# **Workers' Compensation**

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#### I. INTRODUCTION

The 2001-2002 survey period was marked by minimal legislation with respect to workers' compensation. But, as usual, the appellate courts were active in the workers' compensation arena, issuing decisions over a broad range of issues. In particular, significant rulings addressed the impact an employer's late notice to controvert had on the employer's defenses, the potential tort liability of an employer and insurer for the actions of an investigator hired to conduct surveillance, and the specificity of medical evidence that is used to causally connect job-related stress to heart attacks or strokes.

# II. LEGISLATION

The 2002 General Assembly made minimal amendments to the Georgia Workers' Compensation Act ("the Act"). The maximum rate for

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<sup>1.</sup> O.C.G.A. §§ 34-9-1 to -421 (1998 & Supp. 2002).

disability benefits was not increased and was left at the levels established in 2001.<sup>2</sup> There were only three legislative changes of note, and all can be characterized as "housekeeping" changes. The Act was amended to authorize the State Board of Workers' Compensation ("the Board") to provide certain data to state and federal government entities as authorized by law.<sup>3</sup> The specific listing of each certification or license for rehabilitation suppliers was deleted and replaced with a provision enabling the Board to specify certification and licensure through Board rule.<sup>4</sup> Finally, the statutory requirement that income benefit checks must be drawn on a Georgia depository was eliminated.<sup>5</sup>

#### III. EXCLUSIVE REMEDY

For well over a decade, there have been attempted attacks upon the exclusive remedy doctrine.<sup>6</sup> This year was no exception. However, Georgia courts continued to embrace the idea that the exclusive remedy for any damages arising out of or in the course of employment is found in the Act.

A traditional exception to the exclusive remedy doctrine, negligent hiring, was reaffirmed in *Tecumseh Products Co. v. Rigdon*. Wanda Faye Rigdon worked on Tecumseh's manufacturing line next to Dickie Godwin. Rigdon and Godwin exhibited a mutual dislike for one another, and Godwin threatened to hit Rigdon in the head with an engine cylinder block. Thereafter, Godwin twisted Rigdon's arm, injuring her elbow and bicep. Rigdon sued Tecumseh for negligently hiring and retaining Godwin. Rigdon contended that Tecumseh knew or should have known that Godwin was potentially dangerous to other employees because the company had previously fired Godwin after an altercation with his supervisor. A jury found in favor of Rigdon and awarded her \$306,000 in compensatory damages and \$250,000 in punitive damages. On appeal, the court observed that an employer must exercise ordinary care in the selection of employees<sup>9</sup> and determined that whether an employer used ordinary care is an issue for the jury. 10

- 2. Id. §§ 34-9-261 to -262.
- 3. Id. § 34-9-12(b).
- 4. Id. § 34-9-200.1(f).
- 5. Id. § 34-9-221(a).
- 6. Id. § 34-9-11. See H. Michael Bagley, Daniel C. Kniffen & John G. Blackmon, Jr., Workers' Compensation, 45 MERCER L. REV. 493, 584-88 (1993).
  - 7. 250 Ga. App. 739, 552 S.E.2d 910 (2001).
  - 8. Id. at 739-40, 552 S.E.2d at 911-12.
  - 9. Id. at 740, 552 S.E.2d at 912 (citing O.C.G.A. § 34-7-20 (1998)).
- 10. *Id.* at 741, 552 S.E.2d at 912 (citing Sparlin Chiropractic Clinic v. TOPS Pers. Servs., 193 Ga. App. 181, 181-82, 387 S.E.2d 411, 412 (1989)).

The court of appeals addressed the geographic parameters of the exclusive remedy doctrine in the context of employee ingress and egress in Connell v. Head.11 Connell was driving a school bus for the City of Cartersville when she collided with a car driven by Laura Head, a coworker. Before the accident, Head had signed out of work and left the building. When the accident took place, she was in her car on property owned by her employer, the City of Cartersville School System. Head sued Connell, alleging negligence, and Connell raised the exclusive remedy provision as a defense. The trial court denied Connell's motion for summary judgment, finding that the property where the accident occurred was open to public use. 12 The court of appeals disagreed and reversed, holding that Head had not left school property when the injury occurred and that workers must have reasonable time to ingress and to egress the work place. 13 For purposes of the ingress and egress rule, the court defined an employer's premises as "'[the] real property owned, maintained, or controlled by the employer." Therefore, because the accident arose out of and in the course of Head's employment, the exclusive remedy provision barred Head's tort action. 15

In *Miraliakbari v. Pennicooke*, <sup>16</sup> the court of appeals defined the extent to which the exclusive remedy doctrine applies to psychological injuries. <sup>17</sup> A Burger King manager refused to let employee Zohreh Miraliakbari leave or use the telephone to respond to a purported emergency involving her six-year-old son, who had suffered a broken bone at school. Miraliakbari brought a claim on behalf of herself and, as next friend, on behalf of her son, alleging intentional infliction of emotional distress and false imprisonment. The trial court granted summary judgment to defendants, holding that the claim was precluded by the Act and that defendants did not show outrageous conduct sufficient to sustain an emotional distress claim. <sup>18</sup> The court of appeals reversed the ruling that the Act was the employee's exclusive remedy, holding that intentional infliction of emotional distress is not covered by the provisions of the Act, and as such, the claim would not be barred by

<sup>11. 253</sup> Ga. App. 443, 444-45, 559 S.E.2d 73, 75 (2002).

<sup>12.</sup> Id. at 443-44, 559 S.E.2d at 74-75.

<sup>13.</sup> *Id.* at 445, 559 S.E.2d at 75 (citing Peoples v. Emory Univ., 206 Ga. App. 213, 424 S.E.2d 874 (1992)).

<sup>14.</sup> *Id.* (quoting *Peoples*, 206 Ga. App. at 214, 424 S.E.2d at 876); *See also* Rockwell v. Lockheed Martin Corp., 248 Ga. App. 73, 545 S.E.2d 121 (2001).

<sup>15.</sup> *Id*.

<sup>16. 254</sup> Ga. App. 156, 561 S.E.2d 483 (2002).

<sup>17.</sup> Id. at 156-57, 561 S.E.2d at 486.

<sup>18.</sup> Id. at 156, 561 S.E.2d at 485-86.

the exclusive remedy provision.<sup>19</sup> The case of *Oliver v. Wal-Mart Stores, Inc.*,<sup>20</sup> involving similar facts, was held to be controlling.<sup>21</sup>

Despite holding that the exclusive remedy did not apply, the court of appeals did not reverse the trial court's grant of summary judgment on the issue of intentional infliction of emotional distress.<sup>22</sup> While the manager's behavior was possibly reckless and wanton,<sup>23</sup> Burger King owed no duty to the employee's son and had not assumed one. These facts distinguish the case from *Mixon v. Dobbs House, Inc.*,<sup>24</sup> in which an employer assumed a duty to an employee's wife to notify the employee when his wife was in labor.<sup>25</sup> Furthermore, because there was no indication that the employee was faced with reasonable apprehension that the manager would use force to keep her at work, there was insufficient restraint to constitute the tort of false imprisonment, and the court affirmed summary judgment on all issues.<sup>26</sup>

In *DeKalb Collision Center, Inc. v. Foster,* <sup>27</sup> the court discussed the applicability of the exclusive remedy doctrine to injuries sustained by an employee while fighting to protect his employer. <sup>28</sup> Henry Foster was killed at his work place, DeKalb Collision Center, Inc., during a fight involving seven DeKalb Collision Center employees and some contractors. DeKalb Collision Center is an automobile paint and body repair shop. The owner of DeKalb Collision Center contracted with brick masons for construction of a brick facade. After the work was completed, a dispute erupted over the contract price, and the contractor threatened to tear down the brick work. A scuffle ensued between the owner and the contractor. Foster, who was sanding a car at the time, left his work area and attempted to break up the fight. He was injured in the process

<sup>19.</sup> *Id.* at 156-57, 561 S.E.2d at 486 (citing Southwire Co. v. George, 266 Ga. 739, 741, 470 S.E.2d 865, 866 (1996); Betts v. MedCross Imaging Ctr., 246 Ga. App. 873, 875-76, 542 S.E.2d 611, 614 (2000)).

<sup>20. 209</sup> Ga. App. 703, 434 S.E.2d 500 (1993).

<sup>21. 254</sup> Ga. App. at 156-57, 561 S.E.2d at 486. To sustain a claim for intentional infliction of emotional distress, a plaintiff must prove the following elements: "(1) [Defendant's] conduct [was] intentional or reckless; (2) The conduct [was] . . . extreme and outrageous; (3) there [was] a causal connection between the wrongful conduct and the emotional distress; and (4) The emotional stress [was] severe." *Id.* at 157, 561 S.E.2d at 486 (quoting Northside Hosp. v. Ruotanen, 246 Ga. App. 433, 435, 541 S.E.2d 66, 68-69 (2000)).

<sup>22.</sup> Miraliakbari, 254 Ga. App. at 161, 561 S.E.2d at 489.

<sup>23.</sup> Id. at 159, 561 S.E.2d at 487.

<sup>24. 149</sup> Ga. App. 481, 254 S.E.2d 864 (1979).

<sup>25.</sup> Id. at 481-82, 254 S.E.2d at 866.

<sup>26. 254</sup> Ga. App. at 161, 561 S.E.2d at 488.

<sup>27. 254</sup> Ga. App. 477, 562 S.E.2d 740 (2002).

<sup>28.</sup> Id. at 479-82, 562 S.E.2d at 743-45.

and later died. Foster's daughters sued DeKalb Collision Center, its employees involved in the fight, and the contractors, alleging their negligent and willful actions caused his death.<sup>29</sup>

Following the trial, a jury returned a verdict against DeKalb Collision Center. DeKalb Collision Center appealed, asserting that the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict based upon the exclusive remedy provision of the Act. DeKalb Collision Center argued that Foster's death was causally connected to his employment under the positional risk doctrine because his job subjected him to the risk by placing him in the position where he received the fatal injury.<sup>30</sup> The positional risk doctrine, first espoused in Georgia in National Fire Insurance Co. v. Edwards, 31 provides that an injury is compensable under the Act when it is proved that the employee's work "brought him within range of the danger by requiring his presence in the locale where the peril struck, even though any other person present would have also been injured irrespective of his employment."32 The court of appeals observed that while the *Edwards* decision was a unanimous en banc decision, "[t]he positional risk doctrine has been inconsistently applied, and many subsequent decisions have held that the risk must be peculiar to the work."33 However, the court did not see the need to address all of these instances and resolved the perceived conflict in order to decide this particular case.<sup>34</sup> The court went on to observe that:

The risk arose out of Foster's job because it was peculiarly related to his employment and his job brought him within the range of danger when the peril struck. Though it is undisputed that Foster's job description required him to sand cars, apply primer, and wash the vehicles in preparation for paint jobs, these were not the strict and absolute limits of his occupation with DeKalb Collision. Indeed, our case law often allows coverage under the Act for injuries sustained when an employee is not actually performing a task that is part of his job description. For instance, although walking back and forth to one's car parked in an employer's parking lot is not part of most job

<sup>29.</sup> Id. at 477-79, 562 S.E.2d at 742-43.

<sup>30.</sup> Id. at 480, 562 S.E.2d at 742-43.

<sup>31. 152</sup> Ga. App. 566, 263 S.E.2d 455 (1979).

<sup>32.</sup> Id. at 567, 263 S.E.2d at 456.

<sup>33. 254</sup> Ga. App. at 480, 562 S.E.2d at 744. See, e.g., Prudential Bank v. Moore, 219 Ga. App. 847, 467 S.E.2d 7 (1996); A & P Transp. v. Warren, 213 Ga. App. 60, 443 S.E.2d 857 (1994); Swanson v. Lockheed Air Craft Corp., 181 Ga. App. 876, 354 S.E.2d 204 (1987).

<sup>34. 254</sup> Ga. App. at 480, 562 S.E.2d at 744.

descriptions, the ingress and egress rule generally covers injuries suffered while an employee is engaged in such action.<sup>35</sup>

The court further observed that "'an employee owes a duty of loyalty, faithful service and regard for an employer's interest" under Georgia law.<sup>36</sup> Therefore, when an employee is injured doing what he reasonably thinks is necessary to protect his employer's property, any injury that may occur arises out of his employment and is covered by the Act.<sup>37</sup> Based upon the finding that Foster's death arose out of and in the course of his employment, the court held that his survivors' exclusive remedy was under the Act, and the judgment below was reversed.<sup>38</sup>

In Bossard v. Atlanta Neighborhood Development Partnership, Inc., 39 Kenneth Bossard worked for a subcontractor who was hired by a general contractor to put gutters on an apartment building. Bossard received an electrical shock while installing gutters on the apartment building. He sued the building's owner and manager, as well as the general contractor overseeing the work, for his personal injuries. The trial court granted summary judgment to defendants on the ground that Bossard's own negligence was the sole proximate cause of his injuries.<sup>40</sup> reversing the grant of summary judgment to the building's owner and manager, the court of appeals addressed the issue of whether summary judgment in favor of the general contractor should be sustained based upon the exclusive remedy doctrine.41 The court acknowledged the well-established rule that a general contractor is immune from tort liability for an on-the-job injury suffered by an employee of its subcontractor. 42 Because the general contractor, as the employee's "statutory employer," is potentially liable for the injured employee's workers' compensation benefits, the exclusive remedy "doctrine applies even if the general contractor never actually paid any workers' compensation benefits to the employee."43 Applying this principle, the court held that the general contractor was immune from tort liability for Bossard's

<sup>35.</sup> Id. at 480-81, 562 S.E.2d at 744.

 $<sup>36.\</sup> Id.$  at 481, 562 S.E.2d at 745 (quoting Crews v. Roger Wahl, C.P.A., P.C., 238 Ga. App. 892, 901, 520 S.E.2d 727, 734 (1999)).

<sup>37.</sup> Id. at 482, 562 S.E.2d at 745.

<sup>38.</sup> Id.

<sup>39. 254</sup> Ga. App. 799, 564 S.E.2d 31 (2002).

<sup>40.</sup> Id. at 799, 564 S.E.2d at 33-34.

<sup>41.</sup> Id. at 805, 564 S.E.2d at 38.

<sup>42.</sup> *Id.* (citing Warden v. Hoar Constr. Co., 269 Ga. 715, 507 S.E.2d 428 (1998); Wright Assoc. v. Rieder, 247 Ga. 496, 277 S.E.2d 41 (1981); Holton v. Ga. Power Co., 228 Ga. App. 135, 491 S.E.2d 207 (1997)).

<sup>43.</sup> *Id.* (citing *Warden*, 269 Ga. at 716, 507 S.E.2d at 430); see also O.C.G.A. § 34-9-8 (1998).

injuries, and the trial court should have granted summary judgment on this ground. Bossard argued that the general contractor assumed tort liability for his injury in the contract between the general contractor and the subcontractor, citing a provision in the contract in which the general contractor agreed to initiate, maintain, and supervise all safety precautions at the work site and to "provide reasonable protection to prevent damage, injury or loss to . . . [e]mployees on the [w]ork." Bossard argued that he was a third-party beneficiary to this contract, and therefore the general contractor owed him a duty of care. The court of appeals rejected this argument, relying upon the precedent established in Paz v. Marvin M. Black Co., Where the court held that a statutory employer's contractual obligation to another party to maintain a safe work place does not provide a basis for removing the statutory employer's tort immunity under the workers' compensation law."

In Satilla Community Service Board v. Satilla Health Services, Inc., 49 the estate of a deceased social worker brought an action against the guardian of a mentally ill patient who allegedly stabbed the social worker. In turn, the guardian brought a third-party action for contribution and implied indemnity against the patient's psychiatrist and the psychiatric hospital, Satilla Health Services, Inc. Satilla Health Services then brought a fourth-party action against the Satilla Community Service Board, which employed the social worker and contracted with the psychiatric hospital. Satilla Community Service Board sought summary judgment on the basis of implied contract indemnity, sovereign immunity, and the exclusive remedy provision of the Act. The superior court denied the motion for summary judgment filed by the Satilla Community Service Board. 50 The court of appeals reversed the denial of summary judgment on multiple issues, including the exclusive remedy provision of the Act on the implied indemnity and tort claims and for contribution of joint tortfeasors.<sup>51</sup> Satilla Community Service Board contended that because the deceased social worker's dependents had received death benefits under the Act, the exclusive remedy provision barred the third- and fourth-party actions against it for anything other

<sup>44. 254</sup> Ga. App. at 805, 564 S.E.2d at 38.

<sup>45.</sup> Id. (alterations in original).

<sup>46.</sup> Id.

<sup>47. 200</sup> Ga. App. 607, 408 S.E.2d 807 (1991).

<sup>48. 254</sup> Ga. App. at 805, 564 S.E.2d at 38 (citing *Paz*, 200 Ga. App. at 608, 408 S.E.2d at 808).

<sup>49. 251</sup> Ga. App. 881, 555 S.E.2d 188 (2001).

<sup>50.</sup> Id. at 881-82, 555 S.E.2d at 190-92.

<sup>51.</sup> Id. at 882, 555 S.E.2d at 192.

than contractual indemnity.<sup>52</sup> The court of appeals acknowledged that the provisions of section 34-9-11 of the Official Code of Georgia Annotated ("O.C.G.A.")<sup>53</sup> create immunity for an employer as a joint tortfeasor with a third party, "'even when the employer's negligence contributes to the employee's injuries," including those situations in which there is implied indemnity as a joint tortfeasor for contribution.<sup>54</sup> The court further observed that the "Workers' Compensation Act does not bar statutorily granted indemnification,"<sup>55</sup> nor does it "bar a defendant from enforcing a contractual right of indemnity against the employer who has paid workers' compensation benefits to the employee or to the employee's beneficiary."<sup>56</sup>

In Wimbush v. Confederate Packaging, Inc., 57 an employee attempted to add punitive damages to a property claim and thereby avoid the exclusive remedy. Bernard Wimbush caught his pants leg in a machine, injuring his foot and destroying his pants and one boot. He was paid workers' compensation benefits for his physical injuries. He sued his employer for negligence in removing a safety device from the machine, seeking compensatory damages for the destruction of his clothing and punitive damages for the alleged intentional creation of a dangerous condition. The trial court granted the employer's motion for summary judgment, ruling that the claim was barred by the exclusive remedy provision of the Act.<sup>58</sup> The court of appeals found the facts in Superb Carpet Mills v. Thomason<sup>59</sup> to be indistinguishable.<sup>60</sup> In that case, employees who were injured on the job and received workers' compensation benefits sued their employer to recover property damage as well as exemplary damages. 61 The court in Superb Carpet Mills held that while the claims for property damage were not barred by the exclusive remedy provision of the Act, the employees could not recover damages that were based upon the aggravated nature of the employer's conduct

<sup>52.</sup> Id. at 885, 555 S.E.2d at 193.

<sup>53.</sup> O.C.G.A. § 34-9-11 (1998 & Supp. 2002).

<sup>54. 251</sup> Ga. App. at 885-86, 555 S.E.2d at 192 (quoting Ga. Dep't of Human Res. v. Joseph Campbell Co., 261 Ga. 822, 823, 411 S.E.2d 871, 873 (1992)).

<sup>55.</sup> *Id.* at 886, 555 S.E.2d at 193 (citing O.C.G.A. § 46-3-40(b) (1992); Flint Elec. Membership Corp. v. Ed Smith Constr. Co., 270 Ga. 464, 466, 511 S.E.2d 160, 161 (1999)).

<sup>56.</sup> *Id. See also* Seaboard Coast Line R.R. v. Maverick Materials. Inc., 167 Ga. App. 160, 161-63, 305 S.E.2d 810, 812 (1983); Gen. Tel. Co. of the Southeast v. Trimm, 252 Ga. 95, 97, 311 S.E.2d 460, 462 (1984).

<sup>57. 252</sup> Ga. App. 806, 556 S.E.2d 925 (2001).

<sup>58.</sup> Id. at 806, 556 S.E.2d at 925-26.

<sup>59. 183</sup> Ga. App. 554, 359 S.E.2d 370 (1987).

<sup>60. 252</sup> Ga. App. at 806, 556 S.E.2d at 926.

<sup>61. 183</sup> Ga. App. at 554, 359 S.E.2d at 370.

because the employees' personal injuries and property damages arose from the same conduct. 62 Also, the Act precludes recovery of additional damages for an employer's willful or intentional acts. 63 In *Wimbush* the court of appeals specifically rejected the request to overrule *Superb Carpet Mills* to the extent it prohibits recovery for punitive damages. 64

In Kellogg Co. v. Pinkston, 65 Rosemary Pinkston allegedly sustained injuries as a result of her exposure to asbestos dust in the work place. She filed a workers' compensation claim as well as a complaint in the State Court of Fulton County seeking damages from her employer based upon the same injuries she stated in her workers' compensation claim. The employer, Kellogg Company, failed to answer the complaint, and a default judgment was entered awarding compensatory and punitive damages totaling \$4,400,000. Kellogg then sought to set aside the default judgment based upon a lack of subject matter jurisdiction. <sup>66</sup> On appeal, the court of appeals acknowledged that "the rights and remedies of an employee against his or her employer for a work-related injury under the Workers' Compensation Act foreclose all of the remedies at common law or otherwise for such injury."67 The court observed that Pinkston's complaint for damages was nothing more than an action for her work-related injury and that she had failed to plead any of the exceptions to the exclusive remedy doctrine; thus, the lower court "was under a duty to dismiss the Pinkstons' complaint for lack of subject matter jurisdiction."68

## IV. CASE LAW DEVELOPMENTS

# A. Average Weekly Wage

The provisions of O.C.G.A. section 34-9-260<sup>69</sup> provide the means by which the "average weekly wage" of the injured employee is calculated. The employee's average weekly wage is then used to determine the workers' compensation rate to be paid in the event of a compensable

<sup>62.</sup> Id. at 556, 359 S.E.2d at 371-72.

<sup>63.</sup> *Id*.

<sup>64. 252</sup> Ga. App. at 807, 556 S.E.2d at 926.

<sup>65. 253</sup> Ga. App. 190, 558 S.E.2d 423 (2001).

<sup>66.</sup> Id. at 190, 558 S.E.2d at 424.

<sup>67.</sup> *Id.* at 191, 558 S.E.2d at 424 (citing Betts v. MedCross Imaging Ctr., 246 Ga. App. 873, 874, 542 S.E.2d 611, 615 (2000)).

<sup>68.</sup> *Id.* at 191-92, 558 S.E.2d at 425-26. *See also* O.C.G.A. § 9-11-12(h)(3) (1993); Whitlock v. Barrett, 158 Ga. App. 100, 103, 279 S.E.2d 244, 245 (1981).

<sup>69.</sup> O.C.G.A. § 34-9-260 (1998 & Supp. 2002).

injury.<sup>70</sup> The case of *Rheem Manufacturing Co. v. Jackson*<sup>71</sup> provides instruction on which party bears the burden of proof to demonstrate the correct average weekly wage and what evidence is necessary to demonstrate the existence of a similarly situated employee.<sup>72</sup>

In her claim for workers' compensation benefits, Jackson presented no evidence or testimony regarding her average weekly wage. The administrative law judge ("ALJ"), therefore, left the evidentiary record open for the submission of additional evidence to determine a correct average weekly wage figure. While neither party disputed that this employee did not work substantially during the thirteen week period prior to the date of her accident, on evidence was presented on whether a similarly situated employee existed, other than the employee's assertion that there was no such employee. The ALJ, therefore, calculated the employee's average weekly wage based upon utilizing her hourly wage of \$13.23 times her regular forty-hour work week.

Jackson's employer appealed, claiming that Jackson had an affirmative burden of proof to demonstrate the lack of a similarly situated employee and that her mere assertion in this regard was insufficient to meet her burden of proof. The court of appeals agreed, holding that Jackson bore the burden of proof to establish the average weekly wage upon which her compensation was to be computed and further held that "Jackson failed to present *any* evidence at all as to whether a similar employee exists." Jackson's mere testimony, therefore, that no similarly situated employee existed, was insufficient. Presumably, to meet this burden of proof, an employee must present evidence either that the employer has no other employees or that other co-workers are not "similarly situated" in terms of the work performed or the pay received.

<sup>70.</sup> Id. §§ 34-9-261 to -263.

<sup>71. 254</sup> Ga. App. 454, 562 S.E.2d 524 (2002).

<sup>72.</sup> Id. at 456, 562 S.E.2d at 525.

<sup>73.</sup> O.C.G.A. section 34-9-260(1) requires that the employee's average weekly wage figure for the thirteen weeks immediately preceding the injury be utilized to determine the average weekly wage, *provided* that the employee works "substantially the whole" of this thirteen week period.

<sup>74.</sup> O.C.G.A. section 34-9-260(2) requires that if the employee does not work substantially the whole of the thirteen week period prior to the date of accident, the wages of a "similarly situated employee" for this time period should be used.

<sup>75. 254</sup> Ga. App. at 454-55, 562 S.E.2d at 525.

<sup>76.</sup> Id. at 455-56, 562 S.E.2d at 525.

<sup>77.</sup> Id. at 456, 562 S.E.2d at 526.

#### B. Controversion and Suspension of Benefits

In *Meredith v. Atlanta Intermodal Rail Services*, <sup>78</sup> the supreme court clarified an issue of significant confusion over the provisions of O.C.G.A. section 34-9-221, <sup>79</sup> governing an employer's controversion of benefits. <sup>80</sup> In *Meredith* the court held that an employer is *not* precluded from presenting a defense to an employee's claim for benefits, even if the employer fails to make a payment of benefits before filing a late notice to controvert under O.C.G.A. section 34-9-221(d). <sup>81</sup>

Meredith's employer, Atlanta Intermodal Rail Service, filed a first report of injury (WC-1) on May 10, 1999, but did not file a notice to controvert the claim until June 17, 1999, more than twenty-one days after learning about his injury. The employer did not pay any benefits before controverting the claim. Meredith contended on appeal that Atlanta Intermodal was precluded from raising any defenses because its notice to controvert was filed late—beyond the twenty-one days required by O.C.G.A. section 34-9-221(d). In large part, Meredith based his argument on the case of *Cartersville Ready Mix Co. v. Hamby*, and in which the court held that an employer that commenced benefits but failed to include a required late penalty was precluded from later controverting the claim under O.C.G.A. section 34-9-221(h).

The supreme court rejected the employee's argument and distinguished the decision in *Hamby* by pointing out that it was based upon a different portion of O.C.G.A. section 34-9-221.<sup>85</sup> As the court pointed out, subsection (h), upon which the decision in *Hamby* was based, is entirely different than subsection (d), which was the Code section at issue before the court.<sup>86</sup> O.C.G.A. section 34-9-221(h) provides:

Whe[n] compensation is being paid without an award, the right to compensation shall not be controverted except upon the grounds of change in condition or newly discovered evidence unless notice to controvert is filed with the Board within [sixty] days of the due date of first payment of compensation.<sup>87</sup>

<sup>78. 274</sup> Ga. 809, 561 S.E.2d 67 (2002).

<sup>79.</sup> O.C.G.A. § 34-9-221 (1998 & Supp. 2002).

<sup>80. 274</sup> Ga. at 811-12, 561 S.E.2d at 67.

<sup>81.</sup> Id. at 812, 561 S.E.2d at 69.

<sup>82.</sup> Id. at 810, 561 S.E.2d at 67-68.

<sup>83. 224</sup> Ga. App. 116, 479 S.E.2d 767 (1996).

<sup>84.</sup> Id. at 119, 479 S.E.2d at 770.

<sup>85.</sup> Meredith, 274 Ga. at 812, 561 S.E.2d at 69.

<sup>86.</sup> Id.

<sup>87.</sup> O.C.G.A. § 34-9-221(h) (1998 & Supp. 2002).

In effect, Meredith is asking us to overturn the 20-year-old decision in [Raines & Milam v.] Milam, <sup>89</sup> apply the provisions of subsection (h) whenever the employer fails to file a notice to controvert within [twenty-one] days, and require employers to pay all accrued benefits to the employee before being able to challenge the claim after [twenty-one] days. <sup>90</sup>

The court refused to alter subsection (d) in this fashion and held that under subsection (d), an employer is not precluded from raising defenses to a workers' compensation claim because of a failure to make payment of benefits before filing a notice to controvert. In so doing, the court reaffirmed the court of appeals holding in *Milam*: an employer that violates subsection (d) is subject to statutory sanctions but is not precluded from raising a defense. Meredith, therefore, puts to rest any remaining confusion on when an employer may properly controvert a claim and reaffirms the significant distinction between subsections (d) and (h) of O.C.G.A. section 34-9-221.

In Russell Morgan Landscape Management v. Velez-Ochoa, 93 the court of appeals dealt with the proper date for a suspension of benefits, which was substantively correct but procedurally improper. 94 Velez-Ochoa's employer, Russell Morgan Landscape, suspended his workers' compensation benefits on August 11, 1997, by filing a form WC-2. The stated reason for the suspension of the employee's benefits was that Velez-Ochoa was noncompliant with medical treatment, which is not a proper reason for unilateral suspension of benefits. 95 At a hearing

<sup>88.</sup> Id. § 34-9-221(d).

<sup>89. 161</sup> Ga. App. 860, 289 S.E.2d 785 (1982).

<sup>90. 274</sup> Ga. at 812, 561 S.E.2d at 69.

<sup>91.</sup> *Id*.

<sup>92. 161</sup> Ga. App. at 862-63, 289 S.E.2d at 787.

<sup>93. 252</sup> Ga. App. 549, 556 S.E.2d 827 (2001).

<sup>94.</sup> Id. at 551-52, 556 S.E.2d at 829-30.

<sup>95.</sup> *Id.* at 552, 556 S.E.2d at 830. The stated reason for the suspension of the employee's benefits was that Velez-Ochoa was noncompliant with medical treatment. *Id.* at 551, 556 S.E.2d at 830. This was itself a violation of Board Rule 200(d) of the State Board of Workers' Compensation, which states that "[t]he employer/insurer may suspend weekly benefits for a refusal of the employee to submit to treatment *only by order of the* 

before an ALJ, it was found that Velez-Ochoa had undergone a change in condition for the better and was able to return to work without any restrictions from his compensable injury. The ALJ also concluded, however, that Morgan Landscape violated the rules regarding suspension of benefits and, thus, imposed civil penalties, ordered attorney fees, and also ordered a payment of an additional ten days of benefits. 96

The appellate division of the Board adopted the ALJ's findings but also ordered the employer to pay temporary total disability benefits through the date of the ALJ hearing.97 The court of appeals agreed with the appellate division's reasoning, describing it as "an even-handed application of the law."98 On appeal to the Board's appellate division, the employer argued that it should be allowed to suspend Velez-Ochoa's benefits effective August 11, 1997, the date of the erroneous WC-2, rather than January 8, 1999, the date of the evidentiary hearing. The employer described the deficiencies in its WC-2 as merely "clerical error," even though the form (1) listed an erroneous basis for suspension of benefits (noncompliance with medical treatment), (2) failed to contain standard information on the back of the form explaining how to challenge a suspension of benefits, (3) was not accompanied by supporting medical reports as required by the State Board of Workers' Compensation Rule 221(i)(4),99 and (4) failed to provide in advance a ten-day notice of benefits suspension as required by Board Rule 221(i)- $(1).^{100}$ The court of appeals agreed with the appellate division's suspension of benefits as of the date of the hearing "at which time the employee could be fairly said to be on notice of the reasons for the suspension of benefits and to have had an opportunity to present his case."101

#### C. Coverage

O.C.G.A. section 34-9-2(a) provides that the Act will not apply to any private corporation "that has regularly in service less than three employees in the same business within this state, unless such employees

Board." JACK B. HOOD ET AL., GEORGIA WORKER'S COMPENSATION CLAIMS WITH FORMS § 35-2, Rul. 200(d), at 446 (4th ed. 2001) (emphasis added). Under this rule, Morgan Landscape was not permitted to unilaterally suspend benefits based upon the employee's alleged noncompliance with medical treatment, but rather was required to seek an order from the Board allowing such a suspension. 252 Ga. App. at 552, 556 S.E.2d at 830.

<sup>96. 252</sup> Ga. App. at 549-51, 556 S.E.2d at 828.

<sup>97.</sup> Id. at 549, 556 S.E.2d at 828-29.

<sup>98.</sup> *Id.* at 552, 556 S.E.2d at 830.

<sup>99.</sup> HOOD, supra note 95, Rul. 221(i)(4), at 468.

<sup>100. 252</sup> Ga. App. at 551, 556 S.E.2d at 830.

<sup>101.</sup> Id. at 552, 556 S.E.2d at 830.

and their employers voluntarily elect to be bound." The very next section of the Act, O.C.G.A. section 34-9-2.1, provides in paragraph (a) that corporate officers may elect to be exempt from coverage under the Act by providing sufficient written certification of this election. In Hitchcox v. Jack Wiggins, Inc., the court of appeals held that a corporate officer who elects exemption from coverage may still be counted as an "employee" for determining whether the business has three or more employees regularly in service.

As an initial matter, the Board found, and the court of appeals upheld, that the corporate officer, Jack Wiggins, did not sufficiently prove that a valid exemption existed. The court further agreed with the Board that even if Wiggins had proved the asserted exemption, the employer would still be subject to the Act. The court pointed to the portion of O.C.G.A. section 34-9-2.1(a)(3), which specifically provides: "Any employer subject to this chapter pursuant to subsection (a) of Code Section 34-9-2 before the filing of any exemptions shall remain subject to this chapter without regard to the number of exemptions filed." The court, therefore, affirmed the clear legislative intent that an employer may not relieve itself of the obligation to provide workers' compensation coverage that it would otherwise be required to have by exempting its corporate officers, thereby, reducing its number of "employees" to less than three. The court of the court of the subject to the portion of the court of the obligation to provide workers' compensation coverage that it would otherwise be required to have by exempting its corporate officers, thereby, reducing its number of "employees" to less than three.

## D. Tort Claim and Right to Privacy

A case with significant ramifications for the workers' compensation system is *Association Services, Inc. v. Smith.* <sup>110</sup> In that case, the court of appeals held that a workers' compensation claims administrator and its investigator could be liable in tort for intrusion upon seclusion and conspiracy to violate privacy when a conflict in the evidence existed as to whether the investigator trespassed on plaintiff's property to obtain video surveillance in the investigation of plaintiff's workers' compensation claim. <sup>111</sup> The employer's servicing agent, ASI, retained an investigator, Littleton, who conducted surveillance on the employee's

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102. O.C.G.A. § 34-9-2(c) (1998).
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<sup>103.</sup> *Id.* § 34-9-2.1(a).

<sup>104. 249</sup> Ga. App. 845, 549 S.E.2d 806 (2001).

<sup>105.</sup> Id. at 848, 549 S.E.2d at 809.

<sup>106.</sup> Id. at 846, 549 S.E.2d at 807.

<sup>107.</sup> Id. at 847, 549 S.E.2d at 808.

<sup>108.</sup> Id. (quoting O.C.G.A. § 34-9-2.1 (a)(3)).

<sup>109.</sup> Id. at 848, 549 S.E.2d at 808.

<sup>110. 249</sup> Ga. App. 629, 549 S.E.2d 454 (2001).

<sup>111.</sup> Id. at 637, 549 S.E.2d at 461.

home and work place over a three-day period. The investigator videotaped a woman who fit the employee's description. He recorded the woman watering plants, filling birdbaths, and generally showing no sign of injury. The investigator believed that the woman on the tape was the employee, but in fact, he had videotaped her sister (Smith), who worked at the same place as the employee and who was similar in appearance. Despite the videotape evidence, the employer did not suspend workers' compensation benefits, but rather arranged for a meeting at which the videotape was played for the employee and her attorney, and the mistaken identity was ultimately uncovered. At that point, the employer withdrew its motion for a hearing to suspend workers' compensation benefits and paid the employee's attorney fees incurred in the disputed claim. Subsequently, plaintiff and her sister filed a variety of tort claims against the workers' compensation administrator and the investigator, alleging a variety of conspiracy and tort causes of action. The trial court granted summary judgment in defendant's favor on each of plaintiff's claims with the exception of intrusion upon seclusion and conspiracy to violate privacy. 112

The court of appeals affirmed the trial court's determination that the claims alleging intrusion upon seclusion and conspiracy to violate privacy should proceed to a jury. Although the investigator stated that he did not enter plaintiff's private property when he conducted surveillance, plaintiff's husband testified that it would have been impossible for the investigator to have obtained the videotape without trespassing. The court further pointed out that because there was conflicting evidence regarding whether the investigator trespassed on the property of plaintiff's work place, which was owned by plaintiff and her husband, and because the investigator admitted to at least seven "pretext" telephone calls to plaintiff's work place, summary judgment was not proper. 115

Georgia law has long provided that an individual's general right to privacy is waived to some extent when the individual seeks damages in tort against a defendant who has the right to conduct a reasonable investigation of the plaintiff to ascertain the validity of the claim. The reasonableness of the investigation, however, may be for a jury to determine, and the defendant may undertake such an investigation "only in a reasonable and proper manner and only in furtherance of its

<sup>112.</sup> Id. at 629-31, 549 S.E.2d at 457-58.

<sup>113.</sup> Id. at 631-32, 549 S.E.2d at 461.

<sup>114.</sup> Id. at 632, 549 S.E.2d at 459.

<sup>115.</sup> Id. at 632-33, 549 S.E.2d at 459.

<sup>116.</sup> Ellenberg v. Pinkerton's, Inc., 125 Ga. App. 648, 651, 188 S.E.2d 911, 914 (1972).

interest with regard to the suit against it."<sup>117</sup> In this sense, the court's ruling in *Association Services* does not create any new law but is surprising to the extent that the case survived summary judgment based entirely upon a uncorroborated assertion by plaintiff's husband that a trespass must have occurred. Presumably, it could have been established from the videotape itself where the surveillance was obtained and whether a trespass did in fact occur. Certainly, employers and insurers should be vigilant in assuring that any reasonable investigation into an employee's activities does not go beyond the boundaries of the employee's reasonable expectations of privacy, which would, at a minimum, preclude trespass.

## E. Hearing Loss

Claims for occupational loss of hearing are governed by O.C.G.A. section 34-9-264, which provides, among other things, that "no claim for compensation for occupational hearing loss shall be filed until six months have elapsed since exposure to harmful noise with the last employer." In *Woodgrain Millwork/Windsor Wood Windows v. Millender*, 119 plaintiff filed his claim based upon occupational hearing loss on July 28, 1997, only thirteen days after his employment was terminated, and he last suffered exposure to harmful noise with defendant employer. Because the employee's claim was filed less than six months after the exposure to harmful noise, the employer filed a motion to dismiss under O.C.G.A. section 34-9-264(c) but did not file this motion until July 7, 1999, the day before the evidentiary hearing was held before an ALJ. 120

Although the court of appeals disagreed with the Board's reasoning in allowing the claim to be considered timely, it ultimately agreed with the result. The court disagreed with the ALJ's reasoning that the employer "could have timely asserted this motion at a time when the employee would have been able to file an amended claim or new claim for alleged occupational hearing loss. . . . "122" As the court stated, "It was not the employer's responsibility to insure that Millender's claim was properly filed." The court did point out, however, that "[t]here is a vast difference between a notice which is filed beyond the time

<sup>117.</sup> Id. at 652, 188 S.E.2d at 914.

<sup>118.</sup> O.C.G.A. § 34-9-264(c) (1998).

<sup>119. 250</sup> Ga. App. 204, 551 S.E.2d 78 (2001).

<sup>120.</sup> Id. at 205, 551 S.E.2d at 79-80.

<sup>121.</sup> Id. at 206-07, 551 S.E.2d at 81.

<sup>122.</sup> Id. at 206, 551 S.E.2d at 80.

<sup>123.</sup> Id.

allowed by law, and a notice which is filed before it must be." Given the fact that nearly two years elapsed between the time the original claim was filed and the time the employer filed its motion to dismiss, during which extensive discovery was performed by both sides, the court concluded that the intent of O.C.G.A. section 34-9-264 had been met and that "Millender's prematurely filed claim ripened, and was deemed to be filed, at the expiration of the statutory six-month waiting period." <sup>125</sup>

## F. Heart Attacks

In 1996 the Act was amended to define more specifically the compensability of workers' compensation claims involving heart disease, heart attacks, and strokes. O.C.G.A. section 34-9-1(4) now provides that heart disease, a heart attack, or a stroke may be compensable if "it is shown by a preponderance of competent and credible evidence, which shall include medical evidence, that any of such conditions were attributable to the performance of the usual work of employment." The 1996 amendment added, among other things, the phrase "shall include medical evidence," largely in response to a court of appeals case in which an employee successfully recovered for a stroke despite uncontradicted medical testimony that the stroke was not work-related. Since this amendment, the unanswered question has been, "What kind of medical evidence is necessary for the employee to meet his or her burden of proof to demonstrate the compensability of a heart attack claim?"

The court of appeals answered this question in the case of *AFLAC*, *Inc. v. Hardy*. <sup>129</sup> Hardy sought workers' compensation benefits for a heart attack that she claimed was due to stress from her employment with AFLAC. Hardy's heart attack occurred approximately two hours after she arrived at work on April 27, 1998. She experienced nausea, dizziness, and chest pain at work before being taken by ambulance to a local hospital. <sup>130</sup> The medical evidence regarding the relationship of her heart attack to her employment, however, was merely that a

<sup>124.</sup> *Id.* at 207, 551 S.E.2d at 81 (quoting Livingston v. State, 221 Ga. App. 563, 566, 472 S.E.2d 317, 320 (1996)).

<sup>125.</sup> Id.

<sup>126.</sup> O.C.G.A. § 34-9-1(4) (1998 & Supp. 2002).

<sup>127.</sup> Id.

<sup>128.</sup> See Reynolds Constr. Co. v. Reynolds, 218 Ga. App. 23, 459 S.E.2d 612 (1995); see also H. Michael Bagley, Daniel C. Kniffen, John G. Blackmon, Jr. & Philip Comer Griffith, Workers' Compensation, 48 MERCER L. REV. 583, 588 (1996).

<sup>129. 250</sup> Ga. App. 570, 552 S.E.2d 505 (2001).

<sup>130.</sup> Id. at 573, 552 S.E.2d at 506-07.

stressful job "can play a role in exacerbating symptoms." The court of appeals specifically held that such evidence did not meet the employee's burden of proof, stating,

Dr. Gruczak does not state in her report that Hardy's [stress due to work] did exacerbate her symptoms, but merely that work stress "can" do so. Such an equivocal statement merely raises the possibility that stress was a factor, which generally is insufficient to sustain a party's burden of proof.  $^{132}$ 

The court further pointed out that Dr. Gruczak's report did not state, as the ALJ had found, that her job contributed to her coronary artery disease but rather stated that her job "could exacerbate the *symptoms* of her coronary artery disease, which, in the case of heart disease, does not constitute a compensable injury." <sup>133</sup>

The court's decision in *Hardy*, therefore, established that to meet the burden of proof under O.C.G.A. section 34-9-1(4), an employee must present more than mere speculation regarding the causal relationship between the job and the cardiovascular disorder. Furthermore, the claimed causal relationship with the employee's job must do more than merely exacerbate the symptoms of the employee's underlying coronary disease; it must demonstrate an actual causal relationship to either the underlying disease itself or to a subsequent heart attack or stroke.<sup>134</sup>

## G. Hearings

In *Holliday v. Jacky Jones Lincoln-Mercury*, <sup>135</sup> the court of appeals reversed an award of permanent partial disability benefits and remanded the case for another hearing after finding that the employer was not provided with sufficient notice that the issue of permanent partial disability benefits would be tried at the ALJ hearing. <sup>136</sup> After sustaining a compensable injury and receiving workers' compensation benefits, the employee, Holliday, requested a hearing after his benefits were suspended, seeking additional temporary total disability benefits. <sup>137</sup> The transcript revealed that the ALJ framed the issue as follows: "Is the Claimant disabled and entitled to disability benefits and

<sup>131.</sup> Id. at 572, 552 S.E.2d at 507.

<sup>132.</sup> *Id.*, 552 S.E.2d at 508 (citing La Cosecha, Inc. v. Hall, 246 Ga. App. 441, 444, 540 S.E. 2d 659, 661 (2000))

<sup>133.</sup> Id. (citing Carter v. Kansas City Fire & Marine Ins. Co., 138 Ga. App. 601, 226 S.E.2d 755 (1976)).

<sup>134.</sup> *Id*.

<sup>135. 251</sup> Ga. App. 493, 554 S.E.2d 286 (2001).

<sup>136.</sup> Id. at 493, 554 S.E.2d at 287.

<sup>137.</sup> Id., 554 S.E.2d at 287-88.

in what amount, whether it's temporary total or temporary partial or any at all after he last worked."<sup>138</sup> The employee produced a medical report indicating that he had a ten percent permanent partial impairment as a result of his compensable injury. The ALJ ultimately denied the employee's claim for temporary total disability benefits, but awarded him permanent partial disability benefits under O.C.G.A. section 34-9-263<sup>139</sup> based upon the medical report that he introduced at the hearing.<sup>140</sup>

The employer appealed, claiming that it had been given no notice that permanent partial disability benefits were at issue. 141 Holding that the employee originally requested only temporary total disability benefits and that the record contained no evidence that the employee raised the issue of permanent partial disability benefits prior to the hearing, the court of appeals agreed with the superior court that the award of permanent partial disability benefits should be reversed. 142 The court further noted that the employee's request for a hearing, on a form WC-14, did not request permanent partial disability benefits. 143 Nevertheless, the court referred to the long-standing rule that technical niceties of pleading and procedure are not strictly followed in workers' compensation and held that "the evidence sufficiently raised the issue of permanent partial disability such that, had the parties been given sufficient notice, the ALJ could have properly addressed the issue." The court, therefore, remanded the case for another hearing on the issue of whether the employee was entitled to recover permanent partial disability benefits. 145 This case stands as a reminder to workers' compensation practitioners to make sure that the hearing request form specifies all benefits to which the employee seeks entitlement, to insure that those issues may be properly addressed.

# H. Drug Testing

Two cases involving drug testing were decided during this survey period. The first was *Kendrix v. Hollingsworth Concrete Products*, *Inc.*, <sup>146</sup> a case involving an employee who tested positive for both

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138. Id. at 493-94, 554 S.E.2d at 288.
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<sup>139.</sup> O.C.G.A. § 34-9-263 (1998 & Supp. 2002).

<sup>140. 251</sup> Ga. App. at 494, 554 S.E.2d at 288.

<sup>141.</sup> Id.

<sup>142.</sup> Id. at 495, 554 S.E.2d at 288.

<sup>143.</sup> Id. at 497, 554 S.E.2d at 290.

<sup>144.</sup> *Id.* (citing Chem Lawn Servs. v. Stephens, 220 Ga. App. 239, 244, 469 S.E.2d 375, 379 (1996)).

<sup>145.</sup> Id.

<sup>146. 274</sup> Ga. 210, 553 S.E.2d 270 (2001).

marijuana and cocaine. The court in *Kendrix* denied workers' compensation benefits after the ALJ found that the employee failed to rebut the presumption found in O.C.G.A. section 34-9-17(b)(2)<sup>147</sup> that the accident was caused by the illegal use of controlled substances. The employee appealed, arguing that the statute violated equal protection laws by differentiating between legally and illegally controlled substances. <sup>148</sup>

The supreme court reviewed the constitutional challenge to the statute, <sup>149</sup> which provides an exception to the rebuttable presumption if a controlled substance found during a properly administered drug test was "lawfully prescribed by a physician . . . and taken in accordance with such prescription." <sup>150</sup> In addressing an equal protection challenge that does not involve a suspect class or fundamental right, the court must examine whether "'the classification is based on rational distinctions, and the basis of the classification bears a direct and real relation to the object or purpose of the legislation." <sup>151</sup>

The court concluded that "[w]hen a controlled substance is given by prescription, the use of that drug is regulated by several factors that are not present when a drug is taken illegally." A physician determines the proper dosage and duration and also informs the patient of any limitations on activity. Additionally, regulations govern the pharmacist who fills the prescription. These factors provide[d] a rational basis for distinguishing between controlled substances taken by prescription and those taken illegally."

147. O.C.G.A. § 34-9-17(b) (1998). This Code section provides:

No compensation shall be allowed for an injury or death due to intoxication by alcohol or being under the influence of marijuana or a controlled substance, except as may have been lawfully prescribed by a physician for such employee and taken in accordance with such prescription:

(2) If any amount of marijuana or a controlled substance as defined in paragraph (4) of Code Section 16-13-21, Code Sections 16-13-25 through 16-13-29, Schedule I-V, or 21 C.F.R. Part 1308 is in the employee's blood within eight hours of the time of the alleged accident, as shown by chemical analysis of the employee's blood, urine, breath, or other bodily substance, there shall be a rebuttable presumption that the accident and injury or death were caused by the ingestion of marijuana or the controlled substance.

- 148. 274 Ga. at 210, 553 S.E.2d at 270.
- 149. Id. at 210-11, 553 S.E.2d at 270-71.
- 150. O.C.G.A. § 34-9-17(b).
- 151. 274 Ga. at 210, 553 S.E.2d at 271 (quoting Cannon v. Ga. Farm Bureau Mut. Ins. Co., 240 Ga. 479, 482, 241 S.E.2d 238, 241 (1978)).
  - 152. *Id*.
  - 153. Id.
  - 154. Id.
  - 155. Id. at 210-11, 553 S.E.2d at 271.

The court further concluded that this distinction "bears a direct and real relationship to the legitimate government objective of promoting a safe workplace[,]... further[ing] the state's legitimate goal of reducing workplace accidents and increasing productivity by discouraging illegal drug use."<sup>156</sup> Thus, the court affirmed the ALJ's denial of benefits. <sup>157</sup>

The second case, *Marine Port Terminals, Inc. v. Dixon*, <sup>158</sup> involved an employee's refusal to take a drug test. Dixon was injured on the job, and while he was receiving medical care after his injury, the employer requested that he submit to a urine test. Dixon did not submit to the test, contending that his failure to submit was not an unjustified refusal, but was caused by a panic attack he suffered at the time, which prevented him from being able to urinate to provide a sample for the test. The employer alleged that compensation was not due because Dixon unjustifiably refused to submit to the test and that a rebuttable presumption arose under O.C.G.A. section 34-9-17(b)(3) that Dixon failed to rebut, which was that the accident and injury were caused by Dixon's consumption of alcohol or drugs. <sup>159</sup>

The pertinent statute is O.C.G.A. section 34-9-17(b)(3), which provides:

If the employee unjustifiably refuses to submit to a reliable, scientific test to be performed in the manner set forth in Code Section 34-9-415 to determine the presence of alcohol, marijuana, or a controlled substance in an employee's blood, urine, breath, or other bodily substance, then there shall be a rebuttable presumption that the accident and injury or death were caused by the consumption of alcohol or the ingestion of marijuana or a controlled substance. <sup>160</sup>

The ALJ did not rule on whether Dixon unjustifiably refused to submit to the drug test. <sup>161</sup> Instead, the ALJ decided that there was no defense to compensation because the employer failed to prove "that the test that the employee refused would have been conducted in the manner required by O.C.G.A. § 34-9-415." This ruling essentially held that the rebuttable presumption never arises unless the employer first produces

<sup>156.</sup> Id. at 211, 553 S.E.2d at 271 (citations omitted).

<sup>157.</sup> *Id*.

<sup>158. 252</sup> Ga. App. 340, 556 S.E.2d 246 (2001).

<sup>159.</sup> Id. at 340-41, 556 S.E.2d at 247.

<sup>160.</sup> O.C.G.A. § 34-9-17(b)(3).

<sup>161. 252</sup> Ga. App. at 341, 556 S.E.2d at 247.

<sup>162.</sup> *Id.* O.C.G.A. section 34-9-415 is part of Article 11, "Drug-Free Workplace Programs," of the Workers' Compensation Act, which sets out various procedures for specimen collection and testing, types of tests, and the qualifications, procedures and reports of laboratories that analyze specimens.

evidence that the refused drug test would have been performed in the manner set forth in O.C.G.A. section 34-9-415.  $^{163}$ 

On appeal, the court reviewed *Georgia Self-Insurers Guaranty Trust Fund v. Thomas*, <sup>164</sup> in which the supreme court considered whether the applicability of the rebuttable presumption of O.C.G.A. section 34-9-17(b) was dependent upon the employee having been notified that his refusal to submit to drug testing might bar compensation. <sup>165</sup> In that case, the court stated that neither the statute nor the Georgia Constitution made such prior notice necessary for the rebuttable presumption to arise. <sup>166</sup> The court also noted that if the employee does submit to the test, then the employer must show that the test complies with O.C.G.A. section 34-9-415 in order to rely upon the rebuttable presumption. <sup>167</sup>

In contrast, the court in *Dixon* found that *Thomas* does not require an employer to produce evidence that it complied with all the testing procedures of O.C.G.A. section 34-9-415 when no testing was done. The court found that the ALJ erred by ruling that the rebuttable presumption in O.C.G.A. section 34-9-17(b)(3) could not arise because the employer and insurer failed to produce evidence that the refused test would have been performed in the manner set forth in O.C.G.A. section 34-9-415. The case was remanded to the ALJ for a finding on whether the rebuttable presumption arose because Dixon's failure to submit to the test was unjustified. To

# I. Evidence of PPD Benefits

In *Mix v. Allied Readymix*,<sup>171</sup> the issue was whether there was sufficient evidence in the record to support the ALJ's finding of a ten percent permanent partial disability rating. After the employee was injured, the employer's physician gave the employee a five percent permanent impairment rating. The employee's independent expert opined that he had a fifteen percent rating.<sup>172</sup> The ALJ seemed to combine the ratings, and the appellate division affirmed that ruling, but

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163. 252 Ga. App. at 341, 556 S.E.2d at 247.
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<sup>164. 269</sup> Ga. 560, 501 S.E.2d 818 (1998).

<sup>165.</sup> Id. at 561, 501 S.E.2d at 819.

<sup>166.</sup> Id.

<sup>167.</sup> Id.

<sup>168. 252</sup> Ga. App. at 341, 556 S.E.2d at 248.

<sup>169.</sup> *Id.* at 341-42, 556 S.E.2d at 248.

<sup>170.</sup> Id.

<sup>171. 248</sup> Ga. App. 261, 546 S.E.2d 41 (2001).

<sup>172.</sup> Id. at 262, 546 S.E.2d at 43.

the superior court reversed, citing "no evidence in the record" to warrant the award.  $^{173}$ 

On appeal, the court noted that opinions of medical experts are advisory only and may be accepted or rejected by the Board. As the factfinder, the Board was entitled to review the opinions of both physicians and draw its own conclusions from that evidence and other evidence as to the proper permanent partial disability rating for [the employee]. Thus, when the question at issue is the degree of disability, an award is not unsupported by evidence where the trier of fact arrives at a specific percentage of disability from all the evidence in the case. Because the percentage of disability found by the Board lies within the range of all the evidence, the superior court improperly substituted its own findings for the findings of the Board.

## J. Change in Condition

Two fact-specific "change in condition" cases were addressed in this survey period. In the first case, which involved an employee's alleged return work for a partnership, it was not whether the employee was actually paid, but the amount of work and the nature of the employee's tasks that were significant. In ABB Risk Management Service/Georgia Kaolin v. Lord, the employer requested that the employee's benefits be suspended based on a change in condition for the better. Lord had been injured in 1984 while working for Georgia Kaolin and had been receiving benefits. In 1999 he formed a partnership with his daughter, retaining fifty-one percent ownership interest in the partnership, although he was not paid a salary. The partnership purchased seven convenience stores.

Over the next two years, Lord engaged in many activities in furtherance of the partnership's business, including driving his daughter to work, the bank, and the post office; dealing with suppliers; applying for

<sup>173.</sup> Id.

<sup>174.</sup> *Id.* at 262-63, 546 S.E.2d at 43 (citing Caraway v. ESB, Inc., 172 Ga. App. 349, 350, 323 S.E.2d 197, 198 (1984)).

<sup>175.</sup> *Id.* (citing Blevins v. Atl. Steel Co., 172 Ga. App. 557, 558, 323 S.E.2d 861, 862 (1984)).

<sup>176.</sup> Id., 546 S.E.2d at 44 (citing Turner v. Travelers Ins. Co., 114 Ga. App. 729, 730, 152 S.E.2d 783, 785 (1966)).

<sup>177.</sup> Id

<sup>178.</sup> Id. (citing Georgia-Pacific Corp. v. Wilson, 240 Ga. App. 123, 126, 522 S.E.2d 700, 704 (1999)).

<sup>179.</sup> ABB Risk Mgmt. Serv./Ga. Kaolin v. Lord, 254 Ga. App. 88, 561 S.E.2d 225 (2002).

<sup>180.</sup> Id

<sup>181.</sup> Id. at 88-89, 561 S.E.2d at 226.

a liquor license; signing tax returns; working in one of the convenience stores; and helping customers. The employer had video surveillance of Lord engaged in some of these activities. 182

To show a change in condition that would authorize a suspension of benefits, Georgia Kaolin had to establish "(1) that Lord had a physical change for the better, (2) that the change enabled him to return to work, and (3) that work was available to decrease or terminate his loss of income." The ALJ found that Georgia Kaolin met all three elements of their burden and allowed a suspension of benefits. Although the appellate division noted that the medical evidence concerning Lord's condition conflicted with the video surveillance evidence, the ALJ's decision was affirmed. <sup>184</sup>

The superior court, however, reversed the Board, applying the "common law" test for establishing the existence of an employee-employer relationship. The court concluded that Lord was not an employee of the partnership because there was "no evidence showing that [he] received income from the partnership, that he was subject to the control of the partnership, that the partnership had the right to terminate him, or that his services were of significant value to the partnership." <sup>186</sup>

The court of appeals reversed the superior court, noting that the superior court must construe the evidence in the light most favorable to the party prevailing before the Board. Because there was some evidence supporting the Board's conclusion, the superior court erred in disturbing that conclusion. Because there was some evidence supporting the Board's conclusion, the superior court erred in disturbing that conclusion.

In *Jones County Board of Education v. Patterson*, <sup>189</sup> the issue was whether benefits could be suspended based on a combination of factors demonstrating a change in condition for the better. The employee, Patterson, was a vice-principal earning fifty thousand dollars per year. He worked forty hours per week, nine months of the year. Patterson supplemented his income by working an additional fourteen hours per week as a maintenance man. He earned ninety dollars per week for his maintenance duties. <sup>190</sup>

<sup>182.</sup> Id. at 89, 561 S.E.2d at 226-27.

<sup>183.</sup> Id., 561 S.E.2d at 227; see also Smith v. Brown Steel, Ga. Associated Gen. Contractors Self-Insurers Trust Fund, 232 Ga. App. 698, 699, 503 S.E.2d 592, 593 (1998).

<sup>184.</sup> *Id*.

<sup>185.</sup> Id.

<sup>186.</sup> Id. at 90, 561 S.E.2d at 227.

<sup>187.</sup> Id. at 91, 561 S.E.2d at 227.

<sup>188.</sup> Id., 561 S.E.2d at 227-28.

<sup>189. 255</sup> Ga. App. 166, 564 S.E.2d 777 (2002).

<sup>190.</sup> Id. at 166-67, 564 S.E.2d at 778-79.

In June 1992 while doing maintenance work, Patterson fell off a ladder and injured his arm. He lost no time from his vice-principal's job, but was unable to work in maintenance. Because his maintenance job was "concurrent dissimilar" work, he received temporary total disability benefits for the loss of his maintenance income. In the following six years, he went to the doctor for his arm only three times. Patterson was released to resume painting, but could not lift more than fifty pounds and was cautioned to stay off ladders. He never resumed his maintenance duties and continued to receive his weekly benefits. In 1998 Patterson accepted a job as the principal of an elementary school. The job paid seventy thousand dollars per year. He worked fifty to sixty hours per week for all twelve months of the year.

The Board of Education contended that the weekly benefits should be suspended, alleging that Patterson had experienced a change in condition for the better. To authorize a suspension of benefits, the Board of Education had to show that Patterson experienced "a physical change for the better, that he could return to work because of that change, and that jobs were available that would decrease or end his loss of income."

At the hearing, the evidence showed that Patterson's new job as principal paid more than his two previous jobs combined. Further, his hours had increased as well. He made no effort to find part-time work. A vocational expert testified that twenty-one suitable part-time jobs were currently available within Patterson's work restrictions and that he was an excellent candidate for each of them. <sup>195</sup>

The ALJ agreed with the Board of Education and allowed suspension of benefits. The ALJ noted that Patterson was capable of returning to comparable part-time work, evidenced by the fact that his current job required more hours than his previous two combined. Further, he was making more money, which showed an economic change for the better. Finally, the ALJ found that while Patterson was capable of performing a second job, he chose not to work a second job for reasons not related

<sup>191.</sup> Id. at 167, 564 S.E.2d at 779.

<sup>192.</sup> *Id.* If an employee is working more than one job, and is injured on one of his jobs, the responsible employer will address whether the concurrent employment is similar or dissimilar. If the concurrent employments are not similar, then the employee may continue working at the dissimilar first job while receiving compensation for the disability related to his second job. Owens-Illinois, Inc. v. Lewis, 150 Ga. App. 640, 640-41, 258 S.E.2d 293, 294 (1979).

<sup>193. 255</sup> Ga. App. at 167, 564 S.E.2d at 779.

<sup>194.</sup> Id. at 168, 564 S.E.2d at 779.

<sup>195.</sup> Id.

to his disability. $^{196}$  The court of appeals affirmed, holding that the employer met its burden of proving that Patterson had undergone a change in condition for the better. $^{197}$ 

# K. Rycroft Defense

In Shepherd Center v. Williams, <sup>198</sup> the court addressed the impact of an employee's willful failure to disclose a pre-existing physical condition. Williams had a history of back pain dating back to a 1986 workers' compensation injury, including "degenerative changes and bulges at L3-4 and L5-S1 with a central herniation at L4-5." Subsequent to the 1986 injury, he was out of work for two years with back pain and was advised to avoid work that required heavy lifting. After settling his 1986 claim for \$30,000, he returned to the work force. Despite the medical advice to avoid heavy lifting, Williams later took several jobs that required heavy lifting, including a job delivering hospital beds and wheelchairs. In 1997 he applied for a physically demanding job with Georgia Wheelchair, a subsidiary of Shepherd Center, as a delivery technician to home-deliver hospital beds, wheelchairs, walkers, and the like. <sup>200</sup>

He signed a job application that stated, "As a condition of employment, a medical history and examination will be completed. I understand that the results of the medical history and examination must be appropriate for the position for which I am applying." Williams filled out a medical history but denied having ever sustained a back injury and ever having received compensation for any injury or liability. After a routine medical examination, which revealed nothing unusual, Williams was hired by Shepherd.<sup>202</sup>

A few weeks after beginning work, Williams tripped on some stairs and injured his back. He missed only two days from work, but his back continued to hurt. Seven months later, he transferred to another department at Shepherd, where he was responsible for the hospital's equipment, another physically demanding position. In November 1998 he stepped out of an elevator and fell, injuring his back.<sup>203</sup> An MRI confirmed "degenerative disc disease at L3-4 and L4-5 along with a disc

<sup>196.</sup> Id. at 166-68, 564 S.E.2d at 778-79.

<sup>197.</sup> Id.

<sup>198. 251</sup> Ga. App. 560, 553 S.E.2d 872 (2001).

<sup>199.</sup> Id. at 560, 553 S.E.2d at 873.

<sup>200.</sup> Id. at 560-61, 553 S.E.2d at 873-74.

<sup>201.</sup> Id. at 561, 553 S.E.2d at 874.

<sup>202.</sup> Id.

<sup>203.</sup> Id.

bulge at L5-S1."<sup>204</sup> Williams returned to work at light duty but was recommended for surgery. He filed a workers' compensation claim at that time. During the employer's investigation of Williams's medical history, the employer discovered the 1986 back injury. Williams was fired because he lied during his application process.<sup>205</sup>

The employer also defended the workers' compensation claim, citing a  $Rycroft^{206}$  defense. The employer had the burden to show that "(1) the employee knowingly and wilfully made a false representation as to his physical condition; (2) the employer relied upon the false representation[,] and this reliance was a substantial factor in the hiring; and (3) there was a causal connection between the condition falsely represented and the current injury."

At the hearing, the Shepherd Center's Director of Human Resources testified that if Williams had been truthful about his back condition, it would have been further investigated by Shepherd's physician. Based on the physician's findings, Shepherd could have rescinded the offer, offered a lighter job, or attempted to reasonably accommodate Williams's restrictions in the job for which he was applying. The Director testified that she would "have to go with the doctor's decision." 209

The ALJ determined that all elements of the *Rycroft* defense were satisfied and denied the claim. The appellate division affirmed, but the superior court reversed the case, concluding that Williams's truthful answer would have resulted in only further medical inquiry. The superior court concluded that Shepherd did not prove that Williams would not have been hired if he had answered truthfully; thus, his false answers were not a "substantial factor" in the employment decision. <sup>210</sup>

The court of appeals reversed the superior court, noting that *Rycroft* cannot be read in such a narrow "formulaic' fashion."<sup>211</sup> The court stated that a truthful answer will not and "should not result in an 'all or nothing' determination [that] precludes employment completely..."<sup>212</sup> In fact, further medical evaluation is consistent with the Americans with Disabilities Act of 1990<sup>213</sup> and with sound public policy

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204. Id.
205. Id.
206. Ga. Elec. Co. v. Rycroft, 259 Ga. 155, 378 S.E.2d 111 (1989).
207. 251 Ga. App. at 562, 553 S.E.2d at 874 (citing Rycroft, 259 Ga. at 158, 378 S.E.2d at 114).
208. Id., 553 S.E.2d at 874-85.
209. Id., 553 S.E.2d at 875.
210. Id. at 562-63, 553 S.E.2d at 875.
211. Id.
212. Id.
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42 U.S.C. §§ 12101-12213 (1994).

to deter discrimination based on a physical disability.<sup>214</sup> The court found that an admission on an employment application of a prior physical condition, which results in further medical evaluation of the condition and a hiring recommendation based upon that admission, is in itself a "substantial factor" in the hiring process, regardless of the ultimate employment decision.<sup>215</sup> This decision provides further guidance on the evidence necessary for an employer to satisfy the elements of the *Rycroft* defense, but also demonstrates how difficult an employer's burden can be in attempting to meet all of these elements.

## L. Statute of Limitations

In a case involving a 1989 injury, the supreme court revisited the statute of limitations applicable to "change in condition" cases. In *City of Poulan v. Hodge*, the court of appeals addressed the language of the pre-1990 statute of limitations. In *Hodge* the employee suffered a back injury on January 9, 1989. He was paid temporary total disability benefits for two months until March 20, 1989, when he returned to work at light duty. He was eventually released to full duty work on May 22, 1989. No finding of maximum medical improvement ("MMI") was ever made by the treating doctor, although the doctor did check "no" on a medical report as to whether the employee had any permanent disability. 1919

The employee's back continued to worsen. In June 1992 he was diagnosed with a herniated disc, and he underwent surgery for this disc on November 4, 1992. Dr. Hornback, a new treating doctor, opined that the employee did not reach MMI and permanent partial disability ("PPD") status until after the 1992 surgery.<sup>220</sup>

On August 12, 1999, the employee filed a claim for change in condition and for PPD benefits. He contended that an MMI determination must be made prior to a determination of either a permanent total disability or permanent impairment rating. Because MMI had not been assessed until after his surgery, the court determined the statute had not run.<sup>221</sup> The employer contended that the statute of limitations in

<sup>214. 251</sup> Ga. App. at 562-63, 553 S.E.2d at 875.

<sup>215.</sup> Id. at 563-64, 553 S.E.2d at 875.

<sup>216.</sup> City of Poulan v. Hodge, 275 Ga. 483, 569 S.E.2d 499 (2002), affg in part and rev'g in part 251 Ga. App. 500, 554 S.E.2d 233 (2001) (construing O.C.G.A. § 34-9-104 (1998)).

<sup>217. 251</sup> Ga. App. 500, 554 S.E.2d 233 (2001).

<sup>218.</sup> Id. at 500-01, 554 S.E.2d at 234.

<sup>219.</sup> Id. at 501, 554 S.E.2d at 234-35.

<sup>220.</sup> Id.

<sup>221.</sup> Id. at 502, 554 S.E.2d at 235.

O.C.G.A. section  $34-9-104(b)^{222}$  barred the claim for any kind of benefits because more than two years had elapsed since the last payment of income benefits "was actually made."

Although the ALJ and the appellate division agreed that the statute of limitations barred the claim, the court of appeals determined that under case law<sup>224</sup> and statutes that were applicable on the date of the injury, the MMI determination was the condition precedent to rendering a legal disability rating that causes the statute of limitations to commence running.<sup>225</sup> The court held that without a finding of MMI prior to or at the same time a disability rating is rendered, the statute of limitations does not begin to run because there exist potential unpaid claims as to other benefits due.<sup>226</sup>

The employer appealed to the supreme court, which granted certiorari to determine whether the failure to have the MMI determination tolls the statute of limitations. The court of appeals noted that legal determination of PPD benefits to which a worker is entitled cannot be calculated until an employee reaches MMI because the permanency of the injury might not be ascertainable before that point. However, the court of appeals declined to find that the language of the Act required a tolling of the statute until the MMI finding was made. The supreme court agreed with the court of appeals holding but not with its reasoning, and held that the proper inquiry would be to allow the ALJ to consider that no MMI finding was ever made. Instead, the court stated that this is only one evidentiary factor that the ALJ is entitled to consider in determining whether the employee carried his burden of showing that he is "due" permanent partial disability benefits.

222. O.C.G.A. § 34-9-104(b) (1998). The applicable Code section in effect in 1989 was O.C.G.A. § 34-9-82(a), which provides:

The right to compensation shall be barred unless a claim therefore is filed within one year after injury, except that if payment of weekly benefits has been made or remedial treatment has been furnished by the employer on account of the injury, the claim may be filed within one year after the date of the last remedial treatment furnished by the employer or within two years after the date of the last payment of weekly benefits.

- 223. 251 Ga. App. at 502, 554 S.E.2d at 235.
- 224. State v. Birditt, 181 Ga. App. 356, 357-58, 352 S.E.2d 203, 204-05 (1986).
- 225. 251 Ga. App. at 502, 544 S.E.2d at 236.
- $226. \quad Id.$
- 227. 275 Ga. at 483, 569 S.E.2d at 500.
- 228. Id.
- 229. Id. at 485, 569 S.E.2d at 501.
- 230. Id. at 485-86, 569 S.E.2d at 501.

#### M. Standard of Review

Satilla Regional Medical Center v. Corbett<sup>231</sup> examined whether the superior court properly remanded a case to the ALJ for further consideration of the medical evidence introduced during a hearing. The employee had suffered two compensable on-the-job neck injuries in 1994 and 1998, but in this case, she was attempting to link right wrist and thumb problems to her job as well. The ALJ found that the employee had not carried her burden of proving entitlement to benefits for alleged carpal tunnel syndrome based upon the complaints documented in her treating physicians' records. The appellate division of the Board agreed. In their respective awards, neither the ALJ nor the appellate division specifically mentioned certain handwritten notes that the employee made and upon which she relied in support of her claim. On appeal, the superior court reversed the Board's decision and remanded the case to the ALJ, directing the ALJ to reconsider the issues based upon all of the medical evidence, including the handwritten notes that were not specifically referenced in the Board awards.<sup>232</sup>

The court of appeals held that the superior court erred on two counts. First, the court cited to the "any evidence" standard of review, and held that the superior court failed to apply the "any evidence" rule when it reversed the Board. There was, the court stated, not only ample medical evidence in the record to support the Board's findings with respect to the noncompensability of the wrist complaints, but there was also no evidence that the Board had failed to consider the handwritten notes submitted into evidence by the employee. On the contrary, it was evident from the award that the ALJ had "carefully considered most if not all of Corbett's substantial medical records." Thus, as this case makes clear, there is no requirement that the Board specifically refer to every single piece of medical evidence in its findings of fact in order for its award to pass appellate scrutiny.

<sup>231. 254</sup> Ga. App. 576, 562 S.E.2d 751 (2002).

<sup>232.</sup> Id. at 576-77, 562 S.E.2d at 752-53.

<sup>233.</sup> Id. at 578-79, 562 S.E.2d at 754.

<sup>234.</sup> See Owens-Brockway Packaging, Inc. v. Hathorn, 227 Ga. App. 110, 111, 488 S.E.2d 495, 496-97 (1997).

<sup>235. 254</sup> Ga. App. at 577-78, 562 S.E.2d at 755-56.

<sup>236.</sup> Id.

<sup>237.</sup> Id. at 578, 562 S.E.2d at 753.

<sup>238.</sup> Id.

The second error committed by the superior court in *Corbett* was its remand of the case directly to the ALJ.<sup>239</sup> The court of appeals cited O.C.G.A. section 34-9-105(d),<sup>240</sup> which allows the superior court to "recommit the controversy to the *board* for further hearing or proceedings . . . ."<sup>241</sup> This, the court stated, authorizes the superior court to remand only to the appellate division of the Board, not to the ALJ.<sup>242</sup>

# N. Statutory Employer

Every year there is at least one injured employee who tries to climb the statutory employer ladder in order to find workers' compensation coverage where there is otherwise none.<sup>243</sup> In Murph v. Maynard Fixturecraft, Inc., 244 there were several potentially responsible parties. MAPCO, a Delaware corporation, was building a travel center on property it owned in Georgia and hired Murphy & Sons as the general contractor. Because Murphy & Sons did not do refrigeration work, MAPCO hired Maynard Fixturecraft, a Tennessee company with no Georgia employees, to handle the purchase and installation of refrigeration units at the travel center. Maynard, in turn, hired sole proprietor Huff to actually install the units. Huff did not regularly employ three or more employees in Georgia, and he, therefore, did not have any workers' compensation insurance coverage. 245 While working for Huff installing the refrigeration units, Murph fell from a ladder and was seriously injured. He brought suit against all of the above entities, trying to find someone who would pay his substantial lost time and medical bills. Huff was dismissed from the claim early on, as he did not have the requisite number of employees to even be subject to the Act. The ALJ, appellate division, and superior court all agreed that MAPCO, Murphy & Sons, and Maynard should also be dismissed because none were the statutory employer of Murph.<sup>246</sup> The court of appeals agreed with the Board, but only in part.<sup>247</sup> It affirmed that MAPCO, as owner of the premises where Murph was injured, could not be responsible because an owner who is in possession or control of the premises is

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239. Id.
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<sup>240.</sup> O.C.G.A. § 34-9-105(d) (1998).

<sup>241. 254</sup> Ga. App. at 578-79, 562 S.E.2d at 754 (quoting O.C.G.A. § 34-9-105(d)).

<sup>242.</sup> Id., 562 S.E.2d at 753-54.

<sup>243.</sup> O.C.G.A. § 34-9-8(a) (1998).

<sup>244. 252</sup> Ga. App. 483, 555 S.E.2d 845 (2001).

<sup>245.</sup> O.C.G.A. § 34-9-2(a) (1998).

<sup>246. 252</sup> Ga. App. at 483, 555 S.E.2d at 846.

<sup>247.</sup> Id. at 486, 555 S.E.2d at 848.

generally not a statutory employer under the Act.<sup>248</sup> MAPCO was also not a statutory employer under O.C.G.A. section 34-9-8(a), 249 the court stated, because it was not acting as a general contractor for the particular work that Murph was performing when he was injured, as is specifically required by the statute.<sup>250</sup> As to Maynard, however, the court of appeals disagreed with the Board's finding that it could not be a statutory employer.<sup>251</sup> The court held that Maynard was estopped to deny coverage as a statutory employer because it had contracted with MAPCO to obtain workers' compensation coverage for all its employees and to require its subcontractors to obtain workers' compensation coverage for their employees.<sup>252</sup> Murph was a third-party beneficiary to Maynard's agreement with MAPCO; therefore, Maynard had to provide workers' compensation coverage, either personally or through their insurer, for Murph. 253 The appellate court thus found a legal basis to provide a seriously injured employee with much needed coverage under the Act.254

# O. Subrogation

As we enter into the second decade of the resurrection of workers' compensation subrogation in Georgia, <sup>255</sup> the number of subrogation cases issued by the appellate courts continues to rise. This survey year brought six such cases, most of which only serve to further erode the employer's and insurer's ability to obtain a recovery under O.C.G.A. section 34-9-11.1. <sup>256</sup>

*Johnson v. Comcar Industries, Inc.*<sup>257</sup> established the bright-line rule that a workers' compensation subrogation lien attaches only to benefits paid pursuant to Act.<sup>258</sup> In this case, the injured employee was a

<sup>248.</sup> *Id.* at 484, 555 S.E.2d at 846-47 (citing Yoho v. Ringier of Am., Inc. 263 Ga. 338, 339-41, 434 S.E.2d 57, 59-60 (1993)).

<sup>249.</sup> O.C.G.A. § 34-9-2(a).

<sup>250.</sup> Id.

<sup>251. 252</sup> Ga. App. at 484-85, 555 S.E.2d at 847-48. The Board had dismissed Maynard because it had fewer than three regular Georgia employees and was, therefore, not subject to the Workers' Compensation Act. *Id.* at 484, 555 S.E.2d at 847.

<sup>252.</sup> Id. at 485, 555 S.E.2d at 847.

<sup>253.</sup> Id.

<sup>254.</sup> Id. at 485-86, 555 S.E.2d at 848.

<sup>255.</sup> The right to subrogation in the workers' compensation context was reintroduced by the legislature on July 1, 1992. Subrogation was originally made part of the Georgia Workers' Compensation Act in 1920, but that Code section was repealed in 1972. See generally CGU Insurance Co. v. Sabel Indus., 255 Ga. App. 236, 564 S.E.2d 836 (2002).

<sup>256.</sup> O.C.G.A. § 34-9-11.1 (1998).

<sup>257. 252</sup> Ga. App. 625, 556 S.E.2d 148 (2001).

<sup>258.</sup> Id. at 626, 556 S.E.2d at 149.

resident of Virginia and was injured in the course and scope of his employment while driving in Georgia. He was paid workers' compensation benefits under Virginia workers' compensation law. The insurer, Protective Insurance Company, intervened in the employee's third party claim, attempting to assert its subrogation lien under O.C.G.A. section 34-9-11.1 for the benefits it had paid to the employee in Virginia.<sup>259</sup>

The court of appeals held that "the plain meaning of O.C.G.A. § 34-9-11.1(b) allows subrogee employers and their insurers to recover workers' compensation benefits only to the extent that these have been paid . . . under the Georgia Workers' Compensation Act." Thus, there is no subrogation for benefits paid to an injured employee under the workers' compensation laws of another state.  $^{261}$ 

The cases of *Hartford Insurance Co. v. Federal Express*, <sup>262</sup> *CGU v. Sabel Industries*, <sup>263</sup> and *Warner Robins v. Baker* <sup>264</sup> illustrate further difficulties that employers and insurers face in obtaining satisfaction of a subrogation lien. In the first case, tortfeasor Federal Express settled with the injured employee, Binyard, for \$75,000 just before the case went to trial. Hartford had intervened to protect its subrogation lien; therefore, a bench trial was held on the issue of full and complete compensation. The trial court found that the employee had not been fully and completely compensated, and it thus denied the lien. Hartford appealed. <sup>265</sup>

The court of appeals cited to the substantial medical evidence and testimony presented by Hartford that established that the accident was relatively minor, that the employee had not received significant injuries, and that he was exaggerating the nature and extent of his pain, disability, and need for medical treatment. However, the appellate court did not overturn the trial court's findings of fact regarding the absence of full and complete compensation. He must defer to the trial court's factual findings . . . unless they are clearly erroneous. . . . [T]here was adequate evidence supporting the trial court's determination that the medical testimony adduced did not unequivocally refute the seriousness or extent of [Binyard's] injuries. In light of this

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259. Id. at 625-26, 556 S.E.2d at 149.
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<sup>260.</sup> Id. at 626, 556 S.E.2d at 149.

<sup>261.</sup> Id.

<sup>262. 253</sup> Ga. App. 520, 559 S.E.2d 530 (2002).

<sup>263. 255</sup> Ga. App. 236, 564 S.E.2d 836 (2002).

<sup>264. 255</sup> Ga. App. 601, 565 S.E.2d 919 (2002).

<sup>265. 253</sup> Ga. App. at 520, 559 S.E.2d at 530-31.

<sup>266.</sup> Id. at 520-21, 559 S.E.2d at 531.

<sup>267.</sup> Id. at 522, 559 S.E.2d at 531-32 (quotation omitted).

<sup>268.</sup> *Id.* (quotation omitted).

decision, it is still not clear exactly how much evidence the employer and insurer must present to prove that an injured employee was fully and completely compensated.

Sabel is another case in which the court of appeals refused to disturb a trial court's finding of full and complete compensation. The employee, Harrison, suffered catastrophic injuries, including partial amputation of one leg. He settled his claim with the tortfeasor for \$4,500,000. The employer and insurer introduced evidence from a vocational rehabilitation expert, as well as an experienced workers' compensation mediator and former ALJ, to establish the actual value of the claim in the hopes of convincing the trial court that the employee had been adequately compensated even for his very serious injuries. The trial court, nevertheless, denied the subrogation lien, in part, because no evidence was presented on the value of Harrison's wife's claim for loss of consortium and in part because the court found the employer's experts to be "speculative." The court of appeals affirmed this decision. The court of appeals affirmed this decision.

Sabel also dealt with the issue of whether a subrogation lien covers workers' compensation benefits that have not yet been paid to the employee but undoubtedly will be paid in the future. CGU had already paid over \$212,000 in benefits to Harrison under the Act, and because it was a catastrophic injury, CGU expected benefits to be ongoing in significant amounts for many years to come. CGU obviously wished to recover for those future payments as well.<sup>272</sup> In rejecting CGU's argument that the lien would extend to future benefits due, the court of appeals examined the current version of O.C.G.A. section 34-9-11.1 and compared it to its predecessor statutes.<sup>273</sup> The court pointed out that prior versions of the subrogation code section granted the employer and insurer recovery for benefits "payable" to the employee, while the current statute references recovery "not to exceed the actual amount of compensation paid."274 Thus, it was clearly not the legislature's intent in enacting the current version of Georgia's subrogation statute to confer a lien against benefits not yet paid to the injured employee.

*Baker* illustrates yet another full and complete compensation issue as well as other important issues facing the parties to subrogation cases. Baker, a meter reader for the City of Warner Robins, was hurt in an onthe-job car accident. He filed suit against the tortfeasor for his injuries.

<sup>269. 255</sup> Ga. App. at 237, 564 S.E.2d at 837.

<sup>270.</sup> Id. at 238-39, 564 S.E.2d at 837-38.

<sup>271.</sup> Id. at 241, 564 S.E.2d at 840.

<sup>272.</sup> Id. at 243-44, 564 S.E.2d at 840-41.

<sup>273.</sup> Id.

<sup>274.</sup> Id. at 242, 564 S.E.2d at 840 (citing O.C.G.A. § 34-9-11.1(b) (1998)).

Although Warner Robins made Baker aware of its subrogation lien, it never intervened in the third-party claim. Baker settled with the tortfeasor for ninety thousand dollars, and then filed a motion to extinguish his employer's subrogation lien. In support of his motion, he argued that the city had waived the lien and that he had not been fully and completely compensated for all his losses. The trial court held a hearing, left the record open for fifteen days after the hearing for the submission of additional evidence, and then granted Baker's motion and extinguished the lien.<sup>275</sup> The City of Warner Robins appealed.

One by one, the court of appeals rejected each argument advanced by the City and affirmed the trial court's decision to deny the employer's lien.<sup>276</sup> First, the City asserted that it was prejudiced because it did not receive sufficient notice that the trial court hearing would be an evidentiary one.<sup>277</sup> The court disagreed, stating that the City "should have been aware that evidence would be presented at the hearing, because the issue for decision was whether the [Clity could enforce its subrogation lien. Ultimately, this was dependent upon whether Baker had been fully and completely compensated, which is a mixed question of law and fact."278 Additionally, the court pointed out that the City had ample time after the hearing to submit evidence in support of its case but did not do so.<sup>279</sup> Secondly, the City asserted that the burden of proof on the full and complete compensation issue had been misplaced by the trial court. The City asserted that Baker's settlement prior to trial meant that he—not the city—carried the burden of proof. The court of appeals clarified that the employer and insurer always carry this burden of proof regardless of whether the case goes to a jury trial or is settled by the employee without a trial.<sup>281</sup> Thus, there was no error as to who bore the burden of proving that the City was entitled to recovery of its lien.282

Finally, the court considered whether the trial court erred in determining that Baker had not been fully and completely compensated. As in *Federal Express* and *Sabel*, the outcome was not favorable to the employer.<sup>283</sup> In support of its denial of the lien, the court cited to the following facts: Baker was "permanently disabled, receive[d] Social

<sup>275. 255</sup> Ga. App. at 601-02, 565 S.E.2d at 921.

<sup>276.</sup> *Id.* at 605, 565 S.E.2d at 923.

<sup>277.</sup> Id. at 602, 565 S.E.2d at 921.

<sup>278.</sup> Id

<sup>279.</sup> Id.

<sup>280.</sup> *Id.* at 603, 565 S.E.2d at 922.

<sup>281.</sup> Id.

<sup>282.</sup> Id.

<sup>283.</sup> Id

Security disability benefits, and [was] unable to work;" in the settlement, he received "only five years of former salary" less attorney fees and costs; he had undergone two expensive surgeries "with the possibility of more expenses in the future[,]" and he was suffering from depression, alcoholism, and the like. 284 Under these circumstances, the court held that the trial court did not abuse its discretion in holding that the City did not prove full and complete compensation. 285

The subrogation statute, O.C.G.A. section 34-9-11.1(d), provides for reasonable attorney fees for the attorney representing the injured worker in the tort claim. 286 If the employer and insurer retain counsel to intervene to protect their subrogation rights, then attorney fees may be apportioned between counsel for the employee and counsel for the employer and insurer.<sup>287</sup> In Simpson v. Southwire Co., <sup>288</sup> a dispute arose about whether counsel for the employer and insurer was entitled to take a fee pursuant to this Code section. Simpson was injured and received workers' compensation benefits from Southwire, his employer. He filed suit against the third party tortfeasor, Transus, and the employer intervened to protect its lien. The employee's claim against Transus was settled just prior to trial for \$300,000 of which \$100,000 was for attorney fees. Southwire attempted to prove full and complete compensation so that it could recover on its subrogation lien, but ultimately failed to do so. It nevertheless petitioned the court for apportionment of the \$100,000 attorney fees generated by the settlement of the claim.289

The trial court awarded Southwire attorney fees, but the court of appeals disagreed with this course of action and reversed.<sup>290</sup> In so doing, the court looked to the plain wording of O.C.G.A. section 34-9-11.1(d) and set forth three prerequisites for an employer's and insurer's

<sup>284.</sup> Id. at 605, 565 S.E.2d at 923.

<sup>285.</sup> Id.

<sup>286.</sup> O.C.G.A. § 34-9-11.1(d) (1998).

<sup>287.</sup> Id. O.C.G.A. § 34-9-11.1(d) states,

In the event of a recovery from such other person by the injured employee . . . by judgment, settlement, or otherwise, the attorney representing such injured employee . . . shall be entitled to a reasonable fee for services; provided, however, that if the employer or insurer has engaged another attorney to represent the employer or insurer in effecting recovery against such other person, then a court of competent jurisdiction shall upon application apportion the reasonable fee between the attorney for the injured employee and the attorney for the employer or insurer in proportion to services rendered.

<sup>288. 249</sup> Ga. App. 406, 548 S.E.2d 660 (2001).

<sup>289.</sup> Id. at 406-07, 548 S.E.2d at 660-61.

<sup>290.</sup> Id. at 407, 548 S.E.2d at 662.

recovery of attorney fees.<sup>291</sup> First, "the employee must recover from the third-party tortfeasor both plaintiff's damages and lien damages."292 This, of course, is the full and complete compensation requirement that the employer must prove and which Southwire had been unable to prove. Second, the court stated, "[T]he employer or the employer's insurer must have engaged another attorney to pursue its authorized recovery."293 Southwire obviously did meet this criteria. Finally, the court noted, "[A]n application for apportionment of attorney[] fees attributable to such recovery must be filed."294 In this instance, Southwire was seeking to obtain a fee attributable to the employee's settlement of his third-party claim and not to the recovery on the subrogation lien.<sup>295</sup> This was a crucial distinction, leading the court of appeals to conclude that, "O.C.G.A. [section] 34-9-11.1 read as a whole does not permit an apportionment of attorney fees in the absence of the employer's recovery on its subrogation lien after the injured employee has been fully and completely compensated."296

The only subrogation decision issued in the past year that is arguably favorable to the employer and insurer is *Georgia Electric Membership Corp. v. Hi-Ranger, Inc.*<sup>297</sup> In that case, the injured employee, Franks, and his employer, Georgia EMC ("GEMC"), brought suit jointly against Hi-Ranger in federal district court. Franks settled with Hi-Ranger before trial, and he executed a dismissal with prejudice and a limited release, which specifically stated that GEMC's claim against Hi-Ranger would remain pending. Nevertheless, the district court held that the employee's settlement with Hi-Ranger extinguished GEMC's claim for recovery on its subrogation lien. Therefore, it granted summary judgment to Hi-Ranger.<sup>298</sup>

The Eleventh Circuit Court of Appeals certified the following question to the Georgia Supreme Court: "[W]hether a claim for repayment of workers' compensation benefits against a third-party tortfeasor is extinguished by the employee's settlement of his claims and execution of a limited release." The supreme court concluded that GEMC's claim was not extinguished because the release executed by Franks specifically stated that GEMC was not part of the release and that

<sup>291.</sup> Id.

<sup>292.</sup> Id.

<sup>293.</sup> Id. at 408, 548 S.E.2d at 661-62.

<sup>294.</sup> Id., 548 S.E.2d at 662.

<sup>295.</sup> Id. at 409, 548 S.E.2d at 662.

<sup>296.</sup> Id. at 407, 548 S.E.2d at 661.

<sup>297. 275</sup> Ga. 197, 563 S.E.2d 841 (2002).

<sup>298.</sup> Id. at 197, 563 S.E.2d at 842.

<sup>299.</sup> Id.

GEMC's subrogation claim against Hi-Ranger would remain pending before the court. 300 In reaching this decision, the court compared subsections (b) and (c) of the subrogation statute.<sup>301</sup> GEMC argued that if an employer proceeds against a tortfeasor under subsection (c),  $^{302}$  it is not required to prove full and complete compensation in order to recover on its lien.  $^{303}$  The court disagreed, stating that the full and complete compensation rule applies to all subsections of O.C.G.A. section 34-9-11.1.<sup>304</sup> However, the court did point out that it would be possible for an employee to waive his right to have the employer prove full and complete compensation.305 In the event an employer files suit under subsection (c) and the employee chooses not to intervene to protect his recovery, the court stated, then the employer is not required to prove full and complete compensation; it is only required to pay the employee anything it recovers above and beyond the amount of its lien.<sup>306</sup> In the instant case, the court found that Franks had waived his right to have GEMC prove full and complete compensation.307

<sup>300.</sup> Id. at 199, 563 S.E.2d at 844.

<sup>301.</sup> Id. at 197, 563 S.E.2d at 843.

<sup>302.</sup> O.C.G.A. section 34-9-11.1(c) (1998) allows an employer to bring a claim directly against the third-party tortfeasor when the employee does not do so within one year from the date of accident.

<sup>303. 275</sup> Ga. at 198, 563 S.E.2d at 843.

<sup>304.</sup> *Id*.

<sup>305.</sup> Id. at 199, 563 S.E.2d at 844.

<sup>306.</sup> Id. at 198-99, 563 S.E.2d at 844.

<sup>307.</sup> Id. at 199, 563 S.E.2d at 845.