STATE BAR OF GEORGIA 1964

WORKERS' COMPENSATION LAW

Winter 2007/08 John Blackmon, Editor SECTION NEWSLETTER

Midyear Meeting

A section reception will take place on Jan. 10 from 5 p.m. to 7 p.m. during the Bar's Midyear Meeting. The Bar Center is located at 104 Marietta Street. The Omni Hotel, Georgia Aquarium and Centennial Olympic Park are all within walking distance. We encourage as many of you as possible to attend so that we can make this meeting a success.

Inside this Issue

What's Up at the State Board of Workers' Comp?

By Judge Carolyn C. Hall, Chair
Liesa A. Gholson, Director of Process Improvement & Oversight
Judge David K. Imahara, Director of ADR

ICMS

The State Board of Workers' Compensation successfully implemented the new ICMS electronic document management system on Oct. 1, 2005. We have made great progress and have scanned close to 2.5 million documents in the past two years.

Phase 2

On Aug. 21, 2006, the Board successfully implemented Phase 2 of ICMS. Some of the functions of ICMS Phase 2 for Board staff are:

- Electronic processing of mediation/hearing requests
- Automated case assignment to judges
- Electronic calendars for ADR, Hearing, and Appellate Division
- Automated scheduling of hearings/mediations
- Electronic generation of orders/awards with electronic signature

Notices of Hearing/Mediation/Oral Argument and awards/orders are being sent out by e-mail. All of these documents are sent in PDF format. In addition, as many of you have seen, we are now using electronic signatures. If an e-mail containing an order, award, notice, etc. fails, the sender at the Board is notified that such e-mail containing the order, award, notice, etc., failed. In such circumstances, the Board will mail a copy of such document.

When Phase 3 is implemented later this year, if you have filed an attorney fee contract (claimant's attorney) or notice of representation (defense attorney) in a claim and you are a registered user, you will be able to go online and view the file. To be a registered user, an e-mail address is MANDATORY.

The New Claim Number

The automated system generates a Claim Number for each new claim. (e.g. 2005-001522, 2006-001523). 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, (i.e. when a Form WC-1 or WC-14 is filed creating the file). Always remember, only a Form WC-1 or Form WC-14 will actually create a new electronic file.

This number is a unique identifier for the claim. The Board no longer uses social security numbers (SSN) on notices or awards/orders. The SSN is no longer the Board's Claim Number. This "Board Claim Number" must appear on every form or document filed by the parties and attorneys. See Board Rule 60 (c).

Living in Two Worlds

If you have a claim file that was created prior to Oct. 1, 2005 (usually dates of injury prior to this date), your claim is living most likely in two worlds (paper and electronic). This means that when you view a file online, all documents for that claim may not

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Comments From the Chairman

By Ann Baird Bishop
abishop@abishoplaw.com

The 2007-08 Executive Committee of the Workers' Compensation Law Section consists of Ann Bishop, chairman; Joe Leman, upcoming chairman for 2008-09; Staten Bitting; Gary Kazin; Lynn Olmert; Cliff Perkins; John Blackmon; and John Christy. If you have any suggestions or comments about ways to improve our section, please let one of us know.

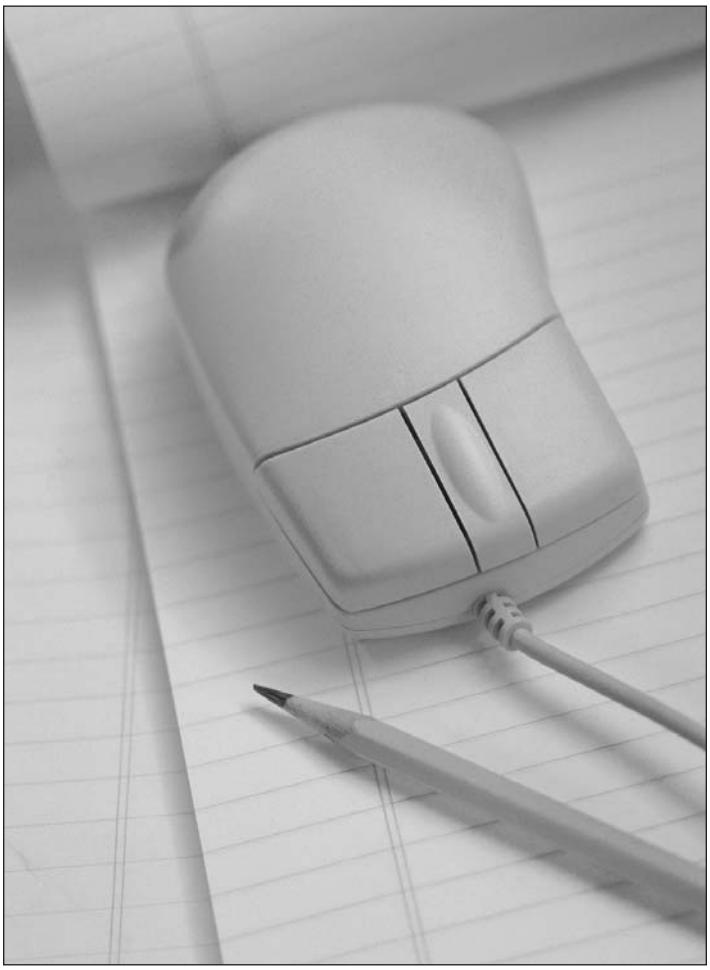
The annual Workers Compensation Law Institute at Sea Palms, Ga., in October 2007 was extremely successful. The chairs of the seminar–Judge Leesa Bohler, David Smith and Brian Lockerbie–did a stellar job of selecting topics and speakers. The evaluations regarding the seminar were among the highest ever. The attendance continues to be high with 465 people present in 2007.

The 2007 Kids' Chance Gala held on Oct. 4 at the ICLE Seminar at St. Simons Island boasted a near record crowd. Judge Carolyn Hall received our section's Distinguished Service Award, which was presented by John Ross of C. W. Matthews, a Kids' Chance board member and chair of the Chairman's Advisory Council.

Entertainment by Cowboy Envy, Judge Hall's favorite musical group, along with the banter of our live auctioneer John Sweet added fun and helped bring in much-needed funds for the Kids' Chance scholarship fund. Thanks to John Sweet for once again serving as auctioneer for the live auction and to the committee who put it all together: Kathryn Bergquist, Judge Elizabeth Lammers, Howard Osofsky, Ann Bishop, Gail Pursel and Amy Moore. Thanks to Cheryl Oliver without whose efforts Kids' Chance could not function.

Total net proceeds of $16,507 from the dinner and auction will help Kids' Chance meet commitments to the 67 students currently on scholarship and to fund nine new applicants for the Spring 2008 school term. Since its beginning in 1988, under sponsorship of the Workers' Compensation Law Section, Kids' Chance has awarded 596 scholarships to the children of Georgia's fatally and catastrophically injured workers. Please keep Kids' Chance in mind in your charitable giving. For more information or to make a donation, please contact the Kids' Chance office at 229-244-0153, kids300@bellsouth.net or visit www.kidschance.org.

The State Board continues to proceed towards a "paperless" system with far fewer problems associated with a change of this magnitude than one would expect. Thanks to the careful planning and thought of Board employees at all levels, the difficulties are far less than I had anticipated and the initial tests have all been successful. Lawyers will be brought in to the system in early 2008 and all phases are expected to be operational before the summer. Please be patient and understand that this is a work in progress.



Many of you are aware of that Lee Southwell, Deborah Krotenberg and Joe David Jackson have been quite ill. Lee is out of the hospital, recovering at home and we all hope he will be returning to the Board soon. Deborah and Joe David continue hospitalized. Please keep them in your thoughts and prayers.

John Blackmon is the editor of the section newsletter for 2007-08. John has been diligent in gathering articles and making sure this newsletter is published timely. Please thank him when you see him. If you have any articles you would like to have considered for publication in the May 2008 edition, please e-mail the article to him at blackmonj@deflaw.com.

The Workers Compensation Law Section is one of the largest sections of the State Bar of Georgia. We should be THE largest. Please encourage all those who practice in our area to join. I look forward to seeing all of you at the meeting/reception our section is hosting at the State Bar Midyear Meeting. **WC**

Recent Appellate Court Decisions in Workers' Compensation

By Neil C. Thom
A.B. Bishop & Associates, LLC

***TIG Specialty Insurance Company v. Brown*, 283 Ga.App. 445, 641 S.E.2d 684 (2007). Decided May 14, 2007.**

The claimant was injured in December 2000, at which time the employer was insured by TIG. The claim was accepted as a medical only claim, and treatment was provided. In February 2002, the employer changed workers' compensation insurers to Zenith. In May 2002, the claimant, for the first time, lost time due to the on the job injury. Temporary total disability benefits were commenced by TIG on behalf of the employer. In February 2004, TIG requested a hearing seeking to transfer responsibility for the claim to Zenith and seeking reimbursement for all payments made since May 2002.

Zenith and the claimant filed motions to dismiss TIG's hearing request. The motions were denied by the administrative law judge who allowed an interlocutory appeal. On appeal the Appellate Division reversed the ALJ and granted the motions based on 34-9-221 (h), which provides that the "right to compensation" cannot be controverted unless notice is filed within 60 days of the due date of the first payment of compensation, unless the controvert is on the grounds of change in condition or newly discovered evidence. It had been more than 60 days from the due date of first payment of compensation, so the Board ruled that TIG could not contest its liability for benefits. The Superior Court of Fulton County affirmed. The Court of Appeals reversed citing *Columbus Intermediate Care Home v. Johnston*, 196 Ga. App. 516, 396 S.E.2d 268 (1990). The Court of Appeals noted that TIG did not challenge the claimant's "right to compensation" but, instead, questioned the carrier from which the claimant should receive compensation and, therefore, 34-9-221 (h) by its terms did not apply.

***Renu Thrift Store v. Figueroa*, 286 Ga.App. 455, 649 S.E.2d 528 (2007). Decided June 20, 2007.**

The employer/insurer paid temporary total disability (TTD) benefits from September 2000 to March 2005 based on an incorrectly high average weekly wage due to an error by the employer. From November 2003 to January 2005, the overpayments were erroneously doubled. The employer/insurer had paid benefits on a weekly basis at times and on a biweekly basis at other times.

After discovering the error, the employer/insurer filed a WC-2, Notice of Suspension of Benefits, on Jan. 26, 2005, stating that the overpayment in the amount of $9,280.49 would be credited toward future permanent partial disability (PPD) benefits. On Feb. 11, 2005, the employer/insurer filed a second WC-2 and suspended TTD benefits on Feb. 21, 2005.

The claimant moved for recommencement of benefits. The employer/insurer objected and requested reimbursement of $23,764. Following a hearing, the administrative law judge (ALJ) found that the employer/insurer was entitled to a credit for overpayment, but only for those overpayments made within the two years prior to the request for reimbursement pursuant to O.C.G.A. § 34-9-245. The ALJ denied the claimant's requests for recommencement of benefits and assessed attorney fees. The ALJ found that the employer/insurer was entitled to repayment in the amount of $2,981.39, based on the employer's calculation of what the correct benefit amount should be.

Both parties appealed, and the State Board's Appellate Division affirmed the ALJ's ruling, except it assessed a 15 percent penalty against the employer/insurer for making biweekly payments and assessed attorney fees against the employer/insurer for the unilateral suspension of benefits. The superior court affirmed.

The Court of Appeals rejected the employer/insurer's argument that reimbursement should be permitted by O.C.G.A. § 34-9-243, which holds that the payment of certain benefits when not due during the employee's disability shall be credited against weekly benefits due with no time limit on the reimbursement claim. This Code Section is typically used when unemployment, wage continuation, or non-workers' compensation disability insurance benefits are paid. The Court of Appeals held that the Board was correct in limiting the employer's recovery of overpayment to those overpayments made within two years prior to the request for reimbursement. As found in Trax-Fax v. Hobba, 277 Ga.App. 464, 627 S.E.2d 90 (2006), O.C.G.A. § 34-9-245 is a statute of repose and extinguishes any previously existing rights to recovery after the two years has passed.

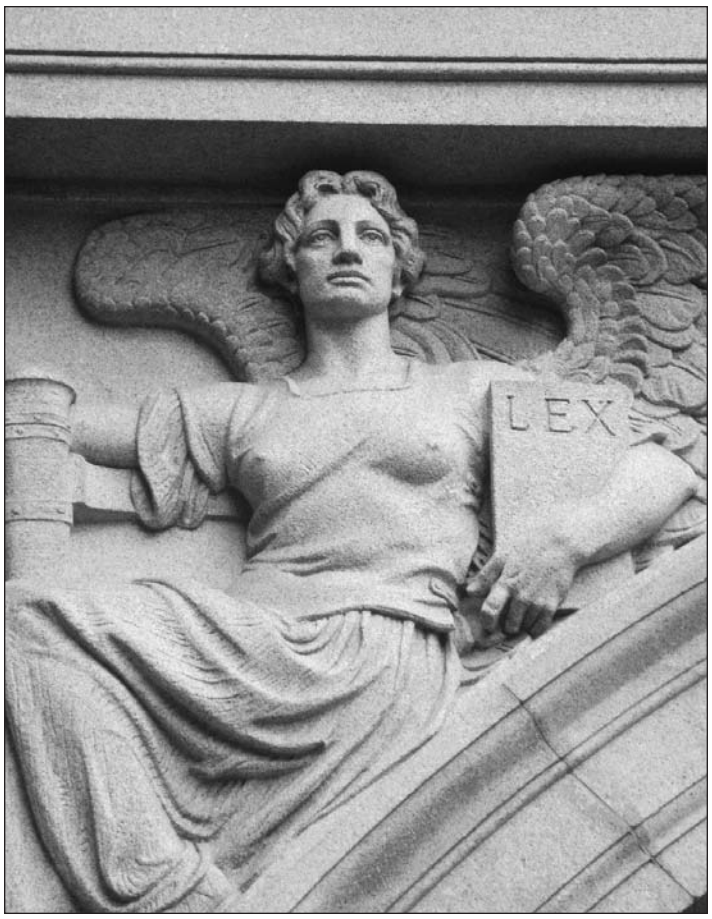
As to the payment of benefits on a biweekly basis, the employer/insurer argued that those checks represented prospective payment of benefits – that is, that each check represented one timely payment and one early payment. The Court of Appeals rejected this argument based on the clear language of O.C.G.A. § 34-9-221(b), which requires that benefits must be paid in weekly installments, absent an alternative schedule approved by the State Board.

***Axson Timber Company v. Wilson*, 286 Ga.App. 482, 649 S.E.2d 609 (2007). Decided July, 10 2007.**

Kenneth Wilson drove a truck for White Trucking Company. White Trucking Company (White) was hired by Rice Timber Company (Rice) to haul lumber to customers' mills. Axson Timber Company (Axson) hired Rice to cut timber on certain tracts of land. Axson buys, procures, and

sells wood to paper mills. Wilson was injured while delivering a load of lumber.

White did not have workers' compensation insurance, so Wilson sought benefits from Rice and Axson as statutory employers. The administrative law judge found that Wilson was an employee of White and not an independent contractor. The ALJ further found that the injury occurred on a premises controlled or managed by Axson and Rice and that Rice was secondarily liable and Axson was tertiarily liable as statutory employers. The Appellate Division and Superior Court affirmed.



O.C.G.A. § 34-9-8 provides that principal or intermediate contractors are statutory employers of a subcontractors' employee only 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. In finding that the injury occurred on premises controlled or managed by Axson and Rice, the ALJ relied on *American Mut. Liability Ins. Co. v. Fuller*, 123 Ga.App. 585, 181 S.E.2d 876 (1981). Fuller held that a trucking company was liable under workers' compensation for the injuries sustained by an employee of a subcontractor trucking company where those injuries occurred on a highway, since the highways were the "premises" on which the principal trucker had undertaken to execute work.

The Court of Appeals, however, had already refused to expand this interpretation of "premises" to shipping destinations in *Gramling v. Sunshine Biscuits*, 162 Ga.App. 863, 292 S.E.2d 539 (1982). In Gramling, the claimant worked for a trucking company hired by Sunshine to transport goods to a customer. The claimant was injured while unloading the trailer at the customer's location. Gramling brought a tort action against Sunshine. The Court of Appeals rejected Sunshine's argument that it was entitled to tort immunity on the basis of exclusive remedy as the claimant's statutory employer, refusing to include the premises of a shipper's customer to which goods are delivered in the "premises" requirement of the statutory employment doctrine.

***Bibb County Board of Education v. Bembry*, 286 Ga.App. 878, 650 S.E.2d 427 (2007). Decided July 30, 2007.**

The claimant sustained strains to her lower back and leg when she tripped over a box of books at a teachers' meeting. The authorized treating physician saw her 10 times, and on her last visit (about 10 weeks after the accident), he concluded that the sprains caused by the work accident had resolved and that any continuing symptoms were related to a pre-existing condition evidenced by pre-injury symptoms. The doctor specifically said that even though a precise medical baseline was impossible to determine, his conclusion was supported by the fact that the symptoms reported from the fall suggested a muscular, rather than discogenic, problem. The claimant's personal physician disagreed, opining that the previous condition was aggravated by the fall and that she had not returned to her pre-injury baseline.

The administrative law judge found that the claimant had not carried her burden of proving that the need for continued medical treatment was caused by her work accident. The State Board's Appellate Division affirmed. The Superior Court reversed the Board, finding that there was no evidence to support the award. The Court of Appeals reversed the Superior Court and reinstated the Board's denial of benefits, since the authorized treating physician's opinions supported the denial, and the award must not be disturbed on appeal if there is any evidence to support it.

***Paschall Truck Lines, Inc. v. Kirkland*, Case No. A07A1023, 651 S.E.2d 804 (Ga. Ct. App. 2007). Decided Sept. 11 2007.**

The claimant, Paul Kirkland, was injured when driving a truck for work. He filed workers' compensation claims in Kentucky, where his employer's main office was located, and in Georgia, where the accident occurred. The parties settled the workers' compensation claims, and the settlement was approved by the Georgia State Board of Workers' Compensation.

The claimant also filed a Georgia lawsuit against the other driver in the accident. The employer moved to intervene to assert its subrogation lien for the workers' com-

pensation benefits paid. The claimant settled his tort suit for $100,000 and moved to extinguish the subrogation lien, claiming that workers' compensation benefits were paid under Kentucky's and not Georgia's workers' compensation law, barring the employer's recovery under O.C.G.A. § 34-9-11.1, which states that the right of subrogation is limited to benefits paid under the Georgia Workers' Compensation Act. The trial court agreed and ruled that the employer had no right of subrogation under the Georgia Act.

The Court of Appeals did not rule on whether the trial court correctly found that no benefits had been paid under the Georgia Workers' Compensation Act. Instead, it affirmed the dismissal of the subrogation lien because the employer had failed to carry its burden of proving that the employee had been fully and completely compensated for his injury. The claimant presented evidence in the trial court that he had not been fully compensated, and the employer did not provide any evidence to the contrary. The Court of Appeals thus affirmed the trial court's decision under the rule that such a judgment must stand if it is right for any reason. *Georgia Elec. Mem. Corp. v. Garnto*, 266 Ga.App. 452, 597 S.E.2d 527 (2004).

***YKK (USA), Inc, et al. v. Patterson*, Case No. A07A1122 (Ga. Ct. App. 2007). Decided Sept. 13, 2007.**

The claimant, Kimberly Patterson, went to the emergency room after noticing that her right leg was blotchy, red, and swollen. She was diagnosed with cellulites. She initially told her co-workers and treating doctors that she didn't know why her leg had swelled and denied injury. She later received a diagnosis of complex regional pain syndrome (CRPS) and claimed she'd suffered a torn leg muscle while pushing a cart at work.

The claimant's family physician did not offer a diagnosis, but concluded that an MRI of the leg showed a contusion or strain of unknown age. Her orthopedic surgeon said that he wasn't sure whether the CRPS was caused by or aggravated by her work. A rehabilitation physician said that the MRI showed what could have been a muscle strain or tear and that all of the claimant's problems were caused by pushing the cart. An occupational physician, on the other hand, said that he saw no indication of a sprain and concluded that the condition was not related to her work.

The administrative law judge (ALJ) of the State Board of Workers' Compensation's Trial Division denied the claim for benefits, finding that the claimant had failed to prove a work-related accident. In the award, the ALJ noted that the claimant did not contend she had suffered pain immediately after the alleged accident. The Appellate Division affirmed. In so doing, the Appellate Division did not rely on the finding that the claimant did not report pain immediately after the alleged accident, but that she had failed to carry her burden of proof by a preponderance of the evidence as a whole. The superior court concluded that the ALJ had overlooked evidence that showed the claimant had reported immediate pain to various individuals. Citing this oversight, the superior court remanded the claim back to the ALJ.

The Court of Appeals held that it was improper for the superior court to remand the case directly back to the ALJ. The Workers' Compensation Act authorizes a superior court to set aside an award on specific grounds and to remand the matter back to the State Board for further proceedings, but is not authorized to send the case directly back to the State Board's Trial Division.

The Court of Appeals also held that it was error for the superior court to vacate the Board's award. Since there was some evidence to support a denial of the claim (the opinions of physicians who disputed the existence of a work-related injury), the Board's award could not be disturbed on appeal.

***L & S Construction, et al. v. Lopez*, Case No. A07A1890 (Ga. Ct. App. 2007). Decided Nov. 26, 2007.**

L&S Construction (L&S) was hired by Bob St. John Construction, LLC, (St. John) to frame a house. Lopez was injured while working on the construction and filed a workers' compensation claim. L&S contended that the claimant was not an L&S employee at the time of the injury, but was instead working for Jim Lawhorne, Sr., father of L&S's principal owner. Lawhorne did not have workers' compensation insurance, so St. John could have been liable as the claimant's statutory employer. The administrative law judge (ALJ) found that the claimant was an employee of L&S. The ALJ further found that L&S's defense of the claim was unreasonable and assessed the claimant's and St. John's attorney fees against L&S.

L&S appealed, and the State Board's Appellate Division affirmed the ALJ award in part, but reversed the assessment of attorney fees, finding that a "reasonable dispute" existed as to who the claimant's employer was at the time of the accident. The claimant and St. John appealed to the superior court, which reversed the Appellate Division, finding that "there were no reasonable grounds to dispute the employment status of the injured worker."

The Court of Appeals accepted L&S's petition for discretionary review. Applying the "any evidence" rule, the Court of Appeals reversed the superior court. The Appellate Division's finding of a "reasonable dispute" was a factual finding and could not be disturbed on appeal where there was any evidence to support it. Without providing any details, the Court of Appeals found that there was testimony that the claimant was employed by Lawhorne and not L&S. That the contention ultimately failed does not by itself render the contention unreasonable. Since there was some evidence to support the Appellate Division's finding of a reasonable dispute, it was error for the superior court to reverse. **WC**

House Bill 661: A Sign of the Times

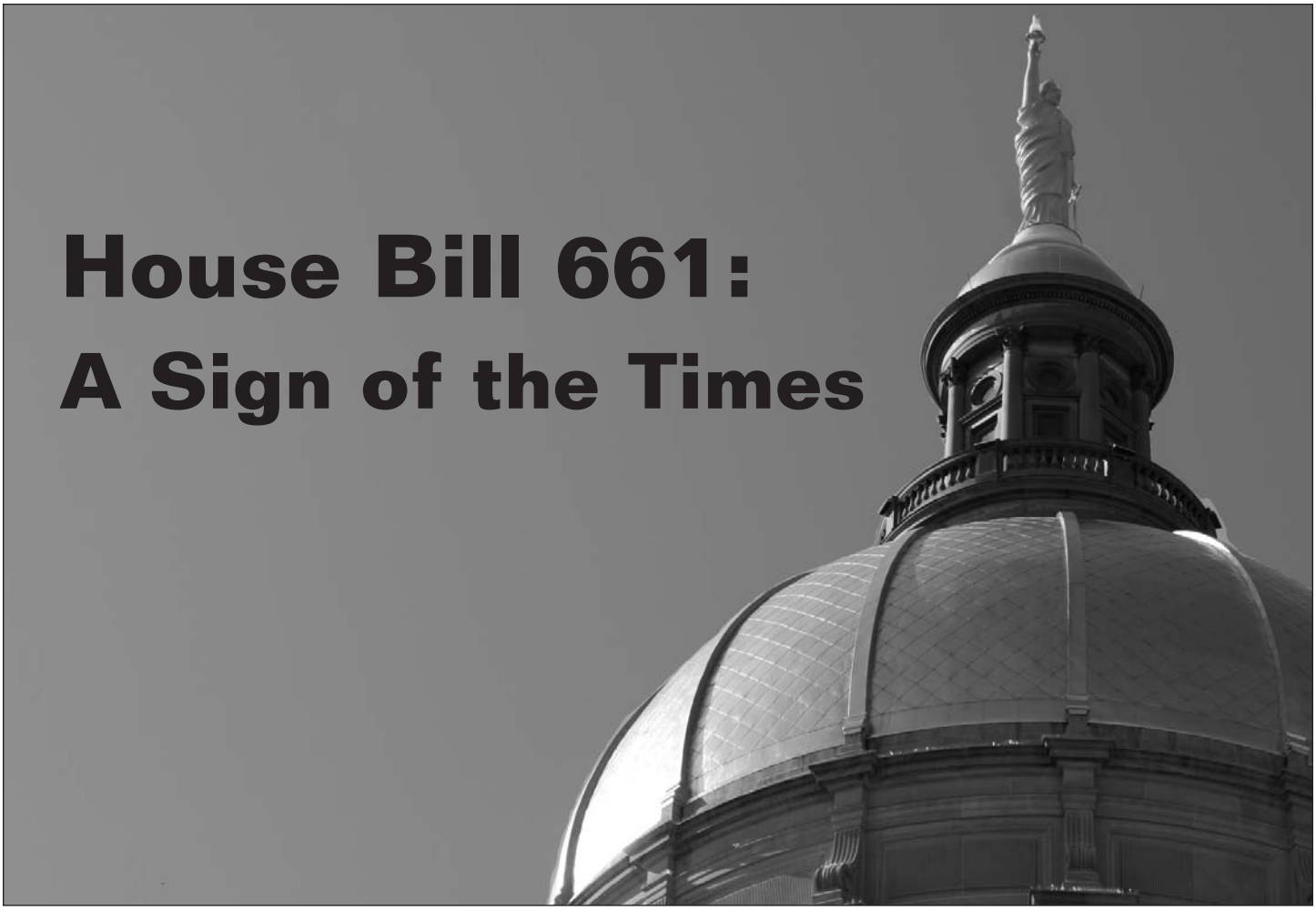


Photo by Johanna B. Merrill

By John G. Blackmon Jr.
Drew Eckl & Farnham, LLP

Over the past several years practitioners in the workers' compensation area have seen numerous attempts by entities seeking reimbursement for monies paid to, or on behalf of, an injured worker, and which possibly should have been the responsibility of a workers' compensation insurance carrier or selfinsurer. Medicare, Medicaid and disability benefit providers are at the forefront. Group health carriers and medical providers are authorized to seek reimbursement, and primarily do so after becoming aware of a workers' compensation claim upon receipt of a third party request for records. Healthcare providers are currently pushing a new piece of legislation, which, while novel, is quite problematic.

House Bill 661 would require the State Board to furnish data to healthcare providers so that they may protect their interests in the event a workers' compensation claim is filed. This new legislation is being proposed by Rep. Mark Burkhalter of District 50. The bill, which if passed, would be codified at O.C.G.A. § 34-9-33, providing as follows:

> To amend Chapter 9 of Title 33 of the Official Code of Georgia Annotated, relating to regulation of rates, underwriting rules, and related organizations, so as to create a workers' compensation records inquiry service to be established and maintained by the State Board of Workers' Compensation, to name which entities shall furnish data; to provide for reporting criteria; to provide for applicability and fees; to provide for resolution of reimbursement disputes; to provide for related matters; to provide for an effective date; to repeal conflicting laws, and for other purposes.
>
> BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:
>
> The General Assembly acknowledges that it is important to control the high cost of health care. There is no one single solution to this crisis, but the solution requires a multitude of efforts and coordination and cooperation with the insurance industry, the general public, health providers, and state, and the federal government. Part of the solution is to eliminate multiple payments of health claims. The creation of a health insurance claim data base will provide a necessary tool to the coordination of benefits between licensed providers under Title 33.
>
> SECTION 1.
>
> Chapter 9 of Title 33 of the Official Code of Georgia

Annotated, relating to regulation of rates, underwriting rules, and related organizations, is amended by adding a new Code section to read as follows:

"33-9-45.

(a) A health care insurer licensed to offer health insurance under Georgia law or a fully selfinsured plan, a governmental plan, or an employee welfare benefit plan as described by the federal Employee Retirement Income Security Act which enrolls residents of this state shall be deemed to be a party with an appropriate interest in the records of the State Board of Workers' Compensation as described in subsection (b) of Code Section 34-9-12. As used in this subsection, the term 'health care provider' means an insurer, a fraternal benefits society, a health care plan, a nonprofit medical service corporation, a nonprofit hospital service corporation, a health care corporation, a health maintenance organization, or any other entity authorized to sell accident and sickness insurance policies, subscribed certificates, or other contracts of health insurance by whatever name called under Title 33.

(b) To provide an entity described in subsection (a) of this Code section with appropriate records access, the State Board of Workers' Compensation shall initiate and maintain a workers' compensation records inquiry service. Each eligible entity, or its designated agent, may submit an electronic list of members' identities for which workers' compensation case information is requested. Each entity shall certify that all persons whose identities are submitted are, or have been, insured members of the entity's health benefit programs. The board shall compare the submitted list of members to the records of valid workers' compensation cases. Where a case record exists for a listed person, the board shall report to the entity or its agent the following information on each such case:

1. The full name of the claimant;
2. The social security number of the claimant;
3. The date of birth of the claimant;
4. The name of the claimant's employer;
5. The date of injury;
6. A description of the type of injury or illness and the body part affected;
7. The name, address, and case number of the insurance carrier handling the case;
8. The name of the insurance adjuster handling the case;
9. The identifying number assigned to the case by the board; and
10. The current status of the case.

Claims data compiled by the board or reported to the entity are confidential and are not subject to Article 4 of Chapter 18 of Title 50, relating to inspection of public records.

(c) State Board of Workers' Compensation file information shall be reported to the entity or its agent in electronic format within 30 days of the entity's original request. The entity or its agent shall be charged a service fee for each submission which shall be set by the board at a level to cover the full costs of the service.

(d) Entities described in subsection (a) of this Code section are authorized to submit requests for reimbursement to the relevant workers' compensation insurer where the entity can document that it has paid medical claims for the diagnosis or treatment of a compensable injury or illness.

(e) Workers' compensation insurers shall make direct reimbursements to entities described in subsection (a) of this Code section whenever the entity can demonstrate that it has paid for compensable medical benefits at the lesser of prevailing workers' compensation provider payment schedules or the entity's actual payments.

(f) Disputes as to the entity's right to reimbursement shall be resolved by referral to the Alternative Dispute Resolution Division of the State Board of Workers' Compensation. Upon denial of reimbursement by a workers' compensation insurer, the entity requesting reimbursement may request mediation of the dispute. Any mediation fee shall be paid by the losing party."

SECTION 2.

This Act shall become effective only if funds are specifically appropriated for purposes of this Act in an Appropriations Act making specific reference to this Act and shall become effective when funds so appropriated become available for expenditure.

SECTION 3.

All laws and parts of laws in conflict with this Act are repealed.

A cursory reading of the proposed legislation raises numerous questions and concerns. First, it comes at a bad time since the State Board is in the midst of implementing a very complex ICMS system. Getting the correct name of the carrier, the servicing agent, and the adjuster handling the case can be difficult. Providing a "current status of a case" is not defined and could be interpreted any number of ways. Obtaining all of the information required will, as anyone who deals with claims can attest, take a significant effort, especially to keep it current. Privacy issues are of a concern as is the impact on settlements, particularly those involving no liability. Finally, there are questions about the initial cost of funding the program, a statute of limitations, and the result of any misinformation or failure to provide information. Reporting requirements for carriers and self-insurers may well have to change since medical only claims are lumped together and filed periodically. Every claim, no matter how insignificant, would need to be

See H.B. 661 on page 18

Use of Evidence, Including Experts, in Catastrophic Cases

By Jerry Stenger
Administrative Law Judge, State Board of Workers' Compensation

Since the time I began hearing catastrophic claims 12 years ago or so, I can recall that I have heard really no more than 18 cases involving this issue. But in that time, I have noticed some trends and tendencies in how the evidence is presented, including the use of what is now called expert vocational rehabilitation testimony. I offer a few observations I have gleaned from those cases as well as a little "two cents worth" of gloss here and there.

1) Kind of Evidence Used at Hearings On Claims in General.

First of all—and this is with apologies to the majority of you in the comp attorney choir that I am preaching to—it is still worth noting that workers' compensation hearings are not an evidentiary free-for-all. When I first began practicing workers' compensation law nearly 20 years ago, there where still quite a few vestiges left of an "anything goes; it's just a comp case" evidentiary attitude, admittedly more so than I have seen since I started hearing cases. (This thinking went with some judges as well as some of the lawyers.) However, it is still surprising in this day and age that parties and attorneys still come to hearings expecting a greater amount of laxity than I believe the law allows, even given that workers' compensation hearings were no doubt never originally intended to be as formal as civil court trials.

In *Cobb County School District v. Barker*, 271 Ga. 35, 37; 518 S.E.2d 126 (1999), a landmark pre-statute amendment catastrophic case, our Supreme Court stated that "[t]he principles of due process 'extend to every proceeding... judicial or **administrative or executive in nature**' at which a party may be deprived of life, liberty, **or property**. [Cit.]" (My emphasis.) Thus, even workers' compensation hearings are to be accorded some level of constitutionally mandated formality. Our workers' compensation Act states the principle equally forcefully by stating that the administrative law judge must conduct the hearing in a manner that, albeit "informal,"[1] is "consistent with the requirements of due process." O.C.G.A. §34-9-102(e)(1). *See also Hart v. Owens-Illinois, Inc*, 165 Ga. App. 681, 302 S.E.2d 701 (1983). O.C.G.A. §34-9-102(e)(1) adds in no uncertain terms that administrative law judges are also bound by the Georgia rules of evidence. Our Court of Appeals, in a rather pithy observation, said in *American Cas. Co. v. Wilson*, 99 Ga. App. 219, 221; 108 S.E.2d 137, 139 (1959) that a hearing conducted without evidentiary rules "could not result in a basis for judicial review, but would amount to no more than a town meeting." *See also Cook v. Georgia Dept. of Revenue*, 100 Ga. App. 172, 110 S.E.2d 552 (1959). It should not be forgotten that, exactly like civil court trials, administrative hearings are designed to be adversarial proceedings and, as such, the rules of evidence must apply. *Finch v. Caldwell*, 155 Ga. App. 813, 273 S.E.2d 216 (1980). *See, e.g., Rheem Manuf. Co. v. Jackson*, 254 Ga. App. 454, 562 S.E.2d 524 (2002), evidence should be presented by testimony, documents, or stipulation; facts stated in brief are not evidence and cannot be the basis for an award.

2) Kind of Evidence Used at Hearings on Catastrophic Claims Specifically.

The catastrophic statute does make mention of a few points of evidence that can be used at catastrophic claim hearings. The most obvious point mentioned is the social security decision. O.C.G.A. §34-9-200.1(g)(6) states:

> a decision granting or denying disability income benefits under Title II or supplemental security 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.

Before the statute was later amended, the *Barker* case held that the statute did not intend that the Social Security decision would be **conclusive** proof of catastrophic status. Rather, "subsection (g)(6) is merely definitional and provides, at most, a rebuttable presumption that the claimant has suffered a compensable 'catastrophic injury.'" *Id.* at 39. Continued the Court in *Barker*: "That the Social Security Administration has deemed the claimant eligible for disability or SSI benefits is not the focus of subsection (g)(6); instead the ALJ must look at the facts presented and the parties' arguments and make an independent determination that the injury alleged by the claimant to be catastrophic...meets the definition set forth [in subsection (g)(6)]." *Id.* at 39. From this, we can see the seed of the point of what other kinds of evidence—evidence besides the social security decision—should be considered, specifically in the language "look at the facts presented...". Putting that aside for the moment though, it has been held that the Supreme Court intended that a rebuttable presumption be created. *See Jered Indus., Inc. v. Pearson*, 261 Ga. App. 373, 582 S.E.2d 522 (2003), which held that, "[i]n interpreting [O.C.G.A. §34-9-200.1(g)(6)], our Supreme Court has concluded that an award of social security benefits creates '[a][2] rebuttable presumption that the claimant has suffered a "catastrophic injury."'"

On July 1, 2003, however, the Legislature enacted an

"It is still surprising in this day and age that parties and attorneys still come to hearings expecting a greater amount of laxity than I believe the law allows, even given that workers' compensation hearings were no doubt never originally intended to be as formal as civil court trials."

amendment to O.C.G.A. §34-9-200.1(g)(6) that clarified the way such decisions are considered. The clarification, added at the end of the "shall give consideration and deference" clause, says:

> provided, however, that no presumption shall be created by any decision granting or denying disability income benefits under Title II or supplementary security income benefits under Title XVI of the Social Security Act.

This is only as it should have been, given, as I believe, that the *Barker* Court was not specifically addressing the issue of whether a presumption was created.[3] And to that effect, the Social Security Administration itself need hardly take any note of the Board's own decisions on disability matters. As is stated in 20 C.F.R. §404.1504 (and its exact replica at 20 C.F.R. §416.904):

> A decision by any nongovernmental agency or any other governmental agency about whether you are disabled or blind is based on its rules and is not our decision about whether you are disabled or blind. We must make a disability or blindness determination based on social security law. Therefore, a determination by another agency that you are disabled or blind is not binding on us.[4]

In *Davis v. Carter Mechanical, Inc.*, 272 Ga. App. 773, 612 S.E.2d 879 (2005), the Court held "[g]iven the similarity between the Social Security provision and O.C.G.A. §34-9-200.1(g)(6), federal case law and SSA policy may be instructive on this issue." *Id.* at Ga. App. 778; S.E.2d 884. However, in saying "may be instructive," *Davis* does not **require** that the Board apply the social security regulations.

At any rate, O.C.G.A. §34-9-200.1(g)(6), perhaps in echo of the *Barker* "look at the [other] facts presented" language, was amended on July 1, 2005 to state that "in determining 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." It is probable that this fresh amendment was intended only for the 130 week "presumption of no catastrophic status" period also included in the 2005 amendment. This is especially since the clause I quoted specifically begins with "during such period", which could only refer to the 130 week presumption period referred to right before. However, I would submit that such an evidentiary consideration requirement, given *Barker's* "look at facts presented" language, is a useful guideline for analyzing any and all evidence—including expert evidence—and at **any** relevant period of the claim, not just the 130 week presumption period.

3) Review of the Evidence.

Evidentiary law presents useful rules for how a trier of fact can weigh evidence. These rules and guidelines are important for attorneys presenting evidence in catastrophic cases, including expert evidence, so that they might know which kinds of evidence to present, and how much evidence to present, too.

The trier of fact is permitted to make reasonable inferences based upon the evidence proven at trial, particularly where the evidence is circumstantial. *See* O.C.G.A. §24-1-1(4)("Indirect or circumstantial evidence means evidence which only tends to establish the issue by proof of various facts, sustaining by their consistency the hypothesis claimed"). *See also Youngblood v. State*, 179 Ga. App. 163, 345 S.E.2d 634 (1986)("The term 'hypothesis' refers to such reasonable inferences as are ordinarily drawn by ordinary men in light of their experience in everyday life."); *Harris v. McClain*, 152 Ga. App. 447, 263 S.E.2d 233 (1979)(circumstantial evidence is evidence which does not prove the ultimate fact, but rather establishes an inference from which the ultimate fact can be drawn); and *Southeastern Fid. Ins. Co. v. Stevens*, 142 Ga. App. 562, 236 S.E.2d 550 (1977)(the hypothesis need only be reasonable and to preponderate to that theory rather than to any other reasonable hypothesis). *Compare Feldschneider v. State*, 127 Ga. App. 745, 195 S.E.2d 184 (1972)(on certain questions that might be known to many, the trier of fact is permitted to go so far as to presume evidence which, in its human experience, it knows to be true, and the trier of fact may make this presumption even without any evidence being introduced). *But see Reid v. Georgia Building Auth.*, 283 Ga. App. 413, 641 S.E.2d 642 (2007), the Board's finding on an issue cannot be "based solely on its own experience."

4) Review of Expert Evidence in Cat Cases.

In the 15 years or so since the catastrophic claims came to the forefront, the importance of expert testimony in catastrophic cases has grown. Prior to then, rehabilitation case managers had often been called upon to provide rehabilitation services to seriously injured and disabled workers, but disputes had to do with whether a supplier should be appointed or not. Or disputes would arise over the extent of services that should be provided the worker. Since time of the 1992 amendment, however, the testimony of rehabilitation case managers has been used to establish the issue of whether a claim is catastrophic or not, and

such testimony has been considered by custom to be expert testimony.

The evidentiary tug of war—and the entire focal point of the case managers' testimony—is based on whether the worker's injury is "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...". O.C.G.A. §34-9-200.1(g)(6)(A). This clause is the high ground that the parties are disputing, and establishing this requirement is the Holy Grail of the party trying to prove or disprove catastrophic status. It might be conceded that the "of a nature and severity" part might be proven only with lay testimony and medical evidence. As was noted in the *Reid* case, cited previously, there was no dispute that that worker was unable to perform her previous job. Accordingly, the only issue was whether there was "any work available in substantial numbers within the national economy" for which the worker was otherwise qualified. It is here in the *Reid* case where the evidentiary battle lay, so one could safely argue that it is only with the "substantial numbers/national economy" part where the "dueling expert" testimony is joined

Photo by Jimmy Emerson

The decision of whether to use a rehabilitation case manager's testimony as expert testimony, of course, rests with the lawyer and the party to the case. But considering how crucial the "substantial numbers" requirement, proving or disproving catastrophic status may best require an expert invocation of those magic words in some manner, be it "yea" or "nay." In this day and age of increasing use of such kind of testimony, it would greatly benefit the lawyer to choose to use rehabilitation manager testimony to bolster the client's case (whether it be for or against catastrophic status), especially if the other side has so engaged such testimony.

There are several instances that might help the lawyer decide. In a case where the worker possesses a favorable social security decision, the defense might seriously consider hiring a rehabilitation manager to examine the evidence and, the employer might hope, present an opinion that the substantial jobs do exist in the national economy, etc. Of course, if there is no social security decision, perhaps the defense might save the expense and trouble of hiring a case manager, though if cost is no object it would hardly hurt to present to the ALJ as much evidence as possible. If a worker does not have a favorable decision, the worker might seriously consider presenting a case manager's testimony. A social security decision is not conclusive, as previously stated, but it can nonetheless be persuasive, so without such evidence, some other form of persuasive—even expert testimony—might be needed, if the worker has only lay testimony and medical evidence to use.

To the lawyer who decides not to call case manager testimony, there are several evidentiary considerations to think about. While there is no requirement that a party seek corroborating evidence, it has been held that an administrative law judge can nonetheless consider whether testimony is strengthened by other evidence. *Distribution Concepts Co. v. Hunt*, 221 Ga. App. 449, 471 S.E.2d 539 (1996). The Rules of Evidence shed light, too:

> If a party has evidence in his power and within his reach by which he may repel a claim...against him but omits to produce it, or if he has more certain and satisfactory evidence in his power but relies on that which is of a weaker and inferior nature, a presumption arises that the...claim against him is well founded....

O.C.G.A. §24-4-22 ("but this presumption may be rebutted."). This Code section does not require that all witnesses be called; it merely provides that an adverse presumption might arise from a failure to call all witnesses. *Jacobs v. State*, 201 Ga. App. 57, 410 S.E.2d 320 (1991). This applies in workers' compensation cases. *General Motors*

Corp. v. Craig, 91 Ga. App. 239, 85 S.E.2d 441 (1954)(where employer did not produce a doctor's evidence, it was presumed that the doctor's evidence corroborated the injured worker). In *City of Poulan v. Hodge*, 275 Ga. 483, 569 S.E.2d 499 (2002), it was held that the absence of a certain piece of evidence (maximum medical improvement) was an evidentiary factor that the ALJ was entitled to consider. Also, though the burden of proof generally lies on the party trying to prove a fact, if the negation of that fact "is essential to a party's...defense, the proof of such negation...lies on the party so affirming it." O.C.G.A. §24-4-1. "The jury may consider the number of the witnesses, though the preponderance is not necessarily with the greater number." O.C.G.A. §24-4-4. *See Downer v. Bazzell*, 216 Ga. 712, 119 S.E.2d 556 (1961). The Board is not "bound in every case to accept the literal statements of a witness before it merely because such statements are not contradicted by direct evidence. Implications inconsistent with the testimony may arise from the proved facts; and in still other ways the question of what is the truth may remain as an issue of fact despite uncontradicted evidence in regard thereto." *Cooper v. Lumbermen's Mut. Cas. Co.*, 179 Ga. 256; 175 S.E. 577 (1934)

All the folderol aside, many catastrophic cases devolve into "dueling case managers" testimony. Thus far, I note two cases that have addressed this. One of them is the afore cited *Reid v. Georgia Building Auth.*, 283 Ga. App. 413, 641 S.E.2d 642 (2007), and that was only to observe the **absence** of any rehabilitation manager testimony. In noting that the only testimony on the crucial job availability point "was [the worker's] statement that she has 'looked for work'", the Court noted that "[n]either Harris [the occupational therapist], nor any other expert witness, testified regarding the availability of work in the national economy for which Reid was otherwise qualified." The tea leaf reading one can safely make is that the Court has possibly recognized that a rehabilitation case manager's opinion would go a long way to proving the "substantial numbers/availability" part of the equation, far better anyway than the worker's own testimony.

The second case I note is another case previously mentioned, the case of *Davis v. Carter Mechanical, Inc.*, 272 Ga. App. 773, 612 S.E.2d 879 (2005), which dealt more closely with the question of expert testimony because not one but two testified. The Court noted that each side called its own rehab manager, and the Court examined carefully the extensive fact analysis each manager made in rendering his opinion. The main issue was whether one of the rehabilitation managers had invoked the proper "magic language." Specifically, the question was whether it was sufficient to testify that a number of jobs "exists" versus whether it should be required that the expert testify that there are actual **openings** for the jobs. The rehab person in question, it was argued, did not therefore present evidence of the number of jobs "available," because the statute says "available," not "exists." In rejecting this argument, the Court went on to hold that, given the legislative history and the intent to closely model the social security language, "available" in our statute simply meant "existing", not "actual job openings". Also considered in *Davis* was the relative weight of the experts' testimony, particularly the amount of work each did in preparing for their opinions. Based on the *Davis* case, the preparing attorney would be well advised to consider whether the rehab manager has interviewed or conducted independent testing. The Court held that those factors did not render that manager's testimony incompetent. However, those factors were certainly relevant in the weight to be assigned the evidence. I would note that, in the *Davis* case, it was the defense's expert who did not perform an interview or an independent test, and yet the Court upheld the Board's denial of catastrophic status. From this, one can easily infer that the trier of fact can assign more weight to an expert's opinion even if that expert based his opinion on facts other than what he obtained from direct observation. To that end, *see also Southwire v. Cato*, 179 Ga. App. 762, 347 S.E.2d 656 (1986), in which it was held that the Board can assign weight to a physician's evidence even if his opinion was based only upon a review of documents and not an examination of the injured worker. **WC**

Endnotes

1. This word was probably the foundation, in my opinion, on which the "anything goes" philosophy might have been founded, quite at the expense of the "due process" part of the law.
2. This was not my edit but that of the Court of Appeals'. The original clause from Barker is quoted right above, where that Supreme Court stated "provides, at most, a rebuttable presumption." (Emphasis mine.)
3. Unless the Court was misspeaking when the justices wrote the words "at most" and when they stated that the social security decision is "not the focus", that the ALJ must "instead" "look at the facts presented".
4. These self-insulating kind of laws and regulations must be all the fashion. Witness O.C.G.A. §34-8-122(b), in the unemployment law chapter: "Any finding of fact or law, judgment, determination, conclusion, or final order made by an adjudicator, examiner, hearing officer, board of review...shall not be admissible, binding, or conclusive in any separate or subsequent action or proceeding between a person and such person's present or previous employer brought before any court...or before any local, state, or federal administrative agency, regardless of whether the prior action was between the same or related parties or involved the same or similar facts...".

Board Updates

Continued from Page 1

be in ICMS. Over time, we are scanning the paper files into ICMS so all active files may be view electronically.

Format and Accuracy

Board forms have been revised specifically to work with the new system. Every single form was reviewed and revised substantially July 1, 2005 and again July 1, 2006 and July 1, 2007. The ICMS document management system uses specific data to identify the claim and process the information. The claim information must be submitted on current forms. See Board Rule 61(b)(55). The correct forms are those issued in July 2007, with some few exceptions. They have "7-2007" printed at the bottom of the page. If you do not use a current form, effective Oct. 1, 2007, the Board will return your form. You must re-file the form or the correct version of the form (which can be found on the SBWC website at www.sbwc.georgia.gov). Do NOT alter the Board forms in any way. See Board Rule 61(b)(55); Board Rule 102(A)(3).

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 website: www.sbwc.georgia.gov. You must use the proper form to report the information. If sufficient space does not exist on a form, do not alter the form, but you may attach a supporting document adding information. For example, if more parties exist than is possible to list on a Form WC-14, attach a piece of paper showing all the correct parties to a claim.

If the information is not completed sufficiently for processing on a form, it will be returned. The WC-1 is the most critical. The form must identify the employer, the insurance carrier or self-insured entity, as well as the claims office handling the claim. Please always complete the section for SBWC ID number, which identifies the carrier or self-insured entity. See Board Rule 61(b)(1). This number can be located in an alphabetical listing on the SBWC website (www.sbwc.georgia.gov). Please note that the Board is rejecting Form WC-1s if sections B, C or D are not filled out.

Finally, when paper forms are sent to the Board, the paper is scanned into the ICMS document management system. Data on the form must be printed clearly and must be dark enough to be scanned correctly. A note on faxes: faxes do not scan well! See Board Rule 60(f)(No faxes shall be sent to the Board, without prior permission). If the information is not clear and dark, effective Jan. 1, 2007, the form will be returned.

Filings Where No Board Form Exists

When filing anything with the Board, place the Board claim number on each page of your document. This is especially important where no Board form exists. If filing correspondence with the Board, please place the Board claim number in the top left corner of each page (you can just write the Board claim number in on each page).

What Causes Delay and How You Can Help

Generally, the manner and method in which the Board processes any filing is still the same. However, with a computer based paperless system, exact precision with filings is required in order for the documents to be processed correctly and efficiently.

Several things can cause a delay in the processing of forms. Inaccurate or incomplete forms go to research and are not processed into workflow. For example, employee name, date of injury, and SSN must correctly match what is on file with the Board or else the ICMS system will not be able to recognize the filing and associate it with the correct file. If the name is off by one letter, the SSN off by one digit, or the date of injury is off by one digit, this may create a new claim, and will delay getting your document into its correct claim file.

Generally, theses problems cause such filing to go to "research" for a Board employee to determine which file the document is to be associated with. This one issue causes thousands of documents to be "suspended" until a proper determination can be made.

Always remember, only a Form WC-1 or Form WC-14 will actually create a new electronic file. As such, if a WC-1 or WC-14 has not been previously filed, any document that is filed with the Board has not file to go to, and will be rejected. See Board Rule 60 (h).

Some things that help us at the Board:

- If a form is available for the document you are filing, always use the form (e.g. Form WC-102d for motions and Form WC-200b for change of physicians), even when you are including attachments.
- Never alter a Board form to change the data or information fields. See Board Rule 61(b)(55) & Board Rule 102(A)(3).
- If a form is not available for the document you are filing, clearly identify and name the document on the first page. Additionally, make sure the first page includes the New Board Claim Number and other claim-identifying information. See Board Rule 60(c).
- Attorneys shall place their Georgia Bar number on all documents filed with the Board. See Board Rule 102(A)(3).
- Except for Stipulated Settlements, Board Rules require that only one copy of a document is to be filed. If a judge or other Board personnel request a courtesy copy of a document be sure to clearly mark the document as a COURTESY COPY so that duplicates are not scanned into the electronic claim file. See Board Rule 60(i).
- All motions are limited to 50 pages unless otherwise permitted by the assigned ALJ. See Board Rule 102(D)(1); Board Rule 200 (b)(1).

Briefs to ALJs are limited to 30 pages. See Board Rule 102(E)(4). Briefs to the Appellate Division are limited to 20 pages. See Board Rule 103(b)(4).

Parties to a Claim

In ICMS, the parties to a claim are critical. It is fairly easy to enter an employee's information, find the employer, and add the attorneys to a claim. In addition for self-insured employers and group self-insurers, it is fairly easy to add these parties because both entities usually only have one claims office handling their claims.

The difficulty and the challenge for all is figuring out the relationship between insurers and their claims offices. ICMS requires links between the insurer/self-insurer/group self-insurer and their designated claims offices. Our goal with this design was to ensure/verify correct coverage and to have the ability to run accurate loss runs on claims. The addresses and contract information of the designated claims offices shall be submitted by the insurer/self-insurer/group self-insurer on the Form WC-121 or Forms WC-131A-Insurers only. See Board Rule 61; Board Rule 126. Only the claims offices properly identified via a Form WC-121 or Form WC-131a by the insurer/self-insurer/group self-insurer as the legitimate administrator of their claims are recognized by the Board.

Defense attorneys should encourage clients to use updated, accurate information when submitting this information. For example, there are a number of insurers who have only designated one claims office handling their claims when they have five or six; it is critical that they file a Form WC-121 or Form WC-131a updating all claims office handling Georgia claims. Failure to do so will lead to inability to utilize EDI, and cause tremendous difficulty in identifying the proper parties in a claim.

One key addition to most forms is a space for the insurer/self-insurer's SBWC ID number, which assists, and in most cases, ensures the correct relationship between insurer and claims offices. Please use it.

Phase 3

The Board has split Phase 3 into two parts. Phase 3A integrates Managed Care and Rehabilitation functions into ICMS. Phase 3B will deploy the web-based submission of forms and electronic viewing capabilities of files. Both have been tested thoroughly and extensively and we are pleased to announce a projected deployment for Dec. 10, 2007.

We have identified a small group of outside attorneys to test the deployment. After the green light is given, we will permit all registered users to begin using our system. We expect to begin full implementation in January 2008. Training courses will be offered for you and your staff and our goal is to make web filing mandatory for all attorneys within one year.

New Help Desk

The Board has established a Help Desk that will integrate the existing Information & Referral (I & R) Department as well as offer support for ICMS functions. The new Help Desk will be included in the implementation of the web-based functions in Phase 3B.

The Board has made process improvement a permanent part of the organization. Liesa Gholson has been named Director of Process Improvement & Oversight and is responsible for ensuring that both internal users and external users are successful with our systems. Liesa's organization will include training, support, and a Help Desk. These functions will be a critical part of implementing the new document management system and ensuring its success to all users.

EDI

Electronic Data Interchange (EDI) will allow insurers and self-insured employers to file data for claims in mass quantity, rather than claim by claim. Deployment of EDI will begin in the Winter of 2008. The Board intends for insurers, self-insurers, and group funds to submit claim information electronically by the 2nd quarter of 2008.

ADR Update

The Board is proud of the growth in mediated cases and settlements. ADR is handling a tremendous volume of cases each year. In 2007, ADR will set approximately 7,000 to 8,000 cases. Of the cases that go forward, we are resolving 80 to 90 percent of those cases.

We currently have seven mediators on staff and two judges. They are Marianne McMillan, deputy director of ADR, Joe Weatherford, David Kay, Karen Boyd, Frances Finegan, Stephanie Jones and Melissa Nelson.

Over the last year, Judge Ronald Conner retired, and entered private practice. Judge Janice Askin was appointed by the Board to fill Judge Conner's position. Judge Askin handles motions for ADR, hears cases, and regularly mediates cases.

Willie Harper retired this year and Doug Witten was promoted to deputy division director of the Appellate Division. As such, we are pleased to welcome over the last year Frances Finegan, Stephanie Jones and Melissa Nelson as our new mediators.

ADR has established several aggressive goals to better serve our workers' compensation community. Our goal is set cases within 30 days. When we are unable to reach this goal in a case, we are always willing to assist with quicker sets. Please feel free to call us at 404-656-2939.

For motions, our goal is provide a ruling within 30 days. We are issuing between 100 to 200 orders per month.

We are dedicated to providing quick resolution to disputes and assisting in providing resolution to claims.

The Future

We are excited about this progress. We hope everyone has a great Holiday Season and a Happy New Year. **WC**

Hazardous Condition: The Status of Illegal Immigrants and Their Entitlement to Workers' Compensation Benefits

By Seth Eisenberg, Georgia State College of Law Third-Year Law Student
and Greg Presmanes, Partner, Bovis, Kyle & Burch, LLC

Introduction

Millions of illegal immigrants reside in the US seeking human rights not afforded to them in their countries of origin. *See* Richard A. Johnson, *Twenty Years of the IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States*, 21 Geo. Immigr. L.J. 239, 241 (2007). Although the exact number of illegal immigrants in the US is currently impossible to calculate, recent estimates calculate the number is close to 12 million. *See* Pew Hispanic Center, Estimates of the Unauthorized Migrant Population for States Based on the March 2005 CPS, http://pewhispanic.org/files/factsheets/17.pdf (last visited Oct. 23, 2007). As the arrival of more illegal immigrants increases each day, higher numbers of undocumented workers enter the labor market in search of jobs and livable wages. *See* Megan A. Reynolds, Comment, *Immigration-Related Discovery After Hoffman Plastic Compounds, Inc. v. NLRB: Examining Defending Employers' Knowledge of Plaintiffs' Immigration Status*, 2005 Mich. St. L. Rev. 1261, 1268 (2005). (Analyzing estimates of illegal immigrant men's participation in American Workforce to suggest that undocumented workers are a growing proportion of the workforce). *See* Johnson, at 265. Many undocumented workers labor at jobs in extremely hazardous conditions. *See id.*

Recognizing hazardous conditions often lead to injuries, many illegal immigrants are injured each year while on the job. *See id.* Despite the certainty that employers knowingly hire illegal immigrants, Congress has made it illegal for employers to knowingly hire and retain illegal immigrants. *See* Sara A. Bollerup, *America's Scapegoats: The Undocumented Worker and Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 38 New Eng. L. Rev. 1009, 1018-1019 (2004). *See generally Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

Congress enacted the Immigration Reform and Control Act (hereinafter "IRCA") as a comprehensive scheme prohibiting the employment of illegal aliens. 8 U.S.C.A. § 1324a(b) (2007).

Acknowledging Congress enacted IRCA to prevent the employment of undocumented workers, the Supreme Court in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) held against awarding back pay wage benefits to illegal immigrants. The Court's decision in *Hoffman* indicated to employers that benefits incident to the employment of legally authorized workers did not apply to undocumented workers. *See Wet Walls, Inc. v. Ledezma*, 266 Ga. App. 685 (2004), *Continental Pet Technologies, Inc. v. Palacias*, 269 Ga. App. 561 (2004). Recognizing federal law clearly bans the employment of illegal immigrants, must employers bear the burden of paying workers' compensation benefits for injuries sustained by undocumented workers?

The answer requires a discussion about a complicated issue: The status of illegal immigrants and their entitlement to workers' compensation benefits.

Workers' compensation benefits provide protection to employers and employees for occupational injuries or death. Majorie A. Shields, Annotation, *Application of Workers' Compensation Laws to Illegal Aliens*, 121 A.L.R. 5th 523 (2004). The basic definition of workers' compensation is "an administrative remedy designed to speed an employee's compensation while insulating both the employer and the employee from the costs and delays inherent in purely judicial adversarial positions." *See id.* For the purposes of receiving workers' compensation benefits, a person must qualify as an "employee" based on the statutory definition drafted by the respective state legislature. *See, e.g.*, O.C.G.A. § 34-9-1(2) (2007).

Issues regarding illegal immigrants and workers' compensation benefits focused on whether an illegal alien qualifies for "employee" status for workers' compensation benefits. *See* Shields, at 523. Employers argued that federal law preempted a state's workers' compensation scheme. *See, e.g., Wet Walls, Inc. v. Ledezma*, 266 Ga. App. 685 (2004), *Continental Pet Technologies, Inc. v. Palacias*, 269 Ga. App. 561 (2004).

Recognizing *Hoffman* applied to wage benefits, most state courts distinguished *Hoffman* as inapplicable to workers' compensation. *See* Shields, at 523. Although most states find a general right to workers' compensation benefits, the conflict involving the status of illegal immigrants and their entitlement to workers compensation benefits continues to evolve in state courts. *See Martines v. Worley & Sons Constr.*, 278 Ga. App. 26 (2006), *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (2003).

Background Information about the IRCA

A discussion about the conflict between the status of illegal immigrants and their entitlement to workers' compensation benefits must begin with a brief overview of the Immigration Reform and Control Act. 8 U.S.C.A. § 1324a

(2007). In 1986, Congress enacted the IRCA with the purpose of diminishing the illegal immigrant population entering into the United States. *See* Johnson, at 244-45. The Act rendered it unlawful for employers to knowingly hire or recruit undocumented workers and required employees to present valid documentation in form of specified documents. *See id. See* generally 8 U.S.C.A. § 1324a (2007).

The IRCA makes it unlawful for an employer "to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C.A. § 1324a(a)(1) (2007). The Act created an employment verification system to effectuate the general rule prohibiting employment of illegal immigrants. *See* 8 U.S.C.A. § 1324a(b) (2007). *See also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147-48 (2002). Mandating employer responsibility, employers must attest to the identity and eligibility of all new hires by examining certain documents before the potential employees start work. *See id*. The required documentation consists of either a valid social security account number card, driver's license, or other documentation evidence that authorizes employment in the United States. *See id.* Employees must also attest to their eligibility as authorized for employment in the United States. *See* 8 U.S.C.A. § 1324a(b) (2007). Employees using fraudulent documentation violate the Act's provisions. *See* generally 8 U.S.C.A. § 1324a (2007). If the potential employee is unable to present valid documentation, the person cannot be hired. *See id.*

The Supreme Court in *Hoffman* Denies Back-Pay Wage Benefits to Illegal Immigrants

In 2002, the Supreme Court analyzed the IRCA and its prohibition on hiring undocumented workers. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). The Court in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) held that awarding back pay wage benefits to an undocumented employee contravened the federal law prohibition on hiring illegal immigrants. *See* Richard A. Watts, *Illegal Aliens and Workers' Compensation Benefits in Georgia*, Presentation at the Atlanta Claims Association Annual Seminar (Feb. 1, 2007).

The employee provided documentation that appeared to authorize his employment in the United States. *See Hoffman*, 535 U.S. at 140. After finding the employee was terminated for union activity, the NLRB board found that the award of back pay benefits was appropriate. *See id* at 141-42. Despite the employee testifying in front of the Administrative Law Judge that he was an illegal immigrant, the Board felt that the award of back pay wage benefits was the most effective way to further the immigration policies embodied in the IRCA. *See id*.

The Supreme Court disagreed and held the award of back pay was foreclosed by the IRCA. *See id*. at 151. Recognizing the undocumented worker's use of false documents to obtain employment violated IRCA, the Court reasoned that Congress would not permit back pay wage benefits where "but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities." *Id*. at 149.

Although the Supreme Court held against awarding back pay wage benefits to illegal immigrants, the *Hoffman* opinion did not expressly preclude the states from awarding workers' compensation benefits to unauthorized aliens. *See* Shields, at 523. *See also Wet Walls, Inc. v. Ledezma*, 266 Ga. App. 685, 686-88 (2004) (reasoning no express preemption of state workers' compensation laws exists in the Supreme Court's opinion in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) or IRCA).

State Courts Uphold Workers' Compensation Benefits

Employers argued that IRCA and the Supreme Court's decision in *Hoffman* emphasized that it is illegal for an undocumented alien to obtain employment benefits in the United States without some party violating federal law. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). For the purposes of receiving workers' compensation benefits, a person must qualify as an "employee" based on the statutory definition drafted by the respective state legislature. *See* Shields, at 523. See also O.C.G.A. § 34-9-1(2) (2007) (providing workers compensation benefits for "employee" defined as including "every person in service of another under any contract of hire or apprenticeship"). The conflict between the status of illegal immigrants and their entitlement to workers' compensation benefits soon escalated in numerous state courts because of the uncertainty between federal and state law. Colorado, Connecticut, Florida, Kansas, Louisiana, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania, Texas, Michigan, Minnesota, Georgia, Tennessee, Virginia, Maryland, California, and Wyoming have all adjudicated cases related to the status of illegal immigrants as an "employee." *See* Shields, at 523.

Illegal Immigrants and the status of "employee"

Prior to *Hoffman*, employers argued in state courts that an undocumented worker failed to qualify for "employee" status as defined by a state's workers' compensation laws. *See id.* Although a split of authority existed as to whether an illegal immigrant qualified as an "employee" for workers' compensation purposes, most states that encountered this argument concluded that undocumented workers were considered covered employees. Colorado, Connecticut, Florida, Kansas, Louisiana, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania, California, and Texas all held or recognized the general right of illegal aliens as employees capable of receiving workers' compensation benefits. After the *Hoffman* decision, Michigan, Minnesota, Maryland, Georgia and Tennessee all held or recognized the validity of illegal aliens as employees capable of receiving workers' compensation benefits. Virginia initially ruled against finding illegal immigrants in the definition of "employee," but the

Virginia Workers' Compensation Act, codified at Va. Code Ann. § 65.2-101 was amended to include aliens, whether lawfully or unlawfully employed, in the definition of "employee." *See* Shields, at 523.

State courts interpreted their workers' compensation statutes to qualify illegal aliens as an "employee" for status eligibility of workers' compensation benefits by distinguishing the coverage of the IRCA. *See, e.g., Dowling v. Slotnik*, 244 Conn. 781, 805-06 (1998). The Supreme Court of Connecticut in *Dowling v. Slotnik*, 244 Conn. 781 (1998) upheld a commissioner's award of workers' compensation benefits to a nanny recognized as an illegal alien. *See Dowling*, 244 Conn. at 819. In *Dowling*, an illegal immigrant was injured while working as a nanny and was awarded workers' compensation benefits. *See id.* at 784-786. The court held illegal aliens were included in the group of "persons" eligible for workers' compensation reasoning the employer received a service sufficient to establish an employer-employee relationship. *See id.* at 805-06. The court found the IRCA was meant to prevent employers from willfully hiring illegal immigrants, and the statute failed to expressly or impliedly preempt the authority of the states to award workers' compensation benefits to undocumented workers. *See id* at 797.

Although most courts upheld the status of an undocumented worker as an "employee" capable of receiving benefits, the Supreme Court of Wyoming in *Felix v. State ex rel. Wyoming Workers' Safety and Compensation Div.*, 986 P.2d 161 (1999) held an illegal immigrant was not an "employee" under its workers' compensation statute. In Felix, the illegal immigrant sustained an injury to his arm while working with a seed cutter. *Felix v. State ex rel. Wyoming Workers' Safety and Compensation Div.*, 986 P.2d 161, 162-63 (1999). The court held the illegal alien was not authorized to work in the United States and thus was not an "employee" for workers compensation purposes. *See Felix*, 986 P.2d at 163-64. It is important to note that the Wyoming statute defined "employee" with the express terms "aliens authorized to work by the United States department of justice, immigration and naturalization service." *See id.* at 164

Pre-emption Issues after the Decision in *Hoffman*

Despite the distinct majority of courts qualifying the status of illegal immigrants as an "employee" capable of receiving benefits, the Supreme Court's opinion in Hoffman clouded the eligibility of undocumented worker's status as "employee." *See* Jacob Y. Statman, *Design Kitchen and Bath v. Lagos: An Undocumented Alien Injured in the Course of His Employment is Entitled to Receive Workers' Compensation Benefits Under the Maryland Workers' Compensation Act*, 36 U. Balt. L.F. 173, 175-176 (2006).

Employers argued that the decision in *Hoffman* precluded any ruling that granted benefits to an illegal immigrant as an "employee" for worker's compensation purposes. *See id.* Employer arguments focused on an express and implied preemption based on the IRCA and *Hoffman* decision. *See Wet Walls, Inc. v. Ledezma*, 266 Ga. App. 685 (2004), *Continental Pet Technologies, Inc. v. Palacias*, 269 Ga. App. 561 (2004).

The Georgia Court of Appeals in *Wet Walls, Inc. v. Ledezma*, 266 Ga. App. 685 (2004) recognized that illegal aliens were entitled to benefits under the Workers' Compensation Act. In *Wet Walls*, the petitioner fractured his back while at work. *See Wet Walls, Inc. v. Ledezma*, 266 Ga. App. 685 (2004). After the injury, the claimant was deported but still filed for workers' compensation benefits. *See id.* at 686. Despite the Supreme Court's decision in *Hoffman* finding an award of back pay to an illegal alien prohibited by the intent of the IRCA, the Georgia Court of Appeals upheld the decision requiring the employer to pay benefits. *See id.* at 689. The court interpreted the employer's argument to suggest that the IRCA and the Hoffman decision expressly prohibited the states' right to award workers' compensation benefits. *See id.* at 686-87. Acknowledging other states concluded that there is no conflict between federal law and the state's ability to award workers' compensation benefits, the court held the employer did not prove an express preemption nor made any argument to establish implied presumption. *See id.* at 687.

Just a few months later, the Georgia Court of Appeals in *Continental Pet Technologies, Inc. v. Palacias*, 269 Ga. App. 561 (2004) again ruled in favor of illegal immigrants' benefits. *See* Richard A. Watts, *Illegal Aliens and Workers' Compensation Benefits in Georgia*, Presentation at the Atlanta Claims Association Annual Seminar (Feb. 1, 2007). In *Palacias*, the injured worker provided false identification to obtain employment. *See Continental Pet Technologies, Inc. v. Palacias*, 269 Ga. App. 561 (2004). The employer argued the undocumented worker should not be considered an "employee because Congress' intent in enacting the IRCA was to provide itself with the sole determination power as to the ability of undocumented workers to gain employee status. *See id.* at 562. The Georgia Court of Appeals held the IRCA did not implicitly preempt workers' compensation statutes reasoning the IRCA focused on preventing employers from hiring unauthorized aliens and was not aimed at invalidating state labor protections or the award of benefits in this case. *See id.* at 562-63.

Although employers argued the Supreme Court's decision in *Hoffman* prevented an illegal immigrant from qualifying as "employee," for workers' compensation benefits, state courts distinguished it as inapplicable to workers' compensation by finding its holding limited in scope to back pay wage benefits that illegal aliens could not have earned at work. *See* Shields, at 523. Further, the courts foreclosed the challenge that federal law preempted state workers' compensation law finding no conflict between the IRCA and state statutory schemes. *See* State Courts Uphold Workers' Compensation Benefits, supra Part IV. By distinguishing the employers' preemption arguments, state courts created a general rule that illegal immigrants were entitled to workers' compensation benefits. *See* Shields, at 523.

Employers Present New Arguments to Suspend Workers' Compensation Benefits

Most states now find as a matter of law that illegal immigrants are entitled to workers' compensation benefits. *See id.* States reasoned exclusion from workers' compensation coverage would mean the workers receive no relief for work related injuries or sue in tort. *See Design Kitchen and Baths v. Lagos*, 388 Md. 718, 733 (2005). Recognizing undocumented workers have a general right to benefits, employers now argue that workers' compensation benefits are not available under the given circumstances of each case. *See Doe v. Kansas Dept. of Human Resources*, 90 P.3d 940 (2004), *Sanchez v. Eagle Alloy Inc.*, 245 Mich. App. 651 (2001), *Martines v. Worley & Sons Constr.*, 278 Ga. App. 26 (2006), *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (2003). For example, a Georgia employer successfully argued that benefits should be removed when an illegal immigrant is released to work light duty but is unable to provide the requisite documents for lawful employment. *See Martines v. Worley & Sons Constr.*, 278 Ga. App. 26 (2006). Again, the employer is claiming the status of the illegal immigrant prevents their entitlement to benefits. *See* State Courts Uphold Workers' Compensation Benefits, supra Part IV. Unlike prior cases, however, the employer now claims the illegal immigrant's status requires a suspension of their otherwise entitlement to benefits. *See Doe v. Kansas Dept. of Human Resources*, 90 P.3d 940 (2004), *Sanchez v. Eagle Alloy Inc.*, 245 Mich. App. 651 (2001), *Martines v. Worley & Sons Constr.*, 278 Ga. App. 26 (2006), *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (2003).

Acknowledging that both Michigan and Kansas recognize illegal immigrants have the status of "employee," each state court still granted a suspension of benefits based on the immigrants' status in the particular case. *See Doe v. Kansas Dept. of Human Resources*, 90 P.3d 940 (2004), *Sanchez v. Eagle Alloy Inc.*, 245 Mich. App. 651 (2001). The Court of Appeals of Michigan in *Sanchez v. Eagle Alloy Inc.*, 245 Mich. App. 651 (2001) held that undocumented worker's use of fake documents to obtain employment constituted "commission of crime," within meaning of workers' compensation statute providing for suspension of certain wage loss benefits. In this case, the claimant used fraudulent documentation to obtain work. *See id.* After suffering a right hand injury on one of the employer's machines, he collected workers' compensation benefits from the employer. *See id.* at 656. Defendant later terminated claimant's employment when he was unable to refuse notice that his social security number was invalid. *See id.* Acknowledging the definition of "employee," expressly included illegal immigrants, the court suspended benefits for wage-loss from beyond the date on which the false employment status was discovered by the employer. *See id.* at 672-73. The court reasoned the claimant's use of fake documents constituted a "commission of a crime" and when the employer learned of claimant's illegal status it prevented the plaintiff from obtaining work because of that crime. *See id.* Although the claimant could no longer receive wage-loss benefits, the employer was still responsible to pay for plaintiff's reasonable and necessary medical treatments. *See id.* at fn.6

Compare *Sanchez v. Eagle Alloy Inc.*, 245 Mich. App. 651 (2001) with *Doe v. Kansas Dept. of Human Resources*, 90 P.3d 940 (2004). Both cases featured use of fake documents, but the claimant in *Sanchez* used the false documents to gain employment and not in workers' compensation proceedings. The court in *Doe v. Kansas Dept. of Human Resources*, 90 P.3d 940 (2004) held the use of an assumed name in obtaining workers' compensation benefits constituted a fraudulent act for purposes of suspending workers' compensation benefits. The claimant was an illegal immigrant who used an assumed name and social security number when filing her workers compensation claim. *See Doe v. Kansas Dept. of Human Resources*, 90 P.3d 940, 944 (2004). During workers' compensation proceedings, the claimant testified to a false identity four times. *See id.* Recognizing the Kansas workers' compensation statute prohibits fraudulent and abusive acts, the court held the illegal alien violated the workers' compensation statute by assuming a false identity and concealing her own identity during the workers' compensation proceedings. *See id.* at 948. The court concluded the intentional and willful use of a false identity in workers' compensation proceedings allowed for the suspension of benefits under their state's workers' compensation statute. *See id.*

In Georgia, the Georgia Court of Appeals in *Martines v. Worley & Sons Construction*, 278 Ga. App. 26 (2006) held that an employer successfully argued workers' compensation benefits should be removed when an illegal immigrant is released to work light duty but cannot take the light duty job offered due to the failure to provide the required documents. In *Martines*, an illegal alien receiving workers' compensation benefits was cleared to return to work with light duty restrictions. See *Martines v. Worley & Sons Constr.*, 278 Ga. App. 26 (2006). His employer offered him a job within the physical restrictions set by his physicians. *See id.* When claimant went to accept the job, he was unable to show his employer proper documentation that he was legally able to work. *See id.* The Georgia Court of Appeals held that the employer could suspend benefits reasoning the claimant unjustifiably refused the suitable light duty employment. *See id.* at 31-32. The court found that claimant's inability to procure a driver's license did not satisfy a justified refusal because it was not related to his physical capacity to perform the job. *See id.* at 32. This decision seems to allow employers to suspend benefits whenever an illegal immigrant is released by doctors for light duty work. *See* Watts (Feb. 1, 2007).

Although some state courts allow suspension of benefits due to circumstances of status of the illegal immigrant, the Minnesota Supreme Court in *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (2003) held that the state could award temporary total disability benefits to an illegal immigrant released to work with restrictions despite federal law preventing the employment of illegal immigrants. In this case,

the claimant was terminated from work after he could not provide documentation allowing him to return to light duty work. *See Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 326-27 (2003). Acknowledging the illegal immigrant continued to search for work while receiving temporary total disability benefits, the employer asserted that the undocumented worker could not make a diligent search for work due to his status and sought to suspend claimant's benefits. *See id.* at 327-28. The court held unauthorized aliens were entitled to receive TTD benefits conditioned on a diligent job search finding their illegal status did not prevent a diligent job search. *See id.* at 331. Although the court held the illegal immigrants' status does not prevent a diligent job search, the decisions seems at odds with federal law because diligent job search could only result in IRCA violations by either the searcher or the employer. See *Cherokee Indus., Inc. v. Alvarez*, 84 P.3d 798 (2003)(discussing the court's rationale in *Correa*).

Conclusion

The status of illegal immigrants and their entitlement to workers' compensation benefits is an issue that has been adjudicated in many state courts. Recognizing the increasing numbers of illegal immigrants entering the labor market each year, workers' compensation cases will continue to debate the status of undocumented workers. Although state courts agree that illegal immigrants have a general entitlement to workers' compensation benefits, the courts now uphold challenges to status under limited circumstances. Employers seeking to suspend benefits should pay close attention to the working restrictions and health status of their undocumented workers. Courts are more likely to suspend benefits when the worker is physically capable but cannot return to work because of their legal status.

It remains to be seen whether the courts will continue to recognize limited exceptions to the general entitlement to workers' compensation benefits. Federal law clearly prohibits employers from hiring illegal immigrants, and the state courts recognize this desire when carving out exceptions. Acknowledging the federal government's interest in regulating immigration, it is likely that Congress or the Supreme Court will revisit the issue of labor benefits of illegal immigrants. **WC**

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Continued from Page 7

reported in such a manner so as to allow the Board to provide the information required in subsection (b) if the legislation is directed at any medical expenses that are provided after a work injury.

There is no doubt about the fact that group health carriers are becoming more aggressive in recouping monies. A prime example of such can be found in an article in *The Wall Street Journal* on Nov. 20, 2007. A Wal-Mart employee, Deborah Shank, suffered permanent brain damage as a result of a motor vehicle accident. The injury was so severe that she was left unable to care for herself. Her husband and three children recovered $700,000 from the trucking company that caused the accident. Wal-Mart filed suit against Shank for the $470,000 it spent on her medical care based on a provision in the policy. It prevailed, leaving the family in a real quandary since Shank's future medical care may be unaffordable. Although seemingly unjust, Wal-Mart pointed to a provision in its group health policy that was intended to negate a double recovery.

Perhaps the real irony here is that a new law is being proposed to allow group health providers a means to recoup monies while no attempt has ever been made to amend our own subrogation statute, O.C.G.A. § 34-9-11.1. This Code section is so poorly drafted that attempts at recovery are expensive and often futile. *See, e.g., CGU Ins. Co. v. Sabel Industries, Inc.*, 255 Ga. App. 236 (2002). If truly interested in preventing a double recovery, the legislature ought to amend it to delete any recovery for indemnity benefits but provide for an absolute lien for any and all medical expenses, which are the lion's share of a workers' compensation claim. This would be a good compromise. The "fully and completely compensated" requirement almost always negates recovery of what an employer or insurer pays when the injury is the result of a third party. Code section 34-9-11.1, at least in its current form, does not work and has not worked since it went into effect 15 years ago.

House Bill 661 is an attempt by group health carriers to shift their burden and responsibilities to the workers' compensation system. Since they already have the ability to intervene in a workers' compensation claim pursuant to O.C.G.A. § 34-9-206, we need to ask whether this legislation is even necessary. While the theory may be good, directing the Board to do their work and asking the taxpayers to fund it, at least initially, should raise some eyebrows. Whether it would reduce costs thereby allowing more affordable health insurance for citizens of Georgia is debatable. As for Georgia employers and their workers' compensation insurers, it certainly could drive up costs if they are required to individually report each and every claim no matter how minor. Just keeping it current is going to be expensive and, as we all know, greater costs beget higher premiums. This piece of legislation needs to be studied in detail to determine the feasibility and costs–those on both sides of the equation–before it is presented for a vote. The study group should include representatives from the State Board as well as employers and workers' compensation insurers. The ripple effects from this piece of legislation might well be undesirable. **WC**

2007-08 Section Officers

Ann Baird Bishop, Chair
AB Bishop & Associates LLC
1855 Piedmont Road, Suite 200
P.O. Box 669968
Marietta, GA 30066-0117
Phone: 770-874-4670
Fax: 770-874-4675
abishop@abishoplaw.com

Joseph T. Leman, Chair-Elect
Coppedge & Leman, PC
508 South Thornton Avenue
Dalton, GA 30720
Phone: 706-226-0040
Fax: 706-226-0050

Staten Bitting
Fulcher Hagler LLP
One Tenth Street, Suite 700
P.O. Box 1477
Augusta, GA 30903-1477
Phone: 706-724-0171
Fax: 706-396-3627
sbitting@fulcherlaw.com

John Douglas Christy
John D. Christy P.C.
909 Ball Street
P.O. Box 1816
Perry, GA 31069
Phone: 478-987-9000
Fax: 478-987-9001
jdchristy@mindspring.com

Gary M. Kazin
Suite 961 Decatur Court
315 W. Ponce de Leon Ave.
Decatur, GA 30030
Phone: 404-378-8227
Fax: 404-377-5977
gkazin@mindspring.com

Lynn Blasingame Olmert
Hollowell Foster & Gepp P.C.
1200 Harris Tower
233 Peachtree Street, N.E.
Atlanta, GA 30303-1507
Phone: 404-658-9900
Fax: 404-880-3364
lolmert@hfglaw.net

Clifford C. Perkins Jr.
Perkins Law Firm LLP
539 Newnan Street
Carrollton, GA 30117
Phone: 770-214-8885
Fax: 770-214-8335
cliffperkins@plflaw.com

John G. Blackmon Jr., Editor
Drew Eckl & Farnham, LLP
880 West Peachtree Street
P.O. Box 7600
Atlanta, GA 30357-0600
Phone: 404-885-6414
Fax: 404-876-0992
jblackmon@deflaw.com

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Editor's Corner

by John Blackmon

I want to thank Judge Hall, Judge Stenger, Judge Imahara, Liesa Gholson, Neil Thom, Greg Presmanes and Seth Eisenberg for their contributions to this issue. Seth was putting the final touches on his article as he was taking final exams. As you all know, this newsletter is our way of getting out information about the section and discussing current issues. The next newsletter will be published in May 2008, and I would welcome any submissions. You can e-mail them to me at jblackmon@deflaw.com or call me with any suggestions at 404-885-6414.

Neil discussed the recent decisions in Georgia, but there is one from Delaware worth mentioning. In that case, the Supreme Court of Delaware allowed one employee to sue his fellow employees for injuries sustained as a result of horseplay. *Grabowski v. Mangler et al.*, No. 65, 2007 (7/1/2007). Georgia, as we know, prohibits such suits but would allow recovery in a workers' compensation setting to a non-participant. O.C.G.A. § 34911, *Clark v. Williamson*, Ga. App. 329 (1992) and *Baird v. Travelers Ins. Co.*, 98 Ga. App. 882 (1959). In *Grabowski*, Delaware adopted the test outlined by Professor Larson to determine if the horseplay was sufficiently outside the scope of employment thereby allowing one employee to pursue a third-party action against another. That test was comprised of four elements:

1. the extent and seriousness of the deviation;
2. the completeness of the deviation (for example, whether it was mingled with the performance of duty or involved an abandonment of duty;
3. the extent to which the practice of horseplay had become an accepted part of the employment; and
4. the extent to which the nature of the employment may be expected to include some horseplay.

1A Arthur Larson, The Law of Workmen's Compensation, § 23.01. The odd twist to the case was its conclusion. Because Grabowski was not a participant in the horseplay when injured, he, like an employee in Georgia, could pursue a workers' compensation claim. However, he was also given the right to proceed with a third-party action against his coemployees. In the former, he would have to take the position that his injuries arose from his employment and in the latter that they did not. Thus, and while Grabowski was given two avenues in which to proceed, he realistically could travel only one path, and unless his coemployees had recently won the lottery, that likely would be the workers' compensation claim. **WC**

State Bar of Georgia
Workers' Compensation Law Section
John G. Blackmon Jr., Editor
104 Marietta Street, NW
Atlanta, GA 30303

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