

12-1995

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Recommended Citation

Bagley, H. Michael; Kniffen, Daniel C.; Blackmon, John G. Jr.; and Griffeth, Phillip Comer (1995) "Workers' Compensation," *Mercer Law Review*. Vol. 47 : No. 1 , Article 14.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol47/iss1/14

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Workers' Compensation

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I. INTRODUCTION

This survey period again saw the introduction of a package of amendments to the Workers' Compensation Act (the "Act") steered through the legislative process by the Chairman of the State Board of Workers' Compensation (the "State Board") and his advisory committee. Though not as dramatic as in past years, subtle changes could have significant impact. The bulk of the amendments arose out of the Board's increasing concern about fraud and abuse in the state's workers' compensation system. Meanwhile, the state's appellate courts continued to tackle the complex issues surrounding compensability of heart attack and psychological injury claims. For the most part, the exclusive remedy doctrine, which bars a tort action for work-related injuries, withstood its increasing assaults.

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The authors express their gratitude to Mark B. Williamson, law student and summer clerk at our firm, for his excellent assistance in the preparation of this Article.

II. LEGISLATIVE CHANGES

The General Assembly continued the trend for this decade by again effecting several substantive changes to the Act in 1995.¹ Effective July 1, 1995, except where specifically designated retroactive, these amendments to the Act were the second consecutive package designed and sponsored by the Chairman of the State Board of Workers' Compensation, Harrill L. Dawkins.²

A. *Limitation on Corporate Officer Exemptions*

Section 34-9-2.1 of the Official Code of Georgia Annotated ("O.C.G.A.") has provided a mechanism for corporate officers to elect to be exempted from coverage under the Workers' Compensation Act.³ Since its enactment in 1982, there have been no limits on the number of officers that could be exempted from coverage.⁴ This unlimited avenue of corporate exemption was potentially problematic since it provided the mechanism for an employer to avoid Workers' Compensation coverage for all employees by deeming them "corporate officers,"⁵ solely for the purpose of exempting them from the Workers' Compensation Act.

Seeking to place reasonable limits on what had heretofore been an unlimited exemption for corporate officers, O.C.G.A. section 34-9-2.1(a) was amended in 1995.⁶ The exemption was limited to no more than five corporate officers, and in order for the written certification of exemption to be in effect,⁷ the corporate officer must be identified by name, as well as by the office held at the time of certification.⁸

B. *Modification of Subrogation Procedures*

Subrogation was one of the most controversial elements of the sweeping legislative changes enacted in 1992,⁹ and the area has

1. O.C.G.A. §§ 34-9-1 to -421 (Supp. 1995).

2. All changes became effective on July 1, 1995 in conjunction with numerous changes to Board Rules.

3. O.C.G.A. § 34-9-2.1 (Supp. 1995).

4. 1982 Ga. Laws 2360.

5. See O.C.G.A. §§ 14-2-840 to -844 (1994).

6. *Id.* § 34-9-2.1 (Supp. 1995).

7. Board Rule 2.1 mandates the filing of a Form WC-8 with the workers' compensation insurance carrier or, in the absence of an insurer, with the Board.

8. O.C.G.A. § 34-9-2.1(a)(1)-(2) (Supp. 1995).

9. See H. Michael Bagley, Daniel C. Kniffen & John G. Blackmon, Jr., *Workers' Compensation*, 44 MERCER L. REV. 457, 465 (1992).

continued to be fraught with controversy and confusion.¹⁰ The General Assembly made an effort to modify two aspects of the subrogation provisions to make the process of subrogation more workable.

It was not clear from re-enactment of subrogation in 1992 whether or not death benefits would be recoverable by an employer in a subrogation action.¹¹ In *Bankhead v. Lucas Aerospace Ltd.*,¹² the United States District Court for the Northern District of Georgia held that the subrogation statute would not allow an employer to recover for death benefits.¹³ The court reasoned that death benefits were simply not among those enumerated in O.C.G.A. section 34-9-11.1.¹⁴ Therefore, the employer had no right of subrogation for death benefits.¹⁵ The General Assembly amended the list of payments made by an employer which are subject to recovery via subrogation in 1995 by inserting "death benefits" among the types of payments that are recoverable.¹⁶

There has also been much controversy over the automatic assignment of the injured employee's cause of action to the employer after one year from the date of injury.¹⁷ In *Bennett v. Williams Electrical Construction Co.*,¹⁸ the court of appeals held that the assignment was automatic and complete.¹⁹ This created a number of unanticipated problems for employers who suddenly found themselves confronted with the possibili-

10. In *Maryland Casualty Ins. Co. v. Glomski*, 210 Ga. App. 759, 437 S.E.2d 616 (1993), the court determined that O.C.G.A. § 34-9-11.1 did not apply retroactively and only applied to injuries occurring on or after that statute's effective date, July 1, 1992. 210 Ga. App. at 761, 437 S.E.2d at 618. *But see* *Moore v. Savannah Cocoa, Inc.*, 217 Ga. App. 869, 459 S.E.2d 580 (1995) (statutory amendment could be applied retroactively); *see also* *Draughn v. Delta Airlines, Inc.*, 218 Ga. App. 540, 462 S.E.2d 445 (1995). For further reading on the impact of the workers' compensation subrogation statute, see Hugh C. Wood, "Plaintiff/Claimant's Perspective of O.C.G.A. § 34-9-11.1," paper delivered January 16, 1995; Michael S. Reeves, "Defendant's Perspective of Workers' Compensation Subrogation," paper delivered January 16, 1995 (both papers provide an extensive review of cases or papers which have cited or discussed the statute) and Hugh C. Wood, "Unintended Mischief Created By the New Workers' Compensation Assignment Statute O.C.G.A. § 34-9-11.1," 31 GA. ST. B.J. 3 (Spring 1995), at 140-48.

11. *See* *Bagley et al, supra* note 9, at 465 ("the language leaves unanswered the question of whether the subrogation provision includes rehabilitation expenses, death benefits, or survivors' benefits.").

12. 878 F. Supp. 221 (N.D. Ga. 1994).

13. *Id.* at 222.

14. *Id.*

15. *Id.* at 223.

16. O.C.G.A. § 34-9-11.1(b) (Supp. 1995).

17. *See id.* § 34-9-11.1(c) (1992).

18. 215 Ga. App. 423, 450 S.E.2d 873 (1994).

19. *Id.* at 424, 450 S.E.2d at 875.

ty of tort claims by employees based upon the employer's failure to assert rights on behalf of the employee against the third-party tortfeasor.

O.C.G.A. section 34-9-11.1(c) was amended in 1995 to modify the absolute assignment from the employee to the employer and to create, in its stead, a partial assignment.²⁰ One year after the work-related injury, the employer and employee will jointly hold the right of action against any third-party tortfeasor.²¹ Furthermore, while the employer or its insurer may intervene in any action to protect and enforce its subrogation lien, the statute specifies that neither the employer nor insurer is required to do so.²²

Although the modification to include death benefits within payments recoverable by subrogation was not retroactive and will take effect on July 1, 1995, the General Assembly attempted to rectify all of the assignment problems that developed as a result of the re-enactment of subrogation in 1992 by making the 1995 corrective language retroactive.²³ The retroactive modification of what is apparently a substantive right under Georgia's Workers' Compensation Act has previously survived constitutional challenges.²⁴ Moreover, the retroactive modification of workers' compensation subrogation rights has been upheld in other states.²⁵

C. *Enhancement of Civil and Criminal Penalties*

The Board has long possessed the authority to assess penalties for failure to follow directives, for making false or misleading statements, or for failure to comply with the insurance requirements of the Act.²⁶ The magnitude of the penalties was increased in 1995 from a range of \$500 to \$5,000 to a range of \$1,000 to \$10,000 for intentionally making false or misleading statements or representations for the purpose of obtaining or denying any benefit or payment under the Act.²⁷ The

20. O.C.G.A. § 34-9-11.1(c) (Supp. 1995).

21. *Id.*

22. *Id.*

23. *See id.* § 34-9-11.1(e).

24. In *Canton Textile Mills v. Lathem*, 253 Ga. 102, 317 S.E.2d 189 (1984), the supreme court found that the retroactive modification of the statute of limitations in byssinosis cases under O.C.G.A. § 34-9-281 was not unconstitutional. 253 Ga. at 105, 317 S.E.2d at 193.

25. In a state facing a similar "re-assignment problem," the Arizona legislature remedied the problem by modifying the statute to allow for re-assignment. *See ARIZ. REV. STAT. ANN. § 23-1023(B)*. The fact that it did so retroactively was upheld. *Stirewalt v. P.P.G. Indus., Inc.*, 674 P.2d 320, 323 (Ariz. 1984) (the legislation affected remedial matters not substantive rights).

26. O.C.G.A. § 34-9-18 (1978).

27. *Id.* § 34-9-18(b) (Supp. 1995).

penalty may be further enhanced with the assessment of the cost of collection against the offending party.²⁸ Note that the new provision in O.C.G.A. section 34-9-18(f) directs that the payment of any penalties be made to the General Fund of the State of Georgia, rather than to the Subsequent Injury Trust Fund.²⁹

Likewise, while criminal sanctions remain a misdemeanor punishable by incarceration of up to one year,³⁰ the potential fine imposed upon a finding of guilt for intentionally making a false or misleading statement or representation for the purpose of facilitating the obtaining or denying of any benefit or payment under the Act was increased from a range of \$500 to \$5,000 to a range of \$1,000 and to \$10,000 per violation, as well as the assessment of the costs of investigation and prosecution.³¹

D. Creation of Fraud and Compliance Unit

A new code section, O.C.G.A. section 34-9-24, was added to provide for the establishment of an office within the State Board of Workers' Compensation that will be known as the "Fraud and Compliance Unit."³² This unit is designed by statute to assist the Chairman of the State Board in investigating allegations of fraud and non-compliance as well as developing and implementing programs to prevent fraud and abuse.³³ While the unit itself will have no prosecutorial authority, the unit is required by statute to promptly notify the appropriate prosecuting attorney's office of any action which involves criminal activity.³⁴ This new code section also contains an immunity provision which should protect any employee or agent of the Board in the execution of their activities in this unit against civil liability for libel, slander, or any other relevant tort.³⁵

E. Workers' Compensation Truth in Advertising Act of 1995

Following the lead of several other states, including California,³⁶ the General Assembly adopted what shall be known as the Workers' Compensation Truth in Advertising Act of 1995 and codified the

28. *Id.* § 34-9-18(e).

29. *Id.* § 34-9-18(f).

30. *Id.* § 34-9-19 (1973).

31. *Id.* § 34-9-19.

32. *Id.* § 34-9-24.

33. *Id.*

34. *Id.* § 34-9-24(a).

35. *Id.* § 34-9-24(b).

36. Workers' Compensation Truth in Advertising Act of 1992, CAL. LAB. CODE §§ 5430-5434 (West 1995).

provisions at O.C.G.A. sections 34-9-30 through 34-9-32.³⁷ The stated purpose of the Act is "to assure truth and adequate disclosure of all material and relevant information in advertising which solicits persons to engage or consult an attorney or a medical care provider for the purpose of asserting a workers' compensation claim."³⁸ The provisions apply only to "television advertisement, with broadcast originating in this state, which solicits persons to file workers' compensation claims or to engage or consult an attorney, a medical care provider, or clinic for the purpose of giving consideration to a workers' compensation claim or to market workers' compensation insurance coverage"³⁹ Note that this provision applies not only to attorneys and medical providers, but also to any entity that seeks to "market workers' compensation insurance coverage."⁴⁰

In any of these circumstances, the Act requires the following notice in Roman font boldface thirty-six point type: "Willfully making a false or misleading statement or representation to obtain or deny workers' compensation benefits is a crime carrying a penalty of imprisonment and/or a fine of up to \$10,000.00."⁴¹ Anyone violating this provision is subject to a fine of between \$1,000 and \$10,000 for each violation.⁴²

F. Empowering the Board to Force Participation in Mediation

The implementation of broad-based mediation has been one of the most significant developments in the last two years. However, the Board was technically without the legal authority to force mediation. O.C.G.A. section 34-9-100, relating to the Board's powers, has been modified to empower the Board to force mediation under the supervision and guidance of the Board.⁴³

G. Renewing the Admissibility of Medical Records

One of the features of the Workers' Compensation Act that avoided undue expense and burden was the hearsay exception for medical reports embodied in O.C.G.A. section 34-9-102(e)(2).⁴⁴ This exemption saved a substantial amount of time and money by avoiding the necessity of either deposing medical practitioners or subpoenaing them to the

37. O.C.G.A. §§ 34-9-30 to -32 (Supp. 1995).

38. *Id.* § 34-9-30(b).

39. *Id.* § 34-9-31.

40. *Id.*

41. *Id.*

42. *Id.* § 34-9-32(a).

43. *Id.* § 34-9-100(b).

44. *Id.* § 34-9-102(e)(2) (1992).

hearing. While this provision had been in existence for two decades, the court of appeals drew into question whether anything other than actual signed office notes would be admissible in *Georgia Power Co. v. Leonard*.⁴⁵ The decision in *Leonard* made it virtually impossible to use letters or notes from physicians, including letters or notes which commented specifically on an employee's ability to do certain forms of light-duty work or normal-duty work.⁴⁶

O.C.G.A. section 34-9-102(e)(2) has been modified to overcome this problem by applying the hearsay exception to any "document" which contains an "opinion relevant to any medical issue,"⁴⁷ and the modification is specifically applied retroactively as well as prospectively.⁴⁸ This should allow the return to our normal practice in the utilization of medical documentation without the necessity of a deposition or the subpoena of medical providers to hearings. This amendment is retroactive since it is clearly procedural.

H. *Modifying the Definition of Catastrophic Injury*

The definition of catastrophic injury became extremely important with the 1992 reform legislation that imposed a 400-week cap,⁴⁹ deleted the requirement for mandatory vocational rehabilitation,⁵⁰ and allowed a shift to temporary partial disability benefits after fifty-two consecutive or seventy-eight aggregate weeks of release to work with limitations,⁵¹ all in noncatastrophic cases.⁵² The proverbial "safety-net" definition in the list of catastrophic injuries relied heavily upon determinations of disability that were imposed by the Social Security Administration.⁵³

A great deal of debate ensued over whether or not determinations by the Social Security Administration would be binding in a workers' compensation proceeding. The claimant's bar desired to have all individuals receiving Social Security Disability Income ("SSDI") benefits automatically categorized as catastrophic for purposes of workers' compensation. However, from a technical standpoint, the requirements

45. 215 Ga. App. 383, 451 S.E.2d 74 (1994).

46. *Id.* at 384, 451 S.E.2d at 75.

47. O.C.G.A. § 34-9-102(e)(2) (Supp. 1995).

48. *Id.*

49. O.C.G.A. § 34-9-261 (1992).

50. *Id.* § 34-9-200.1.

51. *Id.* § 34-9-240.

52. *See supra* notes 49-51.

53. O.C.G.A. § 34-9-200.1(g)(6) (1992).

in Georgia law related to collateral estoppel would appear to bar such an argument.⁵⁴

In an effort to avoid the onslaught of coming litigation over this issue, the catch-all definition found at O.C.G.A. section 34-9-200.1(g)(6) has been modified to read as follows:

Any other injury of a nature and severity that prevents the employee from being able to perform his or her prior work or any work available in substantial numbers within the national economy. A decision granting or denying disability income benefits under Title II or supplemental security income benefits under Title XVI of the Social Security Act shall be admissible in evidence and the board shall give the evidence the consideration and deference due under the circumstances regarding the issue of whether the injury is a catastrophic injury.⁵⁵

Note that the definition in the first sentence of this paragraph is in essence the social security criteria.⁵⁶ However, it allows the State Board of Workers' Compensation to apply the social security criteria for total disability rather than creating an argument that the State Board is limited to following the determination made by the Social Security Administration as a result of a proceeding where all parties to the workers' compensation claim would not have been present. It also facilitates acknowledgment of the Social Security Administration's determination without making that determination binding on the parties in the workers' compensation proceeding.

The Social Security Administration's determinations will be a two-edged sword. They will be admissible when the Social Security Administration determines that the person is not totally disabled to the same extent that they will be admissible to argue that the claimant is totally disabled and meets the criteria for disability income benefits under the Social Security Act.

I. Penalty for Late Payment of Medical Expenses

It has long been the Board's practice to assess penalties for the late payment of medical expenses. This was imposed through Board Rule, but a strict analysis of the Workers' Compensation Act failed to reveal

54. See generally *Ervin v. Swift Adhesives, Inc.*, 208 Ga. App. 265, 430 S.E.2d 133 (1993); *McFadden Business Publications, Inc. v. Guidry*, 177 Ga. App. 885, 341 S.E.2d 294 (1986) (collateral estoppel doctrine applicable to hearings of State Board of Workers' Compensation). The SSDI proceeding would likely not comply because the employer is not a party to that proceeding.

55. O.C.G.A. § 34-9-200.1(g)(6) (Supp. 1995).

56. See 42 U.S.C.A. § 1382(a)(3)(A), (B) (1994).

any legislative authority for this penalty. O.C.G.A. section 34-9-203 has been modified to empower the Board with authority to impose penalties for late payment of reasonable medical charges, but only in specific circumstances.⁵⁷ That code section reads as follows:

The board may, in its discretion, assess a penalty of up to 20 percent of reasonable medical charges not paid within 60 days from the date that the employer or the employer's workers' compensation insurance carrier receives the charges and reports required by the board, where there has been compliance with the requirements of law and board rules. Said penalty shall be payable to the medical provider.⁵⁸

If the medical expenses are received along with the appropriate Board forms,⁵⁹ then payment of the charges as adjusted in accordance with the fee schedule⁶⁰ must be made within sixty days to avoid up to a twenty percent penalty.⁶¹ Unlike other penalties within the Act, the amount of this penalty is discretionary with a maximum of twenty percent and is not automatic.⁶²

J. Alien Dependent Death Benefits

O.C.G.A. section 34-9-265 is one of the provisions in the Workers' Compensation Act that addresses the entitlement of dependents to benefits upon the death of an employee injured in a work-related injury.⁶³ That code section has long differentiated between dependents who are citizens of the United States or Canada and dependents who are not.⁶⁴ This issue has been controversial and was specifically addressed in *Barge-Wagener Construction Co. v. Morales*,⁶⁵ when the court of appeals held that the differentiation was not unconstitutional.⁶⁶ However, the General Assembly has now deleted paragraph five of O.C.G.A. section 34-9-265(b), entitling non-resident aliens of the United States or Canada to the same dependency benefits upon the death of an injured employee as all other dependents.⁶⁷ The issue of citizenship

57. O.C.G.A. § 34-9-203(c) (Supp. 1995).

58. *Id.*

59. Board Rule 205.

60. Board Rule 203.

61. O.C.G.A. § 34-9-203(c) (Supp. 1995).

62. *Id.*

63. *Id.* § 34-9-265.

64. *Id.* § 34-9-265(b)(5) (1992).

65. 263 Ga. 190, 429 S.E.2d 671 (1993).

66. *Id.* at 192, 429 S.E.2d at 673.

67. O.C.G.A. § 34-9-265 (Supp. 1995).

and residency is no longer relevant for purposes of analyzing entitlement to death benefits.

K. SITF Receives No Payment Upon Death With No Dependents

Consistent with the provision directing the payment of all fines and penalties to the General Treasury, O.C.G.A. section 34-9-265(f) has been amended to direct the payment of \$10,000 in instances of no dependency after death to the General Fund of the State Treasury rather than to the Subsequent Injury Trust Fund.⁶⁸

L. Temporary or Leased Employees

While not a part of the legislative package submitted by the Chairman of the State Board of Workers' Compensation, the exclusive remedy doctrine's application to leased and temporary employee situations was specifically addressed by the addition of O.C.G.A. section 34-9-11(c), which reads as follows:

The immunity provided by this subsection shall apply and extend to the businesses using the services of a temporary help contracting firm, as such term is defined in Code Section 34-8-46, or an employee leasing company, as such term is defined in Code Section 34-8-32, when the benefits required by this chapter are provided by either the temporary help contracting firm or the employee leasing company or the business using the services of either such firm or company. A temporary help contracting firm or an employee leasing company shall be deemed to be a statutory employer for the purposes of this chapter.⁶⁹

In the leased employee or temporary employee situation, this would seem to remove the necessity of engaging in a "borrowed servant" analysis,⁷⁰ since there is no longer any requirement that the substitute employer have the right to terminate the employee's services. The mere presence of a leased employee or temporary employee situation, coupled with one of the parties involved in providing workers' compensation coverage, will extend the exclusive remedy to all entities involved.⁷¹ However, deeming the otherwise borrowed servant to be a "statutory

68. *Id.* § 34-9-265(f) (Supp. 1995); *see also* O.C.G.A. § 34-9-358 (Supp. 1995) (which has been amended to delete the SITF's entitlement to these funds).

69. O.C.G.A. § 34-9-11(c) (Supp. 1995).

70. *See* *Sheets v. J.H. Heath Tree Serv., Inc.*, 193 Ga. App. 278, 387 S.E.2d 155 (1989); *Six Flags Over Georgia v. Hill*, 247 Ga. 375, 276 S.E.2d 572 (1981).

71. O.C.G.A. § 34-9-11 (Supp. 1995).

employee⁷² of the company could create some exposure in tort for actions brought against co-employees of the leasing company.⁷³

M. Employees of the Atlanta Committee for the Olympic Games

The General Assembly enacted O.C.G.A. section 34-9-2.4,⁷⁴ which specifically provides that any person who performs voluntary service without pay for the Atlanta Committee for the Olympic Games or for the Atlanta Para-Olympic Organizing Committee shall be deemed an employee of the organization for purposes of workers' compensation while performing such service.⁷⁵ This provision will sunset on December 31, 1997.⁷⁶

III. HEART ATTACK CLAIMS

Heart attack claims have always been among the most difficult types of workers' compensation cases to analyze. Since the court of appeals decision in *A & P Transportation v. Warren*,⁷⁷ which was reported in last year's survey article,⁷⁸ there has been much debate among practitioners concerning whether the law in this area has expanded to create a greater scope of recovery.

The two cases issued during the survey period do not build upon the decision in *Warren*, but illustrate how fact-sensitive these cases are, and how unwilling Georgia's appellate courts have been to establish bright-line tests for recovery. With the controversy surrounding heart attack claims, and the efforts to amend the so-called "heart attack statute,"⁷⁹ this portion of the article will briefly review how the law has developed regarding heart attack claims and analyze the particular tensions that affect these cases.

A. *The "Heart Attack Statute"*

Before 1963, Georgia's workers' compensation statute dealt with heart attack claims as with any other type of injury, meaning that to be compensable the claimant's heart condition must have been shown by a preponderance of the evidence to "arise out of and in the course of

72. See *id.* § 34-9-8.

73. See *Rothrock v. Jeter*, 212 Ga. App. 85, 441 S.E.2d 88 (1994).

74. 1995 Ga. Laws 852.

75. O.C.G.A. § 34-9-2.4(a) (Supp. 1995).

76. *Id.* § 34-9-2.4(b).

77. 213 Ga. App. 60, 443 S.E.2d 857 (1994).

78. See H. Michael Bagley, Daniel C. Kniffen & John G. Blackmon, Jr., *Workers' Compensation*, 46 MERCER L. REV. 566 (1994).

79. O.C.G.A. § 34-9-1(4) (1994).

employment."⁸⁰ With the advancement of medical science, however, and the understanding that heart attacks are almost always the end result of a prolonged disease process known as atherosclerosis, the legislature acted in 1963 to exclude from the definition of "injury" under the Workers' Compensation Act: "Heart disease, heart attack, the failure or occlusion of any of the coronary blood vessels, or thrombosis, unless it is shown by preponderance of competent and creditable evidence that it was attributable to the performance of the usual work of employment."⁸¹

This amendment to the Workers' Compensation Act has remained in this form, with only grammatical changes, since its inception. From its wording, the statute appears to place a higher burden of proof on the claimant to recover for a heart attack, since the statute requires proof by "preponderance of competent and credible evidence," rather than the standard proof by simple preponderance of the evidence.⁸² Moreover, the Legislature obviously would not see fit to exclude heart attacks and heart disease from the definition of injury under the Workers' Compensation Act except under certain circumstances if it did not intend a somewhat higher burden of proof in such cases. In interpreting the statute over the last thirty years, however, neither the Georgia Supreme Court nor the Georgia Court of Appeals has applied this statute restrictively. To the contrary, the courts have uniformly interpreted the statute as placing broad discretion with the State Board of Workers' Compensation to determine the compensability of heart attack claims.⁸³

B. Sources of Evidence: Medical Opinion, Lay Observation, and the "Natural Inference Through Human Experience"

Even before the 1963 amendment, Georgia courts recognized three forms of evidence from which the trier of fact could determine whether or not a heart attack is work-related: (1) medical opinion, (2) lay observation and opinion, and (3) the "natural inference through human experience."⁸⁴

With the passage of the heart attack statute, Georgia courts continued to emphasize these three sources of evidence as the focus for determining whether a heart attack is compensable under the Workers' Compensa-

80. *Thompson-Weinman Co. v. Yancey*, 90 Ga. App. 213, 82 S.E.2d 725 (1954); *Maryland Casualty Co. v. Dixon*, 83 Ga. App. 172, 63 S.E.2d 272 (1951).

81. GA. CODE ANN. § 114-102 (1963), now codified at O.C.G.A. § 34-9-1(4).

82. O.C.G.A. § 24-1-1(5) (1863).

83. See *A & P Transp. v. Warren*, 213 Ga. App. 60, 443 S.E.2d 857 (1994).

84. See *McDaniel v. Employers' Mutual Liab. Ins. Co.*, 104 Ga. App. 340, 343, 121 S.E.2d 801, 804 (1961).

tion Act. The history of the heart attack statute, and the first fifteen years of its interpretation, is well summarized in the 1978 supreme court case, *Guye v. Home Indemnity Co.*⁸⁵ In reviewing the body of case law that developed following the 1963 amendment, the supreme court noted:

It is well recognized in "heart attack" cases that it is often difficult for the trier of fact to find the line between a noncompensable heart injury that is a symptom of an existing disease merely manifested during job exertion, and a compensable heart injury to which the job exertion was a contributing precipitating factor The generalized and complex nature of a heart injury may prevent causation from being conclusively attributed to the work performed.⁸⁶

In *Guye*, therefore, the supreme court identified the dividing line that is ultimately the source of all tension in heart attack claims: determining when the pre-existing disease process stops and work-related causation begins.

In *Guye*, the supreme court was called upon to address whether the 1963 statute prohibited a finding of compensability based upon "natural inference" alone.⁸⁷ Rather than interpreting the statute as establishing bright-line rules, the court concluded that "whatever the effect of the 1963 amendment, its impact was primarily if not exclusively directed to the trier of fact in workmen's compensation cases."⁸⁸ The court therefore held that determinations of compensability can be made strictly upon the natural inference from the evidence alone, where the medical evidence offered is in conflict.⁸⁹

C. *The Elusive Boundaries of Compensability*

With the rule in *Guye* that the heart attack statute is designed primarily as a guide for the finder of fact, subsequent decisions have established few boundaries for the compensability of heart attack claims, and have tended to focus upon whether there was sufficient evidence to support the Board's decision under the "any evidence" standard of review.⁹⁰ Two exceptions are that the natural inference rule may not

85. 241 Ga. 213, 244 S.E.2d 864 (1978).

86. *Id.* at 215, 244 S.E.2d at 866.

87. *Id.*

88. *Id.*

89. *Id.* at 217, 244 S.E.2d at 867. The court specifically declined to consider whether the "natural inference" rule could be utilized where the medical evidence was uncontradicted that the heart attack was not work-related, thereby failing to resolve a conflict that remains to this day. See *Thomas v. U. S. Casualty Co.*, 218 Ga. 493, 128 S.E.2d 749 (1962).

90. Generally, decisions of the State Board of Workers' Compensation must be affirmed on appeal if there is "any evidence" to support them. *Howard Sheppard, Inc. v. McGowan*,

be utilized to find a heart attack compensable where the first symptoms of the attack occur at a time when the employee is not engaged in the employer's business,⁹¹ and that mere symptoms of the underlying heart disease, such as angina pectoris, are not compensable.⁹² Most cases, however, have steadily expanded the scope of the heart attack statute.

For example, in *Zippy Mart, Inc. v. Fender*,⁹³ a claimant's coronary bypass operation was found to be a compensable "accident" arising out of and in the course of his employment because of evidence that the claimant's stress at work accelerated or perhaps even caused his underlying heart disease. An award of benefits was also upheld even though the exact date of the claimant's heart attack could not be medically determined, given other evidence that the claimant's work was physically and emotionally stressful and that she experienced severe chest pain while at work.⁹⁴ Medical testimony that the claimant's work-connected emotional stress "might or could have contributed"⁹⁵ to his heart attack was sufficient to support an award of benefits.⁹⁶ Against this backdrop, the decision in *A & P Transportation v. Warren*,⁹⁷ is little more than a continuation of the court's unwillingness to utilize the requirements of the heart attack statute as a means of imposing distinct boundaries of compensability for heart attack claims.

In *Warren*, the theory of recovery was that the claimant's work as a long-haul truck driver contributed, at least in part, to his development of atherosclerotic heart disease because his work made it difficult for him to exercise on any regular basis or to obtain healthy, low-cholesterol food.⁹⁸ The court of appeals was badly split in the decision in *Warren*⁹⁹ and again struggled with upholding a causal relationship to the claimant's employment (which entailed lack of exercise and poor nutrition) that even the majority recognized "constitutes a hazard to which people are exposed apart from employment."¹⁰⁰ Ultimately,

137 Ga. App. 408, 224 S.E.2d 65 (1976).

91. *Southwire Co. v. Cato*, 250 Ga. 895, 302 S.E.2d 91 (1983).

92. *Carter v. Kansas City Fire & Marine Ins. Co.*, 138 Ga. App. 601, 226 S.E.2d 755 (1976).

93. 170 Ga. App. 617, 317 S.E.2d 575 (1984).

94. *Southwire Co. v. Eason*, 181 Ga. App. 708, 353 S.E.2d 567 (1987).

95. *City Council of Augusta v. Williams*, 137 Ga. App. 177, 178, 223 S.E.2d 227, 228 (1976).

96. *Id.*

97. 213 Ga. App. 60, 443 S.E.2d 857 (1994).

98. *Id.* at 61, 443 S.E.2d at 859.

99. *Id.* at 64, 443 S.E.2d at 860-61. (Indeed, the original majority opinion was in favor of denying the claim, but the court reversed itself upon motion for reconsideration.)

100. *Id.*, 443 S.E.2d at 860.

however, the majority of the court determined not to interfere with the fact-finding authority of the State Board.

The case of *Sutton v. B & L Express*¹⁰¹ provides an interesting contrast to the decision in *Warren*, in that like *Warren*, *Sutton* was a long-haul truck driver who began to feel sick while completing his delivery and was subsequently diagnosed as suffering a heart attack.¹⁰² Unlike *Warren*, however, the State Board denied benefits, finding that the claimant's heart attack was the result of multiple, non-work-related risk factors for coronary disease, including hypertension, cigarette abuse, and obesity.¹⁰³ It was further noted that the claimant's physician testified only that stress from the claimant's job could have been a causative factor in his heart attack, but did not reach any conclusions on this point.¹⁰⁴ While presumably the Board could have found in favor of the claimant on this evidence, the court of appeals upheld the denial of the benefits, holding that the evidence in the record was sufficient for the Board to find no causal relationship and in fact cited the decision in *Warren* as authority.¹⁰⁵ With very similar facts, therefore, completely opposite results were achieved and affirmed in *Warren* and *Sutton*.

Similarly, in *Sewell v. Bill Johnson Motors, Inc.*,¹⁰⁶ an award of benefits was upheld based upon evidence submitted to the State Board that the claimant's job as a service department manager was stressful and contributed to his fatal heart attack. Although no autopsy was performed on the claimant, the testimony of a physician retained to review the claimant's medical records that job-related stress could have been the precipitating factor in the claimant's heart attack was considered competent and credible evidence upon which the Board could award compensation.¹⁰⁷

Although the cases of *Sewell* and *Sutton* do not break any new ground, they are illustrative of the tensions that exist in defining the compensability of heart attack claims under Georgia's Act.¹⁰⁸ *Sutton*, although barely distinguishable from *Warren* on its facts, nevertheless yields a contrary result, underscoring the lack of consistency which is common

101. 215 Ga. App. 394, 450 S.E.2d 859 (1994).

102. *Id.* at 395, 450 S.E.2d at 861.

103. *Id.*

104. *Id.*

105. *Id.*

106. 213 Ga. App. 853, 446 S.E.2d 239 (1994).

107. *Id.* at 853, 446 S.E.2d at 239.

108. *Sewell v. Bill Johnson Motors, Inc.*, 213 Ga. App. 853, 446 S.E.2d 239; *Sutton v. B. & L. Express*, 215 Ga. App. 394, 450 S.E.2d 859.

place in so-called stress claims.¹⁰⁹ Apart from the fact that there is substantial medical debate whether emotional stress plays a significant role in the development of atherosclerotic disease, proving what is, or is not, stressful to any particular individual is virtually impossible. The highly subjective, and often times self-serving, nature of testimony concerning job-related stress makes it all the more difficult to obtain an accurate gauge for the true causes of an individual heart attack. The decisions in *Sutton* and *Sewell*, like the decision in *Warren*, are reminders that until the legislature sees fit to amend the heart attack statute, heart attack claims will remain extraordinarily fact-sensitive and, therefore, largely unpredictable.

IV. PSYCHOLOGICAL INJURIES

Perhaps the most controversial decision to come from the survey period was the case of *George v. Southwire Co.*,¹¹⁰ which raises disturbing questions concerning the compensability of claims for psychiatric disability.

George, a truck driver for the Southwire Company, sustained minor injuries to his right knee, hip, and chest when his truck struck another vehicle that pulled in front of his.¹¹¹ The female passenger of the other vehicle was killed instantly, while the driver was seriously injured. George was taken to the hospital, where he was put in the same room with the injured driver, who was "gurgling and hollering for the deceased woman."¹¹² George became so upset that he had to be removed from the room.

George recovered quickly from his minor physical injuries and was released to return to work without restriction. When he was asked to drive again, however, he was mentally unable to do so and was subsequently diagnosed as suffering from post-traumatic stress disorder.¹¹³ The treating psychiatrist testified that the claimant's post-traumatic stress disorder was primarily caused by what George observed during the accident, but was intensified and prolonged by his knee injury, which acted as a recurrent reminder.¹¹⁴

The Administrative Law Judge ("ALJ") found that the claimant's psychological problems were caused by witnessing the events, and not

109. 215 Ga. App. at 396, 450 S.E.2d at 864.

110. 217 Ga. App. 586, 458 S.E.2d 362 (1995).

111. *Id.* at 587, 458 S.E.2d at 362.

112. *Id.*

113. *Id.*

114. *Id.*

by any of his specific physical traumas.¹¹⁵ The ALJ, therefore, denied the claim for disability based upon the claimant's post-traumatic stress disorder as not arising from a discernible physical injury.¹¹⁶ This decision was affirmed by the Full Board (now known as the Appellate Division) and the superior court.

A three judge panel of the court of appeals reversed, finding: "[a]lthough this physical injury is not the cause of his mental disability, it is part of the reason for its continuation."¹¹⁷ The court's holding is perplexing for several reasons. First, the statement that the claimant's physical injuries were both "not the cause of his mental disability" and yet a "part of the reason for its continuation" would seem to be contradictory.¹¹⁸ Either the claimant's physical injuries caused the claimant's mental disability or they did not. Second, the court's conclusion would appear to be at odds with the well-established any evidence rule,¹¹⁹ which provides that findings of fact by the State Board must be affirmed if there is any evidence to support them. Given the Board's express finding that the claimant's psychiatric disability stemmed from his psychic trauma, and not his physical injuries,¹²⁰ the court of appeals conclusion that the claimant's physical injuries played some role in the claimant's psychiatric disability both violates the any evidence rule and inserts the court of appeals as the finder of fact.

Third, and perhaps of most concern, the court's holding is at odds with well-established precedent requiring a psychiatric disability to be directly related to a compensable physical injury and as a result may spawn increasing litigation over the compensability of so-called stress claims.¹²¹ It has been well-settled in Georgia that, to be compensable under the Workers' Compensation Act, a claim for psychiatric disability must be directly related to a discernible physical injury.¹²² The court in *George* acknowledges this precedent, but cites several older cases for the proposition that a psychiatric disability is still compensable provided there is some physical injury involved, even if the physical injury does

115. *Id.*

116. *Id.*

117. *Id.* at 588, 458 S.E.2d at 363.

118. *Id.*

119. *See* *Howard Sheppard, Inc. v. McGowan*, 137 Ga. App. 408, 224 S.E.2d 65 (1976).

120. *George v. Southwire Co.*, 217 Ga. App. at 588, 458 S.E.2d at 363.

121. Other jurisdictions have hotly debated the impact of mental stress claims on their workers' compensation systems. *See* A. V. Matsumoto, *Reforming the Reform: Mental Stress Claims Under California's Workers' Compensation System*, 27 LOY. L.A. L. REV. 1327 (1994).

122. *W.W. Fowler Oil Co. v. Hamby*, 192 Ga. App. 422, 385 S.E.2d 106 (1989); *Hanson Buick, Inc. v. Chatham*, 163 Ga. App. 127, 292 S.E.2d 428 (1982).

not directly cause the psychiatric disability.¹²³ Such a conclusion would certainly constitute a change in Georgia law, and is not consistent with the cases cited by the court.

For example, the court cites *Indemnity Insurance Co. of North America v. Loftis*¹²⁴ for the proposition that "if a disability exists, whether or not it is physical or mental, if it is real and is brought on by the accident and injury, this being a humane law and liberally construed, it is nevertheless compensable."¹²⁵ The decision in *Loftis*, however, did not hold that a psychiatric disability from a psychic trauma is compensable. To the contrary, *Loftis* involved a claim of psychiatric disability directly related to a back injury and was reversed only because the administrative law judge made an erroneous placement of the burden of proof.¹²⁶ The court in *George* also cites *Howard v. Superior Contractors*¹²⁷ as analogous in that "claimant George's mental disability was brought on by a compensable accident in which he was physically injured."¹²⁸ Quite unlike the facts in *George*, however, the claimant in *Howard* was found to suffer from post-traumatic stress syndrome as a result of the physical injury sustained in his 225 foot fall from a tower at Three Mile Island.¹²⁹ The decision in *Howard*, therefore, can hardly be support for the proposition that a psychiatric disability produced by purely psychic trauma is compensable.

There is little room for argument that the claimant's psychiatric injury in *George* was both legitimate and at least temporarily disabling, and it may be that the court of appeals decision falls within that well-known genre of cases in which bad facts make bad law. Yet, *George* is quite difficult to align with prior cases and is certainly contrary to the court's specific comments in *Hanson Buick, Inc. v. Chatham*:

We do not necessarily agree, however, that the "sophistication and accuracy of psychiatric diagnoses and treatment" is so very great; nor, if it were, could it overcome the clear-cut logic and pervasive public policy underlying the requirement that to be compensable psychological injury or disease must result "naturally and unavoidably" from some discernable physical occurrence. Regardless of what other states may perceive to be reasonable interpretations and functions of their

123. *George v. Southwire Co.*, 217 Ga. App. 586, 458 S.E.2d 362 (1995).

124. 103 Ga. App. 749, 120 S.E.2d 655 (1961).

125. 217 Ga. App. at 587-88, 458 S.E.2d at 363. Note also that O.C.G.A. § 34-9-23, created July 1, 1994, provides that "the provisions of this chapter shall be construed and applied impartially to both employers and employees."

126. 103 Ga. App. at 751, 120 S.E.2d at 656.

127. 180 Ga. App. 68, 348 S.E.2d 563 (1986).

128. 217 Ga. App. at 588, 458 S.E.2d at 363.

129. *Howard v. Superior Contractors*, 180 Ga. App. at 68, 348 S.E.2d at 563.

Workers' Compensation Acts, the allowance of compensation for psychological disorder arising out of psychological injury, even if it were easily proved, could make mischief not remotely intended by the beneficent objectives of our Act.¹³⁰

Certiorari was granted and oral argument was presented to the supreme court on January 16, 1996. The decision should be interesting in light of the fact that the chief justice is already on record as opposed to the long-standing physical injury requirement for claims of psychiatric disability.¹³¹

V. CASE LAW DEVELOPMENTS

A. Accident Arising Out of Employment

When an employee is found dead in a place where he is reasonably expected to be while in the performance of his job duties, and the cause of death is unexplained, there may be a presumption that it arose out of the employment.¹³² The law allows for the presumption to assist the dependents in meeting their burden of proof since the witness to the incident is unavailable to give testimony regarding the causal connection.¹³³ As for causation, it is the "precipitating rather than the immediate causative factor" which must be unexplained.¹³⁴ If the precipitating causative factor in the death is known, and explained, then presumption is unnecessary simply because the question of whether the death arose out of the employment is capable of being proved by other objective evidence.¹³⁵

In *Publisher's Circulation Fulfillment, Inc. v. Bailey*,¹³⁶ the employee was found unconscious in his automobile inside the employer's warehouse six minutes after his shift began. The immediate cause of death, acute carbon monoxide intoxication, was known, but the precipitating cause was unknown.¹³⁷ Thus, the ALJ applied the presumption and, after doing so, found that the accident arose out of and in the course of

130. *Hanson Buick, Inc. v. Chatham*, 163 Ga. App. 127, 129, 292 S.E.2d 428, 430 (1982).

131. See *Williams v. ARA Environmental Servs., Inc.*, 175 Ga. App. 661, 334 S.E.2d 192 (1985) (Benham, J., dissenting).

132. *Odom v. Transamerica Ins. Group*, 148 Ga. App. 156, 251 S.E.2d 48 (1928).

133. *General Accident & Fire Ins. Co. v. Sturgis*, 136 Ga. App. 260, 221 S.E.2d 51 (1975).

134. *Zamora v. Coffee General Hosp.*, 162 Ga. App. 82, 85, 290 S.E.2d 192, 194 (1985).

135. *Id.*

136. 215 Ga. App. 136, 449 S.E.2d 645 (1994).

137. *Id.* at 136, 449 S.E.2d at 646.

employment.¹³⁸ The employer appealed, arguing that Bailey was not found in a place where he reasonably should have been and that his death did not arise from his employment.¹³⁹ The court of appeals rejected both arguments, noting that not only was Bailey found in a place where he might reasonably be expected in the performance of his duties, but the precipitating causative factor was, in fact, unknown. The employer's contention that Bailey died because he left his car running in an enclosed garage could be reached only by drawing certain inferences from circumstantial evidence. In addition to the fact that the ALJ, as the fact finder, rejected these inferences, the court of appeals went on to say that mere inferences are not sufficient to overcome the presumption, which can be rebutted only by competent evidence.¹⁴⁰

B. Any Evidence

The question of whether a physical condition is work-related is clearly one for the State Board. In *J&L Foods v. Brooks*,¹⁴¹ the Board found that the claimant's carpal tunnel syndrome was not related to her employment. Because there was evidence in the record to support such a finding, the superior court was without authority to reverse even though Brooks was supported by one physician who related the condition to her work.¹⁴² It is a well settled principle that the superior court does not have the authority to delve into the record and weigh evidence.¹⁴³

In the event evidence is stipulated as being undisputed before the Board, and a finding is made based on that stipulation, the superior court may reverse only if there is "precedential law that under identical evidence a certain legal conclusion, or 'legal inference' . . . is demanded . . ." ¹⁴⁴ As with any findings of fact by the Board, the any evidence rule will be applied to stipulated facts. Thus, and if nothing else, the court's decision in *Hughes* alerts practitioners to be cautious when stipulating to certain facts at the evidentiary hearing.

138. *Id.* at 137, 447 S.E.2d at 646.

139. *Id.*

140. *Id.* at 138, 449 S.E.2d at 648.

141. 214 Ga. App. 438, 448 S.E.2d 19 (1995).

142. *Id.* at 438, 448 S.E.2d at 20.

143. *Howard Sheppard, Inc. v. Howard*, 137 Ga. App. 224, S.E.2d 65 (1976).

144. *Conquest Carpet Mills, Inc. v. Hughes*, 215 Ga. App. 400, 400, 450 S.E.2d 865, 866 (1994).

C. Appeals

As seen in *Fulton County Board of Workers' Compensation v. Robinson*,¹⁴⁵ the sixty day rule as set forth in O.C.G.A. section 34-9-105(b) continues to plague appellants at the superior court level. Fulton County timely appealed a decision from the State Board.¹⁴⁶ At a hearing set within sixty days of the appeal, the employee moved for recusal of the superior court judge, who four days later, granted the motion and continued the matter for an additional "90 days, through and including 18 December 1993, to allow for another judge to be assigned to hear the case."¹⁴⁷ When it was finally heard on November 1, 1993, the employee moved to dismiss the appeal on the grounds that the Board's decision was affirmed by operation of law. The superior court agreed and dismissed the appeal.¹⁴⁸ The court of appeals, however, reversed, holding that the continuance by the initial judge "through and including" December 18, 1993 was sufficient to meet the "date certain" requirement of the statute.¹⁴⁹

If an issue is not raised before the Board, but could have been, it cannot be raised at the superior court level to seek a reversal or remand. In *Craig v. Red Lobster Restaurant*,¹⁵⁰ the employer/insurer contended that the employee's psychological problems were not causally related to the accident. The Board found otherwise, and awarded the employee psychological treatment.¹⁵¹ While on appeal to the superior court, the employer/insurer raised another defense, which was that the treatment was unauthorized since the employee failed to use the procedures for a change of physician.¹⁵² The superior court remanded the claim for a determination on this issue, but was reversed by the court of appeals.¹⁵³ The issue should have been raised before the Board.¹⁵⁴

D. Attorney Fees

Although representing an injured employee can certainly be a rewarding experience, it has its problems, one of which is termination

145. 215 Ga. App. 378, 450 S.E.2d 850 (1994).

146. *Id.* at 380, 450 S.E.2d at 850.

147. *Id.*

148. *Id.*

149. *Id.* at 379, 450 S.E.2d at 851.

150. 214 Ga. App. 829, 449 S.E.2d 307 (1994).

151. *Id.* at 829, 449 S.E.2d at 308.

152. *Id.*

153. *Id.*

154. *Id.*

by the client. Unfortunately, this may come after the attorney has performed substantial work while handling the file. In *Gleaton v. Hazelwood Farms, Inc.*,¹⁵⁵ the original attorney was discharged after he obtained an offer of \$15,000 to settle the claim. The employee then hired a second attorney, who eventually settled the matter for \$30,000, which provided for a fee of \$10,000. Although the second attorney attempted to resolve the fee dispute with his counterpart by way of correspondence, no reply was received.¹⁵⁶ The stipulated agreement which was submitted to the Board not only disclosed the identity of the first attorney, but it provided for a division of the fees by binding agreement. In the event no agreement could be reached between counsel, the attorney fees were to be held in escrow until such time as a decision could be reached by the Board. The Appellate Division eventually split the fee, awarding both attorneys \$5,000. The superior court reversed, apparently awarding the second attorney the entire fee. The court of appeals thereafter reversed the superior court, holding that the determination of a reasonable value of services was a finding of fact and, therefore, subject to the any evidence rule.¹⁵⁷ The court distinguished those instances in which prior counsel was unaware of the settlement and was denied an opportunity to object from instances in which the issue of attorney fees was not specifically addressed in the settlement papers.¹⁵⁸

E. Change in Condition

In recent years, workers' compensation cases dealing with change in condition¹⁵⁹ issues have focused on the burden of proof required by both claimants and employers. The 1994-95 survey period continued this trend.

Claimant's Burden of Proof. Perhaps the most significant "change in condition" case during the survey period was *Richardson v. Dennis, Corry, Porter & Thornton*,¹⁶⁰ which established a significant exception to the claimant's burden of proof. In recent cases, the court has emphasized that when a claimant is injured at work, receives workers' compensation disability benefits, returns to work, and later seeks a resumption of disability benefits, he bears the burden of proof to show

155. 214 Ga. App. 825, 449 S.E.2d 170 (1994).

156. *Id.* at 825, 449 S.E.2d at 171.

157. *Id.* at 826, 449 S.E.2d at 171.

158. *Id.*

159. See O.C.G.A. § 34-9-104(a).

160. 216 Ga. App. 476, 454 S.E.2d 643 (1995).

a change in condition, and must specifically show that he has diligently sought suitable employment but was not hired due to the compensable disability.¹⁶¹ In *Richardson*, the claimant, an investigator for a law firm, injured her knee in the course of her employment, returned to work two months later, but then left work again when her knee condition worsened.¹⁶² The claimant was ultimately diagnosed with underlying rheumatoid arthritis exacerbated by her knee injury, and it was found by the administrative law judge that the claimant's arthritic episodes prevented her from working at any job and were the basis for her resigning her job with the law firm.¹⁶³ The administrative law judge and the full board awarded disability benefits, but the superior court reversed, finding that the claimant failed to meet her burden of proof to show a change in condition in that she had not shown a diligent job search for suitable employment.¹⁶⁴

The court of appeals reversed, finding that its earlier cases do not require the claimant to demonstrate a search for work if the claimant is totally disabled: "where an employee, such as appellant, returns to work but subsequently becomes totally disabled due to circumstances related to the earlier work injury, proof of these circumstances satisfies employee's burden to show a change of condition and authorizes an award of compensation."¹⁶⁵ The key distinction, therefore, is simply whether or not the claimant is totally or partially disabled when attempting to prove a change in condition. If only partially disabled, the claimant must still demonstrate a diligent search for suitable employment, and that the claimant was not hired because of restrictions from the on-the-job injury. However, if the claimant is totally disabled from any job, the claimant need not prove what would obviously be a futile job search.

The burden to demonstrate a diligent job search applies regardless of whether the claimant is seeking temporary total or temporary partial

161. See *Aden's Minit Market v. Landon*, 202 Ga. App. 219, 413 S.E.2d 738 (1991); *Evco Plastics v. Burton*, 200 Ga. App. 121, 407 S.E.2d 60 (1991); *Brown v. Georgia Power Co.*, 181 Ga. App. 500, 352 S.E.2d 818 (1987). Practitioners should note, however, that since the initial draft of this Article the requirement that the employee show he was not subsequently hired because of his physical condition was deleted. On October 16, 1995, the supreme court specifically overruled *Landon, supra*. See *Maloney v. Gordon County Farms, Inc.*, 265 Ga. 825, 462 S.E.2d 606 (1995).

162. *Richardson v. Dennis, Corry, Porter & Thornton*, 216 Ga. App. at 476, 454 S.E.2d at 644.

163. *Id.*

164. *Id.* at 477, 454 S.E.2d at 644.

165. *Id.*

disability benefits. In *Gilbert/Robinson v. Meyers*,¹⁶⁶ the claimant sustained work-related injuries to his back and left wrist, received temporary total disability benefits, and returned to work with another employer as a food salesman, making less money than his job as head chef, the position he held when he was injured.¹⁶⁷ When the claimant was fired from his sales job for lack of production, the claimant sought a resumption of his temporary total disability benefits. The administrative law judge, however, found that subsequent to his termination from the sales job, the claimant had neither worked nor looked for work.¹⁶⁸ As a result, the claim for additional disability benefits was denied, and although the full board affirmed this decision, the superior court reversed, remanding the case for a determination of whether the claimant's termination from his job as a food salesman was related to his compensable injury.¹⁶⁹

The court of appeals reversed the decision of the superior court, finding that "whether or not the lack of production was due in part or in whole to any compensable disability during this period of employment is not determinative of [claimant's] right to resumption of benefits following the termination."¹⁷⁰ The court held that it was the claimant's burden of proof to show that, following his termination, he had made a diligent job search and was unable to find employment because of the physical restrictions from his compensable injury.¹⁷¹ The court noted that although some of its previous cases¹⁷² involved claims for resumption of temporary total disability benefits, the requirement of a diligent job search is equally applicable where the request is for resumption of temporary partial disability benefits.¹⁷³

The case of *Dasher v. City of Valdosta*,¹⁷⁴ points out that the claimant's burden of proof in a change in condition case is different than the claimant's burden of proof to show disability from an original accident.¹⁷⁵ Dasher was employed by the City of Valdosta and sustained a work-related aggravation to a pre-existing back condition on April 22,

166. 214 Ga. App. 510, 448 S.E.2d 246 (1994).

167. *Id.* at 511, 448 S.E.2d at 247.

168. *Id.*

169. *Id.* at 511-12, 448 S.E.2d at 247.

170. *Id.* at 512, 448 S.E.2d at 247.

171. *Id.* at 511, 448 S.E.2d at 247.

172. *Aden's Minit Market v. Landon*, 202 Ga. App. 219, 413 S.E.2d 738 (1991); *Evco Plastics v. Burton*, 200 Ga. App. 121, 407 S.E.2d 60 (1991).

173. 214 Ga. App. at 511, 448 S.E.2d at 247.

174. 217 Ga. App. 351, 457 S.E.2d 259 (1995).

175. *Id.* at 352-53, 457 S.E.2d at 261.

1992.¹⁷⁶ This accident occurred only two days before the city landfill at which Dasher worked was closed, and Dasher's position eliminated. Before the accident, Dasher had already decided to retire rather than accept a comparable position at another landfill at a reduced salary.¹⁷⁷ Dasher performed his regular duties for the two days between his accident and the date the landfill closed, and subsequently worked in his own landscaping business, performing virtually the same kind of work as he did at the city landfill.¹⁷⁸ When Dasher filed a claim for total disability benefits, the administrative law judge concluded that he had not shown an inability to procure remunerative employment suitable to his impaired capacity and therefore had not met his burden of proof to show disability from the original work-related injury.¹⁷⁹ On appeal, the court of appeals held that it was the claimant's burden of proof to show by a preponderance of the evidence that he experienced a "loss of earning capacity due to the injury and not due to the employee's unwillingness to work or to the economic conditions of unemployment."¹⁸⁰ Viewing the evidence in the light most favorable to the employer, which prevailed before the board, the court of appeals found that there was sufficient evidence to find that the claimant had not met his burden of proof to show disability.¹⁸¹ Practitioners should note, however, that unlike a claimant's burden of proof in a change in condition case, proof of disability following a compensable injury does not appear to specifically require a search for suitable employment. Having to prove, however, a loss of earning capacity due to the injury and not the employee's unwillingness to work or to economic conditions may make this a distinction without a difference.

Employer's Burden of Proof. Frequently, confusion occurs as to whether it is the employer or the claimant who bears the burden of proof to show a change in condition. This was the case in *Drake v. LaRue Construction Co.*¹⁸² Drake sustained an injury while employed as a manual laborer on a construction site, resulting in a fractured skull and dislocated shoulder.¹⁸³ The employer unilaterally suspended benefits on the ground that Drake returned to work with a different employer,

176. *Id.* at 351, 457 S.E.2d at 260.

177. *Id.* at 352, 457 S.E.2d at 260.

178. *Id.*

179. *Id.*, 457 S.E.2d at 261.

180. *Id.* at 352-53, 457 S.E.2d at 261 (citing *Scandrett v. Talmadge Farms*, 174 Ga. App. 547, 330 S.E.2d 772 (1985)).

181. *Id.*

182. 215 Ga. App. 453, 451 S.E.2d 792 (1994).

183. *Id.* at 453, 451 S.E.2d at 793.

but at the hearing, it was determined that Drake had actually not returned to work.¹⁸⁴ The administrative law judge correctly characterized the claimant's request for additional income benefits as a change in condition, but apparently placed the burden of proof on the claimant based upon Drake's additional assertion that he was disabled from psychological problems related to the injury.¹⁸⁵ The employer denied that claimant's psychiatric problems were work-related, and asserted that they pre-existed the compensable injury.¹⁸⁶

As the court of appeals correctly pointed out, there were actually two issues presented in this case: whether the claimant had undergone a change in condition from his original injury,¹⁸⁷ and whether or not his psychiatric problems were related to the compensable injury.¹⁸⁸ Given the finding that Drake had not returned to work, the burden of proof to show a change in condition was on the employer, not the claimant.¹⁸⁹ It was therefore the employer's burden to show that the claimant was completely recovered from his physical injuries or had suitable employment available to him.¹⁹⁰ The claimant bore the burden of proof on the separate issue of whether his psychiatric problems were causally related to the compensable injury. Practitioners should remember that the burden of proof in change in condition cases is dictated by whether or not the claimant has returned to work.¹⁹¹ If so, it is the claimant who bears the burden of proof to show a change in condition, if not it is the employer who bears the burden.

The employer's burden of proof to show a change in condition remains even if the claimant has undergone a non-work-related supervening accident.¹⁹² In *White v. Nantucket Industries*,¹⁹³ the claimant sustained a work-related wrist injury, returned to work as a sitter for an elderly woman, and was paid temporary partial disability benefits given the fact that she was making less money as a sitter than at her pre-injury job.¹⁹⁴ Subsequently, however, the claimant fell and broke her leg in a non-work-related accident.¹⁹⁵ Following the injury to her leg,

184. *Id.*

185. *Id.* at 454, 451 S.E.2d at 793.

186. *Id.*

187. *Id.*

188. *Id.* at 455, 451 S.E.2d at 794.

189. *Id.* at 454-55, 451 S.E.2d at 793. See *Cornell-Young v. Mentor*, 168 Ga. App. 325, 309 S.E.2d 159 (1983).

190. 215 Ga. App. at 454-55, 451 S.E.2d at 793.

191. *Id.*

192. *White v. Nantucket Indus.*, 214 Ga. App. 542, 448 S.E.2d 278 (1994).

193. 214 Ga. App. 542, 448 S.E.2d 278 (1994).

194. *Id.* at 542-43, 448 S.E.2d at 278.

195. *Id.* at 543, 448 S.E.2d at 278.

the claimant sought continuation of the temporary partial disability benefits she received from her previous employer, but the employer argued that the claimant bore the burden of proof to demonstrate a change in condition.¹⁹⁶

Although the state board and superior court denied benefits, the court of appeals reversed, finding that it was the employer who bore the burden of proof in this matter, not the claimant.¹⁹⁷ Even though the claimant had returned to work, the employer bore the burden of proof as it was attempting to demonstrate that the claimant's disability was actually the result of a supervening accident. In such instances, as the court pointed out, the employer must demonstrate that the original compensable disability has resolved and no longer accounts for the claimant's disability.

F. Coverage

Although coverage questions are rare, they are presented to the Board on occasion. In *Ponderosa Collections, Inc. v. Frady*,¹⁹⁸ the employer's workers' compensation insurance expired when the premium payment for another full period was not made. Although notice was sent, the employer denied receiving it.¹⁹⁹ The Board found that there was no coverage²⁰⁰ and was affirmed by the superior court.²⁰¹ On appeal, the employer argued that in addition to the fact that there was a mutual departure from the terms of the policy, coverage should be afforded since it failed to receive notice of the non-renewal.²⁰² The court of appeals was unpersuaded. The fact of the matter was that the employer did fail to make the premium payment and, as a result, coverage simply expired at the end of the scheduled policy period. Because the policy expired, no notice of cancellation was required.²⁰³

G. Exclusive Remedy

Borrowed Servants. The court of appeals re-affirmed the strength of the exclusive remedy doctrine for employers using employees on loan

196. *Id.*, 448 S.E.2d at 278-79.

197. *Id.*, 448 S.E.2d at 279.

198. 216 Ga. App. 619, 455 S.E.2d 346 (1995).

199. *Id.* at 619, 455 S.E.2d at 347.

200. *Id.* at 620, 455 S.E.2d at 347.

201. *Id.*

202. *Id.*

203. *Id.* at 621, 455 S.E.2d at 348.

from a temporary agency in *Coca-Cola Co. v. Nicks*.²⁰⁴ In *Nicks*, the employee stepped into an uncovered manhole on the sidewalk as she was leaving her job. She had been working for several months as an employee on loan from a temporary agency. She settled her workers' compensation claim for \$20,000 then filed a premises liability action against Coke and the City of Atlanta.²⁰⁵ The court held that

[a]n employee, working as a borrowed servant, may recover for injuries sustained in connection with his work from either his general or special employer, or in some instances, both. Such recovery, however, is limited to those benefits available under workers' compensation law. A plaintiff may not recover compensation benefits from one of the employers and maintain an action against the other employer in tort.²⁰⁶

Thus, as a borrowed servant, the employee's sole remedy was in workers' compensation.²⁰⁷

Delays in Medical Care. The court also clarified its prior decision in *Jim Walter Homes, Inc. v. Roberts*,²⁰⁸ which suggested that a refusal to authorize medical treatment may give rise to a common law cause of action in tort, effectively carving out a new exception to the exclusive remedy doctrine.²⁰⁹ In *Dutton v. Georgia Associated General Contractors Self-Insurers Trust Fund*,²¹⁰ the court of appeals affirmed the dismissal of an employee's tort action against the employer-insurer in a "conspiratorial tort action" for an "outrageous, willful and wanton . . . scheme to deprive [the employee] of medical treatment and benefits."²¹¹ *Jim Walter Homes* involved an intentional physical injury resulting from a refusal to authorize treatment and arose from a default judgment in which the allegations of the complaint were established as fact.²¹² In *Dutton*, the court relied upon established precedent from the Georgia Supreme Court to hold that "[a]ll refusals to pay are

204. 215 Ga. App. 381, 450 S.E.2d 838 (1994).

205. *Id.* at 381-82, 450 S.E.2d at 838.

206. *Id.* at 382, 450 S.E.2d at 839.

207. *Id.* Note that O.C.G.A. § 34-9-11(c) has been amended to specifically address leased employee and temporary employee situations. See *supra* text accompanying notes 69-73. The 1995 legislation may no longer require a "borrowed servant" analysis in this context.

208. 196 Ga. App. 618, 396 S.E.2d 787 (1990).

209. *Id.* at 621, 396 S.E.2d at 789-90; see also Bagley et al, *supra* note 9, at 545-46.

210. 215 Ga. App. 607, 451 S.E.2d 504 (1994).

211. *Id.* at 607, 451 S.E.2d at 505.

212. 196 Ga. App. at 619, 396 S.E.2d at 788.

intentional acts and the wrongful refusal to pay and remedy therefor are provided for by the Georgia Workers' Compensation Act."²¹³

Co-Employee Impleader. Although the exclusive remedy doctrine precludes an employee from suing an employer or co-employee directly in this context,²¹⁴ it does not prevent a co-employee from being impleaded into an employee's action against a third party. In *Brown v. Weller*,²¹⁵ while on the way to an employer-sponsored seminar, the plaintiff was rear-ended. A co-employee was riding with the defendant to the seminar. After being sued, the defendant brought the co-employee into the suit by impleader.²¹⁶ The court of appeals allowed the third-party complaint, even though the defendant and co-employee had received workers' compensation benefits.²¹⁷

Intentional Acts. In *Macy's South, Inc. v. Clark*,²¹⁸ an assistant buyer for Macy's was assaulted and raped in a Macy's parking garage located across the street from the downtown store. She was attacked within fifteen minutes from leaving the store. Clark filed a premises liability suit against Macy's, and Macy's claimed the action was barred by the exclusive remedy provision of the Workers' Compensation Act.²¹⁹ The court of appeals determined that the injury arose out of and in the course of Clark's employment.²²⁰ Clark was required to work downtown and chose to work late on the night of the attack.²²¹ The garage was maintained by Macy's and Clark parked her car there because she received an employee discount rate.²²² There was a causal connection between the employment and the injury, and the injury occurred within a reasonable period of egress from the workplace.²²³ Therefore, Clark's action in tort against Macy's was barred because of the exclusive remedy provision of the Act.²²⁴

213. 215 Ga. App. at 608, 451 S.E.2d at 506.

214. See *Sargent v. Blankmann*, 202 Ga. App. 156, 157, 413 S.E.2d 495, 496 (1991).

215. 217 Ga. App. 67, 456 S.E.2d 602 (1995).

216. *Id.* at 67-68, 456 S.E.2d at 602.

217. *Id.* at 68, 456 S.E.2d at 603.

218. 215 Ga. App. 661, 452 S.E.2d 530 (1994).

219. *Id.* at 662, 452 S.E.2d at 531.

220. *Id.* at 663, 452 S.E.2d at 532.

221. *Id.*

222. *Id.*

223. *Id.* at 664, 452 S.E.2d at 532.

224. *Id.*, 452 S.E.2d at 533.

Actions of Service Providers. In *Smart Professional Photocopy Corp. v. Dixon*,²²⁵ the injured employee ordered certain medical reports from her treating physician and the reports were provided by Smart Professional Photocopy. The employee was billed more than allowable under the rules and regulations of the State Board of Workers' Compensation and she brought a civil suit against Smart Professional Photocopy.²²⁶ The court held that Smart was a "service provider" within the meaning of O.C.G.A. section 34-9-205(a),²²⁷ and as such, Dixon's remedy would be to assert her rights under the schedule of fees for physicians and surgeons and pharmaceuticals for services rendered under the Georgia Workers' Compensation law as well as any penalties which may be due under O.C.G.A. sections 34-9-21 and 34-9-18.²²⁸

H. Farm Labor

"Farm laborers" are exempted from the Act.²²⁹ However, because Georgia has a great deal of agriculture, the question of who is a farm laborer is a significant one. In *Lumber City Egg Marketers, Inc. v. Piercy*,²³⁰ the employer had an egg farm and a processing plant, both of which were located on the same property, but were separate operations. The egg farm consisted of chicken houses, cattle, and hay fields.²³¹ The ALJ found that Piercy worked on the farm and, in fact, was shoveling manure when injured. After the injury he did some work at the egg processing plant. However, it was only after the injury that Lumber City reported him as an agricultural worker.²³²

The ALJ awarded benefits, holding that Lumber City was "not primarily in the business of farming and the designation of Piercy as a farm laborer was primarily for accounting purposes."²³³ Focusing on the business activities of Lumber City, the ALJ found that Piercy was not a full-time farm laborer under the Act, and therefore, the exemption did not apply.²³⁴ The court of appeals disagreed with the focus of the inquiry, holding that it is the "status of the employee, not the total

225. 216 Ga. App. 825, 456 S.E.2d 233 (1995).

226. *Id.* at 825, 456 S.E.2d at 234.

227. *Id.* at 827, 456 S.E.2d at 235.

228. *Id.*, 456 S.E.2d at 236.

229. O.C.G.A. § 34-9-2(a) (1992).

230. 217 Ga. App. 584, 458 S.E.2d 364 (1995).

231. *Id.* at 585, 458 S.E.2d at 364-65.

232. *Id.*, 458 S.E.2d at 365.

233. *Id.*

234. *Id.*

activities of the employer."²³⁵ According to the court of appeals, the definition of farm laborer can be quite broad, not only including those who raise livestock, but those who raise chickens as well.²³⁶ Furthermore, it would not cease even though the employee might be doing something incidental to the farming.²³⁷ It went on to frame the issue as being "whether an employee performs some other duties retains his general character as a farm or non-farm laborer; the character of the work does not change with every temporary assignment."²³⁸ The case was remanded for a factual determination as to whether the general character of Piercy's work was non-farm labor.²³⁹

I. Independent Contractor

Both of the cases involving the issue of independent contractor versus employee involved individuals who drove for a living. In *Pitts v. Gopher Courier Service*,²⁴⁰ the employee was injured while delivering a package. The employer sought to have the claim denied on the grounds that, as a matter of law, Pitts was an independent contractor because he was an "owner/operator" under O.C.G.A. section 34-9-1(2).²⁴¹ The ALJ rejected the defense, awarding benefits.²⁴² The Full Board reversed, finding that the Code section applied.²⁴³ The superior court, however, reversed and remanded, directing the Full Board to make further findings of fact and conclusions of law.²⁴⁴ The court of appeals reviewed O.C.G.A. section 40-2-87, which defines owner/operator, and O.C.G.A. section 40-2-88, which provides for the registration of certain commercial vehicles used in interstate commerce, both of which can be found in Article 3(A), Chapter 2, Title 40, Reciprocal Agreements for Registration of Commercial Vehicles. Because there was no evidence indicating that Pitts, who reportedly drove his vehicle locally, was an "owner-operator" under O.C.G.A. section 40-2-87(19), the case was remanded for a determination on this issue.²⁴⁵

235. *Id.*

236. *Id.* at 586, 458 S.E.2d at 365.

237. *Id.*

238. *Id.*

239. *Id.*

240. 216 Ga. App. 219, 453 S.E.2d 505 (1995).

241. *Id.* at 220-21, 453 S.E.2d at 507.

242. *Id.* at 221, 453 S.E.2d at 507.

243. *Id.*

244. *Id.*

245. *Id.*

In *Williams v. Thurston Paulk, Inc.*,²⁴⁶ the employee was hired primarily as an independent contractor to drive a truck. However, in addition to driving, he performed certain other duties. Evidence in the record revealed that he took company vehicles to be fueled, delivered trailers to tire shops for service, and routinely performed the mechanical work.²⁴⁷ Williams testified that he considered himself to be an employee, and was injured while repairing a company truck.²⁴⁸ According to the court, "even if Williams was not working at Paulk's specific behest when he was injured, the record shows that he was doing so with Paulk's permission, consent, and in furtherance of Paulk's business."²⁴⁹ The finding that Williams was an employee at the time of his injury was supported by evidence, and, therefore, the award of benefits was upheld.²⁵⁰

J. Medical Evidence

*Drake v. LaRue Construction Co.*²⁵¹ merits a brief discussion in this section not for the outcome in terms of the final decision but for an evidentiary ruling. More and more accidents involve head injuries, which are being treated by a relatively new specialty, neuropsychology. In a 1992 decision, the Georgia Supreme Court held that a neuropsychologist was not qualified to testify as an expert with respect to causation of psychological problems.²⁵² *Morris* was legislatively overruled effective July 1, 1993.²⁵³ In *Drake*, the law became effective between the time the ALJ heard the case and the appeals to the Appellate Division and superior court, the latter of which held that the testimony was inadmissible.²⁵⁴ The court of appeals reversed, holding that the superior court should have applied the law as it existed "at the time of its judgment rather than the law prevailing at the rendition of judgment under review."²⁵⁵ Practitioners should take note of this evidentiary change.

246. 216 Ga. App. 621, 455 S.E.2d 132 (1995).

247. *Id.* at 622, 455 S.E.2d at 133.

248. *Id.*

249. *Id.*

250. *Id.* at 622-23, 455 S.E.2d at 133.

251. 215 Ga. App. 453, 451 S.E.2d 792 (1994).

252. *Chandler Exterminators, Inc. v. Morris*, 262 Ga. 257, 416 S.E.2d 277 (1992).

253. O.C.G.A. § 43-39-1 (1994).

254. 215 Ga. App. at 454, 451 S.E.2d at 793.

255. *Id.* at 455, 451 S.E.2d at 794.

K. *Medical Treatment*

If there is one area which spawns more disputes than any other in the workers' compensation system, it has to be control over the medical providers. Employers and insurers are afforded the right to designate a medical provider by posting a panel of physicians, a conformed panel, or a managed care organization, by making the employees aware of the posted panel, and by ensuring that the injured employee is adequately treated by accepting liability and providing treatment.²⁵⁶ If liability is contested, then the employee is free to choose a physician.²⁵⁷ Many employees have taken the position that if the employer fails on any of these requirements, it loses all control over the medicals for the duration of the claim. As seen in *Wright v. Overnite Transportation Co.*,²⁵⁸ this is not the case. In *Wright*, there was an initial hearing in which the Board found that the employer failed to explain the posted panel to the employee and, therefore, held that it was responsible for treatment rendered by the employee's own physician. At that point, the employer began to pay for the physician's services.²⁵⁹ The employee attempted to change for a second time and, as with the first, without Board approval.²⁶⁰ The Board held that he could do so, but the superior court and court of appeals ruled otherwise. The employee was required to follow Board procedures for changing physicians, and his failure to do so rendered the second physician unauthorized.²⁶¹ The reason behind the decision was that the employer was providing treatment at the time the employee attempted to change.²⁶² Had it failed in this regard, then the employee would have been free to change without seeking Board approval.²⁶³

L. *Newly Discovered Evidence*

The Appellate Division is authorized to "remand to a single member or administrative law judge any case before it . . . for the purpose of taking additional evidence for consideration by the board in rendering

256. O.C.G.A. § 34-9-201 (1992 & Supp. 1994); *Boaz v. K-Mart*, 254 Ga. 707, 334 S.E.2d 167 (1985).

257. Board Rule 201(e).

258. 214 Ga. App. 822, 449 S.E.2d 167 (1994).

259. *Id.* at 822, 445 S.E.2d at 168.

260. *Id.*

261. *Id.* at 823, 445 S.E.2d at 169.

262. *Id.*

263. *Id.*

any decision or award in the case."²⁶⁴ The Board's rules state that it shall "apply the law of Georgia regarding the tenure and character of newly discovered evidence required for the granting of a new trial."²⁶⁵ In *Old Dominion Freight Line, Inc. v. Anthony*,²⁶⁶ the employee suffered an injury to his foot. The claim was accepted as compensable, and benefits were subsequently terminated based on a return to work release from the authorized treating physician.²⁶⁷ The ALJ ruled against the employee at a change of condition hearing.²⁶⁸ He appealed to the Appellate Division, which entertained several requests for a remand to the ALJ to take further evidence from specific medical providers.²⁶⁹ They were partially granted by the Appellate Division, which, "relying heavily upon the evidence developed on remand, substituted its decision for that of the administrative law judge," ordering the recommencement of total disability benefits.²⁷⁰ The court of appeals, reviewing briefly the criteria for newly discovered evidence, one of which being due diligence, held that the Appellate Division erred.²⁷¹ The contested evidence dealt with whether the employee suffered from reflex sympathetic dystrophy, which was the subject of the initial hearing before the ALJ.²⁷² This being the case, the employee should not have been permitted to obtain a remand to the ALJ "for the purpose of bolstering or extending his evidence on the question of whether he suffered reflex sympathetic dystrophy."²⁷³ The matter was then remanded to the Appellate Division with direction that it be reconsidered after purging the improper evidence from the record.

M. Statutory Employer

If an employee suffers a compensable work-related injury, his recovery against either his immediate employer or a statutory employer shall be limited to those benefits granted under the Act.²⁷⁴ In *Southern Railway v. Hand*,²⁷⁵ the railroad sought to reverse a liability judgment

264. O.C.G.A. § 34-9-103(a) (1992 & Supp. 1994).

265. Board Rule 103(c).

266. 216 Ga. App. 267, 454 S.E.2d 574 (1995).

267. *Id.* at 267, 454 S.E.2d at 576.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 268, 454 S.E.2d at 576.

272. *Id.*

273. *Id.*

274. O.C.G.A. § 34-9-11 (1992 & Supp. 1995); see also *Wright Assocs., Inc. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981).

275. 216 Ga. App. 370, 454 S.E.2d 217 (1995).

in favor of Hand by contending that he was a borrowed servant and, as a result, that any recovery for his injury was limited to workers' compensation benefits. Hand, an employee of Bankhead Maintenance Company, was injured when he was working on Southern's rail line as part of his job.²⁷⁶ Even though Hand

testified that (1) he received his daily work assignments from Southern employees; (2) Southern employees took him to the job site on many occasions, such as the day he was injured; (3) Southern employees helped him unload the truck and prepare his work site; (4) Southern employees could, if they needed to, move him to another job or move him from a job; and (5) Southern employees could make him redo a job,

this was insufficient to find that he was a borrowed servant.²⁷⁷ Hand's testimony did not establish "both that Southern had the exclusive right to discharge him, and that Bankhead had no control and direction over him for the occasion at issue."²⁷⁸ Because these elements were missing, Southern was not entitled to the exclusive remedy bar as set forth in the Act.²⁷⁹

N. Subsequent Injury Trust Fund

For years both the Board and practitioners have taken the position that the Fund could not be held liable for assessment of fees regardless of how unreasonable its actions might have been. In *Muscogee Iron Works v. Ward*,²⁸⁰ the employer filed a claim for reimbursement, which the Fund denied. The Appellate Division held that the denial was unreasonable and assessed attorney fees. The Fund appealed, arguing that O.C.G.A. section 34-9-367 barred such an award.²⁸¹ In a six to three decision, the court of appeals rejected the argument, holding that the Code section only barred recovery of attorney fees by an employer against the Fund when the fees were assessed because of the employer's conduct in defending the claim brought by the employee.²⁸² The supreme court reversed the court of appeals, holding that because O.C.G.A. section 34-9-367 does not specifically authorize attorney fees in a proceeding for reimbursement, they cannot be upheld.²⁸³ "[T]he

276. *Id.* at 370, 454 S.E.2d at 218.

277. *Id.* at 371, 454 S.E.2d at 219.

278. *Id.*

279. *Id.*

280. 216 Ga. App. 636, 455 S.E.2d 363 (1995).

281. *Id.* at 636, 455 S.E.2d at 364.

282. *Id.* at 638, 455 S.E.2d at 365.

283. *Georgia Subsequent Injury Trust Fund v. Muscogee Iron Works*, No. S95G1066, 1995 WL 577515 (Ga. Oct. 2, 1995).

public policy of this state is that [] attorney[] fees of an employer or insurer are not recoverable from the Fund."²⁸⁴

VI. CONCLUSION

If the past few survey periods are any indication, the questions left unresolved by Georgia's appellate courts will continue to provide opportunities for the State Board to take an active role in proposing useful additions, and sometimes corrections, to the Act and Board Rules, in consultation with the attorneys who practice before it. As with many other practice areas reviewed in this volume, alternative dispute resolution, mediation in particular, has brought many changes to the every-day practice of workers' compensation law, especially in the resolution of change of physician, attorney fees, and settlement issues. On the whole, all of the state's decision-makers, including legislators, the State Board, as well as judges on the trial courts and appellate courts, appear to be committed to making the workers' compensation system work effectively for employees and employers alike.

284. *Id.* at *2.