to pay income benefits under either O.C.G.A. § 34-9-261 or § 34-9-262 for an illegal immigrant employee. The *Gutierrez* court did not consider whether the employee’s illegal status resulted in his inability to find work, as the employee’s illegal status was not discovered until after the period in which the employee requested workers compensation benefits.

Employers/Insurers should make a light duty job offer within the restrictions given by the ATP and require the employee to prove their legal right to work in the U.S. If the employee cannot provide the requisite proof for the job, then *Martines* suggests that TTD benefits could be unilaterally suspended by the Employer/Insurer. Future cases involving the “legal status” of the injured worker in a Georgia workers compensation case may clarify how far the Georgia courts are willing to extend the *Martines* decision, and whether the employee continues to have the right to assert his/her 5th amendment privilege when requesting income benefits or perhaps any benefits under the Georgia workers compensation laws.

The other aspect of the “240 process” is when the employer cannot offer suitable work. The employer/insurer then try to find suitable work within the employee’s work restrictions given by the ATP using a labor market survey. The burden to prove there is suitable work available may be impossible, as the work availability in the labor market may not be available to the illegal immigrant employee due to this illegal status and not related to the employee’s physical inability to work. Illegal immigration can bind the hands of the employer/insurer to prove work availability when it is not related to the physical inability to perform the work, and when the employee uses his/her 5th amendment privilege as a shield to discover arguably relevant information in a workers compensation case.

Illegal immigration continues to be a high cost to employers and insurers in Georgia. When a light duty job is not available from the employer, the burden of proof required for an employer/insurer to suspend income benefits must be lightened when proof of job availability in the labor market is shown, and without the proof that the job is available to that specific illegal immigrant. Only through legislation or judicial decision that provides an easier and more logical process to suspend income benefits, can the burden to the employer/insurer be fairer. **WC**

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STATEWIDE SATELLITE PROGRAM

WORKERS' COMPENSATION FOR THE GENERAL PRACTITIONER
A Map to the Mine Field

LIVE Friday, February 20, 2009 · REBROADCAST Thursday, February 26, 2009

6 CLE Hours including
1 Professionalism Hour · 3.5 Trial Practice Hours

AGENDA

Presiding: *Clifford C. Perkins, Jr.*, Program Chair, Perkins Law Firm, LLP, Carrollton

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| <p>8:30 REGISTRATION (All attendees must check in upon arrival. A removable jacket or sweater is recommended.)</p> <p>8:55 WELCOME AND PROGRAM OVERVIEW
<i>Clifford C. Perkins, Jr.</i></p> <p>9:00 EMPLOYMENT, JURISDICTION AND CHOICE OF LAWS
<i>John G. Blackmon, Jr.</i>, Drew, Eckl & Farnham, LLP, Atlanta</p> <p>9:30 ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT
<i>Foy S. Horne</i>, Foy S. Horne, Jr., P.C., Athens</p> <p>10:00 BREAK</p> <p>10:15 PROFESSIONALISM AND PRACTICAL TIPS ON PRACTICE BEFORE THE STATE BOARD OF WORKERS' COMPENSATION
<i>Hon. Johnny Mason</i>, Administrative Law Judge, State Board of Workers' Compensation, Atlanta</p> <p>10:45 SPECIFIC INJURIES AND OCCUPATIONAL DISEASE
<i>N. Sandy Epstein</i>, Wilson & Epstein, LLC, Atlanta</p> <p>11:15 WILLFUL MISCONDUCT, STATUTES OF LIMITATIONS AND NOTICE
<i>Gregg M. Porter</i>, Savell & Williams, LLP, Atlanta</p> <p>11:45 LUNCH</p> | <p>12:45 RYCROFT AND WAGE
<i>Kathryn C. Bergquist</i>, The Bergquist Law Firm, LLC, Roswell</p> <p>1:15 CREDITS AND OFFSETS, DEATH CLAIMS AND MEDICAL BENEFITS
<i>Luanne Clarke</i>, Moore, Clark, DuVall & Rodgers, P.C., Albany</p> <p>1:45 MODIFICATION OF BENEFITS
<i>John F. Sweet</i>, Clements and Sweet, P.C., Atlanta</p> <p>2:15 BREAK</p> <p>2:30 FORM FILING, PAYMENT PROVISIONS, ATTORNEY'S FEES AND COSTS
<i>Terrence Martin</i>, Misner, Scott & Martin, Atlanta</p> <p>3:00 MEDIATION AND SETTLEMENTS
<i>Charles B. Zirkle, Jr.</i>, Zirkle and Hoffman, LLP, Atlanta</p> <p>3:30 APPEALS TO APPELLATE DIVISION, THE SUPERIOR COURT, AND BEYOND
<i>Miles Gammage</i>, Mundy & Gammage, P.C., Cedartown</p> <p>4:00 SUBSEQUENT INJURY TRUST FUND, SUBROGATION AND GUARDIANSHIP
<i>Harold W. "Hal" Whiteman, Jr.</i>, Cohen, Cooper, Estep & Whiteman, LLC, Atlanta</p> <p>4:30 ADJOURN</p> |
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The Current State of Law in Workers' Compensation Subrogation - A Practical Primer

By Craig R. White
Skedsvold & White, LLC.

INTRODUCTION

On July 1, 1992, the general assembly made significant changes to the Georgia Workers' Compensation Act by providing subrogation lien rights to Employer/Insurers against third parties who have injured an Employee. See O.C.G.A. § 34-9-11.1. Although the concept of subrogation in Workers' Compensation cases was first introduced in 1922, the repeal of Georgia Code Annotated § 114-403 in 1972 left Georgia Employer/Insurers with no subrogation lien recovery rights for twenty years. Unfortunately, O.C.G.A. § 34-9-11.1 itself is poorly written and provides little guidance to injured Employees and their Employer/Insurer on how to interpret many of its terms. As a result, Georgia's appellate courts have been forced to define and interpret many of the basic elements of this code section. As such, the purpose of this primer is to provide a framework or guide for evaluating and handling Georgia Workers' Compensation subrogation lien issues.

ESSENTIAL TERMS OF O.C.G.A. § 34-9-11.1

O.C.G.A. § 34-9-11.1 provides that if a third party, other than those excluded by O.C.G.A. § 34-9-11, causes an injury or death to an Employee for which benefits under the Georgia Workers' Compensation Act are payable and for which said third party is legally liable, the injured Employee, or those to whom such Employee's right of action survives at law, may file suit against that third party in any court of competent jurisdiction. O.C.G.A. § 34-9-11.1(a). However, any such cause of action must be filed within the applicable statute of limitations. O.C.G.A. § 34-9-11.1(b). In Georgia, the applicable statute of limitations for personal injury lawsuits is two years from the date the injury occurred. O.C.G.A. § 9-3-33. If the Employee does not file such an action within one year after his date of injury, then the Employer/Insurer may, but is not required to, assert the Employee's cause of action in tort, either in its own name or in the name of the Employee. O.C.G.A. § 34-9-11.1(c). O.C.G.A. § 34-9-11.1 further provides that once the Employer/Insurer files suit against the Third-Party Tortfeasor, it shall "immediately" notify the Employee that it has done so. Similarly, if the Employee files suit against the Third-Party Tortfeasor more than one year after the date of the accident, the Employee must likewise notify the Employer/Insurer that it has taken such action. In any event, Employer/Insurers and the Employee are entitled, as a matter of right, to intervene in any lawsuit filed by the other. O.C.G.A. § 34-9-11.1(c). See Canal Insurance Company v. Liberty Mutual Insurance Company, 256 Ga. App. 866, 570 S.E.2d 60 (2002); P.F. Moon and Company v. Payne, 256 Ga. App. 191, 568 S.E.2d 113 (2002).

Subsequent decisions of the Court of Appeals suggest that it is error not to allow an Employee or Employer/Insurer to intervene in a third-party tort action where the rights of the intervening parties have not been protected (such as when the statute of limitations has expired), where denial of the intervention would dispose of the intervening parties' cause of action, and where final judgment has not been entered. See Department of Administrative Services v. Brown, 219 Ga. App. 27, 464 S.E.2d 7 (1995); Payne v. Dundee Mills, Inc., 235 Ga. App. 514, 510 S.E.2d 67 (1998); see also P.F. Moon & Company v. Payne, 256 Ga. App. 191, 568 S.E.2d 113 (2002). The Court of Appeals has also held that a subrogation lien holder has no standing to appeal error in the underlying third-party tort action unless it intervenes at the trial level. Astin v. Callahan, 222 Ga. App. 226, 474 S.E.2d 81 (1996).

O.C.G.A. § 34-9-11.1 further provides that to the extent the Employer/Insurer has fully or partially paid any Workers' Compensation benefits, it maintains a subrogation lien consisting of all disability, death benefits and/or medical benefits it has paid to or on behalf of the Employee against the recovery against the Third-Party Tortfeasor. However, the Employer/Insurer is not entitled to collect its Workers' Compensation subrogation lien until it establishes that the Employee has been "fully and completely compensated, taking into consideration both the benefits received under this chapter [of The Georgia Workers' Compensation Act] and the amount of the recovery in the third-party claim, for all economic and noneconomic losses incurred as a result of the injury." O.C.G.A. § 34-9-11.1(b). This limitation on the Employer/Insurer's right to subrogation/ reimbursement is consistent with the legislature's concern that the injured Employee first be made whole. See North Brothers Company v. Thomas, 236 Ga. App. 839, 840, 513 S.E.2d 251, 253 (1999).

In addition, the Employer/Insurer cannot recover from any Third-Party Tortfeasor more than the total amount of death benefits, income benefits and medical benefits the Employer/Insurer has paid to the Employee. Any excess verdict or settlement funds must be paid over to the Employee. See O.C.G.A. § 34-9-11.1(c). This provision is incorporated into O.C.G.A. § 34-9-11.1 to prevent the Employer/Insurer from receiving a windfall from a large judgment against a Third-Party Tortfeasor. Fortunately, in one of the rare occasions that the drafters of O.C.G.A. § 34-9-11.1 have actually defined the terms contained in this code section, "employee" is defined as "not only the injured employee but also those persons in whom the cause of action in tort rests or survives for injuries to such employee." O.C.G.A. § 34-9-11.1(c).

In addition, the statute provides that in the event a recovery is made against a Third-Party Tortfeasor, the Employee's attorney is entitled to a reasonable fee for

services provided. However, if the Employer/Insurer have also retained counsel to protect their interests in the case, a court of competent jurisdiction (i.e., the trial court) shall, upon application, apportion the reasonable fee between the parties' respective attorneys. Any such attorney's fee is also subject to the provisions contained in O.C.G.A. §§ 15-19-14 and 15-19-15. See O.C.G.A. § 34-9-11.1(d). As with many of the provisions contained in O.C.G.A. § 34-9-11.1, the legislature did not indicate whether the Employee's attorney is entitled to a fee based on his representation of the Employee/Plaintiff, as commonly determined by a contingency fee contract, or whether it intended for counsel for the Employee/Plaintiff to be entitled to an additional attorney's fee to be deducted from the lien recovered by the Employer/Insurer. In any event, the attorney's fee comes "off the top" of the recovery. See O.C.G.A. § 34-9-11.1(b).

Due to the legislature's failure to define several critical terms or to provide procedures for dealing with subrogation liens with respect to actions filed against Third-Party Tortfeasors, Employees and their Employer/Insurers were initially given little guidance on how to implement and apply the terms of O.C.G.A. § 34-9-11.1. As such, the appellate courts have been forced to address these issues.

One of the most litigated of these issues is the "fully and completely compensated" requirement contained in O.C.G.A. § 34-9-11.1(b). Although the Employer/Insurer automatically possess a subrogation lien from the moment any Workers' Compensation benefits have been paid, they are not entitled to recover on that lien unless the evidence establishes that the Employee has been fully and completely

compensated, taking into account all Workers' Compensation benefits paid to the Employee along with his recovery in the third-party tort claim, for all economic and non-economic losses incurred as a result of the injury.

In several opinions, the Court of Appeals has held that the burden of proof is on the Intervenor lienholder to show that the Plaintiff employee has been fully and completely compensated pursuant to O.C.G.A. § 34-9-11.1. See Georgia Electric Membership Corporation v. Hi-Ranger, Inc., 275 Ga. 197, 563 S.E.2d 841 (2002) (citing Liberty Mutual Insurance



Company v. Johnson, 244 Ga. App. 338, 535 S.E.2d 511 (2000)); see also CGU Insurance Company v. Sabel Industries, Inc., 255 Ga. App. 236, 564 S.E.2d 836 (2002). The Georgia Supreme Court in Hi-Ranger further held that in cases where the lienholder has filed a direct action against a third-party Tortfeasor in the second year of the statute of limitations as set forth in O.C.G.A. § 34-9-11.1 and where the Claimant does not intervene in such an action, there is no requirement for the Plaintiff lienholder to establish that the Claimant was fully and completely compensated. This is because the Claimant waived this issue by failing to intervene in the action filed by the workers' compensation lienholder. See Georgia Electric Membership Corporation v. Hi-Ranger, Inc., 275 Ga. 197, 563 S.E.2d 841, 843 (2002).

Interestingly enough, the Courts have apparently decided that the "fully and completely compensated" standard is applied to each form of damages that can be awarded by the jury, and not the Employee's recovery from the Third-Party Tortfeasor as a whole. The different types of recoverable damages do not merge when determining whether the Employee has been "fully and completely compensated" in the context of O.C.G.A. § 34-9-11.1(b). This is reflected in such opinions as North Brothers Company v. Thomas, 236 Ga. App. 839, 513 S.E.2d 251 (1999) and Hammond v. Lee, 244 Ga. App. 865, 536 S.E.2d 231 (2000).

In North Brothers Company v. Thomas, the Court of Appeals applied its definition of "fully and completely compensated" to each kind of damages that can be awarded by a jury. In that case, the jury awarded Thomas \$25,000 for medical expenses, \$0 for lost wages, \$0 for loss of consortium, \$0 for attorney's fees and \$25,000 for pain and suffering. At the time the verdict was returned,

North Brothers and GAB Robins had maintained a subrogation lien consisting of \$61,844.89 in medical benefits and unspecified income benefits. In the opinion, the Court stated: "Where, for example, the employee's weekly wages exceeded the amount of the workers' compensation weekly benefit actually received, the employer would not be allowed to recover the weekly benefits paid unless and until such time as the employee has been compensated for the difference between the workers' compensation weekly benefit actually received and the employee's normal weekly wage." North Brothers Co. v. Thomas, 236 Ga. App. 839, 841-842, 513 S.E.2d 251, 253-254 (1999). Similarly, the Court held: "[t]he employee has not been fully compensated, and no subrogation claim would thus be permitted, if there

are any outstanding claims for medical expenses for which the employee would be liable, or there are other such items, for which damages are recoverable from the tort-feasor, for which workers' compensation provides no benefits." North Brothers Company v. Thomas, 236 Ga. App. 839, 842, 513 S.E.2d 251, 254 (1999).

This analysis was reiterated by the Court in Canal Insurance Company v. Liberty Mutual Insurance Company, 256 Ga. App. 866, 570 S.E.2d 60 (2002). In that decision, the Court held that: "Thus, where the recovery for medical expenses was more than sufficient to fully and completely compensate for all medical expenses incurred as a result of the injury, i.e., medical expenses paid by the insurer, by the employee, and for unpaid expenses, the insurer was entitled to a subrogation lien against the medical recovery up to the total of its lien." Canal Insurance Company v. Liberty Mutual Insurance Company, 256 Ga. App. 866, 873, 570 S.E.2d 60, 67 (2002). This language, contained in the Canal opinion, implies that the Court would determine that the Employee has not been fully and completely compensated where the jury verdict is insufficient to compensate him for the difference between the two-thirds of the average weekly wage paid under the Georgia Workers' Compensation Act and the Employee's actual wages. In such a case, the Employer/Insurer would not be allowed to recover the income benefits portion of the lien. Similarly, if the Employee has medical bills which have not been paid by the Employer/Insurer, and the verdict is insufficient to reimburse the Employee for such a difference, then the Court would find that he was not fully and completely compensated and would not allow the Employer/Insurer to recover the medical expense portion of the lien.

Finally, the North Brothers opinion also seems to indicate that whether the Employee has been awarded any pain and suffering, future lost wages, future medical expenses or his spouse's loss of consortium claim is irrelevant to determining whether the Employee has been "fully and completely compensated" as contemplated by O.C.G.A. § 34-9-11.1. Unfortunately, we will have to wait and see if future court decisions bear this out. Ultimately, the Court held in North Brothers that the Employee was "fully and completely compensated" as to medical expenses and allowed the Employer/Insurer/Intervenor to attach its lien to that portion of the jury's verdict. See also Hammond v. Lee, 244 Ga. App. 865, 536 S.E.2d 231 (2000).

The Court of Appeals has also held that evidence of contributory/comparative negligence and assumption of the risk are irrelevant to determining whether the Employee/Plaintiff has been fully and completely compensated. See Homebuilders Association of Georgia v. Morris, 238 Ga. App. 194, 518 S.E.2d 194 (1999); Canal Insurance Company v. Liberty Mutual Insurance Company, 256 Ga. App. 866, 570 S.E.2d 60 (2002). Although the Court agreed that these issues are proper in determining the liability of the Third-Party Tortfeasor to the Employee/Plaintiff, it has absolutely no bearing on determining full and complete compensation within the meaning of O.C.G.A. § 34-9-11.1(b). This issue normally arises when the Employee/Plaintiff settles his

claim against the Third-Party Tortfeasor/Defendant, leaving only the issue of whether the Employee has been "fully and completely compensated" to be determined by the Court or jury. However, in cases where the Employer/Insurer has brought a lawsuit directly against the Third-Party Tortfeasor pursuant to O.C.G.A. § 34-9-11.1(c), it steps into the shoes of the Employee and is subject to all liability defenses provided by law.

Another area of heavy litigation is the issue of whether and to what extent a Georgia Workers' Compensation subrogation lien attaches to each form of damages. It would seem that the legislature's use of the phrase "... the employer or such employer's insurer shall have a subrogation lien, not to exceed the actual amount of compensation paid pursuant to this chapter against such recovery" [emphasis added] would imply that the lien would attach to whatever damages a jury might award. However, the Georgia appellate courts have not interpreted O.C.G.A. § 34-9-11.1 in that manner. In North Brothers Company v. Thomas, the Court of Appeals held that a Georgia Workers' Compensation subrogation lien does not attach to a jury award for pain and suffering. North Brothers Company v. Thomas, 236 Ga. App. 839, 513 S.E.2d 251 (1999). The Court reasoned that since North Brothers did not pay any sums for pain and suffering as part of Employee Thomas' Workers' Compensation claim, and if the subrogation lien was allowed to attach to the jury's pain and suffering award, then the injured Employee would then not have been compensated for such losses. North Brothers Company v. Thomas, 236 Ga. App. 839, 841, 513 S.E.2d 251, 253 (1999).

In addition, the Court of Appeals held in Stewart v. Auto-Owners Insurance Company, that a Georgia Workers' Compensation subrogation lien does not attach to any benefits paid under an uninsured/underinsured motorist policy. Stewart v. Auto-Owners Insurance Company, 230 Ga. App. 265, 495 S.E.2d 882 (1998). The courts have also held that the appropriate statute of limitations with respect to initial claims for subrogation is two years, and not the twenty years afforded by O.C.G.A. § 9-3-22. See Newsome v. Department of Administrative Services, 241 Ga. App. 357, 526 S.E.2d 871 (1999).

Another heavily litigated issue is interpretation of the phrase "circumstances creating a legal liability against some person other than the employer" contained in O.C.G.A. § 34-9-11.1(a). This issue most often arises where an injured Employee settles his claim against a Third-Party Tortfeasor and his Insurer without satisfying or otherwise addressing the Employer/Insurer's subrogation lien. Often, the settlement release states that the Third-Party Tortfeasor does not admit any liability and that the parties to the release agree that the Employee has not been fully and completely compensated (even though this is an ultimate issue of fact to be determined by the court or jury). Once the agreement has been executed and funds disbursed, the Employee/Plaintiff dismisses his civil complaint with prejudice against the Third-Party Tortfeasor/Defendant without satisfying the subrogation lien. Often the Third-Party Tortfeasor argues that the Employer/Insurer's subrogation lien is extinguished

upon settlement and dismissal of the lawsuit.

This issue was initially addressed by the Court of Appeals in Rowland v. Department of Administrative Services, 219 Ga. App. 899, 466 S.E.2d 923 (1996). In Rowland, the Court held that settling the underlying tort action does not extinguish the Employer/Insurer's lien on the Employee/Plaintiff's recovery. Rowland v. Department of Administrative Services, 219 Ga. App. 899, 901, 466 S.E.2d 923, 925 (1996); see also Vigilant Insurance Company v. Bowman, 128 Ga. App. 872, 198 S.E.2d 346 (1973). Instead, the Employer/Insurer maintains a right to recover settlement proceeds from the Employee. Id.

"As a matter of general law, where the wrongdoer settles with the insured . . . without the consent of the insurer . . . with the knowledge of the insurer's payment and right of subrogation, such right is not defeated by the settlement." Rowland v. Department of Administrative Services, 219 Ga. App. 899, 902, 466 S.E.2d 923, (1996) (quoting Vigilant Insurance Company v. Bowman, 128 Ga. App. 872, 198 S.E.2d 346 (1973)). With this language, the Court of Appeals essentially held that if the Employee and the Tortfeasor settle their claim with knowledge of the Employer/Insurer's subrogation lien, then the Employer/Insurer is provided with a new cause of action in tort against all parties for settling the action in abeyance of the subrogation lien -- not just an action against the Employee. As such, the Employee, the Third-Party Tortfeasor and the Tortfeasor's Insurer are all potentially liable for the full extent of the Employer/Insurer's subrogation lien.

As a practical matter, exposure to double payments should prevent many insurance companies from settling claims against their insureds without also first resolving the subrogation lien. To some extent, the Third-Party Tortfeasor's Insurer can avoid the risk of double payments to the Workers' Compensation Employer/Insurer by withholding an amount of the settlement proceeds that would be sufficient to satisfy the subrogation lien and/or listing the Employer/Insurer as payee on the settlement check.

Of course, the new cause of action set forth in Rowland is only applicable if the Tortfeasor and his Insurer have notice of the subrogation lien. If they did not have notice, then they are not liable to the Employer/Insurer for the subrogation lien. Department of Administrative Services v. Deal, 220 Ga. App. 846, 470 S.E.2d 817 (1996). Similarly, settlement of an Employee's claim against the Third-Party Tortfeasor where the Employer/Insurer has not yet paid any Workers' Compensation benefits extinguishes the "lien." The Court of Appeals in Georgia Star Plumbing, Inc. v. Bowen reasoned that since the Employer/Insurer had not actually paid Workers' Compensation benefits at the time the settlement was executed, the Employer/Insurer did not have an effective lien as defined by O.C.G.A. § 34-9-11.1(b) to attach to any settlement proceeds. Georgia Star Plumbing, Inc. v. Bowen, 225 Ga. App. 379, 484 S.E.2d 26 (1997).

Although the issue of enforceable legal liability normally arises in the context of settlement between the Employee, the Third-Party Tortfeasor and its Insurer, it naturally follows that a defense verdict indicating no liability on the part of a Third-Party Tortfeasor invalidates the Employer/Insurer's lien pursuant to O.C.G.A. § 34-9-11.1(a). There is also no recovery against the Third-Party Tortfeasor to which the lien can attach. Id.

It should be stressed, however, that an Employer/Insurer should intervene in any action brought by the Employee/Claimant to insure that its subrogation lien will be protected. In Anthem Casualty Insurance Company v. Murray, the Employer/Insurer failed to do so and paid a heavy price. Anthem Casualty Insurance Company v. Murray, 246 Ga. App. 778, 542 S.E.2d 171 (2000). In that action, the Plaintiff and the Workers' Compensation insurance carrier, Anthem Casualty Insurance Company, entered into an agreement wherein the Plaintiff recognized Anthem's subrogation lien and agreed not to settle his claims without Anthem's approval. In return, Anthem agreed not to intervene in the Plaintiff's third-party tort claim. However, this agreement between the Plaintiff and Anthem did

not address how the lien would be handled in the event that the tort case was tried and judgment entered.

At trial, the jury returned with a general verdict of \$1.5 million. In a special interrogatory form, the jury also found that the Plaintiff was 20% negligent in causing his injuries. Although the Defendant satisfied the judgment against it, neither the Defendant nor the Plaintiff paid anything to Anthem. In response, Anthem sued both parties allegedly under the Court's holding in Rowland v. Department of Administrative Services. Eventually, the Defendants sought and received summary judgment. On appeal, the Court focused on the fact that Anthem had failed to intervene to protect its lien. In failing to do so, it allowed the Plaintiff and Defendant to utilize a general verdict form instead of a special verdict form. As held by the Court: "It is the responsibility of the workers' compensation provider to protect its interest by intervention and special verdict requests." Anthem Casualty Insurance Company v. Murray, 246 Ga. App. 778, 780, 542 S.E.2d 171, 174 (2000) (quoting North Brothers Co. v. Thomas, 236 Ga. App. 839, 841, 513 S.E.2d 251,253 (1999)).

The Court further held that by failing to follow the procedures contained in O.C.G.A. § 34-9-11.1 to protect its subrogation lien (i.e., moving to intervene and to request special jury verdict forms), Anthem was prevented from recovering its subrogation lien. Unfortunately, the holding of Anthem Casualty Insurance Company appears to be in conflict with the Court of Appeal's earlier holding in Rowland which suggested that parties with knowledge of a subrogation lien cannot ignore the lien in settling the Plaintiff's claim. As such, it would behoove the Employer/Insurer to intervene in any action by the Claimant where it maintains a subrogation lien. Failure to intervene and request special verdict forms can result in the trial court determining that the Employer/Insurer did not take adequate action to protect its lien. See Canal Insurance Company v. Liberty Mutual Insurance Company, 256 Ga. App. 866, 570 S.E.2d 60 (2002).

In International Maintenance

Corporation v. Inland Paper Board and Packaging, Inc., the Court of Appeals addressed the issue of what effect an Intervenor's rights have over the Plaintiff and Defendant's efforts to resolve the case in chief. International Maintenance Corporation v. Inland Paper Board and Packaging, Inc., 256 Ga. App. 752, 569 S.E.2d 865 (2002). In International Maintenance Corporation, the Court of Appeals held that although a workers' compensation insurer has the right to intervene in a pending action to protect its subrogation lien, such intervention does not affect the employee's power to direct his lawsuit against the third-party tortfeasor or settle the claim. International Maintenance Corporation v. Inland Paper Board and Packaging, Inc., 256 Ga. App. 752, 755-756, 569 S.E.2d 865, 869 (2002). In so holding, the Court has essentially eviscerated any power the Intervenor may have had to prevent settlement of a third party action without the Intervenor's consent or satisfaction of its lien. *Id.* However, the Court did not make any opinion on this issue in cases where the Insurer files suit against a third-party tortfeasor in the second year of the statute of limitations provided by O.C.G.A. § 34-9-11.1. See International Maintenance Corporation v. Inland Paper Board and Packaging, Inc., 256 Ga. App. 752, 756, 569 S.E.2d 865, 869 (2002).

Unfortunately, the Court further held that once a settlement between the Plaintiff and Defendant is consummated, the Intervenor cannot continue to pursue its lien against the Defendant. Instead, it can only continue to claim recovery from settlement proceeds already in the hands of the Plaintiff employee. International Maintenance Corporation v. Inland Paper Board and Packaging, Inc., 256 Ga. App. 752, 756-757, 569 S.E.2d 865, 869-870 (2002). Furthermore, the Court held that there is no legal basis for forcing a Plaintiff to place settlement funds in a constructive trust pending resolution of the Intervenor's subrogation lien. International Maintenance Corporation v. Inland Paper Board and Packaging, Inc., 256 Ga. App. 752, 756, 569 S.E.2d 865, 869 (2002).

The rights of the Intervenor suffered another setback with the Court of Appeals' decision in City of Warner Robins v. Baker. 255 Ga. App. 601, 565 S.E.2d 919 (2002). In Baker, the trial court granted Plaintiff Baker's motion to extinguish the City of Warner Robins' subrogation lien on the basis that the subrogation lien was unenforceable. *Id.* Unfortunately, the City of Warner Robins did not intervene in the underlying tort claim in an effort to protect its subrogation lien. City of Warner Robins v. Baker, 255 Ga. App. 601, 602, 565 S.E.2d 919, 921 (2002). The Court of Appeals held that in order to protect its subrogation lien, a Workers' Compensation Insurer is required to intervene in the underlying tort action. See City of Warner Robins v. Baker, 255 Ga. App. 601, 604, 565 S.E.2d 919, 922 (2002). If the Insurer fails to do so, it has not adequately protected its lien. *Id.*

In dicta, the Court further intimated that a settlement in the third-party tort claim, where the release does not differentiate what types and amounts of damages are paid in consideration of the settlement agreement, acts as a general verdict form. See City of Warner Robins v. Baker, 255 Ga. App. 601, 604-605, 565 S.E.2d 919, 922-923 (2002). As indicated by the Court:

When the employee has received a jury award, an appellate court cannot determine from a general verdict form what portion of an award was meant to compensate the employee for economic losses and what portion was meant to cover noneconomic losses. The same is true when the employee negotiates a settlement of his claim against the tortfeasor and the settlement is a lump sum. A reviewing court cannot determine from the settlement documents what portion of the settlement was allocated to economic losses and what portion was meant to compensate for noneconomic losses. The result is that the lien cannot be enforced, because full and complete compensation cannot be shown.

See City of Warner Robins v. Baker, 255 Ga. App. 601, 604-605, 565 S.E.2d 919, 922-923 (2002) (citing North Bros. Co. v. Thomas, 236 Ga. App. 839, 841, 513 S.E.2d 251 (1999)). However, it should be noted that this language represents dicta and does not necessarily represent the Court's holding with respect to lump sum settlements. However, it is indicative of the direction the Court is taking with respect to settlements where the Plaintiff and Defendant do not differentiate what monies are attributable to which damages.

One issue that is currently in flux is whether an Employer/Insurer/Intervenor is entitled to a jury trial on whether the Employee has been "fully and completely compensated." In Sommers v. State Compensation Insurance Fund, the Court held that the Employer/Insurer/Intervenor is not entitled to a jury trial if they waive it. Sommers v. State Compensation Insurance Fund, 229 Ga. App. 352, 494 S.E.2d 82 (1997). In Liberty Mutual Insurance Company v. Johnson, Judge Yvette Miller held for the Court of Appeals that Employer/Insurers are not entitled to a jury trial on the "fully and completely compensated" issue. Judge Miller based this decision on the fact that the right to subrogation is derivative of the Workers' Compensation Act and not common law. As such, the constitutional guarantee of a jury trial does not apply. Therefore, the trial court must determine this issue and not a jury. See Liberty Mutual Insurance Company v. Johnson, 244 Ga. App. 338, 535 S.E.2d 511 (2000). However, the Court of Appeals in Hammond v. Lee indicated fifteen days later that a bifurcated jury trial was appropriate to determine whether the Employee was fully and completely compensated as contemplated by O.C.G.A. § 34-9-11.1. See Hammond v. Lee, 244 Ga. App. 865, 536 S.E.2d 231 (2000).

Based on its holding in Canal Insurance Company v. Liberty Mutual Insurance Company, it appears that the Court of Appeals is adopting its holding in Johnson and distancing itself from its contrary holding in Hammond. In Canal Insurance Company, the Court of Appeals reiterated that the trial court, and not the jury, must determine whether the Claimant/injured Employee has been fully and completely compensated as contemplated by O.C.G.A. § 34-9-11.1. Canal Insurance Company v. Liberty Mutual Insurance Company, 256 Ga. App. 866, 870, 570 S.E.2d 60, 65 (2002).

However, the Court in Canal Insurance Company reiterated its prior holding in Hammond v. Lee that any trial involving a subrogation lien would need to be bifurcated. As held by the Court:

Where the employer or insurer has intervened, the bifurcation of the tort action trial and determination of tort damages first is appropriate to avoid revealing to the jury that the employee has already recovered a collateral source, the workers' compensation benefits. In the first portion of the bifurcated trial, a special verdict form rather than a general verdict should be used to determine what recovery is returned for medical expenses, lost wages, and pain and suffering, because the subrogation cannot be satisfied out of a noneconomic recovery.

See Canal Insurance Company v. Liberty Mutual Insurance Company, 256 Ga. App. 866, 870-871, 570 S.E.2d 60 (2002) (citing Hammond v. Lee, 244 Ga. App. 865, 868-869, 536 S.E.2d 231 (2000); North Bros. Company v. Thomas, 236 Ga. App. 839, 840-841, 513 S.E.2d 251 (1999); Bartow County Board of Education v. Ray, 229 Ga. App. 333, 335, 494 S.E.2d 29 (1997); Dept. of Administrative Services v. Brown, 219 Ga. App. 27, 28, 464 S.E.2d 7, 8 (1995)). The Court further held that by agreement of the parties or by failure of a party to timely object, the trial court can still submit the issue to the jury. Id. at 871.

Another issue awaiting determination by the Courts is what items constitute disability benefits, death benefits and medical benefits in the context of O.C.G.A. § 34-9-11.1(b). O.C.G.A. § 34-9-11.1 provides that the Employer/Insurer's subrogation lien is comprised of disability benefits, death benefits and medical expenses paid to or on the Employee's behalf under the Georgia Workers' Compensation Act. O.C.G.A. § 34-9-11.1(b). Although it seems clear that disability benefits would encompass all temporary total, temporary partial and permanent partial disability benefits, the Courts have not determined whether salary paid in lieu of Workers' Compensation benefits is considered a disability benefit in the context of O.C.G.A. § 34-9-11.1(b). See O.C.G.A. §§ 34-9-261, 34-9-262 and 34-9-263. Death benefits, as defined by O.C.G.A. § 34-9-265, include burial/funeral expenses and death benefits paid to the Employee's dependents. Medical expenses would include

anything paid pursuant to O.C.G.A. §§ 34-9-200, 34-9-200.1 and 34-9-202. However, since O.C.G.A. § 34-9-11.1 does not provide for attorney's fees, expenses, fines or penalties incurred in litigating the underlying Workers' Compensation claim, those amounts are not recoverable as part of a subrogation lien.

Yet another area that was ripe for judicial interpretation is whether the Employer/Insurer can include future benefits owed to the Employee under the Workers' Compensation Act. Most often, this issue arises where the Employee has received a permanent impairment rating pursuant to O.C.G.A. § 34-9-263, yet no permanent partial disability benefits have been paid because the Employee remains partially or totally disabled. The benefits have already accrued pursuant to O.C.G.A. § 34-9-263 but have not been paid because the Employee is still receiving Temporary Total Disability (TTD) or Temporary Partial Disability (TPD) benefits. See O.C.G.A. § 34-9-263(b) (2). The issue also arises in the context of death benefits paid to the children of the Employee pursuant to O.C.G.A. §§ 34-9-13 & 34-9-265. Death benefits are automatically payable to the deceased Employee's children until they reach 18 years of age. Since Permanent Partial Disability (PPD) benefits and death benefits, as illustrated above, have already accrued and must be paid at some point in the future by the Employer/Insurer, it would make sense that they should be included in the subrogation lien. However, the language contained in O.C.G.A. § 34-9-11.1 suggests that the lien consists only of benefits "paid" to the Employee under the Georgia Workers' Compensation Act.

In CGU Insurance Company v. Sabel Industries, Inc., the Court of Appeals held that a lienholder was only allowed to recover for income, medical and death benefits already paid (not accrued) to or on behalf of the injured/deceased Employee. CGU Insurance Company v. Sabel Industries, Inc., 255 Ga. App. 236, 564 S.E.2d 836 (2002). Even though future benefits, such as those under O.C.G.A. § 34-9-265, may have already accrued, there is no lien for such benefits unless they

have actually been paid. Similarly, no Workers' Compensation lien can attach to future medical expenses and lost wages. Id.; see also Harrison v. CGU Insurance Company, 269 Ga. App. 549, 604 S.E.2d 615 (2004).

Also, keep in mind that O.C.G.A. § 34-9-11.1 is only applicable when benefits have been paid to the Employee under the Georgia Workers' Compensation Act. See O.C.G.A. § 34-9-11.1(a). In a recent opinion entitled Johnson v. Comcar Industries, Inc., the Court of Appeals held that there currently is no substantive law that allows Employer/Insurers who have paid Workers' Compensation benefits under another state's law to intervene in a tort action pending in Georgia. Johnson v. Comcar Industries, Inc., 252 Ga. App. 625, 556 S.E.2d 148 (2001); see also Tyson Foods, Inc. v. Craig, 266 Ga. App. 443, 597 S.E.2d 520 (2004). The Court based its holding on an earlier opinion where the Court of Appeals held that Georgia law governs any right of subrogation in Georgia. Unfortunately, O.C.G.A. § 34-9-11.1 is the only substantive Georgia code section that provides for the recovery of a Workers' Compensation subrogation lien. Since O.C.G.A. § 34-9-11.1 provides that the Employer/Insurer's right to subrogation is limited to benefits paid under the Georgia Workers' Compensation Act, the Employer/Insurer cannot intervene in a Georgia tort case to protect a lien based on benefits paid under another state's law.

In Simpson v. Southwire Company, the Court of Appeals addressed the apportionment of attorney's fees issue. O.C.G.A. § 34-9-11.1(d) provides that upon application by a party, the Court can apportion a reasonable fee between the attorney for the injured employee and the attorney for the Employer/Insurer in proportion to the services rendered. In Simpson, the Intervenor moved the Court to apportion the Plaintiff attorney's fee based on alleged efforts by Counsel for the Intervenor/Employer/Insurer in assisting the Plaintiff/Injured Employee in procuring a recovery in the underlying action. The Court held that since the Intervenor/Employer/Insurer did not recover anything on its subrogation

lien, it did not have a right to seek apportionment of Counsel for Plaintiff/Injured Employee's attorney's fee. See Simpson v. Southwire Company, 249 Ga. App. 406, 548 S.E.2d 660 (2001).

O.C.G.A. § 34-9-11.1(c) provides that during the second year of the statute of limitation for personal injuries, a Workers' Compensation Employer/Insurer can bring an action against a third party to recover its subrogation lien in either its own name or that of the Claimant. See O.C.G.A. § 34-9-11.1(c). As a result of this code provision, there is an issue of whether the "prior case pending" provisions of O.C.G.A. § 9-2-5 apply in situations where the Insurer files an action in the injured Employee's name to recover its lien before that same Employee files his own action to recover for personal injuries. In Janet Parker, Inc. v. Floyd, the Court held that the prior case pending provisions of O.C.G.A. § 9-2-5 do not apply where the Workers' Compensation Employer/Insurer brings an action to recover its subrogation lien in its own name. The Court of Appeals held that in such a circumstance, there would be no privity of parties or causes of action so as to invoke O.C.G.A. § 9-2-5. See Janet Parker, Inc. v. Floyd, 269 Ga. App. 59, 603 S.E.2d 485 (2004). However, it appears that the Court left open the possibility that O.C.G.A. § 9-2-5 would apply to actions filed by an injured Employee after the Employer/Insurer had filed its suit in the Claimant's name to recover its lien. Id. Future opinions from the Court of Appeals should clarify this issue.

Finally, the Georgia Supreme Court has also determined that O.C.G.A. § 34-9-11.1 does not confer any special substantive rights to Employer/Insurers or Employees, nor does it affect the statutory immunity provisions contained in O.C.G.A. § 34-9-11. Warden v. Hoar Construction Company, 269 Ga. 715, 507 S.E.2d 428 (1998).

PRACTICAL APPLICATION OF O.C.G.A. § 34-9-11.1

Clearly, the law concerning the application of O.C.G.A. § 34-9-11.1 to third-party tort claims is likely to remain in flux for an extensive period of time; however, the following guidelines should prove useful in avoiding unnecessary litigation concerning Workers' Compensation subrogation liens.

1. Special Jury Verdict Forms

If the matter should go to trial, keep in mind that there is no presumption that the Employee has been "fully and completely compensated" simply because the jury verdict exceeds the actual amount of Workers' Compensation benefits paid by the Employer/Insurer or the amount of special damages proven. Instead, the Employer/Insurer has the burden of establishing that the Employee/Plaintiff has been fully and completely compensated as contemplated by O.C.G.A. § 34-9-11.1. Bartow County Board of Education v. Ray, 229 Ga. App. 333, 494 S.E.2d 29 (1997); see also Georgia Electric Membership Corporation v. Garnto, 266 Ga. App. 452, 597 S.E.2d 527 (2004); Paschall Truck Lines, Inc. v. Kirkland, 287 Ga. App. 497, 651 S.E.2d 804 (2007).

Absent evidence in the record reflecting the jury's intent, a general verdict form is usually insufficient to establish that the Employee has been fully and completely compensated for all economic and non-economic damages he has incurred as a result of his injury. Id. In Ray, the Court indicated in dicta that the only way the trial court can determine whether an Employee has been "fully and completely compensated" with a general verdict form is where the verdict is less than the proven economic losses or where the verdict is the same as the amount of damages sought. The Employee would be fully and completely compensated in the latter situation, but not in the former. Bartow County Board of Education v. Ray, 229 Ga. App. 333, 334-335, 494 S.E.2d 29, 30-31 (1997). For that reason, the Courts have repeatedly urged the use of a special jury verdict form. Department of Administrative Services v. Brown, 219 Ga. App. 27, 464 S.E.2d 7 (1995); Bartow County Board of Education v. Ray, 229 Ga. App. 333, 494 S.E.2d 29 (1997); North Brothers Company v. Thomas, 236 Ga. App. 839, 840, 513 S.E.2d 251, 253 (1999); Hammond v. Lee, 244 Ga. App. 865, 536 S.E.2d 231 (2000); Canal Insurance Company v. Liberty Mutual Insurance Company, 256 Ga. App. 866, 570 S.E.2d 60 (2002).



Similarly, a general verdict form does not reflect whether the jury believes that some of the Employee's injuries were caused in a previous accident or elsewhere. It would also not reflect whether the jury believed that the Employee was disabled for a lesser period of time than he received disability benefits under the Georgia Workers' Compensation Act. Special interrogatories incorporated into a special verdict form can address these issues and cut down on appeals.

2. Alternative Resolution of Subrogation Lien

Attorneys for Employees and Employer/Insurers should also consider alternative methods of dealing with a subrogation lien.

3. Bifurcated Trial

One option that will maximize both the Employee and Employer/Insurer's recovery in the third-party tort suit is use of a bifurcated trial. This method of trying the case was used successfully by this firm in Hammond v. Lee. See Hammond v. Lee, 244 Ga. App. 865, 536 S.E.2d 231 (2000). In phase one of the trial, Employee's claim against the Third-Party Tortfeasor is tried before the jury. During this phase of the trial, counsel for the Employer/Insurer does not participate, and no reference is made to the fact that the Employee has received any Workers' Compensation benefits. In addition, the Employer/Insurer submits an affidavit indicating the amount of benefits paid to the Employee with supporting documentation into evidence to preserve the record on appeal in the event the jury returns a defense verdict and the case is appealed. A special verdict form is used to determine what specific damages the jury may award to the Employee. Presuming there is a plaintiff's verdict during the first phase of the trial, the parties begin phase two of the trial. During this phase, the Employer/Insurer presents evidence to the same jury on the issue of whether the Employee has been fully and completely compensated for his injuries as contemplated by O.C.G.A. § 34-9-11.1.

As held by the Court of Appeals in Hammond v. Lee, it is appropriate to bifurcate the trial in this manner to prevent the interjection of collateral source payments and insurance into the Employee's case against the Defendant. Hammond v. Lee, 244 Ga. App. 865, 536 S.E.2d 231 (2000). Similarly, the Employer/Insurer is able to present its case about "full and complete compensation" without interjecting contributory/comparative negligence into the trial. North Brothers Company v. Thomas, 236 Ga. App. 839, 841, 513 S.E.2d 251, 253 (1999).

4. File a Third-Party Lawsuit Immediately after the First Anniversary of the Claimant's Accident Date.

Filing a lawsuit on behalf of the insurer immediately after the first anniversary of the Claimant's accident places the insurer in the "driver's seat" of the litigation and can determine when and for how much the case will settle. However, this approach also increases legal costs and expenses in that the full financial cost of the litigation is being borne by the Employer/Insurer and not the Claimant. However, if the Claimant fails to intervene in the Insurer's lawsuit prior to settlement, current case law suggests that the Insurer would not need to prove full and complete compensation to recover its lien. This is an option that needs to be exercised only after the Insurer has made an informed decision as to the costs of litigation as they compare to the overall extent of its lien.

5. If Contemplating Pursuit of Subrogation Lien Recovery,

Do Not Settle the Claim on a No-Liability Basis or Pay Benefits under Another State's Workers' Compensation Act.

As indicated above, an Insurer has no right to bring a subrogation lien claim in Georgia based on benefits paid under another state's Workers' Compensation Act. However, an Employer/Insurer can avoid this

predicament in cases where there is subrogation potential by accepting the claim as compensable and paying benefits (when available) pursuant to the Georgia Workers' Compensation Act. In doing so, the Employer/Insurer is afforded the protections of O.C.G.A. § 34-9-11.1 and can intervene in a Georgia action to recover its lien.

Similarly, be careful when settling the underlying Workers' Compensation claim. If the claim is settled on a no-liability stipulation and release, the parties are agreeing that the Employee's injury did not arise out of and in the course of his employment with the Employer and is not compensable. See O.C.G.A. § 34-9-1 et seq. O.C.G.A. § 34-9-11.1 provides, as a prerequisite to asserting a subrogation lien, that benefits must be paid under the Georgia Workers' Compensation Act. Since a no-liability stipulation and release specifically provides that the alleged injury is not compensable, the Employer/Insurer cannot seek reimbursement for such a settlement under O.C.G.A. § 34-9-11.1.

CONCLUSION

O.C.G.A. § 34-9-11.1 has provided Employer/Insurers with a method of seeking reimbursement for Workers' Compensation benefits paid to an Employee who was injured by a third party while protecting Employees' interests in first being made whole. Though O.C.G.A. § 34-9-11.1 was not well drafted initially, subsequent interpretation by the Georgia appellate courts has provided some guidance in determining each respective party's rights and obligations with respect to Workers' Compensation subrogation liens. Unfortunately, the appellate courts' decisions have also substantially eroded the rights of Workers' Compensation lienholders. Nevertheless, by reasonably interpreting the terms of O.C.G.A. § 34-9-11.1 and applying recent appellate decisions, Employees and Employer/Insurers are given a more complete framework for handling subrogation liens and hopefully avoiding reversal on appeal. **WC**

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Civil RICO: Another End Run on the Exclusive Remedy Provision?

John G. Blackmon, Jr
John D. Bennett

While the workers' compensation system is intended to provide speedy relief for injured workers, its benefits are limited by schedule. Pain and suffering is not compensated and there is no means of obtaining "heightened damages" even though some injuries can be quite severe, even devastating. And in some cases, there is conduct either by the employer or insurer that could, for lack of a better description, "inflamm" a jury. As a result, an employee occasionally will try and find a means to get his or her case out of the workers' compensation system and into the civil courts. To do so, he or she must hurdle the exclusive remedy provision, sometimes succeeding, sometimes not. *Potts v. UAP-GA, Ag Chem, Inc.*, 270 Ga. 14 (1998); compare *Aetna Casualty & Surety Co. v. Davis*, 253 Ga. 376 (1984).

On October 23, 2008, the United States Court of Appeals for the Sixth Circuit issued a decision in a Michigan case involving allegations under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, and a claim for damages for intentional infliction of emotional distress. Several employees of Cassens Transport Company filed suit in federal district court against their employer, its workers' compensation servicing agent, and at least one physician, Dr. Saul Margules, a family practitioner. *Brown v. Cassens Transport Company et al.*, No.05-2089 (6th Cir. Oct. 23, 2008). In a nutshell, the plaintiffs alleged that Cassens, along with its servicing agent and certain "cut off" doctors, engaged in a pattern of racketeering activity that fraudulently denied their workers' compensation benefits. The district court dismissed the case and initially was affirmed by a divided panel of the Sixth Circuit. However, the Supreme Court vacated that judgment, and remanded the matter for further consideration.

The opinion was long on analysis

and rather short on facts, at least detailed specifics about the alleged conduct of the defendants. The court described the conduct as follows:

Specifically, the plaintiffs alleged that Cassens and [the servicing agent] deliberately selected and paid unqualified doctors, including Margules, to give fraudulent medical opinions that would support the denial of workers' compensation benefits, and that defendants ignored other medical evidence in denying them benefits. The plaintiffs claimed that the defendants made fraudulent communications amongst themselves and to the plaintiffs by mail and wire in violation of 18 U.S.C. §§ 1341, 1343, which serve as the predicate acts for their RICO claims.

To understand the decision, a short explanation of RICO is necessary. The Act was passed in 1970 with the goal of eliminating organized crime. However, it subsequently became a tool used by civil lawyers because of the treble damages provision along with the assessment of costs and attorney's fees. Many civil RICO claims involve mail or wire transactions, and must be based on a "predicate act," which is conduct that violates one of the specific statutes set forth in 18 U.S.C. § 1961. For a claim to be actionable, it must be shown that the defendant:

- (1) through the commission of two or more acts;
- (2) engaged in a pattern of racketeering activity (predicate acts) during a defined time period;
- (3) which directly or indirectly affected interstate or foreign commerce.

At the outset, the court of appeals took up the issue of whether the plaintiffs sufficiently pleaded the required elements of a RICO claim. Citing to at least 13 predicate acts reportedly involving fraudulent communications by mail and wire, including "communications among

the defendants and communications from the defendants to the plaintiffs relating to each of the plaintiffs' injuries and claims for benefits" under the Michigan Worker's Disability Compensation Act (WCDA), the court held that they had. It then addressed the "relationship-plus-continuity standard." The court again found in favor of the plaintiffs for two reasons. First, the predicate acts they had alleged were related because they had the same purpose, which was the fraudulent denial of workers' compensation benefits, and involved the same participants. Second, the predicate acts were continuous "under either a closed- or open-ended theory." Finally, the court held that the complaint sufficiently pleaded that the plaintiffs' injuries were the result of a pattern of racketeering involving fraud that deprived them of worker's compensation benefits causing them to incur attorney's fees and medical expenses. The court rejected the defendants' argument that reliance on a misrepresentation was required as an element of a civil RICO claim predicated on mail fraud.

After addressing the sufficiency of allegations, the court of appeals turned its attention to the question of whether allowing the plaintiffs to proceed with a civil RICO claim ran afoul of the McCarran-Ferguson Act, 15 U.S.C. § 1011. That Act allows the states to regulate the business of insurance without federal government interference. The issue was whether the Michigan WCDA fell into the protected area known as the "business of insurance," which the district found to be the case. The Sixth Circuit ruled that the WCDA was, in essence, a public regulation of the employment relationship and a substitute for the court system as opposed to a contractual relationship between employees and employers. The purpose of the WCDA was not to regulate the business of insurance, but rather "a mandatory, public regulation of the tort-liability relationship

between employers and employees...” According to the court, “the employer is not akin to an insurer because it had a preexisting duty under common law to compensate for workplace injuries, and worker’s compensation merely creates a legislative remedy regarding the tort-liability relationship between employers and employees rather than a regulation of the contractual insurance relationship that underlies ‘the business of insurance.’” In the Sixth Circuit’s view, there was “no insurer and no insured.” The fact that the WDCA was separate and apart from Michigan’s Insurance Code also had an impact on the court. Going further, the Sixth Circuit noted that “even in the absence of these conclusions that preclude reverse preemption, the defendants’ insurance-provisions theory would not support their reverse preemption argument” because the employer self insured. The court finally held that by allowing plaintiffs to proceed with a RICO claim would not invalidate, impair or supersede the WDCA since “those subject to these laws can comply with both simultaneously.” As a result, Sixth Circuit reversed the district court and rejected the defendants’ argument that the WDCA reverse preempted RICO under *McCarran-Ferguson*.

After holding that the plaintiffs sufficiently stated a RICO claim, the Sixth Circuit took up the dismissal of the intentional infliction of emotional distress claims. Under Michigan law, elements to such a claim are: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. Ironically, and after having accepted at face value the plaintiffs’ allegations for the RICO claim, specifically that unqualified doctors were used to give fraudulent opinions to deny benefits, the court held that the defendants’ alleged conduct did not meet Michigan’s standard for outrageous conduct. The Sixth Circuit then affirmed the district court’s dismissal of the intentional infliction of emotional distress claims. Perhaps the court had some misgivings about these allegations after all.

Aside from the fact that RICO is very complicated, and has been criticized as an abusive tool in a civil setting, allowing windfall damages, the most critical aspects of the court’s decision are its analysis of insurance in the context of a workers’ compensation system and the impact on those subject to an act by allowing a RICO claim to proceed. Insurance may not have played a significant role decades ago, but it does now. Unless the system is funded by the state government, benefits come from either insurance carriers or via self insured plans that are approved by the state. The district court held that the WDCA was an “integral part of [the] policy relationships between [the] insurer and [the] insured.” *Brown v. Cassens Transport Co.*, 409 F.Supp.2d 793, 809 (2005). It pointed out that the WDCA was “limited to entities within the insurance industry” and “does not include entities outside of the insurance industry simply because it reaches employees, whom one could characterize as either the insured or the beneficiaries of the insurance.” *Id.* On the issue of whether RICO impaired the WDCA, the district court

held that “imposing liability under the RICO Act upon employers beyond that which the WDCA permits robs those employers of the benefits to which they are to receive from the WDCA’s policy balance.” *Id.* at 811.

Assume that this case had been filed in Georgia. Our court of appeals once remarked that “workmens statutory compensation...is more like benefits provided ex contractu under a policy of insurance.” *Gay v. Greene*, 91 Ga. App. 78 (1954). If an employer is subject to the Georgia Workers’ Compensation Act, it must either carry workers’ compensation insurance or be a qualified self insurer unless exempted by law. Title 34-9 dedicates two articles to the administration of insurance and self insurance, even referencing Title 33 in O.C.G.A. § 34-9-122. Title 33, specifically O.C.G.A. 33-7-3(2), provides that a workers’ compensation policy is casualty insurance. It also addresses cancellation, renewal and non-renewal of workers’ compensation policies along with other aspects relating to those policies of insurance. Policies must be approved and workers’ compensation insurance carriers are regulated both by the State Board and the Office of Insurance and Fire Safety Commissioner. In fact, our State Board’s web page reflects that it “regulates and licenses approximately 300 companies and 100 governmental entities...and 400 insurance companies who write policies of workers’ compensation.” To say that a workers’ compensation system is not a “business of insurance” is an incorrect statement in this day and age. The district court’s decision should have been affirmed.

If the allegations are found to be true, and hopefully this is not the case, then the plaintiffs should be compensated and the defendants should pay. RICO is not the proper route. An improper denial of medical care or lost time benefits can be dealt with by the State Board. If an individual knowingly and intentionally makes false or misleading statements, civil fines may be assessed under O.C.G.A. § 34-9-18 along with penalties, attorney’s fees and costs. If the conduct is criminal, then it can be punished under O.C.G.A. § 34-9-19. If there is fraud that is unconnected to the employment, or an intentional tort that cannot be remedied under the Act, then the employee can file a civil suit. *Potts, supra*; *Oliver v. Wal-Mart Stores, Inc.*, 209 Ga. App. 703 (1999). Thus, RICO need not come into play.

In sum, not only did the Sixth Circuit incorrectly decide that a workers’ compensation system is not actively involved in the regulation of the business of insurance, but a RICO action is duplicative in terms of remedying the matter and excessive in its damages. As held by our supreme court, another purpose of the workers’ compensation system is to protect employers from excessive damage awards. *Samuel v. Baitcher*, 247 Ga. 71 (1981). That is exactly what the district court had in mind when it held that a RICO Act claim did impair the WDCA. Had this matter been pending in Georgia, all of the plaintiffs’ complaints could have been addressed and remedied within the confines of the Georgia Workers’ Compensation Act. **WC**

Recent Appellate Court Decisions in Workers' Compensation

By Neil C. Thom

A.B. Bishop & Associates, LLC

***L & S Construction et al. v. Lopez*, 290 Ga.App. 611, 660 S.E.2d 1 (2008)**

Decided 26 November 2007.

The State Board of Workers' Compensation found the claimant was an employee of L & S Construction ("L & S"), which was a subcontractor for Bob St. John Construction, LLC ("St. John"), and awarded indemnity and medical benefits. The ALJ also ordered L & S and its workers' compensation insurer to pay assessed attorney fees to the claimant and St. John. The State Board's Appellate Division affirmed the award of benefits but reversed the award of attorney fees. The Appellate Division specifically found that L & S defended the claim reasonably, having presented evidence that the claimant was employed by an uninsured individual and not L & S, which would have triggered liability on St. John's part as the statutory employer. The superior court reversed, finding that "there were no reasonable grounds to dispute the employment status of the injured worker."

The Court of Appeals reversed the superior court based on the "any evidence" rule. "An employer's defense of a claim may be reasonable even if it is not ultimately successful." *Autry v. Mayor etc. of Savannah*, 222 Ga.App. 691, 692, 475 S.E.2d 702 (1996).

***Coker v. Great American Insurance Company*, 290 Ga.App. 342, 659 S.E.2d 625 (2008)**

Decided 19 February 2008.

Coker was injured at work for Mayo Company, Inc., ("Mayo") when most of his fingers were amputated in a metal cutting accident. He sued Great American Insurance Company ("Great American") and Deep South Surplus of Georgia ("Deep South"), both of whom had performed safety inspections of the employer's premises prior to the accident

in connection with Mayo's workers' compensation policy with American National Fire Insurance Company ("American National"), a wholly owned subsidiary of Great American.

Great American moved for summary judgment on the basis that it is immune from suit, since its wholly owned subsidiary was Mayo's workers' compensation insurer and, as the alter ego of Mayo, enjoyed the tort immunity provided by the exclusive remedy doctrine. The trial court granted summary judgment, and the Court of Appeals affirmed. The parent corporation of a subsidiary that is entitled to immunity as the "alter ego" of the employer, against whom suit is barred by the exclusive remedy doctrine, is entitled to the same immunity.

***McLeod v. Blase*, 290 Ga.App. 337, 659 S.E.2d 727 (2008)**

Decided 18 March 2008.

McLeod, a professional basketball player, brought a professional malpractice action against Blase, a certified athletic trainer. Both parties were employed by the Atlanta Hawks at the time of the alleged malpractice. McLeod claimed that Blase's treatment of the former's work-related injury had been negligent and had resulted in that injury's becoming permanent. Blase moved for summary judgment, asserting that as an employee of the same employer, he enjoyed tort immunity created by the exclusive remedy provision of the Workers' Compensation Act. (O.C.G.A. § 34-9-11(a)) The trial court granted summary judgment.

McLeod argued on appeal that the courts have created an exception to exclusive remedy to allow tort suits against company-employed physicians. (*Downey v. Baxley*, 253 Ga. 125, 317 S.E.2d 523 (1985); *Davis v. Stover*, 258 Ga. 156, 366 S.E.2d 670 (1988)) Since Blase was a licensed medical professional providing professional

services, the exception should apply. The Court of Appeals declined to expand further the *Downey* and *Davis* exception to co-employee immunity beyond physicians and affirmed summary judgment.

***Smart Document Solutions, LLC v. Hall*, 290 Ga.App. 483, 659 S.E.2d 838 (2008)**

Decided 24 March 2008.

Smart Documents Solutions, LLC ("Smart Documents"), a company providing photocopying services to medical providers, filed a declaratory judgment action against the State Board of Workers' Compensation and several Board members. Smart Documents sought guidance regarding the appropriate fee schedule to be used when copying records in connection with workers' compensation proceedings.

The Health Records Act, in O.C.G.A. § 31-33-3, establishes a fee schedule for medical records copying; the State Board of Workers' Compensation has a different schedule that establishes lower fees. The trial court granted the State Board's motion to dismiss the complaint. It held that the Health Records Act's express exemption for "records requested in order to make or complete an application for a disability benefits program" applied to records requested in connection with workers' compensation proceedings.

On appeal, Smart Documents argued that the workers' compensation scheme does not qualify as a "disability benefits program," since it encompasses a range of issues broader than disability only. Smart documents further argued that the Health Records Act's exemption applied only to records requested in connection with "applications" for a disability benefits program, and that workers' compensation claimants do not file an application.

The Court of Appeals rejected both arguments and affirmed the trial court's

dismissal of the Smart Documents complaint. Considering the workers' compensation scheme as a whole and looking for the legislature's intent, the Court held that the Workers' Compensation Act's focus on injury and disability clearly demonstrate that the legislature intended it to function as a disability benefits program. Looking to the ordinary and common meaning of the term "application", the Court held that a claim or request for workers' compensation relief was unquestionably an "application."

Of particular note is that in neither this Court of Appeals case nor in the proceedings below was any exception made for copying records of treatment for conditions other than those caused by an accepted work injury. Since the Court of Appeals held that the State Board has authority to regulate medical photocopying charges "in workers' compensation proceedings", one may reasonably conclude that the Workers' Compensation Fee Schedule applies to any and all records sought in connection with the "proceedings" and not just for treatment of the work injury itself.

Sherman Concrete Pipe Co., et al. v. Chinn, **283 Ga. 468, 660 S.E.2d 368 (2008)**

Decided 21 April 2008.

Chinn's husband sustained fatal work-related injuries on 16 January 1990, and death benefits to Chinn were commenced. After about 13 years, the Georgia Insurers Insolvency Pool began handling the claim and suspended benefits, asserting that the maximum 400 weeks had been paid. Chinn moved for reinstatement of benefits.

Prior to 1989, O.C.G.A. § 34-9-13(e) provided that "[t]he dependency of a spouse and a partial dependent shall terminate at age 65 or after payment of 400 weeks of benefits, whichever is greater." The code section was amended in 1989 to provide that "[t]he dependency of a spouse and a partial dependent shall terminate at age 65 or after payment of 400 weeks of benefits, whichever occurs first." Effective 1 July 1990, the code section was amended again to provide that "[t]he dependency of a spouse and of a partial dependent shall terminate at age 65 or after payment of 400 weeks of benefits, whichever provides greater benefits."

Chinn argued that the version of O.C.G.A. § 34-9-13(e) applicable to her claim's accident date violated *Ga. Const. of 1983 Art. III, Sec. V, Para. III*, which provides: "No bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof." The title of the 1989 enacting legislation was "Official Code of Georgia Annotated – Corrections and Reenactment". The stated purpose of the legislation was characterized by the Supreme Court as, basically, "housekeeping": e.g., correcting typographical and punctuation errors and modernizing language.

An administrative law judge of the State Board ruled against Chinn. On review, the State Board's Appellate Division affirmed the ALJ's award. In doing so, however, it noted that it believed the 1989 version of O.C.G.A. § 34-9-13(e) was, in fact, unconstitutional, but that it had no jurisdiction to make

such a ruling. The superior found that the code section was unconstitutional and reversed the Board's denial of Chinn's request for reinstatement.

Holding that the 1989 change to O.C.G.A. § 34-9-13(e) was "a significant substantive alteration" to which the legislation's title would not alert an unknowing legislator, the Supreme Court affirmed the lower court's ruling and found the change was in violation of the Georgia Constitution.

Parham v. Swift Transportation Company, Inc., **663 S.E.2d 769 (Ga. Ct. App. 2008)**

Decided 18 June 2008.

The claimant began feeling ill while unloading his truck and received hospital treatment, where he was diagnosed with a likely urinary tract infection and acute renal failure with no history of any apparent renal problems. The employer's workers' compensation insurer denied his claim for medical benefits on the basis that the treatment was not for a work injury. The claimant's group health insurer likewise denied payment of the bill on the basis that the treatment was for a work-related condition (although the group insurer did pay bills from physicians who treated the claimant at the hospital). The hospital's discharging physician noted that no definitive cause identified for the infection or the renal failure, but that it was "possible that the patient had some renal failure secondary to his extreme labor in the hot weather." The claimant testified that his physical exertion in the heat caused his hospitalization. The ALJ awarded benefits, and the Appellate Division affirmed.

The superior court reversed the Board's decision, finding that the Board relied on only equivocal medical evidence about the cause of the renal failure. The Court of Appeals held that the superior court's reversal of the Board was error. The Board may believe the claimant's testimony over the testimony of an expert witness, and the claimant's testimony provided the "any evidence" necessary to require an affirmation of the Board's award.

The Court of Appeals pointed out that the superior court's reliance on *AFLAC, Inc. v. Hardy*, 250 Ga.App. 570, 552 S.E.2d 505 (2001), was misplaced, since *Hardy* involved a heart attack, which requires that claimant's meet a higher standard of proof than other medical conditions.

Freeman v. Brandau, **664 S.E.2d 299 (Ga. Ct. App. 2008)**

Decided 26 June 2008.

The Fulton County sheriff and eight sheriff's department employees were sued by deceased court reporter's daughter and estate executrix on the grounds that the sheriff's and employees' negligence allowed an inmate to escape custody, obtain a gun, and shoot the court reporter. The sheriff moved to dismiss the complaint, asserting that the suit was barred by the exclusive remedy provision of the Workers' Compensation Act because he and the court reporter were co-employees. The trial court, treating the motion as one for partial summary

judgment, denied it. The trial court rejected the plaintiffs' claims that the reporter was an independent contractor and that Freeman was not a county employee. The denial was based on what the trial court found to be a unique duty owed by the sheriff to protect judges and their staffs, and that the sheriff could be held liable for breaching that duty.

The Court of Appeals affirmed the trial court, but on different grounds. The Court of Appeals noted that if the reporter and the sheriff had both been county employees, the suit would be barred pursuant to exclusive remedy. The Court found, however, that the sheriff was not a county employee, but an elected constitutional county officer. The Workers' Compensation Act provides that elected county officers may be considered employees if the county's governing authority provides therefor by resolution, but there was no evidence that Fulton County had done so. Having found that the sheriff was not a county employee, exclusive remedy could not apply, and it was unnecessary for the Court to address whether the reporter was an employee or an independent contractor. Likewise, it was unnecessary to determine whether the "unique duty" asserted by the trial court could overcome the Workers' Compensation Act's exclusive remedy provision.

United Grocery Outlet v. Bennett, Case No. A08A0677 (Ga. Ct. App. 2008)

Decided 27 June 2008.

More than two years after the last payment of temporary total disability (TTD) to a workers' compensation claimant, the claimant requested reinstatement of benefits based on a change in condition. The employer denied the request on the basis that the claim was barred by the two-year limitation in O.C.G.A. § 34-9-104(b). The claimant argued that the limitation period was tolled by the employer's failure to serve certain forms required by Board Rules. The ALJ denied benefits, and the Appellate Division affirmed. The superior court reversed, finding the claimant was entitled to benefits.

The Court of Appeals, looking to

the plain language of O.C.G.A. § 34-9-104(b), reversed the superior court. "Nothing in the statutory language tolls this period pending compliance with rules regarding the filing and service of board forms," although an employer who fails to file and serve required forms may be subject to civil penalties. The Court of Appeals also rejected the claimant's argument that the employer's failure to serve required forms notifying her of the TTD suspension deprives her of due process, since she had actual knowledge of the date of the last payment.

Rheem Manufacturing Company v. Butts, Case No. A08A0428 (Ga. Ct. App. 2008)

Decided 8 July 2008.

Rheem employee went to employer's on-site medical clinic complaining of knee pain. After several visits to different doctors at the on-site facility, the employee was referred to an outside orthopedist, whereupon an MRI showed a cancerous tumor in the employee's leg. The employee sued the employer and two of the on-site facility's doctors, alleging negligent delay of diagnosis and treatment of his cancer. When he died thereafter, his widow was substituted as plaintiff and filed a separate wrongful death action. The employer moved for summary judgment, and the trial court denied the motion. The Court of Appeals reversed and remanded with instruction to enter summary judgment in favor of the employer.

The Court of Appeals held that the injury alleged by the employee and his widow was essentially the aggravation of pre-existing, non-work-related cancer by the doctors' negligence. It arose in the course of his employment, since the aggravation occurred during work hours on the employer's premises at a place where the employee was reasonably expected to be in connection with his employment. It arose out of his employment because it occurred while he was doing something incidental to his duties by seeking medical care for knee pain occurring on the job.

If the doctors were co-employees,

the suit is barred by exclusive remedy. If the doctors were not co-employees, the employer cannot be liable for their malpractice pursuant to O.C.G.A. § 34-9-203(b). Liability under the Workers' Compensation Act was not at issue, and the Court's decision leaves open the possibility that an employer can be found liable for the consequences of its physician's malpractice if that malpractice aggravates a preexisting, unrelated condition.

McLendon v. Advertising That Works, Case No. A08A0768 (Ga. Ct. App. 2008)

Decided 10 July 2008.

On 14 March 2005, the claimant filed a WC-14 identifying an accident date of 16 July 2004. On 12 July 2005, the claimant filed another WC-14, purporting to provide an amended first date of accident of 8 June 2004. At hearing, the claimant confirmed on the record that the July 2004 injury date was dismissed with prejudice. The employer moved to dismiss the 8 June 2004 claim on the grounds that it was barred by the one-year statute of limitations. The claimant argued that the 12 July 2005 was an amendment to the 14 March 2005 filing and "related back" to the original filing date. The ALJ disagreed and ruled that the 8 June 2004 claim was barred by the statute of limitations. The Appellate Division and the superior court affirmed.

The claimant argued that his injury was on or about 8 June 2004, but that he could not remember the date when he filed the WC-14. The July 2004 accident date identified on that WC-14 was later found to be in error in light of information found in medical records. The record showed, however, that on 8 March 2005 the claimant signed two attorney fee agreements that identified, *inter alia*, both the June and July accident dates. Furthermore, the March 2005 filing on the July 2004 injury claimed TTD and PPD, but only PPD was claimed in the July 2005 filing on the June 2004 injury. The Court found, therefore, that there was at least some evidence to support the Board's conclusion that the first assertion of the 8 June 2004 claim was on 12 July 2005, more than a year later.

The Court of Appeals also rejected the claimant's argument that O.C.G.A. § 9-11-15(c), which provides that certain amended pleadings in civil matters relate back to the date of the original filing, should apply. The Civil Practice Act does not have mandatory application to workers' compensation cases, except where statute specifically calls for such application. Even if O.C.G.A. § 9-11-15(c) were applicable, there was at least some evidence that the two filings in question did not arise out of the same conduct, transaction, or occurrence, which would preclude relating back.

Keystone Automotive v. Hall, Case No. A08A0086 (Ga. Ct. App. 2008)

Decided 10 July 2008.

The employee, a route salesman, reported to work as usual but was later discovered unconscious beside his truck outside of a warehouse bay door on the employer's premises. He never regained consciousness and died after three weeks of hospitalization. His widow filed a claim for workers' compensation benefits. The treating physician found the cause of death was "cardiopulmonary arrest most likely due to underlying cardiac dysrhythmia." Another physician found that the most likely explanations for the employee's cardiac arrest were that he "could have" suffered primary ventricular hypertrophy or her "could have" had a markedly slow or absent pulse from a cardiac conduction system failure.

The ALJ found in favor of the widow, citing *Zamora v. Coffee General Hospital*, 162 Ga.App. 82, 290 S.E.2d 192

(1982), which held that where a dead or dying employee is found where the employee would reasonably be expected to be while on the job and where the death is unexplained, there is a presumption that the death is compensable. The Appellate Division reversed in a 2-1 decision, concluding that the *Zamora* presumption did not arise, since all of the medical evidence indicated the employee died of a naturally occurring event unrelated to his work. The superior court reversed, finding that the absence of any evidence of what exactly caused the cardiopulmonary arrest, there was no evidence to suggest a non-work-related cause of death.

The Court of Appeals affirmed, agreeing that the Board failed to distinguish between the immediate cause of death (which was known) and the precipitating cause of death (which was never shown). Because the precipitating cause was unknown, the presumption of compensability applied.

2008 Legislative Changes

HB 1186 Subsequent Injury Trust Fund

Amend O.C.G.A. §34-9-358 and §34-9-368:

These sections were amended to change certain provisions relating to payment of assessments to the Subsequent Injury Trust Fund by insurers and self-insurers; to provide for a reserve of surplus funds to be maintained by the administrator of the Fund; and to provide for disbursement of any remaining balance in the Fund once all bona fide claims have been paid. **WC**

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