



# WORKERS' COMPENSATION LAW

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SECTION NEWSLETTER

## Examining the Vocational Expert

By David R. Bergquist

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Since the use of a vocational expert in the workers' compensation arena almost always involves a dispute over a catastrophic designation, the first step is to clarify which statutory definition of "catastrophic" is applicable.

### The Law

Catastrophic claims are governed by O.C.G.A. § 34-9-200.1(g). Five specific injuries are addressed by that statute:

1. Spinal cord injuries;
2. Amputation;
3. Severe brain or closed head injuries;
4. Second or third degree burns over 25 percent of the body as a whole or more of the face and hands;
5. Total or industrial blindness.

Additionally, the statute provides a "catch-all" definition for certain cases that do not fall into the specific categories. It is relatively easy for the parties to agree whether a case falls within the first five definitions. However, the "catch-all" category is not so easy to identify and is the most frequent source of litigation.

From July 1, 1992 through June 30, 1995, the "catch-all" provision in § 34-9-200.1(g)(6) defined a catastrophic injury as:

Any other injury of a nature and severity as has qualified or would qualify an employee to receive disability income benefits under Title II with supplemental security income benefits under Title XVI of the Social Security Act as such Acts exist on July 1, 1992, without regard to any time limitations provided under such Act.

The biggest difference in this version of the "catch-all" provision and the prior version is the considerable weight placed on the decision granting Social Security benefits to a claimant in assessing catastrophic status.

For accidents occurring from July 1, 1995 to June 30,

1997, the "catch-all" phrase was amended to delete the language which created controlling authority in a favorable decision from the Social Security Administration (SSA). Specifically, O.C.G.A. § 34-9-200.1(g)(6) was amended to state:

A decision granting or denying disability income benefits under Title II or supplemental security income benefits under Title XVI of the Social Security Administration shall be admissible in evidence and the Board shall give the evidence the consideration and deference due under the circumstances regarding the issue of whether the injury is a catastrophic injury.

For accidents occurring from July 1, 1997 through June 30, 2003, the "catch-all" provision was again amended concerning work in the national economy. During that period, the "catch-all" provision read as follows: "Any other injury of a nature and severity that prevents the employee from being able to perform his or her prior work **and** any work available in substantial numbers within the national economy **for which such employee is otherwise qualified.**" (Emphasis added).

Most recently, effective July 1, 2005, the Legislature significantly amended the "catch-all" definition of a catastrophic injury. The present version of O.C.G.A. § 34-9-200.1(g)(6) reads as follows:

"A" Any other injury of a nature and severity that prevents the employee from being able to perform his or her prior work and any work available in substantial numbers within the national economy for which such employee is otherwise qualified; provided, however, if the injury has not already been accepted as a catastrophic injury by the employer and the authorized treating physician has released the employee to return to work with restrictions, there shall be a rebuttable presumption during a period not to exceed 130 weeks from the date of the injury, that the injury is not a catastrophic injury. During such period, in determining

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# Comments From the Incoming Chair

By Timothy V. Hanofee  
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I feel privileged and honored to be addressing the Workers' Compensation Section of the State Bar of Georgia as its chairman.

The one constant in my practice of workers' compensation law for more than 28 years has been the professionalism and camaraderie by our members, for the Bar in general, and each other specifically. I have appeared before four chairmen, one chairwoman, nine directors (I think) and at least 29 Administrative Law Judges during my tenure. I have opposed hundreds of different lawyers as well.

The chairmen, chairwoman, directors, Administrative Law Judges and lawyers all have different personalities, demeanors and styles, but the one thing the overwhelming majority has is dedication and respect for the workers' compensation laws of Georgia. We are very fortunate to have men and women who are committed to practicing law with fairness and principle.

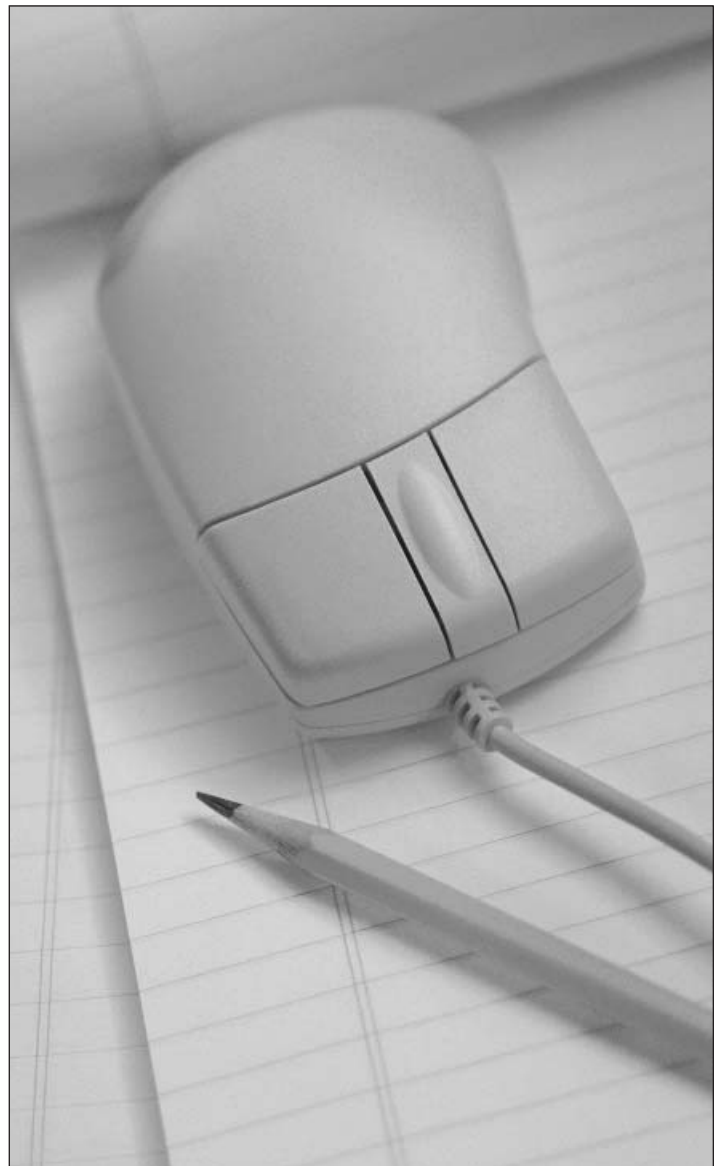
Our section is strong and growing. We currently have 919 members and are the ninth largest section of the Bar. Due to the nature of our practice (i.e. accelerated discovery, fast track hearings), we interact with one another probably more than most any other practice area.

The Executive Committee of our Section presently consists of Ann Bishop, Joe Leman, Staten Bidding, Lynn Olmert and Cliff Perkins. Joining that list is our newest member, John Blackmon of Drew, Eckl & Farnham. Each will serve as chairperson in the order listed.

The ICLE Worker's Compensation Seminar at Sea Palms on St. Simons Island is scheduled for Oct. 5-7, 2006. The chairs of the event are Administrative Law Judge Melodie Belcher, claimant attorney Phil Eddings and defense attorney, B. Kaye Katz-Flexer. They are currently in the process of putting together another great seminar. If anyone has suggestions for topics for the seminar, please feel free to contact one of the chairs.

If any "COMPER" has not attended the October seminar, you are really missing a tremendous three days and nights. While the seminar itself is full of very informative and valuable information, the informal beach atmosphere at St. Simons makes for interesting conversation, new friendships and a very good time. A sincere effort should be made by every Section member to attend this seminar.

Hopefully, by the time you read this, you will have seen the solicitation for "A Just and Noble Cause! The Georgia Story of Workers' Compensation" which is a history of Georgia Workers' Compensation Law. This book, the brainchild of Mark Gannon and others is a must read for



any worker's compensation practitioner who wants to see how the system started and to see how we got to where we are! Please buy a copy for yourself, partners, associates and your clients. Profits from the book sale go to Kids' Chance.

As I take over as chair of the Workers' Compensation Section from Luanne Clark, I am sincerely thankful for her guidance which should make the transition smooth and problem free.

I look forward to serving as chairman and invite any Section member to call or write with any ideas, questions, complaints or comments about our bar!

## Vocational Expert

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whether an injury is catastrophic, the Board shall give consideration to all relevant factors including, but not limited to, the number of hours for which an employee has been released. A decision granting or denying disability income benefits under Title II or supplemental income benefits under Title XVI of the Social Security Act shall be admissible in evidence and the Board shall give the evidence the consideration and deference due under the circumstances regarding the issue of whether the injury is a catastrophic injury; provided however, that no presumption shall be created by any decision granting or denying disability income benefits under Title II or supplemental security income benefits under Title XVI of the Social Security Act.

“B” Once an employee who is designated as having a catastrophic injury under this subsection has reached the age of eligibility for retirement benefits as defined in 42 U.S.C. Section 416(1), as amended March 2, 2004, there shall arise a rebuttable presumption that the injury is no longer a catastrophic injury; provided, however, that this presumption shall not arise upon reaching early retirement age as defined in 42 U.S.C. Section 416(1), as amended March 2, 2004. When using this presumption, a determination that the injury is no longer catastrophic can only be made by the Board after it has conducted an evidentiary hearing.

Despite the myriad of amendments, the general “catch-all” definition of a catastrophic injury has remained essentially the same since July 1, 1997. In short, the Claimant has the burden of proof to show that his/her injury is of such a severity that it:

1. Prevents the employee from being able to perform his/her prior work; and

2. Prevents the employee from performing any work available in substantial numbers within the national economy for which such employee is otherwise qualified.

### General Considerations

Although the issues and potential strategies for an examination of any expert witness are mostly determined on a case-by-case basis, there are some issues which apply universally to all experts – including a vocational expert.

The first step in examining any expert witness is to clarify his/her qualifications. Interestingly, there are no state licensures or certifications in the State of Georgia to officially qualify an individual to work as a vocational expert. In general, a vocational expert will often have obtained at least a masters degree in rehabilitation counseling or other closely related field and will have considerable work experience in the field of vocational rehabilitation prior to undertaking the role of a vocational expert. It should be noted that although similar, experience in vocational rehabilitation (finding an individual a job) does not involve the same analysis as providing an expert vocational opinion concerning the general employability of an individual.

When clarifying the vocational expert’s qualifications, an attorney should closely scrutinize the expert’s work history. Specifically, the expert should be questioned concerning the number of times he/she has provided testimony for litigation, how often the expert has worked for the claimant’s attorney, and what percentage of the expert’s prior opinions have been “in favor of” the employee. An attorney should make every effort through Interrogatories and Request for Production of Documents to obtain the specific case names/numbers of all litigation in which the expert had previously provided an opinion. Of course, obtaining the expert’s prior reports in those cases could be extremely helpful.

Prior to conducting any formal cross-examination of a vocational

expert, an attorney should use the standard discovery process to clarify all of the materials/documents/databases which the expert used to arrive at his/her opinion. It is not uncommon for a vocational expert to, at least in part, base an opinion on incomplete or inaccurate medical records and/or information received from the employee. In fact, vocational experts often provide their opinion without ever having met the employee.

Since most vocational experts have significant experience in the Social Security arena, they will usually rely on various “objective standards” emphasized in Social Security hearings. These materials include the *Dictionary of Occupational Titles*, the *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles*, the *Standard Occupational Classification Manual*, the *Revised Handbook for Analyzing Jobs*, the *Occupational Outlook Handbook*, published by the Department of Labor; the *County Business Patterns* and the *Census Surveys* published by the Bureau of Census; and *Occupational Surveys of Light and Sedentary Jobs* prepared for the Social Security Administration by various State Agencies. A detailed examination of any vocational expert should determine which publications the evaluator used in forming his/her opinion, whether the most recent version of those publications was used, and whether the expert understands the proper use of those publications.

### Preparation For the Cross-Examination of a Vocational Expert

As with any expert, an effective cross-examination of a vocational expert begins long before the deposition or hearing. A thorough preparation should include some or all of the following:

1. Obtain all medical records concerning the employee;
2. Clarify the opinions of the relevant treating physicians;
3. Obtain an Independent Medical Evaluation (IME) with a relevant specialist;

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# Tennis, Anyone? The Causes and Management of Lateral Epicondylitis

By John Dalton, M. D.  
Georgia Hand and Microsurgery

**T**ennis elbow was first described by Henry J. Morris in 1882 after he noted elbow pain in his patients who enjoyed “lawn tennis.” Since that time, this entity, also known as lateral epicondylitis, has been recognized not only in athletes but in seven to 10 percent of the general population. In the workplace, the number of claims submitted for lateral epicondylitis continues to be stable or is rising, depending on the state. Therefore, it is imperative that all those who encounter or manage “repetitive motion disorders” be familiar with this entity.

## Anatomy

General knowledge of elbow anatomy is necessary to understand the symptoms, causes and treatments of lateral epicondylitis. In its simplest form, the elbow can be thought of as a hinge joint. One bone from the upper arm, the humerus, and the two forearm bones, the radius and ulna, articulate at the elbow to form that hinge. The most superficial portion of the humerus can be palpated on either side of the elbow underneath a thin layer of skin and soft tissue. These bony protuberances are called epicondyles and are individually named the medial (inside) and lateral (outside) epicondyles.

Muscles from both the upper arm and forearm cross the elbow in order to provide for joint motion. In addition, a majority of the muscles that move the joints at the wrist and fingers actually cross the elbow, originating, not from the forearm, but from the distal portion of the humerus. In general, muscles that extend (straighten) the wrist and fingers originate from the lateral epicondyle, and those that flex (bend) those joints originate from the medial epicondyle.

The muscles that are involved with

lateral epicondylitis are the wrist extensors. In total, there are three wrist extensors, all sharing a common origin off of the lateral epicondyle. Two of them, the extensor carpi radialis longus and the extensor carpi ulnaris, are superficial muscles lying just below the skin. The extensor carpi radialis brevis (ECRB) lies deeper, below the other forearm muscles, and its tendon is where the pathologic changes associated with tennis elbow are found.

Lateral epicondylitis is misleading, as the suffix “itis” suggests acute inflammation as the primary process. In actuality, tennis elbow is the result of degeneration of the tendon of the ECRB and would be properly labeled as a tendonosis, with an underlying chronic inflammation. While this may seem like an exercise in semantics, this distinction between acute inflammation and degeneration will dictate treatment rationale.

## Symptoms

With a good understanding of the anatomy, the symptoms and exacerbating factors of tennis elbow can be deduced. The primary complaint of patients is pain localized to the lateral epicondyle. This pain can vary in severity from a minor ache to a sharp, knife-like sensation. Often, patients will have pain radiating distally from the lateral epicondyle into the forearm muscles along the course of the ECRB as it makes its way to the wrist.

Symptoms are worsened by activities, which involve forceful or repetitive wrist extension. To be true to this entity’s colloquial name, imagine hitting a one-handed backhand in tennis. The muscles extending the wrist must resist the force of the ball against the racquet. Additionally, repetitive gripping activities will also exacerbate the pain as the wrist comes into extension

whenever a strong, tight fist is made.

As the condition worsens, patients will feel pain with elbow motion, as well, particularly upon straightening of the elbow. Because the ECRB originates before the elbow, then crosses the elbow joint, the muscle stretches when the elbow is straightened. This stretch produces pain. The ECRB also crosses the wrist joint and, therefore, forceful wrist flexion increases the stretch on the muscle, and with it, the perceived pain.

## Causes

Tennis elbow typically occurs in patients between the ages of 40 and 60 with a near-equal distribution between men and women. Most commonly, tennis elbow is not the result of an isolated traumatic event. On the contrary, repetitive activities involving the use of the elbow, wrist, and hand lead to attritional tearing of the ECRB origin. Therefore, it is not uncommon for patient to begin having symptoms one or two days following the exacerbating activity.

A traumatic event can, however, lead to the onset of symptoms. This event may come in the form of a direct blow to the lateral aspect of the elbow or an indirect injury involving twisting of the forearm and elbow. These types of the events can cause injury to the ECRB primarily, but often, there is underlying, low-grade, asymptomatic pathology of the tendon from repetitive use which is exacerbated by the acute injury.

## Physical Exam

On exam, the patient will have exquisite tenderness to deep palpation just distal to the lateral epicondyle over the common origin of the wrist extensor muscles. The patient often will point directly to this area of tenderness when asked to locate the

pain. Occasionally, this tenderness will be present over the muscles themselves further down the forearm. There may be some associated swelling at the lateral elbow, but this is usually not the case.

Certain provocative maneuvers can be performed to help clarify and confirm the diagnosis. The patient is asked to extend the wrist against resistance, stressing the ECRB. This will produce pain localized to the lateral elbow. Passive flexion of the wrist with the elbow extended will also reproduce the pain as the ECRB is stretched.

Imaging studies are often performed but rarely of much value. Plain radiographs of the elbow may show calcification in the tendon just off of the lateral epicondyle. Both ultrasound and MRI had been used to identify pathologic changes in the ECRB tendon with varying degrees of success. Usually, these tests are reserved for patients who have failed to improve after conservative treatment and when surgical options are being considered.

### **Nonsurgical Treatment**

Activity modification, physical therapy and non-steroidal anti-inflammatory drugs (NSAIDs) are the mainstays of early treatment. Simply eliminating the activity, which caused or worsened the symptoms will often lead to resolution over a few weeks. But, because wrist extension and elbow motion are necessary for nearly every basic function of the arm and hand, eliminating these activities may be unrealistic. Athletes find it difficult to stop their sport for several months, and manual laborers often do not have light-duty options available to them.

A physical therapy program is designed to stretch, strengthen, and condition the extensor muscles. One effective stretch is to pull the wrist into flexion with the opposite hand while holding the elbow straight. Often this must first be performed initially with the elbow flexed because of tightness and pain. After flexibility is improved, light-weight strengthening

exercises are performed for all of the forearm muscles. The weight and repetitions are increased as pain decreases. The patient must then remain on a stretching program to help prevent recurrences.

Armbands, which can be found at most drug stores, are used around the proximal forearm. The theory behind these bands is that they take stress off of the ECRB origin by transferring the stress to the place where the armband is applied. Both the science and the clinical results behind this theory are not entirely clear. However, many patients attest to the effectiveness of the bands and they are widely used for this, and other, tendonopathies.

NSAIDs (ibuprofen, naprosyn) are universally given to all patients that can tolerate them as a pain reliever, but they also help to combat the chronic inflammation associated with the extensor muscle degeneration. A corticosteroid injection into the ECRB origin is offered to patients who fail to improve with therapy or who have difficulty performing therapy due to severe pain. This injection targets the inflammation directly. These injections are not without risks, however. Loss of skin pigmentation and atrophy or loss of the subcutaneous fat over the epicondyle can be seen and is often permanent. Therefore, it is best to limit the number of and increase the interval between injections.

No controlled, scientific studies have been performed which clearly document the success rate of tennis elbow treatment. Some physicians feel that, given enough time, all patients with lateral epicondylitis will improve regardless of treatment. However, in practice, this improvement can be slow. Symptomatic relief following the above protocol can be expected in 80-90% of patients after a year of treatment.

In an attempt to shorten the often-lengthy recovery, additional treatment options have been pioneered. These include high-intensity shockwave therapy, ultrasound, blood injection, and botulinum toxin (a.k.a. Botox) injection. The documented success rate of all of these procedures is

between 70-80%, while some studies suggest these modalities are of no benefit. Once again, no controlled studies have been performed comparing these treatment methods with traditional methods. Therefore, since nearly the same percentage of patients improves with no treatment, the true benefit of these alternate therapies remains in question.

### **Surgical Treatment**

Surgical treatment is reserved for truly recalcitrant cases of lateral epicondylitis. In general, if, after six months to a year, patients fail to improve following a rigorous therapy program and multiple corticosteroid injections, they may be surgical candidates.

Open release of the extensor origin can be performed through a lateral incision over the epicondyle. Dissection between the superficial muscles of the extensor origin is undertaken to expose the tendon of the ECRB deep in the wound. Often, at this point, degenerative tissue can be identified at the ECRB origin near the lateral epicondyle. This portion of the tendon is excised and the tendon is repaired. Alternatively, the degenerative portion of the ECRB can be addressed arthroscopically. The undersurface of the ECRB can be visualized with an arthroscope from inside the joint and released.

Similar to the alternative non-operative therapies, there are no controlled studies that document which procedure is more effective. The current literature suggests approximately 80% success after surgical treatment.

### **Worker's Compensation Population**

There exists a general sentiment that patients in the worker's compensation population are less likely to improve with surgical treatment. A well-designed investigation by a group of surgeons at the University of Pittsburg School of Medicine found this not to be the case. Pain relief, symptom recurrence, satisfaction, and return to work were similar between both the worker's compensation and

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# Going Paperless

## An Update from the State Board

By Jan Dillard

State Board of Workers' Compensation Project Manager

The State Board of Workers' Compensation implemented the new ICMS electronic document management system on October 1st, 2005. When fully implemented, ICMS will enable the SBWC to perform all duties associated with claims management, alternative dispute resolution, trial, appeals, settlements, rehabilitation, managed care, and licensure using an Internet-based system.

SBWC has made great progress and scanned over 100,000 documents in the past seven months. While we have experienced some unexpected issues and had a few growing pains, we already see signs of greatness on our horizon.

### The New Claim Number

The ICMS document management system generates a Claim Number for each new claim. This "Board Claim Number" appears on every form. It is a 10-digit number with the first four digits identifying the year the claim is created at the Board (**not** the year of the injury). Unless you are submitting a claim-initiating document (e.g. a WC-14), you must include this claim number on every claim document you submit.

All claim documents generated by the Board and sent to you will have this new Claim Number. All system-generated electronic notifications will include the new Claim Number to assist you in all of your future document filings.

This number is a unique identifier for the claim and distinguishes it from other claims. Please note that if there are multiple claims on file for one claimant, each claim will have a unique claim number.

### Electronic Notifications

#### *Party to the Claim*

Another important feature of ICMS is system-generated email notifications. Everyone identified as a party to the claim, for whom we have an email address, will receive an email notice when a new document goes to the claim file. If you are a Party to the Claim, you will receive a notice that a document has been successfully submitted to the Board. For a few weeks, many people were receiving multiple copies of the same notice. This has been corrected. You should no longer receive multiple copies of the same notice.

#### *Submitter Notification*

In addition, there is an email acknowledgement to the

person submitting the document (who may not be party to the claim). If you submit a document, you will receive an email confirming receipt of the document. Please note: if the submitter is also a party to the claim, that person will receive two notices.

#### *Alternate Email Addresses*

Many people have responded to the Board's request for primary and secondary e-mail addresses. At this time, *only the primary address is being used*. Secondary e-mail addresses will not be activated until Phase 3. Until that time, you might consider using the Rules feature of your personal e-mail application to forward the notice to those who need to be notified.

#### *Notifications to the Wrong Person*

For insurers, e-mail notifications are being sent to the individual identified as the SBWC corporate contact. This individual is often a regulatory or licensing officer, not a claims manager. We are working on a change that allows these corporate email addresses (which are in the database for licensing and permitting activities) to be omitted from receiving individual claim notifications. This change has not yet been completed.

#### *Attorney Information*

The Board is building a database for storing attorney information. This database includes contact information as well as the unique Georgia Bar number for each attorney. It is imperative that each attorney who practices Workers' Compensation law in Georgia forwards the following information to ICMSprep@SBWC.ga.gov. The Georgia Bar Number is critical.

- Attorney Primary E-mail address
- Alternate E-mail address
- Phone Number
- Georgia Bar Number (include on the first page of all documents)

Attorney information is for each individual attorney, not a law firm. If an attorney wants claim-related information to go to a central law firm e-mail address, they must submit this address as their primary e-mail address. *Alternative e-mail addresses will not be used until Phase 3.*

#### *Causing Possible Delays*

Several things can cause a delay in the processing of forms. Omitting critical information, putting the wrong information in specified fields, or changing the form – all

## Paperless

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can cause the document to be suspended or sent to the wrong process.

Please ensure the following:

- Complete the Insurer or Self-Insurer information (not just the TPA or Claims Office)
- Use the correct form (If you are not sure which form to use, refer to the forms and Board Rules, and in particular Board Rule 61(b), on the SBWC website: [www.sbwc.georgia.gov](http://www.sbwc.georgia.gov))
- Do not change the fields to reflect something different than what is on the form.
- Be sure to include the Board Claim Number
- Include the County of Injury and accurate date of injury

In addition, please send only one copy of a form to the Board. Do not submit multiple copies to Claims Processing and do not file more than one copy of legal documents going to a judge, for example, a motion or brief.

If the information is not completed sufficiently for processing, it will be returned. Please always complete the section for SBWC ID # which identifies the carrier or self-insured entity. This number can be located in an alphabetical listing on the SBWC website ([www.sbwc.georgia.gov](http://www.sbwc.georgia.gov)).

### ***A Look to the Future***

We have already created over 15,000 new claims. These are totally electronic claims. This number is growing every day. Thousands of other claims are in the system but they are a combination of paper and electronic data. We will continue to work in both worlds for quite some time. The new system challenges us as we work with a totally different way of life but we already see exciting new capabilities for easy and comprehensive access to information.

## Vocational Expert

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4. Have the employee undergo a Functional Capacities Evaluation (FCE);
5. Conduct surveillance of the employee;
6. Use standard discovery techniques to obtain as much information as possible about the expert, his/her prior opinions, and the supporting basis for his/her opinions;
7. Conduct a detailed deposition of the employee;
8. Conduct a "skip-trace" to determine any prior medical treatment or litigation involving the employee; and
9. Obtain a copy of the employee's complete file from the SSA.

### **Issues Specific To Vocational Experts**

In short, a vocational expert's task is to determine the employee's Residual Functional Capacity (RFC) and determine whether he/she is employable by performing a labor market survey and/or reviewing a "standardized" list/database of occupations. The most obvious step in determining an employee's RFC is to clarify his/her current medical status/restrictions. In addition to verifying that the vocational expert reviewed a complete copy of the employee's medical records, an effective cross-examination should also closely review which medical opinions the vocational expert relied most heavily upon.

As an example, a medical report from the claimant's family doctor may state, "The patient states that his back begins to hurt after sitting for 30 minutes." An effective cross-examination will emphasize the family physician is not a "specialist" and did not specifically restrict the employee to sitting only 30 minutes at a time. Instead, the family physician simply repeated the employee's own self-serving, unsupported statements. Obviously, any surveillance video, medical record or other evidence indicating the claimant is capable of sitting for more than 30

minutes should be raised in the cross-examination of the vocational expert.

An effective cross-examination should also clarify which medical conditions/restrictions are related to the on-the-job injury, as opposed to other unrelated personal health problems – especially in cases involving older employees. In these cases, there may be significant pre-existing contributors to the claimant's current condition which are unrelated to the accident, and may help support a defense against a catastrophic designation.

It is also important to determine if the vocational evaluator and the medical providers have the same understanding of the words used to describe the employee's restrictions. As an example, the medical provider may simply indicate the employee is limited to "light" or "sedentary" work. If, as is usually the case, the vocational evaluator relies on definitions from the SSA, the expert may give these restrictions a meaning different than the doctor intended.

In addition to clarifying the employee's medical condition/restrictions, in order to determine an employee's RFC, a vocational expert will also look at the employee's age, education and work experience. An effective cross-examination should closely scrutinize whether the vocational expert is basing an opinion on the highest level of school completed by the employee or by his/her actual "intelligence" level. There is clearly a difference between education level and intelligence. Two individuals who each graduated from high school may have very different levels of intelligence. In this regard, the attorney should investigate the types of classes taken by the employee and the grades he/she obtained in them. There are several "intelligence tests" which may (or may not) provide a more accurate picture of the employee's abilities than simply looking at the last level of education he completed.

The vocational expert should also be closely questioned about what role the employee's age played in deter-

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mining his/her employability. Often, a vocational expert will rely on the Social Security guidelines which give significant deference to individuals over the age of 49. As with two individuals who completed the same level of education, two individuals of the same age often have dramatically different abilities to adapt to new work situations.

Under the current “catch-all” definition of a catastrophic injury, the employee (via the vocational expert) has the burden to show that his/her injury is of such a severity that it (1) prevents the employee from being able to perform his/her prior work; **and** (2) prevents the employee from performing any work available in substantial numbers within the national economy for which the employee is otherwise qualified. An effective cross-examination will pin down the vocational expert on exactly “how” he/she made a determination about employability.

Specifically, the vocational expert should be questioned closely about his/her knowledge of the employee’s prior work. Although there is no specific opinion addressing this issue, it appears the State Board has adopted the position of the Social Security Administration (SSA); which is that one should look at any work the employee performed for any employer during the 15 year period prior to the compensable accident. Unfortunately, employees often give the vocational expert incomplete/inaccurate information about their work history. Moreover, even if the vocational expert has an accurate list of the employee’s prior jobs during the relevant 15 year period, the vocational expert may not be completely familiar with the actual job duties, exertional level and skill level required in each one of those positions.

An employee may inform the vocational expert that he was a welder for the entire 15 year period. After simply consulting the Dictionary of Occupational Titles, the vocational expert would then claim to know

enough about the duties, skill level and exertional level required in that job to determine if the employee could return to that type of work. Cross examination of the expert may provide an opportunity to show the reality of the employee’s work experience is significantly different from what is described in a database.

As outlined, in order to support a catastrophic designation (under the statute’s current version), the vocational expert must not only opine the employee is unable to perform his prior work, but also that the injury prevents the employee from performing any work available in substantial numbers within the national economy for which the employee is otherwise qualified. The phrase “within the national economy” is defined by the SSA as “work which exists in significant numbers either in the region where such individual lives or in several regions of the county.” 42 U.S.C. § 423(d)(1). Accordingly, the vocational expert should be questioned closely concerning his/her methodology for reviewing potential jobs and the geographic scope of that search.

The vocational expert relies on United States Department of Labor Census Data and State Department of Labor Occupational Employment Statistics Data to extrapolate estimates of numbers of existing jobs. A common error is accepting numbers as published for a category of job rather than further breaking down the total into reasonable numbers for each job included in the category. This can often result in an inflated estimation. For example, within the category of “cashier,” there are at least 26 separate jobs – each with different exertional levels (sedentary and light) and with different skill levels (unskilled, semi-skilled and skilled). Examples of “cashier” jobs include parking lot cashier (light, unskilled), grocery cashier (light, semi-skilled), check cashier (sedentary, semi-skilled). There should be estimated numbers of existing jobs **for each**.

Finally, an effective cross-examination should carefully scrutinize how the vocational expert defined work

“for which such employee is otherwise qualified.” This language was added to O.C.G.A. § 34-9-200.1(g)(6) by the General Assembly in 1997, and there is no case law interpreting exactly what this phrase means. Presumably, the phrase addresses two different abilities of the Claimant: (a) the ability to perform the job from a transferable skills perspective; and (b) the ability to perform the job from a physical perspective.

As has already been discussed, when determining if an employee is able to perform a job “from a transferable skills perspective,” the vocational expert will take into account the claimant’s work history, age and education. As has been shown, an effective cross-examination will require the vocational expert to clarify exactly how he analyzed each one of these factors.

When determining if an employee is able to perform a job “from a physical perspective,” the vocational expert will use medical records to determine the employee’s physical abilities and compare them with the job requirements for each potential occupation as outlined in some generalized database. As discussed previously, an effective cross-examination can call into question the validity of the vocational expert’s opinion concerning the claimant’s physical restrictions. Likewise, under cross-examination, the vocational expert should be questioned about his/her detailed knowledge of the actual skill level and exertional level required in the various occupations surveyed.



# Statutory Employment

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\*With Thanks to C. Wade McGuffey, Jr.

O.C.G.A. § 34-9-8 (2005)

§ 34-9-8. Liability of principal contractor or subcontractor for employee injuries

(a) A principal, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his subcontractors engaged upon the subject matter of the contract to the same extent as the immediate employer.

(b) Any principal, intermediate, or subcontractor who shall pay compensation under subsection (a) of this Code section may recover the amount paid from any person who, independently of this Code section, would have been liable to pay compensation to the injured employee or from any intermediate contractor.

(c) Every claim for compensation under this Code section shall be in the first instance presented to and instituted against the immediate employer, but such proceedings shall not constitute a waiver of the employee's right to recover compensation under this chapter from the principal or intermediate contractor. If such immediate employer is not subject to this chapter by reason of having less than the required number of employees as prescribed in subsection (a) of Code Section 34-9-2 and Code Section 34-9-124 does not apply, then such claim may be directly presented to and instituted against the intermediate or principal contractor. However, the collection of full compensation from one employer shall bar recovery by the employee against any others, and the employee shall not collect a total compensation in excess of the amount for which any of the contractors is liable.

(d) This Code section shall apply only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are otherwise under his control or management.

## Introduction

Typical worker's compensation cases involve an employee who works for an employer with three or more employees who has workers' compensation insurance. However, what happens when you call the State Board of Workers' Compensation and find out that your employer is uninsured? Or, what happens when your employee works for one subcontractor on an irregular basis and is injured? In these situations, you need to investigate whether or not there are "statutory employers" who may be responsible for paying your employee workers' compensation benefits.

Similarly, if you represent an employer who hired other

workers' to perform tasks and then one of their employees is injured, you need to investigate whether your employer may be considered a "statutory employer" under the Workers' Compensation Act. In addition, if someone working on your clients' job files a personal injury suit against the contractor, then the Statutory employer code section may apply and may insulate your client from personal injury suits. If your client would be considered a statutory employer, then the exclusive remedy provision of the Workers' Compensation Act applies and protects your client.

O.C.G.A. § 34-9-8 (quoted above) is intended to ensure that employees in construction and other industries are covered by workers' compensation. Consequently the Workers' Compensation Act places an increased burden, in the form of potential liability for workers' compensation benefits, on the statutory employer, thus encouraging the statutory employer to require subcontractors to carry workers' compensation insurance. *Wright Assocs. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981); *Franks v. Avila*, 200 Ga. App. 733, 409 S.E.2d 564 (1991).

## Status of Statutory Employer

The *quid pro quo* for the obligation to pay workers' compensation benefits is the immunity from suit granted to employers. Those responsible for paying workers' compensation benefits, therefore, are not subject to double liability. While the injured employee is guaranteed the right to sue a third party responsible for the injury, no injured employee can sue those responsible for the payment of workers' compensation benefits. See O.C.G.A. § 34-9-11. Because the immunity is complete, there is an advantage to many businesses to become a statutory employer when they may not be the injured employee's direct employer. The goal is immunity from suit.

A statutory employer is not a true employer as that term is used generally but is one upon whom liability for workers' compensation benefits is imposed by statute. O.C.G.A. § 34-9-8(a) (quoted above.) The obligation to pay compensation is imposed upon a contractor who engages subcontractors who have employees. The language of the statute establishes that the liability for compensation is to an "employee" and, therefore the employee of any subcontractor is treated as if that employee were an employee of the general contractor.

## Requisites to Liability for Benefits

Sole Proprietors: The liability to pay an employee of a subcontractor does not extend to the subcontractor when

the subcontractor is a sole proprietor unless the sole proprietor is also a direct employee. When the subcontractor is operated as a sole proprietorship, the sole proprietor is not an employee of the subcontractor but is in fact the employer. Since a sole proprietor cannot be his or her own employee, a statutory employer would not be liable for any compensation benefits to the sole proprietor. Typically a sole proprietor does not notify his or her agent or insurance company of the election to be treated as an employee and consequently they are not covered. See *Sherwin-Williams Co. v. Escuadra*, 224 Ga. App. 894, 482 S.E.2d 505 (1997). ; *Kaplan v. Pulte Home Corp.*, 245 Ga. App. 286, 537 S.E.2d 727 (2000).

A sole proprietor or partner may elect to be treated as an employee for purposes of the Workers' Compensation Act. O.C.G.A. § 34-9-2.2. Once an election is made, the individual subcontractor is treated the same as any other employee. *Subsequent Injury Trust Fund v. Lumley Drywall*, 200 Ga. App. 703, 409 S.E.2d 254 (1991). A sole proprietor would not, however, be entitled to benefits from a statutory employer because the election is applicable only to coverage purchased by the sole proprietor. If the sole proprietor has coverage, the statutory employer's liability is never realized.

An employer who expressly exempts himself/herself from coverage under O.C.G.A. § 34-9-2.2 is barred from making a claim against the employer's own company and employer could not claim under O.C.G.A. § 34-9-8 (a) to be an employee injured while employed by the company in its capacity as a subcontractor. See *Greg Fisher, Ltd. v. Samples*, 238 Ga. App. 825, 520 S.E.2d 280 (1999).

O.C.G.A. § 34-9-8 also refers to the "subject matter of the contract." This means that a contractual relationship is required for liability to be imposed. Not all contractual relationships are covered, but only those where a contract creates a subcontractor relationship. For example, there is no contrac-

tor/subcontractor relationship when the contract is merely for the sale of goods. *Evans v. Hawkins*, 114 Ga. App. 120, 150 S.E.2d 324 (1966). When there is a contract for the sale of goods, the contract to sell must also require one of the parties to render substantial services in connection with the sale of goods for either the buyer or seller, or both, to be considered a contractor for purposes of O.C.G.A. § 34-9-8. See *Grade A Building Systems v. Trine*, 260 Ga. 252, 391 S.E.2d 764 (1990).

No matter what the scenario, the employer must still be subject to the Workers' Compensation Act, so they must have three or more employees. O.C.G.A. § 34-9-2(a). A general contractor must therefore have three or more employees before it is responsible for the payment of any benefits to the employee of a subcontractor. See *Bradshaw vs. Glass*, 252 Ga. 429, 314 S.E.2d 233 (1984). It is also improper to "stack" the employees of the subcontractor with those of the general contractor to reach the requisite number of employees. See *Smith v. Cornette*, 173 Ga. App. 577, 327 S.E.2d 774 (1985). The claimant has an affirmative duty to prove that the general contractor has the requisite number of employees to be subject to the Act before the claimant can recover from the general contractor. *G & M Quality Builders, Inc. v. Dennison*, 173 Ga. App. 578, 327 S.E.2d 773 (1985).

### Procedure to Obtain Benefits

Before proceeding with a claim directly against the general contractor as a statutory employer, a claimant must first make a claim against the immediate employer. O.C.G.A. § 34-9-8(c). If it turns out that the immediate employer cannot pay because it failed to obtain insurance or is insolvent, there is no waiver of the employee's right to recover from a statutory employer. Many lawyers seem to be particularly confused by this procedure. If the immediate employer is insured, a claim against the statutory employer is improper. If the immediate employer is subject to the Act, however, by reason of having three or more employees, but did not obtain

insurance, the claim must be instituted against the immediate employer, and the statutory employer and its insurer in order to insure that the claim is paid. Only if the immediate employer is not subject to the Act because it has less than the requisite number of employees can a claim be made directly against the statutory employer. O.C.G.A. §34-9-8(c). See *Zurich General Accident & Liability Insurance Co. v. Lee*, 36 Ga. App. 248 (1926). Since the liability of the statutory employer is secondary, where there is no insurance for the immediate employer, the claim should always be instituted against the general contractor and its insurer. *Travelers Insurance Co. v. Sanford*, 242 Ga. 324, 249 S.E.2d 34 (1978).

While there was no general right of subrogation against one who caused the injury to an employee between 1972 and 1992, a general contractor has always had the right to subrogate against an immediate employer by bringing suit for indemnification when it has paid the claimant's workers' compensation benefits. The failure of the statutory employer to require the claimant to first present the claim against the immediate employer, however, does not prevent the general contractor from recovering from the immediate employer. *Travelers Ins. Co. v. Southern Electric., Inc.* 209 Ga. App. 718, 434 S.E.2d 507 (1993).

### Limitation of Liability

The liability of the principal or a general contractor only applies in cases where the "injury occurred on, in or about the premises on which the principal contractor has undertaken to execute work or which are otherwise under his control or management." O.C.G.A. § 34-9-8(d). In *American Mutual Liability Ins. Co. v. Fuller*, 123 Ga. App. 585, 181 S.E.2d 876 (1971), the Court of Appeals of Georgia found that the highways upon which a truck-driver drove were "premises" sufficient to make the shipper of poultry a statutory employer. When a truck-driver was injured when he fell through the floor of a trailer while loading the trailer at the plant of the shipper, however, the manufacturer's

plant was not a sufficient premises for the shipper to become a statutory employer. *Gramling v. Sunshine Biscuits, Inc.* 162 Ga. App. 863, 292 S.E.2d 539 (1982). The only significant difference between the two cases was that in *American Mutual v. Fuller*, the claimant was seeking workers' compensation benefits, while in *Gramling*, the employer was claiming immunity. Although, apparently the holding in *American Mutual v. Fuller* is indistinguishable from the holding in *Gramling*, *Fuller* is often cited for the proposition that a statutory employer's premises could extend well beyond the area over which the statutory employer actually has control. The continued viability of *Fuller*, however, has been questioned as a result of the action of the Supreme Court in *Georgia in Holt v. Traveler's Ins. Co.*, 244 Ga. 857, 262 S.E.2d 139 (1939).

In the case of *Beers Construction Co. v. Doyle*, 230 Ga. App. 593, 496 S.E.2d 921 (1998), the Court of Appeals of Georgia made it clear that "on, in or about the premises on which the principal contractor has undertaken to execute work" means exactly what it says. Unless the injury occurs at the premises where the general contractor is working, the statutory employer is not liable for benefits to the injured employee of a subcontractor. "Imposing workers' compensation liability on a principal contractor for an injury that occurred at a location over which it had no control, and thus could not affect the risks, would render the contractor an insurer, which surely was not the intent of the Workers' Compensation Act." *Id.* 496 S.E.2d at 922.

### **B. Definition of Contractor:**

The definition of a statutory employer has changed dramatically over the years. The statute seems to cover any contractor who subcontracts part of its work. While the definition contained in the Georgia Workers' Compensation Act has remained the same, the courts have changed the manner in which the statute has been applied so dramatically as to actually change the definition. Under O.C.G.A. § 34-9-8, a prin-

cipal, intermediate, or subcontractor becomes the statutory employer of any person injured while in the employ of any of its subcontractors. By virtue of the Code section, any contractor is potentially the "statutory employer" of every subcontractor's employees.

### **1. Statutory Employer**

In *Wright Associates, Inc. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981), the Supreme Court of Georgia made it clear that a statutory employer was any contractor potentially liable for workers' compensation benefits under O.C.G.A. § 34-9-8. The Court held that any contractor potentially responsible for the payment of workers' compensation benefits is entitled to immunity from suit by the injured employee.

In *Rieder*, an employee of a subcontractor brought suit against the principal (general) contractor for personal injuries sustained in an on-site accident. Workers' compensation benefits were paid to the employee by the immediate employer, an independent subcontractor, and not by the general contractor. The general contractor argued that, as a statutory employer potentially liable for workers' compensation benefits under O.C.G.A. § 34-9-8, it should receive the benefits of tort immunity, whether or not it actually paid workers' compensation benefits to the plaintiff. The Georgia Supreme Court agreed, holding that the employee of an independent subcontractor could not recover in tort against the general contractor even though the general contractor had not actually paid any workers' compensation benefits.

However, in *Long v. Marvin M. Black Co.*, 250 Ga. 261, 300 S.E. 2d 150 (1983), the Georgia Supreme Court declined to extend tort immunity to the employees of a statutory employer. While an employee of the "same employer" is immune (O.C.G.A. § 34-9-11), an employee of a statutory employer is not employed by the same employer as the injured employee of a subcontractor. In the *Long* case, an employee of an independent subcontractor, who received workers' compensation benefits from that sub-

contractor, brought an action against the general contractor and its superintendent for injuries sustained in a nail gun accident. Reversing the Court of Appeals, the Georgia Supreme Court held that the claim against the general contractor was barred by tort immunity under *Rieder* because the general contractor was potentially responsible for workers' compensation benefits. The superintendent of the general contractor, an employee of the general contractor and not the subcontractor, was not however, immune from tort liability. The Supreme Court found that the superintendent and the injured employee were not employed by the same employer. The Court recognized that *Long* was not a direct employee of the general contractor but only the statutory employee of the general contractor and held that being an "employee" of the statutory employer was not the same as "an employee of the same employer." Therefore, an employee of a statutory employer does not receive tort immunity from personal injury suits by an employee of a subcontractor and may be a third party tortfeasor under O.C.G.A. § 34-9-11.

### **2. Early Attempts to Narrow the Definition of Statutory Employer:**

After *Long*, the Supreme Court continued to limit the immunity of general contractors by narrowing the definition of statutory employer under O.C.G.A. § 34-9-8. In *Manning v. Georgia Power Co.*, 252 Ga. 404, 314 S.E. 2d 432 (1984), the Supreme Court held that a property owner, although it may be a "principal" is not a "principal contractor" within the meaning of O.C.G.A. § 34-9-8 and is, therefore not a "statutory employer" who is potentially liable for workers' compensation benefits or immune from tort liability by reason of the exclusive remedy doctrine. In *Manning*, a painter who was employed by a painting company, which was under contract with Georgia Power to paint certain structures owned by Georgia Power, brought an action against Georgia Power for injuries he sustained while painting. The Court found that Georgia Power was not the "statutory employer" of the painter,

since Georgia Power was not acting as a contractor, but was merely the owner of the premises on which the injury occurred. Georgia Power was not potentially liable for workers' compensation benefits; and therefore it was not immune from tort liability. The Court expressly stated that an owner or entity merely in possession or control of the premises would not be subject to workers' compensation liability as a statutory employer except in the isolated situation where the party also serves as a contractor for yet another entity and hires another contractor to perform the work on the premises.

The Georgia Court of Appeals also made attempts to limit the definition of statutory employer which resulted in the limitation of the tort immunity. In *Western Electric Co., Inc. v. Capes*, 164 Ga. App. 353, 296 S.E.2d 381 (1982), the Court of Appeals predicted the later decision reached by the Supreme Court of Georgia in *Manning*, supra. In the *Capes*' case, Western Electric sought to avoid liability as a landowner from a suit by an employee of a vending machine company by claiming it was a statutory employer. The court looked to the contractual relationship between Western Electric and the injured employee's immediate employer and concluded that the injured employee's immediate employer was not a subcontractor of Western Electric and therefore Western Electric could not be a statutory employer. Although the Court used confusing language by analyzing the "business enterprise" of Western Electric, it ultimately reached its conclusion that there was no immunity because the contractual relationship did not create a "subcontractor" status.

### 3. Business Enterprise Theory

Despite the holding in *Manning*, and its own early attempts to limit the definition of a statutory employer, the Georgia Court of Appeals actually issued a number of opinions which broadened the definition of statutory employer. For several years, any owner of a business or premises could claim immunity if it acted as its own

"contractor" by actually participating in the activity as part of a business enterprise.

In a second case involving Western Electric, the Court of Appeals expanded the definition of statutory employer to include an owner of premises by requiring only that the contract with the injured employee's employer be part of the "business enterprise" of the owner. See *Godbee v. Western Electric Co., Inc.*, 161 Ga. App. 731, 288 S.E.2d 881 (1982); reversed by *Modlin v. Black & Decker Manufacturing Co.*, infra. The Court later recognized that *Godbee* was a vast expansion of the definition of statutory employer which potentially covered any employer who hired another to perform work.

The Court of Appeals attempted to reconcile the difference in the holdings in the two Western Electric cases, *Godbee* and *Capes* by analyzing the business activity of the purported statutory employer. In *Modlin v. Black & Decker Manufacturing Co.*, 170 Ga. App. 477, 317 S.E.2d 255 (1984), the Court of Appeals held that an owner merely in possession or control of the premises was not a statutory employer except where the owner also serves as a contractor and hires another contractor to perform work. The Court reasoned that an owner who merely hired an independent contractor to perform work is not ordinarily in a position to appreciate and control the risk of injury. Only if an owner also acted as a contractor would it then become a statutory employer. In *Modlin*, however, the Court held the owner was not a principal contractor for the construction of its own plant. Since the owner was not its own contractor, it could not be a statutory employer and would therefore not be immune from tort suit.

In *Wright v. M.D. Hodges Enterprises, Inc.*, 183 Ga. App. 632, 359 S.E.2d 700 (1987), the Court of Appeals however again moved toward an expansion of the definition of a statutory employer to include any business owner actively involved in the "enterprise" in which the employee was injured. The Court reasoned under its "enterprise

theory" that an owner who was acting as its own general contractor and was actively involved in the enterprise was entitled to immunity as a statutory employer. This theory effectively provided an owner, who was not also a contractor, with immunity status by virtue of its participation in a common enterprise making it more than just merely an owner in possession of the premises. The Court, without saying so, rejected a "bright line" test based upon whether or not the purported statutory employer was a contractor or not. For several years thereafter, the courts used the "enterprise theory" to analyze the granting of immunity to owners as statutory employers.

### 4. Yoho v. Ringier of America, Inc.

The Supreme Court of Georgia has now given us a clear rule to define a statutory employer who is immune from suit under the statutory employer provision of the Workers' Compensation Act in the pivotal case of *Yoho v. Ringier of America, Inc.* 263 Ga. 338 434 S.E.2d 57 (1993). In *Yoho*, Ringier of America, Inc. was the owner of a large printing plant which contracted with Accu-Rite Machine Co to perform repair work on its solvent recovery system. One of Ringier's supervisors assisted with some of the work by providing tools with Accu-Rite was lacking and by advising some of the Accu-Rite workers. Yoho, an employee of Accu-Rite, was injured in an explosion while working on the solvent recovery system. Yoho brought suit and Ringier contended it was a statutory employer, asserting that Yoho's sole remedy was the recovery of workers' compensation benefits. The trial court granted summary judgment in favor of Ringier and denied Yoho's motion for summary judgment. Applying the "enterprise" theory, the Court of Appeals affirmed on the basis that Ringier was actually involved in the enterprise in which the plaintiff was injured.

The Supreme Court reversed the Court of Appeals and held that Ringier was not a statutory employer because it did not own any contractual obliga-

tion of performance to another entity and therefore was not a contractor with regard to the repair of the solvent recovery system. The solvent recovery system was a part of Ringier's own plant and the contractual obligation with regard to the repair was not owed by Ringier to another, but was owed instead to Ringier by Accu-Rite. The Court reiterated its earlier decision in *Manning*, *Supra*, that only a "contractor" who is secondarily liable for workers' compensation benefits is entitled to tort immunity as a statutory employer. The Court recited the language from the earlier appellate cases that an owner who is merely in possession or control of the premises would not be subject to potential workers' compensation benefits as a statutory employer. An owner is not a contractor and, therefore, could not be immune from tort liability.

The Court explained that the lack of immunity was not because of the status of Ringier of America, Inc. as an "owner" but because of its lack of status as a "contractor." The contractual obligation of performance is owed to, rather than by, such an owner and it could not then be considered a "contractor." The Court in *Yoho* held that under *Manning*, an "owner" does not attain "contractor" status by its active involvement in the enterprise, but only in the isolated situation where it also serves as a contractor for yet another entity and hires another contractor to perform some or all of the work on its premises. Accordingly, the "enterprise" theory is no longer viable as it is inconsistent with the concept of "principal contractor" as set forth in O.C.G.A. § 34-9-8.

##### 5. Developments since *Yoho*

Since *Yoho*, the courts have made it clear that only a contractor is potentially responsible for workers' compensation benefits and therefore a statutory employer. An owner who does not owe a duty of performance to another, even if the owner is actively involved in the enterprise in which the employee is injured is not entitled to immunity. It is now clear that it is the obligation of performance owed to

another which creates the status of contractor and therefore statutory employer. Only a contractor who is potentially liable for workers' compensation benefits is entitled to immunity. However, any contractor, whether general, intermediate or subcontractor, who owes a duty of performance is a statutory employer and therefore immune from suit. See *Redd. v. Stanfield*, 217 Ga. App. 573, 458 S.E.2d 394 (1995), cert. denied; *England v. Beers Construction Co.*, 224 Ga. App. 44, 479 S.E.2d 420 (1996). In *England*, the court even held that the contractor's actions at an earlier time under a different contract were protected since the contractor was the injured employee's statutory employer at the time of the injury. A contractor two levels "up the ladder," not in contractual privity with the worker's immediate employer, was the worker's statutory employer and was entitled to statutory immunity. *England v. Beers Constr. Co.*, 224 Ga. App. 44, 479 S.E.2d 420 (1996).

In *Dye v. Trussway*, 211 Ga. App. 139, 438 S.E.2d 194 (1993), *Dye* was employed by a temporary employment agency and then assigned to Trussway under a written agreement between the employment agency and Trussway. The plaintiff, *Dye*, was injured in the course of working for Trussway. The Court of Appeals reversed the summary judgment granted to Trussway, holding that the trial court improperly found that Trussway was *Dye's* statutory employer. The suit was, therefore, not barred by the workers' compensation exclusive remedy provision. The court found that Trussway was not a statutory employer who owed a duty of performance to another party and, under *Yoho*, Trussway was not entitled to tort immunity.

The 1995 Georgia General Assembly legislatively overruled *Dye v. Trussway* by giving immunity to businesses using the services of a temporary help contracting firm or an employee leasing company. O.C.G.A. § 34-9-11(c). An employer using such a company has direct immunity from suit by a temporary employee and the temporary help contracting firm or employ-

ee leasing company is entitled to immunity as a statutory employer.

Although the legislature has provided immunity for companies with respect to temporary and leased employees, it did not eliminate the broader impact of the *Yoho* case. For example, in *Guillman v. Georgia Power Co.*, 211 Ga. App. 690, 440 S.E.2d 83 (1994), the Court of Appeals followed the holding in *Yoho* in reversing the grant of summary judgment to Georgia Power on the basis that it was not Guillman's statutory employer. Guillman, an employee of an independent contractor, was injured while making repairs at Georgia Power's Plant branch. Georgia Power argued that it was a statutory employer and therefore immune from the plaintiff's tort action because it was a contractor owing a duty of performance to another, its utility customers. The Court rejected the argument, holding that a mere contract for the sale of goods or services does not make the seller a contractor under O.C.G.A. § 34-9-8, unless there is an undertaking of substantial services in connection with the goods sold. The services provided by Georgia Power were insufficient to qualify Georgia Power as a contractor.

Even though *Yoho* eliminated most instances in which an owner would be entitled to immunity, it did not eliminate immunity for owners entirely. Where the owner is also a contractor and enters into a contract with another contractor under which each contractor owes obligations to the other, the owner is entitled to tort immunity. In *Finley v. Lehman*, 218 Ga. App. 789, 463 S.E.2d 709 (1995), the defendant was both the owner and the developer of a subdivision. As part of the contract to purchase the property, the owner agreed to install sewer and water lines so that houses could be constructed on the lots in the subdivisions by builders. In meeting its obligation, the owner/developer hired a subcontractor and Finley was then killed while working for the subcontractor by a cave-in during the installation of one of the sewer lines. Because the owner had an independent obligation to construct the sewer

lines, the owner was entitled to tort immunity as the decedent's statutory employer. The obligation of performance which creates the status of contractor can even be owed to another owner. *Holton v. Georgia Power Co.* 228 Ga. App. 135, 491 S.E.2d 207 (1997).

### C. Statutory Employer Immunity

Under the Exclusive Remedy Doctrine, the employer of an injured employee is immune from suit because the injured employee's sole or exclusive remedy is workers' compensation benefits. O.C.G.A. § 34-9-11. The employer cannot be sued if it caused the employee's injury. *Kelly v. China One Restaurant, Inc.*, 161 Ga. App. 600, 289 S.E.2d 28 (1981). Even where the employer's negligence may have combined with a third-party's negligent to injure the employee, the employer cannot be sued. An employer is immune even if the employee alleges the injury was due to a willful act such as an assault and battery.

The immunity of a statutory employer has also long been a part of the workers' compensation system. See *Wright Associates v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981). It is now clear that any employer potentially liable for the payment of workers' compensation benefits is immune from suit. The Workers' Compensation Act also makes it clear that a co-employee of the same employer is likewise immune from suit. O.C.G.A. § 34-9-11; see e.g. *Williams v. Byrd*, 242 Ga. 80, 247 S.E.2d 874 (1978). Since a claim by a spouse is derivative, a claim for loss of consortium by the spouse of an injured employee is barred as well. *Gulf States Ceramic v. Fenster*, 228 Ga. 400, 185 S.E.2d 801 (1971). An insurance carrier or a servicing agent for a self-insured employer is entitled to the same immunity as an employer. *Fred S. James & Co. of Georgia v. King*, 160 Ga. App. 697, 288 S.E.2d 52 (1981). The general principles barring a claim against the employer, a statutory employer and a co-employee of the same employer are now widely accepted and rarely challenged.

In *Rothrock v. Jeter*, 212 Ga. App. 85, 441 S.E.2d 88 (1994), the Court of

Appeals relied upon many of the old cases and *Yoho* in part to reach the holding that the plaintiff and the defendant were not employees of the same employer as to entitle the defendant to immunity under the Workers' Compensation exclusive remedy provision. Rothrock operated his truck as an independent contractor for C&N Evans Trucking Company. Jeter, an employee of C&N was injured on C&N's premises while assisting Rothrock with his truck. Jeter received workers' compensation benefits from C&N, his direct employer, and thereafter filed suit against Rothrock for his injuries. Rothrock contended that as a subcontractor, C&N became his statutory employer. Jeter was a direct employee of the statutory employer and he was therefore entitled to the immunity of C&N.

In affirming the denial of Rothrock's motion for summary judgment, the Court of Appeals held that although C&N may have been a statutory employer or Rothrock for determining his own right to workers' compensation benefits against C&N, he was still an independent contractor and not a co-employee of Jeter. Rothrock and Jeter were not employees of the same employer within the meaning of the exclusive remedy provision because one (Jeter) was an employee but the other (Rothrock) was an independent contractor. Immunity afforded to "an employee of the same employer" as contained in O.C.G.A. § 34-9-11(a) does not extend to subcontractors who are not statutory employers when direct employees assert claims against the independent contractor.

Also, if an injured worker loses his or her claim for workers' compensation benefits for reasons unrelated to his or her employment status, they can not sue a statutory employer in tort. In *Maguire v. Dominion Dev. Corp.*, 241 Ga. App. 715, 527 S.E.2d 575 (1999) the general contractor successfully defeated a claim for workers' compensation benefits based upon the worker's failure to follow proper procedures. The Court of Appeals held that the employee's tort claim was barred by the exclusive remedy provision of the Act even though he did not

receive benefits.

### 1. Immunity of Non-Construction Professionals

A number of professionals have attempted to rely upon the immunity as a co-employee to bar claims against them for professional negligence. In *Downey v. Bexley*, 253 Ga. 125, 317 S.E.2d 523 (1984), employees, while proceeding in workers' compensation, sued the company physician alleging fraud, deceit and medical malpractice contending that Dr. Downey knew of their deteriorating health condition, did nothing about their condition, and intentionally concealed the information from them. The Superior Court ruled that Dr. Downey was immune from suit as a co-employee, but the Supreme Court reversed holding that a professional co-employee may be held liable because he owes a unique and professional duty despite his status as a co-employee. This ruling was affirmed in *Davis v. Stover*, 258 Ga. 156, 366 S.E.2d 670 (1988) when the Supreme Court of Georgia held that it was not the allegation of fraud or deceit that eliminated the co-employee physician's immunity but the professional duty owed because of the co-employee's status as a physician.

Similarly a rehabilitation nurse owes a separate and independent professional duty to her client. In *Drury v. VPS Case Management Services, Inc.* 200 Ga. App. 540, 408 S.E.2d 809 (1991), a suit was allowed to proceed against a rehabilitation supplier after an injured employee contended that the supplier had negligently provided vocational rehabilitation services. The Court of Appeals held that a rehabilitation supplier owed a professional duty and that the duty arose subsequent to the injury. The nurse, therefore was not entitled to immunity.

A state patrol captain, however, is not a professional who owes a unique, fiduciary or professional duty to a fellow state patrol officer when driving a car. In *Clark v. Williams*, 206 Ga. App. 329, 425 S.E.2d 311 (1992), a state patrol officer was injured in an accident in which his captain was driving and was killed. The estate of the captain was granted immunity since the

captain was a co-employee and owed no professional duty to the injured officer.

In order to make a party to the contract for the sale of goods a "contractor," the contract to sell must be accompanied by an undertaking by either party to render substantial services in connection with the goods sold. The fact that an injured employee's employer fabricated the parts sold on the construction site does not, in and of itself, make the employer a subcontractor of the contractor. *Gray Bldg. Sys. v. Trine*, 260 Ga. 252, 391 S.E.2d 764 (1990).

## 2. Statutory Employer Immunity for Construction and Safety Managers

The employee of another subcontractor or even the employee of the general contractor is not automatically entitled to immunity because such a person is often not an employee of the same employer. When an employee of a subcontractor is injured, however, in many cases, the construction managers and safety personnel will be entitled to immunity anyway. In light of the previous cases, there was some fear by construction managers and safety managers that while performing their duties, they could subject themselves to suit even though they were not actively doing anything wrong and even though their employer would be immune from suit.

Cases such as *Paz v. Marvin M. Black Co.*, 200 Ga. App. 607, 408 S.E.2d 807 (1991), confirmed many of the fears of construction and safety managers. In *Paz*, a subcontractor's employee was injured in a fall from a scaffold. He then sued the general contractor as well as the general contractor's foreman who was allegedly supervising or directing the use of a bulldozer which was operating around the scaffold at the time it fell. The general contractor also was cited for OSHA violations in connection with the building of the scaffold. Relying on *Long v. Marvin M. Black Co.*, 250 Ga. 621, 300 S.E.2d 150 (1991), the Court of Appeals in *Paz* refused to grant immunity to the supervisor of the general contractor based solely on the fact that the supervisor of the general

contractor was not an employee of the same employer as the injured employee.

The Supreme Court of Georgia in *Long*, however did not address the issue of whether or not the negligence was active or passive or whether a non-delegable duty was involved as requested by the defense. The *Long* case involved active negligence (a nail gun accident) and there was no issue of supervision since the supervisor actually shot the nail gun. The Court of Appeals in *Paz*, did not distinguish between the negligence of discharging a nail gun into another employee (*Long*) and the allegation of a failure to inspect or properly supervise the erection of scaffolding. In *Paz*, although the foreman was actively supervising the work, he was not the person performing the work and therefore it was viewed as a passive negligence case by construction professionals.

The fear of construction and safety managers was compounded by the initial ruling of the Court of Appeals in *Ruiz v. Pardue*, 204 Ga. App. 566, 420 S.E.2d 1 (1992) and *Avelor v. Scaffolding & Shoring Systems, Inc.*, 206 Ga. App. 682, 426 S.E.2d 673 (1992). In those cases, employees of a subcontractor were injured when they fell off of the same scaffolding which caused the injury to Mr. Paz and which was the subject of the suit in *Paz v. Marvin M. Black & Co.*, *supra*. Mr. Ruiz and Mr. Avelor sued the general contractor's safety manager for failing to provide a safe workplace. While the Superior Court originally granted immunity to the safety manager, finding the safety manager was the "alter-ego" of the general contractor, the Court of Appeals, relying on the earlier cases, held that the safety manager was not immune since he was not a co-employee of the same employer as the injured employees.

The Supreme Court of Georgia reversed the Court of Appeals holding that because the general contractor's safety manager was acting as the alter-ego of the general contractor in conducting the safety program (which included any failure to inspect the

scaffolding) he was entitled to immunity. The claimants contended that the safety manager had been negligent in failing to inspect the scaffolding and that it had been erected improperly. The Supreme Court held that the safety managers' duties were non-delegable and a passive duty of general supervision or providing a safe workplace. Therefore, the safety manager was entitled to the general contractor's tort immunity. *Pardue v. Ruiz*, 263 Ga. 146, 429 S.E.2d 912 (1993). The only way the general contractor could perform its duty was through its managers. To allow lawsuits against officers, managers or supervisors who are performing general passive non-delegable duties of the statutory employer would defeat the very purpose of the Workers' Compensation Act by imposing double liability upon the statutory employer who would be obliged to indemnify its managers.

## Conclusions

While the statute imposing liability for workers' compensation benefits upon intermediate or general contractors has remained the same since the Georgia Workers' Compensation Act passed in 1920, the application of what is now O.C.G.A. § 34-9-8 has never been clear. The courts have interpreted the meaning of contractor, subcontractor and even independent contractor in various ways which have been confusing to many lawyers and judges. Since the decision in *Yoho v. Ringier of America, Inc.* it is now clear that only a contractor is obligated to pay workers' compensation benefits to the employee of a subcontractor and that one becomes a contractor only through an obligation of performance created by contract. Once a business enterprise has the potential obligation to provide workers' compensation benefits, it is thereafter immune from tort suit. The potential obligation to pay workers' compensation provides the corresponding tort immunity.

# Recent Appellate Decisions

By Neil C. Thom

A. & B. Bishop & Associates LLC

Since the last newsletter the Court of Appeals has decided a number of cases in the workers' compensation area, as follows:

***Oconee Area Home Care Services, Inc. v. Burton*, 275 Ga. App. 784, 621 S.E.2d 859 (2005). Decided Oct. 12 2005.**

The claimant injured his back at work while lifting a patient on July 16, 2003. He did not return to work until Aug. 4, receiving TTD benefits for two weeks, when his treating physician released him to return. He stopped working again on Aug. 26 due to back pain. According to the claimant, his condition gradually worsened with his regular work activities until he could simply no longer work. No one disputed that the claimant was entitled to workers' compensation income benefits. The employer changed workers' compensation coverage effective Aug. 1, 2003, so the only issue was whether the disability resulted from a Aug. 26 change in condition from the July 16 injury or from a new Aug. 26, 2003 accident.

The ALJ found that the claimant had not sustained a new accident as of Aug. 26 and that his disability was due to the July 16 injury. The Appellate Division affirmed. The Superior Court reversed, finding that the evidence showed a new accident date of Aug. 26, 2003. The first insurer argued on appeal that there was medical evidence to refute the claimant's testimony regarding his gradual worsening without a new injury. Because there was "any evidence" (the claimant's testimony) to support the change in condition finding, however, it was error for the Superior Court to reverse the Board's finding.

***Sears v. Macon Water Authority*, 276 Ga. App. 194, 622 S.E. 2d 867 (2005). Decided Nov. 2, 2005.**

The claimant fell several feet from a ladder at work, sustaining multiple fractures and other injuries. Two days after his discharge from the hospital, he had a heart attack. The employer acknowledged the accident's compensability, but controverted payment of certain treatment associated with the heart attack, contending that it arose from a pre-existing condition, was personal in nature, and did not arise out of or in the course of employment. The claimant requested a hearing, seeking the specific relief of payment of certain heart attack-related expenses. The parties stipulated at hearing that the employer would be liable for those expenses if the ALJ found the heart attack compensable. A cardiologist offered several points in favor of causation: the claimant's discontinued use of blood thinners on the recommendation of those doctors treating him for his injuries made his arteries more susceptible to clotting; the trauma from the fall itself made him more susceptible

to chemical changes which would have failed to prevent clotting; and pain medication taken for the fall's injuries may have masked some of his chest pain. The cardiologist testified that the heart attack was a result of a combination of pre-existing heart disease, physical stress from the fall, fractured bones, pain, reduction of blood-thinning medication, and the chemical changes brought about by the trauma. The ALJ was persuaded by the cardiologist's testimony and found that the fall aggravated the pre-existing heart condition, ordering the employer to pay the medical expenses at issue. The Appellate Division affirmed.

On the employer's appeal to the Superior Court of Bibb County, the award was affirmed, but the superior court added that the employer was "not required to pay any future medical expenses related to Claimant's heart condition." The Court of Appeals affirmed that portion of the superior court's judgment relating to payment of the medical expenses that were at issue before the Board, but reversed that portion relating to future medical expenses, directing the superior court to amend its judgment to remove that language. The Court held that future medical expenses related to any ongoing heart condition that the claimant might have were not an issue before the Board, and including such future expenses was beyond the superior court's jurisdiction.

***John W. Rooker & Associates v. Patterson*, 276 Ga.App. 410, 623 S.E.2d 258 (2005). Decided Nov. 17, 2005.**

The claimant injured his back at work in 1996, resulting in surgical fusion. In 2001, the Board designated his injuries catastrophic. He began receiving temporary total disability (TTD) benefits. In 2003, the employer sought an award reducing the claimant's benefits. It alleged that he had begun doing maintenance work at an apartment complex and that there were jobs available within his changed lifting restrictions. The ALJ rejected the employer's arguments, finding that, although the claimant "helped out" around his friend's apartment complex, his activities did not constitute a return to work. The ALJ further found that, although a labor market survey demonstrated several jobs that were suitable for the employee, there was "no evidence that any of these jobs are actually available to the employee or that the employee was informed of the jobs." The superior court affirmed.

The employer urged the seemingly contrary results reached in *WAGA-TV, Inc. v. Yang*, 256 Ga.App. 224, 568 S.E. 2d 58 (2002), and *ABB Risk Management, etc. v. Lord*, (254 Ga.App. 88, 561 S.E.2d 225 (2002)). In both of those cases, the Court of Appeals held that the superior courts



erred in reversing the Board's findings in the employers' favors that the claimants had experienced changes in condition for the better. The Court of Appeals in the instant *Rooker* case, however, pointed out that its reviews of the *Yang* and *Lord* cases, as of the pending case, were governed by the "any evidence" standard, all with the same legal result. The "contrary" results were at the Board level and, when supported by any evidence, could not be disturbed on appeal. Each of them "could have gone either way", so to speak, but having gone one way or the other with the support of any evidence, they must stay that way.

The Court, citing *Sadie G. Mays Mem. Nursing Home v. Freeman*, 163 Ga.App. 557, 295 S.E. 2d 340 (1982), included a useful reminder of how an employer might show a change in condition for the better: by showing (1) a physical change for the better; (2) an ability to return to work as a result of that change; and (3) the availability of work that would terminate or decrease the loss of income resulting from the work-related disability. One can see that the evidence in *Rooker* might have been enough to persuade the Board that a change in condition for the better had occurred, but as it was not, the decision stood.

***Glover v. Ware*, 276 Ga.App. 759, 624 S.E.2d 285 (2005). Decided Dec. 9, 2005.**

In a wrongful death action brought by the decedent's (Glover) estate against Ware, the defendant moved for summary judgment, alleging Glover was Ware's employee, and therefore the exclusive remedy provision applied. The state court granted summary judgment, but the Court of Appeals reversed, holding that there existed a genuine issue of material fact as to whether Glover was an employee of Ware's landscape business.

Glover was disabled and lived on Ware's property. Ware acted as a de facto guardian, receiving Glover's Social Security disability benefits and taking care of Glover's needs, includ-



ing food, shelter, and clothing. He held a position of authority over Glover, acting as a "father figure". Glover rode with Ware to a job one day, and when one of the crew did not show up, Ware asked him if he would help out. Compensation was not discussed. While Glover was working with the crew, he lost his balance, fell off the back of the truck, and was run over by the mulching machine, resulting in fatal injuries.

Thereafter, an investigator acting on Ware's workers' compensation insurer met with Ware, and Ware signed a statement asserting, inter alia, that Glover was not an employee. Glover's family filed a workers' compensation claim, which was denied by the workers' compensation insurer, then filed this wrongful death action.

Based on Ware's statement in connection with the workers' compensation claim and the fact that the parallels between the authority of an employer and the authority of a "father figure" rendered the existence of an employer-employee relationship inconclusive, the Court reversed the summary judgment.

***Ray Bell Construction Company v. King*, 277 Ga.App. 144, 625 S.E.2d 541 (2006). Decided Jan. 5, 2006.**

The deceased employee was a construction superintendent at a job site in Jackson, Ga. The employer provided housing in Fayetteville so he could live nearby and a company-owned truck for work and personal use. The

employee was killed in an accident on a Sunday after being out of work for a week recovering from knee surgery. He sustained fatal injuries in an accident while he was on his way back from a trip to Alamo, Ga., to take personal furniture to a storage shed on property he owned. The ALJ found that he was returning either to his company-provided housing or to the job site.

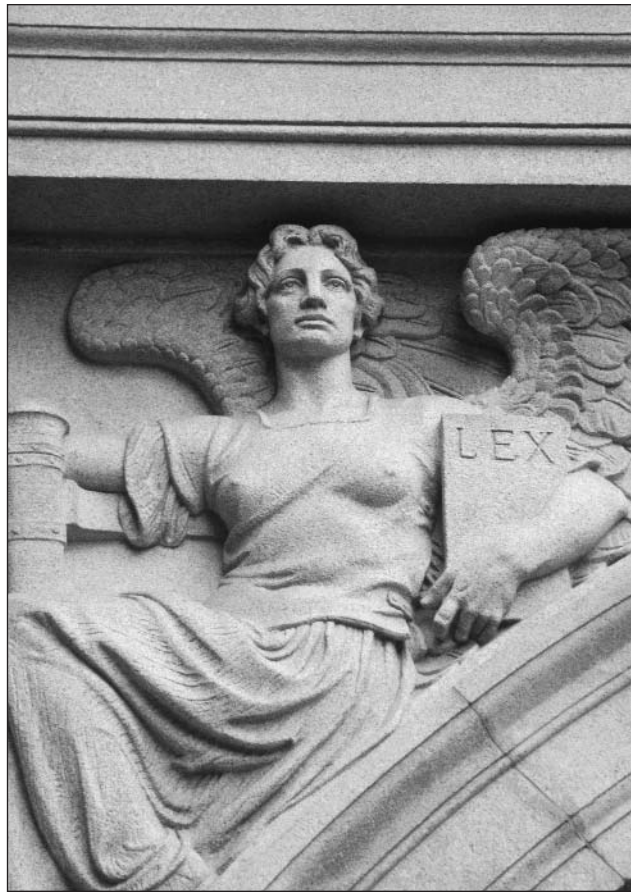
Citing *Boyd Bros. Transportation Co. v. Fonville*, 237 Ga.App. 721, 516 S.E.2d 573 (1999), and *Wilson v. Ga. Power Co.*, 128 Ga.App. 352, 196 S.E.2d 693 (1973), the Board found that the employee was in a state of continuous employment, because he was required to live and work in an area geographically limited by the necessity of being available for work on the job site. The employer argued that the accident did not arise out of and in the course of employment, because the employee was on a purely personal mission when he was injured. A continuous employee who deviates from his employment by taking a trip for personal reasons removes himself from employment during that deviation. *Intl. Business Machines v. Bonzardt*, 156 Ga.App. 794, 275 S.E.2d 376 (1980) Once the personal mission ends, accidents that occur on the trip arise out of and in the course of employment. The Board concluded that, since the accident occurred while the employee was on his way back from (and not to) Alamo for this personal errand, any deviation from the continuous employment had ended. The Board

awarded benefits to the mother and guardian of the deceased employee's minor child, and the superior court affirmed.

The Court of Appeals affirmed, as well, with some clarification. It held that "turning around" from the personal deviation was not, by itself, sufficient to terminate the deviation and restore employment. Instead, citing *Lewis v. Chatham County &c. Commission*, 217 Ga.App. 534, 458 S.E.2d 173 (1995), the Court held that if a deviation is significantly great, merely turning around to return is not enough, but the deviation ends only when the employee has returned to the geographic area where his work requires him to be. The scope of this geographic area is necessarily a factual issue. The Court held that the Board implicitly found that at the time of the car accident the employee had returned to the designated geographic area, and the personal mission was complete. This implicit finding was supported by some evidence: the accident took place in a county adjacent to that where the job site was located.

***Trax-Fax, Inc. v. Hobba*, Case No. A06A0397 (Ga. Ct. App., 2006). Decided Feb. 2, 2006.**

The claimant was president, sole shareholder, and one of only two full-time employees (the other was his wife) of the employer. Following a work-related accident on July 28, 1998, he was awarded temporary total disability (TTD) benefits. The employer's workers' compensation insurer, Travelers, suspended those benefits on April 24, 2002, but did not file a notice of suspension until Dec. 10, 2003. At that time, Travelers requested a hearing to recover TTD benefits it had overpaid, alleging that the employer had returned to work less than a year after the accident. Travelers also sought attorney fees, litigation expenses, civil penalties, and a referral for criminal prosecution.



The ALJ found that the claimant was never totally economically disabled and rejected a statute of limitation defense raised in the claimant's brief, since it had not been raised at the hearing. Specifically, the claimant's brief argued that O.C.G.A. §§ 34-9-104(b) and 34-9-245 barred claims for overpayments asserted more than two years after the overpayment was made. The ALJ ordered full reimbursement of benefits, assessed the Travelers' attorney fees, litigation expenses, and civil penalties against the claimant, and referred the matter to the Board's Enforcement Division for possible criminal prosecution. The Appellate Division upheld the ruling, but for the award of litigation expenses. Agreeing that the claimant had waived any statute of limitation defense, the Appellate Division added that O.C.G.A. § 34-9-245 was inapplicable, since it was enacted after the date of injury and could not be applied retroactively.

The superior court reversed, holding that O.C.G.A. § 34-9-245 was a statute of repose, creating an absolute bar against claims for reimbursement

made more than two years after the overpayment was made and not an affirmative defense that could be waived. The superior court therefore reversed that portion of the Board's award that ordered reimbursement of any benefits paid before Dec. 10, 2001, two years prior to the date the hearing was requested. The superior court also reversed the award of attorney fees, the assessment of civil penalties, and the referral to the Enforcement Division. Travelers' application for discretionary appeal was accepted by the Court of Appeals.

The Court of Appeals held that the superior court's examination (and partial reversal) of the reimbursement order was based on a legal interpretation of O.C.G.A. § 34-9-245 and, as such, was not subject to the "any evidence" rule, but was properly a *de novo* review.

*Trent Tube v. Hurston*, 261 Ga.App. 525, 583 S.E.2d 198 (2003) On the other hand, the superior court's review of those Board findings that warranted the award of attorney fees, the assessment of civil penalties, and the referral to the Enforcement Division was subject to the "any evidence" standard.

Travelers argued that the superior court erred in holding that O.C.G.A. § 34-9-245 was not a statute of limitation and, therefore, subject to waiver by the claimant for not raising it at the hearing. It argued, alternatively, that it was inapplicable to the claimant's case, since it was enacted after the accident. The Court of Appeals rejected both arguments. Looking to the specific language of the statute ("No claim for reimbursement shall be allowed where the application for reimbursement is filed more than two years after the date such overpayment was made"), the Court held that, like a statute of repose, it contemplates an absolute barrier to the right to seek reimbursement after two years and is not, as a statute of limitation would have been, a procedural deadline

imposing a time limit on when the accrued right could have been brought. Having found the statute to be one of repose, it necessarily followed that the right to claim reimbursement for benefits paid more than two years before the filing of the action no longer existed. Thus, integral to the definition to the right of reimbursement and not merely a statute of limitation, application of the statute could not be waived by the claimant.

Rejecting Travelers' argument that the statute could not be applied retroactively, the Court of Appeals pointed out that O.C.G.A. § 34-9-245 was enacted one year after the claimant began receiving TTD benefits. Citing *Hanflik v. Ratchford*, 848 F.Supp. 1539 (N.D.Ga. 1994), the Court acknowledged that statutes of repose can be applied retroactively "to cut short previously accrued causes of action, so long as plaintiffs had an adequate opportunity to bring their lawsuit prior to losing their previously vested rights." Travelers, therefore, had at least a year to seek reimbursement of those initial payments to the claimant, so retroactive application of the statute was not improper.

Finally, the Court of Appeals agreed with Travelers that the superior court's reversal of the attorney fees, civil penalties, and Enforcement Division portions of the Board's award was improper. Since the Board's findings in support of those portions of the award were supported by any evidence, they should not have been disturbed on appeal.

***Martines v. Worley & Sons Construction*, Case No. A05A1985 (Ga. Ct.App. 2006). Decided Feb. 14, 2006.**

The claimant injured his foot in an accident arising out of and in the course of his employment. After he was released by his doctor to work with restrictions, the employer offered him a job as a delivery truck driver, which job was within the restrictions. When he appeared for the job, however, he could not produce a valid dri-

ver's license and could not obtain one, because he had entered the country illegally. There was no evidence that his inability to drive was attributable to any reason other than his inability to obtain a license as a result of being an illegal alien. He testified that he did not know how to drive very well, but admitted that he drove in Mexico. He testified further that he was unable to read or write, further preventing him from obtaining a driver's license. Two days after presenting for work without the required driver's license, his physician certified him unable to work for three weeks, but another medical opinion approximately two months later concluded that he remained capable of light duty work.

The ALJ found that there had been no physical change for the better as of the date of the proposed return to work. He further found that the offered job was not suitable because he did not possess a driver's license, at least partly because he could not read or write and would be unable to pass the required test. The Appellate Division affirmed, but the superior court reversed. The case presented challenges to the Board's applications of law to undisputed facts, so the Board's decision was subject to a *de novo* standard of review. *Trent Tube v. Hurston*, 261 Ga.App. 525, 583 S.E.2d 198 (2003)

Citing the Georgia Supreme Court case of *City of Adel v. Wise*, 261 Ga. 53, 401 S.E.2d 522 (1991), the Court of Appeals explained the test presented by O.C.G.A. § 34-9-240, dealing with refusal of suitable work. The Board must first determine whether the offered job is suitable to the employee's capacity; if it finds the job suitable, then no compensation is allowed for the duration of the refusal, unless in the opinion of the Board the refusal was justified. Suitability deals only with the employee's physical capacity to perform the job, so the Board erred in determining that it was not suitable. The fact that the doctor took him out of work two days later was not relevant to the job's suitability at the time, since the question of present suitability could not be affected by

later events.

Addressing the question of whether the refusal was justified, the Court of Appeals acknowledged that the statute's language gives the Board discretion. The Supreme Court, however, has expressly limited that discretion in *Wise, supra*. To be justified, the refusal "must relate, in some manner, to his physical capacity or his ability to perform the job." *Id.* It cannot relate solely to personal choices unrelated to the work, such as the desire to work a particular shift.

The finding that the claimant's inability to obtain a driver's license due to his inability to read or write was an error of law, since state law provides for tests to be administered orally to illiterate applicants. The Court compared this case with its recent case of *Earth First Grading v. Gutierrez, supra*. In *Earth First*, the employer argued that the claimant's undocumented status rendered him ineligible to receive TTD benefits, since he could not meaningfully accept any employment, making the case analogous to someone who is incarcerated. The Court of Appeals rejected that argument, since that claimant's illegal status had not rendered him incapable of meaningfully accepting employment in the past (he was working, after all, when he was injured). In *Martines*, the claimant's illegal immigration status was the cause of his inability to accept a suitable job. The Court also rejected the claimant's argument that the doctor's "no-work" opinion two days after he revealed the reasons for his inability to perform the job showed that the job was not suitable. It is the time that the light duty job is offered that is relevant to the test of whether it is suitable, and later events do not change the offer's suitability.

## Tennis Elbow

*Continued from page 4*

non-worker's compensation groups. The only significant difference between the groups was that the worker's compensation group had a higher rate of changing jobs because of persistent symptoms.

### Conclusion

Tennis elbow is a challenging problem for both the patient and their care providers. Little evidence exists to clearly define the best treatment protocol. Successful symptom relief can be expected in a majority of patients, but progress can be slow and surgery may be necessary after all non-surgical options are exhausted. Knowledge of the anatomy, pathophysiology, and causes of the problem can help to alleviate the frustration often felt by the patient, case manager, attorney, and physician.

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