

Workers' Compensation

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This survey period brought minimal changes in workers' compensation legislation, but several interesting decisions were issued. Among those decisions are cases confirming the exclusive remedy provisions of the Workers' Compensation Act (the "Act"),¹ a case involving an injury that occurred when an employee was on a lunch break, and several statute of limitations cases.

I. LEGISLATION

Since the enactment of the Americans with Disabilities Act,² the legislature has been discussing whether the Subsequent Injury Trust Fund ("SITF")³ provides any benefits worth the costs assessed against insurers and businesses. Without a great deal of fanfare, the legislature passed a bill providing that the SITF shall cease accepting claims for injuries occurring on or prior to June 30, 2008.⁴ Meanwhile, insurers and self-insurers will continue to pay assessments to the SITF to pay for existing claims.⁵ Although the current change in the law calls for the demise of the SITF, a possibility exists that a different course may be

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1. O.C.G.A. §§ 34-9-1 to -421 (2004).
2. 42 U.S.C. §§ 12101-12213 (2000).
3. O.C.G.A. § 34-9-350 (2004).
4. O.C.G.A. § 34-9-367 (2004).
5. *Id.*

taken. The legislature required the SITF to complete an actuarial study to determine its unfunded liability by January 1, 2005.⁶ On December 31, 2020, the SITF is discharged of its duties, except to administer any remaining claims.⁷

The only other significant legislative change during the survey period dealt with guardianship. In workers' compensation claims, guardians are appointed in two situations: if the claimant is a minor child or if the claimant is legally incapacitated.⁸ Since the imposition of limitations on the board's authority to appoint guardians in 1996, the administration of claims involving minors and incompetents has been more problematic.

The 2004 legislature made two amendments to the Official Code of Georgia Annotated ("O.C.G.A.") section 34-9-226⁹ concerning the appointment of guardians in workers' compensation claims.¹⁰ Before the 2004 amendment, only the probate court of the county in which the minor child or the incapacitated employee lived could appoint a guardian.¹¹ The amendment now provides for the appointment of an appropriate guardian by "a court of competent jurisdiction outside the State of Georgia."¹²

O.C.G.A. section 34-9-226 also provides for the appointment of temporary guardians in cases settled for less than the statutorily mandated maximum amount.¹³ The 2004 amendment to the code section increased this maximum amount from a net settlement of \$25,000 to \$50,000.¹⁴

II. EXCLUSIVE REMEDY DOCTRINE

The attack on the exclusive remedy doctrine¹⁵ has continued for almost two decades, but the doctrine continues to be an area in which there is clarity and simplicity. One recent decision emphasized that the boundaries of the exclusive remedy doctrine extend to alleged injuries that are not compensable under the Act, so long as the injuries are

6. *Id.*

7. *Id.*

8. O.C.G.A. § 34-9-85 (2004).

9. O.C.G.A. § 34-9-226 (2004).

10. *Id.*

11. O.C.G.A. § 34-9-226 (2000), amended by O.C.G.A. § 34-9-226(a) (2004).

12. O.C.G.A. § 34-9-226.

13. *Id.*

14. *Id.*

15. O.C.G.A. § 34-9-11 (2004).

ancillary to a physical occurrence arising out of and in the course of employment.¹⁶

In *Lewis v. Northside Hospital, Inc.*,¹⁷ Patricia Lewis and her co-worker were engaged in a heated argument regarding the handling of work-related material when the co-worker either punched or poked Lewis in the back, which resulted in a battery. Both employees were terminated. Lewis sued not only the co-worker but her employer as well, claiming that the employer was liable for negligent retention and respondeat superior. The trial court granted the employer's motion for summary judgment based on the exclusive remedy doctrine.¹⁸

Lewis appealed, arguing that she suffered mental injuries, which are not compensable under the Act, and therefore, her civil action regarding those injuries should not have been barred by the Act's exclusive remedy provision. Historically, nonphysical mental injuries arising out of a physical occurrence have fallen within the purview of the Act for purposes of the exclusive remedy doctrine, while those claims with no connection to a physical injury have not.¹⁹

In *Bryant v. Wal-Mart Stores, Inc.*,²⁰ the court of appeals held that just because "injuries to . . . peace, happiness, and feelings may not be compensable under the Act does not take those injuries out of the purview of the Act."²¹ The court in *Bryant* concluded that the nonphysical injuries were barred by the exclusive remedy doctrine, even though they were not compensable under the Act.²² A contrary result was reached in *Oliver v. Wal-Mart Stores, Inc.*,²³ when the injury alleged was exclusively nonphysical, involving libel, slander, and intentional infliction of emotional distress.²⁴ The court concluded that the claims were not barred by the Act's exclusive remedy provisions.²⁵

In *Lewis*, however, the court of appeals affirmed the trial court's decision.²⁶ Because Lewis was "injured" in a work-related incident involving a physical battery, no matter how slight, and because her

16. *Lewis v. Northside Hosp. Inc.*, 267 Ga. App. 288, 289, 599 S.E.2d 267, 268 (2004).

17. 267 Ga. App. 288, 599 S.E.2d 267 (2004).

18. *Id.* at 289, 599 S.E.2d at 268.

19. *Id.* at 290, 599 S.E.2d at 269.

20. 203 Ga. App. 770, 417 S.E.2d 688 (1992).

21. *Id.* at 772, 417 S.E.2d at 691.

22. *Id.*

23. 209 Ga. App. 703, 434 S.E.2d 500 (1993).

24. *Id.* at 704, 434 S.E.2d at 500-01.

25. *Id.*

26. *Lewis*, 267 Ga. App. at 289, 599 S.E.2d at 268.

claim for nonphysical damages arose out of that battery, the exclusive remedy provision applied and barred her civil suit.²⁷

III. CASE LAW

A. *Appeal to Superior Court*

In *Fulton County Board of Education v. Taylor*,²⁸ the issue was whether the superior court had jurisdiction to remand a case with directions for the court to answer three questions requiring factual findings and to change the award as deemed necessary based on the three answers.²⁹ Before the superior court heard the case, the administrative law judge (“ALJ”) found the claimant had conducted a diligent job search, and medical benefits and attorney fees were due. The appellate division substantially revised the factual findings and partially reversed the ALJ’s award. Thus, both parties appealed to superior court.³⁰ Being dissatisfied with the superior court’s direction, the court of appeals granted Fulton County Board of Education’s appeal.³¹

Before reaching the substantive matters of the actual case, the court of appeals had to first determine if it had jurisdiction to hear the appeal.³² Because the superior court’s order did not explicitly set aside the appellate division’s award, some debate existed concerning whether the award was appealable.³³ The court resolved this dilemma by noting that the superior court’s order effectively set aside the appellate division award and that the superior court did not explicitly retain jurisdiction.³⁴ Thus, the court of appeals concluded that it did indeed have jurisdiction over Fulton County Board of Education’s appeal.³⁵

27. *Id.* at 292, 599 S.E.2d at 270.

28. 262 Ga. App. 512, 586 S.E.2d 51 (2003).

29. *Id.* at 513, 586 S.E.2d at 52.

30. *Id.*

31. *Id.*

32. *Id.* at 513-14, 586 S.E.2d at 52-53.

33. *Id.* at 514-16, 586 S.E.2d at 53-54.

34. *Id.* at 514, 586 S.E.2d at 53.

35. *Id.* O.C.G.A. section 34-9-105(d) states:

No decision of the board shall be set aside by the court upon any grounds other than one or more of the grounds stated in subsection (c) of this Code section. In the event a hearing is not held and a decision is not rendered by the superior court within the time provided in subsection (b) of this Code section, the decision of the board shall, by operation of law, be affirmed. The date of entry of judgment for purposes of appeal pursuant to Code [s]ection 5-6-35 of a decision affirmed by operation of law without action of the superior court shall be the last date on which the superior court could have taken action under subsection (b) of this Code section. Upon the setting aside of any such decision of the board, the court may

Fulton County Board of Education argued that the appellate division's award was supported by the proper evidentiary standard, and thus, under the "any evidence" rule,³⁶ the superior court was not authorized to set aside those findings by seeking to elicit unnecessary factual findings that had already been resolved by portions of the award.³⁷ The court of appeals agreed with this argument and determined that "[t]he superior court erred to the extent that it sought . . . to elicit additional factual findings on issues that had already been resolved by the portion[s] of the appellate division award that denied . . . disability benefits and assessed attorney fees."³⁸

The court of appeals affirmed the superior court's implicit setting aside of the portion of the appellate division's award that ordered payment of certain medical expenses.³⁹ The court concluded that the evidence did not support the appellate division's stated rationale on the issue of authorized medical expenses.⁴⁰ Thus, although the superior court ostensibly had the power under O.C.G.A. section 34-9-105(d)⁴¹ to remand a case "to the board for further hearing or proceedings in conformity with the judgement and opinion of the court,"⁴² the court of appeals pointed out that such remand is clearly limited.⁴³ A remand by the superior court must be only within the framework of the "any

recommit the controversy to the board for further hearing or proceedings in conformity with the judgment and opinion of the court; or such court may enter the proper judgment upon the findings, as the nature of the case may demand. Such decree of the court shall have the same effect and all proceedings in relation thereto shall, subject to the other provisions of this chapter, thereafter be the same as though rendered in an action heard and determined by the court.

O.C.G.A. § 34-9-105(d) (2004).

36. *Taylor*, 262 Ga. App. at 514, 586 S.E.2d at 53. If there is "any evidence" to authorize a finding in accordance with the contentions of the prevailing party before the board, the superior court and court of appeals are bound by this standard in affirming the award. *Jones County Bd. of Educ. v. Patterson*, 255 Ga. App. 166, 167, 564 S.E.2d 777, 778 (2002).

37. *Taylor*, 262 Ga. App. at 514, 586 S.E.2d at 52. The unnecessary factual findings the board referenced included: when the claimant was temporarily disabled, when he could perform restricted work, and when he could perform regular duty work. *Id.* at 515, 586 S.E.2d at 53.

38. *Id.* at 515, 586 S.E.2d at 54.

39. *Id.* at 515-16, 586 S.E.2d at 54.

40. *Id.*

41. O.C.G.A. § 34-9-105(d).

42. *Id.*

43. *Taylor*, 262 Ga. App. at 513, 586 S.E.2d at 53.

evidence” standard or the five statutory grounds for error⁴⁴ that are applicable to superior court appeals.⁴⁵

In another case concerning a remand by the superior court, the court of appeals again addressed the limited basis for remand by the superior court.⁴⁶ In *Moffitt Construction, Inc. v. Barnes*,⁴⁷ the claimant injured his lower back in January 2000. He was paid temporary disability benefits for his injury. In July 2000 the employer suspended benefits, alleging that the claimant had experienced an improvement in his condition. The claimant objected, and a hearing was held. After the hearing the ALJ issued a decision finding that the employer met its burden of proving a change in condition for the better and allowed the suspension of benefits to stand. As part of the award, the ALJ ordered both parties to agree on a new neurosurgeon to evaluate the claimant.⁴⁸

The claimant appealed the ALJ’s decision, and while the appeal was pending, the parties agreed upon Dr. Franklin Epstein to evaluate the claimant. The doctor evaluated the claimant on April 10, 2002. The oral argument on the appeal was heard May 8, 2002. At that argument the claimant sought to have the appellate division consider the report of Dr. Epstein. The appellate division denied the claimant’s request that Dr. Epstein’s report be considered and affirmed the ALJ’s decision on July 5, 2002. The appellate division did not believe Dr. Epstein’s report was “newly discovered evidence” that it should consider, and therefore, the court concluded that if the claimant chose to use the report, he could seek another hearing to allege a change in condition for the worse.⁴⁹

The superior court determined that the appellate division erred in refusing to consider Dr. Epstein’s report.⁵⁰ The superior court reasoned that the case should be remanded to the appellate division because the ALJ’s decision was largely based on a medical report “that was

44. O.C.G.A. section 34-9-105(c) states:

The findings made by the members within their powers shall, in the absence of fraud, be conclusive; but upon such hearing the court shall set aside the decision if it is found that:

- (1) The members acted without or in excess of their powers;
- (2) The decision was procured by fraud;
- (3) The facts found by the members do not support the decision;
- (4) There is not sufficient competent evidence in the record to warrant the members making the decision; or
- (5) The decision is contrary to law.

45. *Taylor*, 262 Ga. App. at 514, 586 S.E.2d at 53.

46. *Moffitt Constr., Inc. v. Barnes*, 263 Ga. App. 175, 175, 587 S.E.2d 293, 293 (2003).

47. 263 Ga. App. 175, 587 S.E.2d 293 (2003).

48. *Id.* at 176, 587 S.E.2d at 293.

49. *Id.*, 587 S.E.2d at 294.

50. *Id.*

subsequently contradicted completely” by Dr. Epstein.⁵¹ The superior court issued an order that the appellate division consider Dr. Epstein’s report as “newly discovered evidence” and instructed the appellate division to redetermine what weight the report of another doctor, Dr. Goodrich, should be given in determining whether the claimant was disabled.⁵²

The employer and insurer appealed to the court of appeals, citing as error the superior court’s remand of the case to consider Dr. Epstein’s report.⁵³ The court of appeals agreed, noting if there was “any evidence” to support the board’s award, it should be affirmed.⁵⁴ The court of appeals went on to specifically state that while the superior court had the power to set aside the board’s decision and remand, it could only do so on five statutory grounds.⁵⁵ The court determined the alleged newly discovered evidence was not one of those grounds.⁵⁶

B. Continuous Employment

Last year we commented on two Georgia Court of Appeals decisions⁵⁷ affecting the coverage of the Act for employees, such as law enforcement personnel, whose scope of employment frequently extends beyond regular working hours.⁵⁸ In the most recent survey period, the Georgia Supreme Court reversed the court of appeals decision in *Mayor & Aldermen of Savannah v. Stevens*,⁵⁹ holding that the decision “unjustifiably extend[ed] the scope of a public employer’s liability for employee injuries under established workers’ compensation law.”⁶⁰ The claimant, Eunita Stevens, was injured in a car accident while driving to work in her personal car and wearing her police uniform.⁶¹ Stevens was off duty at the time of the accident, but the police department’s policy

51. *Id.*

52. *Id.* at 176-77, 587 S.E.2d at 294.

53. *Id.* at 175, 587 S.E.2d at 293.

54. *Id.* at 176-77, 587 S.E.2d at 294; *see supra* note 36.

55. *Moffitt*, 263 Ga. App. at 177, 587 S.E.2d at 294; *see supra* note 44.

56. *Moffitt*, 263 Ga. App. at 177, 587 S.E.2d at 294.

57. *Mayor & Aldermen of Savannah v. Stevens*, 261 Ga. App. 694, 583 S.E.2d 553 (2003), *overruled by Mayor & Alderman of Savannah v. Stevens*, 278 Ga. 166, 598 S.E.2d 456 (2004); *Harris County Sheriff’s Office v. Negrete*, 259 Ga. App. 891, 578 S.E.2d 579 (2003).

58. *See* H. Michael Bagley, et al., *Workers’ Compensation*, 55 MERCER L. REV. 496 (2003).

59. 278 Ga. 166, 598 S.E.2d 456 (2004).

60. *Id.* at 166, 598 S.E.2d at 457.

61. *Id.*

required that she “enforce the law at any time while she was within the Savannah city limits.”⁶²

Although the claimant was not actively engaged in any law enforcement activity at the time of her accident, the court of appeals determined that her injuries were covered by the Workers’ Compensation Act because “[t]he uncontradicted testimony demonstrated that Stevens was on call, in uniform, armed, carrying a radio, and on the city streets that her job demanded that she protect.”⁶³ The supreme court reversed, however, and ruled that the court of appeals failed to apply the well-established principle that an injury must not only be “in the course of” employment, but it must also “arise out of” employment.⁶⁴

As established in workers’ compensation law, the terms “arising out of” and “in the course of” employment are not synonymous. The requirement that an injury by accident “arise out of” employment refers to the causal connection between the circumstances of the work and the resulting injury.⁶⁵ In contrast the phrase “in the course of” refers to the time, place, and circumstances under which the accident takes place.⁶⁶

While noting that Stevens’s injury might well have been “in the course of” her employment, the court determined her injuries from the car accident did not “arise out of” employment.⁶⁷ The court stated:

Stevens’[s] car accident in this case was in no way related to her work as a police officer. At the time of the accident, she was not actively engaged in any police work nor was she responding to a law enforcement problem. The hazards she encountered were in no way occasioned by her job as a police officer. Because there was no causal connection between her employment and her accident, Stevens’[s] injuries did not arise out of her employment.⁶⁸

The court went on to overrule *Board of Trustees of the Policemen’s Pension Fund v. Christy*,⁶⁹ in which the court held that an officer who was injured on a police motorcycle while riding home from work was

62. *Id.* at 167, 598 S.E.2d at 458.

63. *Stevens*, 261 Ga. App. 694, 698, 583 S.E.2d 553, 556, *overruled by Mayor & Alderman of Savannah v. Stevens*, 278 Ga. 166, 598 S.E.2d 456 (2004).

64. *Stevens*, 278 Ga. at 168, 598 S.E.2d at 458.

65. *Id.* at 166-67, 589 S.E.2d at 457-58.

66. *Lee v. Middleton Logging Co.*, 198 Ga. App. 585, 402 S.E.2d 536 (1991); *McElreath v. McElreath*, 155 Ga. App. 826, 273 S.E.2d 205 (1980); *New Amsterdam Cas. Co. v. Sumrell*, 30 Ga. App. 682, 118 S.E. 786 (1923).

67. *Stevens*, 278 Ga. at 167, 598 S.E.2d at 458.

68. *Id.*

69. 246 Ga. 553, 272 S.E.2d 288 (1980).

entitled to workers' compensation benefits.⁷⁰ As it did in *Stevens*, the court noted that while the claimant in *Christy* might well have been in the course of his employment because he was riding a police motorcycle, and, therefore, perhaps providing a benefit to the employer, no causal connection existed between the injuries and Christy's job as a police officer.⁷¹

With regard to off-duty police officers and other similarly situated employees, the Georgia Supreme Court has now made clear that officers must be more than merely "on call," or otherwise in a place they might reasonably be expected to be in the performance of their duties for an injury to be compensable.⁷² In addition to being "in the course of" employment, claimants will have to show that accidents were actually caused by the performance of work-related activities and did not merely occur at a time when the claimants might have been called to perform police work.⁷³

C. *Hernias*

In *Union City Auto Parts v. Edwards*,⁷⁴ the court of appeals revisited the issue of pre-existing hernias aggravated by an injury arising out of and in the course of employment.⁷⁵ O.C.G.A. section 34-9-1(4)⁷⁶ was amended in 1994 to state that an "aggravation of a preexisting condition by accident arising out of and in the course of employment" is included within the definition of "injury."⁷⁷ However, the code section dealing exclusively with hernias, O.C.G.A. section 34-9-266,⁷⁸ expressly disallows compensation for the aggravation of any type of pre-existing hernia.⁷⁹

Jay Edwards developed hernias as a result of surgery performed before his employment. Then, while in the employ of Union City Auto Parts ("UCAP"), Edwards was injured in an on-the-job automobile accident. The accident aggravated his hernias.⁸⁰

70. *Stevens*, 278 Ga. at 168, 598 S.E.2d at 458; *Christy*, 246 Ga. at 556-57, 272 S.E.2d at 291-92.

71. *Stevens*, 278 Ga. at 167-68, 598 S.E.2d at 458.

72. *Id.*

73. *Id.*

74. 263 Ga. App. 799, 589 S.E.2d 351 (2003).

75. *Id.* at 799, 589 S.E.2d at 351.

76. O.C.G.A. § 34-9-1(4) (2004).

77. *Id.*

78. O.C.G.A. § 34-9-266 (2004).

79. *Id.* See *Edwards*, 263 Ga. App. at 800-01, 589 S.E.2d at 353.

80. *Edwards*, 263 Ga. App. at 799, 589 S.E.2d at 352.

The court of appeals agreed to address whether the aggravation of a pre-existing hernia required payment of medical expenses under the Act.⁸¹ No issue regarding the payment of disability benefits existed.⁸² The court held that O.C.G.A. section 34-9-1(4) codified existing case law so as to provide for the compensation of injuries that aggravate existing conditions.⁸³ However, these conditions are only compensable “[e]xcept as otherwise provided.”⁸⁴ The court held that O.C.G.A. section 34-9-266 provided such an exception with regard to hernias.⁸⁵ Because Edwards’s hernias existed prior to his work-related accident, the exception in O.C.G.A. section 34-9-266 applied and barred him from any recovery of benefits.⁸⁶

D. Late Payment Penalties

Late payment penalties under O.C.G.A. section 34-9-221⁸⁷ are assessed at twenty percent of the total settlement, so such cases are often hotly contested.⁸⁸ Because each case is fact-specific, the timeline of events is always significant. In one such case, *Abdul-Hakim v. Mead School & Office Products*,⁸⁹ the court held that an employer’s check paying a stipulation was timely after reviewing the specific language of the stipulation and determining that the check complied with that language.⁹⁰

81. *Id.* at 800, 589 S.E.2d at 353.

82. *Id.* at 799, 589 S.E.2d at 352. Because the case did not involve any issue regarding the entitlement to disability benefits, the court addressed only in obiter dicta prior anomalous decisions finding that disability benefits could be awarded based upon the aggravation of a pre-existing hernia. *Id.* at 799 n.1, 589 S.E.2d 352 n.1 (citing *Boswell v. Liberty Mut. Ins. Co.*, 77 Ga. App. 556, 49 S.E.2d 117 (1948); *Mfrs. Cas. Ins. Co. v. Peacock*, 97 Ga. App. 26, 101 S.E.2d 898 (1958)).

83. *Id.* at 801, 589 S.E.2d at 353.

84. *Id.*

85. *Id.*

86. *Id.*

87. O.C.G.A. § 34-9-221 (2004).

88. *Id.*

89. 267 Ga. App. 121, 598 S.E.2d 808 (2004).

90. *Id.* at 124, 598 S.E.2d at 811. Board Rule 15(e) states:

Unless otherwise specified in the attorney fee contract filed with the Board and in the terms of the stipulation, the proceeds of the approved stipulated settlement agreement shall be sent directly to the employee or claimant. If an attorney is to be paid, the stipulation must state the amount of the fee, and itemize all expenses which should be reimbursed. Expenses and attorney fees shall be paid in a check payable to the attorney only, and proceeds due to the employee shall be paid in a check payable to the employee only.

Rules & Regulations of the State Board of Workers’ Compensation Rule 15(e) (2004).

The claimant settled his case for \$50,000, and the board approved the stipulation and agreement on December 18, 2001.⁹¹ The agreement stated that “settlement will be paid as follows: \$12,500.00 to the Employee’s attorney and \$37,500.00 to the Employee. All settlement proceeds are to be sent directly to the Employee’s attorney.”⁹² Two days after approval, Mead sent a check for \$37,500 to the law firm of Clements & Sweet, made out to “John F. Sweet and Jamaal Abdul-Hakim.”⁹³ Some time within the following two weeks, the law firm returned the check to Mead, claiming it could not negotiate the check as drafted, and even if it could, Sweet was not available to sign the check. Mead received this returned check on January 4, 2002 and issued a new check payable to Abdul-Hakim on January 15, 2002. The attorney fee portion of the settlement proceeds was never in dispute.⁹⁴

The law firm notified Mead that, pursuant to O.C.G.A. section 34-9-221(f), it was seeking late payment penalties on the \$37,500.⁹⁵ The claimant filed a motion for those fees, based upon the argument that the check did not comply with the terms of the stipulation, and that the law firm could not accept the check without incurring “negative . . . tax consequences.”⁹⁶ Mead disagreed and argued that it issued the check on time, that the check complied with the terms of the settlement agreement, that it sent the settlement check the same way prior weekly checks had been issued, and that the alleged negative tax consequences for the law firm had nothing to do with whether the check was timely.⁹⁷

The ALJ agreed that the check complied with the terms of the settlement agreement and denied the claimant’s motion. The claimant appealed to the appellate division, which affirmed the ALJ’s ruling. The claimant appealed to the superior court, and again the board’s award was affirmed. The claimant then appealed to the court of appeals, which accepted the case.⁹⁸ The court of appeals reviewed the facts but ultimately noted that this was an “any evidence” case and affirmed the superior court.⁹⁹

91. *Abdul-Hakim*, 267 Ga. App. at 122, 598 S.E.2d at 810.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 123, 598 S.E.2d at 810.

97. *Id.*

98. *Id.*

99. *Id.*

E. New Accident and "Any Evidence" Standard

In a case dealing with the finding of a new accident, the court of appeals addressed the superior court's attempt to substitute itself as the fact-finding body in lieu of the board.¹⁰⁰ In *Haralson County v. Lee*,¹⁰¹ the claimant needed a shoulder replacement, and he alleged that his condition resulted from working for Haralson County. The claimant had worked as an appraiser for Haralson County since 1989 and incurred a compensable shoulder injury on June 3, 1993. He was treated by Dr. Ralph Fleck at the time of the injury and thereafter. He was terminated on January 11, 1994, for reasons not related to the job injury but continued to be treated by Dr. Fleck. The claimant then began working full-time in construction for his own business. The claimant testified that he mostly did supervisory work, although on occasion he laid cinder blocks and bricks.¹⁰²

On May 3, 1995, Dr. Fleck diagnosed the claimant with arthritis and prescribed injections. On June 14, 1995, the claimant complained to Dr. Fleck of recurring pain in his shoulder.¹⁰³ Dr. Fleck's notes showed that the claimant "has still been working building houses."¹⁰⁴ On January 25, 1996, while the claimant was holding a tool box in his right hand, he either reached for or lifted a level with his left arm at which time he experienced excruciating pain in his left shoulder. Dr. Fleck subsequently recommended a shoulder replacement. On May 14, 2001, the claimant filed for a hearing seeking payment of medical bills and requesting that Haralson County pay for the shoulder replacement. Haralson County controverted the claim, stating that the claimant had suffered a new accident on January 25, 1996.¹⁰⁵

A hearing was held, and Dr. Fleck's testimony was considered. Dr. Fleck testified that he felt the claimant's construction work aggravated the shoulder and probably caused it to be more painful. Dr. Fleck also testified that he did not think the original June 1993 injury was a direct cause of the need for the shoulder replacement because the claimant actually had shoulder problems before 1993. However, Dr. Fleck stated that the June 1993 incident, as well as the January 1996 incident, aggravated the shoulder.¹⁰⁶

100. *Haralson County v. Lee*, 264 Ga. App. 68, 70, 589 S.E.2d 872, 874 (2003).

101. 264 Ga. App. 68, 589 S.E.2d 872 (2003).

102. *Id.* at 68-69, 589 S.E.2d at 873.

103. *Id.* at 68, 589 S.E.2d at 873.

104. *Id.*

105. *Id.* at 68-69, 589 S.E.2d at 873-74.

106. *Id.* at 69, 589 S.E.2d at 874.

Based on Dr. Fleck's testimony and other evidence, the ALJ determined that the claimant sustained a new injury in January 1996, and that his employment after leaving Haralson County aggravated his pre-existing shoulder problem. The ALJ removed future liability from Haralson County for medical benefits and for the shoulder replacement.¹⁰⁷ The claimant appealed, but the appellate division affirmed the award as "supported by a preponderance of competent and credible evidence contained [in] the record"¹⁰⁸ The superior court, however, reversed the appellate division, holding that the ALJ improperly impeached the claimant's testimony to find a new accident. The superior court stated that Dr. Fleck's notes, which stated that the claimant lifted a level, were contradictory to the claimant's statement that he reached for a level, and that the ALJ should not have concluded that the claimant's testimony was not credible.¹⁰⁹

The court of appeals reversed the superior court.¹¹⁰ The court applied the correct "any evidence" standard and expressly stated that the ALJ did not in fact find any contradiction between the claimant's testimony and that of Dr. Fleck.¹¹¹ The court of appeals cited the proper standard of review, noting that the superior court did not have the authority to substitute itself as the fact-finding body when there was "at least a scintilla of evidence to support [the board's] finding"¹¹²

F. Notice of Hearing

O.C.G.A. section 34-9-102(a)¹¹³ provides that "no hearing [on a workers' compensation claim] shall be scheduled less than [thirty] days nor more than [ninety] days from the date of the hearing notice."¹¹⁴ In *High Voltage Vending, L.L.C. v. Odom*,¹¹⁵ the court of appeals held that effective notice is sufficient to satisfy this code section.¹¹⁶

On May 4, 2001, Ennis G. Odom was injured when he fell from a ladder while performing construction work at You're In Luck Coffee Shop. He filed a notice of claim and a request for hearing on June 7, 2001, listing his employer as Cornetta Enterprises d/b/a High Voltage Vending, with an address in Macon, Georgia. On September 13, 2001,

107. *Id.* at 68, 589 S.E.2d at 873.

108. *Id.*

109. *Id.* at 69-70, 589 S.E.2d at 874.

110. *Id.*

111. *Id.* at 70, 589 S.E.2d at 875.

112. *Id.* at 71, 589 S.E.2d at 875.

113. O.C.G.A. § 34-9-102(a) (2004).

114. *Id.*

115. 266 Ga. App. 537, 597 S.E.2d 428 (2004).

116. *Id.* at 539, 597 S.E.2d at 429.

Odom filed a request to add You're In Luck Coffee Shop, Cornetta Enterprises d/b/a Club Exotica, and John Cornetta as parties to the claim. On September 26, 2001, the court issued an order adding these parties and notifying the new parties of the October 15, 2001 hearing, which was less than thirty days from the date of the order adding the new parties. High Voltage's address was listed as the same Macon address that appeared on the original notice of claim, and the order sent to High Voltage was returned as undeliverable.¹¹⁷

Following a hearing at which High Voltage was not represented, the ALJ issued an award ordering High Voltage to pay benefits. The ALJ found that notice of the hearing was adequate because John Cornetta was president and part owner of High Voltage, and he had been sent a subpoena to appear at the hearing. In addition the address for High Voltage was the same as Cornetta Enterprises, and the notice mailed to Cornetta Enterprises had not been returned. Therefore, High Voltage had adequate notice of the hearing through its president, John Cornetta. On appeal the appellate division and superior court affirmed.¹¹⁸ The court of appeals also affirmed based not only upon its agreement with the underlying decisions but also based upon the apparent fact that High Voltage failed to maintain a current address with the board in violation of O.C.G.A. section 34-9-102(i), which barred High Voltage from arguing that it was denied proper notice.¹¹⁹

G. *Scheduled Break Exception*

The scheduled break exception¹²⁰ states that “[g]enerally, where an employee is on a scheduled break and is not conducting her employer’s business, the Workers’ Compensation Act does not apply.”¹²¹ In *ATC Healthcare Service, Inc. v. Adams*,¹²² the court of appeals helped to define the scheduled break exception and articulated that it is not to be defined rigidly or narrowly.¹²³

Rita Adams was hired by ATC, a staffing agency, to fill nursing positions on an “as needed” basis at the Augusta State Medical Prison. As part of her employment, Adams was sent to a three-day training class. Each day the class would break around noon for an hour, and the employees were allowed to leave the prison premises for lunch. If the

117. *Id.* at 538, 597 S.E.2d at 429.

118. *Id.* at 538-39, 597 S.E.2d at 429.

119. *Id.* at 539, 597 S.E.2d at 429-30. *See* O.C.G.A. § 34-9-102(i) (2004).

120. *Rockwell v. Lockheed Martin Corp.*, 248 Ga. App. 73, 545 S.E.2d 121 (2001).

121. *Id.* at 73, 545 S.E.2d at 121 (citations omitted).

122. 263 Ga. App. 792, 589 S.E.2d 346 (2003).

123. *Id.* at 794, 589 S.E.2d at 348.

class finished everything scheduled for the morning, the instructor would occasionally release the class earlier for the lunch hour.¹²⁴

On the first day of the training program, the instructor released the class around 11:30 a.m. and told it to return at 1:00 p.m. While at a Cracker Barrel restaurant with other trainees, Adams slipped and fell, injuring her right knee. She underwent surgery on the knee two days later and returned to work three weeks afterwards. She filed a workers' compensation claim against ATC, seeking weekly indemnity benefits, medical benefits, and attorney fees. ATC argued that Adams was on a regularly scheduled lunch break, which precluded compensability under the Workers' Compensation Act.¹²⁵

The ALJ awarded Adams the benefits she sought, finding that she was not on a regularly scheduled lunch break.¹²⁶ The appellate division affirmed the decision, but the court of appeals reversed it, concluding that the board had "construed the lunch break rule too narrowly."¹²⁷ The court of appeals differentiated between the concepts of a "scheduled" break and an "unscheduled" break, as opposed to making the regularity of the break controlling, and determined that the lunch break was scheduled.¹²⁸ The court reasoned that although the class was occasionally released early, the schedule for each day included a break for lunch around the same time, and the breaks could be taken off of the premises.¹²⁹ In addition, the employees were free to use their time in any way they wished and were not paid during the regular break time.¹³⁰ The court observed, "[u]nder these circumstances, it strains logic to view the break as anything but scheduled."¹³¹ The court declined to rule on whether an unscheduled lunch break, taken off of the employer's premises, during which time the employee is free of work obligations, arises out of the course of employment.¹³²

124. *Id.* at 793, 589 S.E.2d at 347.

125. *Id.*

126. *Id.*

127. *Id.* at 794, 589 S.E.2d at 348.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 794 n.5, 589 S.E.2d at 348 n.5.

H. Statute of Limitations

The Georgia Court of Appeals issued three decisions¹³³ during the survey period, all involving the change in condition statute of limitations found in O.C.G.A. section 34-9-104(b).¹³⁴

The holding in *Trent Tube v. Hurston*¹³⁵ underscores that the date benefits were last actually paid commences the two year statute of limitations, not the date the employer was entitled to suspend benefits.¹³⁶ Hurston was injured on November 3, 1997, and received workers' compensation benefits. In 1999 Hurston's employer provided him the opportunity to attempt a return to light-duty work, but Hurston ceased working after only two days, claiming he was not sufficiently recovered to perform the job. The employer continued to pay benefits under O.C.G.A. section 34-9-240¹³⁷ while waiting for the results of its appeal. The employer believed that Hurston was no longer entitled to benefits because he was able to perform the light-duty job. The employer prevailed before the ALJ and the appellate division of the State Board of Workers' Compensation. Hurston's benefits were eventually suspended on May 18, 2000.¹³⁸

On February 22, 2001, the claimant attempted to return to the light-duty position the employer had offered him in 1999, but the employer ignored the claimant's written inquiries regarding a return to the job and terminated the claimant's employment. On March 14, 2001, the claimant filed a claim for additional disability benefits, claiming an economic change in condition due to the unavailability of suitable light-duty work. The employer argued that the new claim for disability benefits was barred by the statute of limitations because it was brought more than two years after the date the employer was authorized to suspend benefits, February 17, 1999, which was the date that the ALJ had previously determined that the claimant was capable of working.¹³⁹

The court of appeals affirmed the ALJ's determination, as affirmed by the appellate division and the superior court, that the statute of

133. *Trent Tube v. Hurston*, 261 Ga. App. 525, 583 S.E.2d 198 (2003); *Mechanical Maint., Inc. v. Yarbrough*, 264 Ga. App. 181, 590 S.E.2d 145 (2003); *Wet Walls, Inc. v. Ledezma*, 266 Ga. App. 685, 598 S.E.2d 60 (2004).

134. O.C.G.A. § 34-9-104(b) (2004).

135. 261 Ga. App. 525, 583 S.E.2d 198 (2003).

136. *Id.* at 525, 583 S.E.2d at 200.

137. O.C.G.A. § 34-9-240 (2004).

138. *Trent Tube*, 261 Ga. App. at 525-26, 583 S.E.2d at 200.

139. *Id.* at 526, 583 S.E.2d at 200-01.

limitations did not begin to run until May 18, 2000, which was the last date income benefits were actually paid.¹⁴⁰ O.C.G.A. section 34-9-104(b) provides that the claimant may seek additional disability benefits based upon a “change in condition,” provided that “at the time of application not more than two years have elapsed since the date the last payment of income benefits pursuant to Code Section 34-9-261 or 34-9-262 was *actually made* under this chapter.”¹⁴¹

Although the employer argued that the statute of limitations began to run on the date the claimant was found capable of performing the available light-duty work, the court held “[w]hat matters now is the last date benefits were actually paid, not whether the employee turns out to have been due those benefits. Here, the last payment was indisputably ‘actually made’ to Hurston on May 18, 2000, less than two years before he filed his change in condition claim.”¹⁴² Although not necessary to the ruling, the court of appeals also agreed with the ALJ that late payment penalties issued by the employer under O.C.G.A. section 34-9-221¹⁴³ on March 31, 1999 and April 16, 1999, would also constitute payments of benefits under the statute of limitations provisions.¹⁴⁴ The court stated there was “no reason why these penalty payments should be separated and treated differently from the income benefits from which they arose for statute of limitation purposes.”¹⁴⁵ Even apart from other benefits paid by the employer, the payment of late penalties under O.C.G.A. section 34-9-221(e) would have been sufficient to extend the two year statute of limitations and negate the employer’s statute of limitations defense.

In *Mechanical Maintenance, Inc. v. Yarbrough*,¹⁴⁶ the employer was more successful with the statute of limitations defense.¹⁴⁷ In this case the court of appeals emphasized that the payment of permanent partial disability benefits under O.C.G.A. section 34-9-263¹⁴⁸ does not affect the statute of limitations provision in O.C.G.A. section 34-9-104(b) with regard to temporary or temporary partial disability benefits.¹⁴⁹ Yarbrough was injured on September 26, 1995, and received temporary

140. *Id.*, 583 S.E.2d at 201.

141. O.C.G.A. § 34-9-104(b) (emphasis added).

142. *Trent Tube*, 261 Ga. App. at 527, 583 S.E.2d at 201.

143. O.C.G.A. § 34-9-221 (2004).

144. *Trent Tube*, 261 Ga. App. at 526-27, 583 S.E.2d at 201.

145. *Id.* at 528, 583 S.E.2d at 202.

146. 264 Ga. App. 181, 590 S.E.2d 148 (2003).

147. *Id.* at 184, 590 S.E.2d at 151.

148. O.C.G.A. § 34-9-263 (2004).

149. *Yarbrough*, 264 Ga. App. at 183, 590 S.E.2d at 150-51.

total disability (“TTD”) benefits from August 8, 1996, through his return to work on January 1997.¹⁵⁰

Although Yarbrough was still under light-duty restrictions from his treating physician, he returned to his regular duty as a millwright and continued to perform this job without lost time, until he was laid off on May 20, 1997. Following Yarbrough’s layoff the employer commenced payment of permanent partial disability (“PPD”) benefits under O.C.G.A. section 34-9-263, in accordance with a permanent disability rating from the treating physician. These benefits were paid in full on August 30, 1999.¹⁵¹

On March 6, 2000, six months after Yarbrough’s PPD benefits had ceased and more than two years since he had last received TTD benefits, Yarbrough filed a request for a hearing with the board seeking additional TTD benefits. On May 30, 2000, he filed a second request for a hearing with the board, alleging a new injury on May 20, 1997, the date he had been laid off. Although the ALJ upheld the employer’s statute of limitations defense, the appellate division reversed, and the employer appealed.¹⁵²

The court of appeals reversed the appellate division, holding that Yarbrough’s change in condition claim for additional TTD benefits was barred by the two year statute of limitations in O.C.G.A. section 34-9-104(b).¹⁵³ The court of appeals rejected the appellate division and the superior court’s holdings that the payment of PPD benefits to Yarbrough extended the statute of limitations for the purposes of receiving temporary total or temporary partial disability benefits.¹⁵⁴ The court specifically distinguished the case of *Mickens v. Western Probation Detention Center*¹⁵⁵ and determined that this case dealt solely with the separate statute of limitations for “all issues” cases found in O.C.G.A. section 34-9-82(a).¹⁵⁶ The court reasoned that “*Mickens* did not involve construction of O.C.G.A. [section] 34-9-104(b). It interpreted O.C.G.A. [section] 34-9-82(a), which, as discussed above, requires a new claim for an injury to be filed within one year after the compensable injury, unless the employer has paid ‘weekly benefits’ or provided remedial medical treatment”¹⁵⁷

150. *Id.*

151. *Id.* at 181-82, 590 S.E.2d at 149.

152. *Id.* at 181, 590 S.E.2d at 149.

153. *Id.* at 183-84, 590 S.E.2d at 150-51.

154. *Id.*

155. 244 Ga. App. 268, 534 S.E.2d 927 (2000).

156. O.C.G.A. § 34-9-82(a) (2004).

157. *Yarbrough*, 264 Ga. App. at 183, 590 S.E.2d at 150.

Thus, the court of appeals once again emphasized that the initial question in any statute of limitations case under the Workers' Compensation Act is which statute of limitations applies: the "all issues" statute in O.C.G.A. section 34-9-82(a), or the "change in condition" statute in O.C.G.A. section 34-9-104(b).¹⁵⁸ As the court previously held, the "change in condition" statute of limitations applies if the employee has received any income benefits under the Act.¹⁵⁹

*Wet Walls, Inc. v. Ledezma*¹⁶⁰ concerns a bizarre set of circumstances dealing with the change in condition statute of limitations that was in effect before significant amendments were made on July 1, 1992.¹⁶¹ Ledezma suffered a severe injury in 1989 while in the employ of Wet Walls, Inc., fracturing his back and becoming partially paralyzed. When Ledezma reached maximum medical improvement in 1991, he was given a PPD rating of 65.5 percent but was still found to be unable to return to his previous employment as a manual laborer. Ledezma received TTD benefits, but these were suspended in 1996 when Ledezma was incarcerated and apparently convicted of being an illegal alien. As a condition of his parole, Ledezma was deported from the United States on his release from custody. Notwithstanding his deportation, Ledezma filed a claim for resumption of TTD benefits and payment of the outstanding PPD rating.¹⁶²

The employer raised several defenses, one of which was that the claim for additional TTD benefits was barred by the two year statute of limitations in O.C.G.A. section 34-9-104(b).¹⁶³ The court of appeals noted, however, that the statute of limitations, in effect at the time of the claimant's 1989 accident, was tolled so long as there were additional benefits "potentially due" under the Workers' Compensation Act.¹⁶⁴

The employer also argued that requiring it to pay workers' compensation benefits to a noncitizen, who was unable to legally work in the United States, violated a United States Supreme Court decision holding that the National Labor Relations Board may not award back pay to an illegal alien.¹⁶⁵ Further, the employer argued that it should be allowed

158. *Id.* at 183-84, 590 S.E.2d at 150-51.

159. *See* *ITT-Thompson Indus. v. Wheeler*, 179 Ga. App. 92, 345 S.E.2d 614 (1986); *Clarke v. Samson Mfg. Co.*, 177 Ga. App. 149, 338 S.E.2d 738 (1985).

160. 266 Ga. App. 685, 598 S.E.2d 60 (2004).

161. *Id.* at 685, 598 S.E.2d at 60.

162. *Id.* at 685-86, 598 S.E.2d at 62.

163. *Id.* at 688, 598 S.E.2d at 64.

164. *Id.* *See generally* *Holt's Bakery v. Hutchinson*, 177 Ga. App. 154, 338 S.E.2d 742 (1985).

165. *Ledezma*, 266 Ga. App. at 686, 598 S.E.2d at 65 (citing *Hoffman Plastics Compounds, Inc. v. Nat'l Labor Relations Bd.*, 35 U.S. 137 (2002)).

to cease payment of income benefits to Ledezma because, according to the Immigration Reform and Control Act of 1986,¹⁶⁶ it could not re-employ Ledezma without violating the Act.¹⁶⁷ The court of appeals rejected these arguments as well because it determined that the Immigration Reform and Control Act did not preempt Georgia's Workers' Compensation Act and that the evidence demonstrating Ledezma remained totally disabled, as opposed to partially disabled, precluded any argument about his re-employment.¹⁶⁸ As a result the employer remained obligated to pay the claimant TTD benefits, even though he was precluded from returning to work in the United States.¹⁶⁹

I. Statutory Employment: Employees of Owner-Operators

Under O.C.G.A. section 34-9-1(2),¹⁷⁰ commercial trucking owner-operators, defined as those who lease their trucks and drivers to a motor common carrier, are deemed independent contractors and are not entitled to claim benefits from the carrier for work-related injuries.¹⁷¹ The court of appeals in *C. Brown Trucking, Inc. v. Rushing*¹⁷² clarified that the exclusion does not apply to employees of the owner-operator.¹⁷³

Brown Trucking hired Carlos Garza, an independent owner-operator, to help fulfill contract requirements with a railway. Garza, in turn, hired Harold L. Rushing. Rushing was injured when a train hit the truck he was driving. Because Garza was uninsured, Rushing filed a claim against Brown Trucking. The ALJ found that Brown Trucking was Rushing's statutory employer because, at the time he was injured, Rushing was doing work required to satisfy the contract between Brown Trucking and the railway and because Garza was Brown Trucking's subcontractor.¹⁷⁴

On appeal to the superior court, the board's award was affirmed by operation of law.¹⁷⁵ The court of appeals accepted the discretionary appeal and examined the statute to ascertain whether the legislature intended to apply the owner-operator exclusion to the employees of

166. 8 U.S.C. §§ 1101-1537 (2000).

167. *Ledezma*, 266 Ga. App. at 686, 598 S.E.2d at 65; 8 U.S.C. §§ 1101-1537.

168. *Ledezma*, 266 Ga. App. at 686-87, 598 S.E.2d at 63.

169. *Id.* at 690, 598 S.E.2d at 65.

170. O.C.G.A. § 34-9-1(2) (2004).

171. O.C.G.A. § 40-2-87(19) (2004).

172. 265 Ga. App. 676, 595 S.E.2d 346 (2004).

173. *Id.* at 676, 595 S.E.2d at 347.

174. *Id.* at 676-77, 595 S.E.2d at 347.

175. *Id.* at 676, 595 S.E.2d at 347.

owner-operators.¹⁷⁶ Applying the principle of statutory construction *expressio unius est exclusio alterius*, the court noted that while the Act named a plethora of workers in the same code section as the owner-operator exclusion, there was no mention of owner-operators' employees.¹⁷⁷ Thus, the court determined that "[t]he omission of any such reference from the Code subsection must be regarded as deliberate."¹⁷⁸ The court of appeals affirmed the ruling and held that an employee of an owner-operator may recover benefits from the statutory employer.¹⁷⁹

176. *Id.* at 677, 595 S.E.2d at 348.

177. *Id.* at 677-78, 595 S.E.2d at 348.

178. *Id.* (citing Homebuilders Ass'n of Ga. v. Morris, 283 Ga. App. 194, 196-97, 518 S.E.2d 194, 197 (1999)).

179. *Id.* at 677, 595 S.E.2d at 347-48.