



WORKERS' COMPENSATION LAW

Winter 2007 • Ann Bishop, Editor

SECTION NEWSLETTER

Illegal Aliens and the Georgia Workers' Compensation Act: The Employer/Insurer's Perspective

By Bernadett Rosszer
Drew, Eckl & Farnham

A conservative estimate of the number of illegal aliens living in Georgia is between 228,000 and 250,000. The majority of illegal aliens work in low paying jobs that require the performance of heavy physical labor and are often inherently dangerous, such as food processing and construction work. Consequently, Georgia's workers' compensation attorneys have seen a rise in claims filed by illegal aliens over the last several years. This article examines the effect of an injured employee's illegal status on his or her entitlement to workers' compensation benefits under the Georgia Workers' Compensation Act (GWCA). The article also considers the effect of the newly enacted state legislation on immigration on the workers' compensation system.

The Entitlement of Illegal Aliens to Workers' Compensation Benefits.

It has been established that a worker's illegal alien status itself does not bar the workers' right to receive workers' compensation benefits under the GWCA. In the past, employers tried to invoke traditional contract principles to void the employment relationship, and also argued that federal law preempts state law on the entitlement of illegal aliens to workers' compensation benefits. See *Dynasty Sample Co. v. Beltran*, 224 Ga. App. 90, 479 S.E. 2d 773 (1996); *Continental PET Technologies, Inc. v. Palacias*, 269 Ga. App. 561, 604 S.E.2d 627 (2004); *Earth First Grading v. Gutierrez*, 270 Ga. App. 328, 606 S.E. 2d 332 (2004); *Wet Walls, Inc. v. Ledezma*, 266 Ga. App. 685, 598 S.E.2d 60 (2004).

In *Dynasty Sample Co. v. Beltran*, the employer tried to use traditional contract principles to show that the employment contract between Beltran, an illegal alien, and the employer was void. The Court of Appeals dismissed the employer's argument and held that traditional contract principles are not always applicable in determining whether a person is an employee for the purposes of receiving benefits under the GWCA. The court pointed out that the GWCA has long covered illegal workers and cited

O.C.G.A. §34-9-1(2), in which the definition of "employee" includes minors working under contracts that are illegal based on child labor laws, which traditionally would be void or voidable.

In *Continental PET Technologies, Inc. v. Palacias*, the employer, Continental, once again tried to invoke traditional contract principles to bar Palacias, an illegal alien, from receiving workers' compensation benefits. Specifically, the employer argued that the Immigration Reform and Control Act (IRCA) of 1986 makes it unlawful to employ an illegal alien. Therefore, the employment contract between Palacias and the employer was void. On this basis, the employer argued that Palacias was never an employee of Continental. The Court of Appeals rejected the employer's argument on the basis that O.C.G.A. §34-9-1 provides that an employee includes "every person in the service of another under any contract of hire" and held that "every person" would necessarily include illegal aliens. The court thus found that Palacias was an employee of Continental at the time of her accident.

In *Wet Walls, Inc. v. Ledezma*, Ledezma was hurt on the job and received income benefits. The employer stopped paying benefits after he was incarcerated, deported from the country, and he was banned from returning to the U.S. Ledezma then filed a claim for the reinstatement of his income benefits. The employer argued that he was barred from seeking workers' compensation benefits under GWCA because federal law preempts Georgia law on the question whether or not an illegal alien may receive workers' compensation benefits.

The Court of Appeals explained that under the preemption doctrine, Congress may express its intent to preempt state law (1) by expressly defining the extent of preemption; (2) by implied preemption, i.e. by regulating the area so pervasively that an intent to preempt the entire field may be inferred; or (3) by enacting a law that directly con-

See Employer Perspective page 3

Comments From the Chairman

By Timothy V. Hanofee
tvhanofee@mindspring.com

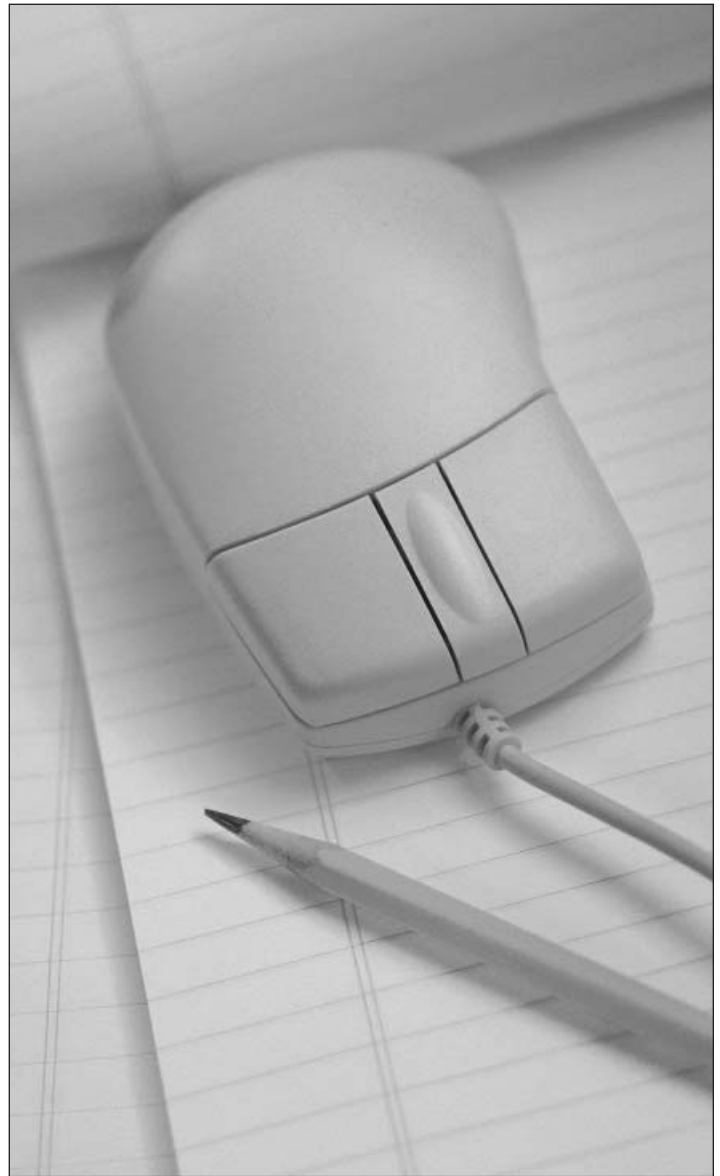
As I write these comments, the ICLE Seminar at St. Simon's is but a memory. Those members unable to attend missed three days of absolutely fantastic weather including a beautiful and gigantic full moon! You also missed three days of very interesting, informative and entertaining topics and speakers. Attendance reached an all-time high and judging from the responses received, the seminar was a tremendous success.

The seminar co-chairs, Judge Melodie Belcher, B. Kaye Katz-Flexer and Phil Eddings, deserve a great deal of credit and thanks for a superb job. (Ann Bishop, you will have a hard time topping this year's program when you are section chair next year!)

The State Bar's Midyear Meeting, traditionally held in January in Atlanta, is being held this year in Savannah instead. The Workers' Compensation Section had no input into the location of the meeting. The Executive Committee of our section thought not enough of our section members would be able to attend this year and scrapped plans to have our traditional meeting where a cocktail party would always seem to break out! The cost of the meeting and social gathering is rather high and with very few expected attendees, it was felt simply not to be a good or sound idea.

Lastly, the Bar's 2007 Annual Meeting will be held June 14-17 in Ponte Verde Beach, Fla., at the Sawgrass Marriott Resort. My experience is that "Compers" do not travel well! However, I would ask for any input from members who plan to attend and want to have a meeting, lunch or reception. If the interest is there, we can certainly participate at the Annual Meeting.

Please feel free to contact me by telephone 404-325-2281, e-mail (tvhanofee@mindspring.com) or in person. **WC**



In this Issue

Page 1
Illegal Aliens and the Georgia Workers' Compensation Act: The Employer/Insurer's Perspective

Page 2
Comments from the Chairman

Page 4
ICMS Update — Phase II

Page 6
Recent Appellate Decisions

Page 9
From Beltran to Martines: Illegal Immigrants and Workers' Compensation from the Claimant's Perspective

Page 11
Altered or Terminated By Law

Page 12
2006 Workers' Compensation Statutory and Rule Changes

Page 15
RSD: A Misunderstood Diagnosis

Employer Perspective *Continued from page 1*

flicts with state law. The Court of Appeals found that none of the above criteria were met in the case because there is nothing in federal law barring illegal aliens from receiving workers' compensation benefits. Therefore, federal law does not preempt state law on this issue. See also *Continental*, 269 Ga. App. 561; and *Earth First*, 270 Ga. App. 328 (barring illegal aliens from receiving workers' compensation benefits would reward employers for hiring illegal aliens).

Employers also argued that an undocumented worker is analogous to an incarcerated person who cannot receive benefits by law, because neither could "meaningfully accept a job even if it were offered." In *Earth First Grading v. Gutierrez*, the court rejected this argument because under the particular facts of that case, the employee's illegal status did not render him unable to "meaningfully" accept employment. Namely, Gutierrez's illegal status was unknown until after the period for which he sought benefits and he actually performed work for the employer in the past, despite his illegal status.

Misrepresentation of Illegal Status While Obtaining Employment

Employers also attempted to use the "Rycroft defense" to invalidate the employment relationship and bar the illegal alien's right to compensation. In *Georgia Elec. Co. v. Rycroft*, 259 Ga. 155, 378 S.E.2d 111 (1989), the Supreme Court of Georgia held that when an employee fraudulently misrepresents his pre-employment physical condition during hiring, this may void the contractual employment relationship and prevent the employee from obtaining workers' compensation benefits. The Court laid out a three-prong test: (1) the employee knowingly and willfully made a false representation when applied for work; (2) the employer relied on the false misrepresentation, which was a substantial factor in the decision to hire the employee; and (3) there is a causal connection between the false misrepresentation and the on-the-job injury.

In *Dynasty Sample Co. v. Beltran*, Beltran, an illegal alien, obtained a job with Dynasty using false documenta-

tion. He later severed two fingers in an on-the-job accident and sought workers' compensation benefits. Dynasty discovered that Beltran intentionally misrepresented his immigration status when he applied for the job. Therefore, the employer denied the claim asserting the *Rycroft* defense. The Court of Appeals pointed out that *Rycroft* dealt specifically with misrepresentations regarding an employee's pre-existing physical condition, not the employee's immigration status. However, in the absence of clear legislative direction on this issue to the contrary, the court concluded that the three-prong test in *Rycroft* is also applicable to other types of fraud in the inducement, unless the fraud is of a type specifically addressed by the GWCA. The court awarded income benefits to Beltran because the employer could not meet the third prong of the *Rycroft* defense, i.e. there was no causal connection between Beltran's illegal status and his accident. See also *Continental*, 269 Ga. App. 561.

Refusal of Suitable Employment Due to Illegal Status

The most recent case regarding illegal aliens is *Martines v. Worley & Sons Construction*, A05A1985 (Feb. 14, 2006). While working for Worley & Sons Construction, Martines suffered an injury to his left foot. Sometime later his physician released him to restricted duty work. His employer offered him a light duty job as a truck driver, which was within his restrictions. Martines accepted the job, but when he reported to work, he was asked to show his driver's license and documentation that he was in the country legally. At that time, Martines revealed he could not produce a Georgia driver's license because he was an illegal alien. The Administrative Law Judge (ALJ) found that the job offered to Martines was not suitable because he did not possess the required driver's license.

The case ultimately found its way to the Georgia Court of Appeals. The court found that the job offered by the employer was suitable to Martines' physical capacity and found that his inability to accept the proffered employment was not justified because

it was not related to his physical capacity or to his ability to perform the job. Martines' could not accept the job due to his legal inability to obtain a Georgia driver's license, which was the result of his personal choice to enter the country illegally. The Supreme Court of Georgia recently denied the appellant's motion for writ of certiorari.

The Georgia Security and Immigration Compliance Act

On April 17, 2006, Gov. Sonny Perdue signed into law the Georgia Security and Immigration Compliance Act (SICA). SICA includes provisions requiring residents 18 years of age or older who are seeking state or federal social welfare benefits administered by a state agency to prove their legal status (with some exceptions, such as emergency medical care, prenatal care, and immunizations of children). Furthermore, SICA also requires that contractors and subcontractors working on state contracts verify the lawful employment status of newly hired employees. SICA has no direct effect on the GWCA because workers' compensation benefits do not constitute state or federal welfare benefits because the employers and insurers pay the benefits. Likewise, there is nothing in the new law that prevents attorneys from representing illegal aliens in workers' compensation claims or immigration matters.

The above-cited cases demonstrate that an employee's illegal alien status itself does not bar his or her right to compensation under the GWCA, even if the illegal status was not disclosed at the time the employee was hired. However, under the newly decided *Martines v. Worley & Sons Construction*, an illegal alien's inability to accept suitable employment due to his or her illegal status may constitute a refusal of suitable employment and could result in the suspension of the employee's income benefits. Even though in *Martines*, the Court of Appeals based its decision on the employee's lack of a valid Georgia driver's license, the ruling implies that an employee's inability to produce a valid work permit itself could result in the suspension of the employee's income benefits. **WC**

ICMS Update — Phase II

By Judge Carolyn C. Hall, chairman
Judge David K. Imahara, director of ADR

After approximately two years of meetings, flow charts, analysis, etc., the State Board of Workers' Compensation successfully implemented the new ICMS electronic document management system on Oct. 1, 2005. This system is being implemented in four phases: (1) Claims Processing—document capture; (2) Trial Management; (3) Web filing and access to the Board file over the web by parties and attorneys in a claim; and (4) Insurer/TPA EDI filing. We have made great progress and scanned more than 500,000 documents in the past 12 months. While we have experienced some unexpected issues and had a few growing pains, we already see signs of greatness on our horizon.

Phase II

On Aug. 21, the Board successfully implemented Phase II of ICMS. Some of the functions of ICMS Phase II 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 judicial orders/awards with electronic signature

Notices of Hearing/Mediation/Oral Argument and awards/orders are being sent out by email. All of these documents are sent as PDFs. 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 receives an email that such email containing the order, award, notice, etc. failed. In such circumstances, the Board will mail a copy of such order, award, notice, etc.

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). 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 will no longer use social security numbers 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/attorneys. See Board Rule 60 (c).

Multiple Dates of Injury

Please note that if there are multiple dates of injury, each date of injury is considered as a separate and distinct claim, and each date of injury/claim will have a unique ICMS Board claim number. Unless you are submitting a claim-initiating document (e.g. a Form WC-14, Notice of Claim), you must include this claim number, with the associated date of injury, on the front page of every claim document you submit, including briefs and other documents for which a form does not exist. If multiple dates of injury are involved, when filing a Form WC-14 Request for Hearing, in section B of the form, please list the other ICMS Board Claim Numbers. However, for each date of injury and associated ICMS Board Claim Number, when requesting a hearing, file a Form WC-14 for each one.

Living in Two Worlds

If you have a claim file that was created prior to Oct. 1, 2005, your claim is living most likely in two worlds (paper and electronic). The Board continues to process files that are primarily paper. Over time, we are scanning the "old" paper files into ICMS. The data for claims created prior to Oct. 1, 2005 was migrated from the Georgia Online (GO) mainframe system to ICMS. However, that data was minimal and does not include all the information ICMS will have. If you are a party to a claim created prior to Oct. 1, 2005, you may not receive e-mail notifications when documents are filed in these claims because the parties or attorneys or record have not been added to the claim in ICMS.

Attorney Information

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

- Attorney mailing address
- Primary e-mail address
- Alternate e-mail address
- Phone number & Fax number
- Georgia Bar number

Attorney information is for each individual attorney, not a law firm or multiple attorneys. If an attorney wants claim-related information to go to a central law firm email address, the attorney must designate the firm email address as his/her primary email address. Due to the large number of e-mails generated from the Board, attorneys may want to provide a general firm email address or an e-

mail address separate from a personal e-mail address. However, for Phase III, where attorneys are recognized as attorneys of record, in order for attorneys to have access to the Board's ICMS electronic files, all registered attorneys must provide an email address for web access and their Georgia Bar number.

Many people have responded to the Board's request for primary and secondary e-mail addresses. At this time, only the primary address is being used. Secondary addresses will not be activated until Phase III. If you need to make a change to your address, e-mail, etc., please do so only on a WC-Change of Address Form. File only one copy with the Board, and your update will be captured everywhere in ICMS. In Phase III, you will be able to update your information online.

Format and Accuracy

Board forms have been revised specifically to work with the new system. Every single form was reviewed and revised substantially on July 1, 2005 and again on July 1, 2006. The current version is on the Board's website at www.sbwg.georgia.gov. **DO NOT ALTER THE BOARD FORMS IN ANY WAY.** See Board Rule 61(b)(64); Board Rule 102(A)(3). Do not change the fields to reflect something different than what is on the form.

If you are not sure which form to use, refer to the forms and Board Rules, and in particular Board Rule 61(b), on the SBWC website: www.sbwg.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 # 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.sbwg.georgia.gov). Please note that the Board is rejecting Form WC-1s if sections B, C, or D are not filled out.

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, PRECISION with filings is required in order 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 SS# must be correct or else the ICMS system will not be able to recognize the filing and associate it with the correct file. This causes such filing to go to "research" for a Board employee to determine which file the filing is to be associated with. This one issue causes thousands of documents to be taken out of workflow (essentially suspended) until a proper determination can be made.

It is also important to know that the type of document or form that is filed triggers the processing of all documents and forms. It is imperative that the mail reception staff be able to identify the type of document so that the automated system will send it to the correct process.

Use of outdated forms. All forms were changed effective July 1, 2005 and again on July 1, 2006, and are available on the Board website

(sbwc.georgia.gov), and the current version is required.

If a form is available for the document you are filing, always use the form, even when you are including attachments. Never alter a Board form to change the data or information fields.

If a form is not available for the document you are filing, clearly identify and name the document on the first page. E.g. Claimant's Brief, Employer/Insurer Brief for Trial and ADR Divisions, Appellant's Brief, Appellee's Brief, for Appeals, etc. Additionally, make sure the first page includes the New Board Claim Number and other claim-identifying information and your Bar Number.

Except for Stipulated Settlements, Board Rules require that only one copy of a document be filed. If a judge or other Board personnel request an additional copy of a document be sure to clearly mark the document as a COPY so that duplicates are not scanned into the electronic claim file.

Omitting critical information that is mandatory for processing. Be sure to complete all of the information on the form. WC-14 – Please ensure the following:

- Make sure you correctly identify the Insurer or Self-insurer and the claims office (TPA). Please note that coverage information for insurers and self-insurers is now available for online look-up at www.sbwg.georgia.gov
- Also critical are the County of Injury, accurate first and last name of the claimant, social security number, and date of injury.
- If the WC-14 is not the claim-initiating document you should use the ICMS Board Claim Number, which eliminates many errors and creation of incorrect duplicate files.
- A separate WC-14 is needed for each date of injury to create a claim file. Each claim file will have a unique Board Claim Number.
- Identify the parties completely and fully. Most importantly, identify

See ICMS page 8

Recent Appellate Decisions

By Neil C. Thom

A. B. Bishop & Associates LLC

Dallas v. Flying J, Inc., 279 Ga.App. 786, 632 S.E.2d 389 (2006). Decided May 12, 2006.

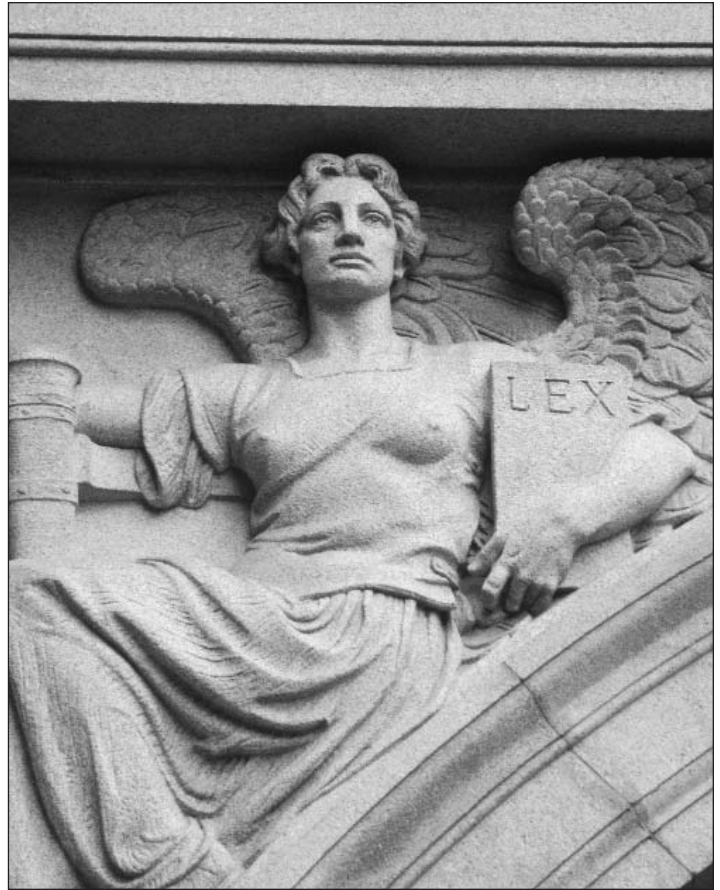
At the employer's request, the ALJ ordered the claimant to return to the authorized treating physician for evaluation. In that order, the ALJ specifically directed the claimant to call the clinic, make an appointment, and attend the appointment. The claimant called the clinic and was advised that it did not make appointments, but that he could be seen as a walk-in patient. The claimant did not go to the clinic. The ALJ ordered suspension of benefits, and the claimant requested a hearing. After hearing, the ALJ determined that the claimant had obeyed the letter, if not the spirit, of his order, and reversed himself, ordering reinstatement of benefits. The Appellate Division disagreed and reversed. Finding that the claimant was well aware that the clinic saw patients on a walk-in, first come first served basis, it ruled that the claimant's refusal to do so constituted a failure to cooperate with medical treatment and ordered a suspension of benefits. In so doing, it rejected the claimant's further argument that requiring him to sit in a waiting room with "20 or more sick patients" while waiting his turn to be seen justified his refusal to cooperate. The Court of Appeals upheld the Appellate Division's suspension of benefits, as there was sufficient (any) evidence to support the finding that the claimant refused to cooperate with medical treatment. O.C.G.A. § 34-9-200(c)

Caswell, Inc., v. Spencer, 280 Ga.App. 141, 633 S.E.2d 449 (2006). Decided June, 23 2006.

The claimant, 62, had compensable back injuries and applied for catastrophic designation. The Board's Rehab Division found the injuries catastrophic. Part of that decision was that his age prevented him from being able to adapt to light duty work. The employer requested a hearing, presenting expert testimony that, while age is an important factor in vocational considerations, a 62 year old is not unable to learn new skills simply because of his age. The ALJ ruled that the injuries were not catastrophic, and the Appellate Division affirmed. The superior court found that age was not properly considered and remanded the case back to the State Board. The Court of Appeals disagreed; age was, indeed, considered. The case was remanded back to the superior court for a final decision with a reminder that the Board's award must be upheld where there is any evidence to support it.

Gill v. Prehistoric Ponds, Inc., Case No. A06A0461, 634 S.E.2d 769 (Ga. Ct. of App. 2006). Decided June 8, 2006.

The claimant was injured cleaning out pens at an alligator farm, which bred, fed, grew and slaughtered alligators for their meat, hides and heads. The Administrative Law



Judge ruled that the employer operated a farm and that the claimant was a farm laborer so that neither party was subject to the Act. The Appellate Division reversed holding that an alligator farm did not constitute a farm within the meaning of O.C.G.A. 34-9-2 (a); the Superior Court reversed the Appellate Division and the Court of Appeals reversed the Superior Court. Stating that the issue was one of first impression, the Court of Appeals agreed with the State Board that alligators are not livestock but game animals and as such are regulated not by the Department of Agriculture but, instead, by the Department of Natural Resources. Moreover, the Court of Appeals recognized that alligator farms are excluded from the definition of "farm" in the Employment Security Law.

Rite-Aid Corp. v. Davis, 80 Ga.App. 522, 634 S.E.2d 480 (2006). Decided July, 13 2006.

Based on vocational expert evidence, the Administrative Law Judge (ALJ) found that the claimant was unable to perform her prior work due to her 1996 injury but able to do other jobs available in substantial numbers in the national economy for which she was otherwise qualified and granted catastrophic designation. As it existed in 1996, O.C.G.A. § 34-9-200.1(g)(6) provided that an injury is catastrophic if it is "of a nature and severity that prevents the

employee from being able to perform his or her prior work or any work available in substantial numbers in the national economy.” (Emphasis supplied.) The Appellate Division adopted the ALJ’s findings of fact as its own, but reversed, holding that the legislature actually intended to require a claimant to establish both that she could not do her prior work and that she couldn’t perform other jobs available in substantial numbers in the national economy. (The statute was changed in 1997 to reflect such a requirement, with the “or” changed to “and”.) The Superior Court reversed, reinstating catastrophic designation, finding that the statute was not ambiguous, absurd, or impractical. The Employer/Insurer appealed. Relying on the plain language of the word “or”, the Court of Appeals affirmed. Three justices concurred in the opinion; one in the judgment only; and three justices dissented, asserting that the majority’s decision would make the definition of a catastrophic injury less strict than that of temporary total disability in O.C.G.A. § 34-9-261. The statutory construction behind the ALJ’s, Superior Court’s, and majority’s decisions was, therefore, absurd

***Vought Aircraft Industries, Inc. v. Faulds*, Case No. A06A1197 (Ga. Ct. of App. 2006). Decided Aug. 29, 2006.**

A hearing in April 2002 found the case compensable. At that hearing the Administrative Law Judge refused to hear the Employer’s claim for credit for salary paid during disability based on the Employer’s failure to file a WC243 at least 10 days prior to the hearing. More than two years later the employer requested a hearing which, among other things, sought credit for the 20 weeks of salary paid. The ALJ ruled that res judicata barred the claim for credit. The Appellate Division reversed and held res judicata did not apply to bar the claim for credit. The Superior Court reversed the Appellate Division on this issue. The Court of Appeals affirmed the ruling of the Superior Court holding that, as a matter of law, the doctrine

of res judicata bars future claims for all things which were or which could have been raised at a previous hearing.

***Korner v. Education Management Corporation*, Case No. A06A0862 (Ga. Ct. of App.). Decided Aug. 29, 2006.**

The claimant who had bachelor’s and master’s degrees was injured when a student she was counseling attacked her on Feb. 21, 2001. The claimant’s physical injuries healed quickly but she continued disabled as a result of psychological/psychiatric conditions. The claimant enrolled in school to establish a new career but did not return to work after the attack. The employer requested a hearing seeking to suspend benefits based on a change in condition for the better. The ALJ found the employer had carried its burden of proving a change in condition for the better that the claimant was able to work and that suitable work was available. The Appellate Division reversed as to the finding of proving the availability of suitable work and ordered benefits to continue. The Appellate Division also refused to allow the employer to convert from TTD to TPD on a statutory change in condition pursuant to 34-9-104 since the employer had not complied with the notice provisions of 34-9-104 (a) (2). The Superior Court reversed the Appellate Division and reinstated the ALJ award as to the availability of suitable employment. The Court of Appeals reversed the Superior Court finding that there was some evidence to support the Appellate Division award and therefore the Superior Court’s reversal was improper.

***Cypress Insurance Company v. Duncan*, Case No. A06A1468 (Ga. Ct. of App. 2006). Decided Sept. 6, 2006.**

The employer/insurer appealed the Superior Court order affirming the decision of the Appellate Division which had adopted the award of the Administrative Law Judge (ALJ) granting the claimant PPD benefits but allowing the employer/insurer to offset temporary total disability (TTD) benefits found to have been overpaid

following what was found to be a return to work. The Court of Appeals affirmed the finding that the claimant was an employee, not an owner, based on the any evidence rule. The Court of Appeals found moot the Board’s ruling that certain documentary evidence did not constitute “newly discovered evidence” since it could have been discovered with the exercise of reasonable diligence. The Court of Appeals reversed the Appellate Division’s award of PPD since the ALJ awarded those benefits sua sponte, without the opportunity to be heard or present evidence.

***Goswick v. Murray County Board of Education*, Case No. A06A1835 (Ga. Ct. of App. 2006). Decided Sept. 1, 2006.**

The claimant appealed the decision of the Administrative Law Judge (ALJ) to suspend his weekly benefits for refusal to undergo an examination by the authorized treating physician. The decision was affirmed by the Appellate Division, affirmed by operation of law in the Superior Court, and affirmed by the Court of Appeals. The code section in question provides that an employee claiming compensation shall submit to examination by a duly qualified physician designated and paid by the employer or the board and authorizes the suspension of benefits for refusal to so submit. The Court of Appeals rejected the claimant’s argument that § 34-9-202 contemplated “independent” medical examinations and excluded the treating physician. That a provision has since been added to the Workers’ Compensation Act (O.C.G.A. § 34-9-200(c) in 2003) expressly providing for suspension of benefits for failure to submit to an examination by, specifically, the authorized treating physician, did not retroactively limit the plain meaning of “duly qualified physician” in O.C.G.A. § 34-9-202 to exclude the treating physician.

***Metropolitan Atlanta Rapid Transit Authority v. Reid*, Case No. A06A0996 (Ga. Ct. of App. 2006). Decided 10 October 2006.**

Five years following his 1999 compensable accident, the claimant requested a change of authorized

Case Law

Continued from page 7

treating physician. The request filed with the State Board consisted of the Form WC-102(b), two pages of argument, and 267 pages of medical records. The request served on the employer (MARTA) consisted only of the Board Form and the two-page argument. MARTA filed an objection, including a copy of the Internal Dispute Resolution (IDR) procedures for changing treating physicians within its Workers' Compensation Managed Care Organization (WCMCO) policies. The ALJ found the IDR procedures irrelevant and granted the claimant's request, citing medical records dating back to 1995. MARTA filed a motion for reconsideration and an appeal with the Appellate Division, citing lack of due process and misleading service for the claimant's failure to serve the exhibits and the ALJ's alleged misinterpretation of the IDR. The Appellate Division affirmed the ALJ, striking the 1995 injury evidence, but not ruling on MARTA's due process and misleading service claims. It found that a claimant was free to avail itself of the change of physician procedures in



O.C.G.A. § 34-9-200(b), even where there was a WCMCO in place.

MARTA appealed to the superior court, but when the Board transmitted the record, it discovered that MARTA's motion for reconsideration and supporting documents had been lost or discarded. MARTA faxed a

copy to the Board, which sent a reconstructed record to the superior court. The Board reported that under its unpublished appellate procedure, the request for reconsideration was not relevant to the proceedings, since the appeal to the Appellate Division terminated the ALJ's jurisdiction over the issues. MARTA added to its appeal a claim of constructive fraud as a result of the Board having lost pleadings

and evidence.

The superior court affirmed the change of physicians, finding that MARTA had not been deprived of due process as a result of the lost pleadings, since it could have raised the issue of misleading service before the Appellate Division. It further found that "any evidence" supported the Board's construction of the IDR procedure.

On MARTA's appeal to the Court of Appeals, the Court affirmed the rulings below. It held that MARTA failed to show any harm as a result of the incomplete service or the loss of its pleadings. As for the IDR issue, MARTA argued that, since Board Rule 208(f) provides that "[d]isputes which arise on an issue related to managed care shall first be processed without charge through the dispute resolution process of the WC/MCO" and since the claimant had failed to avail himself of that process, the change of physicians procedure in O.C.G.A. § 34-9-200(b) could not apply. The Court of Appeals rejected that argument, holding that the existence of a WCMCO did not negate the applicability of a change of physicians by § 200(b). **WC**

ICMS

Continued from page 5

fy the employer as insured or self-insurer. For coverage verification and SBWC ID numbers, see our webpage at sbwc.georgia.gov. If the employer is insured, please identify the insurer and the claims office.

Use the correct form for the action you are requesting. See the SBWC website: sbwc.georgia.gov for forms and Board Rules, in particular Board Rule 61(b), e.g. If you are filing an objection to a motion filed by WC-102d, use the WC-102d. If you are filing an objection to a WC-200b on treating physician or medical treatment, use the WC-200b.

Include the Board Claim Number!

In our current system the Board does not need written confirmation from the attorneys on resets, unless specifically instructed by the judge's office. For attorneys, a claimant's attorney should file an attorney fee contract, and for defense attorneys a notice of representation (Form

WC-102b), for every claim.

A look to the future with Phase III

Coming soon, the Board will implement Phase III where-in ICMS will permit Web-based submission of forms as well as file review over the Internet. Documents that supplement claim forms can be submitted as attachments over the Internet. Once registered, you will be able to submit forms and to view electronic claim files to which you are a party or attorney of record. Remember that many active claim documents filed prior to Oct. 1, 2005 will still be in paper format and thus, not viewable over the Internet.

The Board will offer training on the new Internet-based capabilities later this year. Details on this training will be released in the coming months. **WC**

From *Beltran* to *Martines*: Illegal Immigrants and Workers' Compensation from the Claimant's Perspective

By Jackie Piland and Kellie B. Henson
Law Offices of Gary Martin Hays & Associates

As everyone is probably aware, *Martines v. Worley & Sons Construction*, 278 Ga. App. 26 (2006) was the latest case decided by the Georgia courts regarding illegal immigrants and workers' compensation. However, many attorneys are unaware of the case law that led to this decision. Prior to *Hoffman Plastics, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002), only one case had been decided by the Court of Appeals regarding illegal immigrants and payment of income benefits. This case was *Dynasty Sample Corporation v. Beltran*, 224 Ga. App. 90 (1996). This article will summarize and briefly analyze the decisions issued by the Georgia Court of Appeals in workers' compensation cases regarding illegal immigrants.

Dynasty Sample Corporation v. Beltran, 224 Ga. App. 90 (1996) involved an illegal immigrant who was working with false documents at the time he was injured. The employer/insurer admitted that they could not deny the claimant weekly indemnity benefits simply because he was an illegal immigrant, but the employer/insurer instead argued that they could deny benefits because of the claimant's misrepresentations to the employer. The employer/insurer attempted to argue that under *Georgia Elec. Co. v. Rycroft*, 259 Ga. 155 (1989), the claimant's income benefits should be suspended because he fraudulently misrepresented his legal status. *Dynasty Sample Corporation v. Beltran*, 224 Ga. App. 90, 91 (1996).

The Supreme Court of Georgia held in *Georgia Elec. Co. v. Rycroft*, 259 Ga. 155 (1989) that when an employee fraudulently misrepresents his pre-employment physical condition during hiring, this may void the contractual employment relationship and prevent the employee from obtaining workers' compensation benefits. The Court laid out a three-prong test: (1) the employee knowingly and willfully made a false representation when he applied for work; (2) the employer relied on the false misrepresentation, which was a substantial factor in the decision to hire the employee; and (3) there is a causal connection between the false misrepresentation and the on-the-job injury. *Id.* at 158, 160. The Court of Appeals held in *Beltran* that the employer/insurer failed to meet the third prong of the *Rycroft* defense, and awarded income benefits to the claimant. 224 Ga. App. 90, 92 (1996).

Prior to *Hoffman Plastics, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002), only one case had been decided by the Court of Appeals regarding illegal immigrants and payment of income benefits.

It was not until 2002, when *Hoffman Plastics, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002) was decided, that much of Georgia's case law regarding illegal aliens and workers' compensation began to be litigated. The Supreme Court held in *Hoffman* that the National Labor Relations Board could not award back pay to an illegal alien from an employer that was prohibited from hiring illegal aliens. According to *Hoffman*, awarding back pay to illegal aliens runs counter to the policies underlying IRCA (Immigration Reform and Control Act of 1986), which prohibits employment of illegal aliens in the United States. *Id.* at 149. As a result, many employer/insurers have begun to argue that if an illegal immigrant is unable to receive back pay under federal labor laws, then the illegal immigrant should not be entitled to income benefits under Georgia's Workers' Compensation Act.

Wet Walls, Inc. v. Ledezma, 266 Ga. App. 685 (2004) involved an illegal immigrant that was injured, incarcerated, and then deported back to his native land. Prior to being incarcerated, the claimant received TTD, but once he was incarcerated, the claimant's TTD was suspended. *Id.* After the claimant was deported, he requested recommencement of his TTD and PPD. *Id.* at 686. However, the employer/insurer argued that the rationale of *Hoffman* should apply, and as such, IRCA was in conflict with the Workers' Compensation Act. *Id.* The Court of Appeals disputed this, and held that the employer/insurer's argument that federal law would preempt Georgia law regarding whether an illegal immigrant should receive income benefits was unclear. *Id.* at 687. The court then concluded that although this was an issue of first impression in Georgia, other states that have addressed this issue have concluded that there is no conflict between IRCA and a state's workers' compensation statutes that prohibits an illegal alien from receiving benefits. *Id.* The Court of Appeals then stated that since the claimant was totally disabled, that TTD benefits should be reinstated, and that the request for PPD was not ripe, as the claimant was not eligible for PPD benefits until his TTD benefits had run out. *Id.* at 687-690.

In *Continental Pet Technologies, Inc. v. Palacias*, 269 Ga. App. 561 (2004), the employer/insurer denied a claim from an illegal immigrant solely because she was an illegal

See Claimant's Perspective page 10

Claimant's Perspective *Continued from page 9*

immigrant. *Palacias* involved a case in which the main question before the court was whether the Immigration Reform and Control Act of 1986 (IRCA), which prohibits the knowing hiring of illegal aliens and the use of fraudulent documents to obtain employment, and the corresponding federal regulations, preempt state law for employment purposes relating to workers' compensation. The Court of Appeals held that it did not. *Id.* at 562. Further, the Court of Appeals held that "In as much as the goal of the IRCA is to reduce the incentives for employers to hire illegal aliens, that goal would be subverted by allowing employers to avoid workers' compensation liability for work-related injuries to those employees since such would provide employers with a financial incentive to hire illegal aliens. *Id.* at 564. As such, the Court of Appeals awarded benefits to the claimant. *Id.* at 565.

In *Earth First Grading v. Gutierrez*, 270 Ga. App. 561 (2004), the employer/insurer had originally accepted and paid TTD benefits to Gutierrez, an illegal immigrant. Once the claimant was provided with a regular duty work release, the claimant's TTD benefits were suspended. However, the claimant never returned to work with the employer, and instead returned to work several months later with another employer. During the time between the regular duty work release and the claimant's subsequent employment, he had an independent medical examination, which provided the claimant with light duty restrictions. *Id.* at 328. The ALJ ruled that after the claimant returned to work with another employer, he was no longer entitled to TTD benefits. *Id.* at 329. However, the ALJ then ordered that the claimant was not entitled to any TTD benefits between the time of his regular duty work release and his return to work, because he was an illegal immigrant. *Id.* The ALJ reasoned that Gutierrez's situation was similar to that of a convicted, incarcerated person, in that something other than the work-related injury precluded both from working.

The Court of Appeals held that this was not similar to a convicted, incarcerated person, in that the claimant was under work restrictions, and that he was able to work. *Id.* at 332. As such, the claimant was entitled to benefits between the time of his regular duty work release and his return to work with another employer, as the Court of Appeals found that the claimant was disabled during this time. *Id.* Just because the claimant was an illegal immigrant, it did not mean that the claimant was unable to work.

The granddaddy of these cases is *Martines v. Worley & Sons Construction*, 278 Ga. App. 26 (2006). Many of our CLEs over the past year have had some type of session regarding this case. As such, we will not go over every aspect of this case. However, we will review the highlights.

In *Martines*, the claimant was injured while employed by the employer, and he was eventually released to return to work with restrictions. *Id.* The claimant's new light duty job involved driving a delivery truck, and a condition of his return to work was to produce his driver's license. *Id.* The claimant did not have a driver's license, as he was an illegal immigrant. However, the claimant did know how to drive. As a result, the claimant was unable to return to his employer. The claimant was evaluated by his authorized treating physician two days later, and was placed on no work restrictions. *Id.* at 27. However, the employer/insurer refused to reinstate the claimant's TTD benefits. The Court of Appeals held that the claimant's inability to perform his job was not related to his physical capacity or ability to perform his job. *Id.* at 31. Rather, it was the claimant's legal inability to acquire a driver's license that resulted in his inability to return to work for the Employer. *Id.* at 32.

As can be seen by the cases, there has been quite a shift in reasoning regarding the illegal immigrants and workers' compensation. Further, there will be more litigation involving the Georgia Security and Immigration Compliance Act (SICA), which was signed into law on April 17, 2006. Effective Jan. 1, 2008, employers will

be prohibited from deducting as a business expense \$600 or more in wages paid to any individual that is not authorized to work. If an employer learns that the worker is actually unauthorized to work in Georgia, then the employer will lose this tax deduction. We suspect that there will be more case law in the future regarding an employee's ability to work and his legal ability to work once SICA goes into effect.

In summary, the holding in *Martines* has not changed the status of the current case law in Georgia with respect to illegal immigrants, but provides an additional method for employers/insurers to deny benefits: for failure to obtain the proper license, due to a legal inability based on voluntary conduct, if such license is required for the proffered light duty job. All other things being equal, illegal immigrants are entitled to workers' compensation benefits in Georgia, but are subject to the same rules and laws as workers with proper documentation and natural-born U.S. citizens residing in Georgia. **WC**

Altered or Terminated by Law

By Joseph T. Leman
706-226-0040

Whenever I receive an award in the mail, I immediately turn to the last page to find those words “altered or terminated by law.” Those words are a quick indication of whether or not I have prevailed. It is only after I have satiated that initial curiosity that I begin reading, in earnest, why those words do or do not appear. When I look for those words, I often take them for granted, as though they were “boiler plate” verbiage thrown into awards to make the award sound better. To the contrary, those words are not placed in awards for the purpose of signaling winning or losing or to make the award sound official; but rather, “altered or terminated by law” has an historic and significant legal meaning.

Prior to 1978, the workers’ compensation system in Georgia required that benefits be paid by “award or agreement” and that changes in condition likewise be by “award or agreement” (Code 1933 § 114 - 709). Some of us remember the old agreement system (16s) as well as coverage cards and stipulations without “Hartman language.” It was in 1978 that the legislature revamped our law to provide for a direct pay system and the language then codified changed the “agreement” language to “or otherwise” which is what the language is today in O.C.G.A. § 34-9-104(a)(1). Benefits under the old law could not be terminated unilaterally without a new agreement or award, even if the claimant actually returned to work.

In *Awbrey v. Davis*, 219 Ga. 598 (1964), the Georgia Supreme Court found that:

“where an employee is injured and an agreement to pay total disability compensation benefits is entered into between the employer and employee and approved by the compensation board and such agreement has not been changed or modified by express agreement of the parties or by the judgment of the compensation board or otherwise, the employee is entitled to continue to receive payment for total disability under the agreement after he accepts employment from a different employer and earns as much as or more than he was earning at the time of his injury.” *Id* at 598.

This meant that benefits must “legally” continue even though “factually” the claimant had returned to work. This is a perfect historic example of benefits terminating only by way of a legally recognizable method. An employer/insurer could not unilaterally suspend benefits unless the law allowed such suspension, hence the phrase “altered or terminated by law.” This principle was succinctly stated in *Employers Mutual Liability Insurance Co. V. Derwael*, 105 Ga. App. 54 (1961) which defined what is meant by “terminated by law”:

“...this means that no employer, and no insurance company, can voluntarily and exparte decide to cease paying the employee, regardless of how well founded its claim may be as a matter of fact ...” *Id* at 56.

At the time, in 1961, there were only three ways to terminate benefits: 1) settlement approved by the Board, 2) payout of the statutory maximum or 3) an order or award from the Board allowing termination.

This is the law, as it exists today except for one variation. In 1978, Code Ann. 114 - 709 was amended to include the phrase “or otherwise” (see O.C.G.A. § 34-9-104(a)). Prior to 1978, benefits were commenced by awards and agreements and suspended likewise. The 1978 amendment provided for a direct pay system with what we now know as WC-2’s for the commencement and cessation of benefits. Direct pay by way of a WC-2 or WC-1 Part B provides the “otherwise” in addition to awards for the commencement of benefits. So, in order to terminate benefits unilaterally under the phrase “otherwise,” it must be through a method recognized “by law.” For instance, reducing benefits from temporary total to temporary partial under O.C.G.A. § 34-9-104(a)(2); failure to return to suitable employment under O.C.G.A. § 34-9-240(b)(2); return to work on light duty and without restriction in accord with Rules 221(i)(1) and 221(i)(4); are all legally permissible venues for unilaterally terminating or modifying benefits “by law.”

If the law does not recognize a unilateral termination of benefits (see also O.C.G.A. § 34-9-221(h)) it is necessary for a party to avail itself of O.C.G.A. § 34-9-104(b) which states “any party may apply for another decision because of a change in condition.” Thus, the phrase “altered or terminated by law” carries special meaning by legally protecting the claimant’s benefits except for a handful of legally recognizable methods of terminating benefits. **WC**

2006 Workers' Compensation Statutory and Rule Changes

By Raffaella N. Wilson, Esq.
Hollowell, Foster & Gepp, P.C.

The 2006 Session of the General Assembly of Georgia did not enact many changes in the workers compensation statutes. However, the brevity of changes does not negate their potential to impact claim values since some of the matters which were addressed include an increase in death benefits, Subsequent Injury Trust Fund (SITF) reimbursement and mileage reimbursement. In addition to the statutory changes, there were also several changes to the Board Rules. This article will provide a synopsis of the legislative changes to the workers' compensation statutes along with the changes to the Board Rules.

O.C.G.A. 34-9-25

This is a new statute, which removes the workers' compensation exception from the Patient Self-referral Act of 1993. The act was designed to guard against health care professionals referring patients to other health care providers and facilities in which the health care professional had an investment interest. Certain exceptions apply, however, workers' compensation is no longer exempt.

O.C.G.A. 34-9-104

The 2006 amendment substitutes language in paragraph (a)(2) regarding notice requirements when the claimant has been released to return to work with restrictions. The statute provides:

(2) . . . Within 60 days of the employee's release to return to work with restrictions or limitations, the employee shall receive notice from the employer on a form provided by the board that will inform the employee that he or she has been released to work with limitations or restrictions, will include an explanation of the limitations or restrictions, and will inform the employee of the general terms of this Code section. In no event shall an employee be eligible for more than 78 aggregate weeks of benefits for total disability while such employee is capable of performing work with limitations or restrictions

O.C.G.A. § 34-9-203

The 2006 amendment to paragraph (c)(4) allows the claimant one year from the date of occurrence to submit a mileage reimbursement request. The statute provides:

(4) Notwithstanding any other provision of this subsection, if the employee or the provider of health care goods or services fails to submit its charges to the employer or its workers' compensation insurer within

one year of the date of service or the issuance of such goods or services or, in the case of an employee, within one year of the date of incurring of mileage expenses, then the provider is deemed to have waived its right to collect such charges from the employer, its workers' compensation insurer, and the employee; and, in regard to mileage expenses, the employee is deemed to have waived his or her right to collect such charges from the employer or its workers' compensation insurer.

O.C.G.A. § 34-9-265

The 2006 amendment increases the maximum death benefit for the surviving spouse from \$125,000 to \$150,000.

O.C.G.A. § 34-9-362

The 2006 amendment requires that a party filing a notice of claim with SITF on or before July 1, 2006, obtain a reimbursement agreement from SITF by June 30, 2009. Those notices of claim filed after July 1, 2006 must obtain a reimbursement agreement within three years of filing a notice of claim with SITF or reimbursement is automatically denied. Further, if the compensability of a claim is being adjudicated, the employer or insurer has three years from the date of the final adjudication of compensability to obtain a reimbursement agreement. The statute provides:

(b) In those claims where the employer or insurer is contemplating filing against the fund, the claim must be filed in accordance with the requirements of subsection (a) of this Code section prior to the final settlement of the claim.

(d) For those notices of claim filed with the fund on or before July 1, 2006, the employer or insurer shall have until June 30, 2009, to obtain a reimbursement agreement issued by the fund or the claim for reimbursement shall be deemed automatically denied.

(e) For those notices of claim filed with the fund after July 1, 2006, the employer or insurer shall have three years from the date the notice was received by the fund to obtain a reimbursement agreement issued by the fund or the claim for reimbursement shall be deemed automatically denied.

(f) Notwithstanding subsections (d) and (e) of this Code section, if compensability of the underlying workers' compensation claim is at issue before the State Board of Workers' Compensation, then the employer or insurer shall have three years from the date of final adjudication of compensability by the State Board of Workers' Compensation or any appellate court to obtain a reimbursement agreement issued by the fund

or the claim for reimbursement shall be deemed automatically denied.

(g) Upon actual or statutory automatic denial pursuant to subsection (d), (e), or (f) of this Code section, the employer or insurer shall have 20 days from the date of denial to request a hearing with the State Board of Workers' Compensation pursuant to Code Section 34-9-100; otherwise recovery shall be barred.

2006 Rule Amendments

Several changes to the Rules and Regulations of the State Board of Workers' Compensation were enacted. These changes affect how and when forms are required to be filed, limitations on Brief responses as well as new forms.

Rule 15

Section (e) specifies that the attorney's fee portion of the settlement shall not be taken as a portion or a percentage of medical treatment or expenses.

Section (f) was amended to provide a WC-1 must be included with every no-liability stipulation for each accident date covered in the stipulation.

Rule 61

Rule 61 includes several amendments to the Board forms and filing requirements. Additionally, new Board forms have been included. Please review all the forms as changes may have a direct impact on the necessary filings for your clients.

Section (b)(1) was amended to require insurers and self-insurers to provide their SBWC ID Number on the form where indicated. The form must be completely filled-out to include the name and address of the employee, employer, insurer, self-insurer, or group self-insurer, date of injury, the employee's social security number, the insurer's, self-insurer's, or group/self-insurer's SBWC ID number, or the completion of sections B, C, or D could result in the rejection of the filing with the Board.

Section (b)(2) was amended to specify that the filing of a WC-2 is

required, when paying, suspending, or modifying benefits under O.C.G.A. § 34-9-261, O.C.G.A. § 34-9-262, or O.C.G.A. § 34-9-263.

Section (b)(10) was amended to delete the last sentence which indicates the form is not to be used for a change of address

Section (b)(11) was renamed and rewritten to specify that a form WC-14A is to be filed with the Board to add or amend any information regarding the parties, new dates of injury, hearing issues, mediation issues and part of the body injured.

(b)(11) Form WC-14A. Request to Change Information on a Previously Filed Form WC-14. A party or attorney shall file this form with the Board when requesting correction of a mistake concerning the employee's name, social security number, date of injury, or county of injury on a previously filed Form WC-14. A Form WC-14A shall not be used to change an address of record, add additional parties, or additional dates of injury. A new Form WC-14 shall be filed with the Board to add or amend any information pertaining to the employer, the insurer, the servicing agent or part of body injured, and to add an additional date of injury, hearing issue, or mediation issue.

(b)(25) Form WC-121 Change of TPA Claims Office/Service Agent. An insurer, self-insurer, or self-insurance fund shall file this form to give: (1) notice of the employment of a claims office; (2) change an address of a claims office; (3) add additional claims offices; and (4) notice of the termination of services of a claims office.

(b)(28) WC-200a Change of Physician/Additional Treatment by Consent. . . . A Form WC-200a shall be rejected by the Board if a Form WC-1 or WC-14 has not been previously filed by any party or attorney creating a Board claim.

(b)(36) WC-240 Notice to Employee of Offer of Suitable Employment. . . . File this form as an attachment to a Form WC-2 when unilaterally suspending income benefits under Board Rule 240(b)(1)-(2).

(b)(37) WC-240A Job Analysis. . . . Attach this form with a Form WC-240, and file it with the Form WC-240 as an attachment to a Form WC-2 when unilaterally suspending income benefits under Board Rule 240(b)(1)-(2).

The following includes new Rules and new forms:

(b)(26) Form WC-131. Permit to Write Insurance. Insurers shall complete this form and file it with the Board to receive a permit to write workers' compensation insurance in the state of Georgia.

(b)(27) Form WC-131(a). Permit to Write Insurance Update. Insurers shall complete this form annually and file it with the Board when updating a permit to write workers' compensation insurance in the state of Georgia.

(b)(48) Form WC-Rehabilitation Registration Application. Application to be a licensed rehabilitation supplier. File this form with the Board to be a certified rehabilitation supplier in the state of Georgia.

(b)(49) Form WC-Rehabilitation Registration Application Renewal. Application to renew certification for a licensed rehabilitation supplier. File this form annually with the Board to renew certified rehabilitation supplier status in the state of Georgia.

(b)(54) Any party or attorney filing a form with the Board shall use the most current version of the form. In addition, no party or attorney shall submit any form that has been discontinued or altered. A violation of this rule may result in the rejection of the filing with the Board, and/or the imposition of a civil penalty under O.C.G.A. § 34-9-18.

(b)(55) When electronically filing any form with the Board, and when required by Statute, Rule, or form to serve a copy on an opposing attorney or party, a copy of the form or the ICMS equivalent of the form filed may be used for service.

Rule 100

The amendments to Rule 100 affect confidentiality of mediation notes, postponements, parties in attendance

See Rule Changes page 14

Rule Changes

Continued from page 13

at a mediation conference and misconduct during proceedings. Substantial language has been added to Board Rule 100.

With regard to confidentiality of mediation notes, it has been the case that all communications occurring within the context of mediation may not be disclosed at a subsequent hearing, with the exception of names of physicians submitted in a change-in-physician dispute. However, under the Rule changes, there are some additional exceptions to mediation confidentiality.

(f)(1) An executed Board mediation sheet or written executed agreement resulting from a mediation is not subject to the confidentiality described above.

(f)(2) Neither the mediator nor any 3rd party observer present with the permission of the parties may be subpoenaed or otherwise required to testify concerning a mediation or settlement negotiations in any proceeding. The mediator's notes shall not be placed in the Board's file, are not subject to discovery, and shall not be used as evidence in any proceeding.

(f)(3) Confidentiality does not extend to:

- (A) threats of violence to the mediator or others;
- (B) security personnel or law enforcement officials;
- (C) party or attorney misconduct;
- (D) legal or disciplinary complaints brought against a mediator or attorney arising out of and in the course of a mediation;
- (E) appearance;

Another amendment to Board Rule 100 specifies those who may attend a mediation conference.

(g) Attendance.

(2) Only the parties and attorneys of record may attend a scheduled mediation. Exceptions to attendance may be granted if agreed or consented to by the parties and attorneys of record and approved by a mediator or an Administrative Law Judge.

There have also been some amendments affecting cancellation, and/or postponement of mediation conferences.

(h) Any party or attorney requesting cancellation, postponement or rescheduling of a mediation conference shall provide notice to all parties or their attorneys and shall promptly, but in no event later than 4:30 p.m. on the business day immediately before the scheduled mediation conference, notify the ADR Division of the request: (1) first, by telephone call, and (2) then, when instructed by the ADR Division or when otherwise appropriate or necessary, by a subsequent written or electronic confirmation.

Misconduct during mediations is expressly prohibited.

(i) No person, party, or attorney shall, during the course of any mediation, engage in any discourteous, unprofessional, or disruptive conduct

Rule 102

Section (A)(2) was added to require that all attorneys not licensed to practice in Georgia shall comply with Uniform Rule of Superior Court 4.4.

Section (A)(3) requires that attorneys place their Georgia bar numbers on all filings. Additionally, the current form of all forms must be used. Section (C)(1) adds language regarding a second postponement, specifying that (just like a first-time postponement) it must be made no later than 4:30 p.m. on the business day immediately before the scheduled hearing and the request must be approved by the Administrative Law Judge. The same time requirement applies to a case to be removed from the calendar with no reset.

Section (D)(1) has added the requirement that motions and objections are limited to 50 pages which shall include briefs and exhibits. Exceptions are discretionary for the Administrative Law Judge.

Section (E)(3)(b) now requires all depositions be completed prior to the hearing. Additionally, failure to exchange medical evidence, and presumably failure to conduct timely

depositions, could result in penalties such as cost and exclusion of evidence.

Section (E)(4) requires Briefs to be limited to 30 pages.

Section (E)(7) was added to allow the Board to send a notice of hearing by electronic mail but if electronic mail is not available, the Board will send notice by U.S. Mail.

Rule 108

The Rule specifies certain information on the attorney fee contract.

(a) This contract shall include the following attorney typed information: (1) name, (2) bar number, (3) firm name, (4) address, (5) phone number, (6) fax number, (7) e-mail address, and (8) Board claim number. If the Board claim number is not known, this contract shall include the employee's first name, last name, social security number, and date of injury. Finally, all contracts shall include the employee's name and address.

Additionally, a section has been added to clarify that the attorney may not be paid out of monies for medical treatment or expenses.

Rule 200

The Rule now limits a change of physician request to 50 pages which is inclusive of exhibits. An exception may be granted by an Administrative Law Judge.

Rule 200.1

Section (e)(2)(iv) has been amended to increase the time a party has to object to the designation of a rehabilitation supplier from 15 days to 20 days.

Section (e)(3) limits who may attend a mediation or rehabilitation conference to the parties, attorneys of record and the rehabilitation supplier. If a participant in the mediation or rehabilitation conference wishes to have someone else present, exceptions may be allowed if agreed to by the parties and attorneys of record and approved by a mediator, rehabilitation coordinator, or administrative law judge.

Section (f)(2)(i) no longer requires a

rehabilitation supplier to submit academic transcripts or professional licenses when registering as a rehabilitation supplier.

Section (f)(2)(iii) requires that an appeal of a denial of a rehabilitation supplier's request for an application, renewal or registration be submitted to the Board.

Section (f)(4)(ii) was amended to require appeals for denials of an application for registration as a catastrophic supplier be submitted to the Board.

Rule 202

This Rule no longer defines a functional capacity evaluation as part of "necessary testing."

Rule 203

The mileage rate is 40 cents per mile.

Rule 221

Section (c) provides a WC-1 or WC-2 must be filed with the Board when commencing or suspending payment of benefits even if payment is salary in lieu of benefits. Further, a WC-2 shall be filed with the Board to report changes in the weekly benefit amount. **WC**

RSD: A Misunderstood Diagnosis

By Keith C. Raziano, M.D.

There is no question that Reflex Sympathetic Dystrophy (RSD) has become an increasingly hot topic within the medical/legal field. This is due to an increasingly large number of patients being diagnosed with this painful and frequently misunderstood disorder. RSD is a very difficult diagnosis to understand and, in some cases, the treatment for this disorder can be ineffective as well as expensive. In general, the difficulties encountered by clinicians and patients primarily stem from a misdiagnosis of RSD.

RSD has specific diagnostic criterion and treatment algorithms. By definition, it is a type of Chronic Regional Pain Syndrome (CRPS). RSD (or CRPS type I) is characterized by pain in a specific extremity. It may or may not be caused by any specific injury or inciting event, but the signs and symptoms characterize the syndrome. RSD affects the extremities. The affected areas tend to be painful and swollen, and there are characteristic alterations in skin temperature, color and texture. Individuals with RSD describe their pain as burning, severe, and sensitive to touch. Moreover, alterations in limb appearance occur with time—skin discoloration occurs, limb contractures develop, and joint movement and range of motion decrease. In order to avoid these unwanted end-effects of RSD, rapid diagnosis and aggressive treatment are not only necessary but critical.

Correct diagnosis of RSD is made with clinical examination and testing. Noting the presence of specific symptoms is the first step: severe pain, limb discoloration, limb temperature changes and swelling. The diagnosis can be further confirmed with certain types of diagnostic testing: triple phase bone scan, skin temperature readings, and sympathetic blocks. Once the diagnosis is confirmed, treatment should begin immediately.

Treatment of RSD is most effectively achieved with aggressive physical therapy and tactile stimulation. Adjunctive therapy with specific interventions and oral medications to decrease pain is also beneficial. In general, the primary goal of RSD treatment is decreased pain and return to baseline function. However, the treatment of RSD typically is not the issue. The issue tends to be misdiagnosis.

RSD has inappropriately evolved to become a 'garbage can' diagnosis. Many physicians incorrectly diagnose their patient with RSD when the patient simply complains of pain with an unknown origin. This is incorrect. RSD is a clearly defined diagnosis that can be made with a comprehensive clinical evaluation supplemented by specific diagnostic tests and procedures. Inappropriate diagnosis of RSD will typically lead to inappropriate treatment and therapy. This is not only costly, but ineffective.

Two main points to remember about RSD are: 1) It is imperative that RSD be diagnosed correctly so that appropriate management can be implemented in its initial stages and 2) Treatment of RSD must be performed rapidly in order to prevent further disease progression. RSD can be managed. However, it must be diagnosed early and appropriately. When this done, the patient is more likely to return to his/her prior level of functioning. Moreover, it will prevent future health and pain related problems. **WC**

WORKERS' **COMPENSATION LAW**

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

Tell them to send their name, address and Bar number, along with a \$25 check made payable to the State Bar of Georgia, to:

State Bar of Georgia
Membership Dept.
104 Marietta Street, NW
Suite 100
Atlanta, GA 30303

If you received this newsletter then you are a member of the section through June 30, 2007.

State Bar of Georgia
Workers' Compensation Law Section
Ann Bishop, Editor
104 Marietta Street, NW
Atlanta, GA 30303

NON-PROFIT ORG. U.S. POSTAGE PAID ATLANTA, GA PERMIT NO. 1447
