

Workers' Compensation

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I. LEGISLATION

The year 2007 was relatively quiet for workers' compensation legislation in the Georgia General Assembly. However, there were several statutory modifications of note.¹

The Georgia Workers' Compensation Act² has long excluded "farm laborers" from its coverage.³ The scope of that exclusion was clarified by including within the term farm laborer "any person employed by an employer in connection with the raising and feeding of and caring for wildlife, as such term is defined in paragraph (77) of [Official Code of Georgia Annotated ("O.C.G.A.")] Section 27-1-2."⁴ The Code section referenced defines wildlife as "any vertebrate or invertebrate animal life indigenous to this state or any species introduced or specified by the board and includes fish, except domestic fish produced by aquaculturists registered under [O.C.G.A.] Section 27-4-255, mammals, birds, fish, amphibians, reptiles, crustaceans, and mollusks or any part thereof."⁵

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1. Ga. H.R. Bill 424, Reg. Sess. (2007) contains almost all modifications impacting the Georgia Workers' Compensation Act.

2. O.C.G.A. §§ 34-9-1 to -421 (2004 & Supp. 2007).

3. O.C.G.A. § 34-9-2(a).

4. *Id.* § 34-9-2(a)(1) (Supp. 2007).

5. O.C.G.A. § 27-1-2(77) (2007).

During the legislative session, this was commonly referred to as the “Alligator Farm” amendment.⁶

Since 1985 claims that were not being prosecuted—those evidenced by the absence of any hearing being conducted for a period of at least five years—were deemed to “automatically stand dismissed.”⁷ This provision was modified for any injuries occurring on or after July 1, 2007.⁸ Any claim filed with the Georgia State Board of Workers’ Compensation (the “Board”) after that time, for which neither medical nor income benefits have been paid, shall “stand dismissed with prejudice by operation of law if no hearing has been held within five years of the alleged date of injury.”⁹ This provision applies to all claims except certain and specified occupational disease claims.¹⁰

In another housekeeping modification to the Workers’ Compensation Act, the General Assembly clarified the provisions for independent medical evaluations.¹¹ These provisions have long required that the employee submit to an examination “by a duly qualified physician or surgeon.”¹² The legislature clarified that the evaluation “may include physical, psychiatric, and psychological examinations.”¹³

Similarly, the Board’s power to approve the fees of medical providers was clarified to affirmatively include “charges for prescription drugs, and charges for other items” in addition to the fees of physicians and charges of hospitals.¹⁴

Effective July 1, 2007, the maximum rate for temporary total disability benefits was increased from \$425 to \$500 per week,¹⁵ and the maximum rate for temporary partial disability benefits was raised from \$284 to \$334 per week.¹⁶

6. Two decisions were the impetus for this legislation. In *Cook v. Prehistoric Ponds, Inc.*, 282 Ga. App. 904, 640 S.E.2d 383 (2006) and *Gill v. Prehistoric Ponds, Inc.*, 280 Ga. App. 629, 634 S.E.2d 769 (2006), the Georgia Court of Appeals held that alligator farms are not subject to the farm exclusion. *Cook*, 282 Ga. App. at 905, 640 S.E.2d at 384; *Gill*, 280 Ga. App. at 633, 634 S.E.2d at 773.

7. O.C.G.A. § 34-9-100(c) (2004) (amended 2007).

8. *Id.* § 34-9-100(c) (Supp. 2007).

9. *Id.* § 34-9-100(d)(1).

10. *Id.* § 34-9-100(d)(2).

11. O.C.G.A. § 34-9-202(a) (2004 & Supp. 2007).

12. *Id.* § 34-9-202(a) (2004) (amended 2007).

13. *Id.* § 34-9-202(a) (Supp. 2007).

14. O.C.G.A. § 34-9-205(a) (Supp. 2007).

15. O.C.G.A. § 34-9-261 (2004 & Supp. 2007).

16. O.C.G.A. § 34-9-262 (2004 & Supp. 2007).

II. AUTHORIZED MEDICAL CARE

Perhaps the most fundamental benefit afforded to injured workers under the Workers' Compensation Act is the provision of medical care, and there are mutual obligations and rights imposed by law on both the employer and the employee. In *Goswick v. Murray County Board of Education*,¹⁷ the employee suffered an injury that was accepted as compensable under the Workers' Compensation Act. Subsequently, the employee ceased attending medical appointments for an extended period of time. In an effort to force the employee to appear, the employer attempted to schedule an examination with the authorized treating physician utilizing the independent medical evaluation provisions. However, the employee refused to appear at the examination, and following a hearing, an administrative law judge ("ALJ") ordered him to attend an examination. The employee again refused, contending that the independent medical evaluation provisions of the Workers' Compensation Act did not apply to authorized treating physicians. At a second hearing, the ALJ ordered the suspension of income benefits for the employee's failure to attend the independent medical evaluation, and the appellate division adopted that award.¹⁸ The superior court and the court of appeals affirmed.¹⁹ The court of appeals based its decision on the fact that the plain language of O.C.G.A. section 34-9-202²⁰ required only "that the examining physician be duly qualified, not that the physician be independent nor that the physician not be treating the claimant."²¹

III. WORKERS' COMPENSATION MANAGED CARE ORGANIZATION

One of the vehicles rarely used by employers to satisfy their obligation to provide medical treatment for compensable injuries under the Workers' Compensation Act is a Workers' Compensation Managed Care Organization ("WC/MCO").²² One of the features of a WC/MCO is that it has unique provisions for the resolution of disputes. In *Metropolitan Atlanta Rapid Transit Authority v. Reid*,²³ an employee who had suffered a compensable injury was receiving treatment through his employer's WC/MCO. He became dissatisfied with the treatment he was

17. 281 Ga. App. 442, 636 S.E.2d 133 (2006).

18. *Id.* at 443, 636 S.E.2d at 134.

19. *Id.* at 449, 636 S.E.2d at 139.

20. O.C.G.A. § 34-9-202 (2004 & Supp. 2007).

21. *Goswick*, 281 Ga. App. at 444, 636 S.E.2d at 135.

22. See O.C.G.A. § 34-9-201(b)(3) (2004 & Supp. 2007).

23. 282 Ga. App. 877, 640 S.E.2d 300 (2006).

receiving and applied to the Board for a change of physician.²⁴ While the Board is vested with general authority to order a change of physician under O.C.G.A. section 34-9-200(b),²⁵ Board rules regarding WC/MCOs specifically require that “[d]isputes which arise on an issue related to managed care shall first be processed without charge through the dispute resolution process of the WC/MCO.”²⁶ In this case, the employee’s request for a change of physician was granted without first utilizing the WC/MCO’s internal dispute resolution process, and the employer objected.²⁷ On appeal, the court of appeals affirmed based primarily upon the following observation:

In its order affirming the ALJ, the appellate division interpreted the requirements of [O.C.G.A. section] 34-9-200(b) and found that the Board had jurisdiction to order a change of physician under the statute. Though this interpretation may conflict with the Board’s own internal published rules, i.e., Board Rule 208(f), the interpretation of a statute by an administrative agency charged with enforcing its provisions is given great deference, unless contrary to law. We defer to the Board’s interpretation that [O.C.G.A. section] 34-9-200(b) does not require [the employee] to exhaust the dispute resolution process of the WC/MCO before petitioning the Board for a change in physician.²⁸

IV. THE EXCLUSIVE REMEDY DOCTRINE

Having long been one of the fundamental principles of the Workers’ Compensation Act, the exclusive remedy doctrine was challenged again during this survey period. In *Freeman v. Barnes*,²⁹ the widow of a Fulton County superior court judge who was killed by an escaped prisoner filed an action for her husband’s wrongful death against the county sheriff and a number of his deputies due to their gross negligence. The sheriff moved to dismiss on a number of grounds, including the exclusive remedy provision of the Workers’ Compensation Act. The trial court rejected the exclusive remedy claim.³⁰ The court of appeals affirmed in a split decision.³¹ Two judges ruled that a superior court

24. *Id.* at 877, 640 S.E.2d at 302.

25. O.C.G.A. § 3-9-200(b) (2004).

26. *Reid*, 282 Ga. App. at 880, 640 S.E.2d at 304 (quoting Rules and Regulations of the State Bd. of Workers’ Compensation, Rule 208(f) (2007)).

27. *Id.* at 877, 640 S.E.2d at 302.

28. *Id.* at 881, 640 S.E.2d at 304-05 (footnotes omitted).

29. 282 Ga. App. 895, 640 S.E.2d 611 (2006).

30. *Id.* at 895, 640 S.E.2d at 612.

31. *Id.* at 902, 640 S.E.2d at 616.

judge is an employee of the state and not a county.³² Consequently, the judge and the sheriff were not employees of the same employer, and the exclusive remedy provision of the Workers' Compensation Act would not apply.³³

In *Stevenson v. Ray*,³⁴ a sheriff's deputy and his wife filed suit against the deputy's co-worker asserting claims for personal injury and loss of consortium after an automobile collision during a police chase. They argued that the exclusive remedy provision did not apply because while the co-worker was employed by the same employer, the co-worker was off duty and had been advised by his supervisor against any active involvement in the chase. The co-worker disregarded that directive and was then involved in the motor vehicle accident with the plaintiff deputy.³⁵ The court of appeals held that because the plaintiff and the defendant were both police officers, they were both on call, and therefore, they were both in the course of their employment at the time of the motor vehicle accident.³⁶ Consequently, the injuries arose out of and in the course of the co-workers' employment with the same employer.³⁷ It was thus proper for the superior court to grant the defendant's motion for summary judgment based upon the exclusive remedy provision of the Workers' Compensation Act.³⁸

In *Burns International Security Services Corp. v. Johnson*,³⁹ the parents of a security guard brought a wrongful death action against the deceased security guard's employer. The security guard had been assigned to a job that posed a high security risk to the guard, and she was not provided with a weapon or any other means of protection, nor was she furnished with any form of mobile communication. The security guard did not return from patrol one evening, and nearly three weeks later, she was found dead on the assigned property.⁴⁰ The trial court denied the employer's motion for summary judgment, and the court of appeals reversed, holding that "the trial court erred by failing to conclude that [the security guard's] death arose out of and in the course of her employment."⁴¹ The court determined that the uncontroverted evidence—that the security guard's personal items were never retrieved,

32. *Id.* at 899, 640 S.E.2d at 615.

33. *See id.*

34. 282 Ga. App. 652, 640 S.E.2d 340 (2006).

35. *Id.* at 652-54, 640 S.E.2d at 341-42.

36. *Id.* at 644-45, 640 S.E.2d at 342.

37. *Id.*

38. *Id.*

39. 284 Ga. App. 289, 643 S.E.2d 800 (2007).

40. *Id.* at 289-90, 643 S.E.2d at 801.

41. *Id.* at 293, 643 S.E.2d at 803.

her body was discovered on the property, and she had been deceased for two weeks, perhaps longer—demonstrated that the death occurred within the period of her employment with the defendant.⁴² Thus, the court held that the “remedy, if any, lies exclusively under the provisions of the Workers’ Compensation Act, and the trial court should have granted summary judgment.”⁴³

V. ANCILLARY JURISDICTION OVER COVERAGE DISPUTES

The Board has ancillary authority to resolve insurance policy coverage issues when determining an employee’s rights under the Workers’ Compensation Act.⁴⁴ In *Royal Indemnity Co. v. Georgia Insurers Insolvency Pool*,⁴⁵ the employee suffered a compensable claim that was accepted by his immediate employer’s insurer, but a number of years later, the insurer became insolvent, and the Georgia Insurers Insolvency Pool (the “Insolvency Pool”) began paying benefits to the employee. In 2005 the Insolvency Pool filed a declaratory judgment action in superior court, contending that the employee was the statutory employee of another employer and that the statutory employer and its insurer were obligated to provide benefits and to repay \$73,359.85 to the Insolvency Pool. The alleged statutory employer and its insurance carrier filed a motion for summary judgment, and the Insolvency Pool filed a cross-motion for summary judgment. The trial court granted the Insolvency Pool’s motion for summary judgment.⁴⁶ However, the court of appeals vacated the order and remanded the case with direction to dismiss without prejudice, based upon the determination that the proper forum to resolve ancillary coverage issues is the Board.⁴⁷

VI. NOTICE OF SUSPENSION OF BENEFITS

Before unilaterally suspending benefits based on an employee’s change in condition for the better, O.C.G.A. section 34-9-221(i)⁴⁸ requires that the employer give at least a ten-day notice of the intent to suspend benefits.⁴⁹ In *Reliance Electric Co. v. Brightwell*,⁵⁰ the employee

42. *Id.* at 292-93, 643 S.E.2d at 803.

43. *Id.* at 293, 643 S.E.2d at 803.

44. *Builders Ins. Group v. Ker-Wil Enters.*, 274 Ga. App. 522, 524, 618 S.E.2d 160, 162 (2005).

45. 284 Ga. App. 787, 644 S.E.2d 279 (2007).

46. *Id.* at 789, 644 S.E.2d at 280.

47. *Id.* at 790, 644 S.E.2d at 281.

48. O.C.G.A. § 34-9-221(i) (2004 & Supp. 2007).

49. *Id.*

50. 284 Ga. App. 235, 643 S.E.2d 742 (2007).

suffered an injury that the employer accepted as compensable. Payment of income benefits was initiated and continued until the employee was released to return to work without restriction. The employer utilized a Board form WC-2 to give notice of the suspension of temporary total disability benefits, but the employee received only a six-day notice of the employer's intent to suspend income benefits, rather than the ten days required by O.C.G.A. section 34-9-221(i). The employee requested a hearing, and the ALJ issued an award, finding that the employee had indeed undergone a change in condition for the better and was able to return to work without restrictions. However, because the employer had failed to give a ten-day notice of the suspension, the ALJ ordered that benefits be reinstated and continued through the date of the award. On appeal, the appellate division of the Board affirmed the ALJ's order in every respect, except it allowed suspension of disability benefits as of the date of the ALJ hearing.⁵¹

The court of appeals reversed, holding that a technical violation of O.C.G.A. section 34-9-221 does not bar an employer from contending that less benefits are due after a certain date because of a change in condition.⁵² Instead, a violation of O.C.G.A. section 34-9-221 subjects the employer to potential liability for attorney fees and penalties if the failure to properly suspend is without reasonable grounds.⁵³ The court of appeals rejected the argument that affirmance of the lower court was required by the case of *Russell Morgan Landscape Management v. Velez-Ochoa*.⁵⁴ The court of appeals pointed out that the issue in that case was whether the employer was entitled to suspend benefits as of the date it filed the WC-2 or was required to pay benefits until the date of the hearing.⁵⁵ In determining that the Board had correctly set the date of hearing as the suspension date, the court in *Russell* "relied on the fact that the WC-2 [form] was wholly defective, listing the reason for suspension of benefits as non-compliance with medical treatment," which the ALJ later determined to be completely inaccurate.⁵⁶ Consequently, "[I]t was not until the date of the hearing that the employee could be fairly said to be on notice of the reasons for the suspension of benefits."⁵⁷ That was not the case in *Reliance*.⁵⁸

51. *Id.* at 235-37, 643 S.E.2d at 743.

52. *Id.* at 238, 643 S.E.2d at 745.

53. *Id.*

54. *Id.* at 239, 643 S.E.2d at 745; 252 Ga. App. 549, 556 S.E.2d 827 (2001).

55. *Reliance*, 284 Ga. App. at 239, 643 S.E.2d at 745 (citing *Russell*, 252 Ga. App. at 550-51, 556 S.E.2d at 829).

56. *Id.* (citing *Russell*, 252 Ga. App. at 550-51, 556 S.E.2d at 829).

57. *Id.* (citing *Russell*, 252 Ga. App. at 550-51, 556 S.E.2d at 829).

58. *Id.* at 239-40, 643 S.E.2d at 745.

VII. AVERAGE WEEKLY WAGE

In *Caremore, Inc. v. Hollis*,⁵⁹ the employee sustained a lower back injury that was accepted as compensable. The employer began paying income benefits, although it did not file any forms with the Board. The parties stipulated that the employer had provided meals to the employee at a subsidized rate, and the employee was required to pay only \$1.00 for each meal, resulting in a net benefit of \$3.00 per day and \$15.00 per week. The employer argued that this benefit should not have been included in the calculation of the average weekly wage.⁶⁰ The court of appeals held that the value of partially subsidized meals represented a real economic gain to the employee and that value was properly included in her average weekly wage.⁶¹

VIII. RESPONDEAT SUPERIOR AND THE ACT

In *Gassaway v. Precon Corp.*,⁶² a case that was actually a tort case, the court of appeals considered whether an employee was engaged in furthering his employer's business when he was on an errand during his lunch break and was involved in a car accident.⁶³ In *Gassaway* an engineer trainee with Precon Corp., Charles Duncan Smith, was temporarily in Georgia for his job. He was paid on salary and did not receive overtime compensation or punch a time clock. He was paid a per diem of \$270 per week for meals and lodging and reimbursed for mileage if he used his personal vehicle for company business. On his first day on the job site in Georgia, Smith asked the job superintendent if he could take an extended lunch hour in order to find a place to live. The superintendent granted his request.⁶⁴

Smith drove his own vehicle during the lunch period. He ate lunch, and then looked at and leased a mobile home and arranged for utility service. He drove back to the job site, and as he was turning into the job site, he had a collision with another vehicle. He was cited for failure to yield the right of way. The plaintiffs in the other vehicle filed suit against Smith's employer under the theory of respondeat superior.⁶⁵

59. 283 Ga. App. 681, 642 S.E.2d 375 (2007).

60. *Id.* at 685, 642 S.E.2d at 379.

61. *Id.*

62. 280 Ga. App. 351, 634 S.E.2d 153 (2006).

63. *Id.* at 351-52, 634 S.E.2d at 155.

64. *Id.* at 352, 634 S.E.2d at 155.

65. Under this doctrine, an employer is responsible for its employee's torts only when the torts are committed within the scope of employment and while the employee is engaged in his employer's business. *Torres v. Tandy Corp.*, 264 Ga. App. 686, 688, 592 S.E.2d 111,

Precon Corp. filed a motion for summary judgment, alleging that Smith was not acting in the course and scope of his employment at the time the collision occurred, and the trial court granted the motion.⁶⁶ The court of appeals agreed.⁶⁷ The plaintiffs argued essentially that a determination that Smith was in the scope of employment for the purposes of workers' compensation would then demand a determination that he was in the scope of employment for purposes of their tort case.⁶⁸

One theory that the plaintiffs set forth was that Smith was on a "special mission" for the employer, arguing that the temporary housing was necessitated by Smith's job duties away from home.⁶⁹ However, the court cited the well-recognized principle that when "an employee takes a break for lunch and is not otherwise engaged in his employer's business, the employee is on a purely personal mission."⁷⁰ The court determined that leasing the mobile home and arranging for utilities were not part of the job duties and that Smith's job would not have been in jeopardy if he had not done these errands.⁷¹ He was given a per diem for food and housing, but he could spend it any way he chose. Moreover, the errands could have been accomplished at any time. Accordingly, the court held that the primary beneficiary of these errands was Smith himself, not his employer.⁷²

The plaintiffs tried a second theory to bring the workers' compensation angle back into their case. They argued that Smith's situation was like that of a traveling salesman and that under the workers' compensation statutes, had Smith been hurt, he would have been determined to be in the course and scope of employment. Thus, the plaintiffs argued, for the purposes of the tort suit, Smith should also be determined to be in the course and scope of employment.⁷³ The court pointed out that the few negligence cases describing this type of scenario involved employees driving their employers' cars, which was not the situation in this case.⁷⁴ The court also pointed out the differences between the laws of workers' compensation and the laws of negligence: "To be injured within the course or scope of one's employment in the context of the workers'

113 (2003).

66. *Gassaway*, 280 Ga. App. at 352, 634 S.E.2d at 155.

67. *Id.* at 355, 634 S.E.2d at 157.

68. *Id.* at 354-55, 634 S.E.2d at 157.

69. *Id.* at 353-54, 634 S.E.2d at 156.

70. *Id.*; accord *Nelson v. Silver Dollar City, Inc.*, 249 Ga. App. 139, 145, 547 S.E.2d 630, 635 (2001).

71. *Gassaway*, 280 Ga. App. at 354, 634 S.E.2d at 157.

72. *Id.*, 634 S.E.2d at 156-57.

73. *Id.* at 354-55, 634 S.E.2d at 157.

74. *Id.*; see, e.g., *Gordy Constr. Co. v. Stewart*, 216 Ga. App. 882, 456 S.E.2d 245 (1995).

compensation system is not the same thing as to be in the course or scope of one's employment and cause injury to a third person who is foreign to the employee-employer relationship."⁷⁵

IX. CHANGE IN CONDITION

In *Korner v. Education Management Corp.*,⁷⁶ the employer and insurer tried to show that the employee had undergone a change in condition for the better, that the employee was capable of working, and that there was suitable work available. This case highlights the heavy burden an employer and insurer will have in attempting to suspend benefits when an employee has a restricted work release and the original employer cannot offer work.⁷⁷

In *Korner* the employee had been employed as a clinical therapist for Education Management Corp. ("EMC") for nearly four years when she was attacked by a student that she was counseling.⁷⁸ Her physical injuries cleared up fairly quickly, but she "received psychological and psychiatric treatment for several years for Post Traumatic Stress Disorder caused by the attack."⁷⁹ It was undisputed that she could no longer work with persons with psychological problems. However, she had a B.A. and a Master's degree in social work, and in the past she had worked in residential treatment centers, public schools, and private practice, and she had enrolled in school to establish a new career.⁸⁰

To try to prove that the employee had undergone a change in condition for the better, which should allow a suspension of her weekly indemnity benefits, the employer and insurer called a witness—a rehabilitation counselor—to testify that there were suitable jobs in the marketplace that this employee could perform. The rehabilitation counselor prepared a market survey using ten pages from the employee's deposition and notes from a conversation with EMC's counsel. She identified ten jobs that she thought were appropriate, including sales representative for a home furnishings store, foreign student advisor, library clerk, and blood donor recruiter.⁸¹

Although the ALJ found that the employer and insurer met their burden and allowed suspension of benefits, the appellate division

75. *Gassaway*, 280 Ga. App. at 354, 634 S.E.2d at 157 (quoting *Jones v. Aldrich Co.*, 188 Ga. App. 581, 583, 373 S.E.2d 649, 651 (1988)).

76. 281 Ga. App. 322, 635 S.E.2d 892 (2007).

77. *Id.* at 323, 635 S.E.2d at 893.

78. *Id.* at 322, 635 S.E.2d at 893.

79. *Id.*

80. *Id.* at 322-23, 635 S.E.2d at 893.

81. *Id.* at 324, 635 S.E.2d at 894.

reversed the case. The appellate division held that the rehabilitation counselor's testimony was insufficient because she did not know the employee's rate of pay or whether the employee had past experience in sales, marketing, general office work, or communications, and further, many of the jobs did not even require an undergraduate degree, although they did require certain background and experience requirements the employee did not have.⁸²

The appellate division also determined that the employer and insurer's rehabilitation counselor did not have enough information because she did not talk to the claimant or the treating physicians. The employer and insurer took issue with these determinations, noting that the Board rules did not permit the counselor to speak to the treating physician and that she could not have direct contact with the employee.⁸³ The court of appeals noted that the appellate division's determinations were supported by the evidence, and thus neither it nor the superior court could reverse the appellate division.⁸⁴ The court of appeals did comment that other avenues had been available to the employer and insurer, such as using a direct employee of the insurer to interview the employee and her doctors, and that an independent medical exam was also available to them.⁸⁵

In *Fallin v. Merritt Maintenance & Welding, Inc.*,⁸⁶ the findings on a change in condition case were more favorable to the employer and insurer. Fallin sustained a work-related back injury in November 1998. His indemnity benefits started late, and the employer and insurer never paid the statutorily required penalty on the late benefits. In February 1999 the employer and insurer suspended Fallin's benefits and filed a notice to controvert, asserting that he had undergone a change in condition. The evidence showed that as of at least November 1999 the employee had been working, holding various jobs. The ALJ and the appellate division allowed the suspension of benefits under the change in condition theory.⁸⁷

The employee argued that because the employer and insurer never paid him the few weeks of late penalties he was owed, they did not have the right to controvert his case until those few weeks of late payments were properly paid.⁸⁸ He cited *Cartersville Ready Mix Co. v. Hamby*,⁸⁹

82. *Id.*

83. *Id.* at 324-25, 635 S.E.2d at 894.

84. *Id.* at 325, 635 S.E.2d at 894.

85. *Id.* at 324-25, 635 S.E.2d at 894.

86. 283 Ga. App. 485, 642 S.E.2d 122 (2007).

87. *Id.* at 485, 642 S.E.2d at 122-23

88. *Id.* at 486, 642 S.E.2d at 123-24.

which held that an employer and insurer could not controvert a case under O.C.G.A. section 34-9-221(h)⁹⁰ within sixty days of the claim being accepted if all late penalties were not properly paid before the controvert was filed.⁹¹

However, the employer and insurer in *Fallin* did not controvert the case under O.C.G.A. section 34-9-221(h), but did controvert under O.C.G.A. section 34-9-221(i),⁹² based only on a change in condition. That statute states that when an employer and insurer want to controvert a case based on a change in condition, they should file a notice to controvert at least ten days prior to the suspension of benefits.⁹³

The court of appeals easily distinguished this situation from *Hamby*, as *Hamby* dealt with a situation where the employer and insurer tried to go back and dispute the compensable nature of the employee's injury.⁹⁴ In *Fallin* the employer and insurer were not disputing the compensable nature of the employee's condition but were arguing only that he had a change in condition for the better, and they sought to prove it by showing that he had actually been working.⁹⁵ The court seemed to have no sympathy for the employee, who admitted that he had worked since 1999 but was essentially seeking seven years of benefits on a technicality.⁹⁶ The court also pointed out that if a notice to controvert is invalid, it does not preclude an employer and insurer from asserting a change in condition.⁹⁷

89. 224 Ga. App. 116, 479 S.E.2d 767 (1996).

90. O.C.G.A. § 34-9-221(h) (2004 & Supp. 2007).

91. *Hamby*, 224 Ga. App. at 121, 479 S.E.2d at 771. As provided in O.C.G.A. section 34-9-221(h), "Where compensation is being paid without an award, the right to compensation shall not be controverted except upon the grounds of change in condition or newly discovered evidence unless notice to controvert is filed with the board within 60 days of the due date of first payment of compensation." O.C.G.A. § 34-9-221(h).

92. O.C.G.A. § 34-9-221(i).

93. As provided in O.C.G.A. section 34-9-221(i),

Where compensation is being paid with or without an award and an employer or insurer elects to controvert on the grounds of a change in condition or newly discovered evidence, the employer shall, not later than ten days prior to the due date of the first omitted payment of income benefits, file with the board and the employee or beneficiary a notice to controvert the claim in the manner prescribed by the board.

Id.

94. *Fallin*, 283 Ga. App. at 487, 642 S.E.2d at 124.

95. *Id.* at 486-87, 642 S.E.2d at 123-24.

96. *Id.*

97. *Id.*; see *Sadie G. Mays Mem'l Nursing Home v. Freeman*, 163 Ga. App. 557, 295 S.E.2d 340 (1982).

In an odd set of facts, an employee and a second insurer got together and argued that O.C.G.A. section 34-9-221(h) prevented the first insurer, who was paying benefits, from challenging whether it actually owed the employee's benefits. In *TIG Specialty Insurance Co. v. Brown*,⁹⁸ the employee was injured on December 28, 2000, a time period in which TIG Specialty Insurance Co. ("TIG") insured his employer. The employee lost no time from work, but he did get medical treatment, which TIG paid for. On May 8, 2002, the employee was found unable to work, and TIG began to pay indemnity benefits. As of February 1, 2002, the employer had gotten coverage with another insurer, Zenith. In February 2004 TIG asked for a hearing to determine whether it was entitled to reimbursement from Zenith for the benefits it had paid to the employee.⁹⁹

The employee and Zenith filed separate motions to dismiss, citing O.C.G.A. section 34-9-221(h) and arguing that TIG could not challenge the employee's right to compensation because it had not filed its challenge within sixty days of accepting the claim.¹⁰⁰ The ALJ denied the motions, but the appellate division reversed and dismissed TIG's request for a hearing. On appeal, TIG argued that it was not challenging the employee's right to benefits, but simply whether it should be the one to pay them.¹⁰¹ TIG cited to *Columbus Intermediate Care Home, Inc. v. Johnston*,¹⁰² which held that the sixty day statute of limitation set out in O.C.G.A. section 34-9-221(h) did "not reach a controversy between two insurance companies wherein the compensability of the claimant's injury goes unchallenged."¹⁰³

The Board, it appears, was wary of allowing TIG to go forward with its hearing, concerned it might put the employee's right to compensation in jeopardy considering he had not filed a claim against Zenith, and thus Zenith might be able to challenge payment under the one-year statute of limitations.¹⁰⁴ However, the court of appeals pointed out that as in *Johnston*, there was no determination that the employee had a new injury in May 2002 or that Zenith could successfully challenge payment for such a claim.¹⁰⁵ Essentially, the court of appeals stated that any findings regarding whether the employee had a new injury and whether

98. 283 Ga. App. 445, 641 S.E.2d 684 (2007).

99. *Id.* at 445, 641 S.E.2d at 685.

100. *Id.* at 446, 641 S.E.2d at 686. See *supra* note 91 for full text of this Code section.

101. *Id.* at 447, 641 S.E.2d at 686.

102. 196 Ga. App. 516, 396 S.E.2d 268 (1990).

103. *TIG Specialty Insurance*, 283 Ga. App. at 447, 641 S.E.2d at 686 (quoting *Johnston*, 196 Ga. App. at 517, 396 S.E.2d at 270).

104. See *id.*

105. *Id.*

the second insurer might be responsible would be the province of an ALJ.¹⁰⁶ Accordingly, the court reversed, allowing TIG a chance to have the merits of its case considered before an ALJ.¹⁰⁷

X. NOTICE OF AN ISSUE TO BE TRIED

When presented with the issue of whether an ALJ can, sua sponte, award an employee permanent partial disability (“PPD”) benefits when that issue is not before that ALJ, the court of appeals reinforced the principle that an insurer is entitled to notice and an opportunity to be heard on any issue.¹⁰⁸ In *Cypress Insurance Co. v. Duncan*,¹⁰⁹ the main issue before the Board was whether an injured waitress was an owner or an employee of a diner.¹¹⁰ But when the ALJ granted income benefits for PPD and allowed offsetting of overpayment of indemnity benefits, the insurer objected, having not been afforded notice of the opportunity to be heard on the issue.¹¹¹ The court of appeals agreed that the employer and insurer were entitled to notice and an opportunity to be heard on the issue of PPD benefits and thus reversed the superior court’s affirmance of the award of PPD benefits.¹¹²

XI. NOTICES FROM THE BOARD

The decision in *Winnersville Roofing Co. v. Coddington*¹¹³ shows how much trouble an employer (or insurer) can get into if it ignores notices from the Board. In that case, the employer was a sole proprietorship operated by Wally Dennis. The employee filed a Board form WC-14, and the Board sent at least three hearing notices to the employer. A “show cause order” was sent as well, notifying the employer to produce evidence of any workers’ compensation insurance it may have had. Dennis ignored the hearing notices and the show cause order. The employer actually did have coverage, it seems, but Dennis never notified his insurer. A hearing took place, and the ALJ ruled against the employer. The employer did not appeal within the twenty-day time limit allowed by law.¹¹⁴

106. *Id.*

107. *Id.*

108. *Cypress Ins. Co. v. Duncan*, 281 Ga. App. 469, 472-73, 636 S.E.2d 159, 162 (2006).

109. 281 Ga. App. 469, 636 S.E.2d 159 (2006).

110. *Id.* at 470, 636 S.E.2d at 160-61.

111. *Id.* at 472-73, 636 S.E.2d at 162.

112. *Id.*

113. 283 Ga. App. 95, 640 S.E.2d 680 (2006).

114. *Id.* at 95, 640 S.E.2d at 681-82.

When no payments were made by the employer, the employee took the award to superior court and filed an action to have the court enforce the award by entering judgment against the employer. The employer retained counsel and filed a motion to vacate the award, stating that the employer had not received the WC-14 and had not received notice of the hearing. The employer also asked that the award be set aside and showed that in fact it did have workers' compensation coverage. Additionally, the employer asked the superior court to allow the insurer to be added as a party.¹¹⁵

The superior court denied the motion, noting that when a motion to set aside a judgment is filed under O.C.G.A. section 9-11-60,¹¹⁶ the

115. *Id.* at 96, 640 S.E.2d at 682.

116. O.C.G.A. § 9-11-60 (2006). In its entirety, O.C.G.A. section 9-11-60 provides as follows:

(a) *Collateral attack.* A judgment void on its face may be attacked in any court by any person. In all other instances, judgments shall be subject to attack only by a direct proceeding brought for that purpose in one of the methods prescribed in this Code section.

(b) *Methods of direct attack.* A judgment may be attacked by motion for a new trial or motion to set aside. Judgments may be attacked by motion only in the court of rendition.

(c) *Motion for new trial.* A motion for new trial must be predicated upon some intrinsic defect which does not appear upon the face of the record or pleadings.

(d) *Motion to set aside.* A motion to set aside may be brought to set aside a judgment based upon:

- (1) Lack of jurisdiction over the person or the subject matter;
- (2) Fraud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant; or
- (3) A nonamendable defect which appears upon the face of the record or pleadings. Under this paragraph, it is not sufficient that the complaint or other pleading fails to state a claim upon which relief can be granted, but the pleadings must affirmatively show no claim in fact existed.

(e) *Complaint in equity.* The use of a complaint in equity to set aside a judgment is prohibited.

(f) *Procedure; time of relief.* Reasonable notice shall be afforded the parties on all motions. Motions to set aside judgments may be served by any means by which an original complaint may be legally served if it cannot be legally served as any other motion. A judgment void because of lack of jurisdiction of the person or subject matter may be attacked at any time. Motions for new trial must be brought within the time prescribed by law. In all other instances, all motions to set aside judgments shall be brought within three years from entry of the judgment complained of.

(g) *Clerical mistakes.* Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

party seeking relief must show that the grounds to set aside are “unmixed with [his own] negligence or fault.”¹¹⁷ In this case, because the evidence showed that the employer received at least one of the three notices of hearing sent out by the Board, but chose not to participate and made no move to appeal after the award was issued, its motion to set aside the award “necessarily had to fail as a result of its own admitted neglect or fault.”¹¹⁸

XII. ANY EVIDENCE

In an “any evidence” case involving asbestosis, *Putzel Electric Contractors v. Jones*,¹¹⁹ the court of appeals held that the ALJ’s ruling was supported by the evidence and thus affirmed the employee’s right to compensation.¹²⁰ In this case, the employee had breathing and lung complications for years, but he contended that, although many different explanations for his breathing problems had been offered, including possible asbestos exposure, he had no definitive diagnosis of asbestosis until some eleven years after his lung problems started.¹²¹ The court noted that in this occupational disease case, one that hinged on when the employee first knew or should have known he had the disease, the ALJ properly reviewed an extensive and detailed account of the employee’s medical history.¹²² Because the medical records reviewed by the ALJ contained some evidence in the record to support the employee’s claims, the superior court and the court of appeals affirmed the Board’s findings.¹²³

(h) *Law of the case rule.* The law of the case rule is abolished; but generally judgments and orders shall not be set aside or modified without just cause and, in setting aside or otherwise modifying judgments and orders, the court shall consider whether rights have vested thereunder and whether or not innocent parties would be injured thereby; provided, however, that any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be.

Id.

117. *Coddington*, 283 Ga. App. at 96, 640 S.E.2d at 682 (quoting O.C.G.A. § 9-11-60(d)(2)).

118. *Id.* at 97, 640 S.E.2d at 683.

119. 282 Ga. App. 539, 639 S.E.2d 540 (2006).

120. *Id.* at 546, 639 S.E.2d at 545.

121. *Id.* at 541-42, 639 S.E.2d at 542-43.

122. *Id.* at 544-45, 639 S.E.2d at 544.

123. *Id.* at 545, 639 S.E.2d at 545.

XIII. DUTY OF AN EMPLOYER UNDER AN INSURANCE CONTRACT

In a case that emphasized the duty of a business owner to ensure that he understands the contents of a contract before signing it, the court of appeals held that an insurer had a right to charge a paint contractor a higher premium according to its contract, even though the paint contractor claimed that he could not read well enough to understand the contract.¹²⁴ In *Brewer v. Royal Insurance Co. of America*,¹²⁵ the paint contractor obtained a workers' compensation policy from Royal Insurance Co. of America ("Royal"), and as part of his application, he stated that he did not use subcontractors, which resulted in his premium being very low. He was audited by the insurer, as the contract allowed, and when the insurer found that he was using subcontractors, the insurer sent him a bill for additional premiums.¹²⁶

The paint contractor refused to pay, and the insurer filed suit for the additional monies. When the insurer filed for summary judgment, it was granted. The paint contractor stated that he could not read very well but admitted that he spoke to the agent, signed the application for the insurance, paid the low premium, and then received a copy of the policy, which allowed the insurer to audit him. He admitted he could have had his wife or the agent read the policy to him, but he did not do so.¹²⁷ The court said that in the absence of fraud preventing the owner from reading his contract, the terms of the contract would stand, and his own failure to read it or obtain an explanation of the contract amounted to negligence that would prevent him from avoiding the contract on the ground that he was ignorant of its contents.¹²⁸

XIV. CREDITS

The decision in *Vought Aircraft Industries v. Faulds*¹²⁹ demonstrates the perils of failing to follow the procedures set forth by Board Rule 243¹³⁰ for taking credit for disability benefits paid in lieu of indemnity benefits under the Workers' Compensation Act.¹³¹

124. *Brewer v. Royal Ins. Co. of Am.*, 283 Ga. App. 312, 314, 641 S.E.2d 291, 293 (2007).

125. 283 Ga. App. 312, 641 S.E.2d 291 (2007).

126. *Id.* at 312-13, 641 S.E.2d at 291-92.

127. *Id.* at 314, 641 S.E.2d at 293.

128. *Id.* at 313-15, 641 S.E.2d at 292-93.

129. 281 Ga. App. 338, 636 S.E.2d 75 (2006).

130. Rules and Regulations of the State Bd. of Workers' Compensation, Rule 243 (2007).

131. *Faulds*, 281 Ga. App. at 338-39, 636 S.E.2d at 76-77.

A hearing was initially held in April 2002 at which the ALJ determined that the employee, Faulds, sustained a compensable injury to his right elbow and was entitled to workers' compensation benefits. Prior to the initial hearing, the employer had paid Faulds for twenty weeks of non-workers' compensation disability benefits during the time for which he was subsequently awarded workers' compensation benefits.¹³² Board Rule 243 requires that when an employer seeks a credit for wages or benefits previously paid to an injured worker, notice must be provided to the opposing party on Board form WC-243 "no later than ten days prior to a hearing."¹³³ The employer, however, attempted to file Board form WC-243 on the date of the original hearing in April 2002, and the ALJ ruled that she would not hear the employer's request for a credit because the request was not timely filed.¹³⁴

In March 2003 Faulds's injury was designated as catastrophic by the Board. In 2005 another hearing was held in the case, based upon the employer's contention that the employee had undergone a change in condition for the better and to redesignate the employee's injury as non-catastrophic.¹³⁵ At the 2005 hearing, the employer also attempted to revisit the question of whether it was entitled a credit under O.C.G.A. section 34-9-243¹³⁶ for the twenty weeks of non-workers' compensation disability benefits paid to the employee.¹³⁷

The court of appeals affirmed the decisions of both the Board and the superior court in their findings that the doctrine of res judicata barred any further determination regarding the employer's entitlement to a credit under O.C.G.A. section 34-9-243.¹³⁸ Although the merits of the employer's claim for a credit were never determined at the first hearing, the employer's failure to timely raise the issue in accordance with Board Rule 243 amounted to a waiver because the doctrine of res judicata applies to all issues that are "put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered."¹³⁹ By failing to timely file Board form WC-243 more than

132. *Id.* at 339, 636 S.E.2d at 76.

133. *Id.* at 338, 636 S.E.2d at 76 (quoting Rules and Regulations of the State Bd. of Workers' Compensation, Rule 243).

134. *Id.*

135. *Id.*

136. O.C.G.A. § 34-9-243 (2004 & Supp. 2007).

137. *Faulds*, 281 Ga. App. at 338, 636 S.E.2d at 76.

138. *Id.*

139. *Webb v. City of Atlanta*, 228 Ga. App. 278, 279, 491 S.E.2d 492, 493 (1997) (emphasis omitted) (quoting O.C.G.A. § 9-12-40 (2006)).

ten days before the first hearing, the employer was barred in any subsequent hearing from raising the credit issue.¹⁴⁰

XV. SUICIDE

As long provided under O.C.G.A. section 34-9-17(a),¹⁴¹ workers' compensation benefits are not allowed for "intentionally self-inflicted injury."¹⁴² The case of *Bayer Corp. v. Lassiter*¹⁴³ provides an example of when suicide, by definition a self-inflicted injury, can still be compensable under the Workers' Compensation Act.¹⁴⁴

Lassiter sustained compensable back and leg injuries in a work-related motor vehicle accident, and he also developed severe tinnitus, which was subsequently determined to be related to the accident. When Lassiter subsequently committed suicide by shooting himself with a rifle, his widow sought workers' compensation death benefits, alleging that her husband's suicide was causally related to unbearable pain associated with his compensable tinnitus.¹⁴⁵ In support of this claim, Mrs. Lassiter presented evidence that her husband had no prior significant medical problems, that he had never complained previously of ringing in his ears, that the onset of the tinnitus following the accident caused a personality change in her husband that adversely impacted his judgment and caused him to be afraid to make decisions, and that he would go to the extreme of using a mechanical leaf blower "because that noise was the only thing that could drown out the ringing in his ears."¹⁴⁶ In addition, Mrs. Lassiter testified that the day before he killed himself, he told her that "he had 'to do something' about the ringing in his ears."¹⁴⁷ In support of her claim, Mrs. Lassiter also presented the testimony of a psychiatrist, Dr. Michael Hilton, who testified that Lassiter's suicide was directly related to the tinnitus and a "disturbance of the mind" caused by that disease.¹⁴⁸ Dr. Hilton also specifically testified that Lassiter's disturbance in his mind so impacted his judgment that he deemed suicide preferable to living with the pain caused by the tinnitus.¹⁴⁹

140. *Faulds*, 281 Ga. App. at 338, 636 S.E.2d at 76.

141. O.C.G.A. § 34-9-17(a) (2004).

142. *Id.*

143. 282 Ga. App. 346, 638 S.E.2d 813-14 (2006).

144. *See id.* at 348-50, 638 S.E.2d at 813-14.

145. *Id.* at 346, 638 S.E.2d at 812.

146. *Id.* at 348, 638 S.E.2d at 813.

147. *Id.* at 347, 638 S.E.2d at 813.

148. *Id.* at 348, 638 S.E.2d at 813.

149. *Id.*

The employer and insurer did not present evidence to refute either the testimony of the widow or Dr. Hilton but instead based their defense upon the court of appeals decision in *Dry Storage Corp. v. Piscopo*,¹⁵⁰ “which held that a suicide allegedly resulting from a tortfeasor’s negligence is not . . . a reasonably foreseeable consequence of that negligence.”¹⁵¹ The employer argued that Lassiter’s suicide could not be viewed as causally related to his compensable workers’ compensation injuries.¹⁵² The court of appeals rejected this defense for two reasons.¹⁵³

The court first pointed to the fallacy in attempting to impose standards of tort law on a workers’ compensation claim.¹⁵⁴ Looking back to the Act’s fundamental premise, the court pointed out that workers’ compensation arose as a statutory exemption to tort law, providing no-fault recovery for accidents that arise out of and in the course of employment, while providing employers with immunity from tort claims brought by injured workers.¹⁵⁵ As the court put it,

In light of the purpose and design of the [Workers’ Compensation Act], the question of whether Mr. Lassiter’s suicide was a reasonably foreseeable result of his automobile accident is irrelevant to the current action. That issue would be relevant only in a wrongful death action brought against an alleged tortfeasor.¹⁵⁶

Second, the court held that prior precedent requires a different analysis in a workers’ compensation claim involving suicide than the proximate cause analysis used in a wrongful death claim.¹⁵⁷ It has long been held that for suicide to be compensable under the Workers’ Compensation Act, the evidence must show that the suicide was “caused by severe pain and despair proximately resulting from the accident sufficient to cause a disturbance of the mind and the overriding of normal judgment to the extent that the act, although ‘purposeful’ is found to be not ‘intentional.’”¹⁵⁸ In essence, this analysis requires a two-step process: to determine (1) if the injury complained of was compensable and (2) if the pain associated with the injury causes the

150. 249 Ga. App. 898, 560 S.E.2d 419 (2001).

151. *Bayer*, 282 Ga. App. at 348, 638 S.E.2d at 814 (citing *Dry Storage*, 249 Ga. App. at 900, 560 S.E.2d at 420-21).

152. *Id.* at 349, 638 S.E.2d at 814.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 349-50, 638 S.E.2d at 814.

158. *McDonald v. Atl. Steel Co.*, 133 Ga. App. 157, 158, 210 S.E.2d 344, 345 (1974).

employee “to be so devoid of his normal judgment that his conduct in taking his life could not be viewed as intentional under [O.C.G.A. section] 34-9-17(a).”¹⁵⁹ As noted above, the employer presented no evidence to rebut the testimony of the widow and Dr. Hilton that the pain from Lassiter’s tinnitus was both overwhelming and overcame his judgment to the point that his suicide was not intentional. Because the evidence supported the Board’s decision that Lassiter’s death was related to his compensable injuries, the court affirmed the award of death benefits to Lassiter’s widow.¹⁶⁰

XVI. CATASTROPHIC DESIGNATION

The Georgia Court of Appeals issued three decisions during the survey period further interpreting the definition of a “catastrophic injury” under O.C.G.A. section 34-9-200.1.¹⁶¹ These three cases dealt specifically with the catch-all portion of the statute that defines a catastrophic injury as “[a]ny other injury of a nature and severity that prevents the employee from being able to perform his or her prior work and any work available in substantial numbers within the national economy for which such employee is otherwise qualified.”¹⁶²

The decision in *Caswell, Inc. v. Spencer*¹⁶³ serves as caution against either party making assumptions regarding an employee’s ability to work without first laying an evidentiary foundation for those assumptions. Spencer sustained compensable back injuries in the course of his employment with Caswell, Inc., and a hearing was held to determine whether his injuries qualified as catastrophic.¹⁶⁴ Prior to the evidentiary hearing, an administrative decision issued by the Rehabilitation Section of the Board recommended that Spencer’s injury be considered catastrophic, based in part upon the fact that “a 62-year-old is inherently unable to adapt to the demands of work within the light duty range.”¹⁶⁵

The court of appeals agreed with the Board’s rejection of this assumption, holding that evidence from a vocational expert supported the Board’s conclusion that there are jobs available in the national economy for which the employee was qualified and capable of perform-

159. *Bayer*, 282 Ga. App. at 350, 638 S.E.2d at 814.

160. *Id.* at 349-50, 638 S.E.2d at 814.

161. O.C.G.A. § 34-9-200.1 (2004 & Supp. 2007).

162. *Id.* § 34-9-200.1(g)(6)(A).

163. 280 Ga. App. 141, 633 S.E.2d 449 (2006).

164. *Id.* at 141, 633 S.E.2d at 450.

165. *Id.* at 142, 633 S.E.2d at 451.

ing.¹⁶⁶ The court further ruled that the ALJ conducting the evidentiary hearing was entitled to reject a rehabilitation counselor's testimony that Spencer was unable to learn new skills because of his age for two reasons: (1) the testimony was unsupported by any medical or psychological evidence and (2) the counselor did not perform any tests on the employee to determine his ability to learn but instead relied solely upon Social Security standards that were not placed into evidence.¹⁶⁷ The court rejected Spencer's argument on appeal that the Board did not include consideration of his age in denying catastrophic injury status, holding that the Board specifically relied upon the testimony of a vocational specialist who testified that he was unaware of any school of thought in vocational rehabilitation that a sixty-two-year-old cannot learn new skills.¹⁶⁸ Further, the court noted that this specialist testified that research in fact demonstrates that many people of retirement age are returning to work, that people of any age can learn a new skill, and that there were some four million jobs available in the national economy that were suitable for Spencer.¹⁶⁹

In a different context, the court of appeals similarly rejected an employee's claim for catastrophic status when the only evidence she presented to demonstrate that she was "unable to perform any work available in substantial numbers within the economy" was her own testimony that she had looked for work.¹⁷⁰ In *Reid v. Georgia Building Authority*,¹⁷¹ the employee sustained compensable injuries to two fingers on her dominant right hand, and her subsequent restrictions, which included no heavy gripping or lifting more than ten pounds, rendered her unable to perform the housekeeping work she had previously performed for the Georgia Building Authority.¹⁷² In attempting to have her injury designated as catastrophic, however, she merely testified that she had "looked for work," and presented the testimony of a physical therapist who testified regarding her sedentary work restrictions and her difficulty gripping during a functional capacity evaluation.¹⁷³ No testimony or evidence was presented regarding the availability of work in the national economy for which Reid was

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Reid v. Ga. Bldg. Auth.*, 283 Ga. App. 413, 416, 641 S.E.2d 642, 646 (2007).

171. 283 Ga. App. 413, 641 S.E.2d 642 (2007).

172. *Id.* at 414, 641 S.E.2d at 644-45.

173. *Id.* at 416, 641 S.E.2d at 646.

otherwise qualified. The Board, nevertheless, awarded the employee catastrophic injury designation, concluding that

“it is very unlikely that [Reid] is or ever will be able to return to her prior work in housekeeping for the Employer or for any other employer. Moreover, as a result of her injuries . . . [Reid] is a sixty-six year old one-armed housekeeper whose remaining useful arm is her non-dominant arm, who is without any other skills, training, or experience, and . . . it is more likely than not that such restrictions make [her] unable to perform any economically meaningful work.”¹⁷⁴

The court of appeals rejected the Board's designation of a catastrophic injury, concluding that the Board lacked a sufficient evidentiary foundation to support its conclusions:

[T]he Board determined that the injury was catastrophic based solely on its own experience. Thus, the issue is whether the Board may reach such a conclusion in the absence of competent evidence that the employee is unable to perform any work available in substantial numbers within the economy. We hold that it cannot.¹⁷⁵

The court went on to hold that at a minimum, an employee must present evidence in the form of a vocational expert or other testimony to demonstrate that the substantial numbers of jobs she could perform were unavailable.¹⁷⁶

The case of *Rite-Aid Corp. v. Davis*¹⁷⁷ will have limited application because it involves the interpretation of an older version of O.C.G.A. section 34-9-200.1,¹⁷⁸ but it is nevertheless interesting for its analysis of the wording of this statute and for the sharp division it created on the Georgia Court of Appeals. Davis sustained compensable injuries to her neck and shoulder and argued that the injuries should be designated as catastrophic—even though she could perform work available in substantial numbers in the national economy—because she was unable to perform her prior job for the Rite-Aid Corporation.¹⁷⁹ Although the ALJ accepted the employee's argument, the appellate division of the Board reversed, finding that the language in the 1996 version of O.C.G.A. section 34-9-200.1 required the employee to show both that she

174. *Id.* at 415, 641 S.E.2d at 645 (first alteration in original) (first and second brackets in original).

175. *Id.* at 416, 641 S.E.2d at 646.

176. *Id.*; see also *Davis v. Carter Mech., Inc.*, 272 Ga. App. 773, 612 S.E.2d 879 (2005).

177. 280 Ga. App. 522, 634 S.E.2d 480 (2006).

178. O.C.G.A. § 34-9-200.1 (1992 & Supp. 1996) (current version at O.C.G.A. § 34-9-200.1 (2004 & Supp. 2007)).

179. *Rite Aid*, 280 Ga. App. at 523, 634 S.E.2d at 481.

could not perform her prior job and that she could not perform other work available in substantial numbers in the national economy for which she was qualified.¹⁸⁰ The court of appeals, however, affirmed the superior court's reversal of the appellate division's decision, holding that the old version of the catastrophic injury definition unambiguously allowed the employee to prove that her injury was catastrophic merely by showing that she could not perform her prior work.¹⁸¹

Prior to an amendment in 1997,¹⁸² the catch-all provision of O.C.G.A. section 34-9-200.1(g)(6) stated that a catastrophic injury definition included "[a]ny other injury of a nature and severity that prevents the employee from being able to perform his or her prior work *or* any work available in substantial numbers within the national economy."¹⁸³ The issue before the court of appeals was, very simply, whether to interpret the word "or" between "prior work" and "any work available in substantial numbers within the national economy" as disjunctive or conjunctive.¹⁸⁴ The appellate division of the Board concluded that the legislature meant for the term to be used in the conjunctive, in part, because "the intent was not to define a catastrophic injury less strictly than the generally accepted definition of ordinary total disability."¹⁸⁵ The appellate division further concluded that the legislature's 1997 amendment to O.C.G.A. section 34-9-200.1, which clarified that an employee must prove both an inability to perform prior work and the inability to perform any work available in substantial numbers in the national economy, was further evidence of the legislature's original intent.¹⁸⁶ On appeal, the employer argued in favor of both of the appellate division's conclusions.¹⁸⁷

The court of appeals, however, rejected both of these arguments, determining simply that the legislature's original language was not ambiguous and therefore could not be construed as the employer alleged.¹⁸⁸ Writing for a three judge dissent, Judge Bernes criticized, as did the appellate division, a construction that defines a catastrophic injury less severely than ordinary disability, which requires proof that the employee is unable to find any work for which he or she is suited by

180. *Id.* at 525, 634 S.E.2d at 483.

181. *Id.* at 523, 525, 634 S.E.2d at 481, 483.

182. 1997 Ga. Laws 1367, 1367-75.

183. *Rite-Aid*, 280 Ga. App. at 523, 634 S.E.2d at 481 (quoting O.C.G.A. § 34-9-200.1(g)(6) (Supp. 1997) (current version at O.C.G.A. § 34-9-200.1 (2004 & Supp. 2007))).

184. *Id.* at 525, 634 S.E.2d at 482.

185. *Id.* at 526, 634 S.E.2d at 483.

186. *Id.* at 525-26, 634 S.E.2d at 483.

187. *Id.* at 526, 634 S.E.2d at 483.

188. *Id.*, 634 S.E.2d at 484.

training and experience.¹⁸⁹ As Judge Bernes stated, “[A]pplying the literal meaning would lead to the absurd result of allowing an employee to obtain catastrophic injury benefits by meeting a standard equal to or less strict than the standard for proving temporary total disability.”¹⁹⁰

XVII. APPEALS

The decision in *Wal-Mart Stores, Inc. v. Parker*¹⁹¹ answers the question of how a party should proceed in a workers' compensation appeal to a superior court when the court fails to provide notice of its judgment as required by O.C.G.A. section 15-6-21(c).¹⁹² Wal-Mart appealed a decision of the Board to the superior court, which failed to timely provide notice of its decision as required by O.C.G.A. section 15-6-21(c).¹⁹³ While the superior court acknowledged that Wal-Mart had not received notice of its decision as required, it denied Wal-Mart's motion to vacate and reenter a judgment so that it could timely pursue an appeal to the Georgia Court of Appeals.¹⁹⁴ The superior court reasoned that Wal-Mart ignored the provisions of O.C.G.A. section 34-9-105(b),¹⁹⁵ which stated in part that the superior court must issue a decision within twenty days of the date it hears the workers' compensation appeal, or the decision of the Board is deemed affirmed by operation of law.¹⁹⁶ The superior court found that Wal-Mart was not diligent in determining whether a decision had been reached within the twenty-day deadline provided by O.C.G.A. section 34-9-105(b) and therefore denied Wal-Mart's request to vacate its earlier order.¹⁹⁷

The court of appeals reversed, holding that it was the superior court, not the appealing party, which has the obligation to notify parties of its decision.¹⁹⁸ In addition to holding that the superior court's decision was contrary to the duty imposed by O.C.G.A. section 15-6-21(c), the court of appeals held that

189. *Id.* at 529, 634 S.E.2d at 485 (Bernes, J., dissenting).

190. *Id.*, 634 S.E.2d at 486.

191. 283 Ga. App. 708, 642 S.E.2d 387 (2007).

192. O.C.G.A. § 15-6-21(c) (2004).

193. *Id.* The statute provides that “it shall be the duty of the [superior court] judge to file his or her decision with the clerk of the court in which the cases are pending and to notify the attorney or attorneys of the losing party of his or her decision.” *Id.*

194. *Parker*, 283 Ga. App. at 709, 642 S.E.2d at 388.

195. O.C.G.A. § 34-9-105(b) (2004 & Supp. 2007).

196. *Parker*, 283 Ga. App. at 709, 642 S.E.2d at 388.

197. *Id.*

198. *Id.* at 709-10, 642 S.E.2d at 388-89.

[i]t was also improper for the superior court to decide Wal-Mart's motion based upon a determination that Wal-Mart knew or should have known that a judgment had been entered. Appellate courts of this state have repeatedly held that the issue is not whether the losing party had knowledge that judgment was entered, but whether the court had carried out the duty imposed upon it by [O.C.G.A. section] 15-6-21(c).¹⁹⁹

The court of appeals therefore reversed the decision of the superior court and directed it to vacate its earlier judgment so that Wal-Mart could proceed with an appeal on the merits.²⁰⁰

XVIII. CONTINUOUS EMPLOYMENT

A sharply divided Georgia Supreme Court once again explored the murky waters of the continuous employment doctrine in the case of *Ray Bell Construction Co. v. King*.²⁰¹ While the court did not enunciate any new legal principles in this area, the case serves as yet another illustration of the difficulties in identifying the parameters of employment for those whose work carries them beyond a regular work schedule.

Howard King, a resident of Florida, was employed by Ray Bell Construction Co. ("Ray Bell") as a construction superintendent on a job site in Butts County, Georgia. Ray Bell provided King with company housing in Fayetteville, Georgia, as well as the use of a company-owned truck for both work and personal use. King had been out of work for a week on sick leave while recovering from non-work-related knee surgery when, on a Sunday, he drove the company owned truck from Fayetteville to Alamo, Georgia, 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, King 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.²⁰²

After the Georgia Court of Appeals affirmed a decision by the Board awarding death benefits to King's widow,²⁰³ the Georgia Supreme Court accepted the case on appeal because it was concerned whether the

199. *Id.* at 710, 642 S.E.2d at 389.

200. *Id.* at 711, 642 S.E.2d at 390.

201. 281 Ga. 853, 642 S.E.2d 841 (2007).

202. *Ray Bell Constr. Co. v. King*, 277 Ga. App. 144, 145, 625 S.E.2d 541, 542 (2006).

203. *Id.* at 148, 625 S.E.2d at 544. For a discussion of this case, see H. Michael Bagley, Daniel C. Kniffen & Katherine D. Dixon, *Workers' Compensation*, 58 MERCER L. REV. 453, 475-76 (2006).

court of appeals had applied the correct two-pronged test for a compensable injury reiterated in *Mayor of Savannah v. Stevens*.²⁰⁴ *Stevens* dealt with an off-duty police officer injured in her personal vehicle while driving to work.²⁰⁵ While noting that Stevens's obligations as a police officer required her to enforce the law at any time while she was in the Savannah city limits and that she was therefore in the course of her employment at the time of her automobile accident, the court nevertheless denied workers' compensation benefits, holding that the accident also had to arise out of her duties as a police officer.²⁰⁶ The court stated,

Stevens' 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' injuries did not arise out of her employment.²⁰⁷

Therefore, the court in *Stevens* emphasized that while the continuous employment doctrine expands the parameters of when an employee is in the course of employment, to be compensable, an injury must nevertheless still be related to the hazards connected with the employment in order to establish a causal connection required for the injury to arise out of employment.²⁰⁸

Presumably, therefore, the court's analysis in *Ray Bell* would center on whether King's fatal auto accident was connected to a hazard of his employment. Instead, the court shifted focus away from its analysis in *Stevens* and focused on whether King's deviation from his employment to take furniture to a storage shed had sufficiently ended so that he was brought back within the proximity of the area in which he was in continuous employment.²⁰⁹ Interestingly, the court began its analysis by reference to the adage that the Workers' Compensation Act is "a humanitarian measure which should be liberally construed to effectuate its purpose."²¹⁰ In referring to how it would construe the Workers' Compensation Act, the court made no reference to O.C.G.A. section 34-9-

204. *Ray Bell*, 281 Ga. at 854, 642 S.E.2d at 843; 278 Ga. 166, 598 S.E.2d 456 (2004).

205. *Stevens*, 278 Ga. at 166, 598 S.E.2d at 457.

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

207. *Id.*

208. *Id.*

209. *Ray Bell*, 281 Ga. at 856, 642 S.E.2d at 844.

210. *Id.* at 854, 642 S.E.2d at 843 (quoting *City of Waycross v. Holmes*, 272 Ga. 488, 489, 532 S.E.2d 90, 91 (2000)).

23,²¹¹ passed in 1994, which provides, “This chapter shall be liberally construed only for the purpose of bringing employers and employees within the provisions of this chapter and to provide protection for both . . . [and t]he provisions of this chapter shall be construed and applied impartially to both employers and employees.”²¹² Presumably, this statute superseded previous case law interpretations regarding the liberal construction of the Workers’ Compensation Act, imposing a requirement that such a construction only be used for the purpose of defining whether a particular employer or employee sufficiently meets the statutory definition to fall within workers’ compensation coverage. The question of whether King’s accident arose out of and in the course of his employment does not involve whether he is subject to the Workers’ Compensation Act, as he was clearly an employee of Ray Bell; rather, the issue before the court was simply whether his death arose out of and in the course of his employment—seemingly an issue that would require an impartial, as opposed to liberal, construction under O.C.G.A. section 34-9-23.²¹³

Nevertheless, the court went on to discuss the well-settled principle that traveling employees are deemed to be in continuous employment while away from home in the performance of their duties.²¹⁴ Therefore, traveling employees are afforded a much broader scope of workers’ compensation coverage, which includes “activities performed in a reasonable and prudent manner for the health and comfort of the employee, including recreational activities.”²¹⁵ The court then turned to the analysis of whether King’s deviation to an admittedly non-work-related activity (taking family furniture to an out-of-town location) had sufficiently ended to bring him back within the scope of his employment for Ray Bell.²¹⁶ Determining that the fatal car accident occurred in a county contiguous to where King was performing his job for Ray Bell, the court held that this evidence was sufficient for the Board to conclude that his death fell within the scope of his employment, stating, “With King’s return to the general proximity of the Fayetteville-Jackson area in which he was in continuous employment as a traveling employee, his continuous employment coverage resumed whether he was resuming his

211. O.C.G.A. § 34-9-23 (2004 & Supp. 2007).

212. *Id.*

213. *See Ray Bell*, 281 Ga. at 854, 642 S.E.2d at 843.

214. *Id.* at 856, 642 S.E.2d at 844.

215. *Id.* at 855, 642 S.E.2d at 844; *see also* Thornton v. Hartford Accident & Indem. Co., 198 Ga. 786, 790, 32 S.E.2d 816, 819 (1945); McDonald v. State Highway Dep’t, 127 Ga. App. 171, 176, 192 S.E.2d 919, 923-24 (1972).

216. *Ray Bell*, 281 Ga. at 856, 642 S.E.2d at 845.

trip to the employer's job site . . . or was returning to his employer-provided housing.²¹⁷

In contrast to its analysis in *Stevens*, the court in *Ray Bell* focused less on whether the employee was engaged in an activity connected to the hazard of his employment and instead focused more on simply whether the accident occurred in proximity to the area where he was working for his employer. In so doing, the court recognized the significance of the situation where an employee's job requires him or her to work away from home, live in employer-provided housing, and use employer-provided transportation. In essence, an employer will have an uphill battle in denying such a case because virtually everything an employee does is connected in some way to a "hazard" of his or her employment and because the employee would not be away from home and exposed to those particular hazards but for the traveling nature of his or her employment. As the court pointed out in *Ray Bell*, the exception to such coverage is deviation for activities of a purely personal and non-work-related nature.²¹⁸ In King's case, his personal mission to deliver furniture was deemed to have sufficiently ended when he reentered the general proximity of his employment with Ray Bell, and therefore, his death was deemed to be a compensable event.²¹⁹

In a footnote, the supreme court indicated at least two circumstances that might have changed the result: (1) if King's employment had been terminated or (2) if his employer had suspended the requirement that King live away from home during his medical leave.²²⁰ Presumably, had Ray Bell advised King that while on medical leave he was not required to be away from home, then his status of continuous employment would not have applied.²²¹

It is also interesting to note that the court might have evaluated this case under the long-established presumption in workers' compensation death cases that a death is compensable under the Workers' Compensation Act if the employee is found dead or dying in a place he might reasonably be expected to be in the performance of his duties.²²² While the analysis under this theory would still have focused on the nature of King's continuous employment, the law would have established a

217. *Id.* at 856-57, 642 S.E.2d at 845 (citation omitted) (footnote omitted).

218. *Id.* at 856, 642 S.E.2d at 844.

219. *Id.*

220. *Id.* at 857 n.2, 642 S.E.2d at 845 n.2.

221. *See id.*

222. *Goode Bros. Poultry Co. v. Kin*, 201 Ga. App. 557, 558, 411 S.E.2d 724, 725 (1991); *S. Bell Tel. & Tel. Co. v. Hodges*, 164 Ga. App. 757, 760, 298 S.E.2d 570, 574 (1982); *Zamora v. Coffee Gen. Hosp.*, 162 Ga. App. 82, 84, 290 S.E.2d 192, 193 (1982).

presumption of compensability if he were merely in a place he might be expected to be in performance of his duties.²²³ While the court did not comment on this particular theory, it did note that King's accident might have been compensable under a different workers' compensation theory involving accidents that occur when an employee is using an employer-provided vehicle, stating,

We note that an award of compensation based on the finding of the appellate division of the State Board of Workers' Compensation that King had been injured on his way to the job site is also supported by application of the doctrine which provides coverage to an employee injured on his way to or from work while in a vehicle furnished by the employer as an incident of the employment.²²⁴

In a strongly worded dissent, Justice Melton, writing for two other justices, stated that King's death was not compensable because the purely personal mission from which he was returning did not create any opportunity for him to resume his employment activities, pointing out,

These "limited deviation" cases are inapplicable to the matter at hand . . . because King's mission was wholly personal *from its inception*. . . . He could not have *resumed* his employer's business on his mission because there was no business to resume. On a given mission, one cannot go back into or resume something one has never started.²²⁵

The dissent also pointed out that even if the cases cited by the majority were applicable, King "was still in the process of completing his wholly personal mission" at the time of his death, and therefore he had not resumed his continuous employment.²²⁶

Perhaps the case of *Ray Bell* is best understood as reinforcing the principle that traveling employees have an even broader scope of employment than others, such as police officers and firemen, whose continuous employment is established not by having to be away from home, but rather by simply being on call. For traveling employees, the mere fact of having to be away from home brings the hazards they encounter within the scope of their employment, whereas those employees who are merely on call (such as the police officer in *Stevens*) are not brought within employment-related hazards until they engage in some work-related activity.

223. *Ray Bell*, 281 Ga. at 858, 642 S.E.2d at 846.

224. *Id.* at 857 n.3, 642 S.E.2d at 845 n.3.

225. *Id.* at 859-60, 642 S.E.2d at 847 (Melton, J., dissenting) (footnote omitted).

226. *Id.* at 861, 642 S.E.2d at 848.