Change in Condition and New Accident: The Difference Between the Two, Elements of Each, and Burdens of Proof

Michael F. Antonowich
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I. INTRODUCTION

This Article is designed as a survey of the law on the theories of new accident and change in condition. It will compare and contrast these two theories, which compromise one of the most often litigated areas of workers' compensation law. The respective burdens of proof are placed on the employee/claimant and the employer/insurer when either alleges a change in condition, either for the better or for the worse. These burdens are addressed both as to accidents occurring before and after July 1, 1992. Also addressed are the circumstances and attendant outcomes when more than one employer or insurance company is involved.

The entire focus of this Article is premised on the understanding that a compensable accident has already occurred. If the employee's condition thereafter improves, the employer/insurer will assert this change for the better in an effort to suspend payment of indemnity benefits. From the employee's viewpoint, the change in condition theory arises after a compensable accident, followed by at least a partial recovery by the employee and a subsequent deterioration in the employee's condition to the point of renewed disability. Under these circumstances, the employee will seek reinstatement of benefits at the expense of the employer/insurer involved in the original accident.

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When the employee brings an argument alleging a change in condition for the worse or, alternatively, the occurrence of a new accident, the focal point of the investigation becomes the attendant facts and circumstances concerning the original accident, the employee's physical condition subsequent to that accident, and the circumstances surrounding the employee's return to work including the employee's work activities. The salient point is that the theories of change in condition and new accident, whether fictional or actual, only come into play after a compensable on-the-job injury.

II. NEW ACCIDENT

A. General Considerations

In Central State Hospital v. James, the court of appeals announced two specific circumstances in which a new accident, as opposed to a change in condition, would exist. The first situation, important for statute of limitations considerations, occurs when an employee is injured but continues to work, and at some later date the injury becomes disabling and forces the employee to cease working. The date when the employee is forced to discontinue working is considered the date on which the disability manifests itself and the date of the new accident.

The second situation occurs when the employee has been injured, recovers, and subsequently suffers a second specific disabling injury. In these circumstances the second accident which aggravated the pre-existing condition is a new injury, if the second accident at least partially precipitated the claimant's disability.

B. When an Employee Continues to Work After an Injury

Official Code of Georgia Annotated ("O.C.G.A.") section 34-9-82(a) provides that "[t]he right to compensation shall be barred unless a claim therefor is filed within one year after injury . . ." for all injuries sustained after July 1, 1978. Prior to July 1, 1978, the Georgia statute provided a one year statute of limitations which commenced running on

2. Id. at 309, 248 S.E.2d at 679.
3. Id.
4. Id.
5. Id.
the date of the accident. This distinction is pivotal in claims for initial compensation because the disability engendered by the accident may not manifest itself within one year. Theoretically, an employee involved in an accident on January 2, 1977, but suffering no disability until January 2, 1978, would be foreclosed from asserting an otherwise meritorious claim. In response to this malevolent result, repugnant to the very underpinnings of the workers' compensation system, the courts developed the new accident theory, also referred to as the fictional accident theory.

The new accident theory posits that the statute of limitations will not commence running until the disability from an accident manifests itself. A prime example of the rationale behind this theory is found in Employers Fire Insurance Co. v. Heath. The employee in Heath was employed trimming trees from high voltage wires. In 1972 he was hit in his left eye by a wood chip. The employee kept working, losing time only for medical attention, and filed no claim for compensation. In 1977 his vision worsened to the point of requiring an operation to remove a cataract from his left eye.

When he filed his claim in 1977, both the Administrative Law Judge (“ALJ”) and the Full Board of Workers' Compensation (“Full Board”) found the claim was barred by the statute of limitations. Applying the new accident theory, the court of appeals found the claim to be compensable and not time barred.

Here, the date of the injury under the “new accident” theory was the date the claimant was forced to cease employment or when the gradual loss of his sight prevented him from working since he continued in his employment after the injury to his eye in 1972 until, as a result of the injury, he was forced to terminate his employment.

The new accident theory similarly affects the statute of limitations when an employee is injured, returns to work, and subsequently suffers an aggravation of the pre-existing infirmity. In these situations, the statute of limitations does not commence on the date of disability.

11. Id. at 185-86, 262 S.E.2d at 475.
12. Id. at 186, 262 S.E.2d at 475.
13. Id. at 187, 262 S.E.2d at 475.
resulting from the first accident. Rather, the claimant has one year from the disability date of the aggravating condition to file his claim.\textsuperscript{15}

One important point to remember in this context is that a specific, identifiable accident is not needed to revitalize the previous injury.\textsuperscript{16} When "the employment contributes to the aggravation of the pre-existing injury, it is an accident under our compensation law, and is compensable, and it is not necessary that there be a specific job-connected incident which aggravates the previous injury."\textsuperscript{17}

A change in condition, not a new accident, occurs when an employee is injured, receives compensation, returns to work without fully recovering, and then becomes disabled without an aggravating occurrence.\textsuperscript{18} In Hughes the court of appeals held:

\begin{quote}
[T]hat even if the wear and tear of ordinary life or ordinary work to some extent aggravates a pre-existing infirmity, when that infirmity itself, stemming from the original trauma, continues to worsen, the point where the employee is no longer able to continue his work is not a new accident but is a change of physical and economic condition entitling the claimant to compensation under the original award.\textsuperscript{19}
\end{quote}

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\textsuperscript{16} Addictions caused by the use of drugs or medicines prescribed for the treatment of the initial injury by an authorized physician have been held to be compensable under certain circumstances.

The addiction [can] only be considered a pre-existing condition, if at all, if it was "caused by" the medications prescribed for the first injury. It is not enough that the medication for the first injury "worsened" an already existing addiction, which was further worsened by medication prescribed for the new injury.

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\textsuperscript{17} Home Indem. Co. v. Brown, 141 Ga. App. 563, 566, 234 S.E.2d 97, 99 (1977). See Home Ins. Co. v. McEachin, 151 Ga. App. 567, 260 S.E.2d 560 (1979); Thomas v. Ford Motor Co., 123 Ga. App. 512, 181 S.E.2d 874 (1971); see also Bryan County Emergency Medical Servs. v. Gill, 187 Ga. App. 125, 126, 369 S.E.2d 455, 497 (1988) which states: "[W]here the claimant is injured on the job but continues to perform the duties of his employment until such time that he is forced to cease work because of the gradual worsening of his condition which was at least partly attributable to his physical activity in continuing to work subsequent to his injury, the date of the injury for purposes of the running of the statute of limitation[s] is the date the 'disability manifests itself' and on that date is a 'new accident.'"

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\textsuperscript{18} Id. However, this may not be the case where the employee never fully recovers from his original injury.
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\textsuperscript{19} \textit{Id. at} 330, 187 S.E.2d at 553. See also Northbrook Property & Casualty Ins. Co. v. Babyak, 186 Ga. App. 339, 341, 367 S.E.2d 567, 568 (1988) ("A necessary factual
Again, the pivotal distinction is that a new accident refers to a claim for initial compensation, whereas a change in condition refers to a compensation claim pursuant to a previous award or the voluntary payment of benefits by the employer/insurer.20 If a claim for a change in condition exists, O.C.G.A. section 34-9-104(b) sets out a two-year statute of limitations period that commences with the filing of notice and the employer making final payment.21 For new accident claims, however, O.C.G.A. section 34-9-82(a) provides for a one-year statute of limitations commencing on the date the disability prohibits the claimant from working.22

C. Specific Second Accident

James delineated a second situation in which a new accident could occur.23 This situation occurs when an employee is injured, recovers, then suffers a specific job-related accident that serves to aggravate the prior injury.24 If this second accident at least partially precipitates the employee's disability, it is a new accident.25 "This is true whether the claimant is immediately disabled or if he continues to work after the second accident and his condition gradually worsens until he is forced to cease his employment."26

The court of appeals faced this situation in Mutual Savings Life Insurance Co. v. Pruitt.27 The claimant in Pruitt required surgery when he originally injured his back in a compensable accident on or about October 31, 1979. He reinjured his back in October 1980 and again in July 1981. The last accident required a second operation. The treating physician stated the 1981 accident could have been caused by the weakness or instability resulting from the 1979 accident.28 The court of appeals held that, since the 1981 accident was a specific

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24. Id.
25. Id.
26. Id. (citation omitted).
28. Id. at 477, 343 S.E.2d at 496.
accident that aggravated a pre-existing condition, it constituted a new accident.\textsuperscript{29}

Thus, a second specific accident is treated just as an initial compensable accident. Both are considered original claims for compensation. In either case, the claimant's previously impaired condition is of no consequence.

If the employee's disability results as the immediate consequence of an accident arising out of and in the course of the employment, it matters not that it combines with a pre-existing injury or disease, or that the accident would not have resulted in disablement except for the prior condition, or even that if the accident had not occurred at the time and place it did it might have subsequently occurred in some manner unrelated to the employment, or might eventually have occurred in any event.\textsuperscript{30}

D. When There Are Two or More Employers

A third situation exists, not contemplated directly in James, in which a new accident will, or at least could, be found. The situation occurs when an employee is injured and returns to work with a different employer or employers and again becomes disabled. If a specific accident occurs at the second place of employment, that employer is obviously liable, even under James.\textsuperscript{31} If, however, some question exists about the source of the disability occurring at a subsequent employer, how is this situation to be resolved?

One of the first cases to confront this question was House v. Echota Cotton Mills, Inc.\textsuperscript{32} The claimant was originally injured in May of 1970 and voluntarily quit working on June 4, 1970. Thereafter, the claimant worked in an assortment of capacities with other employers until May 1972, when he was forced to quit work due to the gradual deterioration...
of his back condition. He subsequently filed a claim against Echota Cotton Mills, his employer at the time of his original injury.\textsuperscript{33}

The court of appeals held the claimant had made an initial claim for compensation and therefore was time barred by the one-year statute of limitations.\textsuperscript{34} Since he was not disabled until 1972, the court concluded this claim must rest upon the new accident theory.\textsuperscript{35} Based upon the fact that the "newer accident" did not occur until years after the claimant left Echota Cotton Mills' employ, the case was dismissed pursuant to the statute of limitations of O.C.G.A. section 34-9-82.\textsuperscript{36}

This ruling establishes that under the new accident theory an initial claim is to be brought against the party employing the claimant when the disability arises.\textsuperscript{37} Further, whether this employer was the employer on the date of the original accident is irrelevant.\textsuperscript{38}

The benchmark case in this area, however, was \textit{Certain v. United States Fidelity \& Guaranty Co.}\textsuperscript{39} The focus of the court of appeals in \textit{Certain} was whether new work-related circumstances intervened between job duties at two separate employers.\textsuperscript{40} Specifically, the employee sustained an accident at employer one for which he received compensation. He later returned to the same employer in a light duty capacity. Some two days after returning, the claimant quit employer one to go to work for employer two. He then worked for five months with employer two, performing the same type of strenuous activities he had done at employer one before his injury. As evidenced by his light duty work release, he had been medically forbidden from doing this. By the end of this five month period, the claimant’s condition deteriorated to the point of total disability although he had suffered no specific accident.\textsuperscript{41}

The court prefaced its opinion by stating that "where there is no actual new accident, ordinarily the distinguishing feature that will characterize the disability as either a 'change of condition' or a 'new accident' is the intervention of new circumstances."\textsuperscript{42} The court further held that the switch from medically approved light duty work to normal duty work without medical approval constituted "new circumstances."\textsuperscript{43} These

\textsuperscript{33} Id. at 350-51, 199 S.E.2d at 585-86.
\textsuperscript{34} Id. at 352, 199 S.E.2d at 587.
\textsuperscript{35} Id.
\textsuperscript{36} Id. See O.C.G.A. § 34-9-82 (1992).
\textsuperscript{37} 129 Ga. App. at 352, 199 S.E.2d at 587.
\textsuperscript{38} Id.
\textsuperscript{39} 153 Ga. App. 571, 266 S.E.2d 263 (1980).
\textsuperscript{40} Id. at 573, 266 S.E.2d at 264.
\textsuperscript{41} Id. at 571-72, 266 S.E.2d at 263.
\textsuperscript{42} Id. at 573, 266 S.E.2d at 264.
\textsuperscript{43} Id.
new circumstances led to the inability to continue working for employer two; thus, the claimant suffered a "new accident" while employed by employer two.\(^{44}\) Consistent with the earlier discussion of new accidents, the date of the new accident was the date the disability manifested itself.\(^{45}\)

The first case to fully interpret the new accident theory as set out in Certain was \textit{Slattery Associates, Inc. v. Hufstetler}.\(^{46}\) In \textit{Slattery} the claimant injured his back in January 1979 and received compensation benefits until he returned to work. The claimant, however, continued to experience back pain. The claimant was laid off in September 1979 and secured alternative employment three weeks later. His job duties at the second employer were similar to those at the first, but they were not more strenuous. Due to his continued back problems, however, the claimant was only able to work two and a half days over a two week period. On October 20, 1974, the claimant started working at a third employer, again doing less strenuous work than he had done at the first employer. Although he never suffered a specific accident other than with his first employer, the claimant was forced to quit work on December 17, 1979 due to intolerable back pain.\(^{47}\) The distinguishing point between \textit{Slattery} and \textit{House}, is that an earlier award of compensation had been granted to the claimant in \textit{Slattery}.\(^{48}\)

The court of appeals in \textit{Slattery} then set out the following rule:

\begin{quote}
When other employment intervenes between an original award of compensation and a claimant's subsequent disability, an award against the original employer based upon "change of condition" is not, as a matter of law, barred unless the subsequent employment, in which the gradual worsening condition occurred, evidences a work environment and work circumstances which are "new" and "different" from those existing in the claimant's previous "ordinary work." It is only then that it can be said that the claimant has suffered a compensable "accident" arising out of his subsequent employment rather than a mere economic "change of condition" proximately resulting from his original "accident."\(^{49}\)
\end{quote}

\begin{footnotes}
\item 44. \textit{Id.}
\item 47. \textit{Id.} at 390, 288 S.E.2d at 656.
\item 48. \textit{Id.} at 394, 288 S.E.2d at 659; 129 Ga. App. at 350, 199 S.E.2d at 585.
\item 49. 161 Ga. App. at 395, 288 S.E.2d at 660.
\end{footnotes}
In applying the above-stated rule to the facts of the case, the court upheld the award against the first employer for a change in condition.\(^5\) The court stated that the claimant’s subsequent jobs intervened in merely a temporal sense, not in an injury precipitating causal sense.\(^6\) The court focused on the types of duties the claimant performed at his original and subsequent employers and found the duties to be so similar that no new or different circumstances existed.\(^6\)

The circumstances upon which a new accident could be found in a situation with more than one employer were further refined in *Beers Construction Co. v. Stephens*.\(^5\) After canvassing some of the earlier cases, the court of appeals delineated three instances that dictate the finding of a new accident.\(^6\) One arises when the employee performs work for a second employer that independently aggravates his condition.\(^6\) The second occurs when the employee performs work for a second employer beyond the usual, ordinary, or normal limits of the work that he had been performing for his original employer.\(^6\) The third, consistent with the holding in *Certain*,\(^7\) arises when the requisite job duties at the subsequent employer are more strenuous than those performed for the first.\(^6\)

In any and all of these situations, barring unusual circumstances, the resulting disability constitutes a new accident.\(^6\) Further, when any of these three situations exist, the first employer is relieved of liability from the resulting disability as a matter of law.\(^6\)

The case of *Lockheed Missiles & Space Co. v. Bobchak*,\(^6\) however, illustrates that even if an employee’s disability can be traced to a specific incident while employed for a second employer, the disability will not necessarily be the product of a second injury.\(^6\) In *Lockheed* the claimant fractured his knee in August 1987, while working for W.H. Gross Construction Company. He received disability benefits until he

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\(^5\) *Id.* at 395-96, 288 S.E.2d at 660-61.
\(^6\) *Id.* at 396, 288 S.E.2d at 661.
\(^8\) 162 Ga. App. 87, 290 S.E.2d 181 (1982).
\(^9\) *Id.* at 89-91, 290 S.E.2d at 182-84.
\(^10\) *Id.* at 90, 290 S.E.2d at 183.
\(^11\) *Id.*
\(^12\) 153 Ga. App. 571, 573, 266 S.E.2d 263, 264 (1980).
\(^13\) 162 Ga. App. at 90, 290 S.E.2d at 183.
\(^14\) *Id.*
\(^15\) *Id.* at 91, 290 S.E.2d at 184.
\(^17\) *Id.* at 156, 390 S.E.2d at 83.
began working for Lockheed Missiles & Space Company in October 1987. On February 25, 1988, after climbing a ladder, the claimant experienced a "tired and weak feeling" in the knee he had fractured the year before. The knee eventually required further surgery.  

The issue in Lockheed was which employer's insurance company was liable for the claimant's disability benefits. To make this determination, the court of appeals had to decide whether the claimant's disability resulted from a new accident or a change in condition. The ALJ found the claimant had suffered a change in condition. The Full Board affirmed this ruling. The superior court reversed the board on two grounds. First, no evidence existed to prove the claimant's condition had gradually worsened as a result of the activity connected with his normal duties. Second, the evidence failed to support the board's finding that a specific accident had not aggravated the claimant's prior injury.

The court of appeals reversed the superior court and, drawing on language used in Beers, stated:

[W]e do not believe that in all cases where the worsening of a pre-existing condition can be traced to a "specific incident" occurring on the new job, that incident must necessarily be considered a "new accident." Rather, the determinative inquiry is whether the circumstances associated with the incident and with the new employment in general were "such as to independently aggravate the condition" or whether the renewed impairment instead resulted from the "wear and tear of ordinary life in connection with performance of normal duties ...."

In reaching the decision that the ALJ had been justified in concluding that the claimant suffered a change in condition, the court noted three factors. First, the claimant's duties at Lockheed were no more strenuous than they had been at W.H. Gross. Second, the claimant had experienced continued stiffness in his knee. Finally, a physician testified that people who suffer fractures like the claimant's never fully recover and often require additional surgery every two to five years.

63. Id.
64. Id. at 156-57, 390 S.E.2d at 83.
65. Id.
66. Id. at 157, 390 S.E.2d at 83.
67. Id.
68. Id. at 158, 390 S.E.2d at 84 (quoting Beers, 162 Ga. App. at 90-91, 290 S.E.2d at 181).
69. Id.
70. Id.
71. Id.
72. Id.
One final point to remember, "[w]here employment with a different employer intervenes between the original job-related injury and the subsequent claim, the 'new accident' claim cannot be asserted against the original employer but must be brought against the employer for whom the employee worked at the time of the 'new accident.'" From a tactical standpoint, nothing prevents claimants from filing alternative claims. Claimants may file claims against the parties employing them at the time of their injuries under the change in condition theory. At the same time, they may also file a contemporaneous claim against a subsequent employer alleging either an actual new accident or a fictional new injury claim.

E. When There Are Two or More Insurance Companies

When an employee is injured and the on risk insurance company subsequently changes, the question becomes which insurance company is liable for the employee's disability. "The test to be applied in this case is whether or not there was a subsequent industrial accident which would of itself constitute the cause of the disability." In other words, the assessment of liability hinges upon the determination of whether the employee had a new accident or a change in condition. The new accident or change in condition determination is predicated upon whether an award of compensation had previously been made.

Whenever an individual suffers a second specific accident an initial claim for compensation exists to the extent that the employer/insurer on risk at the time of that accident will bear liability. In Columbus Intermediate Care Home, Inc. v. Johnston, the claimant injured her shoulder while at work and received workers' compensation benefits from U.S. Fire Insurance Company. Workers' compensation coverage was provided by Aetna Casualty and Surety Company after the claimant recovered from her injury and returned to work. The claimant later suffered a specific re-injury to her shoulder that was determined to be a new accident for which Aetna Casualty and Surety Company was liable. The difficulty arises when no specific second accident occurs. The question in these situations is whether a change in condition attributable to the original injury has occurred, an independent aggravation has occurred, or new circumstances have interceded. The

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75. Id. at 131, 217 S.E.2d at 331.
77. Id. at 516-17, 396 S.E.2d at 268.
various theories examining this question are best exemplified by a comparison of two lines of cases, *Liberty Mutual Insurance Co. v. White*,78 and its progeny as compared to *Hartford Accident & Indemnity Co. v. Troglin*79 and its progeny.

In *Troglin* the claimant was injured, received a compensation award, then returned to work with a different employer and was covered by a different insurance carrier. The claimant thereafter ceased working and filed a claim for disability benefits.80 The court held that "[h]is present total disability was the result of the gradual worsening of his condition due to the normal wear and tear of performing the normal duties of his employment and was therefore a change in condition."81 Thus, the insurance company on risk at the time of the original injury was found liable.82 The court made no mention as to whether one job was more strenuous or physically demanding than the other. The court did, however, distinguish *Troglin* from *White* on the basis that the claimant in *Troglin* was awarded compensation prior to returning to work.83

A similar holding was presented in *St. Paul Fire & Marine Insurance Co. v. Hughes*.84 As in *Troglin*, the claimant in *Hughes* was injured in a compensable accident and was working at a different employer when forced to quit. The claimant stated that he suffered no new injury or independent aggravation of his original injury. The employer/insurer at the time of the original accident argued the claimant did sustain a job connected aggravation of his condition while at the subsequent employer. Based on this aggravation, the employer/insurer asserted that the original injury could therefore not be considered as causally relating to the renewed disability.85

The court of appeals discounted the argument of the claimant’s initial employer/insurer, finding the initial employer/insurer liable based on the claimant having undergone a change in condition.86 In so doing, the court set out the following rule:

That even if the wear and tear of ordinary life or ordinary work to some extent aggravates a pre-existing infirmity, when that infirmity

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80. *Id.* at 715-16, 252 S.E.2d at 213-14.
81. *Id.* at 716, 252 S.E.2d at 214.
82. *Id.*
85. *Id.* at 328-30, 187 S.E.2d at 552-53.
86. *Id.* at 330, 187 S.E.2d at 553.
itself, stemming from the original trauma, continues to worsen, the point where the employee is no longer able to continue his work is not a new accident but is a change of physical and economic condition entitling the claimant to compensation under the original award. 87

The landmark case on the new accident side is Liberty Mutual Insurance Co. v. White. 88 In White the claimant sustained a knee injury on May 1, 1972, at which time the Hartford Insurance Company was on risk. After his injury, the claimant switched jobs within the same employer to one requiring a significantly greater amount of standing. As of February 1973, Liberty Mutual took over the employer's workers' compensation coverage. The claimant initially lost no time from work as a result of her injury and continued to work until April 20, 1973. She was forced to stop at that time due to her worsened knee condition. 89

The Deputy Director found that aggravation over a period of time caused claimant's knee condition to gradually worsen to the point where she was forced to quit. 90 At the time the claimant quit, she was covered by a different insurance company than the one on risk on the date of the actual accident. 91 A new injury was found on the date the claimant was unable to continue working because of the aggravation of this pre-existing infirmity. 92 As it was a new injury, the insurance carrier on risk on the date of disability, Liberty Mutual, was liable. 93

The pivotal distinction to be drawn between Troglin and White, and their respective progenies, is the prior compensation award in the former category. 94 Without such an award no change of condition can be found to exist. 95 Hence, a new accident was found in White. 96 The insur-
ance company on risk at the time of the actual injury was relieved of liability by the finding of a new accident. The rather harsh consequence of this finding is that the insurance company on risk at the time the disability manifests itself is liable, even though no job related accident occurred during its coverage.

The inequities of this method of assigning liability are perhaps best evidenced by the case of St. Paul Fire & Marine Insurance Co. v. Norman. The claimant in this case sustained a knee injury while employed at a medical clinic in 1974. Her employer, one of the clinic physicians, performed a knee operation in May 1974. No compensation claim was filed because the claimant’s employer paid the claimant’s salary in lieu of compensation. The claimant returned to work some two months later.

In 1974, when the accident occurred, the insurance company on risk was the Bituminous Casualty Company. At the beginning of 1981, St. Paul took over coverage of the clinic. The claimant’s knee never fully recovered and a second operation was performed. The claimant was out of work from January 15, 1981 until April 6, 1981.

The ALJ and the Full Board found that the claimant had undergone a change in condition. The superior court, holding that the board’s determination was a reviewable conclusion of law and not a finding of fact, reversed and held that a new accident had occurred. The superior court refused to give credit for the salary paid to the claimant and awarded the claimant temporary total disability benefits from January 15 until April 6, 1981. The court also awarded $19,989.53 in accrued medical expenses as well as future medical expenses. All awards were assessed against claimant’s employer and St. Paul.

Bituminous Casualty was let completely off the liability hook.

The court of appeals affirmed the superior court’s award. The appeals court found that because the claimant’s condition had gradually worsened due to a pre-existing work-related injury and the claimant had

97. Id.
99. Id. at 199, 325 S.E.2d at 811.
100. Id., 325 S.E.2d at 811-12.
101. Id., 325 S.E.2d at 812.
102. Id. at 201, 325 S.E.2d at 813; but see Fairfield Plantation v. Parmer, 173 Ga. App. 619, 620, 327 S.E.2d 580, 581 (1985) (holding that “[t]he question of whether a new accident or a change of condition has occurred is a question of fact for the trier of fact.”).
104. Id. at 199-200, 325 S.E.2d at 812.
105. Id.
106. Id. at 201, 325 S.E.2d at 813.
made an initial claim for compensation, as a matter of law, the claimant had suffered a new accident.107 "As to the insurance company, the employer's workers' compensation carrier at the time of the 'new accident' is liable for claimant's compensation rather than the carrier at the time of the original job-related injury."108

III. CHANGE IN CONDITION

A. Generally

[A] "change in [one's] condition" means a change in the wage-earning capacity, physical condition, or status of an employee or other beneficiary covered by this chapter, which change must have occurred after the date on which the wage-earning capacity, physical condition, or status of the employee or other beneficiary was last established by award or otherwise.109

The applicable statute of limitations for a change in condition claim for an injury suffered after July 1, 1978, is found in O.C.G.A. section 34-9-104.110 Subsection (b) states that any party may bring a change in condition claim seeking to end, increase, or decrease income benefits so long as "that at the time of application not more than two years have elapsed since the date" of final payment of income benefits due under this chapter.111

The court of appeals in Central State Hospital v. James,112 announced three criteria for distinguishing between a new accident and a change in condition.113 Only one of these facilitated a finding that the claimant had undergone a change in condition.114 The example used in James involved a situation where an employee is injured, receives compensation, and subsequently returns to normal duty work.115

107. Id. at 201-02, 325 S.E.2d at 813.
110. Id. § 34-9-104(b).
111. Id.
113. Id. at 309-10, 248 S.E.2d at 679.
114. Id. at 311, 248 S.E.2d at 680.
115. Id. at 309, 248 S.E.2d at 679.
Then as a result of the wear and tear of ordinary life and the activity connected with performing his normal duties and not because of a specific job-related incident his condition gradually worsens to the point that he can no longer continue to perform his ordinary work. This gradual worsening or deterioration would constitute a change in his condition and not a new accident.\textsuperscript{116}

"The proper classification of the basis of a claim as an "accident," "change of condition," or "new accident" hinges generally upon two factors: (1) Whether the claim seeks initial or additional compensation for the "injury"; and, (2) the proximate cause of the injury for which compensation is being sought."\textsuperscript{117} Of course, a claim for initial compensation is an assertion of an accident or a new accident. A claim for additional compensation under a prior award is a change in condition claim.\textsuperscript{118}

A claimant bears the burden of proof when bringing a change in condition claim that necessarily asserts a change in condition for the worse.\textsuperscript{119}

To establish a change of condition, the claimant must show (1) that his condition had changed for the worse; (2) that because of this change he was unable to continue at work; (3) that because of his inability to work, he had either a total or partial loss of income; and (4) that the inability to work was proximately caused by the previous accidental injury.\textsuperscript{120}

\textsuperscript{116} Id. at 310, 248 S.E.2d at 679.
\textsuperscript{117} Holt's Bakery v. Hutchinson, 177 Ga. App. 154, 157, 338 S.E.2d 742, 746 (1985). See also Certain v. United States Fidelity & Guar. Co., 153 Ga. App. 571, 573, 266 S.E.2d 263, 264 (1980) ("[W]here there is no actual new accident, ordinarily the distinguishing feature that will characterize the disability as either a 'change of condition' or a 'new accident' is the intervention of new circumstances.").
\textsuperscript{120} East Texas Motor Freight Lines, Inc. v. Jacobs, 163 Ga. App. 727, 728, 296 S.E.2d 80, 80-81 (1982). See also Burton, 200 Ga. App. 121, 122, 407 S.E.2d 60, 62 (1991) ("In seeking a resumption of benefits, the burden is on the employee to show that, 'after his termination for cause,' his inability to secure suitable employment elsewhere was proximately caused by his previous accidental injury.").
In essence, the claimant’s burden boils down to a showing that unemployment or reduced compensation is causally related to the original disability claim. In *Gilmer v. Atlanta Housing Authority,* the claimant injured his back and later returned to work with the same employer. He was later discharged due to on-the-job misconduct. The ALJ and Full Board found that he had shown a change in economic condition for the worse and awarded total disability benefits. The superior court reversed, stating that plaintiffs unemployed status was not caused by his back injury but rather because he had “voluntarily committed acts which he knew could result in his termination.”

The court of appeals then reversed the superior court. The court of appeals held that although claimant was discharged for cause, his current loss of earnings was due to his diminished earning capacity. Since his disability precipitated his diminished earning capacity, the court of appeals held that he was entitled to additional income benefits.

Thus, claimants can receive benefits if their disability prevents them from securing alternative employment, even though their discharge from suitable employment resulted from their own acts of malfeasance. If, however, the acts of malfeasance prevent the claimants from returning to work, those individuals are not entitled to a resumption of benefits. Claimants are only entitled to resume benefits if they can show an ongoing disability attributable to the original injury.

In *Freeman v. Continental Baking Co.*, the employee suffered a disabling knee injury that required surgery. Upon recovering from that surgery the employee returned to work and bid on a position in a different department. The new position would have allowed him to perform activities within his physical limitations. While the employee did pass the physical examination to perform the requisite job duties, he failed the company drug test and was terminated as a result.

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122. *Id.* at 326, 316 S.E.2d at 536.
123. *Id.* at 326-27, 316 S.E.2d at 536.
124. *Id.* at 327, 316 S.E.2d at 536.
125. *Id.*
128. *Id.* at 49, 311 S.E.2d at 239.
130. *Id.* at 855-56, 443 S.E.2d at 521.
court of appeals held that any economic loss suffered by the claimant was not causally related to the on-the-job injury.\textsuperscript{131} Rather, claimant's economic loss resulted from his impermissible drug use that prevented him from passing the qualifying drug test.\textsuperscript{132} The language used by the court of appeals in \textit{Freeman} also provides the basis upon which an employer/insurer can unilaterally suspend payment of benefits.\textsuperscript{133} An employer/insurer properly suspends benefits based upon a change in condition when suitable work is available and the employee has the ability to perform that work.\textsuperscript{134}

To carry the burden of proof when they are injured, return to work, and are subsequently terminated for reasons unrelated to their accidents, claimants must demonstrate a causal connection between their original on-the-job injury and any subsequent inability to find suitable alternative employment.\textsuperscript{135} If claimants simply make no effort to find suitable alternative employment after termination, they cannot possibly carry their burden of proof and their claims will be denied.\textsuperscript{136} In essence, claimants' lack of effort to find alternative employment preemptively prevents them from carrying their burden of proof. This burden will be placed on claimants even if they return to work on a light duty status or at modified or restricted work activities.\textsuperscript{137}

In \textit{State v. Bardge},\textsuperscript{138} the claimant argued he was unable to seek alternative employment because he was rendered disabled by an earlier injury to his arm.\textsuperscript{139} The court of appeals concluded that the claimant's theory that he could not look for alternative employment because of his disability was "circular."\textsuperscript{140} "His lack of effort to obtain employment fails to support the burden placed on all claimants, that his inability to find employment was proximately caused by his accidental injury."\textsuperscript{141}

\begin{itemize}
\item \textsuperscript{131} \textit{Id.} at 856-57, 443 S.E.2d at 522.
\item \textsuperscript{132} \textit{Id.} at 857, 443 S.E.2d at 522.
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Landon}, 202 Ga. App. at 219, 413 S.E.2d at 738; \textit{see also Burton}, 200 Ga. App. at 121, 407 S.E.2d at 60; \textit{Powell}, 182 Ga. App. at 533, 366 S.E.2d at 267.
\item \textsuperscript{138} 211 Ga. App. 307, 439 S.E.2d 1 (1993).
\item \textsuperscript{139} \textit{Id.} at 309, 439 S.E.2d at 2.
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} \textit{Id.} at 309-10, 439 S.E.2d at 2.
\end{itemize}
In *Autolite v. Glaze*, the claimant was injured and returned to a light duty position with her employer. Thereafter, Autolite was forced to close its plant due to economic conditions. Thus, the claimant was prevented from continuing her light duty position for reasons unrelated to her original accident. Subsequent to her lay-off the claimant sought light duty work but received no offers. It is significant that the record in this case was silent as to why the claimant did not receive an offer of alternative employment. Based on this silence, the court of appeals held the claimant had not carried her burden of proving that her earlier on-the-job injury proximately caused her inability to obtain suitable alternative employment. The claimant was denied additional income benefits because she failed to draw the necessary causal connection between her original on-the-job injury and her inability to find suitable alternative employment subsequent to her lay-off for economic reasons.

When the employer/insurer files a change in condition claim, necessarily a change in condition for the better, the employer/insurer bears the burden of proof. "To terminate compensation because of change in condition, the employer must show 'a change in the wage earning capacity, physical condition, or status of an employee,' and to do so, the employer must show the ability to return to work and that suitable work is available."

In *White v. Nantucket Industries*, the employee injured her wrist while working for Nantucket Industries. After subsequently being terminated for reasons unrelated to this injury, the employee obtained alternative employment working as a sitter for an elderly woman. The claimant was afforded temporary partial disability benefits because she was unable to generate an average weekly wage equal to or greater than the amount she had earned at the time of her original injury. The employee subsequently suffered a fall and broke her leg which prevented her from sitting for this elderly patient. The employer/insurer thereafter

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143. *Id.* at 780, 440 S.E.2d at 497.
144. *Id.* at 781, 440 S.E.2d at 498.
145. *Id.*
146. *Id.*
suspended payment of indemnity benefits to the employee and asserted that the employee should bear the burden of proving a renewed entitlement to indemnity benefits. The employer/insurer further claimed that any additional disability subsequent to the leg injury was still causally related to the original wrist injury.\textsuperscript{150} The court of appeals reversed the lower court decisions and held that the employer/insurer should bear the burden of proof in this case.\textsuperscript{151} The court held that by virtue of the ongoing payment of temporary partial disability benefits, the employer/insurer recognized the ongoing disability attributable to the original injury.\textsuperscript{152} Therefore, to suspend benefits the employer/insurer was the party seeking to prove a change in condition for the better and the burden of proof was properly placed on it.\textsuperscript{153} In this case, the employer/insurer was unable to demonstrate the claimant had sufficiently recovered from her original wrist injury and could generate a wage equal to or greater than the amount she earned at the time of her original injury.\textsuperscript{154} Therefore, the court concluded the claimant was entitled to ongoing temporary partial disability benefits, rather than temporary total disability benefits, until the employer/insurer could demonstrate a change for the better in her condition.\textsuperscript{155} With the escalating costs of workers' compensation benefits, employers are generally becoming more willing to make modified or light duty work available. The employer/insurer can assert a change for the better in the claimant's condition by demonstrating that suitable work is available and the claimant's refusal to return to that proffered position is unjustifiable. The General Assembly revised O.C.G.A. section 34-9-240, effective July 1, 1994.\textsuperscript{156} Apparently, this code section will not apply retroactively, but only to those accidents occurring on or after July 1, 1994. Of note, however, is that application of the statute still remains undecided because the court of appeals has not entertained this specific issue. With this understanding, two possibilities arise in the event the authorized treating physician releases the individual to return to work in a limited capacity. Employees will be immediately entitled to a resumption of their indemnity benefits if a job is tendered pursuant to

\begin{flushleft}
\textsuperscript{150} Id. at 542, 448 S.E.2d at 278.
\textsuperscript{151} Id. at 543, 448 S.E.2d at 279.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} O.C.G.A. § 34-9-240 (Supp. 1994).
\end{flushleft}
the provisions of Board Rule 240.\textsuperscript{157} However, employees must demonstrate the inability to perform light duty work for fifteen days or more.\textsuperscript{158} The burden of proof will remain with the employer/insurer to demonstrate a change for the better in the claimant's condition, which still may be proven through the suitability of available work for that individual.\textsuperscript{159} In the alternative, if the employee refuses to attempt the job approved by the authorized treating physician, the employer/insurer is entitled to unilaterally suspend payment of benefits.\textsuperscript{160}

Under this scenario, the burden shifts to the employee to demonstrate a renewed entitlement to income benefits.\textsuperscript{161}

For accidents occurring prior to July 1, 1994, the general rule is that the employer/insurer must first receive authorization from the state board to suspend payment of benefits based upon the refusal of suitable employment.\textsuperscript{162} If the employer/insurer is successful in this endeavor it can, upon authorization from the state board, suspend payment of indemnity benefits.\textsuperscript{163} Of course, O.C.G.A. section 34-9-104(a)(2) has eliminated the necessity of demonstrating the availability of suitable employment in post July 1, 1992 non-catastrophic accident cases; the claimant must be released to return to work with restrictions for fifty-two consecutive weeks or an aggregate of seventy-eight weeks.\textsuperscript{164} For all cases with an accident date preceding July 1, 1992 or subsequent to July 1, 1992 but prior to the running of the threshold limits set out in O.C.G.A. section 34-9-104(a)(2), the employer/insurer may rely upon the availability of suitable employment as a means of demonstrating a change for the better in the claimant's condition.\textsuperscript{165} What constitutes suitable employment is a factual determination often resolved by the state board.\textsuperscript{166} When the proffered job is not suitable, the claimant maintains his right to receive ongoing indemnity benefits.\textsuperscript{167}

\begin{footnotes}
\footnote{157} Ga. Bd. of Workers' Compensation R. 240 (Supp. 1994). \\
\footnote{158} Id. \\
\footnote{159} Id. \\
\footnote{160} Id. \\
\footnote{161} Id. \\
\footnote{162} But see Freeman v. Continental Baking Co., 212 Ga. App. 855, 856, 443 S.E.2d 520, 521 (1994) (a case in which the court of appeals provided that the employer/insurer could unilaterally suspend payment of benefits upon a showing that the claimant had the capacity to return to work and that suitable work was available). \\
\footnote{164} O.C.G.A. § 34-9-104(a)(2). \\
\footnote{165} Id. \\
\footnote{166} Id. \\
\footnote{167} Employer's Fire Ins. Co. v. Walraven, 130 Ga. App. 41, 42, 202 S.E.2d 461, 462 (1973).}

Obviously, an employer fails to offer suitable employment when it cannot or will not offer a position within the physical limitations imposed by the claimant's treating physician. Similarly, a claimant is not free to reject a proper job so long as the job is suitable to the claimant's capacity. In McDaniel v. Roper Corp., the court of appeals upheld the state board decision that the claimant's personal preference not to work on the second shift did not establish a legitimate basis for declining a position otherwise suitable to the claimant's capacity. Since every case presents a distinct factual determination, no bright line tests can be applied. Rather, the overall governing principles are that the claimant must accept a genuine job offer suitable to the individual's capacity. For the employer/insurer, the governing principle is that it must make a legitimate job offer suitable to the claimant's capabilities and, preferably, approved by the authorized treating physician.

In Clark v. Georgia Craft Co., the claimant's left arm was amputated. He was later fitted with a prosthetic arm and returned to work in the company's shipping department. Because this work area was not air conditioned, claimant experienced considerable difficulties. The employer offered claimant a position as a courier at the same wage level. The claimant refused this offer, quit the job in the shipping department, and sought resumption of his disability benefits. The court of appeals upheld the reinstatement of his benefits finding that "a claimant justifiably could refuse a job where it offered him no challenge and no opportunity for advancement."

The Georgia Supreme Court has provided some insight into the factors the Workers' Compensation Board may consider in determining whether a particular job is suitable employment. In City of Adel v. Wise, Wise injured his elbow while on the job. When his doctor suggested that he perform only light duty work for a time, the city offered him the temporary position of radio dispatcher. After his recovery, the city was to return Wise to his former job as fire captain. Wise refused the

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169. Id. at 801, 328 S.E.2d at 462.
171. Id. at 864, 256 S.E.2d at 147.
172. Id.
173. Id.
174. Id.
176. Id. at 884-85, 345 S.E.2d at 62.
177. Id. at 886, 345 S.E.2d at 63.
dispatcher job because the hours of the job conflicted with a part time job that he had held for seven years, thus reducing his overall income by $163 a week. The city discontinued all disability benefits after Wise refused the position.179

Wise brought an action for reinstatement of his benefits. The ALJ denied Wise’s claim, finding that he had the capacity to perform the job. The Full Board reversed this decision after determining that the job was not suitable.180 The city appealed to the superior court which found, due to the economic factors, that the dispatcher job was suitable to his capacity as a matter of law.181 The court of appeals reversed the superior court on the grounds that the board could exercise discretion in determining which jobs were suitable, and that discretionary rulings by the board should not be reversed absent abuse.182 The supreme court reversed the court of appeals.183 The supreme court specifically questioned “whether the potential loss of a part-time job may be considered as a factor in determining whether a job offered by an employer is ‘suitable to the capacity’” of the employee.184 The court decided that the loss of a part time job was not a valid consideration and then stated:

We hold that the discretion afforded the board under O.C.G.A. § 34-9-240 to determine that an employee’s refusal of proffered work is justified must relate to the physical capacity of the employee to perform the job; the employee’s ability or skill to perform the job; or factors such as geographic relocation or travel conditions which would disrupt the employee’s life.185

A unique interpretation of what constitutes available suitable work occurred in Commercial Union Insurance Co. v. Weeks.186 The claimant, the sole owner and operator of a construction company, acted as its “working president.” As such, he was responsible for job bids, job specifications, procurement of contracts, and the presentation of bids to potential clients. In February 1977, the claimant was involved in a car accident while on company business, and suffered a concussion and other injuries. Due to the injuries suffered, claimant received temporary total

179. Id. at 54, 401 S.E.2d at 523.
180. Id.
181. Id.
182. Id., 401 S.E.2d at 524.
183. Id. at 56, 401 S.E.2d at 525.
184. Id. at 54, 401 S.E.2d at 524.
185. Id. at 56, 401 S.E.2d at 525.
disability benefits until May 16, 1978, when the employer/insurer requested a change in condition hearing.\textsuperscript{187}

In support of its contention, the employer/insurer produced medical evidence showing the claimant had undergone a physical improvement since his accident. Further, the employer/insurer claimed that no physical barrier prevented the claimant from performing some sort of remunerative employment. The employer/insurer, therefore, argued that it had satisfied its burden of proof.\textsuperscript{188}

The claimant maintained the company had ceased to be a viable business due to his inability to work. As the “working president” of a non-viable business, “there is no work or duties to which he can assign himself, nor any income from which to pay himself a salary.”\textsuperscript{189} At the hearing, the claimant testified that “he supposed there was work he could do but [he] did not know what it was and nothing had been offered to him in the way of income-producing labor.”\textsuperscript{190} No mention was made of any attempt by the claimant to elicit some type of employment.\textsuperscript{191}

The court of appeals upheld the position of both the Full Board and the superior court, holding the claimant was still totally disabled.\textsuperscript{192} The court did find, however, that the employer/insurer had “established that there were medical indications that [claimant] exhibited a physical ability to do some type of work. [T]his [d]id not meet the requirement of a showing that [claimant] had available some work suitable to his disabled condition, even if with some company not his own.”\textsuperscript{193}

\textit{Peterson/Puritan, Inc. v. Day}\textsuperscript{194} reaffirmed the rationale of \textit{Weeks}. With regard to the employer’s burden of proof, the court of appeals stated that “it is clear that it is not enough to show the claimant is physically able to work.”\textsuperscript{195} Therefore, “it would be inequitable to permit the employer to terminate compensation merely because the claimant’s physical condition has improved and she can return to some form of income producing labor.”\textsuperscript{196}

\begin{footnotes}
\item[187] Id. at 20-22, 270 S.E.2d at 259-60.
\item[188] Id. at 21-22, 270 S.E.2d at 260.
\item[189] Id. at 21, 270 S.E.2d at 260.
\item[190] Id. at 23, 270 S.E.2d at 261.
\item[191] Id.
\item[192] Id.
\item[193] Id.
\item[194] Id. at 829, 270 S.E.2d at 259 (1981).
\item[195] Id. at 829, 270 S.E.2d at 267 (citing Commercial Union Ins. Co. v. Weeks, 155 Ga. App. 20, 270 S.E.2d 259).
\item[196] Id.
\end{footnotes}
Meanwhile, the same courts nurtured a divergent and seemingly hostile line of cases.

[If the employer and insurer claim a change of condition for the better, such may be shown even though the claimant is not actually working, has sought no work, may be unwilling to try to work, or has received no offer of employment from his former employer or another, if there is evidence to support a finding of some improvement which discloses an ability to return to work.]

This position was reaffirmed in *Jackson v. Seaboard Fire & Marine Insurance Co.* Moreover, the court in *Jarallah v. Pickett Suite Hotel* maintained that

[in order for the board to terminate an employee’s eligibility for benefits, the evidence must prove an improved economic condition. This is proved by evidence that the employee’s physical condition has improved to the point that he has either already returned to work or has the ability to return to work.]

In *Jackson*, a case decided two years before *Weeks*, the court found the employer/insurer had carried its burden of proof by showing an ability to return to work. “[T]hey were not required to show that [claimant] had a current offer of employment [or reemployment].” The court of appeals took this one step further in *Freeman v. Continental Baking Co.* In *Freeman* the court held the employer could unilaterally suspend payment of benefits based upon a change in condition if the employer demonstrated that the claimant was capable of returning to work and that suitable work was available.

These cases can be synthesized by virtue of the degree to which the claimant’s disability has dissipated. When the claimant has fully recovered from the job-related disability, the employer/insurer need not demonstrate the availability of specific work. The court of appeals in *Magee* held the claimant had fully recovered from her job related accident and her persisting disability was due to injuries received in a

200. *Id. at 685, 420 S.E.2d at 368 (citing Fairway Transp. v. Brenner, 192 Ga. App. 871, 872, 386 S.E.2d 674 (1989)).*
201. *144 Ga. App. at 532, 241 S.E.2d at 637.*
202. *Id.*
204. *Id. at 856, 443 S.E.2d at 522.*
car accident. The court distinguished Peterson/Puritan by stating that "the claimant was not denied any further compensation because . . . the disability she now has is not connected with her employment." Therefore, the question of the availability of work was not in issue.

Since the claimant in Magee sustained an intervening accident that precipitated her disabled status after her job related accident, the case presented a somewhat unusual set of circumstances; the language of the opinion was therefore commensurately guarded. The thrust of Magee was, however, made unmistakably clear in Pierce v. AAA Cabinet Co.

The claimant in Pierce was injured in a compensable accident and received benefits for about a year and a half. Upon receipt of a report that the claimant was medically able to return to work, the employer/insurer terminated benefits. The claimant opted not to return to work, but sought a hearing contesting the assertion of a change in condition. The ALJ, the Full Board, and the superior court all found the termination of benefits was proper.

On appeal the claimant argued that since the employer did not demonstrate work was available, the termination of benefits was improper. In support he relied upon, among others, Georgia Power Co. v. Brown, Peterson/Puritan v. Day, and Commercial Union Insurance Co. v. Weeks.

The employer/insurer argued the above cited cases were distinguishable because they involved only a degree of improvement as opposed to a complete recovery. In Weeks and its progeny, the claimants' conditions improved to a status that allowed them to perform some work. In Pierce and its progeny, however, the claimants fully recovered and were capable of performing pre-injury work without restriction.

206. Id. at 866, 292 S.E.2d at 477.
207. Id.
208. Id.
209. Id.
211. Id. at 463, 326 S.E.2d at 575.
212. Id.
213. Id.
218. Id.
219. Id.
The court of appeals affirmed the lower tribunals, and provided a clear-cut statement of the law.220 Since [claimant's] continued unemployment is not due to his former disability, the employer has no further responsibility for [claimant's] economic condition. That being so, there was no necessity that [the employer] show that work is available to [the claimant]. Having recovered from the injury he received in [employer's] employ, [claimant] is in the same position as every other member of the general work force.221

Thus, a showing of the availability of work is not a part of the employer's burden of proof where the claimant has fully recovered from his injuries and has been released to normal duty work without restriction.222

Of course, claimants will be eligible for benefits if they are capable of demonstrating that their inability to procure some type of work is directly related to their disability.223 The case of United States Fidelity & Guaranty Insurance Co. v. Giles,224 well illustrates this point.

In Giles, the claimant, an insurance claims adjustor, was injured in a work related car accident in 1979. He received no income benefits but did receive medical expenses. In addition, he was determined to have a twenty percent impairment to the body as a whole. In 1980 claimant quit his job and took a similar position with a new employer. Due to a reduction in the new employer's workforce, claimant was laid off in 1983. Claimant thereafter filed for income benefits based on his 1979 accident.225

The ALJ found claimant had carried his burden and proved a change in condition from permanent partial disability to total disability under O.C.G.A. section 34-9-261.226 This was affirmed by the Full Board and the superior court.227 The court of appeals upheld the award, citing McDonald v. Townsend as controlling.228 The distinction between these two cases is that although claimant's "inability to find work as a

220. Id. at 464, 326 S.E.2d at 577.
221. Id.
225. Id. at 684, 340 S.E.2d at 284-85.
226. Id.
227. Id.
228. Id. at 685, 340 S.E.2d at 285 (citing McDonald v. Townsend, 175 Ga. App. 811, 334 S.E.2d 723 (1985)).
claims adjuster may not be related to his injury, his inability to find
other work for which he is suited is related to his injury."229

The claimant had experience in, and sought positions in, the fields of
construction, teaching, and athletic coaching.230 In finding the claim-
ant was eligible for benefits, the court of appeals stated the now
established rule:

It is not the ability to perform the particular job in which one was
engaged at the time of the injury which is the determining factor in a
case such as this, but rather whether the claimant’s inability to find
any work for which he is suited by training and experience is a result
of the injury suffered.231

B. Changes Enacted as of July 1, 1992

O.C.G.A. section 34-9-104(a)(2), effective July 1, 1992, applies only to
non-catastrophic cases and establishes a new means for an employ-
er/insurer to demonstrate a change for the better in an injured
employee’s condition.232 Significantly, this code section applies only to
non-catastrophic accidents occurring on or after July 1, 1992.233
Equally significant is that this code section in no way impairs or inhibits
the ability of either the employer/insurer or the claimant to establish a
change in condition in the same way that was available to them prior to
the enactment of this statute.234

Pursuant to O.C.G.A. section 34-9-104(a)(2), the employer/insurer is
unilaterally empowered to convert payment of temporary total disability
benefits to temporary partial disability benefits if the injured employee
has been able to perform restricted or modified work activities for fifty-
two consecutive weeks.235 When the injured employee has not been
provided fifty-two consecutive weeks of restricted work releases by the
authorized treating physician, but has amassed an aggregate of seventy-
eight weeks of restricted work releases, the employer/insurer is also
entitled to convert payment of temporary total benefits to temporary
partial disability benefits.236 When either of these quantitative criteria
has been satisfied, the employer/insurer is unilaterally allowed to
convert payment of benefits so long as the procedural prerequisites set

229. Id.
230. Id.
233. Id.
234. Id.
235. Id.
236. Id.
out in Board Rule 104 have been met.\textsuperscript{237} Since this code section applies only where the claimant is not working, in most circumstances a conversion from temporary total disability to temporary partial disability will take place. These figures, of course, will depend upon the date of the accident and the employee's average weekly wage.

When O.C.G.A. section 34-9-261 was revised effective July 1, 1992, a 400 week cap was placed on temporary total disability benefits in non-catastrophic cases.\textsuperscript{238} O.C.G.A. section 34-9-262 controls payment of temporary partial disability benefits and places a 350 week cap on those disability benefits.\textsuperscript{239} These disability benefits are calculated from the date of the injury forward.\textsuperscript{240} When an employer/insurer utilizes the provisions of O.C.G.A. section 34-9-104(a)(2) to convert temporary total disability payments to temporary partial disability benefits, the claimant's overall entitlement to income benefits may be reduced by fifty weeks.\textsuperscript{241} A claimant may, however, still subsequently refile and assert a renewed entitlement to temporary total disability benefits after having compiled either fifty-two consecutive weeks of restricted work releases or an aggregate amount of seventy-eight weeks of restricted work duty releases.\textsuperscript{242}

\textbf{C. Two Insurance Companies/Two Employers}

As was the case with the finding of a new accident, some question exists as to who will be held liable when an employee is injured, receives benefits, and then suffers a change in condition after returning to work with a different employer or a different insurance carrier. The first inroad which helped to effectively clear these muddied waters occurred in \textit{Leatherby Insurance Co. v. Hubbard}.\textsuperscript{243}

In \textit{Hubbard} the claimant was originally injured in October 1974 when he fell twenty-six feet and was impaled on a steel rod. He then returned to work for the same employer in January 1975. On May 14, 1975, claimant again fell while at work and was treated by the same physician who treated him after his 1974 accident.\textsuperscript{244}

The insurance company on risk during 1974 was Argonaut. Leatherby took over coverage in January 1975. The question thus presented was

\textsuperscript{237} \textit{Id.}; GA. BD. OF WORKERS' COMPENSATION R. 104 (1992).
\textsuperscript{239} \textit{Id.} § 34-9-262.
\textsuperscript{240} \textit{Id.}
\textsuperscript{241} \textit{Id.} § 34-9-104(a)(2).
\textsuperscript{242} \textit{Id.}
\textsuperscript{244} \textit{Id.} at 477, 236 S.E.2d at 169.
whether claimant's operation of August 1975, to remove a neuroma in the scar tissue, was precipitated by the 1974 accident or the 1975 accident. If due to the earlier accident, Argonaut would be liable for a change in condition. Alternatively, Leatherby would be held liable if the operation was due to what would have effectively been a finding of a new accident in 1975.245

The ALJ determined that the operation and ensuing disability were due to the original accident.246 Moreover, the judge found the injury in 1975 was only of a temporary duration which had resolved itself by August of 1975.247 Therefore, Leatherby was held liable for temporary total disability benefits from May 14, 1975 until August 5, 1975.248 Argonaut was held liable for benefits after August 6, 1975 based on a change in condition predicated on the original accident.249

The Full Board affirmed the ALJ’s award.250 The superior court, however, reversed and remanded because it detected no evidence to support a change in condition finding.251 The court of appeals reversed the superior court and reinstated the ALJ’s award.252 Thus, Argonaut was found to be liable for claimant’s change in condition based on his original injury.253

The next major case in this area was Slattery Associates, Inc. v. Hufstetler,254 which conspicuously omitted any reference to, or reliance upon, Leatherby. The court of appeals ruled:

that when other employment intervenes between an original award of compensation and a claimant’s subsequent disability, an award against the original employer based on a “change of condition” is not, as a matter of law, barred unless the subsequent employment, in which the gradual worsening condition occurred, evidences a work environment and work circumstances which are “new” and “different” from those existing in the claimant’s previous “ordinary work.”255

In applying this rule to the facts of the case, the court found the claimant did not encounter new or different circumstances at his new

245. Id. at 477-78, 236 S.E.2d at 169.
246. Id. at 478, 236 S.E.2d at 169-70.
247. Id., 236 S.E.2d at 170.
248. Id.
249. Id.
250. Id.
251. Id.
252. Id. at 480, 236 S.E.2d at 170.
253. Id.
255. Id. at 395, 288 S.E.2d at 660.
employer after his accident and before his disability. The subsequent employments were therefore 'intervening' only in a temporal and not a causal sense. In light of this finding, the original employer/insurer was held liable for claimant's change in condition.

An interesting adaptation of the above-stated rule occurred in Garrard v. Pitts Plumbing Co. The claimant was initially injured in 1980 when the backhoe he was running overturned. This accident resulted in a herniated disc. The claimant's attempts to return to work at a wide variety of jobs were unsuccessful, and he was unable to generate any income aside from his workers' compensation benefits. On November 26, he attempted to work at cutting down a tree, became dizzy and passed out, and the severed treetop fell, dislocating his shoulder and breaking five ribs.

The claimant asserted he took this job due to the receipt of a WC-2 indicating his benefits would be suspended on November 26. The ALJ found the severity of the original injury in 1980 prevented the claimant from returning to the type of work in which he had previously engaged. Further, the judge maintained that despite the fall from the tree and the resulting injuries, the claimant remained totally disabled. Therefore, he suffered no change in condition from the original disability. This was adopted by the Full Board, but reversed by the superior court.

The court of appeals reinstated the ALJ's determination. Of primary consideration was the medical testimony illustrating that even had the second accident not occurred, the claimant could not have returned to his previous strenuous work activities. "Only in the infrequent case, as here, where there is clear testimony accepted by the trior [sic] of fact to the effect that the original disability is continuing and sufficient can the original employer be held responsible."

256. Id. at 396, 288 S.E.2d at 661.
257. Id.
260. Id. at 457, 294 S.E.2d at 658-59.
261. Id.
262. Id. at 458, 294 S.E.2d at 659.
263. Id.
264. Id. at 457, 294 S.E.2d at 658.
265. Id. at 459, 294 S.E.2d at 660.
266. Id.
267. Id.
test is "whether disability resulting from the original, compensable accident is in and of itself, an efficient contributing cause of the claimant's inability to return to work."

IV. TEMPORARY AGGRAVATION

Sometimes, a second accident will constitute the cause of a claimant's disability. In this case, the employer/insurer on risk when the first accident occurred may be held liable while the employer/insurer on risk at the time of the second accident may not. Another possibility is that the employer/insurer on risk at the time of the second accident may be held liable for a temporary exacerbation of the underlying disability for which the initial employer/insurer is responsible.

In the case of Ashley v. American Mutual Liability Insurance Co., the claimant injured his left arm while at work on May 10, 1968. This injury required the claimant to undergo surgery. The claimant, however, had broken the same bones eleven years earlier. The court in Ashley held that "while the claimant may have sustained an accident on May 10, 1968, it was of a minor nature and produced no disability but that the disability which the claimant has is a result of the accident of 1957." Disability benefits were therefore denied.

In Garner v. Atlantic Building System, Inc., the court of appeals attempted to define and clarify certain terms of art.

When the "aggravation" of a pre-existing condition was sufficient of itself to constitute the cause of the claimant's inability to work this court has held that the "aggravation" constituted a new injury. Unfortunately, this court has also used the word "aggravation" in a situation where the claimant's condition, from the wear and tear of performing his usual duties, continues to worsen to the point that he can no longer perform the duties of his employment. Under these circumstances the claimant has not sustained a new injury, but has had a change of economic condition as to entitle him to compensation for a change in condition under the original award.
The court further stated that "the State Board of Workers' Compensation
should, when referring to a new accident, use the word 'aggravation,' and
when referring to a condition which is not a new accident, use the
terminology gradual worsening or deterioration, or recurrence, as
appropriate to the circumstances."276

In Leatherby Insurance Co. v. Hubbard,277 discussed above, the court
held the second fall resulted only in a temporary aggravation of the
original injury, and any disability resultant from the second fall had
completely resolved itself.278 Thus, the surgery the claimant under-
went after suffering the second accident was held to be a result of the
first accident.279 Since this accident led to the claimant's total disability,
the insurance company on risk at the time of the first accident was held
responsible for the claimant's subsequent total disability.280 The
insurance company on risk at the time of the second accident was held
liable for a three month period that the court determined was precipitat-
ed by an accident that occurred while they were the company on risk.281

In Peachtree Plaza Hotel v. Haynes,282 the claimant originally injured
his back while working for the Peachtree Plaza Hotel as a bartender.
This injury required a laminectomy. Claimant then returned to light
duty work and remained for a period of five months. Thereafter, the
claimant went to work as a fast food manager for eight months, after
which he was forced to quit because the constant standing accentuated
the pain in his back. While riding on a MARTA escalator, the claimant
fell and then filed claim for a change in condition against Peachtree
Plaza Hotel seeking reinstatement of his benefits.283

The court of appeals ultimately held the escalator incident constituted
merely a temporary aggravation, and after a few days of intense pain
claimant returned to his prior position.284 "This evidence supports the
conclusion that (claimant) suffered a 'change in his condition' stemming
from the original trauma for which the original employer was lia-
able."285 Relying on claimant's need to leave his position as a fast food

276. Id.
278. Id. at 479, 236 S.E.2d at 170.
279. Id.
280. Id.
281. Id. See also Eastern Airlines, Inc. v. Moss, 197 Ga. App. 61, 397 S.E.2d 445
283. Id. at 831, 296 S.E.2d at 148.
284. Id. at 832, 296 S.E.2d at 148.
285. Id. at 831, 296 S.E.2d at 148 (citing Slattery Assocs., Inc. v. Hufstetler, 161 Ga.
manager, where claimant did not encounter “new circumstances,” the court held claimant’s condition had changed for the worse before the MARTA accident.\textsuperscript{286} Claimant could therefore recover benefits from Peachtree Plaza Hotel based upon a change for the worse in his condition attributable to the original accident.\textsuperscript{287}

V. CONCLUSION

In conclusion, certain ground rules may be posited. An initial claim for compensation is an accident or a new accident. As such, the date the disability manifests itself will serve as the date of the accident for statute of limitations purposes. In contrast, a change in condition occurs if the claim is subsequent to a previous award or voluntary payment of income benefits.

Liability for an accident or new accident will lie with the insurance carrier on risk at the time of the disability; this may not be the same carrier that was on risk at the time the accident actually occurred. Liability for a change in condition, however, will be traced back to the carrier on risk at the time of the original accident. A third possibility is presented when a claimant is injured, returns to work, then suffers a temporary aggravation or exacerbation of his injury. The employer/insurer at the time of the exacerbating injury will be liable only for the amount of temporary disability occasioned by the aggravating event. Thereafter, the court will find the employer and insurance carrier on risk at the time of the original accident responsible for any continuing disability.

From a litigation standpoint, it is recommended that a claimant’s attorney file an action against both the original employer and the subsequent employer if any question exists as to whether the claimant has suffered a change in condition or a new accident. The claimant’s attorney will therefore avoid the possibility of having unnecessary bifurcated litigation. Further, the attorney will avoid the necessity of bringing two separate actions if the first action determines the improper defendant has been named.

While the primary goal of all claimants’ attorneys is to secure benefits for their clients, attorneys may side with one employer/insurer versus another in attempting to demonstrate either a new accident or a change in condition. This choice depends on the effect of either employer/insurer

\textsuperscript{286} Id. at 832, 296 S.E.2d at 148.
\textsuperscript{287} Id.
on a claimant’s average weekly wage and corresponding compensation rate. If the injured employee generated a higher weekly wage after returning to work subsequent to an earlier compensable accident, then the employee would be well advised to establish the intervention of new circumstances, an actual injury, or an independent aggravation of a prior physical infirmity rather than showing a change in condition. Of course, a valid and reasonable basis must be demonstrated to name any employer/insurer as the defendant.

From the employer/insurer’s standpoint, the presentation of evidence will rely exclusively on whether it is attempting to show a change in condition or a new accident. From the defense table, the specific activities performed by the employee subsequent to his return to work, the physical stress involved with subsequent work activities, and any other new circumstances that may be identifiable will be the focus of attention. In addition to a factual comparison between the various jobs performed by the claimant, an examination of the medical records, to determine whether a renewed period of disability is caused by the gradual deterioration of the individual’s condition or by a specific event, will also be necessary.

Finally, due consideration must be given in preparation for any hearing to recognize which party will bear the burden of proof. In any initial claim for benefits, the claimant will bear the burden of proof, whether in an all issues hearing or when asserting a new accident. The employer/insurer will bear the burden of proving a positive change in the claimant’s condition when the claimant has not actually returned to work. If the claimant has returned to work subsequent to the occurrence of a compensable accident and thereafter asserts a renewed entitlement to disability, the claimant will bear the burden of proof.

When an injured employee returns to work and is subsequently discharged or released for reasons unrelated to the original injury, the claimant must demonstrate by a preponderance of the evidence that a diligent search for other suitable employment was unsuccessful because of the on-the-job accident. To carry this burden, claimants must demonstrate that they are unable to secure alternative suitable employment. The best evidence of this requirement is proof that they were denied employment because of the physical infirmity resulting from their compensable accident.