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Workers' Compensation

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For workers' compensation, the 1999-2000 survey period was largely notable for a number of legislative changes and for another year in which Georgia's appellate courts dealt with numerous cases interpreting the exclusive remedy provisions of the Workers' Compensation Act. As always, however, the appellate courts also decided numerous workers' compensation cases, with issues ranging from the "any evidence" rule to superior court judgments.

Additional legislative activity is possible in the coming year as a special commission appointed by Governor Barnes readies a report, due in April 2001, on proposed changes to the workers' compensation system.

I. LEGISLATIVE CHANGES

As in most other years during the last decade, the Chairman's Advisory Committee made a number of recommendations regarding amendments to various sections of the Workers' Compensation Act.

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Listed below is a summary of the changes made by the Legislature during the 2000 session, all of which became effective on July 1, 2000.

A. Spousal Dependency—Official Code of Georgia Annotated (“O.C.G.A.”) section 34-9-13(b)(1)

This amendment deleted the language referencing employment of the spouse of a deceased employee. Most households need both incomes, and the employment of a spouse for a period of ninety days prior to the accident should not be a determinative factor as to whether the spouse was wholly dependent on the deceased employee. Instead, the presumption of total dependence is now rebuttable if the husband and wife lived separately for ninety days before the accident.

B. No-Liability Settlements—O.C.G.A. section 34-9-15

Two new subsections to the statute were added. Subsection (b) gives the Board authority to approve fees for no-liability stipulations. Subsection (c) addresses the problem of social security offsets in the settlement of workers' compensation cases by allowing lump-sum settlements to be prorated over the life expectancy of the injured worker.

C. Late Payment of Medical Charges—O.C.G.A. section 34-9-203(c)

The Board is permitted to assess a penalty of up to twenty percent of reasonable medical charges not paid within thirty days from the date that the employer or insurer receives the charges along with medical reports and forms required by the Board. Specifically, the amendment decreased the length of time an employer or insurer may make payment of medical charges from sixty days to thirty days.

D. Electronic Funds—O.C.G.A. section 34-9-221

This amendment allows income benefits to be paid by electronic funds transfer.

E. Temporary Total Disability Maximum—O.C.G.A. section 34-9-261

This amendment increased the maximum amount of temporary total disability benefits from \$350 per week to \$375 per week, and it increased the minimum amount of temporary total disability benefits from \$35 per week to \$37.50 per week.

F. Temporary Partial Disability Maximum—O.C.G.A. section 34-9-262

This amendment increased the maximum amount of temporary partial disability benefits from \$233.33 to \$250 per week.

G. *Death Benefit Maximum—O.C.G.A. section 34-9-265(d)*

The maximum death benefit paid to a surviving spouse who is the sole dependent at the time of death was increased from \$100,000 to \$125,000.

II. EXCLUSIVE REMEDY

During the last survey period, the appellate courts devoted substantial attention to the exclusive remedy doctrine. The court's application of the exclusive remedy provisions of the Workers' Compensation Act ("the Act") can be categorized in three areas: (1) the protection of the co-employee; (2) the adherence to proper procedure and the penalties thereof; and (3) the interaction between the exclusive remedy provisions with other existing laws.

A. *The Protection of the Co-Employee*

The Act expressly provides, and Georgia courts have upheld the legal contention, that when a claimant sustains an injury in the scope of employment by another co-employee's negligence, the co-employee is immune from tort liability.¹

In *Webster v. Dodson*,² the claimant sought damages from a co-employee and Stein Mart under the theories of assault and battery and intentional infliction of emotional distress. While fielding a store complaint about which the claimant may have had pertinent information, the co-employee made contact with the claimant's shoulder "to get her attention to tell her to be quiet" until the co-employee finished the conversation with the upset customer.³ It was undisputed that the physical contact arose during the handling of a work-related activity, during normal working hours, and from the assigned work duties in the furtherance of Stein Mart's business.⁴ Hence, the court found no evidence to suggest that the alleged tortious act was committed for personal reasons unrelated to the conduct of the employer's business.⁵ The trial court's finding that the claim was barred by the Act was properly adjudicated summarily.⁶

1. O.C.G.A. § 34-9-11 (1998).

2. 240 Ga. App. 4, 522 S.E.2d 487 (1999).

3. *Id.* at 5, 522 S.E.2d at 488.

4. *Id.* at 6, 522 S.E.2d at 489.

5. *Id.*; see also *Johnson v. Holiday Food Stores, Inc.*, 238 Ga. App. 822, 824-25, 520 S.E.2d 502, 505 (1999) (holding that summary judgment was appropriate when the evidence showed that the injuries were solely caused by the wilful act of a third person for entirely personal reasons).

6. 240 Ga. App. at 6, 522 S.E.2d at 489.

Subsequently, the court stood on the *Webster* opinion to address a similar tort claim issue in *Solis v. Lamb*.⁷ In *Solis* plaintiff failed to respond to the co-employee's request for admission that the co-employee was "acting during the course and scope of her employment at the time of the alleged events as stated in the complaint."⁸ Moreover, plaintiff "chose not to seek the liberal remedies afforded to parties under the statute to avoid the consequences of a failure to respond."⁹ Therefore, in light of the claimant's admissions, the exclusive remedy provisions of the Act were triggered, and recovery was barred.¹⁰

In *Cotton v. Bowen*,¹¹ the court addressed the related issue of whether a co-employee loses immunity if he is considered a "construction design professional."¹² Plaintiff was an experienced operator of a printing press that required him to "web" sheets of paper through rollers. Plaintiff was asked to test a printing press that had been modified and reinstalled. During the testing, plaintiff's arm was crushed in the rollers. Plaintiff brought suit against the installers of the press and a co-employee.¹³ The court affirmed the granting of summary judgment to the co-employee, holding the exclusive remedy provisions of the Act barred plaintiff's tort claim.¹⁴ Plaintiff contended the co-employee lost his statutory protection on the ground that he was a "construction design professional."¹⁵ The court disagreed and held the segment of the statute cited by plaintiff created a second category of immune persons, rather than an exception.¹⁶ In its explanation, the court relied upon language in *Warden v. Hoar Construction Co.*¹⁷ in concluding that the statute provides immunity to co-employees and to "persons who provide workers' compensation benefits under a contract with the employer, and 'construction design professionals.'"¹⁸ Consequently, the court held the Act provided plaintiff with his exclusive remedy.¹⁹

7. 244 Ga. App. 8, 534 S.E.2d 582 (2000).

8. *Id.* at 10, 534 S.E.2d at 584.

9. *Id.* at 9, 534 S.E.2d at 584 (quoting *G.H. Bass & Co. v. Fulton County Bd. of Tax Assessors*, 268 Ga. 327, 331, 486 S.E.2d 810, 813 (1997)).

10. *Id.* at 9-10, 534 S.E.2d at 584.

11. 241 Ga. App. 543, 524 S.E.2d 737 (1999).

12. *Id.* at 545, 524 S.E.2d at 739-40.

13. *Id.*, 524 S.E.2d at 739.

14. *Id.* at 545-46, 524 S.E.2d at 739-40. The co-employee's status of employment as a co-employee was undisputed. *Id.* at 545, 524 S.E.2d at 739.

15. *Id.* at 545, 524 S.E.2d at 739 (quoting O.C.G.A. § 34-9-11(a) (1998)).

16. *Id.*

17. 269 Ga. 715, 507 S.E.2d 428 (1998).

18. 241 Ga. App. at 545, 524 S.E.2d at 739-40 (quoting *Warden*, 269 Ga. at 716, 507 S.E.2d at 429).

19. *Id.* at 546, 524 S.E.2d at 740.

While the court in *Webster* found summary judgment was appropriate, the court in *Wade v. Georgia Diversified Industries, Inc.*,²⁰ found the facts in this wrongful death action created genuine issues for a jury to consider.²¹ In *Wade* the employer provided a free transportation service for its employees.²² Participation in the service was not mandatory, nor were the employees paid for traveling to and from work. Occasionally, the president of the company would use his personal vehicle to transport employees. The decedent used the free transportation service and was paid based on his production. On the night of the fatal accident, the decedent worked later than his normal shift and accepted a ride home in the president's personal vehicle. After taking other employees home, the president made the unilateral decision to return to the office. Before reaching the office, however, they were involved in the accident.²³ The court concluded that a jury must determine whether the fatality arose out of and in the course of the employment or whether the accident was the unfortunate result of a co-employee's merely gratuitous ride.²⁴

B. *The Procedural Adherence*

During the survey period, the court stressed the importance of procedure and protocol. In *Maguire v. Dominion Development Corp.*,²⁵ plaintiff formed a partnership with two of his relatives and began to work at a construction site under a general contractor. While working, plaintiff injured his back and foot when the scaffolding where he was standing collapsed. Plaintiff brought suit against the general contractor for negligence. In turn, the general contractor sought immunity under the exclusive remedy doctrine. The trial court affirmed the administrative law judge's ("ALJ") finding that plaintiff was not an "employee" of the general contractor, but rather was an immediate employee of the partnership he created with his two relatives. As a result, O.C.G.A. section 34-9-8 required plaintiff to seek benefits from the partnership before pursuing a claim against a statutory employer. Because plaintiff did not do so, the general contractor did not pay workers' compensation benefits.²⁶ Moreover, the court clarified that "statutory employers also

20. 240 Ga. App. 225, 522 S.E.2d 746 (1999).

21. *Id.* at 228, 522 S.E.2d at 748.

22. *Id.* at 225-26, 522 S.E.2d at 747. The court distinguished *Jose Andrade Painting v. Jaimes*, 207 Ga. App. 596, 428 S.E.2d 640 (1993), because the facts before the court authorized the inference that the claimant's injuries occurred in the course of transportation supplied by the employer. 240 Ga. App. at 227, 522 S.E.2d at 748.

23. 240 Ga. App. at 226, 522 S.E.2d at 747.

24. *Id.*, 522 S.E.2d at 747-48.

25. 241 Ga. App. 715, 527 S.E.2d 575 (1999).

26. *Id.* at 716-17, 527 S.E.2d at 576-77.

enjoy tort immunity even if they do not pay a claim."²⁷ The court forcefully remarked that it would not "allow injured workers to circumvent a statutory employer's tort immunity by intentionally failing to file a claim against his immediate employer."²⁸

In *Sam's Wholesale Club v. Riley*,²⁹ the court addressed the impact that a default judgment and the absence of a lower court's transcript have when an appellate court reviews a dispute involving the exclusive remedy provisions.³⁰ In this case plaintiff sought damages for intentional infliction of emotional distress, assault, and attempts to commit physical injuries. The employer, Sam's Wholesale Club ("Sam's"), fell into default judgment. The trial court denied Sam's motions to dismiss, set aside, and open default judgment. Particularly, Sam's argued that plaintiff was precluded from recovery under tort liability because of the exclusive remedy provisions of the Act.³¹ The court concluded that because no transcript of the evidence was presented at the hearing of damages and because the allegations of the complaint were deemed supported by proper evidence by virtue of the default judgment, it was unable to review the issue and had to presume the trial court's findings were proper.³² Moreover, the court reiterated that a plaintiff may bring an action for intentional infliction of emotional distress, and it would not be barred by the exclusivity provisions of the Act.³³

C. Other Laws and Their Effect on the Exclusive Remedy

This year the courts have addressed how other laws coexist and interplay with the exclusive remedy doctrine. In *SCI Liquidating Corp. v. Hartford Insurance Co.*,³⁴ the Georgia Supreme Court handled a certified question from the Eleventh Circuit Court of Appeals on the "issue of whether a Title VII sexual harassment claim can be construed as 'arising out of and in the course of employment'" as it relates to the

27. *Id.*

28. *Id.*

29. 241 Ga. App. 693, 527 S.E.2d 293 (1999).

30. *Id.* at 697, 527 S.E.2d at 297.

31. *Id.* at 694-97, 527 S.E.2d at 295-97.

32. *Id.* at 697, 527 S.E.2d at 297; *see also* *Atwood v. Southeast Bedding Co.*, 236 Ga. App. 116, 116, 511 S.E.2d 232, 233 (1999) (stating when an appellant omits the transcript from the record on appeal, an appellate court must assume the judgment below was correct).

33. 241 Ga. App. at 697, 527 S.E.2d at 297; *see also* *Oliver v. Wal-Mart Stores*, 209 Ga. App. 703, 704, 434 S.E.2d 500, 500 (1993) (stating intentional infliction of emotional distress claims are not barred by the exclusivity provisions of the Act when injuries are of a physical nature).

34. 272 Ga. 293, 526 S.E.2d 555 (2000).

interpretation of a clause in a commercial contract.³⁵ In this case, Sunrise Carpet Industries ("SCI") filed suit in federal court to recover from its insurance carrier damages SCI paid to three former employees as a result of a sexual harassment suit.³⁶ Hartford Insurance Companies denied the claim on the ground that the policies issued expressly excluded claims made by SCI employees for personal injuries "arising out of and in the course of employment."³⁷ Subsequently, the District Court for the Northern District of Georgia found the policies covered the sexual harassment claims against SCI and granted summary judgment in favor of SCI. The Eleventh Circuit reversed the summary adjudication and certified the question to the Georgia Supreme Court.³⁸

The court announced it would adopt the workers' compensation interpretation of the terms "in the course of" and "arising out of" employment as they relate to a commercial liability insurance contract.³⁹ Furthermore, the court articulated that "sexual harassment claims have been held not to 'arise out of' employment, even though they occur 'in the course of' employment."⁴⁰ Hence, the court held that in this case the sexual harassment suffered by the former employees was not a proximate result of a risk of employment that a reasonable person could have foreseen due to the nature of the work.⁴¹ Therefore, the contested clause did not exclude coverage.⁴²

In dissent, Justice Fletcher argued that the "use of workers' compensation law to guide the interpretation of a contract not involving workers' compensation is inappropriate."⁴³ More explicitly, he wrote that the concerns involving the state imposed workers' compensation system "have no place in interpreting private contracts."⁴⁴ Based on these particular facts, the dissent pointed out that the policy contained a specific exclusion for workers' compensation claims, and it would be "illogical and redundant to incorporate workers' compensation law into the exclusion."⁴⁵ Furthermore, the primary issue was not whether the sexual harassment was within the scope of an employee's duties, but

35. *Id.* at 293, 526 S.E.2d at 556.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 294, 526 S.E.2d at 556-57.

40. *Id.*, 526 S.E.2d at 557.

41. *Id.*

42. *Id.* at 295, 526 S.E.2d at 557.

43. *Id.* (Fletcher, J., dissenting).

44. *Id.*, 526 S.E.2d at 557-58.

45. *Id.*

whether the claims arose out of and in the course of employment. Justice Fletcher concluded they did.⁴⁶

Moreover, the court revisited *Georgia Power Co. v. Franco Remodeling Co.*⁴⁷ on remand in light of the Georgia Supreme Court's reversal of *Flint Electric Membership Corp. v. Ed Smith Construction Co.*⁴⁸ and *City of Dalton v. Gene Rogers Construction Co.*⁴⁹ In *Franco Remodeling Co. I* the court was bound to hold the High-voltage Safety Act did not create an exception to the exclusive remedy provisions of the Act.⁵⁰ In *Franco Remodeling Co. II*,⁵¹ however, the court held the indemnity provision of the High-voltage Safety Act may be enforced without disturbing the exclusive remedy provisions of the Workers' Compensation Act.⁵² Similar to the exception outlined in *Flint Electric Membership Corp.*, this exception is very limited.⁵³

Subsequently, in *Stephens v. Harbor Club, Inc.*,⁵⁴ the court briefly addressed the interplay of ERISA as it relates to the Act.⁵⁵ The court held ERISA does not preempt an action for fraud concerning workers' compensation benefits.⁵⁶ Additionally, in a footnote, the court found plaintiff's action was not barred by the exclusive remedy provisions of the Act because the torts alleged did not arise out of and were not in the course of her employment.⁵⁷ The court noted that the intentional misconduct of the employer after the injuries were sustained spawned the workers' compensation claim.⁵⁸

III. CASES

A. Any Evidence

As usual, Georgia's appellate courts heard more than one "any evidence" case on appeal. The case law is well settled that the State Board of Workers' Compensation ("the Board") is the fact finder in workers' compensation cases, and if there is any evidence to support the

46. *Id.*

47. 233 Ga. App. 640, 505 S.E.2d 488 (1998).

48. 229 Ga. App. 838, 495 S.E.2d 136 (1997).

49. 223 Ga. App. 819, 479 S.E.2d 171 (1996).

50. 233 Ga. App. at 643, 505 S.E.2d at 490.

51. 240 Ga. App. 771, 525 S.E.2d 152 (1999).

52. *Id.* at 771, 525 S.E.2d at 153.

53. 229 Ga. App. at 838-40, 495 S.E.2d at 136-38.

54. 244 Ga. App. 384, 535 S.E.2d 256 (2000).

55. *Id.* at 384-85, 535 S.E.2d at 257-58.

56. *Id.* at 385, 535 S.E.2d at 258.

57. *Id.* at 385-86 n.1, 535 S.E.2d at 258 n.1.

58. *Id.* at 384-85, 535 S.E.2d at 257.

Board's award, the evidence must be construed in the light most favorable to the prevailing party.⁵⁹

In *Columbus Fire Department / Columbus Consolidated Government v. Ledford*,⁶⁰ the court of appeals determined that post-traumatic stress disorder suffered by a firefighter would not qualify as an "injury" under the Act.⁶¹ The firefighter failed to prove to the ALJ and the appellate division that his psychological problems arose out of an accident in which a compensable physical injury was sustained.⁶² "[A] psychological injury is compensable only 'if it arises naturally and unavoidably . . . from some discernible physical occurrence.'"⁶³ Although the Board determined the employee's psychological condition was the result of witnessing severe injuries and deaths in fires and automobile accidents, the Board concluded the employee failed to persuasively establish his psychological condition was causally related to a physical injury sustained on the job.⁶⁴

In an attempt to find a physical injury to connect to the employee's psychological condition, the superior court reversed the Board, pointing to evidence of an episode of smoke inhalation suffered by the employee. The superior court issued an order finding the Board had applied an erroneous standard of law requiring the physical injury precipitate and/or cause the employee's psychological disability.⁶⁵

The court of appeals accepted the case on discretionary appeal and reversed the superior court, pointing out the record contained evidence to support the Board's findings.⁶⁶ The court stated: "Even assuming that Ledford's psychological problems emanated from 'revolting employment related experience[s]' that caused the ensuing psychological injury, such an injury is not compensable" without the compensable

59. *Atlas Automotive, Inc. v. Wilson*, 225 Ga. App. 631, 633, 484 S.E.2d 669, 671 (1997); *Gleaton v. Hazelwood Farms, Inc.*, 214 Ga. App. 825, 826, 449 S.E.2d 170, 171 (1994).

60. 240 Ga. App. 195, 523 S.E.2d 58 (1999).

61. *Id.* at 197-98, 523 S.E.2d at 61.

62. *Id.* at 197, 523 S.E.2d at 61.

In order for a psychological injury to be compensable, it must satisfy two conditions precedent: (1) it must arise out of an accident in which a compensable physical injury was sustained; and (2) while the physical injury need not be the precipitating cause of the psychological condition or problems, at a minimum, the physical injury must contribute to the continuation of the psychological trauma. *Id.* See *Abernathy v. City of Albany*, 269 Ga. 88, 495 S.E.2d 13 (1998); *Southwire Co. v. George*, 266 Ga. 739, 470 S.E.2d 865 (1996).

63. 240 Ga. App. at 197, 523 S.E.2d at 61 (quoting *Southwire Co.*, 266 Ga. at 741, 470 S.E.2d at 865).

64. *Id.* at 195-96, 523 S.E.2d at 60.

65. *Id.* at 196, 523 S.E.2d at 60.

66. *Id.* at 198, 523 S.E.2d at 61.

physical injury.⁶⁷ Under the “any evidence” standard, the superior court erred by substituting its own findings for that of the Board.⁶⁸

In another “any evidence” case, *Bibb County v. Higgins*,⁶⁹ the issue was whether the employer’s expert witness based his testimony upon misrepresentations of facts posed to him. An employee’s former wife, as next friend of the employee’s minor children, brought a claim alleging the employee’s job-related stress and exertion contributed to or aggravated his hypertension, causing a fatal stroke.⁷⁰ Relying in part upon the testimony of the employer’s expert witness, the ALJ determined that “there was insufficient competent and credible evidence to prove that [the employee’s] stroke arose out of and in the course of his employment.”⁷¹ The superior court reversed the Board, finding the testimony of the expert witness was not supported by facts otherwise found in the record. The employer appealed the superior court’s reversal of the Board, and the claimant cross appealed, arguing the ALJ also committed reversible error in basing his award in part upon medical treatises not admitted into evidence.⁷²

The court of appeals found the expert witness’ statements were not based upon misrepresentations, as the superior court had found, because there was evidence in the record that supported the expert’s opinions.⁷³ Thus, the court found that because the evidence was to be construed most favorably to the Board’s award, the superior court was without the authority to reverse the Board.⁷⁴ The court also found that although it is true that “books of science and art are not admissible in evidence to prove the opinions of experts,”⁷⁵ this error on the part of the ALJ “was harmless for want of prejudice inuring to [the employee’s] detriment.”⁷⁶

B. Appeal of Interlocutory Orders

In last year’s survey period, the Georgia Court of Appeals reaffirmed its previous holdings that there is no appeal to the superior court from

67. *Id.*

68. *Id.*

69. 241 Ga. App. 161, 526 S.E.2d 379 (1999).

70. *Id.* at 161, 526 S.E.2d at 380.

71. *Id.*

72. *Id.* at 162-63, 526 S.E.2d at 380-81.

73. *Id.*

74. *Id.* at 163, 526 S.E.2d at 381.

75. *Id.* (quoting *Suarez v. Suarez*, 257 Ga. 102, 103, 355 S.E.2d 649, 650 (1987)).

76. *Id.*

an interlocutory order of the State Board of Workers' Compensation.⁷⁷ This year brings yet another decision on this issue, which not only adds to the line of cases that interpret the superior court's jurisdiction to hear appeals under O.C.G.A. section 34-9-105 but which also distinguishes a final decision from a nonfinal decision.

In *Cartwright v. Midtown Hospital*,⁷⁸ the employer's expert witness refused to divulge his social security number to the claimant's counsel during his deposition. The ALJ denied the claimant's motion to compel the expert to reveal his social security number. The appellate division affirmed the ALJ, as did the superior court, and the claimant then filed an application for discretionary appeal of that decision.⁷⁹ The court of appeals turned to the well-established principle that "only a *final* award, order, judgment, or decision of the board is subject to appeal to the superior court," and held that this was an interlocutory order over which the superior court had no jurisdiction.⁸⁰ Cartwright argued that an order on a change of physician, although not final, could still be appealed to the superior court.⁸¹ The court of appeals distinguished that case from the instant one.⁸² A change of physician, the court reasoned, is appealable because failure to allow superior court jurisdiction over that kind of order would result in the order's being totally unreviewable, thereby raising due process concerns.⁸³ Moreover, an order granting or denying a change of physician is a substantive decision that affects the injured employee's ability to obtain treatment. Therefore, public policy demands the appellate review of the order.⁸⁴

Despite its finding that the superior court had no jurisdiction to entertain the appeal of the interlocutory order and its vacation of the judgment, the court of appeals did hold the trial court did not err in its ruling: "[A]ny disputes over the relevancy of discoverable information are within the sound discretion of the trial court."⁸⁵

77. H. Michael Bagley et al., *Workers' Compensation*, 51 MERCER L. REV. 549, 560 (1999).

78. 243 Ga. App. 828, 534 S.E.2d 504 (2000).

79. *Id.* at 828, 534 S.E.2d at 505.

80. *Id.* at 829-30, 534 S.E.2d at 505-06 (citing *Fasher Painting & Decorating Co. v. Bordelon*, 204 Ga. App. 196, 196, 419 S.E.2d 82, 83 (1992)) (emphasis in original).

81. *Id.* at 830, 534 S.E.2d at 506. See *Columbus Foundries Inc. v. Moore*, 175 Ga. App. 387, 333 S.E.2d 212 (1985).

82. 243 Ga. App. at 830, 534 S.E.2d at 506.

83. *Id.*

84. *Id.*

85. *Id.* (citations omitted).

C. Average Weekly Wage

The court of appeals addressed two cases dealing with the calculation of an employee's average weekly wage. The first case involved whether employer-paid fringe benefits should be included in the calculation of the wage, and the second case involved an employee who worked for two different employers at the same time.

In *Groover v. Johnson Controls World Service*,⁸⁶ the Board refused to include the amount paid by the employer for the employee's health insurance premiums in the amount of the employee's wage.⁸⁷ The employee appealed, but the court of appeals affirmed the finding of the Board.⁸⁸

The court noted that Board Rule 260(a)⁸⁹ contained some direction, but the Board rule had not been applied as expressly written because it was inconsistent with prior judicial decisions.⁹⁰ Furthermore, the wording of the Board rule had since changed.⁹¹ The court also pointed out that a Board rule cannot be used to alter judicial interpretation of a statute, and it found that despite the changes in the Board rule, there was simply "no legal basis for expanding the statutory term 'average weekly wage'⁹² to encompass fringe benefits" such as an employer's direct payment to an insurance provider for employee health benefits.⁹³

In the second case, *O'Kelley v. Hall County Board of Education*,⁹⁴ the court addressed a concurrent similar employment situation in which the employee worked less than thirteen weeks for one of her two employ-

86. 241 Ga. App. 791, 527 S.E.2d 639 (2000).

87. *Id.* at 792, 527 S.E.2d at 641.

88. *Id.* at 791, 527 S.E.2d at 640.

89. GA. BD. OF WORKERS' COMPENSATION R. 260(a) (1999). "[C]omputation of wages shall include, in addition to salary, hourly pay, or tips, the reasonable value of food, housing, and other benefits furnished by the employer without charge to the employee which are listed as earned income on the employee's Federal Form W-2 for federal income tax purposes." *Id.*

90. 241 Ga. App. at 793, 527 S.E.2d at 641 (citing *Pizza Hut Delivery v. Blackwell*, 204 Ga. App. 112, 418 S.E.2d 639 (1992)).

91. *Id.* Board Rule 260(a) now provides that "[c]omputation of wages shall include, in addition to salary, hourly pay, or tips, the reasonable value of food, housing, and other benefits furnished by the employer without charge to the employee which constitute a financial benefit to the employee and are capable of pecuniary calculation." GA. BD. OF WORKERS' COMPENSATION R. 260(a) (2000).

92. O.C.G.A. § 34-9-260 (1998 & Supp. 2000).

93. 241 Ga. App. at 793, 527 S.E.2d at 641.

94. 243 Ga. App. 522, 532 S.E.2d 427 (2000).

ers.⁹⁵ The employee was hired by the Hall County Board of Education as a substitute lunchroom worker on September 3, 1995, and she subsequently became a permanent employee on October 3, 1995. She was injured on October 18, 1995. She had not worked “substantially the whole”⁹⁶ of the thirteen weeks for the Hall County Board of Education prior to her injury date, but she had held a part-time job with Dari-Spot for five years.⁹⁷

In calculating her average weekly wage, Hall County Board of Education added her seven weeks of work with Hall County to the thirteen weeks for Dari-Spot and divided the sum by thirteen. It contended the language of O.C.G.A. section 34-9-260(1) allowed this calculation because the statute required only that the employee have worked in the same kind of job—in this instance, food services—for thirteen weeks prior to her injury. The employee objected, and the ALJ agreed with the employee that O.C.G.A. section 34-9-260 did not encompass the employer’s method of calculation. The Board calculated the wages the employee earned from each job separately and then added them together. However, the superior court reversed the Board, agreeing with Hall County’s original method of calculation.⁹⁸

The court of appeals determined that each employer’s wages had to be calculated separately.⁹⁹ Section 34-9-260(1) of the O.C.G.A. was inapplicable to the Hall County Board of Education wage calculation because the employee had not worked for the Board of Education for substantially the whole of the thirteen weeks. Thus, the parties had to look to subsection (2), which the court also found inapplicable because the parties stipulated there was no similarly situated employee.¹⁰⁰

95. *Id.* at 523, 532 S.E.2d at 428. When an employee is concurrently employed by different employers at the time of the injury, is doing similar work for each of them, and sustains an injury while working for one of the employers who is subject to the Workers’ Compensation Act, the employee’s total wages from all his employers are considered in determining the average weekly wage. *St. Paul-Mercury Indemnity Co. v. Idov*, 88 Ga. App. 697, 700, 77 S.E.2d 327, 330 (1953).

96. O.C.G.A. section 34-9-260(1) (1998 & Supp. 2000) states:

If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of 13 weeks immediately preceding the injury, his average weekly wage shall be one-thirteenth of the total amount of wages earned in such employment during the 13 weeks.

97. 243 Ga. App. at 522, 532 S.E.2d at 428.

98. *Id.* at 522-23, 532 S.E.2d at 428.

99. *Id.* at 524, 532 S.E.2d at 429.

100. *Id.* at 524-25, 532 S.E.2d at 429. O.C.G.A. section 34-9-260(2) (1998 & Supp. 2000) states:

"Where neither subsection (1) nor subsection (2) can 'reasonably and fairly be applied,' subsection (3) states that 'the full-time weekly wage of the injured employee [must] be used.'"¹⁰¹ Thus, the Hall County wages should have been calculated as the wage per hour multiplied by the number of hours that would constitute a full-time work week for that employee.¹⁰² The court of appeals held that the Board properly calculated the employee's wage and reversed the superior court.¹⁰³

D. Burden of Proof

Faced with a difficult set of facts, the court of appeals took the opportunity in *Hulbert v. Domino's Pizza, Inc.*,¹⁰⁴ to discuss a claimant's burden of proof to establish a compensable workers' compensation injury.¹⁰⁵ Hulbert, a Domino's Pizza delivery man, testified he was returning from a pizza delivery when he was pulled over by a vehicle with a flashing blue light. Hulbert was approached by someone he assumed to be a police officer but whom he could not identify because the individual shined a bright light in his face. After the individual allegedly said, "Take this," Hulbert was doused with gasoline and set on fire, suffering second- and third-degree burns to fifty percent of his body, requiring months of hospitalization.¹⁰⁶

Domino's controverted its liability, contending the assault was not related to Hulbert's employment as a pizza deliverer. Specifically, Domino's presented evidence attempting to show either that the assault was an act of revenge perpetrated by Hulbert's brother-in-law because Hulbert had committed sexual battery against the brother-in-law's child five years earlier, or that Hulbert injured himself. The ALJ, the appellate division of the Board, and the superior court agreed that Hulbert failed to demonstrate the assault was causally related to his

If the injured employee shall not have worked in such employment during substantially the whole of 13 weeks immediately preceding the injury, the wages of a similar employee in the same employment who has worked substantially the whole of such 13 weeks shall be used in making the determination under the preceding paragraph.

101. *Id.* at 525, 532 S.E.2d at 430 (quoting O.C.G.A. § 34-9-260(3)); *see also* Federated Mut. Hardware Ins. Co. v. Elliott, 88 Ga. App. 266, 271, 76 S.E.2d 568, 571 (1953) (stating that O.C.G.A. section 34-9-260(3) must be applied when subsections (1) and (2) are inapplicable in arriving at the average weekly wage).

102. 243 Ga. App. at 525, 532 S.E.2d at 430 (citing *Black v. American & Foreign Ins. Co.*, 123 Ga. App. 133, 136, 179 S.E.2d 679, 682 (1970)).

103. *Id.*

104. 239 Ga. App. 370, 521 S.E.2d 43 (1999).

105. *Id.* at 372, 521 S.E.2d at 46.

106. *Id.* at 370-71, 521 S.E.2d at 45.

employment.¹⁰⁷ However, the court of appeals reversed, finding the ALJ placed a greater burden of proof on the claimant than the Act requires.¹⁰⁸

Writing for a three-judge panel, Judge Barnes concluded that "Hulbert's uncontradicted testimony that he was returning to Domino's after having delivered a pizza when he was the victim of an unprovoked attack by an unidentified person for unknown reasons was sufficient to meet [his] burden."¹⁰⁹ The court went on to hold Domino's various theories as to what caused Hulbert's assault "are really affirmative defenses and not part of a claimant's initial burden."¹¹⁰

Noting that pizza deliverers are "exposed to dangers through the nature of their employment," the court concluded that "the conditions of Hulbert's employment did not merely provide the time and place for the assault, but increased the risk of attack, and subjected him to a danger peculiar to his employment."¹¹¹ However, Domino's presented evidence from the investigating police officer that more than \$500 cash was found in the Domino's truck; that robbery did not appear to have been a motive in the assault; and that although Hulbert's eyeglasses, cigarette lighter, and driver's license were found at the scene, no tire tracks or other evidence demonstrated that another vehicle was present when Hulbert was burned.¹¹² The court seems to have concluded that random assault is a particular risk of pizza deliverers, apparently relying upon evidence submitted by Hulbert that rocks had been thrown at Domino's employees in the area where Hulbert worked, and that Domino's delivery persons in general have been the target of violent assaults in other areas of the country.¹¹³

Therefore, although the attacker was unidentified and the reason for the assault was completely unexplained, the court of appeals concluded that Hulbert had sufficiently met his initial burden of proof to recover workers' compensation benefits.¹¹⁴ To hold otherwise, the court believed, would place an impossible burden on the claimant "to prove that he never did anything to make anyone mad at him at any time before the attack."¹¹⁵ The burden of proof in this case, therefore, fell to the employer to prove by a "preponderance of the evidence" its

107. *Id.* at 371-72, 521 S.E.2d at 45-46.

108. *Id.* at 370, 521 S.E.2d at 45.

109. *Id.* at 372, 521 S.E.2d at 46.

110. *Id.*

111. *Id.* at 373, 521 S.E.2d at 46-47.

112. *Id.* at 371, 521 S.E.2d 45-46.

113. *Id.* at 372-73, 521 S.E.2d at 46.

114. *Id.* at 374, 521 S.E.2d at 47.

115. *Id.*

affirmative defenses that Hulbert's injuries were either self-inflicted or the result of a personal attack unrelated to his employment.¹¹⁶ The court went on to note that the evidence presented by Domino's amounted to "mere speculation and conjecture in the form of *possible* inconsistent theories for *possible* causes of Hulbert's injuries."¹¹⁷ It is difficult to imagine, however, what other evidence Domino's might have presented with regard to its affirmative defenses, and indeed, the burden of proof suggested by the court of appeals with regard to this affirmative defense might be as impossible as the burden the court found unreasonable to apply to the claimant.

E. Change in Condition

This year's survey period brought two changes-in-condition cases. The first, *Georgia-Pacific Corp. v. Wilson*,¹¹⁸ deals as much with the "any evidence" standard of review as it does with change in condition. The employee, Wilson, suffered from compensable carpal tunnel syndrome, with an onset in February or March 1994. From March through October 1994, she continued to work in an unrelated part-time job with another employer, cleaning offices five nights a week for four hours a night. Following a hearing, the ALJ awarded Wilson medical expenses and directed Georgia-Pacific to pay her weekly benefits for the time she underwent carpal tunnel release surgery. However, the ALJ found that any continuing wrist problems from which Wilson suffered were not related to her compensable injury.¹¹⁹

A year and a half later the employee was back before the Board requesting a change in condition for the worse as of March 6, 1997 and continuing. She had, by that time, developed reflex sympathetic dystrophy ("RSD"), which precluded her from working, and she was also suffering from depression, which she contended was the result of, or was at least exacerbated by, her original wrist injury. In his award, the ALJ found no medical evidence conclusively linking the compensable injury and the RSD and found Wilson had, in fact, fully recovered from her injury by June 1995.¹²⁰ He also found the employee's depression was not related to the original wrist injury, but to other nonwork-related problems that affected the employee's hands and wrists.¹²¹ The appellate division determined the ALJ's findings in this regard were

116. *Id.*

117. *Id.*

118. 240 Ga. App. 123, 522 S.E.2d 700 (1999).

119. *Id.* at 123, 522 S.E.2d at 702.

120. *Id.*

121. *Id.*

supported by a preponderance of the credible and competent evidence and affirmed.¹²²

Wilson took her case to the superior court, which found insufficient evidence to support the Board's conclusion that the disabling mental condition was not precipitated by her compensable wrist injury.¹²³ The superior court found evidence in the record that showed "her disabling emotional condition was caused by an unbroken series of medical problems with her hands and wrists, the first of which was work related and compensable."¹²⁴ The superior court, therefore, reversed the Board.¹²⁵

The court of appeals agreed with Georgia-Pacific's argument that the superior court had overstepped the legal scope of its review.¹²⁶ The court cited the age-old propositions that findings of fact made by the Board are conclusive and binding if there is *any evidence* to support them and that the issue of whether an employee's alleged inability to work is due to a change in condition is a question of fact for the ALJ.¹²⁷ The court went on to state that Wilson, as the party seeking a change in condition determination, bore the burden of proving her disability was proximately caused by her previous compensable injury because a psychological injury is compensable only if it is found to arise naturally and unavoidably from some discernible physical occurrence.¹²⁸ Citing to the record and facts as found below, the court of appeals noted that Wilson had been diagnosed with long-standing emotional conflicts, panic attacks, and phobia even before her original on-the-job injury.¹²⁹ This evidence supported the Board's determination that Wilson had failed to carry her burden of proof on the change in condition, and the superior court's decision was reversed.¹³⁰

The second change-in-condition case this year, *Aldrich v. City of Lumber City*,¹³¹ picks up where *Bahadori v. National Union Fire Insurance Co.*¹³² left off last year. In *Bahadori* the supreme court held

122. *Id.* at 124, 522 S.E.2d at 702.

123. *Id.*

124. *Id.*, 522 S.E.2d at 702-03.

125. *Id.*, 522 S.E.2d at 702.

126. *Id.* at 126, 522 S.E.2d at 704.

127. *Id.* at 124-25, 522 S.E.2d at 703.

128. *Id.* at 125, 522 S.E.2d at 703. *See* *Southwire v. George*, 266 Ga. 739, 741, 470 S.E.2d 865, 866 (1996).

129. 240 Ga. App. at 126, 522 S.E.2d at 703-04.

130. *Id.*, 522 S.E.2d at 704.

131. 241 Ga. App. 724, 530 S.E.2d 195 (1999).

132. 270 Ga. 203, 507 S.E.2d 467 (1998); *see also* H. Michael Bagley et al., *Workers' Compensation*, 51 MERCER L. REV. 549, 570 (1999) (explaining O.C.G.A. section 34-9-

that a two-year statute of limitations applied to claims by an employer/insurer for reimbursement of an overpayment of benefits to an employee who had returned to work.¹³³ In *Aldrich* the court of appeals was asked to decide whether a change in condition could be found to have occurred and whether reimbursement by the employee could be ordered *retroactively* to a prior decision of the Board.¹³⁴

The facts of this case were somewhat similar to those in *Bahadori*. Aldrich was injured in 1989 when his foot was struck by lightning while working as a police officer for the City of Lumber City. After an evidentiary hearing and an appeal to the appellate division, his claim was found to be compensable in an order of the Board dated May 3, 1991. While the appeal had been pending, the employee secretly returned to work, first for the Department of Family and Children's Services ("DFACS"), and then as a security guard. In 1994 he began working as a police officer for the City of Alamo. Although he was working this entire time, Aldrich continued to receive total disability benefits pursuant to the Board's May 1991 award. On November 3, 1994, Aldrich's patrol car allegedly hit a cow, and he filed a workers' compensation claim for neck and knee injuries allegedly arising out of that incident. The adjuster, thinking she recognized Aldrich's name from the 1989 claim, investigated and determined the two claims were filed by the very same person. She therefore controverted the 1994 injury and terminated his temporary total disability ("TTD") payments for the 1989 injury effective December 7, 1994.¹³⁵

The employee requested a hearing, seeking reinstatement of benefits for the 1989 injury based upon a change in condition for the worse.¹³⁶ The ALJ was unimpressed by Aldrich and his testimony and not only found that he failed to prove a change in condition for the worse as of December 1994, but also that the evidence showed Aldrich had changed for the better as of February 7, 1991. Therefore, the ALJ ordered the employee to reimburse the employer/insurer for all weekly benefits paid from February 7, 1991 through December 7, 1994. The appellate division and the superior court affirmed this decision.¹³⁷

Aldrich argued to the court of appeals that the finding of a change in condition as of February 1991 was a violation of *res judicata* because the

104(d)(2) was intended to limit claims for overpayment to change in condition cases only).

133. 270 Ga. at 203, 507 S.E.2d at 469.

134. 241 Ga. App. at 727, 530 S.E.2d at 197-98.

135. *Id.* at 724-25, 530 S.E.2d at 196.

136. He also, in the alternative, claimed that he suffered a new on-the-job injury in 1994. This assertion was, however, rejected by the ALJ. *Id.* at 725, 530 S.E.2d at 196.

137. *Id.*

Board's May 3, 1991 award had granted him benefits.¹³⁸ The court disagreed.¹³⁹ First, it cited to O.C.G.A. section 34-9-104(b), which allows for modification of a Board award under certain statutory circumstances.¹⁴⁰ Finding that all the criteria of Section 34-9-104(b) were met in this case—there was a change in condition ending the employee's entitlement to benefits; the prior decision had not been based upon a settlement; and the two-year statute of limitations had not run—the court held the Board had jurisdiction to modify its May 3, 1991 award.¹⁴¹ Second, the court held the Board had not erred in finding the change in condition to be retroactive to February 1991 because O.C.G.A. section 34-9-104(d) expressly allows for these retroactive findings.¹⁴² Specifically, "[t]he award or other order contained in the final decision entered by the administrative law judge or the board shall be effective as of the time of change in condition as found by the administrative law judge or board, *notwithstanding the retroactive effect of the award or order.*"¹⁴³

Finally, the court cited to *Bahadori* for the proposition that an employer/insurer is not limited to recovering only those overpayments made after last established by award and held that, if the statute of limitations were not a problem, or if its expiration could be overcome by proving fraud on the part of the employee so as to toll the statute, then all overpayments could be recovered.¹⁴⁴

One interesting footnote to this case is that the above decision by the court of appeals was not its initial decision. The original decision, authored by Judge Smith, was actually vacated after a motion for reconsideration was filed by the employer/insurer, based in large part

138. *Id.*, 530 S.E.2d at 196-97. Another argument advanced by Aldrich was that certain stipulations and agreements set forth in a reimbursement agreement entered into between the employer/insurer and the Subsequent Injury Trust Fund ("SITF") barred review of the May 1991 award. The court found they did not for three reasons: (1) The award predated the SITF agreement by several years, and it therefore could not be based on the SITF agreement, in whole or in part; (2) the reimbursement agreement was a plan for repayment by the SITF to the employer/insurer, and not a settlement agreement between the employee and the employer/insurer, which is specifically prohibited from subsequent review under the terms of O.C.G.A. section 34-9-104(b); and (3) because the employee was not a party to the reimbursement agreement, and because the issues in the agreement and the board award were not identical, *res judicata* did not apply to the award. *Id.* at 727-28, 530 S.E.2d at 198.

139. *Id.* at 725, 530 S.E.2d at 197.

140. *Id.* at 726, 530 S.E.2d at 197.

141. *Id.*

142. *Id.* at 727, 530 S.E.2d at 197.

143. *Id.* (citing O.C.G.A. § 34-9-104(d)(2) (1998)) (emphasis added).

144. *Id.* at 727-28, 530 S.E.2d at 197-98.

upon the supreme court's ruling in *Bahadori*. The above opinion, authored by Judge Eldridge and concurred in by Chief Judge Johnson, Presiding Judge Pope, and Judge Ellington, was substituted in its place, and Judge Smith's original majority opinion became the dissent.¹⁴⁵ Judge Blackburn concurred specially in part and dissented in part.¹⁴⁶ Thus, a very divided court of appeals essentially reversed itself. The matter is now pending before the Georgia Supreme Court, and next year's issue of the survey will report on the final outcome of this interesting saga.

F. *Conduct in a Workers' Compensation Case*

A recent opinion that was not issued in a workers' compensation case, but which is nevertheless indirectly relevant to the compensation arena, was *In re D.K.M.*¹⁴⁷ Plaintiff, an aspiring lawyer, filed an application for certification of fitness to practice law in 1992. For the next several years, he sat for the bar exam, but he did not pass it. His certification to practice law was suspended in 1996, after the Board to Determine Fitness of Bar Applicants ("the Fitness Board") received a complaint from an ALJ of the State Board of Workers' Compensation, who had presided over plaintiff's pro se workers' compensation case.¹⁴⁸

A formal hearing was held before the Fitness Board. The hearing officer found D.K.M.'s conduct in the workers' compensation case was "inappropriate, threatening, and an abuse of the legal process."¹⁴⁹ Furthermore, D.K.M. had shown a total lack of judgment and common courtesy. The officer found he had filed complaints against the ALJ and opposing counsel that were frivolous and lacking in justification or integrity. Upon reviewing the officer's findings, the Fitness Board tabled D.K.M.'s application, recommending he engage in community service

145. *Id.* at 733, 530 S.E.2d at 201 (Smith, J., dissenting). Judge Smith was joined by Judge Barnes in his dissent. Judge Smith focused on the part of O.C.G.A. section 34-9-104(d)(1), which states that the retroactive effect of a change-in-condition decision is "subject to the limitation in subsection (a) of this Code section," including the requirement that the change occurred *after* the date on which the employee's wage-earning status was last established. *Id.* Judge Smith reasoned that *Bahadori* had no application to Aldrich's case, as the former case did not even address the retroactivity of a change-in-condition award. *Id.* at 733-34, 530 S.E.2d at 202. Instead of applying the change-in-condition analysis used by the majority, Judge Smith would have applied a fraud-based analysis and a totally different legal remedy: a motion in the superior court to set aside the May 1991 award, pursuant to O.C.G.A. section 34-9-60(d). *Id.* at 734-35, 530 S.E.2d at 203.

146. 241 Ga. App. at 728, 530 S.E.2d at 198 (Blackburn, J., concurring specially in part, dissenting in part).

147. 271 Ga. 473, 520 S.E.2d 216 (1999).

148. *Id.* at 473, 520 S.E.2d at 217.

149. *Id.*

activities that would demonstrate his rehabilitation, good character, and fitness to practice law. Instead, plaintiff wrote a letter to the Fitness Board stating that he could not engage in those sorts of activities due to his workers' compensation back injury, but that he had donated money to the homeless and hired poor persons to perform yard work for him. Unimpressed, the Board denied his application for certification of fitness to practice law. D.K.M. appealed to the supreme court.¹⁵⁰

Applying the "any evidence" standard of review, the supreme court held the record indeed supported the Board's decision to deny certification to D.K.M.¹⁵¹ In particular, plaintiff's conduct before the ALJ in his workers' compensation case was persuasive to the court. Although he had written letters of apology to the ALJ and opposing counsel in that case, D.K.M. had never recognized the inappropriateness of his behavior, and he had never explained or taken responsibility for his actions. Moreover, he had not been forthright in his responses to the Fitness Board, which was a basis for finding him unfit to practice law. Finally, D.K.M. had failed to prove his rehabilitation by clear and convincing evidence simply by donating money and food to the poor.¹⁵² The message of *In re D.K.M.* might be for pro se claimants in workers' compensation cases to be on their best and most professional behavior, lest they one day decide they want to be certified as fit to practice law. The same rule, however, certainly applies to those who are already admitted to practice law in Georgia.

G. Credit for Workers' Compensation Payments

In *Georgia Forestry Commission v. Taylor*,¹⁵³ the court of appeals held as a matter of first impression that an employer's credit under O.C.G.A. section 34-9-243¹⁵⁴ for disability benefits paid to an employee under the employer's plan was to be calculated based on the net, rather

150. *Id.* at 473-74, 520 S.E.2d at 217.

151. *Id.* at 474, 520 S.E.2d at 217.

152. *Id.*

153. 241 Ga. App. 151, 526 S.E.2d 373 (1999).

154. O.C.G.A. section 34-9-243(b) (1998) states:

Except as otherwise provided in this Code section or in a collective bargaining agreement, the employer's obligation to pay or cause to be paid weekly benefits under Code Section 34-9-261 or 34-9-262 shall be reduced by the employer funded portion of payments received or being received by the employee pursuant to a disability plan, a wage continuation plan, or from a disability insurance policy established or maintained by the same employer from whom benefits under Code Section 34-9-261 or 34-9-262 are claimed if the employer did contribute to such a plan or policy. The employer funded portion shall be based upon the ratio of the employer's contributions to the total contributions to such plan or policy.

than the gross, amount of benefits.¹⁵⁵ The employee's gross disability retirement benefits amounted to \$1,622.02 per month, but after state and federal taxes and health insurance premiums were deducted, he received a monthly net amount of \$1,268.52. The ALJ, appellate division, and superior court all determined that the employer's credit under O.C.G.A. section 34-9-243 would be based on the net benefit rather than the gross benefit, and the employer appealed.¹⁵⁶

Despite noting that the amount the employee received could actually have been manipulated by the employee to "maximize his recovery," the court of appeals affirmed the court below, finding rules of statutory construction would require a review of the plain language of O.C.G.A. section 34-9-243(c)¹⁵⁷ and finding:

the amount for which the employer receives credit is the amount to which the employee is entitled—which is that amount which the employee has *received* or is *receiving*. Because the statute does not state that the employer should be credited for the amounts paid, the employer's credit should be based on the amounts the employee actually receives, i.e., the *net* amount of the check.¹⁵⁸

H. *Employer/Employee Relationship*

Though also not a workers' compensation case, *Kilburn v. Patrick*¹⁵⁹ illustrates how workers' compensation analysis and principles are applied even outside the scope of the Act. This case involved a shareholder action against a corporation for conversion and breach of fiduciary duty.¹⁶⁰ The shareholder agreement entered into by plaintiff contained a provision stating that if a shareholder "withdraws, resigns, or is terminated with or without cause by the Board of Directors from his employment by the Corporation," then the other majority or minority shareholder, as the case might be, was granted the option and right to purchase all of the transferring stockholder's shares.¹⁶¹ Plaintiff, Patrick, resigned from the company and sought to prevent the other shareholder from purchasing his shares. In support of his position,

155. 241 Ga. App. at 151, 526 S.E.2d at 373.

156. *Id.* at 152, 526 S.E.2d at 373-74.

157. O.C.G.A. § 34-9-243(c) (1998). "The credit or reduction of benefits provided in subsection (b) of this Code section shall only be made for those amounts which the employee is entitled to, has received, or is receiving during any period in which benefits under Code Section 34-9-261 or 34-9-262 are claimed." *Id.*

158. 241 Ga. App. at 153, 526 S.E.2d at 374.

159. 241 Ga. App. 214, 525 S.E.2d 108 (1999).

160. *Id.* at 214, 525 S.E.2d at 109.

161. *Id.* at 214-15, 525 S.E.2d at 109.

Patrick asserted that the stock repurchase provision in the shareholder agreement applied only to *employees* of the company who resigned, withdrew, or were terminated. Because he was not an employee but, rather, a shareholder, his shares could not be purchased. The trial court agreed, finding the term "employment" in the purchase provisions unambiguously indicated a master-servant relationship. It therefore directed a verdict for plaintiff on the conversion claim.¹⁶²

The court of appeals held that the directed verdict was error and that the trial court had wrongly, and narrowly, interpreted the term "employment" as used in the shareholder agreement.¹⁶³ The court pointed out that Georgia law often gives "employment" a broader meaning than simply the master-servant relationship.¹⁶⁴ By way of example, it cited to the workers' compensation context in which an employer/employee relationship can be inferred when one party "receives valuable services from another[] and retains the right to control and discharge the one performing the services."¹⁶⁵ Because the term "employment" was capable of more than one interpretation, the court looked to find a construction that would uphold the contract in whole and in every part.¹⁶⁶ The court concluded that interpreting "employee" as including only a traditional, typical, master-servant relationship would render the shareholder agreement meaningless.¹⁶⁷ None of the minority or majority shareholders would be deemed to be an employee of the company under this strict analysis, and therefore, no repurchase provision could even come into effect.¹⁶⁸ By looking to workers' compensation law principles and definitions, the court was able to bring a clear and accurate reading to an agreement at issue in a case not involving workers' compensation.

I. Failure to Obtain Workers' Compensation Coverage

The court of appeals heard three cases during the survey period dealing with an employer's failure to obtain workers' compensation insurance. While one case dealt with an employer's liability for failing to obtain insurance, the other two dealt with an employer's remedy against those who failed to procure coverage on the employer's behalf.

162. *Id.* at 215, 525 S.E.2d at 110.

163. *Id.* at 216, 525 S.E.2d at 110.

164. *Id.*

165. *Id.* (citing *Housing Auth., City of Cartersville v. Jackson*, 226 Ga. App. 182, 184, 486 S.E.2d 54, 56 (1997)).

166. *Id.* at 217, 525 S.E.2d at 111.

167. *Id.*

168. *Id.*

In *Sheehan v. Delaney*,¹⁶⁹ the claimant was injured while working for American Trucking, which had no workers' compensation insurance in violation of O.C.G.A. section 34-9-2(a).¹⁷⁰ After an ALJ awarded the claimant benefits, American Trucking commenced bankruptcy proceedings, having not paid any of the claimant's workers' compensation benefits. The claimant then filed a complaint in superior court against the sole shareholders of American Trucking, seeking a monetary judgment for the benefits payable under the ALJ award.¹⁷¹

The court of appeals affirmed the trial court's grant of summary judgment to the claimant, affirming a long-standing principle that if an employer becomes insolvent, the agent of the employer responsible for procuring workers' compensation benefits may be held personally liable.¹⁷² The court also rejected defendant's argument that the claimant was required to show negligence in defendant's failure to obtain workers' compensation insurance for the trucking company.¹⁷³ The court found no precedent for the proposition that the owners of a business are only liable if they are negligent in failing to procure workers' compensation coverage, and the court also concluded that no such requirement is appropriate given the "quid pro quo" toward immunity that an employer holds under the workers' compensation system.¹⁷⁴

In *National Council on Compensation Insurance, Inc. v. Strickland*,¹⁷⁵ the employer was plaintiff in an action brought in state court seeking damages for an alleged breach of fiduciary duty to provide workers' compensation coverage. Plaintiff, Strickland, sought workers' compensation coverage for himself and his company, All Star Concrete, from the Matrix Insurance Agency. Plaintiff was told by the agency that his premium would be higher for his inclusion in All Star Concrete's coverage, and Strickland completed an application for workers' compensation coverage to this effect. After several insurers refused to write coverage for plaintiff, the agency applied to the National Council on Compensation Insurance ("NCCI") for coverage through the Assigned Risk Pool. NCCI operates under a contract with the Georgia Insurance Commissioner to serve as administrator for the Assigned Risk Pool, and

169. 238 Ga. App. 662, 521 S.E.2d 585 (1999).

170. O.C.G.A. § 34-9-2(a) (1998).

171. 238 Ga. App. at 662, 521 S.E.2d at 586.

172. *Id.* (citing *Samuel v. Baitcher*, 247 Ga. 71, 73-74, 274 S.E.2d 327, 329 (1981); *Underwood v. Dunn*, 221 Ga. App. 185, 186, 470 S.E.2d 781, 782 (1996)).

173. *Id.* at 663, 521 S.E.2d at 586.

174. *Id.* at 664, 521 S.E.2d at 587.

175. 241 Ga. App. 504, 526 S.E.2d 924 (1999).

it has authority to bind insurance coverage for those insurers within the Pool. In reviewing plaintiff's application, however, an account analyst for NCCI found insufficient payroll to include plaintiff individually within All Star Concrete's coverage. The NCCI analyst allegedly contacted the insurance agent and was told simply to remove plaintiff from coverage, and the analyst complied. The insurance agency, however, denied ever giving this instruction. Plaintiff was never advised that his individual request for coverage was removed from the application.¹⁷⁶

Plaintiff sued NCCI and the insurance agency when he was later injured on the job and was denied coverage.¹⁷⁷ The court of appeals reversed a grant of summary judgment to NCCI, finding that it acted as a "gratuitous volunteer" and that a jury question remained as to whether its actions caused the lack of coverage and whether plaintiff's failure to read the policy that was ultimately issued constituted contributory negligence.¹⁷⁸ "In changing and altering the application, instead of rejecting it and requiring a written authorization for the declination of individual coverage by the plaintiff or a supplemental application form, NCCI exceeded its authority as administrator and gratuitously assumed new duties as a volunteer with different non-contractual duties."¹⁷⁹ The case was therefore remanded to allow plaintiff to proceed with his claim against NCCI and the insurance agency although the court noted plaintiff's failure to read the policy that was ultimately issued may affect plaintiff's ability to recover.¹⁸⁰

The employer was also successful in *GFA Business Solutions, Inc. v. Greenway Insurance Agency, Inc.*,¹⁸¹ which involved a suit for damages against an insurance agency for failure to procure workers' compensation insurance after the employer provided more than \$229,000 in premiums over a two-year period of time. Plaintiff, GFA Business Solution ("GFA"), agreed with O'Malley of the Greenway Insurance Agency ("Greenway") for the agency to provide workers' compensation insurance. O'Malley was given a check for \$7,000 as a down payment on initial premium, and GFA paid hundreds of thousands of dollars in premiums over the next two years. O'Malley issued a certificate of insurance confirming GFA's coverage. An insurance investigator, however, later informed GFA that O'Malley had never obtained insurance on its behalf.

176. *Id.* at 505-06, 526 S.E.2d at 926.

177. *Id.* at 505, 526 S.E.2d at 926.

178. *Id.* at 507-08, 526 S.E.2d at 927-28.

179. *Id.* at 507, 526 S.E.2d at 927.

180. *Id.* at 508, 526 S.E.2d at 928.

181. 243 Ga. App. 35, 531 S.E.2d 134 (2000).

Instead, O'Malley had paid claims out of Greenway Agency accounts, and the GFA premiums had been used either for paying claims or for O'Malley's personal use.¹⁸²

GFA sued Greenway for breach of contract and fraud, but the agency was granted summary judgment by the trial court, which found that no "insurance contract" existed between the agency and GFA and that Greenway could not be held liable for fraud by the unauthorized acts of O'Malley.¹⁸³ While the court of appeals agreed that Greenway was not liable for fraud, it reversed the trial court's finding that GFA could not recover for breach of contract.¹⁸⁴ The court noted that the contract between GFA and Greenway was not an "insurance contract," but rather was an agreement for Greenway to procure insurance for GFA.¹⁸⁵ The court found O'Malley had actual authority to bind Greenway to procure insurance, and the evidence demonstrated an oral agreement to this effect.¹⁸⁶ The case was therefore reversed and remanded to allow GFA to proceed against Greenway for breach of contract.¹⁸⁷

J. Independent Contractor/Statutory Employer

The case of *Greg Fisher, Ltd. v. Samples*¹⁸⁸ presented an interesting review of the various potential theories of recovery for a subcontractor who is injured when in the performance of work for a general contractor. Unfortunately for the claimant, Mr. Samples, none of the available theories afforded him any coverage for his injuries.¹⁸⁹

Samples, who owned a carpentry business and worked side by side with his employees, was hired by Fisher to perform framing work on a building project. Although Samples obtained workers' compensation insurance for his employees, he elected to exempt himself from coverage as permitted by O.C.G.A. section 34-9-2.2.¹⁹⁰ After sustaining an injury, Samples pursued workers' compensation coverage from his own insurer and from Fisher. After being informed by his own carrier that coverage was denied because he had exempted himself from coverage, Samples pursued his claim against Fisher on the grounds that Fisher was his statutory employer pursuant to O.C.G.A. section 34-9-8(a),¹⁹¹

182. *Id.* at 35-36, 531 S.E.2d at 135.

183. *Id.* at 36, 531 S.E.2d at 135.

184. *Id.*, 531 S.E.2d at 136.

185. *Id.*

186. *Id.* at 36-37, 531 S.E.2d at 136.

187. *Id.* at 36, 531 S.E.2d at 136.

188. 238 Ga. App. 825, 520 S.E.2d 280 (1999).

189. *Id.* at 828-29, 520 S.E.2d at 282-83.

190. O.C.G.A. § 34-9-2.2 (1998 & Supp. 2000).

191. *Id.* § 34-9-8(a) (1998).

and alternatively that O.C.G.A. section 34-9-124(b)¹⁹² estopped Fisher from denying coverage.¹⁹³ The court of appeals rejected both of these arguments.¹⁹⁴

The court first noted that Samples was barred from pursuing coverage against his own insurer because of his election not to be included as an employee under that policy.¹⁹⁵ Samples' election in this regard also proved fatal to his claim under O.C.G.A. section 34-9-8(a) that Fisher was his statutory employer. This code section provides that "a principal, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his subcontractors."¹⁹⁶ As the court pointed out, Samples was clearly not an "employee" of Fisher's subcontractor, but to the contrary, Samples was *the* subcontractor.¹⁹⁷ Therefore, he was not entitled to the coverage afforded to employees of subcontractors under the statutory employer provisions.¹⁹⁸

The court similarly rejected Samples' arguments that Fisher was estopped to deny coverage under O.C.G.A. section 34-9-124(b), which refers to coverage being extended to "employees ordinarily exempt from its provisions." As the court pointed out, Samples' status was that of an owner and employer, not an employee.¹⁹⁹ Moreover, the court noted that the cases relied upon by Samples were all decided prior to the enactment of O.C.G.A. section 34-9-2.2 in 1984, and the court therefore did not contemplate Samples' situation as an owner/employer who exempted himself from coverage.²⁰⁰

K. Jurisdiction on Appeal

If a superior court does not enter its award within twenty days of a hearing on an appeal, it loses jurisdiction,²⁰¹ even if the order entered after the twenty-day deadline concerns only attorney fees under O.C.G.A. section 9-15-14(b).²⁰² In *Brassfield & Gorrie v. Ogletree*,²⁰³ the ALJ and appellate division determined an employer was responsible for an

192. *Id.* § 34-9-124(b).

193. 238 Ga. App. at 825-26, 520 S.E.2d at 281.

194. *Id.* at 827-28, 520 S.E.2d at 282-83.

195. *Id.* at 828, 520 S.E.2d at 282.

196. O.C.G.A. § 34-9-8(a) (emphasis added).

197. 238 Ga. App. at 827-28, 520 S.E.2d at 282.

198. *Id.* at 827, 520 S.E.2d at 282.

199. *Id.* at 828, 520 S.E.2d at 283.

200. *Id.*

201. *Taylor Timber Co. v. Baker*, 226 Ga. App. 211, 212-13, 485 S.E.2d 819, 821 (1997).

202. O.C.G.A. § 9-15-14(b) (1993 & Supp. 2000).

203. 241 Ga. App. 56, 526 S.E.2d 103 (1999).

employee's proposed surgery.²⁰⁴ The employer appealed to superior court, and the employee filed a motion for attorney fees based on frivolous appeal. After a hearing on the matter, but more than twenty days later, the superior court entered an order awarding the employee attorney fees.²⁰⁵ The court of appeals determined the narrow twenty-day window, designed to promote speedy resolution of workers' compensation appeals, applies to all aspects of the case.²⁰⁶ The court of appeals reversed the superior court's ruling, finding the superior court lost jurisdiction of the case when an order on the attorney fees had not been entered within twenty days of the hearing.²⁰⁷

L. Petition for Entry of Judgment

Under O.C.G.A. section 34-9-106,²⁰⁸ the superior court has the power to render judgment on an award of the State Board of Workers' Compensation. The power of the court is very narrow, allowing the court simply to render judgment on the award and notify the parties unless the award on its face is legally insufficient.²⁰⁹ In *Hansche v. City of Atlanta Police Department*,²¹⁰ an employee requested the superior court enter judgment on an award against the city. The city objected and argued it was entitled to credit for temporary partial disability benefits paid to the employee even though the Board's award stated the city was not entitled to such a credit. The superior court, however, denied the employee's petition on the ground that the Board's award was unclear.²¹¹

The court of appeals found the superior court should have granted the employee's petition because the Board's award was legally sufficient in stating the city could not take a credit for the temporary partial disability benefits already paid.²¹² The court pointed out that the city should have appealed the original award rather than attempt to obtain

204. *Id.* at 56, 526 S.E.2d at 104.

205. *Id.*

206. *Id.* at 57, 526 S.E.2d at 104 (citing *Felton Pearson Co. v. Nelson*, 260 Ga. 513, 514, 397 S.E.2d 431, 432 (1990)).

207. *Id.*

208. O.C.G.A. § 34-9-106 (1998).

209. *Id.* *Hansche v. City of Atlanta Police Dep't*, 242 Ga. App. 606, 608, 530 S.E.2d 512, 513 (2000); *see also* *Wade v. Harris*, 210 Ga. App. 882, 885, 437 S.E.2d 863, 866 (1993); *City of Hapeville v. Preston*, 67 Ga. App. 350, 357, 20 S.E.2d 202, 207 (1942) (stating the superior court is to enforce, not change, the award).

210. 242 Ga. App. at 606, 530 S.E.2d at 512.

211. *Id.* at 607, 530 S.E.2d at 512-13.

212. *Id.* at 608, 530 S.E.2d at 513.

the credit when the employee petitioned for entry of judgment.²¹³ By failing to appeal the original award to the superior court, the city waived any new arguments it had. Thus, the superior court should have entered judgment as demanded in the employee's petition.²¹⁴

M. Premium Disputes

A workers' compensation insurer that sued for collection of unpaid premiums got more than it bargained for in the case of *International Indemnity Co. v. Regional Employer Service, Inc.*²¹⁵ The employer, Regional Employer, counterclaimed against the insurer, alleging it paid excessive premiums due to the insurer's submission of incorrect data to a licensed rating organization. A jury found in favor of the employer, awarding special damages of \$109,000 and attorney fees of \$23,006 against the insurer.²¹⁶

The court of appeals affirmed, but it avoided the question of whether O.C.G.A. section 34-9-136,²¹⁷ which requires a workers' compensation insurer to submit statistical data to an employer before it goes to a licensed rating organization for determining an employer's experience modification factor, creates a private cause of action for a violation of this statute.²¹⁸ In ruling upon the insurer's allegation that the trial court committed error by allowing evidence that this statute was violated, the court simply noted that the evidence was probative with respect to the insurer's claims for unpaid premiums because it might be considered by the jury with respect to mitigation of damages and set-off.²¹⁹ The court also held that sufficient evidence of causation was presented by evidence that the insurer reported inaccurate data to the rating organization, resulting in excessive premiums, and by evidence from the insurer's own vice president, who acknowledged that inaccurate data supplied to the rating organization would result in inaccurate premiums.²²⁰

213. *Id.*

214. *Id.*

215. 239 Ga. App. 420, 520 S.E.2d 533 (1999).

216. *Id.* at 420, 520 S.E.2d at 534-35.

217. O.C.G.A. § 34-9-136 (1998).

218. 239 Ga. App. at 421, 520 S.E.2d at 535.

219. *Id.*

220. *Id.* at 423, 520 S.E.2d at 537.

N. Prior Inconsistent Testimony

A third nonworkers' compensation case, *Smalls v. Walker*,²²¹ involved an injured employee taking conflicting positions in a workers' compensation claim and in his subsequent personal injury claim. Smalls was employed as a route salesman and suffered a compensable neck injury in an accident that occurred in January 1995. He received TTD benefits and was then released to work without limitations. On May 13, 1995, Smalls was involved in a nonwork-related accident when defendants, Walker and Boyd, backed into his vehicle.²²² Attempting to obtain additional workers' compensation benefits for his original on-the-job injury, Smalls denied that the May 1995 accident caused any injury to him or to his vehicle, testifying he had been experiencing disabling pain ever since January 1995. The ALJ disagreed with Smalls' contentions, finding the medical evidence showed a more significant accident than the employee had claimed, one that was sufficient to aggravate his pre-existing neck problems so as to cause additional pain and disability. The claim for workers' compensation benefits was therefore denied.²²³

Smalls was forced to file for bankruptcy in 1996 during the pendency of his workers' compensation appeals. In his bankruptcy petition, he did not list any personal injury claim against defendants as a potential asset. However, he brought this personal injury action against Walker and Boyd in 1997.²²⁴ The trial court granted defendants' motion for summary judgment in large part based upon Smalls' testimony in his workers' compensation claim that he was not injured in the May 1995 accident.²²⁵ On appeal the court held that Smalls was not judicially estopped from asserting his personal injury action by virtue of his prior inconsistent testimony in the workers' compensation case that he had

221. 243 Ga. App. 453, 532 S.E.2d 420 (2000).

222. *Id.* at 453-54, 532 S.E.2d at 421.

223. *Id.* at 454, 532 S.E.2d at 421.

224. *Id.*

225. *Id.* at 454-55, 532 S.E.2d at 422. The trial court also ruled against Smalls on the grounds that he had not listed the claim against Walker and Boyd as an asset in his bankruptcy petition. *Id.* at 456, 532 S.E.2d at 422. The court of appeals did find, in accordance with existing legal precedent, that this omission resulted in Smalls' being judicially estopped from recovery in his personal injury claim. *Id.* at 455, 532 S.E.2d at 421-22; *see also* Byrd v. JRC Towne Lake, Ltd., 225 Ga. App. 506, 507, 484 S.E.2d 309, 310 (1997); Southmark Corp. v. Trotter, Smith & Jacobs, 212 Ga. App. 454, 455, 442 S.E.2d 265, 266 (1994) (noting that a party is estopped from asserting a position in a judicial proceeding that is inconsistent with a position successfully asserted by it in a prior proceeding).

not been injured by Walker and Boyd.²²⁶ The doctrine of judicial estoppel, the court noted, required a showing that plaintiff's position in a previous judicial proceeding had been successfully asserted.²²⁷ In this instance, Smalls' claims that he was not injured in the subsequent accident had been rejected by the ALJ.²²⁸ Additionally, the court stated, Smalls' testimony with respect to whether or not he was injured and disabled as a result of the May 1995 accident had been a matter of his own personal belief.²²⁹ Because the proximate cause of his disability following both the job-related and nonjob-related accidents was a "complex question," the court of appeals declined to find that Smalls actually changed his position from one judicial proceeding to the next, so that he would be precluded from recovery on that basis.²³⁰

O. Statute of Limitations

In *Mickens v. Western Probation Detention Center*,²³¹ the court of appeals construed the statute of limitations contained in O.C.G.A. section 34-9-82(a),²³² regarding the time for filing a claim for compensation.²³³ Mickens had injured her leg in a 1995 fall and was paid salary in lieu of benefits as well as medical benefits. She returned to work and her five percent permanent partial disability ("PPD") rating was commenced, with the final payment made on March 3, 1997. On March 3, 1998, one year after she last received PPD benefits, but more than one year after her compensable injury, she requested a hearing to obtain benefits for a back injury that she claimed also occurred in her on-the-job fall.²³⁴ At issue was whether the claim for the back injury was barred by the one-year statute of limitations, or whether payment of the PPD benefits had extended the statute of limitations to two years

226. 243 Ga. App. at 455, 532 S.E.2d at 422.

227. *Id.* at 456, 532 S.E.2d at 422.

228. *Id.* at 455-56, 532 S.E.2d at 422.

229. *Id.* at 456, 532 S.E.2d at 422-23.

230. *Id.*

231. 244 Ga. App. 268, 534 S.E.2d 927 (2000).

232. O.C.G.A. § 34-9-82(a) (1998). That statute states:

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.

Id.

233. 244 Ga. App. at 269, 534 S.E.2d at 928.

234. *Id.* at 268-69, 534 S.E.2d at 927-28.

after the "date of the last payment of weekly benefits."²³⁵ The employer/insurer argued there should be no extension because PPD benefits were not included in the term "weekly benefits" set forth in section 34-9-82(a).²³⁶

However, the court held the employee's claim was not time barred.²³⁷ It reached this conclusion from a straightforward reading of the statute, finding that the plain terms of O.C.G.A. section 34-9-82(a) placed no restrictions or specifications upon what kind of "weekly benefit" would extend the statute of limitations.²³⁸ Had the legislature intended some limitation, the court stated, it certainly could have made that intent clear in the statute.²³⁹ The court also pointed out that O.C.G.A. section 34-9-263,²⁴⁰ which sets forth the employer/insurer's PPD benefits obligations, expressly refers to those payments as "weekly income benefits."²⁴¹ Thus, it was clear the payment of PPD benefits to Mickens qualified as payment of weekly benefits so as to extend the statute of limitations. In the wake of this decision, it will be equally clear in most workers' compensation contexts that the payment of PPD benefits will be construed by the Board and the courts to be no different from payment of weekly income benefits under O.C.G.A. section 34-9-261²⁴² and 262.²⁴³

P. Subrogation

In *Newsome v. Department of Administrative Services*,²⁴⁴ the court of appeals held that, under O.C.G.A. section 34-9-11.1,²⁴⁵ it is the statute of limitations applicable to a claimant's third-party cause of action that controls an employer/insurer's subrogation claim.²⁴⁶ Stephens' workers' compensation insurer, the Georgia Department of Administrative Services ("DOAS"), filed an action against Newsome in Stephens' name, pursuant to O.C.G.A. section 34-9-11.1(c), alleging

235. *Id.*, 534 S.E.2d at 928.

236. *Id.* at 269, 534 S.E.2d at 928.

237. *Id.* at 268, 534 S.E.2d at 927.

238. *Id.* at 270, 534 S.E.2d at 929.

239. *Id.*

240. O.C.G.A. § 34-9-263 (1998).

241. 244 Ga. App. at 270, 534 S.E.2d at 929. O.C.G.A. § 34-9-263 (1998) states in pertinent part, "In cases of permanent partial disability, the employer shall pay weekly income benefits to the employee according to the schedule included in this Code section."

242. O.C.G.A. § 34-9-261 (1998 & Supp. 2000).

243. *Id.* § 34-9-262.

244. 241 Ga. App. 357, 526 S.E.2d 871 (1999).

245. O.C.G.A. § 34-9-11.1 (1998).

246. 241 Ga. App. at 358, 526 S.E.2d at 872-73.

Newsome's negligence caused the injuries to Stephens for which DOAS paid \$45,000 in workers' compensation benefits.²⁴⁷ The suit was filed, however, more than two years after the date of the accident, and therefore beyond the two-year statute of limitations for negligence actions.²⁴⁸ However, DOAS argued the applicable statute of limitations was O.C.G.A. section 9-3-22,²⁴⁹ the so-called omnibus statute of limitations that provides a twenty-year deadline within which to file causes of action under statutes that do not otherwise have a limitation period.²⁵⁰

Although the trial court denied Newsome's motion for summary judgment, the court of appeals reversed.²⁵¹ The court concluded that "it is clear that the Legislature intended that the asserting employer be deemed an 'employee' for statute of limitation purposes and subject to the two-year statute of limitations applicable to Stephens."²⁵² The court found this conclusion to be consistent with general concepts of subrogation in which the subrogating party is essentially substituted for another.²⁵³ The court also relied upon that portion of O.C.G.A. section 34-9-11.1 that provides the employer/insurer is "asserting the employee's cause of action."²⁵⁴ As a result, employers or insurers who choose to file a cause of action under O.C.G.A. section 34-9-11.1(c) must be sure to do so within the statute of limitations applicable to the claimant/employee.

Q. Superior Court Judgments

It has long been axiomatic that the superior court, in entering judgment on an award of the State Board of Workers' Compensation, cannot change the Board's award.²⁵⁵ The case of *Ayers v. Rembert*²⁵⁶ involved an interesting, and very limited, exception to that rule. Rembert obtained an award from the ALJ holding his claim to be compensable and granting him TTD and medical benefits along with attorney fees. On appeal to both the appellate division and the superior court, the ALJ's award was affirmed. When the employer did not pay under the award, Rembert filed a petition with the superior court

247. *Id.* at 357, 526 S.E.2d at 872.

248. *Id.* at 358, 526 S.E.2d at 872.

249. O.C.G.A. § 9-3-22 (1982).

250. 241 Ga. App. at 358, 526 S.E.2d at 872.

251. *Id.* at 357, 526 S.E.2d at 872.

252. *Id.* at 358, 526 S.E.2d at 873.

253. *Id.*

254. *Id.*

255. *Wade v. Harris*, 210 Ga. App. 882, 885, 437 S.E.2d 863, 866 (1993).

256. 241 Ga. App. 698, 527 S.E.2d 290 (1999).

seeking judgment pursuant to O.C.G.A. section 34-9-106.²⁵⁷ The superior court entered judgment on the award, ordering Ayers to pay the accrued TTD benefits, medical expenses, and attorney fees that were set forth in the ALJ's award. The superior court also went a step further and ordered Ayers to pay Rembert an additional penalty of twenty percent on the overdue TTD benefits.²⁵⁸ This penalty had not been included in the ALJ's award. The court of appeals affirmed the assessment of the late payment penalty.²⁵⁹

At first glance, and under existing case law, the court of appeals' affirmance might appear to be misguided. Indeed, Ayers argued the superior court exceeded its statutory authority under O.C.G.A. section 34-9-106 by adding the twenty percent penalty to the Board's award.²⁶⁰ Normally, the court of appeals acknowledged, the superior court is without power to change an award of the Board.²⁶¹ In this particular instance, however, the additional penalty was *specifically authorized* by a statute, O.C.G.A. section 34-9-221(f),²⁶² which provides, in relevant part: "If income benefits payable under the terms of an award are not paid within 20 days after becoming due, there shall be added to the accrued income benefits an amount equal to 20 percent thereof." Penalties, the court reasoned, accrue automatically by operation of the statute.²⁶³ Unlike the situation in which the superior court orders payment of TTD benefits that had never been included in the underlying Board award,²⁶⁴ the instant case involved superior court enforcement of an award exactly as written, "in a manner consistent with the underlying award of the [B]oard and in conformity with the Code."²⁶⁵ Therefore, the superior court did not exceed its authority by including

257. O.C.G.A. § 34-9-106 (1998). The relevant portion of the statute states:

Any party in interest may file in the superior court of the county in which the injury occurred . . . a certified copy of a . . . final order or decision of the members or of an award of the members unappealed from or of an award of the members affirmed upon appeal, whereupon the court shall render judgment in accordance therewith and notify the parties.

Id.

258. 241 Ga. App. at 699, 527 S.E.2d at 292.

259. *Id.* at 701, 527 S.E.2d at 293.

260. *Id.* at 699, 527 S.E.2d at 292.

261. *Id.*

262. O.C.G.A. § 34-9-221(f) (1998 & Supp. 2000).

263. 241 Ga. App. at 699, 527 S.E.2d at 292.

264. *See, e.g.,* Kingery Block & Concrete Co. v. Luttrell, 174 Ga. App. 481, 483, 330 S.E.2d 181, 183 (1985) (limiting power of superior court to enforcement of the final award of the full board).

265. 241 Ga. App. at 701, 527 S.E.2d at 293.

a statutorily mandated twenty percent late payment penalty in its judgment.²⁶⁶

266. *Id.*

* * *