Workers' Compensation

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I. LEGISLATION

There was minimal legislation during the 2006 term of the Georgia General Assembly that impacted workers' compensation. In fact, most of the legislative changes could be characterized as general housekeeping measures. For example, Official Code of Georgia Annotated ("O.C.G.A.") section 34-9-104[1] was changed to make its wording consistent with that found in other sections of the Workers' Compensation Act.[2] The mandate that the employee shall receive notice from the employer was

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1. *Id.* at 195-96, 622 S.E.2d at 869-70. The superior court may only affirm or reverse as a matter of law, and it may sometimes give directions. *Id.* at 196, 622 S.E.2d at 869. O.C.G.A. section 34-9-105(c) provides for the limited circumstances when the superior court may set aside the board's decision:

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

O.C.G.A. § 34-9-105(c) (2004). In *Atkinson v. Home Indemnity Co.*, the court of appeals held that the superior court may not substitute itself as a fact-finding authority in lieu of the board. 141 Ga. App. 687, 687, 234 S.E.2d 359, 360 (1977).

2. O.C.G.A. §§ 34-9-1 to -389 (2004 & Supp. 2006).

changed to provide that the employer shall send notice to the employee.[3] The time limit for submitting mileage expenses was clarified as running one year from the date that the mileage was incurred.[4] Also, the total compensation payable to a surviving spouse as a sole dependent at the time of death was increased from $125,000 to $150,000.[5]

Probably the most significant amendment impacting workers' compensation was actually not an amendment to the Workers' Compensation Act. Instead, the amendment was to the Patient Self-Referral Act.[6] The legislature enacted the Patient Self-Referral Act in 1993 based upon the premise that the "referral of a patient by a health care provider to a provider of designated health care services in which the health care provider has an investment interest represents a potential conflict of interest."[7] Georgia's Patient Self-Referral Act was generally modeled after the federal law commonly referred to as the Stark Act.[8]

The Patient Self-Referral Act prohibits referral arrangements, including the obvious ownership interest and even profit-sharing arrangements where any consideration is paid for the referral.[9] There also are a number of specific exceptions to the patient referral prohibition. Until this year, one of those exceptions was for physicians treating workers' compensation patients.[10] That exception was deleted in its entirety by the 2006 General Assembly,[11] thereby making the Patient Self-Referral Act applicable even in the context of workers' compensation.

II. RECENT CASES

A. *The Exclusive Remedy Doctrine*

The exclusive remedy doctrine provides that an employee who suffers an injury that arises out of and in the course of employment is barred from seeking any remedy against his employer outside the parameters of the Workers' Compensation Act.[12] This doctrine remains a corner-

3. Ga. H.B. 1240, § 2, Reg. Sess. (2006).
4. *Id.* § 3.
5. *Id.* § 4.
6. O.C.G.A. §§ 43-1B-1 to -8 (2005 & Supp. 2006).
7. O.C.G.A. § 43-1B-2 (2005).
8. 42 U.S.C. § 1395nn (2000 & Supp. III 2003).
9. O.C.G.A. § 43-1B-4(1) (2005).
10. O.C.G.A. § 43-1B-7 (2005).
11. O.C.G.A. § 42-1B-7 (Supp. 2006).
12. O.C.G.A. § 34-9-11 (2004).

stone of the workers' compensation system, and Georgia's appellate courts continue to uphold it.

As a fundamental threshold requirement for the application of the exclusive remedy provision, an employer-employee relationship must exist.[13] In *Chapman v. C.C. Dickson Co.*,[14] on the day the employee's employment was terminated, the employee, Chapman, received permission to use the company's truck to take home personal belongings. However, before Chapman left, he fell and was injured. Chapman brought suit, alleging that the company was negligent, and the company moved for summary judgment on grounds that (1) the Workers' Compensation Act was Chapman's exclusive remedy because he was still an employee when he fell and (2) the company was not negligent because it did not have any notice of the dangerous condition that caused Chapman's fall. The trial court granted the company's motion and Chapman appealed.[15] The Georgia Court of Appeals affirmed the trial court's grant of summary judgment on the ground that there was no evidence that the company was negligent.[16] Because there was no evidence that the company was negligent, the court of appeals did not reach the question of whether Chapman was still an employee at the time he fell.[17]

However, in *Lambert v. Briggs & Stratton Corp.*,[18] the court addressed the specific extension of the exclusive remedy provision to businesses utilizing the services of certain "temporary help contracting firms" for employee leasing arrangements.[19] The plaintiff in that case was a Talent Tree Staffing employee who was contracted out to Briggs & Stratton at the time she was injured at the defendant's manufacturing facility.[20] The court rejected the argument that there must be evidence that the defendant exercised direct supervision over the plaintiff at the time of her injuries.[21] Instead, the court found that the mere presence of a leased employee or temporary employee situation, coupled with satisfaction of the other jurisdictional requirements for workers' compensation coverage, was sufficient to extend the exclusive remedy provision to all parties involved.[22]

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13. *See* Glover v. Ware, 276 Ga. App. 759, 624 S.E.2d 285 (2005).
14. 273 Ga. App. 640, 616 S.E.2d 478 (2005).
15. *Id.* at 640-41, 616 S.E.2d at 478-79.
16. *Id.* at 642, 616 S.E.2d at 479.
17. *Id.*
18. No. CV604-016, 2006 WL 156875 (S.D. Ga. Jan. 19, 2006).
19. *Id.* at *2.
20. *Id.*
21. *Id.*
22. *Id.*

Similarly, in *Apperson v. Southern States Cooperative*,[23] an employer deducted premiums for the purpose of providing workers' compensation coverage to an independent contractor. After the independent contractor was injured on the job, he applied for and received workers' compensation benefits and later brought an action against the employer sounding in tort.[24] The court stated that it is well-settled law that "when an employer of an independent contractor provides workers' compensation insurance to [the independent contractor], the independent contractor is estopped from denying coverage and seeking damages in tort."[25] Accordingly, the court granted the defendant-employer's motion for summary judgment.[26]

In *Theesfeld v. Image Electrolysis & Skin Care, Inc.*,[27] the plaintiff in a tort action alleged that she was an independent contractor at the time that she was injured. In response, the defendant filed a motion for summary judgment, contending that the plaintiff had not only filed a claim for workers' compensation benefits, but also that the claim had been settled. Therefore, the defendant argued that the plaintiff's suit was barred by the exclusive remedy provisions of the Workers' Compensation Act. The trial court granted summary judgment on this ground.[28] On appeal, the court stated that when compensation is paid pursuant to a settlement of a workers' compensation claim, any subsequent tort suit by the injured party is barred by the exclusive remedy provision.[29] However, in this case, there was no evidence in the record that compensation was paid pursuant to a settlement agreement approved by the Georgia Workers' Compensation Board (the "board").[30] Nonetheless, the court of appeals affirmed the grant of summary judgment on other grounds.[31]

There are exceptions to the exclusive remedy doctrine, but they are not always viable as a way to hold the employer vicariously liable. In *Crisp Regional Hospital, Inc. v. Oliver*,[32] an employee, Oliver, sustained a back injury while working as a custodian for Crisp Regional Hospital. The hospital provided medical care benefits for the injury by sending him to its own medical clinic for treatment. Oliver sued the hospital in

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23. No. 6:04-CV-20(WLS), 2005 WL 2290200 (M.D. Ga. Sept. 16, 2005).
24. *Id.* at *1.
25. *Id.* at *2.
26. *Id.* at *3.
27. 274 Ga. App. 38, 619 S.E.2d 303 (2005).
28. *Id.* at 38-39, 619 S.E.2d at 304.
29. *Id.* at 39, 619 S.E.2d at 304-05.
30. *Id.*, 619 S.E.2d at 305.
31. *Id.* at 40, 619 S.E.2d at 305.
32. 275 Ga. App. 578, 621 S.E.2d 554 (2005).

tort, alleging vicarious liability for the negligence of its employees in providing treatment. The hospital raised the exclusive remedy statute as a bar to the tort claim.[33] The trial court ruled that while the exclusive remedy provision would bar the claim based upon the alleged negligence of nonprofessional administrative employees, it would not bar the claims based upon the alleged negligence of professional employees, such as physicians and nurses.[34] The court of appeals reversed, holding that there is no exception to the exclusive remedy provision for alleged professional negligence.[35] The court noted that the exclusive remedy provision does not bar an action against an individual physician for professional negligence when the physician is a co-employee of the injured employee.[36] However, there is no basis for a tort action seeking to impose vicarious liability for the negligence of the employer of both the injured claimant and the professional co-employee.[37]

It has long been the law that an employee injured at work by the intentional tort of a co-employee may assert a common law cause of action for damages against the co-employee where there is no remedy for the conduct provided by the Workers' Compensation Act.[38] This is particularly true where there are allegations of sexual harassment. While sexual harassment by a coworker may occur in the course of employment, the conduct is almost always for purely personal reasons unrelated to the furtherance of the employer's business. Thus, it typically does not arise out of employment, which means that is not covered under the Workers' Compensation Act.[39]

In *Travis Pruitt & Associates, P.C. v. Hooper*,[40] the employee alleged that she was a victim of a co-employee's sexual harassment and filed suit against the employer, alleging that it was liable under principles of respondeat superior and ratification.[41] The trial court denied the employer's motion for summary judgment.[42] On appeal, the court reversed the trial court's judgment.[43] The reversal was based in part

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33. *Id.* at 578-79, 621 S.E.2d at 556; *see* O.C.G.A. § 34-9-11.
34. *Crisp*, 275 Ga. App. at 579, 621 S.E.2d at 556.
35. *Id.* at 580-82, 621 S.E.2d at 557-58.
36. *Id.* at 581, 621 S.E.2d at 558.
37. *Id.* (citing Davis v. Stover, 258 Ga. 156, 366 S.E.2d 670 (1988)).
38. *See* Potts v. UAP-GA. AG. Chem., Inc., 270 Ga. 14, 16-17, 506 S.E.2d 101, 103 (1988) (discussing intentional torts as related to workers' compensation liability).
39. Murphy v. ARA Servs., Inc., 164 Ga. App. 859, 861-63, 298 S.E.2d 528, 530-32 (1982).
40. 277 Ga. App. 1, 625 S.E.2d 445 (2005).
41. *Id.* at 1, 625 S.E.2d at 447.
42. *Id.*
43. *Id.*

upon the observation that the same facts that established that the employee had a common law cause of action also established that the employer could not be held liable on the basis of respondeat superior for the alleged tortious conduct of the plaintiff's co-employee.[44]

B. Aggravation of Pre-existing Condition

In *Georgia Pacific Corp. v. Cross*,[45] the appellate court held that aggravation of the employee's "'work-related arthritic condition,'" stemming from a 1995 occupational exposure to sulfuric acid, was compensable.[46] The board found that the employee's last day of work on January 4, 2002 amounted to a "'new injury.'"[47] The employee, Cross, had been exposed to sulfuric acid on August 22, 1995, and he suffered effects from it until 2002, missing some time from work in 1995 and again in 2000 and 2001. Cross's doctor diagnosed him with an autoimmune disorder, which the doctor concluded was caused by Cross's exposure to sulfuric acid in 1995. Cross stopped work on January 4, 2002, and on January 28, 2002, he filed a workers' compensation claim against his employer, Georgia Pacific.[48] Georgia Pacific contended, inter alia, that Cross's claim for an "occupational injury" was barred by the one-year statute of limitations because his injury arose in 1995.[49] The Administrative Law Judge ("ALJ") agreed with Georgia Pacific, but the board's appellate division reversed, finding that his continued work aggravated his condition.[50] The court of appeals affirmed the appellate division's decision.[51]

C. Employer/Employee Relationship

The case of *Glover v. Ware* deals with the fundamental element in every workers' compensation case—the employer-employee relationship.[52] In *Glover* the estate of Willie Fred Glover filed suit in Gwinnett County State Court against Charles Ware, a landscaper, and his business entity, Old BW Landscaping, Inc., for wrongful death after Glover fell off a flatbed truck and was crushed to death by a mulching machine. The defendants argued that Glover was an employee of Old

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44. *Id.* at 3, 625 S.E.2d at 448.
45. 275 Ga. App. 664, 621 S.E.2d 586 (2005).
46. *Id.* at 664-65, 621 S.E.2d at 587-88.
47. *Id.* at 664, 621 S.E.2d at 587.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 665-66, 621 S.E.2d at 588.
52. 276 Ga. App. at 759-62, 624 S.E.2d at 285-88.

BW Landscaping, and the trial court agreed, granting summary judgment for the defendants based on the exclusive remedy provisions of the Workers' Compensation Act.[53]

The estate appealed, and the court of appeals reversed the summary judgment, stating that the facts were sufficiently in dispute to prevent summary judgment.[54] The facts showed that Glover lived in a trailer on Ware's farm, and Glover received Social Security disability payments, which were paid to Ware on Glover's behalf. Ware took care of all of Glover's needs, including food, shelter, clothing, and spending money, which exceeded the amount Glover received from Social Security.[55]

On the date of the accident, Glover went to the job site with Ware, and Ware testified that Glover did not go there as an employee. When a crew member failed to show up, Ware asked Glover to help out. Pay was not discussed. Glover had not worked for Ware before. Glover was on the bed of a flatbed truck, moving hay bales from the truck bed onto the conveyor of a mulching machine. As the truck started up a slope, Glover lost his balance and fell off. The mulching machine ran over him. Emergency personnel were called, but Glover did not survive the accident.[56]

Glover's family filed for workers' compensation death benefits, but the case was not pursued at the state board. The workers' compensation carrier asked Ware to sign a statement that Glover was not his employee, which Ware did. Glover's family went on to file the wrongful death suit, and the defendants then asserted the exclusive remedy provisions.[57] In looking at the conflicting evidence—which included Ware's signed statement for his insurance carrier that Glover was not an employee—the court of appeals reversed the state court, simply stating that the case presented genuine issues of fact for a jury to decide.[58] The court pointed out that the "situation is unusual, and none of the reported cases directly apply,"[59] despite the body of law which seemed to support the trial court's findings.

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53. *Id.* at 759, 624 S.E.2d at 286.
54. *Id.* at 761, 624 S.E.2d at 288.
55. *Id.* at 759, 624 S.E.2d at 286.
56. *Id.* at 760, 624 S.E.2d at 287.
57. *Id.* at 759, 624 S.E.2d at 286.
58. *Id.* at 761-62, 624 S.E.2d at 287-88.
59. *Id.* at 761, 624 S.E.2d at 288.

D. Failure to Cooperate with Medical Treatment

In *Dallas v. Flying J, Inc.*,[60] the employee was injured and received benefits. The employer, Flying J, wanted the employee to return to his doctor at the Glynn Immediate Care ("GIC") clinic, and the employee was ordered by the ALJ to call GIC and schedule an appointment within fifteen days. He did not comply, and his benefits were suspended. He sought reinstatement of his benefits, arguing that he called GIC several times and tried to schedule an appointment, but the GIC would only take walk-ins. In his view, he did everything possible to comply with the ALJ's order, but the clinic would not schedule an appointment.[61] The ALJ felt constrained to lift the suspension of benefits because the employee "'perfectly complied with the letter'" of the order.[62]

The board's appellate division vacated the ALJ's reinstatement of benefits, accepting the employer's argument that the employee failed to cooperate with medical treatment.[63] The Workers' Compensation Act required the employee to submit himself to an examination by the treating doctor at reasonable times, and if he refused, his benefits could be suspended.[64] The employee argued that it was "'unreasonable to expect him to sit in a room which may be cramped with twenty or more sick patients awaiting his turn.'"[65] The appellate division reversed the ALJ's reinstatement, finding that the employee knew he could receive treatment on a walk-in basis and that he should have gone to the clinic for treatment.[66] The court of appeals affirmed the appellate division's decision.[67]

E. Superior Court's Jurisdiction

In *Sears v. Macon Water Authority*,[68] the appeal dealt with an order issued by the superior court, which limited future medical expenses for a compensable condition.[69] The court of appeals held that the superior court exceeded its jurisdiction in adding the limiting language to its

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60. 279 Ga. App. 786, 632 S.E.2d 389 (2006).
61. *Id.* at 787-88, 632 S.E.2d at 391.
62. *Id.* at 788, 632 S.E.2d at 392.
63. *Id.* at 789, 632 S.E.2d at 392.
64. *Id.* at 791, 632 S.E.2d at 393; *see* O.C.G.A. § 34-9-200(c) (2004).
65. *Dallas*, 279 Ga. App. at 790, 632 S.E.2d at 393.
66. *Id.* at 790-91, 632 S.E.2d at 393.
67. *Id.* at 791, 632 S.E.2d at 393.
68. 276 Ga. App. 194, 622 S.E.2d 867 (2005).
69. *Id.* at 195, 622 S.E.2d at 869.

order.[70] In this case, the employee fell from a ladder and sustained several injuries, including fractured bones. While in the hospital, he was taken off a blood thinner he had been taking for his heart condition, and about four days after the fall, he had a heart attack. The medical evidence showed that the heart attack was caused by a combination of the employee's pre-existing heart disease, physical stress from the fall, fractured bones, pain, reduction of blood thinning medications, and the chemical changes in his body that made his arteries more susceptible to clotting.[71]

The ALJ found that the heart attack arose from the fall's aggravation of the employee's pre-existing heart disease and ordered that related medical expenses from the treatment be paid. The employer appealed, but the appellate division affirmed the ALJ's finding.[72] When the employer appealed to superior court, the court affirmed the appellate division but added that the employer is "'not required to pay any future medical expenses related to Claimant's heart condition.'"[73] The employee appealed that portion of the superior court's order, and the court of appeals agreed that the superior court exceeded its jurisdiction by making a finding of fact regarding the compensability of all future medical bills related to the employee's heart condition.[74]

F. Reimbursement of Benefits

In *Trax-Fax, Inc. v. Hobba*,[75] the issue was whether O.C.G.A. section 34-9-245,[76] which provides that claims for reimbursement of overpaid

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70. *Id.*

71. *Id.* at 194-95, 622 S.E.2d at 868-69.

72. *Id.* at 195, 622 S.E.2d at 869.

73. *Id.*

74. *Id.* at 195-96, 622 S.E.2d at 869-70. The superior court may only affirm or reverse as a matter of law, and it may sometimes give directions. *Id.* at 196, 622 S.E.2d at 869. O.C.G.A. section 34-9-105(c) provides for the limited circumstances when the superior court may set aside the board's decision:

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

O.C.G.A. § 34-9-105(c) (2004). In *Atkinson v. Home Indemnity Co.*, the court of appeals held that the superior court may not substitute itself as a fact-finding authority in lieu of the board. 141 Ga. App. 687, 687, 234 S.E.2d 359, 360 (1977).

75. 277 Ga. App. 464, 627 S.E.2d 90 (2006).

76. O.C.G.A. § 34-9-245 (2004). The code section reads:

> Should the board find that a claimant has received an overpayment of income benefits from the employer, for any reason, the board shall have the authority to

income benefits must be filed within two years from the date the overpayment was made, applied to a case of overpayment that began in the year prior to the statute's enactment.[77] Hobba, an employee of Trax-Fax, was also the president and sole shareholder of the company. He was injured in a work accident on July 28, 1998 and was paid temporary total disability benefits through April 24, 2002. Travelers, Trax-Fax's carrier, found out that Hobba had actually returned to work some time prior to April 24, 2002 and sought to have Hobba reimburse all the benefits he had been paid.[78]

At a hearing, the ALJ found that Hobba had never been totally economically disabled and that Travelers was entitled to full reimbursement of all benefits paid to Hobba. The ALJ also ordered Hobba to pay attorney fees, litigation expenses, and a civil penalty, and referred the case to the board's enforcement division. Hobba appealed, but the appellate division affirmed the ALJ.[79] He then appealed to superior court, arguing that O.C.G.A. section 34-9-245 should have applied as a statute of repose,[80] thus only allowing recovery of overpayments made in the two years prior to the request for reimbursement. The superior court agreed with this argument and concluded that Travelers was only entitled to reimbursement of benefits that were paid in the two years preceding the date that it filed its reimbursement claim. The superior court also reversed the board's award of attorney fees, the assessment of the civil penalty, and the referral of the matter to the board's enforcement division.[81]

> order repayment on terms acceptable to the parties or within the discretion of the board. No claim for reimbursement shall be allowed where the application for reimbursement is filed more than two years from the date such overpayment was made.

Id.

77. *Trax-Fax*, 277 Ga. App. at 466, 627 S.E.2d at 93.
78. *Id.* at 464-65, 627 S.E.2d at 92.
79. *Id.* at 465, 627 S.E.2d at 92-93.
80. The distinction between the statute of limitation and the statute of repose is that:

> "A statute of limitation is a procedural rule limiting the time in which a party may bring an action for a right which has already accrued. A statute of ultimate repose delineates a time period in which a right may accrue. If the injury occurs outside that period, it is not actionable." A statute of repose stands as an unyielding barrier to a plaintiff's right of action. The statute of repose is absolute; the bar of the statute of limitation is contingent.

Simmons v. Sonyika, 279 Ga. 378, 379, 614 S.E.2d 27, 29 (2005) (quoting Craven v. Lowndes County Hosp. Auth., 263 Ga. 657, 660, 437 S.E.2d 308, 310 (1993)) (citations omitted); *see generally* Trent Tube v. Hurston, 261 Ga. App. 525, 583 S.E.2d 198 (2003) (discussing statute of limitations in workers' compensation reimbursement cases).

81. *Trax-Fax*, 277 Ga. App. at 465, 627 S.E.2d at 92-93.

Travelers then appealed to the court of appeals, arguing that because O.C.G.A. section 34-9-245 is a statute of limitations that Hobba failed to raise as a defense at the hearing, the defense was waived.[82] In the alternative, Travelers pointed out that O.C.G.A. section 34-9-245 was enacted a year after Hobba's injury, and thus, even if it is a statute of repose, it should not be retroactively applied.[83] The court of appeals, however, held that the superior court's interpretation of O.C.G.A. section 34-9-245 as a statute of repose was correct and that the statute could be applied in this case even though the alleged injury occurred a year before the statute's enactment.[84] Thus, Hobba only had to reimburse Travelers for the two years preceding the date on which Travelers brought its reimbursement claim.[85] But the court also held that the superior court had no right to reverse the board's assessment of attorney fees, the civil penalty, and the referral of the matter to the enforcement division.[86] As a result, the board's decision on those issues was allowed to stand.[87]

G. Subject Matter Jurisdiction to Determine Coverage

The insurer's defense that it properly cancelled an employer's coverage is most often asserted after an employee files a claim. When the insurer raises this defense after the employee has filed a claim, all parties are likely to ask the state board to rule on the coverage issues because it is convenient to have one hearing for the coverage and workers' compensation issues. It is also more economical and efficient to have the coverage issue addressed by the state board rather than by the superior or state courts. The state board is allowed to decide coverage issues that concern the payment of benefits to an injured employee because the issue is ancillary to an employee's claim.[88]

In *Builders Insurance Co. v. Ker-Wil Enterprises, Inc.*,[89] the employee, Jacob Reeves, filed a claim with the state board against Ker-Wil Enterprises, Inc. ("Ker-Wil") and Builders Insurance ("Builders"), the insurer, for compensation of an injury he sustained under Ker-Wil's employment. Builders disputed the claim and denied coverage,

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82. *Id.* at 466, 627 S.E.2d at 93.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 471-72, 627 S.E.2d at 97-98.
87. *Id.* at 472, 627 S.E.2d at 98.
88. *See* Builders Ins. Group, Inc. v. Ker-Wil Enters., Inc., 274 Ga. App. 522, 525, 618 S.E.2d 160, 163 (2005).
89. 274 Ga. App. 522, 618 S.E.2d 160 (2005).

contending that it had timely and properly cancelled Ker-Wil's policy.[90] Builders filed a complaint for declaratory judgment and a motion for summary judgment in Henry County Superior Court.[91] Both pleadings essentially sought a finding from the court that Builders properly and timely cancelled the coverage for Ker-Wil.[92] The employer then filed an answer and a motion to dismiss, arguing that a declaratory judgment was not appropriate in this case and that the coverage issue should have been addressed by the state board when the employee's claim was heard. The superior court granted Ker-Wil's motion to dismiss but did not rule on Builders's motion for summary judgment.[93]

Builders appealed to the court of appeals, arguing that the superior court erred in granting the employer's motion to dismiss and in not ruling on Builders's motion for summary judgment.[94] Builders also argued that the state board did not have subject matter jurisdiction to decide the coverage issue.[95] However, the court of appeals agreed with the superior court's handling of the case, pointing out that the purpose of a declaratory judgment is "'to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.'"[96] Here, because Builders had denied coverage from the outset, a declaratory judgment was not appropriate or available because Builders was neither uncertain nor insecure with regard to its rights, status, or legal relations.[97] Essentially, the court reasoned that declaratory judgment could be used in a situation where the insurer was not sure if it should provide coverage, but not in a case where the insurer had already made the decision to deny coverage.[98]

The court also stated that the failure to rule on the motion for summary judgment was not error, and because there was no ruling, there was nothing for the court of appeals to review.[99] Builders's last argument was that the state board had no subject matter jurisdiction to resolve the coverage issue.[100] The court of appeals confirmed that there was no Georgia case explicitly on point.[101] Nonetheless, in

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90. *Id.* at 522, 618 S.E.2d at 161.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 523, 618 S.E.2d at 161-62 (quoting O.C.G.A. § 9-4-1 (1982)).
97. *Id.*, 618 S.E.2d at 162.
98. *Id.*
99. *Id.* at 522, 618 S.E.2d at 161.
100. *Id.* at 523, 618 S.E.2d at 162.
101. *Id.*

accordance with the general rule,[102] the court held that the board had jurisdiction "to resolve workers' compensation insurance coverage issues that bear upon the payment of benefits to an injured employee claimant."[103]

H. Change in Condition

In *John W. Rooker & Associates v. Patterson*,[104] the court of appeals affirmed the state board's latitude in determining when an employee has actually returned to work for purposes of determining a change in condition.[105] Patterson, a heavy equipment operator, suffered injuries in 1996 that ultimately resulted in a spinal fusion. The employer voluntarily accepted the claim, and Patterson's injuries were ultimately deemed catastrophic under O.C.G.A. section 34-9-200.1.[106] Subsequently, however, the employer sought to reduce Patterson's disability benefits from temporary total to temporary partial, based upon the allegation that Patterson had returned to work as a maintenance worker for an apartment complex.[107] The evidence showed that Patterson was a close friend of the apartment manager of the complex where he was alleged to have worked. The apartment manager used to baby-sit Patterson's children when they were younger, and Patterson visited the complex on a regular basis. Patterson occasionally assisted the manager around the property by performing odd jobs, including replacing faucets, changing doorknobs, checking the wiring on stoves, unstopping refrigerator wiring, and picking up items from the store, but he had not been paid for these jobs. There was evidence, however, that Patterson was paid gas money for driving to various stores, ranging from $10 to $50, totaling up to $100 over the course of the year. Both the employee and the apartment manager testified that Patterson did not work for the apartment complex, but rather simply helped out with small tasks when the regular maintenance workers were not available. The ALJ

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> "The general rule appears to be that, when it is ancillary to the determination of the employee's right, the Board has authority to pass upon a question relating to the insurance policy, including fraud in procurement, mistake of the parties, reformation of the policy, cancellation, existence or validity of an insurance contract, coverage of the policy at the time of injury, and construction of extent of coverage."

Id. (quoting 9 Larson's Workers' Compensation Law §§ 150.04 [1]-[2]).

103. *Id.* at 525, 618 S.E.2d at 163.

104. 276 Ga. App. 410, 623 S.E.2d 258 (2005).

105. *Id.* at 410-11, 623 S.E.2d at 259-60.

106. *Id.* at 411, 623 S.E.2d at 260; *see* O.C.G.A. § 34-9-200.1 (2004 & Supp. 2006).

107. *Rooker*, 276 Ga. App. at 411, 623 S.E.2d at 260.

determined that the employee had simply helped out by performing odd jobs for a friend and that his activities did not constitute an actual return to work.[108]

On appeal, the employer argued that the evidence before the board demanded, as a matter of law, the conclusion that Patterson had undergone a change in condition and that a reduction in benefits was required.[109] Specifically, the employer relied upon the court's previous decisions in *WAGA-TV, Inc. v. Yang*[110] and *ABB Risk Management Service v. Lord*[111] for the proposition that proof of the employee's activities at the apartment complex demanded the conclusion that the employee had returned to work.[112] The court of appeals observed that in those cases, the state board had considered similar evidence and determined that the employee had, in fact, returned to work.[113] But the court distinguished these cases, stating, "Our opinions in *Yang* and *Lord* were grounded on the 'any evidence' standard of review; they do not mandate the same result on similar facts."[114] Next, the employer argued that evidence of suitable employment from a labor market survey demanded the conclusion that the employee had undergone a change in condition.[115] The court rejected this argument because there was no evidence that any of these jobs were actually available to the employee or that he knew about them.[116] In determining whether a particular employee's activities constitute an actual "return to work," the facts of each particular case must be closely examined, with a focus on the employee's ability to earn income.[117]

In *Metropolitan Atlanta Rapid Transit Authority* ("MARTA") *v. Bridges*,[118] the court of appeals once again strictly construed O.C.G.A. section 34-9-104(a)(2) with regard to the reduction of benefits based upon an employee's release to light-duty work.[119] After sustaining a compensable injury, Bridges's benefits were suspended based upon a normal-duty work release from his authorized treating physician, Dr. Bernot. Bridges then requested a hearing to challenge the suspension of benefits

108. *Id.* at 413-14, 623 S.E.2d at 261-62.
109. *Id.* at 412, 623 S.E.2d at 261.
110. 256 Ga. App. 224, 568 S.E.2d 58 (2002).
111. 254 Ga. App. 88, 561 S.E.2d 225 (2002).
112. *Rooker*, 276 Ga. App. at 412, 623 S.E.2d at 261.
113. *Id.* at 412-13, 623 S.E.2d at 261.
114. *Id.* at 413, 623 S.E.2d at 261.
115. *Id.* at 414, 623 S.E.2d at 262.
116. *Id.*
117. *See id.* at 413, 623 S.E.2d at 261.
118. 276 Ga. App. 220, 623 S.E.2d 1 (2005).
119. *Id.* at 224, 623 S.E.2d at 3.

and to seek a change in physicians to Dr. Kingloff. After an evidentiary hearing, the ALJ issued an award on November 1, 2002, finding that Bridges's condition had not changed for the better, that he was entitled to temporary total disability benefits retroactive to April 5, 2002 (the date the benefits were originally suspended), and also granted a change in physicians to Dr. Kingloff. On January 21, 2003, MARTA unilaterally reduced Bridges's benefits under O.C.G.A. section 34-9-104(a)(2) from temporary total disability benefits to temporary partial disability benefits based upon a WC-104 form that MARTA filed. The form was based upon Dr. Bernot's conclusions about the claimant's condition in February 2002, which was prior to the ALJ's decision. Following a second evidentiary hearing, a different ALJ issued an award on December 10, 2003, finding that the reduction of benefits was improper because MARTA had failed to prove compliance with the mandatory requirement of filing the WC-104 form with the board.[120]

On appeal, the court held, "In order to avail itself of the opportunity to unilaterally convert an employee from temporary total disability to temporary partial disability, MARTA was required to strictly comply with O.C.G.A. § 34-9-104(a)(2)."[121] In this regard, MARTA's failure to prove that the WC-104 form was filed with the board violated Board Rule 104, which required that the form be filed with the board and sent to the employee.[122] MARTA argued that the employee stipulated at the hearing that the WC-104 existed.[123] The court relegated its discussion of this argument to a footnote, holding that the stipulation "[did] not fulfill the requirements of the statute."[124] In addition, the court of appeals held that Dr. Bernot's medical report, upon which the WC-104 was based, was no longer valid given the original hearing, which rejected Dr. Bernot's opinion.[125] Similarly, the court rejected MARTA's attempts to rely on another WC-104 that was issued in November 2001 and was based upon the opinion of Dr. Dawkins.[126] The court noted:

> Following his return to light duty status by Dr. Bernot, there was no WC-104 filed by MARTA with the Board with a statement by Dr. Kingloff, the authorized treating physician pursuant to Conner's award,

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120. *Id.* at 221-22, 623 S.E.2d at 2.

121. *Id.* at 224, 623 S.E.2d at 3.

122. *Id.* at 223, 623 S.E.2d at 3 (citing Rules and Regulations of the State Bd. of Workers' Compensation, Rule 104(a) (2003)).

123. *Id.* at 224 n.3, 623 S.E.2d at 4 n.3.

124. *Id.*

125. *Id.* at 224, 623 S.E.2d at 4.

126. *Id.*

> or Dr. Bernot that Bridges was able to return to light duty . . . . MARTA's failure to show compliance with the statutory requirements precludes its unilateral suspension of benefits.[127]

What is curious about the court's comments is that the first ALJ award "established that Bridges had been capable only of sedentary work since the 2001 accident."[128] Presumably, therefore, at least one of the res judicata effects of the first award was to establish that Bridges was capable of at least some form of light-duty work. Nevertheless, the court rejected MARTA's various efforts to reduce benefits under O.C.G.A. section 34-9-104(a)(2) because of MARTA's failure to strictly follow the notice requirements contained therein.[129]

Since the Georgia Supreme Court's decision in *Maloney v. Gordon County Farms*,[130] the appellate courts have occasionally struggled with what constitutes the proximate cause of an employee's reduced income in attempting to find a change in condition.[131] The court of appeals addressed this issue again in *Roberts v. The Jones Co.*[132] Roberts sustained a compensable injury to her right wrist while working at Flash Foods, which voluntarily commenced workers' compensation benefits. Roberts eventually returned to light-duty work with Flash Foods, but her employment was subsequently terminated for reasons unrelated to her on-the-job injury. Roberts then looked for work with other employers, eventually finding a job at Huddle House which paid less than her previous job with Flash Foods.[133]

After beginning work at Huddle House, Roberts requested a hearing seeking temporary total disability benefits for the period between her termination at Flash Foods and the start of her job at Huddle House.[134] She also sought temporary partial disability benefits "based on a change of economic condition for the worse" because her income was less at Huddle House.[135] After an evidentiary hearing, the ALJ determined that Roberts had undertaken a diligent but unsuccessful

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127. *Id.* at 224-25, 623 S.E.2d at 4.

128. *Id.* at 222, 623 S.E.2d at 2.

129. *Id.* at 225, 623 S.E.2d at 4; *see also* City of Atlanta v. Sumlin, 258 Ga. App. 643, 646, 574 S.E.2d 827, 830 (2002) (requiring the employer's strict compliance with O.C.G.A. § 34-9-104(a)(2) and Board Rule 104).

130. 265 Ga. 825, 462 S.E.2d 606 (1995).

131. *See* Padgett v. Waffle House, Inc., 269 Ga. 105, 498 S.E.2d 499 (1998); Harrell v. City of Albany Police Dep't, 219 Ga. App. 810, 466 S.E.2d 682 (1996); L.C.P. Chems. v. Strickland, 221 Ga. App. 742, 472 S.E.2d 471 (1996).

132. 277 Ga. App. 517, 627 S.E.2d 139 (2006).

133. *Id.* at 517-18, 627 S.E.2d at 139-40.

134. *Id.* at 518, 627 S.E.2d at 140.

135. *Id.*

search for suitable employment following the termination of her employment at Flash Foods and that she was therefore entitled to temporary total disability benefits for this period of time. The ALJ denied temporary partial disability benefits, however, finding that the employee had failed to produce evidence that her lower earnings at Huddle House were related to her compensable injury with Flash Foods.[136]

The court of appeals reversed, stating:

> Where, as here, after a diligent job search the employee accepts lower-paying work for continuing disability incident to a compensable injury the need for temporary partial disability benefits is no less compelling than the case for temporary total disability benefits under *Maloney*. To hold otherwise would be to create a disincentive for motivated workers to seek suitable employment after suffering a compensable injury and would undermine the well-settled principle that the Workers' Compensation Act be interpreted liberally for the protection of both employers and employees.[137]

The court of appeals noted that the supreme court's decision in *Maloney* overturned a number of prior decisions that imposed an additional requirement upon change of condition claimants to show why they were refused prospective employment.[138] In denying Roberts's claim for temporary partial disability benefits, the ALJ concluded that Roberts had failed to show a connection between her lower wages at Huddle House and her compensable injury at Flash Foods.[139] Because the ALJ imposed upon Roberts the requirement that she demonstrate that her lower wages at Huddle House were a result of the compensable injury she sustained at Flash Foods, the court of appeals concluded that the ALJ "imposed on Roberts the additional burden of proof which *Maloney* rejected."[140] As a result, the court reversed the ALJ's decision on Roberts's entitlement to temporary partial disability benefits and remanded the case for further proceedings.[141]

Obviously, the mere fact that one job pays less than another does not mean that an employee's reduced income has been proximately caused by restrictions from the compensable injury. Apparently, however, the

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136. *Id.*

137. *Id.* at 519, 627 S.E.2d at 140 (citing O.C.G.A. § 34-9-23 (2004); Lumbermen's Mut. Cas. Co. v. Griggs, 190 Ga. 277, 287, 9 S.E.2d 84, 90 (1940)) (footnote omitted).

138. *Id.* at 518-19, 627 S.E.2d at 140 (citing *Maloney*, 265 Ga. at 827-28, 462 S.E.2d at 608).

139. *Id.* at 519, 627 S.E.2d at 140.

140. *Id.*

141. *Id.*

court of appeals concluded that the evidence of this employee's diligent but unsuccessful job search before finding work at Huddle House demanded the conclusion that her lower wages there were proximately caused by the compensable injury. To the extent this conclusion is based on O.C.G.A. section 34-9-23,[142] it would appear to be misplaced, as this code section requires that the Workers' Compensation Act be liberally construed "only for the purpose of bringing employers and employees within the provisions of this chapter and to provide protection for both."[143] Other than this one exception, the code section goes on to require that "[t]he provisions of this chapter shall be construed and applied *impartially* to both employers and employees."[144]

The right of illegal aliens to workers' compensation benefits is an issue that has surfaced at the appellate level several times recently.[145] In *Martines v. Worley & Sons Construction*,[146] the employee's status as an illegal alien was a factor in determining change in condition. Martines sustained a compensable injury to his left foot while in the employ of Worley & Sons Construction, which voluntarily paid workers' compensation benefits. When Martines was eventually released to work with restrictions as a result of the left foot injury, Worley & Sons offered light-duty work as a delivery truck driver, a job within his physical limitations. In order to return to the truck driving position, Martines was asked to produce a valid driver's license and proof of legal citizenship. At that time, Martines revealed that he could not produce a Georgia driver's license and could not obtain one because he was in the country illegally.[147]

After a subsequent evidentiary hearing, an ALJ concluded that the job offered to Martines was not suitable because he did not possess the driver's license required for the job.[148] Although affirmed by the appellate division, the superior court reversed this finding, and the court of appeals affirmed the superior court's reversal.[149] The court of appeals held, "We conclude that an injured worker's refusal to accept a suitable job based on a *legal* inability to perform the job resulting from the worker's voluntary conduct, rather than a lack of skill or physical

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142. O.C.G.A. § 34-9-23 (2004).
143. *Id.*
144. *Id.* (emphasis added).
145. *See* H. Michael Bagley, Daniel C. Kniffen & Katherine D. Dixon, *Workers' Compensation*, 57 MERCER L. REV. 419, 430-34 (2005).
146. 278 Ga. App. 26, 628 S.E.2d 113 (2006).
147. *Id.* at 26, 628 S.E.2d at 114.
148. *Id.* at 26-27, 628 S.E.2d at 114.
149. *Id.* at 27, 32, 628 S.E.2d at 114, 117.

capacity, is not justified as a matter of law."[150] In so holding, the court relied upon the Georgia Supreme Court's ruling in *City of Adel v. Wise*,[151] which established a two-pronged test to determine when benefits are appropriately suspended on the basis of an offer of suitable employment.[152] First, the state board must determine whether the employment offered by the employer and refused by the employee is suitable to the employee's capacity, which means whether the employee's capacity or ability to perform the work is within his physical limitations or restrictions.[153] Second, if it is determined that the proffered employment is suitable to the capacity of the employee then the board must determine whether the employee's refusal of the job is justified.[154] As the court further explained, however, the board's discretion in determining whether a refusal of light-duty work is justified is not without limits, and the refusal "'must relate, in some manner, to his physical capacity or his ability to perform the job in order for his refusal to be justified within the meaning of O.C.G.A. [section] 34-9-240.'"[155] In applying this standard, the court held that Martines's situation is analogous to a person whose license has been revoked or a person who is in jail after conviction of a crime.[156]

The court observed that its prior decision in *Earth First Grading v. Gutierrez*[157] did not require a different result.[158] The court noted that in *Gutierrez*, the court rejected the employer's argument that the illegal immigrant employee in that case was precluded from receiving temporary total disability benefits because the employee's illegal status was analogous to incarceration.[159] The court distinguished *Gutierrez* by pointing out that the employee's illegal status in that case was not the cause of the employee's inability to find work because his illegal status was not discovered until after the period for which the employee sought benefits, and the employee had performed work for the employer despite his illegal status.[160] In contrast, the employee's illegal status in *Martines* was the cause of the employee's inability to accept the

150. *Id.* at 26, 628 S.E.2d at 114 (emphasis added).
151. 261 Ga. 53, 401 S.E.2d 522 (1991).
152. *Martines*, 278 Ga. App. at 28, 628 S.E.2d at 115 (citing *Wise*, 261 Ga. at 54-55, 401 S.E.2d at 524).
153. *Id.*
154. *Id.*
155. *Id.* (quoting *City of Adel*, 261 Ga. at 55, 401 S.E.2d at 524).
156. *Id.* at 29, 628 S.E.2d at 116.
157. 270 Ga. App. 328, 606 S.E.2d 332 (2004).
158. *Martines*, 278 Ga. App. at 29-30, 628 S.E.2d at 116.
159. *Id.* at 29, 628 S.E.2d at 116.
160. *Id.* at 29-30, 628 S.E.2d at 116.

proffered employment because the employee revealed his illegal status at the time he was denied employment as a truck driver as a result of his "legal inability to obtain a Georgia driver's license."[161]

In addition, the court rejected Martines's argument that his illiteracy prevented him from obtaining a license because the regulations of the Department of Motor Vehicles allow for oral testing.[162] The court also noted that because Martines was not a resident of the state of Georgia, he could not be issued a Georgia driver's license in any event, so the question of administration of the test does not even arise.[163] The court also rejected Martines's argument that his refusal of employment was justified because of the employer's failure to require employees to complete an I-9 form and concluded that this had no legal effect on whether the employee's refusal of work was justified.[164] Finally, the court rejected the argument that a physician's medical release, which was issued two days after the employee refused the truck driving position and stated that the employee was totally disabled, required a finding that the employee's refusal of employment was justified.[165] The court stated:

> "[T]he statutory test focuses on the time that the lighter-duty employment is offered." Evidence that Martines was unable to work two days later is not evidence that he was unable to work at the time the position was offered, particularly when it is undisputed that he reported to work on the date requested, made no complaints of pain, and, as the ALJ found, returned home because "he was unable to provide proper documentation."[166]

I. Change in Condition Versus New Accident

A highly unusual set of facts in *Footstar, Inc. v. Stevens*[167] caused the court of appeals to once again elaborate on the differences between a change in condition and a new accident in determining the liability of multiple workers' compensation carriers.[168] Stevens was originally injured on November 8, 1999, while working as the manager of a K-Mart store shoe department that was operated by Footstar. At that time, Footstar's workers' compensation coverage was provided by Travelers

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161. *Id.* at 30, 628 S.E.2d at 116.
162. *Id.*
163. *Id.*
164. *Id.*, 628 S.E.2d 116-17.
165. *Id.* at 31, 628 S.E.2d at 117.
166. *Id.* (citation omitted).
167. 275 Ga. App. 329, 620 S.E.2d 588 (2005).
168. *Id.* at 333, 620 S.E.2d at 590.

Insurance, which voluntarily accepted Stevens's head, neck, and shoulder injuries. But, because Stevens continued working, she received only medical benefits for treatment of her injuries. On January 1, 2001, Liberty Mutual Insurance Company became Footstar's workers' compensation carrier.[169]

Although Stevens continued to suffer from problems with her head, neck, and shoulder, she continued to work, using sick leave and vacation time because she was unable to work a full eight-hour work day. She persuaded her doctor to allow her to continue working so she could support her two children.[170] In August 2001, however, Travelers requested a hearing to determine whether it remained responsible for payment of the employee's medical treatment, or whether Liberty Mutual should be responsible on the basis that she had a new injury during Liberty Mutual's coverage. After an evidentiary hearing, the ALJ concluded that Travelers remained responsible for payment of Stevens's continuing medical expenses and that she had not sustained a new injury or new accident under Liberty Mutual's coverage.[171]

Approximately one month after the ALJ's December 18, 2001 award, Stevens stopped working because of her injuries. Travelers appealed the ALJ's award to the state board's appellate division, which ultimately affirmed the findings on August 7, 2002. Although Footstar itself had commenced payment of weekly indemnity benefits to the employee, neither Travelers nor Liberty Mutual issued payment of benefits. Ultimately, Stevens requested a hearing before the state board to determine whether she was entitled to income benefits, and if so, which insurance carrier was responsible. At the second hearing, the ALJ found that because no income benefits had previously been paid to Stevens by Travelers, a fictional new accident date had to be established as Stevens's date of disability. The ALJ selected January 5, 2002, the date Stevens left work, as the fictional new accident date. This meant that Liberty Mutual, the insurance carrier on that date, was liable for any benefits owed to Stevens.[172]

Liberty Mutual appealed to the appellate division, which reversed the ALJ's finding that a new injury had occurred on January 5, 2002. Travelers appealed to the superior court, which affirmed the appellate division's reversal of the ALJ.[173] The court of appeals affirmed the

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169. *Id.* at 330-31, 620 S.E.2d at 589.
170. *Id.* at 330, 620 S.E.2d at 589.
171. *Id.* at 331, 620 S.E.2d at 589.
172. *Id.* at 331-32, 620 S.E.2d at 589-90.
173. *Id.* at 332, 620 S.E.2d at 590.

superior court's affirmance.[174] The court also distinguished a previous line of cases which held that no change in condition can occur if income benefits have not previously been paid.[175] The court stated that those cases are distinguishable because all involved the voluntary payment of benefits by the employer, as opposed to a case, as with Ms. Stevens, in which compensability had been established by a previous award.[176] The court pointed out that the statutory definition of a "change in condition" in O.C.G.A. section 34-9-104 makes no reference to what type of compensation must have been awarded, only that the "'wage-earning capacity, physical condition, or status of the employee . . . was last established by award or otherwise.'"[177]

In *Oconee Area Home Care Services, Inc. v. Burton*,[178] another case dealing with the subject of change in condition versus new accident, the court of appeals concluded that the evidence justified the board's conclusion that the employee had sustained a change in condition as opposed to a new accident.[179] Burton was originally injured on July 16, 2003, at which time Healthcare Mutual provided workers' compensation coverage to Burton's employer. Coverage changed to Southeast U.S. Captive effective August 1, 2003, and although Burton returned to work on August 4, 2003, he subsequently left work again on August 26, 2003.[180]

At a hearing to determine whether Healthcare Mutual or Southeast U.S. Captive should be responsible for workers' compensation benefits after he went out of work on August 26, 2003, Burton testified that his inability to continue working was due to the first injury, and that he did not suffer a new accident of any kind. Despite what the ALJ described as certain inconsistencies in Burton's testimony, the ALJ found his testimony, which was partially corroborated by a supervisor, to be credible. Accordingly, the ALJ concluded that the employee's disability was the result of a change in condition and not a new injury.[181] The court of appeals held that even though this conclusion was contradicted by certain medical testimony and Burton's inconsistent statements, there

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174. *Id.* at 334, 620 S.E.2d at 591.

175. *Id.*; *see* Smith v. Mr. Sweeper Stores, Inc., 247 Ga. App. 726, 544 S.E.2d 758 (2001); Wier v. Skyline Messenger Serv., 203 Ga. App. 673, 417 S.E.2d 693 (1992); Northbrook Prop. & Cas. Ins. Co. v. Babyak, 186 Ga. App. 339, 367 S.E.2d 567 (1988).

176. *Footstar*, 275 Ga. App. at 334, 620 S.E.2d at 591.

177. *Id.* at 333, 620 S.E.2d at 591 (quoting O.C.G.A. § 34-9-104(a)(1)).

178. 275 Ga. App. 784, 621 S.E.2d 859 (2005).

179. *Id.* at 786, 621 S.E.2d at 861-62.

180. *Id.* at 784, 621 S.E.2d at 860.

181. *Id.* at 786, 621 S.E.2d at 861.

was nevertheless sufficient evidence in the record to support the ALJ's conclusion that a change in condition had occurred.[182]

J. Continuous Employment

In *Ray Bell Construction Co. v. King*,[183] the court of appeals continued its application of the continuous employment doctrine as a basis for awarding workers' compensation benefits when the employee was not clearly engaged in employment-related activities. In this case, Howard was employed by Ray Bell Construction Company as a construction superintendent on a job site in Butts County. Ray Bell Construction provided Howard with company housing in Fayetteville, as well as the use of a company owned truck for both work and personal use. Howard had been out of work for a week recovering from knee surgery when, on a Sunday, he drove the company owned truck from Fayetteville to Alamo to deliver family furniture to a storage shed on property he owned. On his return trip, he suffered fatal injuries in a motor vehicle accident in Monroe County, Georgia, which is adjacent to Butts County. At the time of the accident, Howard was carrying Ray Bell tools in his truck and was returning either to his company-provided housing in Fayetteville or to his job site in Butts County.[184]

The court of appeals affirmed the state board's determination that Howard was in continuous employment at the time of his fatal injuries, and therefore, death benefits were payable under the Workers' Compensation Act.[185] The court stated, "Here, Howard was in continuous employment in that he was 'required by [his] employment to lodge and work within an area geographically limited by the necessity of being available for work on the employer's job site.'"[186]

The court held that "some evidence supported the Board's implicit finding that . . . [Howard's] personal mission had ended at the time of the accident."[187] The court noted that the proximity of the site of the accident, in a county adjacent to where Howard was required by his employer to lodge and work, made it clear that he had sufficiently returned from any deviation from his employment and was in the "general geographic area" required by his continuous employment.[188]

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182. *Id.*
183. 277 Ga. App. 144, 625 S.E.2d 541 (2006), *cert. granted*.
184. *Id.* at 145, 625 S.E.2d at 542.
185. *Id.* at 146, 625 S.E.2d at 542.
186. *Id.* (quoting Wilson v. Ga. Power Co., 128 Ga. App. 352, 353-54, 196 S.E.2d 693, 694 (1973)) (brackets in original).
187. *Id.* at 148, 625 S.E.2d at 544.
188. *Id.*

The court acknowledged that the mere act of an employee on a personal mission turning around to return toward the employee's assigned geographic area does not, by itself, establish that the employee has resumed employment activities.[189] Nonetheless, the court affirmed the board's decision, stating that "[w]e will not substitute our judgment for that of the Board as to the precise bounds of the general Fayetteville/-Jackson geographic area to which Howard was assigned."[190]

189. *Id.* at 147, 625 S.E.2d at 543.
190. *Id.* at 148, 625 S.E.2d at 544.