



# WORKERS' COMPENSATION LAW

Spring 2008 • John Blackmon, Editor

Section Newsletter

## NOTES FROM THE CHAIR

By Ann Baird Bishop  
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The 2007-08 year is coming to a close and the Workers' Compensation Section has thrived. We have over one thousand members and we hope to continue to grow in the coming years. The Executive Committee (Joe Leman, Staten Bitting, Cliff Perkins, Lynn Olmert, Gary Kazin, John Blackmon, John Christy and I) has worked hard to develop a system that will serve all of us over the years to come. Among the changes we have made in an effort to improve our service to the Section and the Workers' Compensation community at large are the following: (1) appointing the Executive Committee member in the 2<sup>nd</sup> year slot as Editor of the

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## Don't Overlook Other Income Benefits

By Michael J. Hofrichter  
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When representing your client in a workers compensation claim, it is easy to focus solely on those benefits. Quite frequently, your client may also be eligible for other income benefits such as those from the Social Security Administration and employer-sponsored disability plans. While you certainly do not need to know how to handle those claims, you should at least be able to identify when your client may be eligible for these benefits and how such benefits interact with workers compensation benefits. Here are a few issues which commonly arise in our firm's representation of our WC, SSD and LTD/ERISA clients.

### Look for other benefits during the initial client interview.

Your client comes to you for help after a disabling work injury and is often not sophisticated enough to know that income benefits may come from several sources. The two most common companion claims to a WC claim are Social Security Disability (SSD) and employer-sponsored short or long term disability benefits. Do not assume that your client is not eligible for these benefits just because they do not mention it as many employees are unaware of such benefits. At a minimum, be aware that such benefits may exist and ask direct questions to your client regarding these claims.

Not all employers offer short term disability (STD) or long term disability (LTD) coverage, although STD benefits are more common and usually last 180 days. For LTD benefits, there is no one-size-fits-all plan/policy. Benefits vary from a flat monthly amount to a percentage of benefits, generally 60

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# Principles of Statutory Construction in Georgia Workers' Compensation Law

By Nancy Glenn  
Nancy Glenn, P.C.

The Georgia Workers' Compensation Act ("the Act") is to be liberally construed "to effectuate the humane purposes for which it was enacted." It's a phrase that you see frequently as a practitioner of workers' comp law, and it is the most well-known principle of statutory construction. However, there are two other lesser known principles of statutory construction in Georgia workers' compensation law. A 1994 amendment to the Act calls for liberal and *impartial* construction, and there is case law standing for the proposition that the Act is to be *strictly* construed. This article examines the different statutory construction principles and suggests uses for each.

## Humane Purposes Doctrine

Liberally construing the Act to effectuate the humane purposes for which it was intended is the oldest and most commonly used statutory construction principle. Just what are the humane purposes underlying the Act? The courts have provided various explanations over the years. According to one of the most commonly quoted "humane purpose" decisions, *Lumberman's Mut. Cas. Co. v. Griggs*, 190 Ga. 277 (1940), the purpose of the Act "is to alleviate human suffering and to contribute to human need when accidental injury is suffered in the manner prescribed by the statute." *Lumberman's Mut. Cas. Co.* at 288. Another humane purpose is to provide immediate financial relief to injured workers. *Travelers Ins. Co. v. Southern Electric, Inc.*, 209 Ga. App. 718 (1993). Another such purpose is to protect employers against excessive damage awards. *Dekalb Collision Center, Inc. v. Foster*, 254 Ga.App. 477 (2002).

Georgia courts have quoted the liberal construction/humane purposes language in

cases involving a wide variety of issues. One of the most common uses is in sufficiency of notice cases. In *Schwartz v. Grennbaum*, 236 Ga. 476 (1976), the Georgia Supreme Court quoted the humane purposes language and held that an employee's notice of injury need not indicate that the injury arose of and in the course of employment. *Schwartz* has been frequently cited for the humane purposes doctrine, in notice cases and in an array of other cases. See, for example, *Edgeman v. Organic Chemical Corp.*, 173 Ga.App. 4 (1984) holding that the Board can award a lump sum with a credit to be taken against future PPD benefits; *Gossage v. Dalton Fire Dept.*, 257 Ga. 430 (1987) holding that the employee need not state that the accident or injury occurred on the job; *Franks v. Avila*, 200 Ga.App. 733 (1991) holding that employee need not obtain a judgment against his immediate employer before proceeding against the statutory employer.

Interestingly, Georgia courts do not use the humane purposes language only when the ruling is in favor of the employee. To the contrary, the decisions often acknowledge the humane purposes underlying the Act in cases where the ruling is against the injured worker. See, e.g., *Collie Concessions v. Bruce*, 272 Ga.App. 578 (2005) (parking lot exception did not apply); *Williams v. Atlanta Family Restaurants, Inc.*, 204 Ga.App. 343 (1992) (claimant outside the scope of employment); *Dekalb Collision Center, Inc. v. Foster*, 254 Ga.App. 477 (2002) (negligence suit barred by exclusive remedy).

## Liberal and Impartial Construction under OCGA §34-9-23

A second statutory construction principle, closely related to the liberal construction/hu-

mane purposes language, is found in the Act. O.C.G.A. §34-9-23, enacted in 1994, mandates liberal and *impartial* construction. That code sections provides,

This chapter shall be liberally construed only for the purpose of bringing employers and employees within the provisions of this chapter and to provide protection for both. This chapter is intended to provide a complete and exclusive system and procedure for the resolution of disputes between employers and employees who are subject to this chapter concerning accidents and injuries arising out of and in the course of employment as defined by this chapter. The provisions of this chapter shall be construed and applied impartially to both employers and employees.

The 1994 amendment (“the amendment”) deviates from case law by leaving out the “humane purposes” language and by expressly requiring impartial application of the Act. This provision seems to narrow the liberal construction principle by requiring liberal construction “only for the purpose of bringing employers and employees within the [Act].” However, in the seminal case, *Maloney v. Gordan County Farms*, 265 Ga. 825 (1995), the Georgia Supreme Court implied that the humane purposes principle is to be considered along with the more narrow statutory construction required by OCGA §34-9-23. Rejecting the requirement that an employee attempting to establish a change of condition show that prospective employers did not hire the employee because of his disability, the *Maloney* Court stated, “This additional requirement ... contravenes the principle that the Workers Compensation Act be interpreted liberally ‘to effect the humane purposes for which it was enacted’. See also OCGA §34-9-23.” (citations omitted) *Maloney* at 828.

Following the *Maloney* decision, the amendment was cited in a hodgepodge of cases. Although the decisions make reference to the limited liberal construction called for in the amendment, the rulings often reflect an ap-

plication of the broader liberal construction for humane purposes principle. For example, in *Pringle v. Mayor & Aldermen of Savannah*, 223 Ga.App. 751 (1996), the Court held that the Board can require employers to provide handicap-accessible housing to workers injured on the job. In *Housing Authority, City of Cartersville v. Jackson*, 226 Ga.App. 182 (1997), the Court of Appeals held that an employer-employee relationship can exist under the Act even where there was no payment of wages or other compensation. In both cases, the Court made reference to the amendment and emphasized that the liberal construction required by the amendment is limited in scope.

In *Cartersville Ready Mix Co. v. Hamby*, 224 Ga. 116 (1996), the Georgia Supreme Court focused less on the limited liberal construction mandated by the amendment and instead, stressed that the purpose of the amendment is to require *impartiality* in enforcement of the Act. In that case, the Court held that the penalty for late payment set forth in OCGA §34-9-221(e) is “compensation” within the meaning of OCGA §34-9-221 (h) and a notice to controvert will be considered timely only if all accrued benefits and penalties are paid within the time frame specified therein. The Court explained the amendment by stating,

OCGA §34-9-23 requires even-handed treatment of both employer and claimant. We act even-handedly when we apply the Act as it is written. Just as the claimant must meet the statute’s requirements in order to qualify for benefits, so must the employer adhere to the procedural requirements in order to controvert the claim.

### **Cartersville Ready Mix Co. at 119.**

Given the amendment’s call for liberal construction “for the purpose of bringing employers and employees” within the Act, a more logical use of the amendment has been in statutory immunity cases. In *England v. Beers Construction Co.*, 224 Ga.App. 44 (1996), for example, the issue was whether

a general contractor and a property owner were entitled to tort immunity provided by OCGA §34-9-11. Determining that the contractor was entitled to immunity, the Court quoted OCGA §34-9-23 in its entirety and noted that it was “bound by” the statute. Although the Court offered no analysis of the amendment, the decision that the employer was entitled to immunity is consistent with the amendment’s requirement that the Act be liberally construed for the purpose of bringing employers within its provisions.

### Strict Construction

In direct contrast to the liberal construction principles found in case law and in the amendment, Georgia courts have also suggested that the Act is to be *strictly* construed. The Court of Appeals explained the strict construction doctrine in *Mackenzie v. Sav-A-Lot Food Store*, 226 Ga.App. 32 (1997). In that case, the issue was whether the superior court’s order had any legal effect given its untimely entry. The Court found that the provisions of OCGA §34-9-105(b) rendered the superior court’s order a nullity because

the order was not entered in accordance with the time limits set forth in that code section. In so holding the Court stated,

The Workers’ Compensation Act, OCGA §34-9-1

et seq., is a legislative creation. In complete derogation of the common law, *the provisions of the Act must be strictly construed* as the act derives its own authority and power, as well as the authority and power it confers on others, solely from the provisions the legislature has crafted. (citations omitted) (emphasis added)

### Mackenzie at 33.

Application of the strict construction principle makes sense in a situation like the one in *Mackenzie* because *Mackenzie* involved the effect of noncompliance with filing deadlines. Strict construction of procedural rules benefits all parties by providing for

fairness and predictability in the process. However, the strict construction principle has been cited in cases involving very different issues. For example, in *Abernathy v. City of Albany*, 269 Ga. 88 (1998), the Georgia Supreme Court cited the strict construction principle in declining to expand the meaning of “injury” to include psychological injuries not accompanied by physical



injuries. Similarly, in *Union City Auto Parts v. Edwards*, 263 Ga.App. 799 (2003), the Court rejected the claimant's argument that he should be awarded compensation for aggravation of pre-existing hernias. In so doing, the Court again emphasized that the Act is in derogation of the common law and as such its provisions must be strictly construed.

The strict construction rule came up once more in *Goswick v. Murray County Board of Education*, 281 Ga.App. 442 (2006). In *Goswick* the Court held that "duly qualified physician" as used in OCGA §34-9-202(a) includes the claimant's treating physician. In support of its ruling the Court stated, "This accords with our obligation to strictly construe the workers' compensation statute." (citations omitted), *Goswick* at 444.

The Court also advocated the strict construction principle in *Coker v. Deep South Surplus of Georgia, Inc.*, 258 Ga.App. 755 (2002). In *Coker* the injured worker filed a negligence suit against a third party, Deep South. The trial court granted summary judgment to Deep South on the grounds that it was entitled to immunity as the alter ego of the employer, Mayo. The Court reversed the summary judgment ruling and stated, "*Because the Workers' Compensation Act is in derogation of common law, its provisions must be strictly construed. Strictly construing the above-emphasized immunity provision of OCGA §34-9-11(a), ... Deep South is not Mayo's alter ego and is not immune from suit.*" (footnote omitted) (emphasis added) *Coker* at 756.

It is worth noting that both the *England* case, above, and the *Coker* case dealt with statutory immunity. The amendment was cited in the *England* case where the statutory immunity was held to apply to an employer, but strict construction principles were cited in finding that it did not apply to the third party in *Coker*.

## Practical Considerations

As the foregoing discussion illustrates, Georgia appellate courts make frequent reference to statutory construction principles in workers' compensation cases. However, there is not a clear pattern of use for the different statutory construction rules. Nevertheless, it is useful to argue principles of statutory construction. Even though the "humane purposes" language was left out of the 1994 amendment, that concept is alive and well, and counsel for employees can and should argue it, along with the provisions of the amendment. The liberal construction/humane purposes language is routinely cited in sufficiency of notice cases, and counsel for employees should argue humane purposes/liberal construction in those claims. Also, given the amendment's mandate that liberal construction be used for the purpose of bringing employees within the Act, it makes sense to rely on the amendment where the issue is whether the injury arose in the scope of and in the course of employment.

Counsel for employers should certainly always argue the impartiality component of the amendment. Counsel for employers or third parties will also want to rely on the amendment's call for liberal construction when arguing for statutory immunity.

So how should the *strict construction* case law be used? Putting aside the argument that strict construction of the Act is never appropriate, since liberal construction is mandated by statute, the courts have shown a willingness to rely on strict construction in rejecting attempts to expand the meaning of "injury" as used in the Act. Also, counsel for employers *and* employees will want to argue for strict construction of the Act in cases involving noncompliance with procedural rules—provided their opponent is the party with the noncompliance problem. **WC**

# Impeachment Under Georgia Law

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Impeachment of a witness is the process by which the laws of evidence allow the attorney to call into question the credibility of a person who is testifying at a trial. There are several ways to impeach a witness, which include: 1) showing that the witness is biased for or against a certain party, 2) showing that the witness has made prior inconsistent statements, 3) showing that the witness had a physical or mental limitation, and therefore could not have accurately perceived the events he is testifying about, and 4) showing that the witness has a reputation for dishonesty, which is most often shown by prior criminal convictions.

One of the strongest forms of impeachment is the prior criminal conviction. Until recently, the longstanding rule in Georgia stated that a witness in a civil case may always be impeached by proof of a conviction for a felony or other crime involving “moral turpitude.” In other words, if the witness had been convicted of a felony in the past, the impeaching attorney could question the witness about the conviction, in hopes that the jury would give less weight to the witness’ testimony. The impeaching attorney could also question the witness about any conviction, including misdemeanors, so long as the crime was a crime of “moral turpitude.” One court defined “moral turpitude” as “an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.” *Carruth v. Brown*, 202 Ga. App. 656, 658 (Ga. App. 1992). In general, the offenses of obtaining money from another by fraud or false pretenses or larceny after

trust were considered crimes involving moral turpitude. *Id.*

Until the recent Georgia Court of Appeals case of *Adams v. State*, Georgia case law found the misdemeanor crime of shoplifting to be a crime of moral turpitude, which by law, allowed an attorney to impeach a witness who had previously been convicted of shoplifting. *Tilley v. Page*, 181 Ga. App. 98, 100 (Ga. App. 1986) (holding that shoplifting is a form of theft or larceny, and such offenses have previously been held to involve moral turpitude) *rev’d* on other grounds.

In 2005, the Georgia legislature enacted O.C.G.A. § 24-9-84.1 to establish guidelines for the use of criminal convictions to impeach witnesses or defendants who testify at trial. O.C.G.A. § 24-9-84.1 (a) (3) states, “[e]vidence that any witness or the defendant has been convicted of a crime shall be admitted if it involved dishonesty or making a false statement, regardless of the punishment that could be imposed for such offense.” Rather than codifying the existing standard found in Georgia case law for crimes involving “moral turpitude,” the Georgia legislature chose to use the language of the Federal Rules of Evidence Rule 609 (a) (2). Therefore, because the Georgia legislature adopted the language in the Federal Rules of Evidence, Georgia courts would logically turn to federal case law for guidance in its interpretation of the new statute.

In *Adams v. State*, 284 Ga. App. 534 (Ga. App. 2007), the court found the defendant’s prior misdemeanor conviction of theft by receipt of stolen property was not a crime involving dishonesty within the meaning of

O.C.G.A. § 24-9-84.1 (a) (3). The court in *Adams v. State* was not asked to rule on the issue of whether misdemeanor shoplifting was a crime involving dishonesty, however, the court discussed the crime of shoplifting in its opinion.

The court in *Adams v. State*, found that the United States Court of Appeals for the Eleventh Circuit has held that crimes such as theft, robbery, or shoplifting do not involve “dishonesty or false statement” within the meaning of the Federal Rules of Evidence Rule 609 (a) (2). The court further stated that, for impeachment purposes, crimes of “dishonesty” are limited to those crimes that bear upon a witness’s propensity to testify truthfully. The court cited the case of *United States v. Ashley*, 569 F2d 975, 979 (5th Cir. 1978) for its holding that shoplifting was not a conviction involving dishonesty or false statement within the meaning of Rule 609 (a) (2). For guidance, the court in *Adams v. State* looked at the Conference Committee Notes to the federal rule, and found that crimes involving “dishonesty and false statement” include crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify truthfully.

The newly enacted O.C.G.A. § 24-9-84.1 still allows for any felony conviction to be

used to impeach a witness, so long as the probative value of admitting the evidence outweighs its prejudicial effect to the witness, and not more than 10 years has passed since the conviction or release from the confinement imposed, unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. Additionally, if an attorney intends to use a prior criminal conviction more than 10 years old, the attorney must provide the adverse party sufficient advance written notice of intent to use such evidence to provide the

adverse party with a fair opportunity to contest the use of such evidence. If the proponent fails to provide such notice, the prior criminal conviction (if more than 10 years old) will not be admissible to impeach the witness.



The Georgia legislature’s recent passage of O.C.G.A. § 24-9-84.1 and the Georgia Court of Appeals decision in *Adams v. State* has sparked an interesting debate about what crimes should be characterized as crimes involving dishonesty. The court in *Adams v. State* pointed out that many states have differing opinions on whether to allow prior convictions of shoplifting, receipt of stolen property, and other forms of larceny to be used to impeach a witness’ testimony. Many practitioners and lay persons would consider someone who robs, steals, or receives stolen goods knowing they were stolen to be a dishonest or deceitful person. The Georgia Court of Appeals, however, disagrees. **WC**

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Newsletter for that year; (2) appointing the individual in the 3<sup>rd</sup> year slot to be in charge of the Section meeting/reception at the mid-year meeting; (3) appointing the individual in the 4<sup>th</sup> year slot as the person in charge of making our Section's annual report to the State Bar; (4) appointing the Executive Committee Member in the 5<sup>th</sup> year slot as the individual in charge of handling the Distinguished Service Award; and (5) assisting in disseminating emails, through the State Bar, that are of interest to our Section. In addition, the Section's payment for publication of *A Just and Noble Cause, a History of Workers' Compensation in Georgia* has been completed and our Section is back in the black.

Joe Leman will take over as Chairman of the Section for 2008/2009 and he has planned a wonderful seminar at Sea Palms. I hope all of you can come. Staten Bitting will follow Joe as Chair for 2009/2010 and did a fantastic job in planning and executing the annual seminar for the General Practitioner which was held this spring at State Bar headquarters.

Most of you have heard about the changes in the annual dinner to benefit Kids' Chance which is held on the Thursday night of the seminar. This year the dinner is a Low Country Boil prepared by the chef at Blackwater Grill and will be held off site in conjunction with a Casino party along with our annual silent auction. We hope to raise more money than ever before in honor of the 20 year anniversary of Kids' Chance, the brainchild of Bob Clyatt, a former Chair of our Section. Please make plans to attend and support our Section's charity which, by now, has been copied by most other states.



If you have not already done so, please send your email address to Liesa Gholson, Director of Process Improvement and Oversight at the State Board. Because we are moving into full utilization of ICMS, it is important for the Board to have the email addresses of all participants in the system. The State Bar is unable to release a list of email addresses of Section members, so Liesa must develop that list and needs your help. The Board will appreciate your sending your email address to Liesa at [gholsonl@sbwc.ga.gov](mailto:gholsonl@sbwc.ga.gov).

Please continue to support our Section and the State Board and do all you can to assist in the important work that we do to assist in furthering the system that helps both injured workers and employers. It is truly *A Just and Noble Cause*. I can't tell you how much I have enjoyed my year as Chairman and how strongly I encourage each of you to get involved. You will get as much as you give. Thanks for a great year.

--Ann Bishop



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percent of basic monthly earnings, excluding bonuses and overtime. Some LTD plans/policies pay for only two years, some for life (not many of these) but most pay to age 65 or to regular retirement age. Most LTD plans/policies have a change in definition of disability after two years (own occupation to any occupation) and have a two-year cap on disabilities caused by psychiatric conditions.

If your client does not know if their employer offers STD or LTD benefits, then either you or your client should contact the plan administrator at the employer and request a copy (by certified mail) of the Summary Plan Description for short and long term disability benefits and a copy of any insurance policies which fund these benefits. Go ahead and request an application for such benefits, too. Once received, read through the plan and/or policy to determine the amount and length of benefits, the definition of disability and any applicable offsets. Encourage your client to apply for such benefits, if eligible. Failure to take these simple steps could cost your client a lot of money in lost disability benefits. Don't dawdle, either. Most disability plans have a "proof of loss" provision requiring that a claim be made in a certain amount of time, sometimes as short as 90 days.

In addition to STD and LTD benefits, the Social Security Act offers monthly cash benefits to disabled workers who have reported a prescribed amount of income to the Social Security Administration (SSA). A claimant is "fully insured" if their Earnings Record shows income in 20 out of 40 quarters (5 out of 10 years) prior to the onset of disability. Eligible persons receive roughly what their retirement benefits would be and are also eligible for Medicare 24 months following entitlement to monthly income benefits. If your client has earned enough credits to qualify for SSD benefits and will be totally disabled for twelve months or more, encourage them to file for

SSD benefits regardless of whether you believe they will prevail. They may begin the process by filing an application for benefits at their local SSA office, calling 1-800-772-1213 or by applying online at [www.ssa.gov](http://www.ssa.gov). If your client comes to you after a denial of SSD benefits, make sure they understand that they only have 60 days to file their appeal. Failure to timely appeal may cause them to have to begin anew. Currently, the average processing time in metro Atlanta (initial application to date of hearing) is as long as three years, so it is important to not miss any appeal deadlines.

### **Should a claimant delay filing for SSD benefits if a WC settlement is likely?**

To avoid the Medicare Set Aside (MSA) process, some attorneys often give bad advice by recommending to their client that they delay filing for SSD benefits until their WC claim has resolved. The theory is that if their client has applied for SSD/Medicare then an MSA becomes more likely. If the WC claim can be settled within twelve months from the date of injury/disability, then there may be no harm in advising the client to delay applying for SSD benefits. However, if the WC claim will last more than twelve months, have good reasons why you tell your client to delay filing for SSD benefits. Although there is no statute of limitations to file an SSD claim (we recently won a case with a disability date as far back as 1971), SSA only allows a claimant to recover twelve months of back benefits from the date of application. If your client waits more than twelve months from the date of disability to file for SSD benefits, they will lose out on back benefits and may blame you for bad advice if you told them to wait. Another problem is that the current length of a typical SSD claim is so long that if your client delays filing for a year or longer, he is only tacking another year or more onto an already lengthy process. There is no bright line rule on this issue as such decision is weighed on a case-by-case

basis, but we generally do not recommend to our clients that they wait to file for SSD benefits if the WC claim will last more than twelve months.

### **Does receipt of WC benefits affect entitlement or amount of SSD or LTD benefits?**

Receipt of monthly WC benefits may affect the amount of monthly SSD benefits. For low wage earners, there will likely be a significant offset against monthly WC benefits. For higher wage earners, there may be no offset at all. See 42 U.S.C. § 424a (a)-(b) for the formula to calculate SSD benefits. SSA does not offset for STD or LTD benefits. Fortunately, when a WC settlement is reached, the law allows the claimant to spread out the net proceeds from the settlement over the remainder of his lifetime, thus dramatically reducing the amounts from being deducted from future SSD benefits.

Almost all employer-sponsored disability plans/policies will have benefit “offset” language, allowing for a dollar-for-dollar reduction of gross LTD benefits by the claimant’s receipt of other income benefits, such as SSD, WC, VA, other disability benefits, retirement, third party settlements, etc., including amounts for dependent benefits in the case of SSD benefits. It is not uncommon for a large monthly LTD benefit to be whittled down to the policy minimum (i.e. 10 percent of gross LTD benefit or \$100.00) after all offsets have been taken. The offset is particularly harsh on low wage earners who have paid for employer-sponsored LTD benefits only to learn that the benefit promised to them was illusory. In assessing a claim for LTD benefits, the first step is always to determine the net LTD benefit as this generally will determine whether legal representation is warranted. Claims with very little net benefits are rarely worth pursuing.

### **What “credits” may an employer/insurer take based on a claimant’s receipt of other income benefits?**

O.C.G.A. § 34-9-243 (b) provides that the employer/insurer is entitled to credit for the employer-funded portion of payments to the injured employee “pursuant to a disability plan, a wage continuation plan or from a disability insurance policy established or maintained by the same employer.” Thus, an employer/insurer paying WC benefits may take credit for STD or LTD benefits only to the extent that the employer is funding those benefits. No credit is allowed if the employee pays the entire premium for disability benefits. The employer/insurer may also take credit for a claimant’s receipt of unemployment benefits. O. C. G. A. § 34-9-243 (a). The employer/insurer is not entitled to credit for a claimant’s receipt of SSD benefits, earned and unused sick pay, vacation pay, retirement benefits, disability retirement benefits, disability pension benefits and death benefits under an employee benefit plan.

See *Glisson v. Rooms To Go*, 608 S.E. 2d 50 (2004), *City of Waycross v. Holmes*, 532 S.E. 2d 90 (2000), *City of Atlanta v. Arnold*, 542 S.E. 2d 181 (2000), *Southern Bell v. Hodges*, 298 S.E. 2d 570 (1982) and *Brannon v. Georgia Bureau of Investigations*, 246 S.E. 2d 511 (1978).

There are no published decisions on the issue of credit for severance pay, although several ALJs have refused to allow credit for such pay, using *Glisson*, supra, as guidance. When an employer/insurer seeks a credit against WC benefits paid or due, the burden of proof rests with the employer/insurer. O.C.G.A. § 34-9-243 (e).

### **How does a lump sum WC settlement affect LTD benefits?**

We all know how to structure a WC settlement with regard to protecting SSD benefits. What about protecting LTD benefits? A WC settlement may completely wipe out, or greatly diminish, a claimant’s receipt of future LTD benefits based on policy language

allowing credit for WC benefits. But, the offset only applies to amounts attributable to loss of income and cannot include current and future medical payments provided in the WC settlement. Look to the plan/policy language to determine if there is a method for offsetting lump sum settlements. Although some policies contain such language, it usually does not exist. Therefore, before settling your WC case, call the adjuster directly and ask how their company treats lump sum settlements. If they completely withhold LTD benefits until the amount of the settlement is accumulated, that should be discussed with your client before you agree to settle the WC claim.

**Do not ignore effect of a WC settlement on group health insurance benefits, either.**

Health insurance plans vary as to coverage for disabled workers. Some do not offer coverage beyond what is required by COBRA (generally, 18 months if not disabled or 29 months if disabled). Other plans continue coverage as if the disabled worker was still “active,” so long as the worker is receiving disability benefits under the employer plan. Read the health insurance plan to see how this situation is handled. Danger arises when a WC claim is settled with a resignation *before* an employee receives (or applies for or is in appeals with) LTD benefits. Make sure that your client is aware of the possibility of forfeiting group health insurance benefits if a general resignation is required by the employer/insurer. This is less of a concern if your client is covered under her spouse’s health plan or if she is eligible for Medicare.

**Where employee is receiving or is eligible for SSD, LTD and WC, what factors are considered in determining which case to settle?**

This answer varies widely from case to case. It is sometimes hard to settle a WC or LTD case which otherwise would have been easy to settle if no other benefits were in-

involved. Some factors in determining which case (if any, or both) to settle include the age of the claimant, prior wage level (determines whether SSA will offset WC benefits), the length of LTD benefits, the offset language in LTD policy (how are lump sum settlements addressed and whether there is any offset against retirement benefits), whether the LTD benefits are taxed and whether there is an overpayment due to LTD or WC against prior receipt of other benefits. Also consider that a catastrophic WC claim pays benefits for life, where most LTD benefits stop at age 65. As discussed above, the effect of forfeiting health insurance benefits must also be weighed.

**Can a general waiver of “all claims” in conjunction with a WC settlement be used as a bar to a claim for LTD benefits under an employer-sponsored plan?**

It depends on the wording of the waiver document. If the language specifically excludes claims for employer-sponsored disability benefits under ERISA, then a claimant may be precluded from later making a claim for benefits. If vague, however, there is no presumption to a bar for benefits. If an employer/insurer is insisting on a waiver of all claims and there is specific language relating to ERISA claims or benefits, make sure that your client is aware that future LTD benefits are at risk should the waiver be signed.

**What happens where the employee is receiving employer-sponsored LTD benefits but failed to file a WC-14 during the statute of limitations?**

Where the employer/insurer has not accepted any liability for a work-related injury (no medical or indemnity paid) and the employer/insurer did not encourage the employee to file for employer-sponsored disability benefits or otherwise give the employee any reason to believe that his disability benefits were being paid in lieu of his WC benefits,

the employee's receipt of disability benefits will likely *not* toll the WC statute of limitations. *Leavell v. Life Ins. Co. of Georgia*, 165 Ga. App. 770, 302 S.E. 2d (1983). If, on the other hand, the employer was found to have encouraged the employee to file for disability benefits instead of WC benefits or where the employer notifies the employee that it is withholding WC benefits due to receipt of disability benefits, then an employee may have up to two years to file a claim under O.C.G.A. § 34-9-82 as there may be a finding that the employer was paying disability benefits in lieu of WC benefits. *Harper v. L&M Granite Co.*, 197 Ga. App. 157, 397 S.E. 2d 739 (1990).

The issue is less clear where the employee files for disability benefits on his own, is not receiving either medical or indemnity benefits from the employer/insurer but the employer/insurer is aware of the WC claim and does not file a controvert or give the employee any reason to believe that his WC claim will be denied. Whether a claim for WC benefits filed under a one- or two-year statute of limitations will be denied is unclear.

### **What the heck is ERISA and why does it apply to my client?**

The Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et. seq., is a comprehensive federal scheme designed to protect plan participants and ensure receipt of contractually defined benefits. ERISA plans are considered gifts to employees, and the law governing these benefits follow the law of trusts, not contracts. Generally, if the benefit provided to the employee was sponsored by his employer or was otherwise part of an employer benefit plan, then ERISA applies. That means that most employer-sponsored health, life, disability and retirement benefits are governed under ERISA, unless the employer is a government entity or a church. Under ERISA, state law claims and remedies are preempted. One of the biggest mistakes we see in our

LTD/ERISA practice is where the claimant failed to exhaust administrative remedies and instead filed a lawsuit in state court alleging breach of contract and bad faith only to have an aggressive defense attorney remove to federal court. This is often hard to fix, particularly if the administrative review period has expired and the plan/insurer refuses to reopen the claim.

### **Know the difference between an individual disability policy and an employer-sponsored disability policy.**

Just because your client paid for the premiums for a disability policy offered by his employer does not make such policy an individual disability policy. The difference between an employer-sponsored disability policy and an individual policy (one purchased from the neighborhood insurance agent without employer sponsorship) is the difference between the remedies available. Where an insurance company denies a claim under an individual disability policy, a claim may be filed in state court alleging breach of contract, bad faith, punitive damages, etc., and a jury will determine the case. If the denied claim is from an employer-sponsored disability plan/policy, then the claim must be filed in federal court under ERISA and there will be no jury trial, no state law causes of actions and no punitive damages. The claimant's "day in court" is often nothing more than a review of the claims file by a federal judge. The judge reviewing the decision of the plan/insurer will adopt one of three standards of review, which will determine the deference given to a plan or insurer's decision. The three forms of review are (1) *de novo*; (2) arbitrary and capricious; and (3) heightened arbitrary and capricious. The standard of review is determined by a variety of factors including whether the plan is self-funded with third party administration and whether the plan/policy and contains the requisite "discretionary language." *Williams v. BellSouth Telecommunications, Inc.*, 373 F.

3d 1132 (11<sup>th</sup> Cir. 2004) provides the current method in the Eleventh Circuit of applying the various standards of review. This is subject to change pending the decision from the United States Supreme Court in *Wanda Glenn v. MetLife* (argued April 23, 2008, case no. 06-923).

### **Tips for handling an LTD/ERISA claim at the administrative level.**

The “administrative level” of an LTD/ERISA claim is the period between the initial application and the date of the final decision by the plan/insurer. Administrative remedies must be exhausted prior to filing a lawsuit, so you need to build your case during the administrative review period, not after a lawsuit has been filed. If you are inclined to help your WC client appeal the denial of his employer-sponsored disability benefits, you should do the following: (1) Read both the Summary Plan Description (SPD) and/or insurance policy, if any. This will provide the information necessary to process a claim for benefits, including whether ERISA applies, the contact information for the plan administrator, the type and amount of benefits, discretionary language clause (determines the standard of review) and any benefit offsets. (2) Request a copy of the claims file and applicable disability plan/policy from the plan administrator and the insurance company, if any. (3) Request medical records from all treating sources. (4) Once the claims file and all medical records have been received and fully reviewed, ask the treating doctor to complete a questionnaire, write a detailed narrative or submit to a recorded statement which addresses the requirements necessary for receipt of disability benefits and which is in direct response to the adverse decision from the plan/insurer. A narrative is always better than a questionnaire and a recorded statement is better than a narrative. It is not enough for the treating doctor to merely state that the claimant is “disabled;” rather, she must address the reasons

why the claimant is disabled, supported by objective medical evidence, if available. The treating doctor should also address any non-physical limitations including psychiatric issues, chronic pain, adverse side effects of the claimant’s medications and other conditions inhibiting the claimant’s cognitive functioning or ability to focus, concentrate and remember. Many treating doctors are willing allies because they are sufficiently outraged when plan administrators or insurance companies question or reject their disability opinions. Where necessary, also consider an FCE or neuropsychological testing. (5) Advise the claimant to apply for SSD. (6) Load up the claims file. Continuously submit any evidence which supports the claim, even if the administrative record has closed or if a lawsuit has been filed. This evidence should include any SSD awards, relevant medical records, medical literature on the claimant’s condition, and statements from friends, clergy, co-workers or managers. (7) If the administrative review process has already closed when you become involved, continue to submit your evidence and write a letter to the plan administrator or insurance company asking that the record be reopened and the additional evidence considered. Their action in refusing to reopen a closed claim may be deemed “arbitrary and capricious” conduct. (8) If all of the above has been done and the plan/insurer have issued a “final denial” letter, then your client will be deemed to have exhausted his administrative remedies and may then file a lawsuit in federal court.

### **Define the scope of representation.**

If you are not going to assist your client in their claims for SSD or employer-sponsored disability benefits, make sure your attorney-client contract is sufficiently clear that you are only representing them in their WC claim. Send a follow-up letter confirming the scope of your representation. **WC**

# ICMS: A Roadmap to Success

By Kathy Oliver

State Board of Worker's Compensation

**Where We've Been:** The State Board of Workers' Compensation successfully implemented Phase I of the Integrated Claims Management System (ICMS) on October 1, 2005. We have made great progress and committed more than two and a half million pages into ICMS thus far. Board staff now has immediate real-time secure access to electronic files over the internet, diminishing delays caused by the need to transport paper files from the main office in Atlanta to field offices. Prior to ICMS, Board staff access to a paper file was limited to one person at a time; now, multiple parties have simultaneous access to the electronic files. Previously, parties to the claim had access to paper files only by requesting a copy, incurring copying costs and delays while requests were processed and shipped.

On August 21, 2006, the Board successfully implemented Phase II of ICMS. Some of the functions of ICMS Phase II for Board staff were:

- Electronic processing of mediation and hearing requests
- Automated case assignment to judges

- Electronic calendars for ADR, the Trial Division, and Appellate Division
- Automated scheduling of hearings and mediations
- Electronic generation of judicial orders and awards with electronic signatures.

Notices of Hearing, Mediation, and Oral Argument as well as Awards and Orders are being sent out by email. Parties receive these the very day they're issued, eliminating mailing delays.

**Where We Are:** The State Board implemented Phase III for Board staff on December 17, 2007. Phase III of ICMS permits Web-based submission of documents as well as file review over the Internet for parties to the claim. Phase III was deployed with a very small group of Pilot Partners on December 20, 2007, and the first online filing was received and processed successfully that same day. A second small group of Pilot Partners was added near the end of January, and successive groups are being added in February. In March we will begin deployment in a phased approach until full deployment has been achieved.

Once registered, an attorney or insurance entity who is a party to a claim and who

is also a registered user will be able to view that file online as well as submit documents online. Web-filing of forms in existing claims has been greatly simplified. Filings are made from within the individual claim files. ICMS already "knows" the parties to the claim and the date of accident for each claim file. ICMS will automatically capture submitter information and filing date. Check-boxes are used to indicate the purpose of a particular filing. Thus the information required to be typed into the forms will be the specifics as to the purpose of the filing – e.g. "motion to compel compliance with medical recommendations" or "request hearing for recommencement of benefits based upon ..." Attachment of supplemental materials or briefs will be possible through links on the web "form".

Documents filed online pass directly into the Board's workflow queues, with little to no delay. For example, documents that took up to 10 working days to reach workflow now reach the appropriate secretary instantaneously. These documents are immediately viewable in the secure electronic file. In 2007 we received and pro-

cessed 292,934 documents into ICMS. The cumulative effect of electronic filing will have an enormous effect on time and effort required to get these documents into the appropriate files.

Once in place, the State's Nortel Call Center Solution will be used to capture and track incoming call information, giving us new capabilities to measure and improve response times and compile a knowledge base of uniform solutions to recurrent issues.

ICMS has allowed us to increase telework by approximately 15%, and further increases are expected in the future.

**Where We Are Going:** Over the coming months Electronic Data Interchange ("EDI") data submission will be

added to the ICMS system. This process is already underway. Once the Board has successfully completed testing, and a Pilot is successfully completed, the Board will begin to release this phase of ICMS to licensed insurers, self-insurers, and group funds. EDI will allow insurers and self-insurers to submit large volumes of data electronically directly into ICMS, providing a streamlined method of data transmission as an alternative to submitting individual forms into individual claims.

Within eighteen months following successful completion of the Pilot, the Board's intent is to have all First Reports of Injury and Subsequent Reports of Injury submitted electronically, whether via EDI or by web-submission of forms into

individual claim files. Electronic filing will become mandatory for all insurers, self-insurers, and group funds by second quarter 2009.

Carolyn C. Hall, SBWC Chairman, stated "This demonstrates our dedication to service in action, a hallmark of the State Board of Workers' Compensation's commitment to making Georgia the Best Managed State."

With ICMS, our Roadmap to Success runs through the information superhighway. Instantaneous, secure, and accurate access to files makes our service faster, friendlier, and easier for external constituents and internal customers. **WC**

*"Honestly, y'all it was really easy and I am ... technologically impaired so if I can do it you have made the system fantastically user friendly."* --Ann Bishop

*"I submitted a WC-14 adding an issue in this one today... like lightning!"* --Kelly Benedict

*"That is so darn fast..."* --Stacey Anne Torpey

# The Rycroft Defense: When an Employee's Misrepresentation Can Bar Recovery of Workers' Compensation Benefits

By: Greg Presmanes & Christina Gulas  
Bovis, Kyle & Burch, LLC

In applying for work, employees are not always honest about their medical history. When it comes to securing a job, an applicant may willfully misrepresent his or her medical condition in hopes of being considered for the position. When this type of misrepresentation goes undetected, problems often arise when the employee sustains another injury to the same body part while on the job. Is the new injury compensable? If the employer uncovers the misrepresentation, the answer may be `no' and the employee who may otherwise have been entitled to workers' compensation benefits may encounter a bar to recovery.

## The Rycroft Decision

Under certain circumstances courts have afforded the employer a defense to liability when the job applicant fraudulently misrepresents their physical condition on hiring, and subsequently re-injures the same body part. In Georgia this defense is known as the Rycroft defense because it was judicially created by the Georgia Supreme Court in the case of *Georgia Electric Company v. Rycroft*, 259 Ga. 155, 378 S.E.2d 111 (1989). In *Rycroft*, the Court held that

when an employee fraudulently misrepresents his pre-employment physical condition during the hiring process, under certain circumstances, it will be a bar to recovering workers' compensation benefits for a subsequent injury to the same body part.

The facts of *Rycroft* deserve attention because the situation at issue is not uncommon. The employee in *Rycroft* had sustained a herniated lumbar disc injury while working for a previous employer, and settled a workers' compensation claim for that injury. The employee underwent surgery, but then sustained a second back injury, and filed another claim against the same previous employer. In filling out an employment application for a subsequent employer, Georgia Electric Company, the claimant omitted his prior employment, and indicated that he had never had a back injury. Furthermore, the employee denied any prior injuries in a face to face employment interview. The claimant began working for Georgia Electric Company, and shortly thereafter fractured his lower spine at the same point of his previous injury. The employee was on the job at the time and was awarded temporary total

disability benefits. However, Georgia Electric Company discovered that the claimant had lied on his employment application and requested a suspension of all indemnity and medical benefits. The employer testified that it would not have hired the claimant for this particular job, which required extensive bending, stooping, twisting and lifting, if he had answered the questions truthfully and would have terminated him if this knowledge had been discovered.

The Georgia Code, O.C.G.A. 34-9-19, provides that no compensation shall be paid for an occupational disease where the employee has falsely misrepresented himself as never having been disabled, laid off or compensated for that occupational disease (emphasis added). However, the Court in *Rycroft* noted that Georgia statutes are silent as to the effect of misrepresentations for injuries that are not "occupational diseases." The court cited with approval both Professor Larson's treatise on worker's compensation law and an Arkansas Supreme Court decision. See, *Larson's Workers' Compensation Law*, Ch.66, § 66.03; *Shippers Transp. of Ga. v. Stepp*, 265 Ark. 365,



578 S.W.2d 232 (1979). Relying on these sources the Rycroft Court found that the following factors must be present for a misrepresentation in a job application to bar benefits: (1) The employee must have knowingly and willfully made a false representation as to his physical condition; (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring; (3) There must have been a causal connection between the false representation and the injury.

The Court cited several factor in the rationale of this defense: Georgia's public policy favoring truthfulness in employment applications; the longstanding principle of law that a contractual relationship procured through fraud makes a contract voidable at the behest of the injured party (citing O.C.G.A. 13-5-5); and the fact that an employee's intentional misrepresentation of his physical condition unfairly denies the employer access to the Georgia Subsequent Injury Trust Fund.

The Americans With Disabilities Act ("ADA") applies to some employers and may impact the types of pre-hiring questions that an employer may ask. Under the ADA, inquiries into past accidents and prior disabilities are only

allowed in the post-job-offer stage.

The Rycroft case does not abolish or modify the statute of limitations set forth in O.C.G.A. 34-9-221(h). Therefore, if the claim is accepted as compensable, the defense must be asserted within 60 days of the due date of first payment unless evidence on which the defense is based is "newly discovery." *Cumberland Distribution Services, Inc. v. Fuson*, 228 Ga. App. 380, 492 S.E.2d 2 (1997); *Floyd S. Pike Elec. Contractors v. Williams*, 207 Ga. App. 86, 427 S.E. 2d 67 (1993); *Snapper Power Equip. Co. v. Crook*, 206 Ga. App. 373, 425 S.E.2d 393 (1992).

Georgia courts have since applied the Rycroft defense and resolved some questions that were left unanswered by the Supreme Court, e.g., what is an "intentional misrepresentation;" what constitutes "reliance;" what is a "substantial factor" and what do you have to establish to have a "causal connection between the misrepresentation and injury." These questions are addressed below. All three "prongs" of the three-part test set out in the Rycroft case must be met for the defense to be successful.

### **I. What is an Intentional False Misrepresentation?**

For an employee's falsification of his employment application to constitute a bar to his recovery of workers' compensation benefits, "the employee must have knowingly and willfully made a false representation concerning his physical condition." Rycroft, 378 S.E. 2d 111.

The Georgia Court of Appeals later dealt with the issue as to whether the misrepresentation had to be in writing, and found that the misrepresentation need not be a written response. In *Saunders v. Bailey*, 205 Ga. App. 808, 423 S.E.2d 688 (1992), the Court held that an employee's oral statement can constitute a knowing and willful misrepresentation.

Claimants frequently argue that their misrepresentation was not intentional but was rather their "good faith opinion." In *Saunders*, the claimant was asked "if she had any health problems that would keep her from doing the type of work described to her." She answered that "her health would not be a problem" and the Court found that this was her good faith opinion and was not a knowing misrepresentation.

### **II. What is a "Substantial Factor?"**

For an employee's falsification of his employment application to constitute a bar to his recovery of workers' compensation benefits, "the

employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring.” Rycroft, 378 S.E. 2d 111.

### **A. Reliance**

In *Gordon County Farms v. Edwards*, 204 Ga. App. 770, 420 S.E.2d 607 (1992), the Court ruled that the Employer/Insurer could not prevail on a Rycroft defense because a scar from the previous surgery was visible when he underwent his pre-employment physical, thus destroying the Employer’s testimony that they reasonably relied on the Claimant’s misrepresentation, rather than their own pre-employment physical. In that case, the employee denied any prior work-related injuries on his written job application and also told the doctor at his pre-employment physical examination that he had no prior back injuries. In fact, however, the employee had undergone back surgery in the past for a work injury and re-injured his back while working for the new employer. The employer suspended benefits and asserted the Rycroft defense, but the ALJ ruled that there was no causal connection between the previous injury and the subsequent injury under the third prong of the test. The Board’s Appellate Division agreed and held that the misrepresentation did not constitute newly discovered evidence permitting the Employer to controvert the claim. The Court of Appeals also affirmed the grant of benefits, stating that since the scar from the previous back surgery was visible, the employer was not prevented from discovering the prior injury if it had exercised due diligence. Judge Carley reluctantly concurred with the affirmance, but stated that the mere fact that a pre-employment physical examination took place, in which the physician relied upon the employee’s fraudulent representation, should not preclude the employer from asserting the Rycroft defense in the proper case.

### **B. Substantial Factor**

The “substantial factor” element of the Rycroft defense was disputed in *Shepherd Center v. Williams*, 251 Ga.App. 560, 553 S.E.2d 872 (2001). In this case the claimant hurt his back on the job with a previous employer and settled a workers’ compensation claim. The claimant then applied for a position with The Shepherd Center and stated that he had never sustained a back injury. Just one month later he injured his back on the job and filed for workers’ compensation. Upon filing, The Shepherd Center investigated and found that he had had a prior back injury. Discovering this falsity, they fired him. The claimant filed a workers’ compensation claim, and The Shepherd Center asserted the Rycroft defense. The claimant argued that although his employer may have relied on his false answer, his false answer was not a “substantial factor” in the decision to hire him because The Shepherd Center did not testify definitively that they would not have hired him had they known the truth. The Shepherd Center testified that had he been truthful about his prior back injury, they would have done one of three things: 1) referred him for other positions; 2) given him a reasonable accommodation; 3) or rescinded his job offer. The Court found that an employer does not have to show that they would not have hired the claimant if he had been truthful in order to prove the second prong of the Rycroft Defense. The Court held that since a truthful answer would have been a substantial factor in The Shepherd Center’s employment determination, it follows that the misrepresentation was a substantial factor in making the hiring decision.

The second prong of the Larson test, “substantial factor” was also disputed in *Fort Howard Corp. v. Devoe*, 212 Ga. App. 602, 442 S.E.2d 474 (1994). In this case the misrepresentation was made during a training/employee intake period before actual work was to begin. The claimant contended that the second part of the Rycroft test was not

met because he had already been “hired” at the time he made the misrepresentation. The Court declined to read Rycroft so narrowly. They noted that the claimant would not have been allowed to begin work if he had answered truthfully and he would have been subject to further medical testing. Therefore, an employee cannot claim that they were already hired at the time they lied in order to avoid the employer’s Rycroft Defense.

### **III. What constitutes a “causal connection between the false representation and the injury?”**

In order for a valid Rycroft defense to exist, “There must have been a causal connection between the false representation and the injury.” Rycroft, 378 S.E. 2d 111(Ga. Supreme Court 1989).

The third prong of the Larson test, “causal connection between the false representation and the injury” was interpreted in Gordon County Farm v. Cope, 212 Ga.App. 812, 442 S.E.2d 896 (1994). In that case the claimant appealed from a Superior Court ruling which held that the proper standard for “causal connection” is whether or not the employee’s pre-existing condition contributed to the occurrence of the accident. The Court of Appeals reversed. Specifically, the court found that the employer is not required to show that the claimant’s pre-existing condition caused the injury; rather, it need only show that there was a causal connection between the misrepresentation about the condition and the injury sustained. The Court found that the employer did not have to show that her prior back injury caused her to fall. The Court found that it was sufficient to show that she lied about her condition and that the injury resulting from the on-the-job fall was considerably worse than it would have been had the preexisting condition not been present.

Another case dealing with the third prong of the Rycroft defense, is the case of Dynasty

Sample Co v Beltran, 224 Ga. App. 90, 479 S.E. 773 (1996). In that case the Claimant was an illegal alien who used false documentation to get hired by the employer. He then was injured on the job, and made a workers’ compensation claim. Subsequent to the job injury, the employer discovered that the Claimant was an illegal alien, and that the documents he had presented to them on hiring, to prove his legal residency, were false. Although the employer admitted that under the law in Georgia they could not deny benefits to the employee solely because of his illegal alien status, they argued that the employee was not entitled to benefits because the employment contract was void based on the employee’s misrepresentations and false documents. The Court of Appeals affirmed the lower court’s decision that misrepresentations made by an illegal alien regarding his immigration status to induce hiring will not void the employment relationship. In doing so, the Court of Appeals strictly interpreted Rycroft, and found that the third prong, causal connection between the misrepresentation and the subsequent injury, was absent.

### **IV. Practice Tips**

**WRITTEN EMPLOYMENT APPLICATIONS:** It is recommended that employers use written employment applications.

**POST-HIRING MEDICAL QUESTIONNAIRE:** It is recommended that employers use a post-hiring medical questionnaire, which complies with the ADA, with specific and relevant questions about prior accidents, injuries and medical treatment. Questions simply asking if the job applicant knows of any reason why he or she could not perform the duties of the job are not sufficient, because the Claimant can testify that in his or her own opinion, he or she thought they could do the job.

**IF THE INVESTIGATION SHOWS CLAIMANT FRAUD, THE EMPLOYER/INSURER MUST CONTROVERT COMPENSABILITY WITHIN 60**

**DAYS OF THE JOB ACCIDENT:** Since the statute of limitations, giving the employer/insurer 60 days to controvert compensability, the employer/insurer would be well-advised to investigate possible fraud in the application for employment, and controvert within that time, if evidence is found showing that the Claimant fraudulently misrepresented his or her physical condition, and subsequently injured the same body part on the job.

**INVESTIGATE POSSIBLE WAIVERS OF THE RYCROFT DEFENSE:** The Rycroft defense is based in part on the employer/insurer's reli-

ance upon the Claimant's misrepresentation in applying for the job. If the employer discovers the misrepresentation, but yet continues to let the Claimant work, without firing him or her, then the Courts will usually find that the employer/insurer is not entitled to prevail on the Rycroft defense because it did not rely on the Claimant's misrepresentations, but on the employer's own knowledge of the misrepresentation and the employer's own opinion that the Claimant could perform the work, as shown by the fact that the employer did not decide to terminate the Claimant upon discovering the misrepresentation. **WC**

## Editor's Corner

By John Blackmon

I want to thank Ann Bishop for the work she did this year as the Chair of the Workers' Compensation Committee. Ann will be departing the Committee and will be replaced by Joe Leman. I think all members will agree that she worked tirelessly to keep usw in focus and on the same page, which is an arduous task considering that almost all of the work is done by e-mail. Ann will be missed.

The annual meeting of the State Bar will be held from June 5th to June 8th at the Amelia Island Plantation.

The Committee is soliciting nominations for the Distinguished Service Award that will be given during the Kids' Chance dinner during the seminar at St. Simons in October. You can send nominations to Cliff Perkins at [cliffperkins@plflaw.com](mailto:cliffperkins@plflaw.com) or via mail at 539 Newnan Street, Carrollton, GA 30117. The criteria for a nominee is that he or she be at least 50 years old, has been working in the workers' area for at least 20 years, and has been working for the benefit of the system in particular and the community in general. Considering the fact that we are such a large section, it is a real honor to be selected.

As far as the October seminar, we encourage all of you to attend. The Kids Chance dinner is going to be a low country boil this year, with auction of course, and is being spearheaded by Judge Beth Lammers. It will be a great time and is our way of giving back to the children of seriously injured workers so please plan to be there. As usual, it will be held on Thursday evening.

On the subject of legislation this past session, House Bill 661, which would have required the Board to provide certain information to group health providers, apparently stayed in committee. We need to hope that it remains there. As drafted, it would have been a nightmare for the Board, and adversely impact employees, employers, insurers, and practitioners, at least in my opinion.

Finally, I want to thank those who wrote articles for this issue, Mike Hofrichter, Nancy Glenn, Mike Rosetti, Ben Jordan, Matt Nanninga, Neil Thom, Christina Gulas, Greg Presmanes and Kathy Oliver. The next issue will be published in December, and submissions are welcomed. John Christy will be taking over as Editor so you if you would like to have something published, please send it to him at [jdchristy@mindspring.com](mailto:jdchristy@mindspring.com). **WC**

# Recent Development Involving the Exclusive Remedy Provision of the Georgia Workers' Compensation Act

By Michael Rosetti & Ben I. Jordan  
David & Rosetti, LLP

The exclusive remedy provision of the Georgia Workers' Compensation Act limits an injured employee's rights to those contained within the Act. O.C.G.A. § 34-9-11 (a). The purpose for this provision has been summarized as follows:

The rationale for this exclusion is a trade-off or quid pro quo between the employer and employee. The employer is insulated from direct common law tort liability in exchange for providing the whole array of workers' compensation benefits to the employee regardless of any negligence involved in any accidental injury. The employee forgoes his common law rights, including claims for pain and suffering, in exchange for this broad workers' compensation coverage.

James B. Hiers, Jr. & Robert R. Potter, *Georgia Workers' Compensation Law & Practice*, § 8-1 (5<sup>th</sup> Ed., 2007). The provision is designed to provide the employee with prompt access to income benefits and medical treatment "reasonably required and appear likely to effect a cure, give relief, or restore the employee to suitable employment." O.C.G.A. § 34-9-200 (a). However, it is also designed to protect employers from tort claims from injured employees, and double liability. Richard C. Kissiah, *Georgia Workers' Compensation Law*, § 34.01(1) (3<sup>rd</sup> Ed., 2007).

The Georgia courts have addressed numerous issues involving the exclusive remedy provision over the past few years. Litigated issues have included which parties have immunity from tort liability as a result of the exclusive remedy provision, exceptions to the general rule allowing professional mal-

practice actions against co-employee doctors, whether a co-worker's action causing an injury arose out of and in the course of employment, and the effect of no-liability settlements on tort claims.

## Co-employees

The general rule is that co-employees enjoy the same protection from tort liability as employers under the exclusive remedy provision. O.C.G.A. § 34-9-11(a) was amended in 1974 to include a provision stating an employee cannot file a claim in tort against a co-worker. A recent high profile case touched on issues related to co-worker protection from tort liability under the exclusive remedy provision.

In *Freeman v. Barnes*, 640 S.E. 2d 611 (2006), suit was initiated by the estate of Superior Court Judge Rowland Barnes, who was murdered in his courtroom, against the Sheriff of Fulton County Myron Freeman and eight other Fulton County employees. The defendants asserted the exclusive remedy provision barred the widow's claims because both were employees of the State and County and thus co-employees. The defendants also argued that, because the widow received workers' compensation dependency benefits, the exclusive remedy provision barred a tort claim.

The Georgia Court of Appeals held that the widow's action was not barred by the exclusive remedy provision. The court found Judge Barnes was not a co-employee because he worked for the State whereas the Sheriff and the others worked for the county. The court also pointed out that "[a]n em-

ployer in a situation where coverage is questionable should not be able to voluntarily assume liability for the limited benefits of the Workers' Compensation Act and thereby avoid the potentially greater liability of a common-law action." This decision demonstrated the court's position that the exclusive remedy provision may serve as a shield, but should not be used by employers as a sword to dictate the type of benefits an individual is entitled to receive under Georgia law.

### **Exception for professional malpractice actions**

An exception to the general rule providing co-employees immunity under the exclusive remedy provision relates to professional malpractice actions. This exception to the general rule was carved out in *Downey v. Bexley*, 253 Ga. 125, 317 S.E.2d 523 (1984). In *Downey*, the Supreme Court of Georgia held that "where a professional co-employee is charged with fraud, deceit, and violation of professional trust, he may be held liable in tort for his wrongdoing to an injured co-employee." *Id.* The rationale for the exclusion was the "unique duty owed others by professional persons . . ." and that "[a] professional person is liable for an abuse of the trust reposed in him by the public, provisions of the compensation act notwithstanding." *Id.* at 125-26. In *Davis v. Stover*, 258 Ga. 156, 157 (fn6); 366 S.E. 2d 670 (1988), the Court expanded the exception to medical malpractice cases in which there was no fraud, deceit, or violation of professional trust.

A recent decision involved a plaintiff seeking to expand the exception to the exclusive remedy provision for professional malpractice cases. In *McLeod v. Blase*, A08A0582 (Georgia Court of Appeals, March 28, 2008), the plaintiff filed a professional malpractice claim against a certified athletic trainer. Both individuals were employees of the Atlanta Hawks. The defendant asserted that the exclusive remedy provision barred the

claim but the plaintiff countered, citing the professional malpractice exception. In the *McLeod* case, the Georgia Court of Appeals acknowledged that the language in the Supreme Court of Georgia cases could be read to extend to other professionals. However, the Georgia Court of Appeals declined to extend the exception to an athletic trainer: "[w]e find no authority for concluding that the exception automatically applies whenever a defendant co-employee is a professional who is subject to the authority of a professional licensing board." A08A0582 (Georgia Court of Appeals, March 28, 2008).

In *Crisp Regional Hospital v. Oliver*, A05A1173; A05A1174; A05A1175 (Georgia Court of Appeals, September 23, 2005), the court limited the professional malpractice exception to the physician alleged to have committed the malpractice, refusing to extend the exception to the employer-hospital. In that case, the plaintiff was a custodian for Crisp Regional Hospital and experienced a work-related accident. Crisp Regional Hospital sent him to its emergency room for treatment. The plaintiff claimed there was a delay in the administration of his claim/treatment and it was this delay which caused permanent spinal cord injury. He filed suit against non-professional administrative employees for simple negligence, for the professional negligence of the nurse employees, and for the professional negligence of two physicians. The plaintiff also named Crisp Regional Hospital under the theory of vicarious liability.

The court first addressed the issue of whether a claim could be made on the premise that the employer exacerbated the work-related injury when it delayed authorizing medical treatment. The court, following the decision in *Doss v. Food Lion*, 267 Ga. 312 (1996), held that because the Workers' Compensation Act has penalties in place for unreasonable delays in authorizing medical

treatment and provides additional benefits for work-related injuries made worse by the delay, the exclusive remedy provision barred a claim for that cause of action. The rationale was extended to this case. “Because the WCA provides a remedy in the form of benefits for a work-related injury exacerbated or aggravated subsequent to the initial injury, Oliver cannot accept WCA benefits and also bring an independent tort action against his employer seeking to recover damages for worsening of the injury.”

The Georgia Court of Appeals next addressed the plaintiff’s assertion that, because his allegations included professional negligence, the exception extended to the hospital. The court noted the narrow exception relating to the “relationship of trust between the physician and patient” allowed for the exception to the exclusive remedy provision of the WCA for medical malpractice actions brought against the co-employee physician. However, the court pointed out the reason for the exception for physicians was inapplicable to the employer and thus the theory of vicarious liability on the part of the hospital was rejected.

### **Question of whether the accident arose out of and in the course of employment**

Three recent decisions have addressed factual questions of whether an accident arose out of employment, thus invoking the exclusive remedy provision. Each case was largely fact-driven, although the results were a bit inconsistent.

*Burns International Security Services Corporation v. Johnson*, A06A1900 (March 19, 2007), involved a murdered security guard. Tamika Johnson, who was hired as a security guard, was inexperienced, unarmed, and received a one-day orientation. The evidence demonstrated that when Johnson was placed on the jobsite in question, many of the com-

pany’s internal safety protocols were ignored. The assignment involved security a high-risk location, requiring a more experienced team of guards. Instead, Johnson, who was inexperienced, was placed on the site alone. Johnson worked on April 19, 2000 but when a second guard arrived to relieve her, Johnson could not be located. The relief guard notified the company, but no effort was made to locate her. A limited search was performed the following day and a few days later. Finally, more than three weeks after Johnson went missing, her body was found. The death was ruled a homicide.

Johnson’s parents filed a wrongful death claim against her employer and the exclusive remedy provision was raised as a defense. The Georgia Court of Appeals evaluated the case based on whether the accident (the murder) arose out of the employment. To make that determination, it resorted to cases dealing with assaults by third parties against an employee and reiterated the general rule that such acts are treated as compensable under the Act, so long as the assault was not committed for personal reasons. Noting all of the employment-related risks associated with her job, the court concluded that “ ‘[u]nder these circumstances . . . the conditions of [Johnson’s] employment did not merely provide the time and place for the assault upon her, but . . . the same increased the risk of the attack, and subjected her to a danger peculiar to the employment.’ ” Since the accident arose out of and in the course of her employment, the Georgia Court of Appeals reversed the trial court’s denial of the motion for summary judgment and found the exclusive remedy provision barred the claim against the employer.

In *Stevenson v. Ray*, A06A1880 (Georgia Court of Appeals, November 30, 2006), the plaintiff filed suit against Timothy Ray, a co-worker in the Laurens County Sheriff’s Department for alleged negligence result-

ing from a motor vehicle accident. Ray was a deputy sheriff who left work following his shift in a marked patrol car and wearing his uniform. He was subject to call at any time that evening because he had a “take home” patrol car. On his way home, he heard that other deputies were engaged in a pursuit. Ray was told by the supervisor that he was not to respond and that he was to go home. However, when a patrol car in pursuit passed him, Ray joined the pursuit to “back up [his] fellow officers.” During this process, Ray’s car collided with Stevenson’s patrol car.

The Georgia Court of Appeals upheld the trial court’s grant of summary judgment under the exclusive remedy provision. The court noted that “because there was a causal connection between Ray’s employment and the collision, Stevenson’s injuries arose out of his and Ray’s employment as police officers.”

This case can be contrasted with *Champion v. Pilgram’s Price Corporation of Deleware*, A07A0682 (Georgia Court of Appeals, July 5, 2007). In that case, Dianne Martin was killed by a tractor-trailer operated by a co-employee. Her estate filed a wrongful death claim. Martin arrived approximately 78 minutes before her shift began, and company policy prohibited clocking in more than 30 minutes before the start of a shift. No more than 10 minutes were needed for Martin to get to her work station. Among other defenses, the employer argued it was entitled to summary judgment under the exclusive remedy provision. The court rejected the notion the claim was barred as a matter of law. It relied on the fact that a period of employment permits a “reasonable” time for ingress and egress and noted that “[r]easonableness in this context is fact-driven. Instead of focusing on the amount of time necessary to reach the employee’s work station, as suggested by the Company, the courts focus on the length of time between the reception of

injuries and the time work was scheduled to begin.” As such, a jury question existed as to whether she was in the scope of her employment.

### **Effect of a no-liability settlement**

In *Ridley v. Monroe*, 256 Ga. App. 686, 569 S.E. 2d 561 (2002), the Georgia Court of Appeals addressed the issue of whether the exclusive remedy provision barred the employee’s tort claim against a co-employee arising out of a motor vehicle accident. Ridley sued Monroe claiming damages resulting from a motor vehicle accident while the two employees were on a lunch break. There was an allegation that Ridley was on a work-related errand, thus bringing the claim within the Workers’ Compensation Act. Ridley’s claim for workers’ compensation benefits was denied and it was ultimately settled on a no-liability basis. Ridley then filed suit against Monroe. Monroe defended the case on the grounds the exclusive remedy provision barred the tort claim. Ridley argued that because the settlement was reached on a no-liability basis, the claim did not fall within the Workers’ Compensation Act. She asserted that, since there was a Board Order stating there was no compensable accident arising out of and in the course of her employment, the exclusive remedy provision was inapplicable. The Georgia Court of Appeals rejected Ridley’s claim, noting that “[a]s we have found on several occasions, O.C.G.A. § 34-9-11 bars tort suits against an employer or its employees following a workers’ compensation settlement. And we cannot accept Ridley’s argument that an employee avoids the exclusive remedy’s bar simply by inserting a “no-liability” clause into a settlement agreement.”

Of note in the Ridley case, there was a dissent authored by Judge Barnes. The dissent pointed out that in the case of *Wade v. Georgia Diversified Indus*, the Georgia Court of

*Continued on Page 27*



## Recent Appellate Court Decisions in Workers' Compensation

By Neil C. Thom

A.B. Bishop & Associates, LLC

*Coker v. Great American Insurance Company*, Case No. A07A1760

(Ga. Ct. App. 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 em-

ployer, against whom suit is barred by the exclusive remedy doctrine, is entitled to the same immunity.

*McLeod v. Blase*, Case No. A08A0582 (Ga. Ct. App. 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*, Case No. A07A2159 (Ga. Ct. App. 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*, Case No. S08A0473 (Ga. S. Ct. 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 depen-

dent 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. **WC**

*Continued from Page 24*

Appeals reversed a summary judgment granted to a defendant under the exclusive remedy provision when there was a conflict in the evidence as to whether the injury was in the course of the employment. Judge Barnes noted that, in this case, there was no such conflict as the very language of the no-liability stipulation and agreement specified there was no accident arising out of and in the course of her employment. It appears the majority's concern was for an employee to settle a workers' compensation claim and agree to a no-liability stipulation and agreement, "with the expectation that the employee would then pursue claims against the co-worker in the potentially more lucrative tort arena."

\* \* \*

These recent cases demonstrate a few patterns. The courts appear less likely to extend the exception to the exclusive remedy provision for professional malpractice claims. This is evidenced by the fact they would not extend it to apply to non-physicians and would not allow the imposition of vicarious liability on hospital-employers. By contrast, litigation turning on whether actions arose out of and in the course of employment are more unpredictable. In some cases, the courts have ruled as a matter of law on the issue of whether an employee's action arose out of and in the course of employment whereas other cases allowed the issue to proceed to a jury. **WC**

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