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Workers’ Compensation

by H. Michael Bagley*
and
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Having experienced substantial legislative changes in 1990, the workers’ compensation pendulum swung back to the appellate courts during the most recent survey period, resulting in equally far-reaching developments. The flurry of appellate decisions is notable for the efforts of Georgia’s appellate courts to strike a balance between the humane purposes of the Workers’ Compensation Act (the “Act”){1} and the ever-increasing economic burdens placed upon society by both the workers’ compensation system and health care in general.

The decisions concerning the parameters of suitable employment, the all-issues statute of limitations, and the exclusive remedy doctrine typify the ebb and flow of the judicial reasoning demonstrated over the last survey period. For this reason, these three areas are considered first in the Article, followed by a survey of the remaining cases that significantly affect Georgia workers’ compensation law.

I. Rejection of Suitable Employment

In an area in which the State Board of Workers’ Compensation (the “Board”) had accumulated vast discretion; the supreme court’s ruling in

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City of Adel v. Wise dramatically restricts the discretionary authority of the Board in determining whether an employee’s rejection of suitable employment is justified.

While the tender of suitable employment to an employee claiming disability related to an on-the-job injury is a routine scenario, prior appellate decisions produced less than a clear view of the rights and obligations of the parties under the Act. The Act specifically addresses an employee’s refusal of tendered employment in Official Code of Georgia Annotated (“O.C.G.A.”) section 34-9-240, which provides: “If an injured employee refuses employment procured for him and suitable to his capacity, he shall not be entitled to any compensation at any time during the continuance of such refusal unless in the opinion of the [b]oard such refusal was justified.”

There are related considerations which often arise that are unaffected by the supreme court’s decision in Wise. First, the threshold question in assessing the rights and obligations of the employer and employee to ongoing temporary disability benefits is whether the employee continues to possess physical limitations related to the on-the-job injury. It is not the inability to perform the particular job in which the worker was engaged at the time of the injury that is a determining factor. The determining factors are the worker’s inability to find any work suitable to the worker’s condition as a result of the work-related injury and compatible with his or her training and experience. Furthermore, the existence of a permanent impairment rating entitling the employee to permanent partial disability benefits under O.C.G.A. section 34-9-263 does not, ipso facto, foist the employee into that category of those entitled to either the payment of temporary disability benefits or the tender of suitable employment. Rather, the law in Georgia provides that “[i]mpaired earning capacity is not one involving a percentage of disability, but rather impairment that renders claimant unable to return to his regular employment or ‘to procure remunerative employment at a different occupation suitable to his impaired capacity.’ If the impairment prevents that return then his disability is total.”

It remains settled that when an employee suffers an on-the-job injury, returns to gainful employment, and subsequently seeks the recommencement of temporary disability benefits, the burden of proof is on the employee to show a change in condition. However, if the employee is collecting temporary disability benefits for either temporary total disability or temporary partial disability, the burden of proof will be upon the employer to justify the suspension of benefits.

There are two basic ways for the employer to satisfy its burden of proof when seeking to terminate payment of temporary disability benefits. First, the employer can show the absence of any limitation related to the on-the-job injury. Therefore, when an injured employee has recovered fully from the injury sustained such that the employee no longer possesses any physical impediment to gainful employment, then the employer need not show the availability of suitable employment in order to suspend the payment of temporary disability benefits. Second, when the employee still suffers limitations in the performance of gainful employment that are related to the on-the-job injury, then in order to terminate benefits, the employer must show that the employee has the ability to return to work and that suitable work is available. Wise arose from this type of factual setting.

The employee in Wise was employed by the City of Adel Fire Department. He sustained an on-the-job injury and was released to perform light duty work. The city offered him a job as a dispatcher for the city's police department, "with the promise that as soon as [he] was physically able, he would be returned to his job with the fire department at no loss of pay or seniority." It was undisputed that Mr. Wise was physically capable of performing the job offered, but he declined this position since the hours conflicted with another part-time job that he had held for sev-
eral years. The Administrative Law Judge ("A.L.J.") found that the job offered was suitable to the injured employee's impaired condition and denied the request for disability benefits. On appeal to the full Board, the decision was reversed based upon the finding that the loss of the part-time job would result in a net loss of wages; therefore, the position offered was not suitable employment within the meaning of O.C.G.A. section 34-9-240. The superior court reversed the Board's award and found that the proffered employment was suitable. The court of appeals reversed again focusing on the Board's discretion in finding that the employee was justified in refusing the proffered employment.

Confronted with what Justice Benham appropriately described in his dissenting opinion as a "see-saw journey through the various tribunals of this state," the majority of the Georgia Supreme Court framed the issue as: "[W]hether the potential loss of a part-time job may be considered as a factor in determining whether a job offered by an employer is 'suitable to the capacity' of an employee within the meaning of O.C.G.A. § 34-9-240." Establishing a framework in which to resolve the issue, the court acknowledged the two-pronged test embodied in section 34-9-240. First, it must be determined whether the employment offered by the employer and refused by the employee is "suitable to [the] capacity" of the employee. If this threshold consideration is met, the second prong of the test allows the employer to suspend the payment of disability benefits during the continuance of the employee's refusal to work "unless in the opinion of the [B]oard such refusal was justified."

While it was undisputed that the employment tendered to Mr. Wise was physically suitable, thereby automatically satisfying the first prong of the test, the court resolved any lingering doubt on the parameters of this analysis by emphasizing that it "refers to the employee's capacity or ability to perform the work within his physical limitations or restrictions." Through this point, the court's reasoning was without controversy.

13. Id. at 54, 401 S.E.2d at 523.
14. Id.
16. 261 Ga. at 56, 401 S.E.2d at 525 (Benham, J., dissenting).
17. Id. at 54, 401 S.E.2d at 524.
18. Id. at 54-55, 401 S.E.2d at 524.
19. Id. at 54, 401 S.E.2d at 524.
20. Id. at 55, 401 S.E.2d at 524.
However, when the court shifted its focus to the second prong, its reasoning became more controversial. While acknowledging that the Board has wide discretion to determine whether an employee's refusal of suitable employment is justified, the court emphasized that this discretion is not without limit:

"[T]o say that this discretion is without limits would render meaningless the first prong of the statute. The board would have the power to find under any circumstance that the employee was justified in refusing to accept work which he was physically capable of performing. Such an interpretation would not carry out the intent of the legislature.""\(^{23}\)

Phrased almost as a truism, the idea that the Board has distinct limits on its discretion to determine whether an employee's refusal of suitable employment is justified reflects a relatively radical change of policy when viewed from the perspective of appellate trends in the last decade and harkens back to an earlier era. Prior to the last decade, the controlling issues were the nature of the work offered and the employee's ability to perform it at that time."\(^{24}\) An employee's attempt to justify the refusal of suitable employment for reasons other than physical incapacity were not viewed as a viable excuse,"\(^{24}\) but that view was dissolved by the court of appeals in Clark v. Georgia Craft Co."\(^{25}\) In Clark the A.L.J. determined that the proffered employment was within the claimant's physical capacities, but the A.L.J. concluded that the claimant was justified in refusing the employment tendered "because it did not provide 'a reasonable opportunity for advancement and growth and a correlation with the [claimant's] interests and aptitudes.'"\(^{26}\) The court of appeals emphasized the Board's "broad discretion" in determining whether proffered employment is refused justifiably, and mandated that the courts give "due deference to the wisdom of the [B]oard in deciding discretionary issues within its area of expertise."\(^{27}\) Carod Building Services v. Williams\(^{28}\) provides another illustration of the broad discretion given to the Board by the court of appeals in determining whether rejection of suitable employment is justified. In Williams the court found no abuse of discretion when the

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22. Id.
26. Id. at 885, 345 S.E.2d at 62 (quoting A.L.J.'s findings).
27. Id. at 885-86, 345 S.E.2d at 63.
Board held an employee’s rejection of employment was justified not only when a security guard’s position was rejected because of the employee’s wish not to carry a gun, but also when the same employee’s rejection of a retail position was justified based upon his refusal to take the prerequisite lie detector test.  

While the supreme court in Wise did not specifically overrule Clark it reasoned that the Board “could have” found that the employee was justified in refusing the proffered employment since the evidence suggested that it had adverse physical effects on the employee.  

The decision in Wise establishes limitations on the Board’s discretion in determining whether an employee’s rejection of suitable employment is justifiable, which certainly operates to overrule Clark sub silentio:

We hold that the discretion afforded the Board under O.C.G.A. § 34-9-240 to determine that an employee’s refusal of proffered work is justified must relate to the physical capacity of the employee to perform the job; the employee’s ability or skill to perform the job; or factors such as geographic relocation or travel conditions which would disrupt the employee’s life.

Hence, the supreme court has established a rigid analysis involving the tender and rejection of employment by employees injured on the job and collecting temporary disability benefits. When the employment proffered is suitable to the employee’s impaired physical capacity, there are essentially only two general categories of acceptable justifications for refusal—lack of “ability or skill” and “life-disrupting” geographic location or travel conditions.  

The court gave examples of how the new standard operates. It would not be “unreasonable for a nurse to refuse a typing job which she is physically capable,” but lacking skills, to perform.  

Similarly, an employee’s incarceration pending adjudication of guilt is a justifiable refusal of employment.  

On the other hand, an employee is not

29. Id. at 342, 355 S.E.2d 725-26. The comments regarding the Board’s discretion under § 34-9-240 were obiter dictum, since the issue of the case concerned a failure to cooperate with rehabilitation.
31. Id. at 56, 401 S.E.2d at 525.
32. Id. (citing Acco-Babcock, Inc. v. Counts, #87A-JL-1 (Del. Super. Ct. 1988)).
33. Id. (citing Shogren v. Bethesda Lutheran Med. Center, 359 N.W.2d 595 (Minn. 1984)).
34. Id. (citing Acco-Babcock, Inc. v. Counts, #87A-JL-2 (Del. Super. Ct. 1988)).
35. Id. at 55-56, 401 S.E.2d at 524 (citing Howard v. Scott Hous., 180 Ga. App. 690, 350 S.E.2d 27 (1986)).
justified in refusing to accept suitable employment because of a shift assignment\textsuperscript{56} or because the employment is nonunion.\textsuperscript{57}

The obvious impact of this decision will be to return the focus of most disputes concerning the tender and rejection of employment to a determination of whether the position offered is physically suitable to the employee's impaired condition. The mere tender of a job will not be sufficient to authorize suspension of temporary disability benefits without evidence that the job is suitable to the employee's impaired condition.\textsuperscript{58} Similarly, the fact that a claimant is capable of performing some form of light duty work will not authorize the suspension of temporary disability benefits without a showing that some suitable work is available.\textsuperscript{59} Finally, even in situations when an expert medical opinion addresses the suitability of the employment offered, the Board retains its broad discretion to believe lay testimony, particularly that of the injured employee, notwithstanding the adverse testimony of medical experts.\textsuperscript{60}

II. Statute Of Limitations

Last year saw the resolution of a debate that stirred for several years concerning the erosion of the change in condition statute of limitations found in O.C.G.A. section 34-9-104(b).\textsuperscript{61} Within three months after the legislature amended the change in conditions statute of limitations, however, a new debate arose concerning the so-called all-issues statute of limitations.\textsuperscript{62} The court of appeals decision in Harper v. L & M Granite Co.\textsuperscript{63} promises to be to the all-issues statute what Holt's Bakery v. Hutchinson\textsuperscript{64} was to the change in condition statute.

42. The "all-issues" statute of limitations in O.C.G.A. § 34-9-82 (1988) applies to claims in which the claimant has never been paid disability benefits, whereas the "change in condition" statute of limitations applies to those cases in which the injured worker has previously been paid income benefits. ITT-Thompson Indus. v. Wheeler, 179 Ga. App. 92, 345 S.E.2d 614 (1986); Clarke v. Samson Mfg., 177 Ga. App. 449, 338 S.E.2d 738 (1985).
In *Harper* the claimant allegedly injured his back while operating the polishing mill in October 1987, then immediately notified his supervisor of the injury and, within a few days of the accident, personally notified the president of the company. The record also contained evidence showing that, within thirty days of the injury, the claimant saw a doctor who called the president of the company to ask whether the claimant's medical treatment would be covered through workers' compensation. The company president, Mack Thornton, denied that Mr. Harper related his back problems to an on-the-job accident, and testified that the claimant was paid full salary for the first two weeks he was out of work as a voluntary advance in recognition that there would be a delay in the claimant's receipt of group health disability benefits. The employer also denied the advance was paid to prevent the claimant from filing a workers' compensation claim. The claimant, however, alleged that he had notified the president that he desired workers' compensation benefits and was told to file for group insurance instead.\(^{46}\)

In May 1989, more than one year after the date of the alleged accident but less than two years after claimant received the two weeks of salary paid by the employer, the claimant filed a claim with the Board. The employer asserted the statute of limitations defense contained in O.C.G.A. section 34-9-82, which both the A.L.J. and the full Board declined to accept.\(^{47}\) On appeal to the superior court, however, the Board's decision was reversed and the court of appeals granted an application for a discretionary appeal.\(^{47}\)

The all-issues statute of limitations in section 34-9-82(a) provides:

> The right to compensation shall be barred unless a claim therefor is filed within one year after injury, except that if payment of weekly benefits has been made or remedial treatment has been furnished by the employer on account of the injury the claim may be filed within one year after the date of the last remedial treatment furnished by the employer or within two years after the date of the last payment of weekly benefits.\(^{48}\)

Both the A.L.J. and the full Board agreed that the two weeks of voluntary salary paid to the claimant in 1987 constituted salary in lieu of workers' compensation benefits, thereby invoking the two-year clause in the statute of limitations provision.\(^{49}\) The basis of the superior court's reversal was that the only evidence in the record concerning the nature of the

\(^{45}\) 197 Ga. App. at 158-60, 397 S.E.2d at 741-42.

\(^{46}\) *Id.* at 158, 397 S.E.2d at 741.

\(^{47}\) *Id.* at 157, 397 S.E.2d at 740.


\(^{49}\) 197 Ga. App. at 159, 397 S.E.2d at 741.
initial payments made to the claimant was the testimony of the company president, and since this evidence was that the payments were not for workers' compensation, there was no evidence to support a finding that the benefits were in lieu of workers' compensation.\textsuperscript{50}

The court of appeals first noted that the record in a workers' compensation claim must "be construed in a light most favorable to the party prevailing before the [B]oard, and every reasonable factual inference and presumption of validity of [the] award should be indulged in by the reviewing court."\textsuperscript{51} The court then reasoned that the issue before it was simply whether there was any evidence to support the Board's determination that the initial payments to the claimant were, in fact, in lieu of compensation.\textsuperscript{52} The court stated that the Board:

\begin{quote}
\textit{could infer from a combination of the testimony of [claimant] and Mack Thornton that L & M elected to pay [claimant] benefits on account of his injury in lieu of having him immediately file a claim for workers' compensation, as Mack Thornton, President of L & M, desired not to process the claim under workers' compensation but as an insurance claim.}\textsuperscript{53}
\end{quote}

The court found that this inference from the evidence was sufficient, "albeit barely," to meet the "any evidence" standard of review.\textsuperscript{54}

The court was at pains, however, to distinguish two arguments raised by the employer in support of its statute of limitations defense. The first concerned the fact that the payments made to the claimant in 1987 did not qualify as salary in lieu of compensation as defined at that time by Board Rule 220(b) and its interpretation by the court in\textit{Davis v. Union Camp Corp.}\textsuperscript{55} In\textit{Davis}, which has been legislatively overruled by the July 1, 1990 amendment to O.C.G.A. section 34-9-243,\textsuperscript{56} the court of appeals held that an employer who pays salary in lieu of compensation cannot take credit for such payment against workers' compensation benefits unless strict compliance with Board Rule 220 is observed.\textsuperscript{57} This rule required that the claimant be given the election of salary in lieu of compensation and that various forms be filed with the Board verifying this fact.\textsuperscript{58} Under the decision in\textit{Davis}, the employer in\textit{Harper} could not have

\begin{thebibliography}{99}
\item 50.  Id., 397 S.E.2d at 741-42.
\item 51.  Id., 397 S.E.2d at 742.
\item 52.  Id. at 160, 397 S.E.2d at 742.
\item 53.  Id.
\item 54.  Id.
\item 55.  188 Ga. App. 36, 371 S.E.2d 898 (1988).
\item 57.  188 Ga. App. at 37-38, 371 S.E.2d at 899-900.
\item 58.  For a general discussion, see H. Michael Bagley, Daniel C. Kniffen & John G. Blackmon,\textit{ Workers' Compensation,} 41 MERCER L. REV. 429, 460-61 (1989).
\end{thebibliography}
taken credit for the initial two weeks of salary paid to the claimant as salary in lieu of compensation because none of the forms required by Board Rule 220 were filed.

The court of appeals in Harper distinguished the decision in Davis as concerning a question separate from whether money paid to a claimant is sufficient to toll the all-issues statute of limitations. In so doing, the court interpreted the phrase "payment of weekly benefits" in the all-issues statute of limitations as having a much broader meaning than in any other portion of the Act. Although section 34-9-82 refers specifically to "payment of weekly benefits" as the necessary element to trigger a two-year statute of limitations, the court of appeals in Harper substituted, and emphasized, the phrase "benefits . . . on account of the injury" as the operative phrase to toll the statute of limitations. The phrase "benefits on account of injury" appears to have no relation to the statutory mandate of "payment of weekly benefits," which presumably refers to the weekly form of compensation required by O.C.G.A. sections 34-9-261 to 34-9-263.

The court also distinguished the employer's argument that, assuming the payments made to the claimant were for workers' compensation, purely voluntary payments of compensation do not toll the statute of limitations. As the court properly pointed out, the cases relied on by the employer for this argument related to payments made by employers under the old "agreement system" of compensation, rather than under the "direct payment system" implemented in 1978. The court also noted that the all-issues statute of limitations has been amended since the cases relied on by the employer were decided to include a two-year statutory period when "weekly benefits" have been paid. In distinguishing this argument, the court noted that the current statute "on its face does not distinguish between payments of weekly benefits made voluntarily and those made otherwise; all that is required to trigger the two-year limita-
tion is that the payment, whether voluntarily made or not, was tendered as a weekly benefit on account of the injury." 66

The expansion of the all-issues statute of limitations by the court of appeals presents employers with a variety of new problems. Employers must now decide whether they are waiving their statute of limitations defense to a potential workers' compensation claim simply by providing their employees with group disability benefits or other forms of "benefits on account of the injury" when their workers suffer nonwork related injuries. Conceivably, under the Harper decision, any payment made on account of an injury that is later alleged to be work-related constitutes "payment of weekly benefits" sufficient to invoke the two-year statute of limitations provision in section 34-9-82. This could have a chilling effect on employer benefits for nonwork-related medical conditions.

This new interpretation of the all-issues statute of limitations greatly expands the two-year exception in that statute, which may have been intended to cover an entirely different situation. Ordinarily, the payment of any income benefits would immediately trigger a two-year statute of limitations, since any claim for additional benefits would be considered a "change in condition" claim. 67 O.C.G.A. section 34-9-221(h) 68 provides, however, that an employer-insurer may accept payment of workers' compensation benefits and then controvert the claim within sixty days of the due date of first payment of compensation. 69 When a claim is initially accepted, but then controverted within sixty days, a claim for additional benefits arguably would not be a change in condition case, since liability was denied. However, a claim for additional benefits could still be made within two years of the last payment of weekly benefits under the exception contained in O.C.G.A. section 34-9-82. Although it would seem that this is the situation in which the two-year exception was meant to apply, the decision in Harper expands this exception to apply to any payment made "on account of the injury." In attempting to avoid what may have been a potentially harsh statute of limitations result in a single case, the court of appeals may have opened yet another Pandora's Box of litigation in the statute of limitations area. 70

66. Id.
67. See supra note 42 and accompanying text.
69. Id.
70. Id.

The court might have concluded, under existing case law, that the statute was tolled because of what the claimant described as an apparent inducement by the employer to not file a workers' compensation claim. The court has held that an intentional, affirmative act of concealment or misrepresentation by either the employer or insurer that deters the claimant from timely filing a claim tolls the statute of limitations. Perkins v. Aetna Casualty & Sur. Co., 147 Ga. App. 662, 249 S.E.2d 661 (1978); see also Cotton States Ins. Co. v. Studdard, 126 Ga. App. 217, 190 S.E.2d 549 (1972).
III. Exclusive Remedy

The survey period produced a number of cases addressing the exclusive remedy provision of the Georgia Workers' Compensation Act, found in O.C.G.A. section 34-9-11.71 Essentially, the exclusive remedy provision provides that if an employee suffers a compensable work-related injury, his rights and remedies are limited to those found in the Act.72 A tort claim, therefore, would be barred. However, because the Act provides limited "punitive damages" in the form of penalties and assessed attorney fees,73 individuals continue to file tort claims in those circumstances in which the possibility of a major punitive damage award exists. A good example of such a case is Jim Walter Homes, Inc. v. Roberts.74 In Roberts plaintiff suffered a compensable work-related injury and received workers' compensation benefits. She subsequently moved to Florida and sought additional medical treatment, which was denied by the insurance carrier as unauthorized. As a result, she was forced to return to Georgia to obtain "authorized" medical care. In February of 1989 she filed a medical malpractice lawsuit, adding a claim against her employer-insurer, alleging that they intentionally withheld medical treatment, which she claimed amounted to a conspiracy and resulted in her total disability. She sought both compensatory and punitive damages.75 Defendants failed to answer the complaint and a default judgment was taken in favor of Roberts for $1,500,000 in general damages and $500,000 in punitive damages. Although the general damages were reduced to $1,000,000, the trial court refused to open the default, which led to this appeal.76

On appeal Jim Walter Homes argued that the trial court had no subject matter jurisdiction because the claim concerned a workers' compensation matter and, therefore, was barred by the exclusive remedy provision.77 The court of appeals rejected this, holding that when Jim Walter Homes failed to answer the complaint it admitted to "wilful and intentional torts committed outside the purview of the Workers' Compensation Act."78 Unfortunately, the court went further than it had to, stating that this was "an intentional physical injury resulting from appellant's refusal to authorize necessary treatment, rather than an intentional financial injury

72. Id.; see also 2A ARTHUR LARSON, WORKERS' COMPENSATION LAW § 65 (1990).
75. Id. at 618-19, 396 S.E.2d at 788.
76. Id.
77. Id. at 620, 396 S.E.2d at 789.
78. Id.
resulting from a delay in paying workers’ compensation benefits.” Thus, the court’s opinion leaves the impression that even had Jim Walter Homes timely answered the complaint, plaintiff’s cause of action would not be barred by the exclusive remedy provision. This is not the case in Georgia.

The court attempted to distinguish an intentional physical injury, which occurred in this instance, from an intentional financial injury, which occurred in Bright v. Nimmo. In Bright the Georgia Supreme Court held that the intentional delay of workers’ compensation indemnity benefits did not give rise to an independent cause of action. In doing so, however, the supreme court merely mentioned in passing that it was not faced with an intentional physical injury. This was nothing more than dicta. Intentional physical injuries are in fact covered under the Act, and it is the intentional financial injury, or violation of a professional trust, that may give rise to a tort claim. Any reliance on Bright for the principle that there is a cause of action for an intentional physical injury is incorrect. If the Act provides a remedy, such as assessed attorney fees, for the nonpayment or failure to provide medical care, then there can be no tort claim. Thus, if Roberts stands for anything, it stands for the principle that failure to answer a complaint may land the employer-insurer in a civil action although the claim would otherwise be barred by the exclusive remedy provision of the Act.

79. Id. at 621, 396 S.E.2d at 789.
82. 253 Ga. at 381, 320 S.E.2d at 368. Indeed, the case cited by the supreme court in Bright as allowing tort claims for intentional physical injuries, Smith v. Rich’s, Inc., 104 Ga. App. 883, 123 S.E.2d 316 (1961), was overruled by its own decision in Southern Wire & Iron, Inc. v. Fowler, 217 Ga. 727, 124 S.E.2d 738 (1962).
83. Southwire Co. v. Benefield, 184 Ga. App. 418, 361 S.E.2d 525 (1987). The court of appeals in that case even noted that Bright did not change this rule of law. Id. at 419, 361 S.E.2d at 526. Of course, the assumption is that the intentional physical injury is work-related and not personal. See, e.g., Hardee’s Food Sys. v. Evans, 197 Ga. App. 5, 397 S.E.2d 474 (1990).
87. In fact, there is a case almost on point. In Aetna Casualty & Sur. Co. v. Davis, a companion case to Bright, the supreme court held that nonpayment of medical bills under a settlement did not give rise to a tort claim even if it was intentional. 253 Ga. 376, 377, 320 S.E.2d 368, 370 (1984). The Act provides a remedy with assessed attorney fees. O.C.G.A. § 34-9-108 (1988); see also Superb Carpet Mills, Inc. v. Thomason, 183 Ga. App. 554, 359 S.E.2d 370 (1987); Larson, supra note 72, at § 68.34(c), 13-128, n.49.19.
Intentional physical injuries were discussed in at least two other cases during the survey period: *Hall v. Johnson* and *Hardee's Food Systems v. Evans*. In *Hall* plaintiff was injured "when he was intentionally 'head-butted' by the defendant, a fellow-employee, at their place of employment." He later filed a tort action seeking to recover both for his injuries and for his wife's loss of consortium. The court of appeals held that his claim was barred, and distinguished an earlier case in which not only did the plaintiff fail to receive workers' compensation benefits, but there was evidence to show that her injury resulted from an intentional act "directed against her by fellow employees for 'purely non-work-related personal reasons.'" This is indeed the case, and as noted by the court in *Evans*, if the plaintiff alleges that the injuries resulted from purely personal reasons, having no relation to the employee's performance of his work duties, then a tort claim may lie. In such case, summary judgment should not be granted to the employer-insurer on the exclusive remedy defense.

The duty to provide a safe work place and the exclusive remedy provision were brought into question on two occasions during the survey period. In *Garrett v. K-Mart Corp.*, plaintiff initially sought workers' compensation benefits, but her claim was denied by the Board, which found that her injury did not arise out of her employment, but was instead caused by a pre-existing condition that was not aggravated by her work. Garrett then filed the tort claim, which the trial court dismissed under the exclusive remedy provision. The court of appeals, although noting that for the exclusive remedy provision to apply the injury must arise out of and in the course of employment, which was certainly not the case here, nevertheless affirmed the decision under the doctrine of res judicata. The Board had previously found that there was "no peculiar danger to which her work exposed her," thus allowing the court to dispose of the allegation that her employer failed to furnish a safe work place.

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90. 198 Ga. App. at 495, 402 S.E.2d at 98.
91. Id.
92. Id.; see also Crawford v. Meyer, 195 Ga. App. 867, 395 S.E.2d 327 (1990) (injury by coemployee in parking lot was covered).
96. Id. at 374, 398 S.E.2d at 304.
97. Id. at 375, 398 S.E.2d at 304.
98. Id. at 376, 398 S.E.2d at 305.
In *Dugger v. Miller Brewing Co.*, the issue of a safe work place was brought before the court of appeals in a slightly different manner. Dugger was injured while repairing a steam line during his employment with Miller Brewing Company and received workers' compensation benefits. He then sued Miller Brewing Company for additional compensatory and punitive damages, maintaining that the exclusive remedy provision of the Act had been pre-empted by federal labor law. Furthermore, he maintained that Miller Brewing "intentionally" concealed certain hazards in the work place which resulted in his injury. The court rejected both of these arguments. The Act was not pre-empted by federal law. Furthermore, and as noted above, so long as the injury arises out of and in the course of employment, there can be no recovery for additional damages even though the injury may have resulted from willful or intentional acts by the employer.

If the employer occupies a separate legal persona that is involved in the accident, then it may be susceptible to a tort claim. In *Doggett v. Patrick*, plaintiff was an employee of Handy Food Center, Inc., a small chain of grocery stores. He suffered a serious work-related injury that was caused by a defective suspended ceiling. Although Doggett received workers' compensation benefits from his employer, he also filed suit against the president of the corporation, E.M. Patrick, under the theory of premises liability. In addition to being president of Handy Food Center, Inc., although not a shareholder, Patrick had constructed the building, owned it, and leased it to the corporation.

The court held that the question in the case was whether Patrick "acted as a separate legal entity in constructing and maintaining the building or merely acted in his representative capacity as the alter ego of the corporation-employer." In this case there were enough questions to send the matter to the jury. Not only had Patrick acted as the general contractor during construction, but he owned the building in his individual capacity, receiving lease payments "in addition to his salary and other compensation as president" of Handy Food Center, Inc., Doggett's immediate employer. Because there was an issue of fact as to whether Patrick knew or should have known about the defective condition due to his sta-

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100. *Id.* at 850-53, 406 S.E.2d at 485-86.
101. *Id.* at 853-54, 406 S.E.2d at 485-86.
102. *Id.* at 853, 406 S.E.2d at 486.
105. *Id.* at 420, 398 S.E.2d at 770.
106. *Id.* at 421, 398 S.E.2d at 771.
107. *Id.*
status as the owner of the building, as opposed to his status as president of the company, summary judgment could not be granted under the exclusive remedy provision.\textsuperscript{108}

The last decision to be discussed in this section concerned yet another constitutional attack on the exclusive remedy provision. In \textit{Smith v. Gortman},\textsuperscript{109} the employee was killed while riding in a truck driven by a coemployee. His parents filed a wrongful death action against the coemployee, but the trial court granted summary judgment on the grounds that the claim was barred by the exclusive remedy provision. The Smiths appealed, claiming that the decision violated their right to equal protection.\textsuperscript{110} In this regard, they cited a 1989 Georgia Supreme Court case, \textit{Jones v. Jones},\textsuperscript{111} which held that the interspousal immunity doctrine violated equal protection when applied to wrongful death cases.\textsuperscript{112} The supreme court disagreed, distinguishing \textit{Jones}, and held that there was a rational basis to support the separate treatment of the two classifications of wrongful death claimants in the workers' compensation context: Those who die as the result of negligence of their employer or a coemployee, and those who die as the result of the negligence of some other party.\textsuperscript{113} This question had already been decided adversely to the plaintiffs, and a different result was not required because a death was involved.\textsuperscript{114} The purpose of the Act, which is to award benefits without regard to negligence or assumption of the risk, while at the same time assuring the employer of limited liability, is served equally whether the employee is injured or killed.\textsuperscript{115}

\textbf{IV. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT}

The question of whether an accident arises "within the course of employment" during a recreational or social activity was addressed in at least one case during the survey period. In \textit{Pizza Hut, Inc. v. Hood},\textsuperscript{116} plaintiff, an employee of Pizza Hut, drowned at a company picnic. His parents and the administrator of his estate filed a lawsuit against Pizza Hut, which moved for summary judgment on the grounds that the sole remedy was under the Act. The trial court disagreed, and on appeal the

\begin{itemize}
\item \textsuperscript{108} \textit{Id.} at 422, 398 S.E.2d at 772.
\item \textsuperscript{109} 261 Ga. 206, 403 S.E.2d 41 (1991).
\item \textsuperscript{110} \textit{Id.} at 206-07, 403 S.E.2d at 42.
\item \textsuperscript{111} 259 Ga. 49, 376 S.E.2d 674 (1989).
\item \textsuperscript{112} \textit{Id.} at 50, 376 S.E.2d at 676.
\item \textsuperscript{113} 261 Ga. at 207, 403 S.E.2d at 42.
\item \textsuperscript{114} \textit{Id.} at 206-07, 403 S.E.2d at 42 (citing O.C.G.A. § 34-9-11 (1988)).
\item \textsuperscript{115} \textit{Id.} at 207, 403 S.E.2d at 42.
\item \textsuperscript{116} 198 Ga. App. 112, 400 S.E.2d 657 (1990).
\end{itemize}
question became whether it could be said that Hood's injury occurred within the course of his employment.117

According to the court of appeals:

Recreational or social activities are within the course of employment, and thus subject to the Workers' Compensation Act if, (1) they occur on the work premises during a lunch or recreation period as a regular incident of employment, or (2) employee participation is required, either expressly or by implication, or (3) the employer derives a substantial benefit from the event beyond the improvement in employee health and morale that is common to all kinds of recreational or social activities.118

In this case not only did the picnic take place away from the employer's premises, but Hood was not required to attend. The court of appeals disagreed with appellant's contention that the picnic promoted a new product, thereby allowing Pizza Hut to derive a benefit beyond the improvement in employee health and morale.119 There was "no evidence in the record that Pizza Hut made any effort at the picnic to promote a new product."120 As a result, it could not be said that Hood's drowning occurred within the course of his employment, and his parents and estate were allowed to proceed with the tort claim against Pizza Hut.

For an accident to arise "within the course of employment," it must occur "at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling his duties or engaged in doing something incidental thereto."121 In Lee v. Middleton Logging Co.,122 claimant was denied benefits by the Board, which found that his injury resulted from willful misconduct, and did not arise out of and in the course of employment. In Lee claimant came to the employer's premises for personal reasons and on a day on which he was not scheduled to work. During his visit to the premises, Lee went into a work area and began to climb on some trailers in an attempt to assist an independent contractor with his duties. The independent contractor admonished Lee, telling him to get off the trailer. As he was doing so, Lee fell and injured his foot.123 Based on these facts the court of appeals agreed with the Board and held that the injury did not occur within the course of Lee's employment. Therefore, benefits were properly denied.124

117. Id. at 112, 400 S.E.2d at 658.
118. Id.
119. Id.
120. Id., 400 S.E.2d at 659.
123. Id. at 586, 402 S.E.2d at 537.
124. Id. at 586-87, 402 S.E.2d at 537.
V. ATTORNEY FEES

Attorney fees may be assessed "[u]pon a determination that proceedings have been brought, prosecuted, or defended in whole or in part without reasonable grounds". Although indemnity benefits may be awarded to the claimant, attorney fees should not be assessed if there is conflicting medical evidence. This situation was presented to the court of appeals during the survey period in *Mount Vernon Mills, Inc. v. Gunn*.

In *Gunn* claimant sustained a work-related injury on October 7, 1987. On January 31, 1989 she returned to work pursuant to her treating physician's determination that she could do so without restriction. Shortly thereafter Gunn stopped working, claiming she could not work because of the pain. Thereafter, she was seen by several physicians, none of whom found her to be totally disabled. In the meantime, Ms. Gunn's employment was terminated because she was out of work for six days without explanation. She filed a claim based on a change in condition, seeking indemnity benefits since the date she last worked.

The A.L.J. not only awarded indemnity benefits, but also assessed attorney fees based on a finding that "the employer had full knowledge of claimant's injury and disability when it terminated claimant." As such, the A.L.J. ruled that the employer defended the claim without reasonable grounds. The assessed attorney fees were affirmed by both the full Board and the superior court. The court of appeals reversed, however, finding that the Board substituted its own interpretation of the medical opinion, and rejected the expert opinion shared by each of the physicians that the claimant was capable of working. An award in favor of the claimant was not demanded by the evidence, and according to the court of appeals, the conclusions of the Board did "not amount to evidence of unreasonableness on the part of the employer in predicating its defense on the expert opinions of the physicians."

VI. AVERAGE WEEKLY WAGE

The problem of computing an average weekly wage for an individual who works in a unique position, but does so for less than thirteen weeks, was addressed in *Richards v. Wilkinson Shaving Co.* In a rather inter-

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128. *Id.* at 109-10, 397 S.E.2d at 604.
129. *Id.* at 110, 397 S.E.2d at 604.
130. *Id.* at 111, 397 S.E.2d at 605.
131. *Id.*
esting and well-reasoned decision, the court of appeals upheld an award of maximum benefits under O.C.G.A. section 34-9-260(2) based on a "burden of proof" analysis in a situation in which the claimants were unable to present direct evidence on the wages of a similar employee.

Richards, an employee of Wilkinson, was killed in a work-related accident. At the time of his death he had been employed for less than thirteen weeks. Not only were there no available records of a "similar employee," but Richards apparently had been paid on a commission basis, thereby making it impossible to determine his "full-time weekly wage." According to the superior court, this claim presented a situation in which an individual might have a right to compensation, but no entitlement to such because of an inability to "provide sufficient evidence of the proper amount." The superior court reversed the award by the Board of the maximum amount of benefits, which was based on the income records of two similar employees of another employer.

As noted by the court of appeals, the record showed that there had been a "similar employee" with Wilkinson, but that his wage records were destroyed by fire prior to the hearing before the Board. Furthermore, neither the owner of the company nor the former employee could recall the amounts. Thus, Richards’ widow and minor children were unable to present any direct evidence on what the "similar employee" actually had earned. Having already held that section 34-9-260(2) required the use of the records of a similar employee with the same employer, the court of appeals framed the issue as whether the lack of any direct evidence of the actual earnings of the similar employee mandated reversal of an award of maximum benefits that had been calculated under this particular subsection based on the wage records of another employer.

After noting that the burden was initially upon "the claimant to establish by sufficient competent evidence the basis upon which [the] compensation [was] to be computed," the court held that in this instance, they had met their burden of proof. Claimants had sought to rely on the records of a similar employee of Wilkinson’s. Having been denied the ability to present direct evidence based on information that, according to

134. 198 Ga. App. at 49, 400 S.E.2d at 347.
135. Id. at 45-46, 400 S.E.2d at 345; O.C.G.A. § 34-9-260(1) to (3) (1988).
136. 198 Ga. App. at 46, 400 S.E.2d at 345 (quoting the superior court).
137. Id. at 46-47, 400 S.E.2d at 345.
138. Id. at 47, 400 S.E.2d at 346.
139. Id. at 46, 400 S.E.2d at 346.
140. Id., 400 S.E.2d at 345.
141. Id., 400 S.E.2d at 346.
142. Id. at 47, 400 S.E.2d at 346 (quoting Masterpiece Finishing Co. v. Callahan, 180 Ga. App. 216, 217, 348 S.E.2d 586, 588 (1986)).
the court of appeals, was within the employer's "peculiar knowledge," claimants then tendered evidence of two similar employees of another employer during the thirteen week period immediately preceding the injury. The court found that:

This evidence was, under the circumstances, sufficient circumstantial evidence of the earnings of appellee's similar employee to meet the claimants' burden of proof under subsection (2) of O.C.G.A. § 34-9-260, and to shift to appellee the burden of coming forward with some rebutting evidence showing that the actual wages of its similar employee during the 13-week period had, in fact, not been as great as those of the two employees of the other employer.

Because the employer-insurer did not come forward with rebuttal evidence, the Board was authorized to award maximum benefits to Richards' dependents.

The holding in this case will have a very narrow application. The court of appeals warned that its decision was not to be interpreted to allow an individual to "recover indirectly what [he] could not recover directly."

As such, this case should be limited to those situations in which the individual has worked for the employer for less than thirteen weeks, has no full-time wage, and is unable to present any direct evidence on the wages of a similar employee with the same employer through no fault of his own. In fact, and in keeping with the holding of this case, such an employee must exist.

VII. Change in Condition v. New Accident

In every survey period there is always at least one case dealing with the question of change in condition as opposed to new accident. This survey period was no exception, and the court of appeals addressed this issue in the case of *Eastern Airlines, Inc. v. Moss.* Moss, an employee of Eastern Airlines, was initially injured on February 17, 1986. At the time of the injury, which was diagnosed as bilateral carpal tunnel syndrome, Travelers Insurance Company was providing coverage. After a short recuperative period, Moss returned to work in a less strenuous job, one which did not involve substantial wrist movement. She continued to work, apparently without difficulty, until December 16, 1987. On that day she was required to perform strenuous duties involving excessive use of her arms

143. *Id.*
144. *Id.* at 47-48, 400 S.E.2d at 346-47 (emphasis added).
145. *Id.* at 48, 400 S.E.2d at 347.
146. *Id.*
WORKERS' COMPENSATION

and hands. This even included some of the same duties that she had been required to perform prior to the initial injury in February 1986.\footnote{148}

The duties Moss performed on December 16, 1987 left her with pain and swelling in both hands. She reported the incident and obtained medical treatment. On December 22, 1987, a day when Moss missed work, Eastern Airlines terminated her. At that time Georgia Adjustment Bureau was providing coverage. She thereafter filed a claim seeking benefits.\footnote{149}

Both the A.L.J. and the full Board found that her condition was aggravated by the performance of the duties on December 16, 1987, and awarded her benefits against Eastern and Georgia Adjustment Bureau. The superior court reversed, however, finding that Moss suffered only a temporary exacerbation of a pre-existing condition from which she had fully recovered by the time of the hearing on September 14, 1988, therefore, finding that Travelers was responsible after that time. Apparently, this decision was based on testimony from Moss at the hearing to the effect that she would be willing to perform the lighter duties she was performing before the aggravation on December 16, 1987.\footnote{150}

First, the court of appeals pointed out that the statement by Moss at the hearing that she would be willing to perform the job did “not demand a finding that she was not economically disabled.”\footnote{151} The proximate cause of her disability was a question of fact to be determined by the Board.\footnote{152} In this case the Board had determined that her disability resulted from the strenuous duties on December 16, 1987, and that Eastern and Georgia Adjustment Bureau were responsible. Because the superior court does not have the authority to substitute itself as a finder of fact, it erred in finding that Moss merely suffered a temporary exacerbation and that Travelers was responsible from September 14, 1988 forward.\footnote{153}

VIII. COVERAGE

In Trammel Crowe Construction Co. v. Rumph,\footnote{154} the court of appeals considered two questions: first, whether the insured had received timely notice of cancellation as required by O.C.G.A. section 33-24-44(b);\footnote{155} sec-

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\begin{itemize}
  \item 148. \textit{Id.} at 61-62, 397 S.E.2d at 446.
  \item 149. \textit{Id.} at 62, 397 S.E.2d at 446.
  \item 150. \textit{Id.}
  \item 151. \textit{Id.}
  \item 152. \textit{Id.}
  \item 153. \textit{Id.} at 62-63, 397 S.E.2d at 446-47.
  \item 155. O.C.G.A. § 33-24-44(b) (1990).
\end{itemize}
}
ond, whether Board Rule 126(a)(2) is mandatory to effect cancellation.

In Rumph Selective Insurance Company ("Selective") issued a workers' compensation policy to Pyramid Construction Company ("Pyramid") for the period of November 17, 1987 to November 17, 1988. In June 1988, Selective sought to cancel the policy effective August 15, 1988. On June 30, 1988, one of Selective's underwriters directed a clerk to prepare a notice of cancellation to send to Pyramid, to the agent who placed the policy, and to National Council on Compensation Insurance ("NCCI") pursuant to Board Rule 126. The facts showed that NCCI never received notice of the cancellation, but did receive an endorsement from Selective on August 12 which indicated that the policy would be cancelled August 15. As for Pyramid, its president did not receive notice of the cancellation until July 23 or 24. Rumph, a Pyramid employee, was injured on August 17 and filed a claim against Selective, which denied coverage.

When the matter came before the Board, Selective put into evidence a Post Office certificate of bulk mailing that showed that on July 1, 1988 six unidentified items were mailed. Selective also put into evidence a separate sheet containing the names of six policy holders, including Pyramid, and a statement showing that cancellation notices were issued on July 1. Unfortunately, the Post Office did not stamp the list. Furthermore, Selective had no one available to testify that the notices were actually mailed.

The A.L.J. found that Selective had coverage because of its failure to comply with the cancellation requirements of section 33-24-44(b) and Board Rule 126(a)(2), which required the insurer to notify NCCI of cancellation. The full Board agreed and affirmed the award, but the superior court reversed and held that because Pyramid received actual notice, Selective did not have to demonstrate that the notice of cancellation was mailed pursuant to the statute. In this regard, the superior court relied on an earlier case, Travelers Indemnity Co. v. Guess. As for Board Rule 126, the superior court found that compliance was not mandatory and that filings with NCCI were merely evidence of cancellation.

The court of appeals took the case on discretionary appeal and reversed. The court distinguished Guess, stating that in that case, notice of cancellation was given pursuant to section 33-24-44(d). In Guess the

157. 198 Ga. App. at 754, 403 S.E.2d at 72.
158. Id. at 754-55, 403 S.E.2d at 72-73.
161. Id. at 755-57, 403 S.E.2d at 73-74.
162. Id. at 755-56, 403 S.E.2d at 73 (reviewing Guess, 243 Ga. 559, 255 S.E.2d 55 (1979)).
insurance carrier cancelled within sixty days of the date on which the policy was issued; therefore, notice requirements were satisfied upon showing that the insured received actual notice more than ten days before cancellation.\textsuperscript{163} In the instant case, however, Selective cancelled under subsection (b) and, as a result, the court of appeals not only held that Selective failed to show that it mailed the cancellation more than thirty days before the policy-ending date, but that Pyramid’s president received actual notice approximately three weeks prior to this date.\textsuperscript{164} Thus, Selective had not effectively cancelled as of August 15, 1988.\textsuperscript{165}

Respecting the notice requirements under Board Rule 126, the court of appeals agreed with the superior court that the filing of forms with NCCI constituted only evidence of coverage or lack thereof.\textsuperscript{166} Construed liberally, the endorsement filed on August 12 could be considered evidence of termination of coverage.\textsuperscript{167} However, because the cancellation would not be effective less than fifteen days after filing, coverage would have terminated on August 27, 1988.\textsuperscript{168} Therefore, the notice Selective gave to NCCI was not sufficient to bar coverage of Rumph’s injury.\textsuperscript{169}

\textbf{IX. Independent Contractor}

The Georgia Supreme Court took the opportunity during the survey period to review the definition of an “independent contractor” and to apply that definition to hold that the facts presented to the Board demanded the conclusion that the claimant was an independent contractor, rather than an employee, of the defendant employer. In \textit{RBF Holding Co. v. Williamson},\textsuperscript{170} claimant, Williamson, performed part-time general maintenance for RBF Holding Company (“RBF”) and was injured while performing work for RBF. The uncontradicted evidence in the record was that RBF did not control the time, method, and manner of Williamson’s work; that Williamson started and finished jobs at his own schedule; that Williamson refused jobs when they conflicted with his full-time job or with personal plans such as hunting; that Williamson used his own tools in performing work for RBF; and that Williamson testified that as long as he got the work done, RBF did not care how he did it.\textsuperscript{171} The supreme court cited the well-recognized rule that, in determining whether a worker

\begin{itemize}
\item[163.] \textit{Id.} (reviewing \textit{Guess}, 243 Ga. 559, 255 S.E.2d 55 (1979)).
\item[164.] \textit{Id.} at 754, 403 S.E.2d at 73.
\item[165.] \textit{Id.} at 756, 403 S.E.2d at 74.
\item[166.] \textit{Id.} at 756-57, 403 S.E.2d at 74.
\item[167.] \textit{Id.} at 757, 403 S.E.2d at 74.
\item[168.] \textit{Id.}
\item[169.] \textit{Id.}
\item[170.] 260 Ga. 528, 397 S.E.2d 440 (1990).
\item[171.] \textit{Id.} at 526-27, 397 S.E.2d at 441.
\end{itemize}
is an employee or an independent contractor, the test is whether the employer has the right to direct the time, manner, method, and means of the employment. Interestingly, the A.L.J., the full Board, the superior court, and the court of appeals, which rejected the employer's application for a discretionary appeal, all found that the record justified a finding that claimant was an actual employee of RBF, obviously concluding the employer exercised some manner of control. The supreme court concluded, however, that the “any evidence” rule did not control the case, since the facts of record were not in conflict and could result in only one legal conclusion. The decision in Williamson is the most recent guide to defining the elusive concept of “control” in the determination of independent contractor versus employee questions, a concept that has proven difficult to squarely define.

X. INTOXICATION

The 1990 Georgia General Assembly devoted a great deal of attention to the ever-increasing problem of illegal drugs. As a part of its efforts to wage the “war on drugs,” the General Assembly amended O.C.G.A. section 34-9-17 to bring within the defense of “willful misconduct” any injury due to “being under the influence of marijuana or a controlled substance.” Prior to the amendment, this portion of the “willful misconduct” statute barred compensation for injuries due to “intoxication.” As a case decided in the recent survey period demonstrates, however, the General Assembly’s amendment to section 34-9-17 does not add any significant deterrent to the use of drugs in the work place.

In Thomas v. Helen’s Roofing Co., claimant was replacing a roof on a building when he lost his footing and fell. When claimant was taken to the hospital for his injuries, laboratory tests revealed the presence of cocaine in his urine. Subsequent history revealed that claimant had used

172. Id. at 526, 397 S.E.2d at 441 (citing State v. Goolsby, 191 Ga. App. 161, 381 S.E.2d 299 (1989)).
173. Id., 397 S.E.2d at 440.
174. Id.
175. Id.
176. As one judge has commented: “The protean concept of control is not capable of a simple explanation. Perhaps it best belongs with that genre of phenomenon over which the court must say ‘I can’t define it, but I know it when I see it.’” Harris v. City of Chattanooga, 507 F. Supp. 365, 373 (N.D. Ga. 1980).
178. Id.
179. Id.
both marijuana and cocaine in the past, although claimant denied using cocaine on the date of the injury. Appellant's supervisor testified that he did not see the accident, but having examined the roof and the area where claimant fell, it was his opinion that claimant had jumped from the roof. The supervisor testified that he had seen claimant jump from a roof before. The A.L.J. found that claimant's injury was caused by his intoxication from the use of cocaine, and denied the claim pursuant to section 34-9-17. This decision was affirmed by the full Board and the superior court.\footnote{182}

The court of appeals reversed, however, finding as a matter of law that the evidence was insufficient to establish a causal connection between the alleged intoxication and the actual injury.\footnote{183} The court first noted that claimant's injury was prior to the effective date of the July 1, 1990 amendment that specifically refers to the use of marijuana or a controlled substance.\footnote{184} The court found this to be noncontrolling, however, since it had previously held that the phrase "intoxication" means something more than the mere ingestion of alcohol or drugs, regardless of whether it refers to alcohol alone or a controlled substance.\footnote{185} The court then reversed the Board's decision by finding that, as a matter of law, there was insufficient evidence to find either that claimant was intoxicated or that any intoxication caused the accident and injury.\footnote{186}

The decision emphasizes that an employer-insurer must do more than merely show the presence of a controlled substance in claimant's bloodstream at the time of the injury. The court specifically stated: "[W]e do not find that the presence of cocaine in [claimant’s] urine constitutes evidence of [claimant’s] intoxication at the time of his injury."\footnote{187} The court further found that there was no evidence that claimant was under the influence of cocaine to the extent that it altered his judgment or caused him to fall.\footnote{188} The court noted the supervisor's testimony that, based on his inspection of the accident scene and his prior experiences with claimant, it was his opinion that claimant jumped, rather than fell, from the roof.\footnote{189} The court did not state, however, why this was insufficient evidence to support a finding of a causal connection between the presence of cocaine in claimant's bloodstream and the accident.\footnote{190} The

\begin{itemize}
\item \footnote{182}{Id. at 161-62, 404 S.E.2d 332-33.}
\item \footnote{183}{Id. at 162-63, 404 S.E.2d at 332-33.}
\item \footnote{184}{Id. at 162, 404 S.E.2d at 332.}
\item \footnote{185}{Id. (citing Parks v. Maryland Casualty Co., 69 Ga. App. 720, 26 S.E.2d 562 (1943)).}
\item \footnote{186}{Id., 404 S.E.2d at 332-33.}
\item \footnote{187}{Id.}
\item \footnote{188}{Id., 404 S.E.2d at 333.}
\item \footnote{189}{Id., 404 S.E.2d at 332.}
\item \footnote{190}{Id. at 161, 404 S.E.2d at 332.}
\end{itemize}
court simply noted that it was the employer's position that the mere ingestion of cocaine should be considered willful misconduct, and rejected the argument based upon its prior holdings that a causal connection must be shown between the intoxication and the injury.\footnote{191}{Id. at 162-63, 404 S.E.2d at 333 (citing City of Buford v. Thomas, 179 Ga. App. 769, 347 S.E.2d 713 (1986)).}

The decision in *Thomas* confirms that the 1990 amendment to section 34-9-17 did not substantively alter the willful misconduct defense by the addition of the specific terms “marijuana or a controlled substance.” Further efforts to bolster defenses to on-the-job accidents involving drug use will have to await further legislation.

\section*{XI. Lump Sum Advance}

In *MARTA v. Powell*,\footnote{192}{198 Ga. App. 811, 402 S.E.2d 805 (1991).} the court of appeals reversed a lump sum advance to the claimant under O.C.G.A. section 34-9-222,\footnote{193}{O.C.G.A. § 34-9-222 (1988).} and in doing so further delineated the evidentiary requirements for such an advance.\footnote{194}{198 Ga. App. at 811-12, 402 S.E.2d at 806.} Claimant requested a lump sum advance to redeem his home, which was sold at a tax sale. The original advance request was for $10,360.89 plus attorney fees, but was later reduced to $6,821.91 when claimant received a tax refund. The employer, MARTA, objected to the advance on several grounds. MARTA asserted that the tax delinquency predated claimant's injury, that a sworn affidavit did not support the request for an advance, that there was insufficient evidence of a permanent disability to be used to later recoup the advance, and that there was evidence indicating that claimant had been working while claiming to be disabled. The Board, apparently without specific findings of fact, determined that the advance was in the best interests of claimant and would not work an undue hardship on the employer. Therefore, the Board awarded an advance of $8,250 to be credited against payment of future permanent partial disability benefits.\footnote{195}{Id. at 811, 402 S.E.2d at 805-06.}

The court of appeals reversed the lump sum award for primarily two reasons.\footnote{196}{Id. at 811-12, 402 S.E.2d at 806.} First, the court of appeals determined that claimant's unsworn affidavit was insufficient to support his allegations of financial need.\footnote{197}{Id. at 811, 402 S.E.2d at 806.} The court of appeals had earlier held that the proof required for a lump sum advance, while not necessitating a full evidentiary hearing, must nev-
Nevertheless be verifiable.\textsuperscript{188} The lack of a sworn affidavit was especially important to the court given the evidence presented by the employer indicating that claimant’s financial condition may not have been truthfully represented by the claimant’s affidavit.\textsuperscript{189} Specifically, the employer’s evidence indicated that claimant’s wife actually owned the home in question, and that the claimant may actually have been working while drawing benefits and asserting the need for an advance.\textsuperscript{200}

Second, the court found that there was insufficient evidence of a permanent disability that would allow the employer to subsequently recoup the advance payment.\textsuperscript{201} Although claimant apparently alleged that his injuries would result in a permanent disability, the record did not contain any evidence of a permanent partial disability rating from a physician.\textsuperscript{202} There was no finding, therefore, that claimant’s injury was permanent and would result in an award of permanent partial disability benefits under O.C.G.A. section 34-9-263.\textsuperscript{203} Since an award of permanent partial disability benefits requires a finding that the injury is actually permanent,\textsuperscript{204} there was no valid permanent partial disability rating against which the employer could credit a lump sum advance.\textsuperscript{205}

In its recent decisions concerning lump sum advances, the court of appeals has emphasized the Act’s preference for the payment of weekly, as opposed to lump sum, benefits.\textsuperscript{206} Practitioners seeking to obtain lump sum advances for their clients should be careful to follow closely the requirements of section 34-9-222 and Board Rule 222,\textsuperscript{207} and to document carefully their client’s financial need.

\textbf{XII. Medical Benefits}

In a decision with far-reaching implications for the scope of medical benefits under the Act, the court of appeals held in \textit{Berry College, Inc. v. Storey}\textsuperscript{208} that, under certain conditions, an employer-insurer can be held

\begin{itemize}
\item[199.] \textit{Id.}
\item[200.] \textit{Id.}, 402 S.E.2d at 805-06.
\item[201.] \textit{Id.} at 811-12, 402 S.E.2d at 806.
\item[202.] \textit{Id.}
\item[203.] \textit{Id.} at 812, 402 S.E.2d at 806; O.C.G.A. § 34-9-263 (1988).
\item[205.] 198 Ga. App. at 811-12, 402 S.E.2d at 806.
\item[207.] GA. Bd. of WORKERS COMPENSATION R. 222 (O.C.G.A. tit. 34 app. (Supp. 1991)).
\end{itemize}
liable for payment of household maintenance services under the provisions of O.C.G.A. section 34-9-200(a) providing for payment of medical benefits. The claimant in Storey sustained a work-related knee injury, and subsequently received a prescription from her authorized treating physician for “domestic household services,” which the employer-insurer refused to pay because such services were not medical in nature and not covered by the Act. The case was controlled by section 34-9-200(a), which provides: “The employer shall furnish the employee entitled to benefits under this chapter such medical, surgical, and hospital care and other treatment, items, and services which are prescribed by a licensed physician . . . .” The employer-insurer’s essential argument was that the “services” referred to in the statute contemplate only medical services, and a prescription for domestic household services does not fall within the statute. The court of appeals rejected this argument, however, finding that “nothing in O.C.G.A. § 34-9-200(a) excludes payment of household maintenance services by an employer to an injured employee.”

Perhaps recognizing the possible dangers of an open-ended allowance of “services” under the Act, the court of appeals also discussed four conditions that must be met before nonmedical services can be compensable. First, the court noted the statutory language that the services in question must be “prescribed by a licensed physician.” Second, the services in question must, as with any compensable medical treatment, be “reasonably required and appear likely to effect a cure, give relief, or restore the employee to suitable employment.” The litigation of these questions will obviously closely resemble previous litigation regarding whether the treatment received by an injured worker is authorized or reasonably required to effect a cure or give relief to the claimant’s injury.

The court established two additional conditions, holding that an employer-insurer is responsible for payment of nonmedical services “only where the factfinder determines that all those services are for the exclusive benefit of the injured employee and directly give relief to the work-related injury.” The court also emphasized that the burden of proof as to all of these conditions lies with claimant, and reversed the blanket

211. Id. at 298, 404 S.E.2d at 641.
213. 199 Ga. App. at 298, 404 S.E.2d at 642.
214. Id. at 299, 404 S.E.2d at 642.
215. Id. at 299-300, 404 S.E.2d at 642.
216. Id. at 299, 404 S.E.2d at 642 (quoting O.C.G.A. § 34-9-200(a)).
217. Id. (quoting O.C.G.A. § 34-9-200(a)).
218. Id. at 300, 404 S.E.2d at 643 (emphasis added).
award of domestic household services to claimant by concluding that the Board did not properly require claimant to prove that all of the domestic services were exclusively for her benefit or directly related to her compensable injury.219

The conditions presented by the court in Storey provide some guidance for the future evaluation of cases involving nonmedical services. For example, the court pointed out that while claimant's physician gave her a nonspecific prescription for general domestic services, claimant acknowledged that her injury did not prevent her from performing any regular activity that did not involve bending, squatting, or slight bending of the knee.220 Such restrictions would not, therefore, prevent claimant from performing a variety of "domestic services," including ironing, vacuuming, or the like.221 The court also noted that the domestic services prescribed might also apply to her husband, whose hernia condition also rendered him unable to perform some kinds of domestic services.222 The court specifically held that an employer

is liable only for a proportional share of the household maintenance services performed in the household to relieve the work-related injury of the employee exclusively (and see O.C.G.A. § 19-7-2), regardless of the particular allocation of household maintenance services in the employee's household prior to the employee's work-related injury.223

In determining the "proportional share" of the household maintenance services, therefore, the court of appeals has directed that the Board consider whether the services are exclusively for the employee, regardless of how the work was divided prior to the accident, and charge the employer only with those prorated services directly related to the injury and exclusively for the employee's benefit. The court also referenced O.C.G.A. section 19-7-2,224 a portion of the Domestic Relations Code describing a parent's joint and several duty to provide for the maintenance, protection, and education of his or her child.225 Presumably, therefore, the Board may also consider the claimant's lawful duty to provide for his or her children in considering what domestic services are for the "exclusive" benefit of the employee.

Undoubtedly, the decision in Storey will prompt a great deal of litigation to define the boundaries of nonmedical services. As a new definition

219. Id. at 299, 404 S.E.2d at 642.
220. Id. at 300, 404 S.E.2d at 643.
221. Id.
222. Id.
223. Id.
225. 199 Ga. App. at 300, 404 S.E.2d at 643.
of what medical treatment encompasses under the Workers' Compensation Act, the case may also prompt legislative review.

XIII. Payment of Benefits

The court of appeals took the opportunity in *Columbus Intermediate Care Home, Inc. v. Johnston* to graft an exception to an earlier holding that the provisions of O.C.G.A. section 34-9-221(h) operate as a statute of limitations on the controverting of a claim more than sixty days after the due date of the first payment of compensation. In *Johnston* the court held that section 34-9-221(h) is not a statute of limitations in all circumstances. The issue in *Johnston* did not concern the compensability of the claim itself, but rather which of two insurers was responsible for payment. Claimant was originally injured in 1984, when the employer was insured by U.S. Fire Insurance Company ("U.S. Fire"). The claim was accepted as compensable and paid by U.S. Fire through the date of claimant's return to work in 1985 to a light-duty position. In September 1985 Aetna Casualty & Surety Company ("Aetna") replaced U.S. Fire as the workers' compensation provider for the employer. Claimant again became disabled, as a result of her shoulder problems, from February 1986 until April 1986, and went out of work again on May 8, 1987 following an incident in April of that year when, after performing cardiopulmonary resuscitation, she began to experience chest pains and, subsequently, severe neck and shoulder pain. U.S. Fire continued to provide disability benefits to claimant until October 30, 1987, when it filed a notice to controvert based upon an alleged new accident outside of its coverage period.

Prior to a hearing, the A.L.J. issued an interlocutory order directing U.S. Fire to continue payment of benefits. However, after a hearing, the A.L.J. determined that claimant sustained a new accident in May 1987 and ordered that Aetna was responsible for all payments thereafter. On appeal, Aetna contended that section 34-9-221(h) barred U.S. Fire from controverting the claim since more than sixty days had passed from the due date of the first payment of compensation. The court of appeals rejected this argument, however, pointing out that *Carpet Transport v. Pittman* was "predicated on the protection of the employee's right to

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229. 196 Ga. App. at 517-18, 396 S.E.2d at 270.
230. Id. at 516-17, 396 S.E.2d at 269-70.
231. Id. at 517, 396 S.E.2d at 269-70.
continued compensation from attack by the employer/insurer." Since it was not the employee's right to compensation that was being challenged, the court held that the Carpet Transport rationale did not apply and that section 34-9-221(h) did not operate as a bar to U.S. Fire's controversy of the claim.

Johnston raises the interesting question of whether there is any statute of limitations at all on a claim by one workers' compensation carrier when liability properly rests with another carrier. The statute of limitations provisions in sections 34-9-82 and 34-9-104(b) apply only to claims by an injured worker against the employer-insurer, and under the reasoning of Johnston would have no application to a "two-insurer" battle. Johnston, therefore, points out a troublesome gap in workers' compensation procedure in two-insurer cases.

XIV. PROCEDURE

A. Motions

Although the vast majority of the Civil Practice Act ("CPA") is not applicable to workers' compensation matters, including motions to dismiss or motions for summary judgment, the Board may nevertheless entertain the equivalent in certain instances. In Continental Baking Co. v. Brock, claimant filed a second request for benefits, the first request having been denied after a hearing. The employer-insurer filed the equivalent of a motion to dismiss, asserting res judicata and collateral estoppel. The A.L.J. granted the motion, but the full Board and superior court held that this could not be done, pointing to the fact that the CPA did not apply to workers' compensation matters. The court of appeals reversed, holding that under O.C.G.A. sections 34-9-100(a) and 34-9-102(c), the A.L.J. had such authority to hear a motion "which asserts the claim is barred." These situations, however, are likely to be few and far between since they are specifically limited to those claims that are barred as a matter of law.

234. Id. at 518, 396 S.E.2d at 270.
236. Those portions of the Civil Practice Act that are specifically applicable can be found in O.C.G.A. § 34-9-102(d)(1) (1988).
238. Id. at 579, 402 S.E.2d at 332.
240. 198 Ga. App. at 579, 402 S.E.2d at 333.
Motions for reconsideration apply not only to final orders, but also apply to preliminary orders if they are filed within the statutory twenty-day period. In *Scott v. Tremco*, Tremco was dismissed by an A.L.J. who ruled that it was not the statutory employer. The case was thereafter transferred to a second A.L.J. who, presumably within twenty days of the first order, held a hearing on the claim, to reconsider the dismissal. Thereafter, the second A.L.J. issued an award of benefits in favor of claimant, finding that the dismissal was erroneous. However, no benefits were awarded against Tremco as the statutory employer because it was not present at the hearing.

More than twenty days after the date of the award, claimant, seeking benefits against Tremco, requested a hearing. The A.L.J. held a second hearing and ordered Tremco to pay benefits as a statutory employer. Thereafter, Tremco appealed, contending that the claim was barred because claimant failed to file the appeal within the statutory time period. The court of appeals pointed out that if the initial award of benefits had not addressed the issue of Tremco’s dismissal, then the matter would have been res judicata after the appeal period expired. However, the first award contained a finding that Tremco had been erroneously dismissed. The court of appeals determined that the second A.L.J.’s decision was essentially a reconsideration and reversal of the previous dismissal, and, therefore, the A.L.J. had authority to hold Tremco liable.

B. Records of the Board

The files maintained by the Board are not open to the public and may be inspected only by claimants, employers, insurance carriers that are called upon to pay benefits, or any party at interest. In *Farrell v. Dunn*, defendants in a personal injury suit attempted to obtain records from the Board regarding plaintiff’s prior workers' compensation claim. The Board refused to provide the records, and a motion to compel followed, which the trial court denied. The court of appeals affirmed, specifically citing to the statutory prohibition. Because defendants were

242. Id. at 606-07, 405 S.E.2d at 348.
243. Id. at 607, 405 S.E.2d at 348.
244. Id., 405 S.E.2d at 349.
245. Id.
248. Id. at 631, 405 S.E.2d at 732.
249. Id. at 632, 405 S.E.2d at 732.
not parties at interest to plaintiff's workers' compensation claim, they
had no right to the records.250

C. Superior Court Appeals

As has been the case in past survey periods, the time limits set forth in
O.C.G.A. section 34-9-105 continue to be the subject of review in the ap-
pellate courts.251 Not only must the hearing be set within sixty days from
the notice of appeal, but an order must be issued within twenty days from
the hearing or the award of the Board will be affirmed by operation of
law.252 The inequities of the situation have not escaped the court of ap-
ppeals, and in one decision it urged the Georgia General Assembly to take
action, stating:

[P]ractitioners would do well to hasten immediately from the filing of the
notice of appeal to superior court to set a date for hearing within the
next sixty days. If at the time of the scheduled hearing the record is not
present, the superior court judge may continue the hearing to a date cer-
tain, as provided in § 34-9-105(b) and then order the [B]oard to provide
the record before that date. In this manner, counsel for the appellant will
avoid the loss of jurisdiction over the appeal by the superior court.253

Until the law is changed, this warning should be heeded.

As noted in Felton Pearson Co. v. Nelson,254 the superior court may
continue the hearing to a date certain if the hearing is first set within the
sixty day period. This is the case even though it is done to allow the
parties to be given ten days advance notice.255 Indeed, a second continu-
ance may even be granted.256 Note, that in allowing the continuance, the
court of appeals remarked that "repeated or unlimited continuing of a
hearing would defeat the legislative purpose [of O.C.G.A. section 34-9-
105(b)]."257 Thus, practitioners would be well advised to avoid numerous
continuances.

In one interesting decision, Miller v. Merck & Co.,258 the superior court
attempted to avoid the harshness of the rule by issuing a "preliminary"

250. Id. at 631-32, 405 S.E.2d at 732.
255. Id. at 513, 397 S.E.2d at 432.
257. Id. at 767, 403 S.E.2d at 64.
opinion within twenty days of the hearing and promising a final decision at a later date. When the court finally rendered a decision that partially affirmed and partially reversed the Board’s award, the claimant appealed. Claimant contended that the entire decision had been affirmed by operation of law since the first order of the superior court was not fully “dispositive of the issues on appeal.” The court of appeals agreed, pointing to specific language in section 34-9-105 requiring that the “decision of the Board shall be considered affirmed by operation of law if no order of the court dispositive of the issues on appeal has been entered within 20 days of the date of the hearing.”

XV. RES JUDICATA

A decision of the Board is res judicata to a later proceeding if there is an identity of the parties, an identity of the cause of action, and an adjudication on the merits of the claim even though the issue may not have been specifically addressed by the Board, but could have been litigated. In Garrett v. K-Mart Corp., a case discussed earlier in this Article, the Board denied benefits to claimant. She thereafter filed a tort claim alleging that her employer failed to maintain a safe work environment. Although the Board’s award made no reference to this specific allegation, the court of appeals nevertheless held that her claim was barred because of res judicata. According to the court, “[a] judgment is conclusive as to all matters put in issue, or which under the rules of law might have been put in issue on the trial of the case.” Because the claimant could have raised the tort claim during the hearing before the Board, such claim being specifically within the Board’s jurisdiction, she was barred from raising it at a later date.

XVI. APPLICATION MISREPRESENTATION

The application misrepresentation defense as set forth in Georgia Power Co. v. Rycroft was touched on in Byrd’s Electric & Plumbing,
Inc. v. Johnson.\textsuperscript{269} In Johnson the A.L.J. denied benefits to claimant on the grounds that he made a false representation regarding his physical condition in his employment application, which was relied upon by the employer, and that there was a causal connection between the false representation and the current back injury. However, the A.L.J. also remarked that because of claimant's various statements about the injury, he questioned whether there had even been an accident. The full Board reversed, finding that claimant's "response on the employment application did not rise to the level of a false statement" as required by Rycroft.\textsuperscript{270} Nevertheless, the full Board affirmed the denial of benefits "on the A.L.J.'s finding that appellee's testimony was incredible and unworthy of belief."\textsuperscript{271} On appeal, the superior court remanded the case to the Board and required the A.L.J. to make specific findings on both the credibility of claimant and whether he actually suffered an accident arising out of and in the course of his employment.\textsuperscript{272}

The court of appeals reversed the superior court on the issue of credibility.\textsuperscript{273} According to the court, this issue had been considered by the full Board, which concluded that the A.L.J. found claimant's testimony not credible or worthy of belief.\textsuperscript{274} The court of appeals affirmed the superior court's decision to remand the case on the issue of whether there was an accident arising out of and in the course of employment.\textsuperscript{275} In doing so, the court pointed out that to prevail on a Rycroft defense, the employer-insurer must prove a "causal connection between the false representation and the injury."\textsuperscript{276} In other words,

there must be a causal connection between the employee's pre-existing physical condition, regarding which the employee made the false representation, and the injury for which benefits are claimed, since to interpret it otherwise would lead to the ridiculous requirement that the false representation, in and of itself (rather than the subject matter of that representation), be causally connected to the injury.\textsuperscript{277}

Thus, the case went back to the A.L.J. for a finding on causal connection.

The problem with the decision in Johnson is that there seems to have been no reason to remand the case in the first place. When the full Board

\begin{itemize}
\item \textsuperscript{269} 199 Ga. App. 621, 405 S.E.2d 548 (1991).
\item \textsuperscript{270} Id. at 622, 405 S.E.2d at 549.
\item \textsuperscript{271} Id.
\item \textsuperscript{272} Id.
\item \textsuperscript{273} Id., 405 S.E.2d at 550.
\item \textsuperscript{274} Id., 405 S.E.2d at 549-50.
\item \textsuperscript{275} Id. at 622-23, 405 S.E.2d at 550.
\item \textsuperscript{276} Id. at 622, 405 S.E.2d at 550 (quoting Rycroft, 259 Ga. 155, 160, 378 S.E.2d 111, 115 (1989)).
\item \textsuperscript{277} Id.
\end{itemize}
reversed the A.L.J., specifically finding that the first fact-finding element of the Rycroft defense had not been met, that is a false statement in the employment application, the finding should have been conclusive on both the superior court and the court of appeals. From a reading of the decision, it seems as though the full Board thereafter denied the claim based on a finding that there was no accident arising out of and in the course of employment. In this regard, the full Board cited to the A.L.J.'s award in which he found the claimant's testimony on this point to be "incredible and unworthy of belief." If the full Board, basing its decision on credibility, denied benefits on the issue of accident arising out of and in the course of employment, then the denial should have been affirmed by both the superior court and court of appeals under the "any evidence" rule. Thus, there was no reason to remand it to the A.L.J. for a finding on one element of a defense which the full Board already held to be inapplicable.

XVII. SUBSEQUENT INJURY TRUST FUND

The notice requirements on filing a claim against the Subsequent Injury Trust Fund (the "Fund") are clearly set forth in the statute, and any claim which is not timely filed will be barred. This was made patently clear in the case of Georgia Subsequent Injury Trust Fund v. ITT-Rayonier. In ITT-Rayonier, claimant first suffered a work-related back injury in 1979. The accident was deemed compensable, and benefits were paid. She returned to work, and in March 1983, she suffered a second injury, which the employer-insurer accepted. The employer-insurer instead paid claimant benefits as though she had undergone a change in condition from the 1979 injury. In 1984, claimant, maintaining that she had suffered a second accident in March 1983, filed a claim for additional benefits. While admitting that they were liable for benefits under a change in condition, the employer-insurer controverted the claim on the grounds that the one-year statute of limitations for the accident in March 1983 had expired. However, in March 1985 the employer-insurer relented, accepted liability for the second accident, and paid her the additional benefits to which she was entitled.
In April 1985, more than two years after the second accident, the employer-insurer filed a claim for reimbursement against the Fund. The Fund denied the claim on the grounds that it was untimely filed under O.C.G.A. section 34-9-362(a), which requires that the claim be filed against the Fund "as soon as practicable, but in no event later than 78 calendar weeks following the injury or the payment of an amount equivalent to 78 weeks of income or death benefits, whichever occurs last." When apprised of the tardiness of their claim, the employer-insurer maintained that the claim was timely filed because it was not until March 1985 that they accepted the subsequent accident. Until that time, they had paid the claimant based on a change in condition. The court of appeals rejected this argument, stating that "[t]here is no statutory provision authorizing the employer and insurer to urge their own unilateral mistake of law as a basis for securing reimbursement from the Fund." The claim should have been filed within 78 weeks from the accident in March 1983.

XVIII. Statutory Employer

The question of statutory employer and the protection afforded to that party under the exclusive remedy provision of the Act came into play just once during the survey period. In Fennell v. Max Rittenbaum, Inc., plaintiff was injured when she was struck by a forklift operated by an employee of Max Rittenbaum, Inc., doing business as Clean Rite Products ("Clean Rite"). Plaintiff, Joyce Fennell, was actually an employee of Paulding Enterprises, a private day care center that provided a variety of services for eligible mentally retarded persons ("clients"). Paulding Enterprises entered into a contract with Clean Rite to provide clients that were "hired as employees of Paulding primarily to place and seal cleaning items, usually rags and sponges, properly into plastic bags." Clean Rite was in the business of selling automobile cleaning aids to mass merchandisers, automotive distributors, and automotive retailers. The clients were to be supervised by an employee of Paulding Enterprises, which in this case was the plaintiff.

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285. 198 Ga. App. at 468, 402 S.E.2d at 55 (quoting O.C.G.A. § 34-9-362(a)).
286. Id.
287. Id. at 469, 402 S.E.2d at 55.
288. Id., 402 S.E.2d at 55-56.
290. Id. at 619, 405 S.E.2d at 547.
291. Id.
The superior court dismissed Joyce Fennell's claim on the grounds that Clean Rite was her statutory employer within the meaning of O.C.G.A. section 34-9-8(a) and, therefore, was protected from tort claims under the exclusive remedy provision. The court of appeals agreed, holding that if Clean Rite was not "merely in possession or control of the premises" but [was] actively involved in the enterprise in which the employee was injured, then the circumstances of the particular case should determine whether the owner is a statutory employer of the injured employee. As such, the "bright line" rule was inapplicable, and the trial court properly used the "owner plus" or "circumstances of the case" test to dismiss Fennell's claim.

XIX. Subrogation

As noted in K-Mart Apparel Corp. v. Temples, Georgia does not recognize the theory of subrogation. In that case, claimant suffered a work-related injury that eventually necessitated surgery. During the procedure, a nerve to her bladder was severed, causing permanent physical injury and requiring psychiatric treatment. Claimant filed a medical malpractice lawsuit that was settled. She also filed a claim for reimbursement for the medical expenses that resulted from the botched surgery. The Board awarded reimbursement, and the superior court affirmed. The employer-insurer appealed, arguing that O.C.G.A. section 34-9-203 was unconstitutional because it required them to compensate claimant for consequences of a physician's malpractice without affording them the corresponding right to recover the payment through subrogation. The court of appeals rejected this argument and held that not only were they not deprived of any property without procedural due process, but they had "no constitutionally protected interest in any sums the employee receives from the third-party tortfeasor." According to the court, "due process safeguards only those interests in property 'that a person has already acquired in specific benefits.'" If subrogation is going to be given to the employer-insurer, it will have to come from the legislature.
XX. Conclusion

As Georgia courts continue to struggle with balancing the interests of labor and business under Georgia's workers' compensation system, it appears that the pendulum for workers' compensation change may again swing back to the legislature in the coming year. During the 1991 General Assembly, House Bill 1082, a broad-based amendment to the Act proposing pro-business changes in the workers' compensation system, was successfully blocked by competing interests. Committees in both the House of Representatives and the Senate, however, continue to study the Act for possible change in the 1992 session, and it is likely that significant changes to the Act will occur. In an era of budget consciousness and concern over skyrocketing health care costs, it will be interesting to observe how the 1992 Georgia legislature addresses these problems through the workers' compensation system.