



# WORKERS' COMPENSATION LAW

Winter 2004 • Staten Bitting, Editor

SECTION NEWSLETTER

## Workers' Comp Case Law Update

by Lee Southwell

There have been two subrogation cases recently decided. Both of these cases basically reaffirm long-standing principles, but both contain unique facts, which make them worthy of mention.

The first case is *Georgia Electric Membership Corporation v. Garnto* 266 Ga. App. 452 (2004). In that case, Garnto was involved in a work-related automobile collision. He filed a personal injury action against the driver of the other vehicle. Georgia Electric Membership Corporation, his employer, intervened to assert and protect an alleged subrogation lien. The parties settled the personal injury action, and GEMC sought to impose its subrogation lien on the settlement proceeds.

The trial court dismissed the subrogation lien. The trial court found that Garnto had not been fully and completely compensated for all economic and non-economic damages, taking into consideration workers' compensation benefits paid and settlement proceeds received. The trial court took note of the fact that Garnto had been a commercial airline pilot in the past, but that because of his shoulder, arm, hip, and leg injuries he suffered in the automobile collision, he could no longer perform that type of work. The trial court also noted that Garnto feared that his injuries would prevent him from renewing his pilot's license so that he could not even fly private airplanes in the future. The trial court further noted that Garnto would suffer pain for the rest of his life. The

trial court held that GEMC had presented no evidence to demonstrate that Garnto had been fully and completely compensated for all of his economic and non-economic damages.

In the process of affirming, the court of appeals noted that GEMC appeared to assert that Garnto was fully compensated for his economic losses by workers' compensation benefits. The court of appeals pointed out that it was impossible for this assertion to be correct because the workers' compensation law provided for a partial, not a total replacement of lost wages.

The court of appeals further noted that GEMC had presented the affidavit of an alleged expert witness, an insurance adjuster who purported to be an expert in evaluating claims for settlement. The alleged expert formed his opinion based on multiples of special damages and consideration of weather juries in the trial venue were believed to be liberal or conservative. The multiples were three, four, or five times the special

damages. In this case, a multiple of three would show that Garnto had been fully compensated, but multiples of four or five would not. The court of appeals stated that when the trial court held that GEMC had presented no evidence on the issue of economic damages the trial court either believed the alleged expert's affidavit had no

probative value or that, because of the range of multiples presented and the failure to take into consideration the unique circumstances of this case, it was not sufficient to carry the burden of proof as a matter of law. It is especially important to note that a general evaluation based on settlements for

insurance purposes which does not address any unique circumstances of a particular case cannot carry the burden of proving that a plaintiff has been fully and completely compensated.

The second subrogation case is *Tyson Foods, Inc. v. Craig*, 266 Ga. App. 443 (2004). In that case, Craig was



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# Take Advantage of Technology

If you have not visited the Web site of the State Board of Workers' Compensation or the Subsequent Injury Trust Fund, I would encourage you to do that. There is a tremendous amount of information and numerous resources.

The Alternative Dispute Resolution Division now has the mediation calendar for the areas outside of Atlanta available for viewing on the website. The website also announced the ADR Unit's designation of settlement days in the Atlanta office.

If you have not done so already, the 2004 Board Form changes are available for downloading from the website. The revised forms became effective July 1, 2004.

The SITF website has a place that allows you to check the progress of any claims submitted to them for acceptance. There is also a section on the proper procedure for submitting a claim.

The e-mail addresses of persons with whom you may want to be in contact can also be found on this website. E-mail is a very effective tool for avoiding the time lag, which can occur in telephone tag. Additionally, in my experience, e-mail communications tend to be more time efficient because the natural tendency to extend a telephone call for fear of being thought rude.

The Web sites have become very easy to use and have valuable information added on a regular basis. If you are not utilizing this resource, I recommend that you take a look and see what you have been missing. **WC**

## State Board of Workers' Compensation Calendar

### 2005 Regional Seminar Dates and Locations

<i>Date</i>	<i>City</i>	<i>Location</i>
April 14	Dalton	NW Georgia Trade & Convention Center
April 21	Carrollton	Cultural Arts Center
May 3	Athens	Holiday Inn - East Broad Street
May 10	Albany	Merry Acres Event Center
May 11	Waycross	Okefenokee Technical College
May 12	Savannah	Coastal Georgia Center

### 2005 Workers' Compensation Law Section Seminar Date and Location

August 29 - 31  
Renaissance Waverly Hotel  
2450 Galleria Parkway  
Atlanta, GA 30339

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# Kids' Chance Inc. Chatroom

by Cheryl G. Oliver

We're happy to announce the appointment of two new members to the Kids' Chance Board of Directors: Atlanta attorney Susan Sadow and Douglas attorney Jeff Kight.

Outgoing directors Stephen Garner and Judge Yvette Miller were recognized at the State Board of Workers' Compensation annual seminar in September for many years of exemplary service to Kids' Chance. They both promise to remain supporters of our unique, life-changing organization.

**Susan Sadow** was born in Jersey City, NJ; earned her Bachelor of Arts degree from Tufts University and a law degree from Emory University. Among her many accomplishments is a listing in *The Best Lawyers in America* 2003-04 for specialization in workers' compensation law. A certified mediator, she was named a Georgia Super Lawyer in the March 2004 edition of *Atlanta* magazine. In Susan's words, here is why she is willing to serve on the Kids' Chance Board:

"I accepted the nomination to be on the Board of Directors of Kids' Chance because over the years I have witnessed the devastating impact that serious work-related injuries and deaths have on my clients' families. I am anxious to reach out to young people who seek to overcome the obstacles that have been placed in their paths and still hope to make the most of themselves despite terribly adverse circumstances that they have encountered along the way. I look forward to the challenge of contributing to an organization whose focus is on selecting deserving young adults and enabling them to continue their education and pursue their dreams."

Susan and her husband, criminal defense lawyer Steve Sadow, are parents to two sons, ages 16 and 19.

**Jeff Kight** is one of the Kids' Chance success stories! Born in Douglas, Georgia, he became one of the first recipients of a Kids' Chance scholarship while earning his undergraduate degree at Mercer University. He then went on to pursue his law degree at Mercer, which he earned in 1995. He now practices law in his hometown. Jeff's father was disabled due to a work-related accident and Jeff learned first-hand about Kids' Chance. Asked why he's willing to serve, he responded:

"I am truly honored to serve on this Board because as a former scholarship recipient, I know, understand and deeply appreciate the need and the good that this organization provides for its students. It is not at all out of a sense of obligation of being a past recipient that I serve; it is from my desire to serve an organization with a mission

that is clear, that is needed and that is so appreciated by the students and their families. I have been so blessed and fortunate in all aspects of my life, not the least of which is to be a part of this organization and to have learned the ideal of service to others, an ideal that I learned early on from the very founder of KIDS' Chance and its board members with whom I now proudly serve."

Jeff and his wife, Walda, are the proud parents of a 3-year-old son, Brandon.

## Special Events Report

Despite ongoing economic uncertainty, our special events this year have brought in much needed dollars for our scholarship fund. Our hard-working volunteers have made that happen, along with support from sponsors and participants and we're grateful to them all. (Amounts reported are gross proceeds)

- GSIA Auction (chaired by Karen Cook) — \$5,474
- Walk for Charity — \$5005
- Tennis Tournament (chaired by Bridget Kelly) — \$19,005
- Family Fun Fest (chaired by Gloria Cook) — \$38,555
- Bowling - Valdosta (chaired by Linda Ray) — \$11,378
- Golf Tournament (chaired by Carole Reich & Sherri Cloud) — \$70,000+ (proceeds still coming in)
- ICLE/Kids' Chance Dinner/Dance/Auction (co-chaired by Kathryn Bergquist and Judge Beth Lammers) — \$24,500+
- 15th annual Kids' Chance Run/Walk (chaired by Gregg Porter) — \$18,000+ (proceeds still coming in)

Still to come is UAW Bowling, chaired by Bo Marlowe on Nov. 6 in Forest Park and the I-Day Auction, chaired by Angela Barnard, on Nov. 10 at the Cobb Galleria.

We're blessed to also receive proceeds from Hugh McNatt's Herculean efforts for the Cliff Adams Kids' Chance Scholarship Fund; from the Builders' Insurance Group Golf Tournament (Sept. 30); from the TJR Golf Outing in Savannah sponsored by the Southeastern Orthopedic Center (Sept. 27); and many other benevolent supporters.

With a record 57 students on scholarship (395 total scholarships awarded to date), and ten new applications pending approval, we're extremely grateful for all of the support and help we receive. Huge thanks are due to members of the Workers' Compensation Section of the State Bar of Georgia, our official sponsors. What would we do without you? **WC**

# 2004 Workers' Compensation Law Institute

The annual Workers' Compensation Institute was held Oct. 7-9 at the Sea Palms Resort on St. Simons Island. It seems that the event becomes more popular each year. There were over 400 registrants for this year's institute. The Section thanks Nicole Tifverman and Joe Leman for all their hard work in chairing the program. They did an outstanding job.

As always, the gathering was animated. The cocktail party was lively. The golf and tennis tournament provided an outlet the competitive spirit advocates tend to possess. The Kids' Chance dinner-dance and auction was a success. Joe Sartain and Curtis Farrar were presented with the Section's Distinguished Service Award at the event. Kids' Chance Executive Director Cheryl Oliver has provided a more detailed account of the event, which appears on page 5.

Judge Hall gave her annual State of the Board overview from her perspective as chairman of the State Board. She was pleased to report that Georgia was once again one of only eight states to receive an "A" rating on its 2004 report card from the Work Loss Data Institute. Information was given of the progress of the major initiative known as the Integrated Claims Management System at the Board. This will, among other things, lead to less paper-intensive practice and claims management, as well as afforded better access to more information. An update was also provided on the difficult task of revising and improving the Workers' Compensation Fee Schedule. This revision is underway. The goals of timely and high-quality medical care and treatment are the focus of the effort.

A lively panel discussion broke out among Don Hartman, Charlie Drew, Warren Coppage, Bobby Potter, George Talley, John Sweet, Joe Sartain

and Joe Hennesy. The topic was ethics. What we received were entertaining exchanges about memorable discovery disputes, hearings (successes and failures), numerous acts of professional courtesies and assorted foibles. As with all war stories recalled by superior advocates, there were clear lessons to be gleaned. We are grateful to these distinguished practitioners for sharing their experiences with us. Thanks also to Luvenia B. George for preparing the paper which was included in the materials.

Mark Gannon, chairman of the Rules Committee, provided some elaboration on the reasoning behind, and purpose of, some of the Board Rules that have generated issues in claims. Among these were Rule 205, Rule 240 and Rule 207. The attendees were also given a heads up on some anticipated rules or rule changes. Mentioned were the rules necessary to implement the Integrated Claims Management System, a new medical release authorization form for catastrophic rehabilitation coordinators, possible amendments to Rule 200 regarding physicians who provide expert testimony and possible amendments to rules pertaining to the Subsequent Injury Trust Fund.

Appreciation is also expressed to all those who presented papers on substantive areas of the law and practice. These included:

- John Furgueson - *Case Law Update*
- Tim Hanofee - *Trying A Workers' Compensation Case*
- Ann Bishop - *Deposing A Doctor: A Report From The Doctor's Perspective*
- Todd Colarusso - *Cross-Examining A Doctor On The A.M.A. Guides To The Evaluation Of Permanent Impairment*
- John Seiler - *Interpreting Medical Records*

- Deborah Krotenberg - *Rehabilitation Update: Understanding 34-9-200.1(G)(6) Transferability Of Skills And The Attorney/Catastrophic Rehabilitation Supplier Relationship*
- Janyce Dawkins - *Beyond 200.1: Representing The Catastrophically Injured Claimant*
- Miles Gammage - *How To Stay Away From A Medicare Set-Aside Trust/Account*
- John Blackmon - *Drugs, Alcohol And Willful Misconduct: Proving And Persuading*
- Bruce Carraway - *Professionalism In Handling Workers' Compensation Cases*
- Beth Randolph - *An Adjuster's Perspective On Dealing With Claimants and Defense Attorneys*
- Stan Carter - *Integrated Claims Management System*
- Tommy Goddard - *Got Credit? A Review Of Workers' Compensation Credits and Offsets*
- Judge Leesa Bohler - *An Administrative Law Judge's Perspective on Trial Tactics*
- Judge David M. Imahara - *How To Catch The Appellate Division's Attention*
- David Taylor - *Georgia Subsequent Injury Trust Fund: Final Or Interlocutory Order?*

These papers are informative and they were presented well.

The Workers' Compensation Section has among its members some of the most effective advocates at the Bar today. Fortunately, when the swords are traded for swizzle sticks, this is truly a congenial group. Those who attended this year's program at St. Simons found this to be true, once again. Congratulations to all who put on this successful event. **WC**



## Sartain, Farrar Receive Distinguished Service Award

Joe B. Sartain Jr. and Curtis Farrar Jr. were presented the Workers' Compensation Law Section's Distinguished Service Award during the ICLE/Kids' Chance Dinner-Dance, which was held on Oct. 7 in conjunction with the 2004 Workers' Compensation Law Institute in St. Simons Island.



**Top:** Joe Sartain, Emily George, section chair, and Tom Finn

**Bottom:** Curtis Farrar, Emily George, David Moskowitz and Kurt Farrar

## Kids' Chance, Section Produce Sold-Out Event at 2004 Institute

The 2004 ICLE/Kids' Chance Dinner/Dance & Auction on Oct. 7 was a better-than-ever event with a new dimension. The Workers' Compensation Law Section presented Distinguished Service Awards to two distinguished members: Joe B. Sartain Jr. and Curtis Farrar Jr.

Held at the elegant King & Prince Beach & Golf Resort on St. Simons Island, the evening included a gourmet dinner, music by D.J. Tommy Tucker & the Dance Jammers, dynamic silent and live auctions. Net proceeds added almost \$15,000 to the Kids' Chance scholarship fund just in time for Spring semester tuition payments due in December.

Spearheaded by Kathryn Bergquist and Judge Beth Lammers, the auctions added excitement to the evening. Attorney John Sweet served as auctioneer, and Tom

Chambers offered his supportive remarks about the Kids' Chance program and grace for the meal. Luanne Clarke again proved to be an outstanding spokesperson for Kids' Chance. ICLE staffer Martha Phillips donated lovely centerpieces offered for sale to attendees. Thanks to all of you, and to Emily George, section chair, for guidance throughout the planning process. Volunteers like these provide the backbone of the Kids' Chance program.

As the new year approaches, a record number of students are receiving financial aid through Kids' Chance scholarships. As word spreads about the unique, life-changing service we provide, applications multiply and the need for funding grows. Thank you, members of the Workers' Compensation Law Section of the State Bar of Georgia, for your enduring support and partnership. Our kids are counting on you. **WC**

## Case Law

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injured in a Georgia Truck Collision. Although he could have received benefits under the Georgia Workers' Compensation Law, he did not. His workers' compensation benefits were paid pursuant to Texas law.

Craig filed a personal injury action against the driver of the other vehicle involved in his collision. Tyson Foods intervened to protect an alleged subrogation lien. After the personal injury action was settled, the parties presented the subrogation issue to the trial court on stipulated facts and briefs. The trial court dismissed the subrogation lien. On appeal, Tyson Foods argued that the trial court had failed to give full faith and credit to the Texas subrogation law and had clearly erred in finding that Tyson Foods could never prove that Craig had been fully and completely compensated.

The court of appeals disagreed. The court of appeals pointed out that the determination as to whether a plaintiff had been fully and completely compensated is a question of fact for the trial court to decide and the appellate court to affirm if there is any evidence to support it.

In this case, even though Georgia and Texas both have subrogation schemes, the two schemes are in direct and irreconcilable conflict. Under Texas law, attorneys' fees and expenses are the first items to be paid out of the proceeds of a judgement in favor of the plaintiff. The third item to be paid is reimbursement of workers' compensation benefits. The Texas law does not contain any provision requiring that the plaintiff be fully and completely compensated before a subrogation lien can be applied. The policy of Georgia, as expressed in code section 34-9-11.1(b), is to apply a subrogation lien only if the plaintiff/employee has been fully and completely compensated. Because the Texas law violated Georgia policy, the trial court was not required to give it full faith and credit.

Further, even though Craig was not paid any benefits under the Georgia Workers' Compensation Law, he was eligible for those benefits because his accident occurred in Georgia. Therefore, the law of Georgia, the place of the wrong, applied. According to Georgia law, the only benefits subject to a subrogation lien are those paid pursuant to the Georgia law. In as much as all benefits, which Craig had received, were paid pursuant to Texas law, there was nothing to which a Georgia subrogation lien could attach. This latter holding reaffirmed the holding of *Johnson v. Comcar Industries*, 252 Ga. App. 625 (2001).

The case of *Abdul-Hakim v. Mead School & Office Products*, 267 Ga. App. 121 (2004), deals with imposition of a penalty for alleged late payment of settlement proceeds. In that case, the Board approved a \$50,000 settlement in Abdul-Hakim's case on Dec. 18, 2001. The settlement agreement specifically provided that the employee's portion of settlement proceeds were to be sent directly to his attorney's office.

On Dec. 20, 2001, Mead sent the employee's check to his attorney's office. The check was made payable jointly to the employee and his attorney. This practice was common at the time, but became dangerous because of changes in Internal Revenue Service regulations. Because he feared adverse tax consequences, employee's attorney returned the check to Mead and requested issuance of a new check payable to the employee alone. That check was sent more than 20 days after Dec. 18, 2001.

Employee's attorney moved for imposition of a 20 percent late payment penalty. The administrative law judge denied the motion, and the Appellate Division held that the Dec. 20, 2001 check was timely paid and was sent to the proper location in compliance with the terms of the settlement agreement. Therefore, the payment was timely and the attorney's tax concerns were irrelevant.

The appeal to superior court resulted in an automatic affirmance. The

court of appeals granted discretionary appeal and also affirmed. The court of appeals noted that Board Rule 221 requires that benefits be sent to the employee's address of record or to another address as specified by the employee. The provision of the settlement agreement that the employee's portion be sent directly to his attorney's office specified the address. Because the check was mailed inside Georgia, the benefits were considered paid on Dec. 20, 2001. Dec. 20, 2001 is far less than 20 days from Dec. 18, 2001. The court of appeals agreed with the Appellate Division that the employee's attorney's tax concerns based on the way the check was payable were not relevant. The court of appeals agreed with the Appellate Division that no late payment penalty should be imposed under the facts and circumstances of this case because no late payment had occurred under those facts and circumstances.

The case of *Wet Walls, Inc. v. Ledesma*, 266 Ga. App. 685 (2004), is one of those rare cases which can truly be classified as a landmark. In that case, Saul Ledesma, an illegal alien, suffered an on-the-job injury in 1989. As a result of that injury, he was left partially paralyzed. In 1991, his authorized treating physician found that he had reached maximum medical improvement and gave him a permanent partial disability rating of 65.5 percent to the body as a whole.

In 2002, the same physician found that Ladesma was unable to return to his former occupation as a manual laborer and needed further testing to determine whether he could be released to return to any kind of work. Ladesma's employer accepted his injury as compensable and began paying temporary total disability benefits effective 1989. Payment of these benefits continued until Ladesma's incarceration. Payment of temporary total disability benefits was suspended at that point.

When he was released from custody, Ladesma was also deported. As a condition of his parole, he is banned from re-entering this country. Despite this fact, he filed a claim for resump-

tion of payment of temporary total disability benefits and payment of permanent partial disability benefits in a lump sum. The employer/insurer resisted this claim on a number of bases. The administrative law judge awarded temporary total disability and permanent partial disability benefits. The Appellate Division affirmed the award of temporary total disability benefits but denied the claim for permanent partial disability benefits. The Appellate Division held that Ladesma was entitled to receive temporary total disability benefits from the date of his injury and that because of this entitlement he was not entitled to permanent partial disability benefits. The Appellate Division further held that the only reason Ladesma did not receive temporary total disability benefits for a period of time was that he was incarcerated. Therefore, it was not proper under the facts of this case to order payment of permanent partial disability benefits while Ladesma was in jail. The superior court affirmed pursuant to the any evidence rule.

All parties appealed to the court of appeals. The court of appeals affirmed. The employer/insurer's first argument to the court of appeals was that it was not required to pay any benefits to Ladesma or any other illegal alien and pursuant to the United States Supreme Court decision of *Hoffman Plastics, Inc. v. National Labor Relations Board*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.E.d. No. 2d 271(2002). That case had held that the National Labor Relations Board could not award back pay to an illegal alien from an employer which was prohibited from hiring illegal aliens. This prohibition was contained in the Immigration Reform & Control Act of 1986. The court of appeals held that *Hoffman Plastics*, supra, did not apply in this case. Although the employer/insurer did not make their argument clear, the court of appeals believed that they were arguing that the IRCA preempted state workers' compensation laws. The court of appeals rejected this argument. The court of appeals stated that federal preemption was strictly a matter of

congressional intent.

This intent could be expressed in three ways: (1) Congress could expressly state an intent to preempt; (2) Congress could enact a scheme of regulations which was so pervasive that an intent to preempt could be implied; or (3) Congress could enact a scheme which is clearly in conflict with state law. In this case, the court of appeals held that there was no express preemption or direct conflict. The court further noted that employer/insurer had presented nothing which would authorize a finding that preemption could be implied. The court further noted that although the direct conflict issue was an issue of first impression in Georgia, it had been raised and ruled on in other states. The court noted that both Minnesota and Pennsylvania had stated that there was no direct conflict between IRCA and state workers' compensation law. The court further noted that employer/insurer argued that they should not be required to pay income benefits to a person who was not capable of working in this country. The court of appeals said that this argument had no relevance in the present case, because Ladesma was totally disabled and was not physically capable of performing any kind of work. The court of appeals noted that the fact that Ladesma had been partially paralyzed in his original injury and that his treating physician wanted to perform further tests before even considering releasing him to return to any kind of work was sufficient evidence to support a finding that Ladesma was totally disabled. Employer/insurer also argued that requiring them to pay income benefits to an illegal alien was a violation of equal protection. The court of appeals pointed out that this argument also assumed that Ladesma was capable of performing some kind of work, a fact which had been found not to exist.

The court of appeals also noted that the only case in Georgia which dealt with payment of income benefits to an illegal alien was *Dynasty Sample Corporation v. Beltran*, 224 Ga. App. 90 (1996). In that case, the State Board of Workers' Compensation had awarded

temporary total disability income benefits to an illegal alien from the time of his injury to the time of his termination following a medical release to return to restricted work and an actual return to restricted work. (It should be noted that Beltran was not terminated because of his undocumented/illegal status until he had been released to return to restricted duty, had actually returned to restricted duty, and had worked for two days.) The employer/insurer also argued that Ladesma had failed to prove a change in condition for the worse following his release from prison. The administrative law judge, Appellate Division, superior court, and court of appeals disagreed.

The court of appeals pointed that, contrary to employer/insurer's contention, the case of *Maloney v. Gordon County Farms*, 265 Ga. App. 825 (1995) did not apply in this case. First, Ladesma had not actually returned to work and then ceased to work for reasons unrelated to his injury. Second, he was not required to perform a diligent job search because it had been established that he was totally disabled and not capable of performing any work. Under these circumstances, a job search would be meaningless. The law does not require the doings of a useless act. The employer/insurer's final argument was that Ladesma's claim for further income benefits was barred by the statute of limitation and code section 34-9-104(b). The court of appeals noted that the law in effect at the time of Ladesma's 1989 jury was the law as it existed prior to the 1990 amendment to code section 34-9-104(b).

Therefore, the fact that Ladesma had an established permanent partial disability rating which had not been paid at the time his temporary total disability benefits were suspended because of his incarceration, those benefits remained potentially due and he had not received all benefits due under code Chapter 34-9. Therefore, under the law in effect in 1989, the statute of limitations on a change in

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condition claim had not begun to run. The court made no comment on what the result would have been had the post-1990 law been in effect, and to have done so would have been nothing more than dicta. Ladesma argued that the Appellate Division had erred in denying his claim for permanent partial disability benefits. The court of appeals disagreed. The court of appeals held that code section 34-9-263(b) provided that permanent partial disability benefits were not payable as long as the employee was entitled to income benefits for temporary total or temporary partial disability. The court of appeals noted that the law dealt with entitlement to benefits, not actual receipt of benefits.

Therefore, the fact that Ladesma did not receive temporary total disability benefits while he was incarcerated was irrelevant. The Appellate Division also held that to order payment of permanent partial disability benefits while Ladesma was incarcerated would be to grant him an unjust windfall. He had been entitled to temporary total disability benefits since 1989 and did not receive those benefits only because payment was suspended while he was in jail. The court stated that income benefits for temporary total disability are normally capped at 400 weeks from date of injury, but that no such cap exists in a catastrophic case. The court pointed out that if Ladesma's injury were ever designated catastrophic, he could receive temporary total disability income benefits for the rest of his life.

This analysis overlooks the fact that

there was no time limit on payment of income benefits for "temporary" total disability for any kind of injury in 1989. The 400-week cap was not enacted until 1992 and could not be retroactively applied in this case. Nevertheless, the court of appeals correctly pointed out that it entirely possible that Ladesma might never become entitled to permanent partial disability benefits during his lifetime. Therefore, the only reason he might be entitled to permanent partial disability benefits was the fact that he was incarcerated.

The court of appeals agreed with the Appellate Division that a prisoner should not receive such a windfall under these circumstances. (A question which remains to be answered is whether a prisoner who is not total disabled and who might well not be entitled to temporary total disability benefits were he or she not in prison

might be entitled to permanent partial disability benefits during incarceration. The *Ladesma* case does not answer this question.)

The case of *C. Brown Trucking Company v. Rushing*, 265 Ga. App. 676 (2004), deals with the rights of employees of owner-operators under the workers' compensation law. In that case, Brown Trucking Company had a contract with Norfolk Southern Railway to perform work on the railroad's premises. As a part of that contract, Brown hired Rushing's employer to supply trucks and drivers. Rushing's employer was an owner-operator. Rushing was injured when a train struck the truck he was driving while he was performing work on behalf of his employer under Brown's contract on the railroad's premises. Rushing first made his claim against

his immediate uninsured employer. When that employer did not pay the claim, Rushing filed a claim against Brown as a statutory employer. Brown denied liability on the basis that Rushing's employer was an owner-operator and therefore was an independent contractor as a matter of law. Brown further contended that employees of the independent contractor by operation of law were also independent contractors not covered by the workers' compensation law. The administrative law judge rejected these contentions. The administrative law judge found that Rushing was performing activities which were a part of the subject matter of the contract between Brown and Norfolk Southern. The administrative law judge further found that the accident occurred on the premises where the contract was to be performed. The administrative law judge also found that the exemption for owner-operators did not extend to employees of owner-operators.

Therefore, the administrative law judge found that Brown was Rushing's statutory employer. The administrative law judge also awarded Rushing assessed attorney's fees on two grounds. He found that Brown had defended the claim without reasonable grounds and had failed to file a timely notice to controvert without reasonable grounds. On appeal, the Appellate Division found that Brown had not defended the claim without reasonable grounds but otherwise affirmed, including retaining assessed attorney's fees based on an unreasonable violation of code section 34-9-221. The Appellate Division's decision was deemed affirmed by operation of law at the superior court level. The court of appeals granted discretionary appeal. The court of appeals affirmed the decision of the Appellate Division. The court of appeals pointed out that the 1991 amendment to code section 34-9-1(2) which defines owner-operators as independent contractors made no reference to employees of owner-operators. The court of appeals noted that code section 34-9-1(2), which contains the definition of an employee under the workers' compensation law,





made reference to a large number of groups. Employees of owner-operators were not among the groups mentioned. The court of appeals said that failure to include employees of owner-operators among the groups mentioned in code section 34-9-1(2) created a stronger inference that the General Assembly intended to exclude employees of owner-operators from the exemption from coverage for owner-operators than would have been created had no groups been specified. The court of appeals further distinguished Tennessee and Alabama cases which did hold that employees of owner-operators are not employees of common carriers. In both states, the exemption applies to common carriers as employers, not to owner-operators as employees. This distinction makes a large difference. On the issue of assessment of attorney's fees, the court of appeals reaffirmed the principle that a contention that a particular worker is not an employee is a ground for filing a notice to controvert, not an exemption from the duty to file a notice to controvert. The court went on to say that the evidence in the record in this case established an unreasonable violation of code section 34-9-221 and supported the assessment of attorney's fees based on such a violation.

The case of *High Voltage Vending, LLC v. Odom*, 266 Ga. App. 537 (2004), represents an extension of *American Mobile Imaging, Inc. v. Miles*, 260 Ga. App. 877 (2003). The *Odom* case also involves an issue of notice of a hearing. In that case, John Cornetta was the part owner and president of a number of businesses. These businesses included the You're In Luck Coffee Shop, Club Exotica, High Voltage Vending, LLC, and Cornetta Enterprises. There was evidence in the record indicating that John Cornetta was president and 50 percent owner of High Voltage Vending, that High Voltage Vending and Cornetta Enterprises shared a common address, and that John Cornetta's business card listed High Voltage Vending as one of the businesses he owned.

Odom sustained his on-the-job

injury while performing construction work at the You're In Luck Coffee Shop. His original hearing request listed his employer as Cornetta Enterprises d/b/a High Voltage Vending, LLC. He later sought to add other parties. The administrative law judge did add You're In Luck Coffee Shop, Cornetta Enterprises d/b/a Club Exotica, and John Cornetta as employers. The order adding employers also listed High Voltage Vending as an employer. The address listed for High Voltage Vending was incorrect, and the hearing notice sent to that entity at that address was returned as undeliverable.

Nevertheless, based on the evidence which demonstrated the connection between John Cornetta and all of the involved businesses, the fact that John Cornetta was subpoenaed to appear at the hearing, and the fact that High Voltage Vending shared an address with Cornetta Enterprises, which did receive notice of the hearing which was not returned, the administrative law judge found that High Voltage Vending received proper notice through its president, John Cornetta. The administrative law judge ordered High Voltage Vending to pay benefits to Odom for Odom's compensable injury. The Appellate Division, the superior court and the court of appeals affirmed. The court of appeals stated that, pursuant to the any evidence rule, the evidence in the record which demonstrated the connections between John Cornetta and all of the involved businesses and the fact that John Cornetta and some of the involved businesses did receive actual notice of the hearing was sufficient to establish that High Voltage Vending did receive proper notice of the hearing. Citing *American Mobile Imaging, Inc. v. Miles*, supra, the court of appeals pointed out that code section 34-9-102 put a greater emphasis on the sending of notice than on the actual receipt of notice. The court also pointed out that due process required notice which was reasonably calculated to apprise parties of the pendency of a hearing and to allow all parties an opportunity to appear and present evidence. The notice in this case met

this standard. The court also pointed out that High Voltage Vending had failed to supply the Board with a current address, in violation of code section 34-9-102(i). The court further held that High Voltage Vending could not violate one portion of code section 34-9-102 and at the same time be heard to complain about failure to receive notice under another subsection of that same code section.

It was once believed that law enforcement officers had a broader scope of employment which made it easier for them to recover for injuries received while going to or coming from work. This belief turns out not to be well founded. In *Mayor & Aldermen of the City of Savannah v. Stevens*, 278 Ga. 166 (2004), a City of Savannah police officer who was assigned to administrative duties was injured while proceeding from her home to work. The accident occurred while the officer was driving her personal vehicle and was less than a block from the station. At the time of the accident, the officer was armed and in uniform. Her police radio was switched on, and she had reported to the dispatcher that she was available for assignment to any needed law enforcement duties. According to police regulations, any officer who saw a crime being committed was required to take action and any officer who was requested to render assistance to the public was required to do so. An officer who was technically off duty was still required to respond to calls for assistance from other officers. Based on all these facts, the administrative law judge, the Appellate Division, the superior court and the court of appeals all ruled that Officer Stevens' accident arose out of and in the course of her employment. The court of appeals did state that it did not intend to rule that police officers were on duty 24-hours per day, seven days per week and that any accident which befell them arose out of and in the course of their employment and did not believe that the administrative law judge and the Appellate Division intended to so hold. The court of

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appeals that great deference should be given to the collective expertise of the Board (administrative law judges and Appellate Division) and that they should be trusted to know the difference between accidents which did and did not arise out of and in the course of employment based on all the facts of an individual case. The Supreme Court granted certiorari. The Supreme Court did not acknowledge that the Board had any expertise and was not entitled to any deference. The Supreme Court did admit that Officer Stevens was in the course of her employment at the time of her accident. The court held that the accident did not arise out of the employment because it did not result from a risk, which had any relationship to the employment. The Supreme Court thus acted as if an officer whose employment required him or her to travel the streets was not subject to the hazards of the highway. The court stated that Officer Stevens' risk of sustaining the accident, which befell her, was no greater than the risk to which any other member of the public on the same street at the same time would be subjected. It is difficult to understand how an officer who was so clearly on duty and in the course of her employment did not sustain an accident, which arose out of that employment. It has yet to be determined how broadly the decision will be applied. It should be remembered that this case involved the going to and coming from work rule, and it should be limited to that rule in order to minimize the damage that could otherwise do.

Another disturbing decision is *Hill v. Omni Hotel at CNN Center*, 268 Ga. App. 144 (2004). CNN Center covers several city blocks in downtown Atlanta, and is made up of several buildings, including a sports arena and a rapid transit station. The Omni Hotel is located in one of those buildings. That building also contains a food court and the CNN Towers, one of which was, among other things, the home of the Board at one time. The

building had multiple entrances, including one, which provided direct access to the Omni Hotel.

Employee Hill entered the building from the rapid transit station and was proceeding on the most direct route to her workstation at the hotel. She tripped on a rolled up carpet inside the door, fell and injured herself.

Based on a finding that prior case law held that when more than one business occupied a building, and it was necessary for the employee to pass through the building to reach the specific location of his or her employer, the portions of the building through which the employee had to pass were considered part of the employer's premises, the administrative law judge held that Hill's injury arose out of and in the course of her employment. The administrative law judge ruled that the injury occurred while she was on her employer's premises.

A majority of the Appellate Division reversed. The majority treated this case as being analogous to cases in which an employee was proceeding from a parking lot to the specific premises of his or her employer. The majority held that if the employer did not own, control, or maintain the parking lot, injuries which occurred between the lot and the employer's premises were not compensable. The majority held that the Omni Hotel did not own, control, or maintain the portion of the buildings, which lay between the outer doors and the hotel. That portion of the building was equally accessible to the public and to employees of various businesses located within the building who were proceeding to their employers' specific locations. The majority believed it was significant that one of the many entrances into CNN Center led directly to the Omni Hotel and nowhere else.

The superior court affirmed, as did the court of appeals. The court of appeals ruled that the number of entrances into a building was not significant. It was significant that an injury occurred in the public portion of the building, which was not

owned, controlled, or maintained by any particular business located in the building. Such an injury was no more compensable than one, which occurred, while an employee was proceeding from a public parking lot to his or her employer's specific premises.

This case will probably create more questions than it answers and will spoon litigation. The issue of how public the portion of the building where an injury occurs is an whether that location is or is not close enough to the employer's specific location to be considered a part of the employer's premises will be a fact question which will vary from case to case. This case does put an end to some speculation, however. The question had been asked about whether an employee who works in one business located in a shopping mall who suffers an injury after having entered the mall but while proceeding through the public portion of the mall to the employer's location suffers a compensable injury. It is now known that he or she does not.

The case of *Atlas Construction, Inc. v. Pena*, Ct. App. No. A040929, decided June 30, 2004, is little more than an any evidence case. That case involved a group of workers who were traveling between their residence in Georgia and a work site in South Carolina. Atlas Construction was the general contractor on the job site, and hired the Pena Brothers and their employees to do siding work. The Pena Brothers had workers' compensation insurance to cover their employees, but held themselves out as a partnership and did not include themselves as employees under the workers' compensation policy. That policy expired and was not renewed one day before the accident in which one of the Penas was seriously injured. Atlas Construction paid for lodging for the workers at the work site and paid the expenses of transportation to and from Georgia for the Penas and their employees. It was also found that Atlas Construction obtained a covenant not to compete from the Penas and reserved the right to increase the number of contractors

for whom they could not work at any time without further consideration. It was also found that Atlas Construction Company exercised control over activities at the job site. Based on all this evidence, the administrative law judge found that Pena was a statutory employee and a direct employee of Atlas Construction. The Appellate Division adopted the decision of the administrative law judge and the superior court affirmed. The court of appeals basically affirmed. The court of appeals did not agree that Pena was a statutory employee of Atlas Construction. The court of appeals pointed out that Pena and his brother had formed a partnership and that neither had taken any steps to make themselves employees of the partnership. Because neither was an employee of the partnership, they were considered to be the subcontractor/employer and could not be statutory employees. This fact does not defeat the claim, however. The evidence in the record was sufficient to demonstrate that Atlas Construction had the right to control the time, manner and method of performing the contract. Although it was not necessary to demonstrate that control was actually exercised, the fact the control was actually exercised in some instances demonstrated that the right to control did exist. Although Pena was not a statutory employee of Atlas Construction, the evidence was sufficient to demonstrate that he was a direct employee of Atlas Construction and that his accident and injuries were therefore compensable.

There are times when the legal community believes that it knows what the law is, only to have that opinion radically changed by a more recent court decision. The case of *Mayor & Aldermen of the City of Savannah v. Stevens*, 278 Ga. 166 (2004), discussed above, is one of those cases. Another such decision is *Chaparral Boats, Inc. v. Heath*, Ct. App. No. A04A0981, decided Aug. 3, 2004. In that case, the employee arrived late for work in January 2001. As she was hurrying across the parking lot to clock in, she hyperextended her knee. She did not slip on or trip over anything in the

parking lot, and did not even attribute the hyperextension to the fact that she was hurrying. She continued to work after this incident, and contended that her continued work aggravated the condition of her knee. The aggravation continued to the point that employee eventually became unable to continue to work. She filed a claim for benefits based on two compensable injuries. The administrative law judge found that the first injury was not compensable, but the second injury was. The administrative law judge found that there was no work-related reason why employee hyperextended her knee. In so doing, he distinguished *Johnson v. Publix Supermarkets*, 256 Ga. App. 540 (2002). The administrative law judge ruled that Johnson involved an injury which resulted while an employee was proceeding from one part of the employer's premises to another for work-related reasons. Johnson's injury arose out of her employment even though she did not slip or trip over anything other than her own feet when she injured herself. The administrative law judge further found that, although employee's original injury was not compensable, her ultimate disability was compensable. He based this holding on the fact that employee's continued work aggravated her pre-existing non-work-related condition to the point that she was eventually no longer able to work. At that point, the administrative law judge found that a new, compensable accident had occurred. On appeal, the Appellate Division agreed that the first injury was not compensable, but found that the second injury was also not compensable. The superior court reversed the Appellate Division, and held that both injuries were compensable. The court of appeals granted discretionary appeal. The court of appeals reversed in part. In the process of doing so, the court of appeals "disapproved" some of the holdings in *Johnson v. Publix Supermarkets*, *Supra*. The court of appeals first discussed its rules regarding what is and what is not binding precedent. According to those rules, a whole court decision is not binding precedent unless at least

seven judges concur in the opinion. In *Johnson*, *Supra*, only six judges concurred in the majority opinion, while three other judges concurred in the judgment only and three judges dissented. Therefore, *Johnson* was not binding precedent and was only persuasive authority to the extent to which a later court wanted to be persuaded. The Heath court ruled that *Johnson* applied the positional risk doctrine used to determine whether an injury arises out of employment, to broadly. That doctrine generally states that an injury arises out of employment if the employee is required to be in the location where the danger exists because of his/her employment and the employment brings the employee within range of the danger. The Heath court stated that this doctrine did not apply so broadly as to cover any injury which occurred on the employer's premises. The Heath court interpreted *Johnson* as practically extending the positional risk doctrine that far, and disapproved this action. The Heath court also disapproved *Johnson's* complete rejection of the peculiar risk doctrine and overruling of cases which applied that doctrine. The Heath court then redefined the peculiar risk doctrine. That doctrine requires that a risk be "peculiar" to employment in order to arise out of employment. A peculiar risk did not have to be unique to employment, however. It only had to be "peculiar" in the sense that there is a greater risk that an accident will occur and cause injury or that there is a greater risk that an event, regardless of its initiating cause, will cause injury because of the employee's employment in order for that risk to be peculiar to employment so that an injury arises out of employment. Therefore, the court of appeals held that Heath's first injury did not arise out of her employment and was not compensable. Because she continued to work, and because her continued work aggravated the condition of her knee to the point that she became disabled, the court of appeals ruled that she sustained a compensable new injury

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on the day she was forced to cease work. The court of appeals rules that there was no evidence to support the Appellate Division's contrary conclusion. Therefore, the superior court incorrectly ruled that Heath's first injury was compensable as a matter of law but correctly ruled that her second "injury" was compensable as a matter of law.

If any employee dies instantly as the result of a work-related injury, death benefits become immediately payable. If there is a gap between the work-related injury and death resulting from that injury, the situation may or may not be different. Code Section 34-9-265 (b) (4) provides that if the employee received income benefits prior to death, those benefits are deducted from the "400-week maximum" in order to determine the number of weeks during which death benefits are payable. Prior to July 1, 1985, this provision applied in all death claims because death benefits were payable for a maximum period of 400 weeks from the date of injury. Since 1985, the absolute limitation of 400 weeks from the date of injury has ceased to exist. Death benefits are payable to a child until age 18, or until age 22 if the child remains a full-time student. Death benefits are payable to a surviving spouse until that spouse reaches age 65 or receives 400 weeks of income benefits, whichever is greater. If the surviving spouse is at the time of death or within one year of death becomes the sole dependent, there is a limit on the amount of death benefits payable. Between 1992 and 2000, that limit was \$100,000.00. Since 2000, the limit has been \$125,000. The case of *One Beacon Insurance Company v. Hughes*, Ct. App. Nos. A04A0982, A04A0983, decided Sept. 1, 2004, deals with application of these principles. In that case, Hughes suffered a catastrophic injury in 1994. He died in 2001 as a result of that injury. The employer/insurer had paid temporary total disability income benefits to him between 1994 and 2001. After he died, they began paying

death benefits to his widow, who was at the time of his death the sole dependent. When the combination of temporary total disability benefits and death benefits equaled \$100,000 the employer/insurer suspended payment of death benefits. The widow filed a claim for reinstatement of death benefits. The administrative law judge stated that this case involved an attempt to reconcile Code Section 34-9-13, which provide that a spouse's dependency continued until age 65 or 400 weeks of income benefits, whichever provided the greater amount of benefits, and Code Section 34-9-265 (b) (4), which provided that there was a deduction for income benefits paid to the deceased employee prior to death from the "400-week maximum" period for payment of death benefits. The administrative law judge ruled that Code Section 34-9-265 (b) (4) did not apply in a case in which a surviving spouse chose to receive benefits until age 65. He based this ruling on the fact that Code Section 34-9-265 (b) (4) mentioned 400-week cases but did not mention age-65 cases.

There was also an issue as to whether the limitation found in Code Section 34-9-265 (d) on benefits payable to a surviving spouse as a sole dependent applied at all to an age-65 case, and if so, which limitation applied (the 1992 limitation in effect at the time of Hughes' injury in 1994 or the 2000 limitation in effect at the time of his death.) The administrative law judge ruled that Code Section 34-9-265 (d) did apply to age-65 cases. He based this ruling on the fact that the code section did not contain any language which indicated an intent not to apply it to all cases. The administrative law judge also ruled that the limitation on death benefits in effect at the time of the original injury controlled. He treated the death claim as derivative of the claim based on the injury, and not as a separate and distinct claim. The Appellate Division and the superior court affirmed. All parties appealed to the court of appeals.

The employer/insurer argued that Code Section 34-9-265 (b) (4) applied

in all cases. The court of appeals disagreed. The court of appeals agreed with the administrative law judge that Code Section 34-9-265 (b) (4) specifically limited its application to 400-week cases. That code section did not mention age-65 cases, and the court of appeals agreed with the administrative law judge that it did not apply to those cases. The court of appeals also agreed with the administrative law judge that if there was a gap between the injury which caused death and the death itself, the limitation found in Code Section 34-9-265 (d) in effect at the time of injury was controlling. On cross appeal the employee argued that Code Section 34-9-265 (d) did not apply to age-65 cases.

The court of appeals disagreed. The court of appeals agreed with the administrative law judge that Code Section 34-9-265 (d) applied in all cases in which the surviving spouse was at the time of death or became within a year of death the sole dependent. This ruling was based on the fact that the code section contained no language which indicated an intent to apply it to anything other than all cases.

The case of *Continental Pet Technologies, Inc. v. Palacias*, Ct. App. No. A04A1491, decided September 13, 2004, is very similar to *Wet Walls, Inc. v. Ledesma*, 266 Ga. App. 685 (2004), discussed above. It is significant that a unanimous 12-judge court reached the same conclusion as was reached in the *Ledesma* case, *Supra*. The court of appeals once again ruled that Congress did not expressly or impliedly demonstrate an intent to preempt state workers' compensation laws by enacting federal immigration control laws. The federal laws were aimed at employers, not employees. The employer/insurer argued that Palacias obtained employment fraudulently because she alleged that she was a legal alien and that her employment was therefore void.

The court of appeals did not agree. The court of appeals also rejected the argument that the claim was barred pursuant to *Georgia Electric Company v. Rycroft*, 259 Ga. 155 (1989). The court

of appeals ruled that there was not a causal connection between the employee's false representation as to her immigration status and her injury. Five judges who concurred in all of these holdings also reached the same result for other reasons. They pointed out that the Georgia Workers' Compensation Law contained no exclusion from eligibility for benefits based on immigration status. In fact, the Georgia law had since its inception provided coverage for workers' whose employment was illegal. The 1920 legislation contained a provision which included within the definition of "employee" minors working in violation of child labor laws. (The judges pointed out that this was the category of illegal workers with which the legislature was most concerned in 1920.) This language has remained in effect ever since 1920. It was also pointed out that the federal laws intended to give employers an incentive not to hire undocumented aliens. To deny these aliens workers' compensation benefits in the event of an injury would be to give employers a large economic incentive to hire such workers and would thus run counter to the intent of the federal legislation.

Code Section 34-9-240 provides that income benefits, other than those for permanent partial disability, are not payable if an employee refuses to accept employment offered to him/her which is suitable to his/her impaired condition. It would seem to be a necessary implication that the impaired condition results from a compensable injury. In *Freeman v. Southwire Company*, Ct. App. No. A04A2145, decided Sept. 22, 2004, the employee sustained a compensable injury. She was later released to return to restricted work. Southwire offered her a job which was within her restrictions. The employee actually returned to work performing that job. She continued to work until she developed greater disability due to conditions which were not caused by her compensable injury or otherwise work-related. After she ceased to work because of this greater disability, she requested reinstatement of total disability benefits.

The administrative law judge, the

Appellate Division, and the superior court denied the request. The administrative law judge ruled that because the greater disability was not work-related, it did not qualify the employee for workers' compensation benefits. The court of appeals ultimately agreed. The court of appeals pointed out that employee had actually returned to and successfully continued to perform the job originally offered to her until a non-work-related condition made it impossible for her to continue. The court of appeals held that employee's refusal to continue to work due to non-work-related reasons did not justify her refusal to continue to accept the offered employment. The court of appeals stated that to rule otherwise would be to order the employer to pay workers' compensation benefits for a non-work-related condition. There is no other part of the workers' compensation law under which such an order would be issued, and no such order would be issued under the circumstances of this case. It should be noted that this case applies to a fairly narrow set of circumstances, and that all of these circumstances must be present in order for this case to apply to other cases.

As the case of *Tyson Foods, Inc. v. Craig*, 266 Ga. App. 443 (2004), discussed above, demonstrates, Georgia has a strong policy in favor of requiring that a plaintiff be fully and completely compensated before a subrogation lien will be applied to the recovery of personal injury damages when that injury also gives rise to a workers' compensation claim. That policy is so strong that it authorizes rejection of contrary policies in other states if Georgia law applies to the claim. That policy is not strong enough to authorize rejection of a contrary federal policy, however.

The Georgia Supreme Court so stated in *Thurman v. State Farm Mutual Automobile Insurance Company*, 278 Ga. 162 (2004). That case involved an automobile accident in which a federal employee received injuries. The federal employee filed a third party action and recovered. The federal workers' compensation insurer sought

to impose a subrogation lien. The federal law did not require that the employee be fully and completely compensated before a federal subrogation lien could be imposed. That law did contain provisions regarding how the lien was to be calculated.

The Georgia Supreme Court ruled that Georgia's policy requiring full and complete compensation had to yield to the federal policy. Georgia was, however, allowed to interpret the federal provisions regarding calculation of the lien in such a way as to produce the smallest lien possible.

It appears from some of the cases previously discussed that the Supreme Court and court of appeals are narrowing the scope of the concept of "arising out of and in the course of employment." The case of *Amedisys Home Health Care, Inc. v. Howard*, Ct. App. No. A04A2079, decided Sept. 16, 2004 appears to run counter to that trend.

In that case, employee was a home health nurse. A large part of her work was done in the field. She made home visits to patients. Employer paid mileage for travel from the first patient to the next and succeeding patients until the last one. Mileage was not paid for travel from home to the first patient or from the last patient to home. The employee and other nurses also took turns being on call on weekends. When they were on call, they were paid extra for being in that position. An on-call nurse was required to be available for telephone contact from patients at all times and was required to give advice or visit if necessary. The evidence revealed that the employer preferred that visits be made. Employees were also required to complete paperwork regarding visits. They were encouraged to do the paperwork at the homes of the patients, but the employer recognized that it was frequently impossible to complete this task at the patient's home.

Therefore, employer allowed employee and other nurses to complete their paperwork at home and

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provided a drop box in a location away from the employer's office so that paperwork could be turned in quickly in accordance with employer's requirements. Employee Howard was on call on a weekend and had completed a visit to a patient. On her way home, she stopped to pick up a take-out pizza to bring home for her family's dinner. The employee parked her car in her driveway. She got out, carrying her cellular telephone, her pager, paperwork to be completed inside the house, a newspaper, and the pizza. She tripped in the driveway and injured her ankle. Her husband called an ambulance, and employee found another nurse to cover the remainder of the weekend on-call shift. Employee was out of work for four weeks and incurred some medical expenses. Employer denied that her injury arose out of and in the course of employment. The administrative law judge agreed. The Appellate Division reversed.

The Appellate Division found that employee was in continuous employment during her three-day on-call shift. The Appellate Division also found that employee and other nurses routinely performed work-related functions at home with the knowledge and approval of employer. All of these circumstances meant that employee was at a place where she might reasonably have been expected to be in the performance of her duties and was doing those duties or something incident thereto at the time of her injury. Therefore, the injury arose in the course of employment. The injury also resulted from a risk which, considering all the circumstances, could be said to be reasonably related to employee's working conditions. Therefore, it arose out of employment. The superior court affirmed. The court of appeals also affirmed. The court of appeals agreed with the Appellate Division's analysis of the requirements of arising out of and in the course of employment. Employer also argued that employee had deviated from the course of her employment when she picked up the pizza.

The court of appeals agreed, but pointed out that after picking up the pizza, the employee had resumed her journey home to perform work-related functions along with other activities. Therefore, the court of appeals ruled that the deviation had ended and employee once again resumed the course of her employment. The court also pointed out that a journey did not have to have the performance of the employer's business as its sole purpose in order to be included in the course of employment. It was enough that the trip had a substantial business purpose. For all these reasons, employee's injury arose out of her employment.

Other cases discussed in this summary which might tend to produce a contrary result are distinguishable. The fact that employee was working a three-day on-call shift put her in continuous employment during that time. The fact that she and other nurses routinely did required employment-related activities at home with the knowledge and approval of employer also expanded the scope of her employment beyond that of other employees in other circumstances.

The case of *Longuepee v. Georgia Institute of Technology*, Ct. App. A04A1803, decided Oct. 5, 2004, did not result from a workers' compensation claim. It arose from a personal injury action and a defense to that action that the employee's exclusive remedy was found under the Workers' Compensation Act.

In that case, employee arrived at work and parked her car in a parking facility owned by Georgia Tech and provided for use by the school's employees. Her specific employment location was approximately three blocks from the parking facility. As she was traversing the three blocks, she was run over by a vehicle owned and operated by Georgia Tech while attempting to cross a public street. She filed a personal injury action under the Georgia Tort Claims Act and her husband filed a loss of consortium action under that same act. Georgia Tech moved for summary judgment based on the exclusive-remedy provision of the Workers' Compensation Act. The trial court

granted the motion and the court of appeals affirmed. The court of appeals stated that injuries which occur while an employee is proceeding to and from work are generally not compensable. There is an exception if the employee is proceeding from a parking lot owned, controlled, or maintained by the employer to another part of the employer's premises where his/her work station is located. The fact that the parking lot is owned, controlled, or maintained by the employer makes the lot a part of the employer's premises. The same rule does not apply if the lot is not owned, controlled, or maintained by the employer. In this case, the employee's injury occurred while she was proceeding from one part of the employer's premises to another and therefore arose out of and in the course of her employment. Under these circumstances, the employee's exclusive remedy against Georgia Tech was under the Workers' Compensation Act. Her husband's loss of consortium claim was also barred because he had no such right under the Workers' Compensation Act.

The employee did make an interesting argument which did not succeed and had no chance of succeeding. She argued that because she chose to walk from the parking lot to her work station rather than taking a bus provided by Georgia Tech, and this decision was based on her desire to improve her personal health through the exercise of walking, she was on a personal mission at the time of her injury. The court of appeals rejected this argument. The court of appeals pointed out that either walking or taking the bus would have taken the employee on a reasonably direct route to her work station. The fact that she chose to walk did not amount to a deviation from the course of employment. As has frequently been stated before, the trip on foot had more than one purpose. The fact that one of those purposes was the employee's personal desire for more exercise in order to improve her health did not remove her from the course of employment. It was enough that the trip on foot had a substantial business purpose along with all of its other purposes. **WC**

# Annual Board Seminar a Success

The State Board of Workers' Compensation held its Annual Education Seminar Aug. 29 through Sept. 1 in Atlanta. This year's event was titled "Combatting the Fear Factor." It was well attended. There were 575 registered for the program. The registration included persons from the following professions:

- 81 employers;
- 144 self-insurers;
- 44 attorneys;
- 97 rehabilitation suppliers;
- 113 insurance/claims representatives;
- 96 medical providers (including 6 physicians, 50 nurses and 40 classified as other);
- There were 62 speakers who made presentations to the attendees.
- 255 exhibitors were represented at the event.

The keynote speaker at this year's seminar was Robert R. Snashall. Snashall was chairman of the New York State Workers' Compensation System from 1995 to 2003. He now has a private firm specializing in workers' compensa-

tion consulting. He addressed various ethical challenges confronting workers' compensation professionals in a rapidly changing environment.

This annual seminar provides informational workshops for the attendees. Generally speaking, these are broken down into the subject areas of insurance/claims, rehabilitation, legal and medical topics. The Board members, Board employees and volunteers once again did an excellent job in putting on the event and in presenting the educational workshops.

If you have never volunteered to assist in the Board's Annual Education Seminar, you should. It is a rewarding experience. You will have an opportunity to interact with the large number of professionals involved in the various aspects of the workers' compensation system. It also provides an incentive to remain up to date on various topics of interest in development of the workers' compensation law. It has been said that no one learns so well as when learning a subject in order to teach it. Please offer your time and services to this worthwhile effort. **WC**

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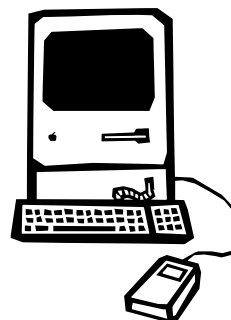
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# **WORKERS'** **COMPENSATION LAW**

## Know someone who is interested in joining the Workers' Compensation Law Section?

Tell them to send their name, address and Bar number, along with a \$20 check made payable to the State Bar of Georgia, to:

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