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Workers' Compensation

by H. Michael Bagley*
Daniel C. Kniffen**
and
John G. Blackmon, Jr.***

I. INTRODUCTION

After the difficult debate surrounding workers' compensation legislation in 1992, few would have thought it possible that the Georgia Legislature would revisit the Workers' Compensation Act (the "Act")\(^1\) any time soon. Yet, the 1994 General Assembly made a number of substantial changes to the Act, constituting by far the most significant development in workers' compensation law over the survey period. Important case law decisions affected the areas of exclusive remedy, the employment relationship, and heart attack claims.

II. LEGISLATIVE CHANGES

The General Assembly effected several major substantive changes to the Workers' Compensation Act in 1994.\(^2\) Effective July 1, 1994, these amendments to the Act were designed and sponsored by the Chairman of the State Board of Workers' Compensation, Harrill Dawkins.\(^3\)

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2. Id. All changes became effective July 1, 1994 in conjunction with extensive changes to Board Rules.
3. Id.
A. Aggravation of Preexisting Condition

While the definition of "injury" and "personal injury" set out in the Workers' Compensation Act made no mention of the aggravation of a preexisting condition prior to 1994, it has long been a well-established principle that the aggravation of a preexisting condition by employment activities is viewed as an injury arising out of and in the course of employment.\(^4\) The judicial inclusion of "aggravation of a preexisting condition" into the definition of "injury" and "personal injury" was codified in 1994.\(^5\)

Similarly, the General Assembly codified the well-established principle that the aggravation of a preexisting condition by an injury arising out of and in the course of employment is compensable only for so long as the condition is aggravated.\(^6\) While the definition of injury and personal injury were specifically amended to include aggravation of a preexisting condition, the amendment also restricted the inclusion "only for so long as the aggravation of the preexisting condition continues to be the cause of the disability; the preexisting condition shall no longer meet this criteria when the aggravation ceases to be the cause of the disability."\(^7\) In other words, not only will the employee's entitlement to disability benefits cease, but the employee shall no longer be entitled to medical care as well, since the entire claim ceases to be compensable.

B. Accidents Caused by Alcohol and Controlled Substances

It is well-settled that injuries which are proximately caused by an employee's intoxication as a result of the consumption of alcohol or controlled substances are barred as wilful misconduct.\(^8\) However, since this is an affirmative defense, the burden of proof has been on the employer, and the practicalities of amassing all of the evidence needed are all too often insurmountable.

In order to facilitate the fair and efficient administration of claims involving employees under the influence of alcohol or drugs at the time of their on-the-job injury, Official Code of Georgia Annotated ("O.C.G.A.")

\(^7\) O.C.G.A. § 34-9-1(4) (Supp. 1994).
section 34-9-17\textsuperscript{9} was amended in 1994 to parallel the criminal provisions applicable to individuals charged with driving motor vehicles under the influence of alcohol or drugs.\textsuperscript{10} The burden-shifting presumptions created in the statutory framework for dealing with individuals charged with driving under the influence of alcohol or drugs have withstood constitutional challenges based upon an alleged denial of due process of law and have been found to be a valid and enforceable evidentiary tool.\textsuperscript{11}

A rebuttable presumption that the accident and injury were caused by the consumption of alcohol is created “if the amount of alcohol in the employee’s blood within three hours of the time of the alleged accident, as shown by chemical analysis of the employee’s blood, urine, breath or other bodily substance, is 0.08 grams or greater . . . .”\textsuperscript{12} Similarly, if “any amount of marijuana or controlled substance” is found in the employee’s blood within eight hours of the time of the accident, as shown by chemical analysis of blood, urine, breath or other bodily substance, a rebuttable presumption is created that the accident and injury were caused by the ingestion of the drug.\textsuperscript{13}

Previously, evidence confirming the mere ingestion of alcohol or controlled substances, without more, was not sufficient to mount a defense based upon the wilful misconduct of the employee.\textsuperscript{14} In the situations specified by this amendment, the burden of moving forward will be upon the employee, and the employee will be confronted with the task of essentially disproving that the alcohol or controlled substances were the proximate cause of the on-the-job accident and injury.\textsuperscript{15}

Anticipating possible attempts to foil the testing requirements of these provisions, the statute also provides that if the employee unjustifiably refuses to submit to a reliable, scientific test to be performed in compliance with drug-free workplace programs,\textsuperscript{16} then the same

\begin{itemize}
  \item 9. O.C.G.A. § 34-9-17 (Supp. 1994).
  \item 10. Id. § 40-6-392 (1991).
  \item 13. Id. § 34-9-17(b)(2).
  \item 14. See, e.g., Thomas v. Helen’s Roofing Co., 199 Ga. App. 161, 404 S.E.2d 331 (1991). The court of appeals noted that the existence of cocaine in the bloodstream, without specific evidence of intoxication causing the injury, would not be sufficient to bar the claim. Id. at 161, 404 S.E.2d at 331.
  \item 15. O.C.G.A. § 34-9-17(c) (Supp. 1994).
  \item 16. Id. § 34-9-415.
\end{itemize}
C. Penalty Provisions

The State Board of Workers' Compensation ("Board") has long possessed the authority to administer penalties for the failure to file forms or to follow orders or directives; in addition, the Board may administer penalties upon violation of any rule or regulation. The authority of the Board to administer penalties was expanded in 1994 to include the power to assess a civil penalty of not less than $500 and no more than $5,000 per violation against any person who knowingly and intentionally makes any false or misleading statement or representation for the purpose of facilitating the obtaining or denying of any benefit or payment under the Act. Likewise, the Board has the same authority for violations of the provisions requiring employers to obtain workers' compensation insurance or qualify as a self-insured.

D. Construction and Interpretation of the Act

Through judicial pronouncement, it has become axiomatic that the Georgia Workers' Compensation Act is a "humanitarian measure meant to provide relief to the injured employee, and the Act should be liberally interpreted by the Courts to carry out that purpose." However, the underlying philosophy of interpreting the Act itself in a liberal manner has frequently been used in practice as the basis for interpreting the facts as well as the law in favor of a claimant, which is erroneous as a matter of law.

In an effort to more clearly define the manner in which the Act should be construed and interpreted, O.C.G.A. section 34-9-23 restricts liberality of construction to only the purposes of "bringing employers and employees within the provisions of this chapter and to provide protection for both." Furthermore, for the first time in the history of the Act, the General Assembly specified that the Act's intent is "to provide a complete and exclusive system and procedure for the resolution of

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17. Id. § 34-9-17(b)(3).
18. Id. § 34-9-18(a).
19. Id. § 34-9-18(b).
20. Id. § 34-9-18(c).
disputes between employers and employees ....” However, the provision leaves no room for doubt that the Act “shall be construed and applied impartially to both employers and employees.”

The essence of the General Assembly's message in O.C.G.A. section 34-9-23 is twofold. First, the workers' compensation system should be the exclusive remedy for resolving disputes between employers and employees for injuries to the employee which arise out of or in the course of employment. Second, coverage by the Act is the only issue which shall require liberal construction, and all issues other than coverage under the Workers' Compensation Act shall be construed in a manner which is impartial to both employers and employees.

E. Qualifications and Roles of Members of the Board

In a subtle change, acknowledging the reality of impartial Board members, O.C.G.A. section 34-9-42(a) was modified to change the requirement that there be one member “considered a representative” of employers and another member “considered a representative” of employees to a requirement that each of those members be “knowledgeable of the concerns” of either employers or employees. Gone is the statutory requirement of an advocate on the Board for each side. Instead, the Board shall have a designated member who is a resource of knowledge and information.

This change is consistent with the judicial function of the Board, and in furtherance of the judicial function of the Board, there is now the statutory mandate that Board members shall be subject to the Georgia Code of Judicial Conduct.

F. Standard of Review by the Board

Prior to July 1, 1994, appeals to the full Board from an award of an Administrative Law Judge (ALJ) were de novo proceedings. The full Board had the authority to consider all evidence in the record and it was not bound to follow any of the ALJ's findings of fact or conclusions of law.

The General Assembly amended O.C.G.A. section 34-9-103(a) to abolish de novo review by the Board of awards from ALJs. After July
1, 1994, the "findings of fact made by the Administrative Law Judge in the Trial Division shall be accepted by the Appellate Division where such findings of fact are supported by a preponderance of competent and credible evidence contained within the records."30

A preponderance of evidence is defined in Georgia law as being where the evidence shows that a certain fact is more likely true than not true.31 Therefore, in order to have the Full Board reverse a finding made by an ALJ, the appellant will be required to show that the finding of fact made by the ALJ was at least based upon evidence which was evenly balanced in support of each party's contention.32

G. Issues Related to the Employee's Return to Work

Aden's Minute Market v. Landon33 and its progeny reemphasized the burden that must be carried by an injured employee who has ceased working for reasons unrelated to the on-the-job injury and seeks the reinstatement of disability benefits.34 The employee must not only show the existence of continued physical limitations related to the on-the-job injury, but must also show that the employee has made a good faith effort to find other employment which is suitable to the employee's impaired condition.35 Not only must employees show that they have applied for jobs, but employees must also show that they did not get the jobs because of their impaired condition.36

In order to streamline this evidentiary process, the General Assembly modified the rule against hearsay from potential employers to whom the employee has applied for work, in the same manner as the rule against hearsay has been modified for certain medical reports,37 and the parties may now submit into evidence a form "signed and dated by a prospective employer... in lieu of the oral testimony of such prospective employer... [to] document that the employee has applied for a position or positions suitable to the employee's limitations or restrictions resulting from the work-related injury and was not hired."38

30. Id. § 34-9-103(a).
32.
34. Id. at 219, 413 S.E.2d at 738. For a detailed discussion, see H. Michael Bagley et al, Workers' Compensation, 45 MERCER L. REV. 493, 504 (1993).
35. 202 Ga. App. at 219, 413 S.E.2d at 738.
38. Id. § 34-9-102(e)(3).
In situations where the injured employee who continues to possess limitations is offered a job that is suitable, the employee shall have fifteen working days as a "trial return to work period" without experiencing a shift in the burden of proof if the employee's efforts to return to work in that fifteen-day period are unsuccessful. Benefits shall be immediately reinstated and the burden of proof will remain upon the employer to prove that the employee is not entitled to continuing benefits in the event the employee is unable to perform the job for more than fifteen days. However, if the employee refuses to attempt the job, the employer may unilaterally suspend benefits upon proof that the job was approved by the authorized treating physician within sixty days of the job offer, that the employee was given at least ten days notice of the suitable job, and certification that the employee did not attempt the job.

H. Medical Benefits

The employer is required to provide employees who have been injured on the job with medical benefits, which include "such medical, surgical, and hospital care and other treatment, items, and services which are prescribed by a licensed physician, including medical and surgical supplies, artificial members, and prosthetic devices and aids damaged or destroyed in a compensable accident." The 1994 amendments to O.C.G.A. section 34-9-201 allow employers to elect between three different mechanisms for providing medical care: the traditional posted panel, a conformed panel of physicians, or managed care organization procedures.

Traditional Posted Panel. The traditional posted panel of physicians existed in essentially the same format for two decades before the 1994 amendments, and it still exists as an option for employers to use in providing medical services under the Workers' Compensation Act. To utilize the traditional panel, the employer must maintain a list of at least four physicians, professional associations, or corporations of physicians, and an employee may select the services of the physicians on the list if he is injured on the job. An employee challenging the

39. Id. § 34-9-240(b).
40. Id. § 34-9-240(b)(1).
41. Id. § 34-9-240(b)(2).
42. Id. § 34-9-200(a).
43. Id. § 34-9-201(b).
44. Id.
validity of a panel of physicians must prove that the panel is defective.\textsuperscript{45} If the panel contains less than four physicians, does not list an orthopaedic surgeon, or if more than two of the four medical providers listed are industrial clinics, the panel will be considered defective.\textsuperscript{46} In such cases, the employee can seek treatment from a physician of the employee's choice.\textsuperscript{47} After notice is given by the employee to the employer, the physician selected becomes the authorized treating physician, and the employee may make one change from that physician to another physician without approval of the employer and without an order of the Board.\textsuperscript{48} However, any further change of physician or treatment requires a formal request to the Board or an agreement by the parties.\textsuperscript{49}

**Conformed Panel.** To utilize the conformed panel of physicians, the employer must maintain a list of at least six physicians or professional associations reasonably accessible to employees.\textsuperscript{50} In addition to the four physician minimum required in the traditional posted panel of physicians, conformed panel status is achieved by adding a chiropractor and a general surgeon.\textsuperscript{51}

An employee may obtain the services of any physician from the conformed panel and may thereafter also elect to change to another physician on the panel without prior authorization within sixty days of the date of first treatment for the injury.\textsuperscript{52} The physician selected will then become the authorized treating physician in control of the employee's medical care and may arrange for any consultation, referral, and extraordinary or other specialized medical services as the nature of the injury shall require without prior authorization of the Board.\textsuperscript{53} However, any physician to whom the employee is referred by the primary authorized treating physician shall not be permitted to arrange for additional referrals.\textsuperscript{54}

An employee challenging the validity of a conformed panel of physicians must prove that the panel is defective.\textsuperscript{55} If the panel

\textsuperscript{45.} Id.; Board Rule 201(a)(1).
\textsuperscript{46.} O.C.G.A. 34-9-201(b); Board Rule 201(c)(1).
\textsuperscript{47.} O.C.G.A. § 34-9-201(f) (Supp. 1994).
\textsuperscript{48.} Board Rule 201(c) (Supp. 1994).
\textsuperscript{49.} Id.
\textsuperscript{50.} O.C.G.A. § 34-9-201(b)(2) (Supp. 1994); Board Rule 201(a)(2).
\textsuperscript{51.} O.C.G.A. § 34-9-201(b)(2) (Supp. 1994); Board Rule 201(a)(2).
\textsuperscript{52.} O.C.G.A. § 34-9-201(b)(2) (Supp. 1994).
\textsuperscript{53.} Id.
\textsuperscript{54.} Id.
\textsuperscript{55.} Id.
contains less than six physicians or does not contain providers of the types of health care services required, the panel will be considered defective. In such cases, the employee can seek treatment from a physician of the employee's choice. After notice is given by the employee to the employer, the physician selected becomes the authorized treating physician, and the employee may make one change from that physician to another physician without approval of the employer and without an order of the Board.

**Workers' Compensation Managed Care Organizations.** An employer or the workers' compensation insurer of an employer may contract with a workers' compensation managed care organization ("WCMCO") certified by the Board. A WCMCO is a plan certified by the Board that provides for the delivery and management of treatment to injured employees under the Act. The language of the statute enabling the use of WCMCO's in Georgia borrows heavily from similar provisions in the laws of Oregon and Minnesota.

An employer utilizing a WCMCO in Georgia may satisfy the notice requirements by posting notices in permanent places upon the business premises which identify the WCMCO, give the effective date of the contract with the WCMCO, as well as the WCMCO's geographical service area, the telephone number and address of the administrator, and the WCMCO's toll-free twenty-four-hour telephone number. The party who challenges the validity of the WCMCO panel shall have the burden of proof.

**Authorization by Referral.** Whether utilizing a traditional posted panel, a conformed posted panel, or a WCMCO, a referral by an authorized treating physician for a specific ancillary treatment or medical services does not constitute a change of physician and does not require an order from the Board, but the physician receiving the patient on referral has no authority to make any other referrals except back to the original referring physician. The referring physician remains the

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56. *Id.*
58. Board Rule 201(c) (Supp. 1994).
60. *Id.* § 34-9-201(b)(3).
64. Board Rule 201.
65. O.C.G.A. § 34-9-201(b) (Supp. 1994); Board Rule 201(a).
authorized treating physician for all other purposes. The employer's liability for the medical expenses of the second physician is limited to the treatment requested by the initial authorized treating physician. Amendments to O.C.G.A. section 34-9-201 in 1994 overrule earlier decisions requiring prior approval of the Board of all ancillary medical services.

Change of Physician. If the employee wishes to go to a physician not listed on the panel or in the WCMCO, the employee may make a request for a change of physician. Likewise, if the employer is dissatisfied with the treatment the employee is receiving and the employee will not agree to seek other care, the employer may also make a request for a change of physician. The 1994 amendments to the Act gave the State Board the power to order a change of physician or treatment upon its own motion, as well as upon the request of an employer or employee, after the parties have been given fifteen days in which to voice any opposition.

Medical Care in the Controverted Case. When an employer controverts a claim, or denies that the employee has suffered a compensable injury and that the employee is entitled to receive benefits, the employer loses the right to control who provides medical care to the employee. However, the employee's ability to select providers of medical services is not unrestricted after a previously controverted claim subsequently is found to be or accepted as compensable. Under these circumstances, the employee is authorized to select one of the physicians who had provided treatment for the work-related injury prior to the finding or acceptance of compensability. After notice is given to the employer, the physician so selected becomes the authorized treating physician, and the employee may make one change from that physician to another physician who had provided treatment for the work-related

66. O.C.G.A. § 34-9-201(B) (Supp. 1994).
70. Id.
71. O.C.G.A. §§ 34-9-200(b) and 34-9-201(e).
72. O.C.G.A. § 34-9-201(e).
73. Id.
74. Id.
injury prior to the finding or acceptance of compensability, without approval of the employer and without an order of the Board.\textsuperscript{75}

\section*{III. EXCLUSIVE REMEDY}

As in the last survey period, there were several decisions during this survey period regarding the exclusive remedy doctrine.\textsuperscript{76}

\subsection*{A. Providing Medical Care}

\textit{Jim Walters Homes, Inc. v. Roberts,}\textsuperscript{77} created controversy regarding the exclusive remedy doctrine since it contained certain dicta which generated the argument that delays in providing or authorizing medical care could subject the employer or insurer to tort liability.\textsuperscript{78} The authors previously opined in the 1993 survey that \textit{Jim Walters Homes} represented an anomaly in Georgia law.\textsuperscript{79} In \textit{Wall v. Phillips,}\textsuperscript{80} the court of appeals emphasized this anomaly.\textsuperscript{81} In \textit{Wall} a former employee commenced a tort action against her former employer alleging that the plant nurse prescribed pain medication without first obtaining authorization from her treating physician.\textsuperscript{82} In response, the employer raised the exclusive remedy provision of the Act,\textsuperscript{83} but the trial court denied the employer's motion for summary judgment.\textsuperscript{84} The court of appeals reversed this denial, finding that the employer was entitled to summary judgment since the exclusive remedy doctrine also applies to "intentional torts committed by one worker against a co-worker, unless the tortious act was committed for personal reasons unrelated to the conduct of the employer's business."\textsuperscript{85} More importantly, the court specifically distinguished the decision in \textit{Jim Walters Homes} as follows:

Phillips misplaces her reliance upon \textit{Jim Walters Homes v. Roberts} . . . . In \textit{Jim Walter}, a default case, the former employer was deemed to have admitted to an intentional tort that was outside the purview of the Georgia Workers' Compensation Act. Jim Walter thus has no application to the instant case, where the nursing services were

\textsuperscript{75} Board Rule 201(b) (Supp. 1994).
\textsuperscript{76} For a general overview, see Bagley et al, supra note 34, at 494.
\textsuperscript{78} Id. at 620-21, 396 S.E.2d at 789-90.
\textsuperscript{79} See Bagley et al, supra note 34, at 498.
\textsuperscript{81} Id. at 490, 436 S.E.2d at 517.
\textsuperscript{82} Id., 436 S.E.2d at 518.
\textsuperscript{83} Id. at 491, 436 S.E.2d at 518 (citing O.C.G.A. § 34-9-11(a) (1992)).
\textsuperscript{84} Id. at 490, 436 S.E.2d at 518.
\textsuperscript{85} Id. at 491, 436 S.E.2d at 518.
rendered at the workplace and solely because of Phillips' position as an employee . . . .

B. Intentional Acts

In Hadsock v. J.H. Harvey Co., an employee was followed by a fellow employee and an accomplice to a bank where the employee was making a night deposit on behalf of his employer. The employee was robbed and killed by the fellow employee and his accomplice. In a tort action filed against the employer, summary judgment was granted to the employer under the exclusive remedy doctrine, and the court of appeals affirmed because it was undisputed that the employee had been assigned the task by his supervisor. While the performance of the task by the employee was clearly contrary to company policy, the employee was not in a position to challenge the order. In extending the exclusive remedy provision to this circumstance, the court made the following observation on how to construe the Act:

The Workers' Compensation Act is to be liberally construed in determining whether an injury is compensable under it . . . it must be viewed in this manner both when an employee has made a claim and is seeking coverage under it and when an employer has sought its protection as a defense to a tort action. One of the purposes of the Act is the humanitarian one of providing relief to injured employees, but another purpose is to protect employers against excessive recoveries of damage.

In contrast with the decision in Hadsock, in Rogers v. Carmike Cinemas, the court was confronted with an employee's allegation of sexual harassment by company officers and employees. The employee asserted in the complaint that she had to endure on almost a daily basis harassing conversations involving sexual innuendo and sexual overtone, as well as direct confrontations regarding sexual favors from Carmike's officers and employees. At the conclusion of the employee's evidence, the employer moved for directed verdict on the basis that the claims were barred by the exclusive remedy doctrine of the Act. The employer's motion for directed verdict was granted, but on appeal, the court of

86. Id. at 491-92, 436 S.E.2d at 519.
88. Id. at 783, 442 S.E.2d at 894.
89. Id.
90. Id. at 783-84, 442 S.E.2d at 894.
91. Id. at 784, 442 S.E.2d at 894 (citations omitted).
93. Id. at 428-29, 439 S.E.2d at 664-65.
appeals reversed on the basis that the Act excludes from coverage an injury caused by the willful act of a third person directed against an employee for reasons personal to the employee and applied that principle to the circumstances of the case.  

Similarly, in Oliver v. Wal-Mart Stores, Inc., summary judgment had been granted to Wal-Mart Stores in an action brought by a former employee claiming slander and intentional infliction of emotional distress after being upset by her manager reading a counseling statement to her following an allegation that she had taken a ten-cent cup of ice without paying for it. In refusing to extend the exclusive remedy provision to this circumstance, the court found:

This court has held that to be compensable under the Act, the injury must be a physical injury or harm. It is undisputed that the only injury involved in this case is a non-physical one . . . . We conclude that since the only injury involved in this case is a non-physical one, it is not one which is compensable under the Act.

However, the Supreme Court reached a different conclusion in Hennly v. Richardson. A former employee filed a tort action alleging that her supervisor had wilfully directed his pipe smoke at her with the intent to inflict injury. The court of appeals had reversed the trial court's grant of partial summary judgment based upon the court of appeals' finding that the alleged conduct was not work-related and therefore not barred by the exclusive remedy doctrine of the Act. In reversing the court of appeals, the Supreme Court found:

The injuries of which Richardson complains began and occurred while she was at her place of employment during the regular work day and were the result of the conditions under which she worked . . . . Hennly's smoking was a part of that work environment, rather than an act directed at Richardson personally.

Further emphasizing the bright-line distinction between physical and non-physical injury, Baldwin v. Roberts stemmed from a tort action brought by a former employee alleging that her former supervisor struck

94.  *Id.* See also Murphy v. ARA Servs., Inc., 164 Ga. App. 859, 298 S.E.2d 528 (1982).
96.  *Id.* at 703, 434 S.E.2d at 500.
97.  *Id.* at 704, 434 S.E.2d at 500.
99.  *Id.* at 355, 444 S.E.2d at 319-20.
her in the face after she was escorted from the business premises.\textsuperscript{103} Although the employee alleged that the altercation was a result of personal animosity, the court pointed out that while personal animosity may have ultimately resulted, the origin of a dispute stemmed from the performance of the employee's work, and as such, any battery claim would be barred by the exclusive remedy doctrine.\textsuperscript{104} As to the employee's further contention that the battery was not covered by the Act because her employment had already been terminated at the time it occurred, the court pointed out that since the aggressive acts "were part of the res gestae of the [alleged] discharging of Black by Baldwin, the injuries which resulted from those actions arose out of and in the course of employment."\textsuperscript{105}

C. Entities Covered

The threshold consideration in determining whether or not the exclusive remedy provision is applicable is whether or not there is an employer-employee relationship.\textsuperscript{106} Coverage by the exclusive remedy doctrine cannot be induced by unilateral payments of medical bills and disability benefits to an independent contractor, as argued in Collins v. Grafton.\textsuperscript{107} While acknowledging that the law contemplates some situations where the doctrine of estoppel might be utilized to bar individuals from arguing that they are not covered by the provisions of the Act, the court emphasized:

Unbridled application of the doctrine of equitable estoppel cannot be a means by which the very purpose of the Act is thwarted. The successful continuation of the Workers' Compensation system requires that studied caution be exercised before the doctrine of estoppel is applied against an injured party who does nothing more than receive compensation benefits voluntarily provided by an employer.\textsuperscript{108}

Similarly, the exclusive remedy doctrine will not be extended to an alleged co-employee simply because the alleged employer settles a workers' compensation claim on a stipulation of no-coverage under the Act.\textsuperscript{109}

\begin{itemize}
\item \textsuperscript{103} \textit{Id.} at 546, 442 S.E.2d at 272.
\item \textsuperscript{104} \textit{Id.} at 546-47, 442 S.E.2d at 274.
\item \textsuperscript{105} \textit{Id.} at 547, 442 S.E.2d at 274.
\item \textsuperscript{106} O.C.G.A. § 34-9-11 (1992).
\item \textsuperscript{107} 263 Ga. App. 441, 435 S.E.2d 37 (1993).
\item \textsuperscript{108} \textit{Id.} at 444, 435 S.E.2d at 40.
\end{itemize}
A. Appeals

Several cases issued by the court of appeals during the survey period reemphasized the strict nature of statutory deadlines in superior court appeals. Other decisions considered a party's standing to appeal and the applicability of civil sanctions under O.C.G.A. section 9-15-14 in workers' compensation appeals.

In *Borden v. Holland*, the employee filed a notice of appeal to the superior court, and subsequently scheduled a hearing. Both parties later agreed to waive oral argument and to simply submit the case on briefs. The superior court issued its order reversing the denial of benefits by the Full Board which denied the claim based upon a statute of limitations defense.

The employer appealed, arguing that since the superior court's decision was issued sixty-four days after the filing of the notice of appeal, the Board's denial of the claim had been affirmed by operation of law four days earlier, under the requirements of O.C.G.A section 34-9-105(d).

In response to the employer's argument, the employee contended that since oral argument was waived, the superior court had an additional twenty days under the statute before the Board's decision was considered affirmed by operation of law. The court of appeals rejected the employee's arguments, and once again strictly interpreted the provisions of O.C.G.A. section 34-9-105(b) in order to expedite the disposition of workers' compensation claims. As the court stated: "We decline to carve out an exception which gives the superior court more than the statutory sixty days to rule on a claim when the parties waive the

111. Id. at 821, 442 S.E.2d at 917.
112. Id.
113. Id. at 821-22, 442 S.E.2d at 917 (citing O.C.G.A. § 34-9-105(b) (1994)) requires that workers’ compensation cases appealed to the superior court must have a hearing within sixty days from the date the notice of appeal is filed with the Board, or the decision is considered affirmed by operation of law. The statute also provides that if the hearing is scheduled within the original sixty day period, it may be continued to a date certain by order of the court, and a written decision must then issue within twenty days of the hearing date or the Board’s decision is affirmed by operation of law. Id. at 820, 442 S.E.2d at 916.
114. Id. at 822, 442 S.E.2d at 917.
115. Id.
hearing." The court of appeals concluded, therefore, that the State Board's decision was affirmed by operation of law, and the superior court's order was therefore null.117

The court applied the same rationale to reach an even harsher result in Buschel v. Kysor/Warren.118 In this case, the superior court entered an order reversing a decision of the State Board on August 5, 1993, twenty days after the timely scheduled hearing on the appeal was conducted.119 The order itself, however, was not entered in the superior court clerk's office until the next day, twenty-one days after the hearing.120 Once again, the court narrowly construed O.C.G.A. section 34-9-105(b), which requires that the order disposing of a workers' compensation appeal must be entered within twenty days of the hearing of the appeal or the award is affirmed by operation of law.121 In this case, therefore, even though the superior court judge actually signed the order reversing the State Board's decision within twenty days, the order was null because it was not timely entered in the superior court clerk's office.122 The court's strict interpretation of the requirements for superior court appeals serves as a reminder to practitioners that the deadlines within O.C.G.A. section 34-9-105(b) must be strictly adhered to.

Southwire v. Hull,123 is authority for the basic proposition that a party without standing cannot appeal a decision of the State Board to a superior court.124 The employer, Southwire Company, requested a hearing in an attempt to change an element of the employee's medical care from twenty-four hour nursing attention to substantially less expensive non-professional attendant care.125 While the ALJ granted the employer's request, the Full Board reversed, finding that it would not be in Hull's best interests for a change in nursing service at that time.126 Although securing a reversal by the Full Board, the employee appealed to the superior court, where he obtained an order reversing the Full Board's decision "to the extent it requires either the dispensing or

116. Id.
117. Id.
119. Id. at 93, 444 S.E.2d at 107.
120. Id.
121. Id.
122. Id.
124. Id. at 131, 441 S.E.2d at 293.
125. Id.
126. Id. at 132, 441 S.E.2d at 294.
administering of medication by unlicensed attendants." The court of appeals pointed out that the Full Board's denial of Southwire's request was a decision in Hull's favor, and he therefore had no standing to appeal to the superior court.

In *Atlanta Family Restaurants v. Perry*, the court of appeals re-established an old, but important, principle regarding Full Board appeals. The court held that since an appeal to the Full Board is a de novo proceeding, in which either party can raise any issue involved in the case, an adverse party need not cross-appeal to preserve the right to appeal beyond the Full Board decision. The Full Board could not, therefore, dismiss the employee's Full Board appeal from the ALJ decision without the employer's consent. Practitioners should be aware, however, that the standard for review at the Full Board level has been changed by a 1994 amendment to O.C.G.A. section 34-9-103 and the different standard of review may well produce a different result in a subsequent opinion.

Perhaps the most significant case affecting superior court appeals in workers' compensation cases during the survey period was *Contract Harvesters v. Clark*, which held that the provisions of O.C.G.A. section 9-15-14 for frivolous litigation applies to such appeals. The employer, which appealed an award of benefits from the State Board to the superior court, was assessed $1500 in attorney fees under O.C.G.A. section 9-15-14 for what was found to be a frivolous appeal. Rejecting the employer's argument, the court of appeals held that the provisions of O.C.G.A. section 9-15-14 applied to workers' compensation appeals in superior court because such a proceeding constitutes a civil action within the intended scope of the statute: "We hold that O.C.G.A. § 9-15-14(b) authorizes a superior court to assess attorney fees against a party or his counsel who has prosecuted a frivolous appeal from a workers' compensation award of the ALJ or the Full Board in the superior court." Aggrieved parties in superior court appeals, therefore, are no longer without a remedy. Although the court has

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127. *Id.*
128. *Id.*
130. *Id.* at 581, 434 S.E.2d at 140.
131. *Id.* at 582, 434 S.E.2d at 141.
132. *Id.*
133. See supra text accompanying note 28.
135. *Id.* at 299, 439 S.E.2d at 33.
136. *Id.* at 298, 439 S.E.2d at 31.
137. *Id.* at 299, 439 S.E.2d at 33.
previously held that penalties prescribed by O.C.G.A. section 5-3-31 do not apply to superior court appeals in workers' compensation cases, the more expansive provisions of this Code section now provide a remedy for frivolous appeals.

B. Arising Out Of And In The Course Of Employment

Two cases during the survey period presented the court of appeals with the opportunity to further define the elusive parameters of when an injury "arises out of and in the course of" employment.

The case of Johnson Controls, Inc. v. McNeil revisited the question of when injuries sustained by an employee who is en route to medical treatment for a compensable injury "arise out of and in the course of" employment. McNeil was injured while traveling from his home to a physical therapy appointment prescribed by his orthopedic physician for a compensable on-the-job injury. The court of appeals held that the injuries McNeil sustained on the way to the physical therapy appointment were not compensable because the employer did not require McNeil to attend the physical therapy appointment as a prerequisite to returning to work, nor did the employer either schedule the appointment or provide McNeil with transportation for it. The court emphasized its holding in prior cases that when the accident in question occurs during a time when the employee is free to go where he or she chooses, and the medical treatment involved is purely voluntary and not required in some fashion by the employer, then the claim is not compensable.

The case of City of Atlanta v. Spearman presents a continuation of the line of cases dealing with injuries occurring in the employer's parking lot. Spearman worked for the City of Atlanta at city hall, and was provided parking in a garage controlled by the Georgia Building

141. Id. at 785, 440 S.E.2d at 529-30.
142. Id. at 784, 440 S.E.2d at 529.
143. Id. at 785, 440 S.E.2d at 530.
Authority about one block away. Although the City deducted twenty dollars a month from his pay for the parking space, and then made a lump sum payment to the Building Authority for the spaces, the garage itself was managed, operated, and controlled by the Building Authority, and not the City. The ALJ, Full Board, and superior court all held that Spearman's accident in the garage arose out of and in the course of her employment on the basis that the City of Atlanta maintained direction and control over the employee's use of the parking facility, even though the City had no control over the management of the garage itself. The court of appeals reversed, noting initially the general rule that injuries occurring while the employee is going to or coming from work do not arise out of and in the course of employment. An exception to this rule is that when an employee is injured in a parking lot owned or maintained by the employer, the incident is held to arise out of and in the course of employment. The court of appeals noted that "the ALJ mistakenly equated the City's control over the allocation of the parking spaces with control and direction over the parking lot itself... there was no evidence that the City owned, operated or controlled the lot." The fact that the City provided the parking garage spaces for its employees, therefore, did not bring an injury in the garage within the scope of the claimant's employment. The exception to the "going to/coming from" rule only applies where the employer owns, operates, or controls the parking facility itself.

C. Attorney's Fees

City of Atlanta v. Spearman, also provides an instructive holding in the area of attorney fees. O.C.G.A. section 34-9-108 provides that attorney fees can be assessed against any party to a workers' compensation claim when the offending party prosecutes or defends the claim upon unreasonable grounds. The ALJ, after finding that the claimant's injuries sustained in a parking garage arose out of and in the

147. 209 Ga. App. at 644, 434 S.E.2d at 87.
148. Id.
149. Id., 434 S.E.2d at 87-88.
152. 209 Ga. App. at 645, 434 S.E.2d at 88 (emphasis in original).
153. Id.
154. Id.
course of her employment, assessed attorney fees against the City of Atlanta based upon the finding that the City's notice defense was unreasonable.\textsuperscript{157} The City was successful before the court of appeals in reversing the award of benefits, and then argued that its success on the compensability issue precluded an award of attorney fees on the notice defense.\textsuperscript{158} The court of appeals noted that it was unaware of any cases in which the employer's defense prevailed and yet the employee was awarded attorney fees, but noted that "it is conceivable that this result could lie under the statute."\textsuperscript{159} The court of appeals nevertheless noted that the City, having prevailed in its ultimate defense of the claim, obviously did not defend the case upon unreasonable grounds.\textsuperscript{160} The court dismissed the notice defense as "not vigorously pursued."\textsuperscript{161} And "in light of these circumstances we find that the award of attorney fees was improper."\textsuperscript{162}

The court seems to acknowledge that while attorney fees can be assessed where even a part of the claim is defended upon unreasonable grounds, the totality of the circumstances should be viewed to determine whether or not the offending party has truly been unreasonable.\textsuperscript{163}

\textbf{D. Board Authority}

It is well-established that the State Board of Workers' Compensation is a creature of statute and has no inherent powers except as directed by statute.\textsuperscript{164} Three cases decided during the survey period further delineate the extent of the Board's authority.

Two cases concern O.C.G.A. section 34-9-47, which controls the Board's power to appoint interim members to hear the Full Board appeals, and which has undergone substantial recent amendment.\textsuperscript{165} The case of \textit{Arrow Co. v. Hall}\textsuperscript{166} was tried before an ALJ who, by the time the case was ultimately remanded by a superior court to the Full Board for reconsideration, had herself been appointed a member of the Full Board.\textsuperscript{167} The ALJ participated in the decision of the Full Board on

\begin{itemize}
\item \textsuperscript{157} 209 Ga. App. at 644, 434 S.E.2d at 88.
\item \textsuperscript{158} \textit{Id.} at 646, 434 S.E.2d at 89.
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{165} O.C.G.A. \textsection{} 34-9-47 (Supp. 1994).
\item \textsuperscript{166} 212 Ga. App. 365, 441 S.E.2d 794 (1994).
\item \textsuperscript{167} \textit{Id.} at 365, 441 S.E.2d at 795.
\end{itemize}
remand. Although O.C.G.A. section 34-9-47(b) was amended in 1993 to preclude such a situation from happening, the amendment occurred after the time relevant to the case before the court. The court of appeals nevertheless found that O.C.G.A. section 15-1-8(a)(2) controlled. This statute provides that:

no judge or justice of any court, magistrate, nor presiding officer of any inferior judicature or commission shall: ... (3) sit in any case or proceeding ... in which he has presided in any inferior judicature, when his ruling or decision is the subject of review, without the consent of all parties in interest.

Finding that none of the parties to the workers' compensation claim received any notice that the ALJ who heard the case would participate in the Full Board decision, the court held that the Full Board's decision was improper and required remand.

The case of Levi Straus & Co. v. Lane also involved O.C.G.A. section 34-9-47, and the Board's attempt to implement by its rule-making authority what had been omitted in an amendment to the Code section. The Code was amended in 1992 to create separate trial and appellate divisions within the State Board of Workers' Compensation. This amendment, however, deleted the Board's authority to make temporary appointments of administrative law judges to the appellate division. Acting to correct this oversight, the Board, pursuant to its rule-making powers under O.C.G.A. section 34-9-59, adopted Board Rule 47, which read as follows:

The appellate division of the Board may appoint administrative law judges of the trial division to serve as a judge of the appellate division to review cases on appeal; however, not more than one administrative law judge shall serve as a judge on the appellate division on any one case.

When Levi Straus appealed an award of benefits to claimant Lane to the Full Board, one of the members of the Full Board that heard the appeal

168. Id. at 366, 441 S.E.2d at 795.
169. Id., 441 S.E.2d at 796.
170. Id.
175. 1992 GA. LAWS 1942.
176. Id.
was an ALJ appointed under Board Rule 47.\textsuperscript{178} The court of appeals agreed with Levi Strauss that the Board was without authority to adopt Board Rule 47 when the Legislature had specifically deleted the authority to appoint an administrative law judge as a temporary member of the Full Board in the 1992 amendment to O.C.G.A. section 34-9-47.\textsuperscript{179} Since the Legislature acted in 1993 to again amend the Code section and reconfer upon the Board the authority to appoint acting members of the Full Board, the case is significant as the most recent authority for the proposition that the State Board is limited expressly to the powers granted by the Legislature, and cannot utilize its rule-making authority to exceed those limitations.\textsuperscript{180}

E. Change in Physicians

In \textit{Dart Container Corp. v. Jones},\textsuperscript{181} the court of appeals ruled that its decision in \textit{Lee Fabricators v. Cook},\textsuperscript{182} should be given retroactive application.\textsuperscript{183} The court's decision in \textit{Lee Fabricators} was that O.C.G.A. section 34-9-200(b) and O.C.G.A. section 34-9-201 provide the exclusive method for changing authorized physicians, and that parties disregarding these procedures are "bound by the consequences of their actions."\textsuperscript{184} Although this decision reversed years of standard practice within the workers' compensation field, in which changes of physician were routinely agreed to voluntarily without a formal award of the Board, the court found that the decision in \textit{Lee Fabricators} did not establish a new substantive principle of law, nor overrule past precedent.\textsuperscript{185} Although the decision in \textit{Lee Fabricators} was legislatively overruled by an amendment to O.C.G.A. section 34-9-201 that became effective July 1, 1994,\textsuperscript{186} it is now clear that the decision in \textit{Lee Fabricators} will control all cases prior to the 1994 amendment.

F. Change in Condition

The court of appeals resolved an issue that has been hotly disputed over the last several years by deciding in \textit{Gordon County Farm v.}

\begin{itemize}
  \item \textsuperscript{178}__ Ga. App. __, S.E.2d __ (A93A2507 11/15/93).
  \item \textsuperscript{179}__ Ga. App. __, S.E.2d __ (A93A2507 11/15/93).
  \item \textsuperscript{180}__ Ga. App. __, S.E.2d __ (A93A2507 11/15/93).
  \item \textsuperscript{181}209 Ga. App. 331, 433 S.E.2d 417 (1993).
  \item \textsuperscript{182}203 Ga. App. 450, 417 S.E.2d 35 (1992).
  \item \textsuperscript{183}209 Ga. App. 331, 332, 433 S.E.2d 417, 419.
  \item \textsuperscript{184}203 Ga. App. at 451, 417 S.E.2d at 36.
  \item \textsuperscript{185}Id.
  \item \textsuperscript{186}See supra text accompanying note 50.
\end{itemize}
that an employee's testimony regarding what she was told by a prospective employer about why she was not hired is inadmissible hearsay, and cannot be utilized to meet her burden of proof to show a change in condition.\textsuperscript{188}

Maloney returned to work after sustaining a compensable injury at Gordon County Farm, and was later terminated for causes unrelated to her injury. At the hearing she requested to prove a change in condition, Maloney relied on her own testimony that a prospective employer told her that she could not be hired because she was on workers' compensation.\textsuperscript{189} The court held that the employee's testimony regarding the statements of the prospective employer was inadmissible hearsay, and not admissible under the res gestae exception to the hearsay rule.\textsuperscript{190}

A majority of the court of appeals agreed that the statements of the prospective employer were inadmissible hearsay.\textsuperscript{191} The dissenting opinion, however, argued that the employee's own testimony regarding the fact that the job offer was withdrawn only after she mentioned her compensable injury was both admissible and probative of her inability to find suitable employment.\textsuperscript{192} The majority felt that even this testimony was inadmissible hearsay because it was offered not merely as evidence of the timing of the withdrawn job offer, but as evidence of the truth of the alleged statements by the prospective employer.\textsuperscript{193} Apparently, no evidence was introduced into the record to substantiate the allegation that the prospective employer actually offered the job and then withdrew it other than the employee's own testimony.\textsuperscript{194} The court of appeals therefore determined that there was no admissible testimony in the record to support the employee's burden of proof, and reversed the award of benefits.\textsuperscript{195}

\textsuperscript{188} Id. at 254, 447 S.E.2d at 624.
\textsuperscript{189} Id. at 253-54, 447 S.E.2d at 624.
\textsuperscript{190} Id. at 254, 447 S.E.2d at 624 (citing O.C.G.A. § 24-3-3 (Supp. 1994)).
\textsuperscript{191} Id.
\textsuperscript{192} 214 Ga. App. at 255-56, 447 S.E.2d at 625-26 (Pope, J., dissenting). The claimant’s burden of proof in a change in condition case is to show that his inability to find employment is proximately caused by the original compensable injury. Brown v. Georgia Power Co., 181 Ga. App. 500, 352 S.E.2d 818 (1987); Evco Plastics v. Burton, 200 Ga. App. 121, 407 S.E.2d 60 (1991). To meet this burden, the claimant may not simply present evidence that he has looked for work; rather, the claimant must show that the reason the claimant has been refused job offers is because of restrictions from the original compensable injury.
\textsuperscript{193} 214 Ga. App. at 254-55, 447 S.E.2d at 624-25.
\textsuperscript{194} Id., 447 S.E.2d at 625.
\textsuperscript{195} Id. at 255, 447 S.E.2d at 625.
The court's adherence to its earlier pronouncements regarding the employee's burden of proof in change in condition cases continued in *Autolite v. Glaze*,196 and *Atlanta Hilton & Towers v. Gaither*.197 The decision in *Glaze* reaffirmed the court's commitment to the principle that an employee cannot meet the burden of proof to show a change in condition merely by testifying that she has sought work from other employers but was not hired.198 Without evidence as to why she was not hired, Glaze did not meet her burden of proof to show that her compensable injury was the proximate cause of her unemployment.199

The employee met an even worse fate in the *Gaither* decision. Gaither alleged a change in condition from a fourth slip and fall accident while employed at the Atlanta Hilton Hotel.200 In addition to holding that numerous inconsistencies in Gaither's testimony supported the ALJ decision that no change in condition had in fact occurred, the court noted that Gaither had not presented any evidence that she had even sought work after her termination by the hotel, and therefore could not meet her burden of proof to show a change in condition.201 In addition to losing the appeal, Gaither was assessed $500 in penalties for a frivolous appeal in arguing that she was entitled to an assessment of attorney fees against the employer.202

The distinction between the substantive and procedural requirements in a change in condition case is highlighted in *Freeman v. Continental Baking Co.*203 Freeman sustained a compensable injury, and was released to light-duty work by his authorized treating physician.204 Freeman then bid on a position in the shipping department with the employer and, according to the evidence, would have been offered the position because of his seniority but for the fact that he failed a routine drug test.205 Freeman was terminated because of his drug use, and the employer unilaterally suspended benefits four months later.206 The ALJ, and the Full Board, ordered the reinstatement of benefits on the grounds that the employee was never formally offered suitable employment before his termination, and therefore the employer had not met its

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198. 211 Ga. App. at 781, 440 S.E.2d at 498.
199. Id. at 780, 440 S.E.2d at 497.
201. Id. at 346, 436 S.E.2d at 74.
202. Id. at 348, 436 S.E.2d at 76.
204. Id. at 855, 443 S.E.2d at 521.
205. Id. at 855-56, 443 S.E.2d at 521.
206. Id. at 856, 443 S.E.2d at 521.
burden to prove a change in condition for the better.\footnote{207} The court of appeals, however, affirmed the superior court's reversal of the award of benefits.\footnote{208}

As the court pointed out, it is well-settled that to justify a suspension of benefits, an employer must show that the employee has undergone a "change in condition" for the better.\footnote{209} To meet this burden, the employer must show either that the employee is able to return to work or that suitable work is available.\footnote{210} These are the well-established requirements to prove a substantive change in condition. Board Rule 221(i) and Board Rule 240 constitute the procedural requirements for suspending benefits based upon a change in condition.\footnote{211} Board Rule 221(i) does not specifically contemplate a unilateral suspension of benefits when the claimant is still restricted to light-duty work,\footnote{212} but Board Rule 240 provides that an employer may not unilaterally suspend benefits based upon the allegation that the employee has unreasonably refused suitable employment without obtaining an order from the State Board.\footnote{213}

Continental Baking argued that Freeman underwent a change in condition for the better because he would have returned to suitable employment but for his improper drug use.\footnote{214} The court of appeals agreed that the proper focus was on Freeman's economic condition, and not whether he had formally been offered a job.\footnote{215} Even though no job was actually offered, because of Freeman's improper drug use, the court held that the employer had met its burden of proof to show that Freeman's unemployment was caused by his impermissible drug use, rather than his compensable injury.\footnote{216}

The decision in \textit{Freeman} is interesting in its focus on the proximate cause of the claimant's unemployment, a theme that has been sounded regularly in change in condition cases involving the claimant's burden of proof.\footnote{217} Clearly, there was work available to Freeman that was suitable to his impaired condition, and the fact that it was not formally

\footnotesize{
\begin{itemize}
  \item \footnote{207} \textit{Id.}
  \item \footnote{208} \textit{Id.} at 857, 443 S.E.2d at 522.
  \item \footnote{209} \textit{Id.} at 856, 443 S.E.2d at 521.
  \item \footnote{211} Board Rule 221(i); Board Rule 240 (Supp. 1994).
  \item \footnote{212} Board Rule 240.
  \item \footnote{213} Board Rule 240.
  \item \footnote{214} 212 Ga. App. at 855-56, 443 S.E.2d at 521.
  \item \footnote{215} \textit{Id.} at 856, 443 S.E.2d at 521.
  \item \footnote{216} \textit{Id.} at 856-57, 443 S.E.2d at 522.
  \item \footnote{217} \textit{See supra} text accompanying note 207.
\end{itemize}
}
offered to him was caused by his own improper drug use. Although the court may well have inserted itself as a fact-finder in concluding that Freeman's drug use was the cause of his unemployment, it properly placed the emphasis upon substance over form. It will be interesting to see whether or not future decisions regarding the employer's burden of proof in change in condition cases continue the focus on the proximate cause of the claimant's disability, as have the cases interpreting the claimant's burden of proof.

G. Change in Condition versus New Accident

The court of appeals revisited the issue of "change in condition versus new accident" in the case of City of Marietta v. Kirby. The case law in this area has been confusing for several years now. Unfortunately, the decision in Kirby does not shed any new light on the problem.

Kirby injured his neck in 1982 while working for the City of Marietta, and was awarded workers' compensation benefits. In 1989, Kirby filed another claim for disability benefits, and the insurer for the 1982 claim contended that Kirby's disability was the result of a new injury occurring in 1986 when he lifted a dog while fighting a fire. The insurer, which did not provide coverage for the City at the time of the alleged new accident, pointed to medical records and the deposition of the claimant's physician, both of which indicated that the claimant had reported aggravating his condition by lifting the dog. The ALJ, Full Board, and superior court, however, all concluded that the evidence supported the determination that the claimant had suffered a change in condition, rather than a new accident.

It is well-established that a change in condition occurs when a claimant is injured on the job, receives compensation, returns to work, and 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." Both Kirby and his physician explained the reference in the medical records to the job-related aggravation as merely a response to question-

221. Id.
222. Id.
223. Id.
ing by the physician about the employee's recent activities, and not because the incident made his condition worse.\textsuperscript{226} Despite the specific mention of a job-related aggravation, therefore, the court of appeals held that there was sufficient evidence for the State Board to conclude that the claimant's disability was the result of a gradual worsening, rather than a new accident.\textsuperscript{226} In so holding, the court appeared to follow the causation analysis emphasized in its most recent cases\textsuperscript{227} rather than the bright-line test enunciated by the decision in James\textsuperscript{228} and its progeny.\textsuperscript{229}

\textbf{H. Coverage}

Occasionally, the court of appeals is presented with insurance coverage questions in the workers' compensation context. The case of American Resources Insurance Co. v. Connor\textsuperscript{229} offered some unusual facts on this issue.

American Resources Insurance Company provided workers' compensation insurance to Vector Construction, Inc., a general construction contractor, and Omega Interiors, a wallboard installation subcontractor.\textsuperscript{231} Omega and Vector were sister corporations, sharing common ownership and office space. After Omega experienced an adverse loss ratio, however, American cancelled its policy under the terms of the agreement. Omega made several efforts to renew its policy with American, and even threatened to cancel Vector's insurance with American if the policy for Omega was not reinstated. American's consistent response, however, was that it was not interested in insuring Omega under any circumstances, and that if necessary it would cancel the Vector policy as well rather than insure Omega.\textsuperscript{232}

The agent attempting to place coverage for Omega suggested that Omega lease its employees to Vector through an employee leasing agreement and then add the Omega employees under a special endorsement to Vector's policy with American. After the agreement was drafted, the agent requested that American issue endorsements to Vector's policy providing coverage for additional job classifications listed

\textsuperscript{225} 210 Ga. App. at 568-69, 436 S.E.2d at 765.
\textsuperscript{226} Id. at 569, 436 S.E.2d at 765.
\textsuperscript{228} 147 Ga. App. 308, 309, 248 S.E.2d 678 (1978).
\textsuperscript{231} Id. at 885, 434 S.E.2d at 738.
\textsuperscript{232} Id. at 886, 434 S.E.2d at 738-39.
as "wallboard-install and drivers" and "clerical" workers, the same classifications as covered in Omega's cancelled policy.233 American issued the requested endorsements, but later denied a claim filed by an Omega employee, contending that the placing of Omega employees under Vector's policy through the endorsement was fraudulent.234

Although the ALJ agreed that the leasing agreement and subsequent endorsements were "a subterfuge, if not an outright fraud," the judge found coverage existed because American was given sufficient information when the endorsements were requested to investigate further.235 The ALJ found coverage, therefore, simply based upon American's obligation to investigate the request for the endorsement to Vector's policy. The Full Board and superior court affirmed, but the court of appeals reversed.236

The court of appeals found that the State Board's decision regarding coverage was essentially an estoppel theory, holding that American should have known that the endorsements to the Vector policy were intended to cover Omega employees.237 The court noted initially that the doctrine of estoppel cannot be used to expand an insurance policy as to such basic elements as who is insured238 but also noted that the evidence did not support the Board's conclusion that American had sufficient information to lead it to believe that the endorsements were covering Omega employees.239 The court pointed to American's consistent refusal to insure Omega employees, even at the cost of losing the Vector policy, and to what the ALJ described as the employer's "subterfuge, if not outright fraud" in attempting to cover Omega employees by adding them to the Vector policy.240 Given this finding, the court found there was no evidence to support the conclusion that, even if an estoppel argument applied, American knew or should have known that Omega employees were to be covered under the Vector endorsements.241

233. *Id.*
234. *Id.*, 434 S.E.2d at 739.
235. *Id.*
236. *Id.*
237. *Id.* at 887, 434 S.E.2d at 740.
239. 209 Ga. App. at 888, 434 S.E.2d at 740.
240. *Id.*
241. *Id.*
I. Death Claims

The case of Buschel v. Kysor/Warren® presented the court of appeals with its latest opportunity to visit the presumption that an employee's death arises out of and in the course of employment if he is found dead or dying at a place he might reasonably be expected to be in the performance of his job, and the death is unexplained.  On November 10, 1990, Buschel walked to the breakroom at Kysor/Warren, bought a soft drink, and collapsed, gasping for air. Although rushed to a hospital by ambulance, Buschel died in the emergency room. Her dependents brought a claim for workers' compensation death benefits alleging that Buschel's death was caused by exposure to the substance Toluene at work. Although four different pathologists gave opinions on the cause of Buschel's death, none of them could agree on the cause. The ALJ found that the decedent's death was unexplained, and that the presumption in favor of compensability applied. In rejecting the employer's defense that the death occurred during a regularly scheduled work break, the ALJ also concluded that Buschel's death resulted from long-term exposure to Toluene in the work place.

At the court of appeals, the employer contended that the award of death benefits should be reversed because of the inconsistent conclusions that the death was unexplained and that it was caused by long-term exposure to Toluene. The court of appeals rejected this argument, finding that the conflict was of no legal significance because it was made in response to the employer's rest break defense. Moreover, the court pointed out that the location of the decedent in the breakroom was not significant to the application of the presumption, since this was a place where the employee might reasonably be expected to be in the performance of her duties. The court agreed with the State Board that the employer had not demonstrated that the injury leading up to the employee's death (exposure to Toluene) occurred during the regularly

244. 213 Ga. App. at 92, 444 S.E.2d at 107.
247. Id. at 93, 444 S.E.2d at 107-108.
248. Id. at 93-94, 444 S.E.2d at 108.
249. Id. at 94, 444 S.E.2d at 108.
scheduled lunch break. Therefore, the employer had not established an essential element of the lunch break defense so as to rebut the presumption of compensability.

In Georgia Subsequent Injury Trust Fund v. Bottle Warehouse, the court of appeals held that the limitation in O.C.G.A. section 34-9-265(b) regarding payment of death benefits to non-resident alien dependents only applies where there is proof that the dependents are actually non-residents. While it was undisputed that the decedent was an Ethiopian national who sent money to his parents in that country, and no dependents of the deceased employee were found in the United States, no actual proof that the decedent’s dependents were non-residents was presented. The employer argued that, direct proof of the dependents’ non-residence notwithstanding, the $10,000 sum ordinarily paid to the Georgia Subsequent Injury Trust Fund (SITF) where a compensable death occurs without any remaining dependents should be reduced to the one $1,000 maximum mandated by O.C.G.A. section 34-9-265(b) to non-resident dependents. Although the State Board and superior court agreed with this argument, the court of appeals rejected it holding “to the extent that O.C.G.A. Section 34-9-358(a) requires computations to be made based on a ‘hypothetical’ dependent, we fail to understand why it should be presumed that such dependents of alien workers are non-resident aliens.” In the absence of direct proof that the dependents are non-resident aliens, therefore, the provisions of O.C.G.A. section 34-9-265(b) do not apply.

J. Employment Relationship

Among the more significant workers’ compensation decisions during the survey period is North v. Floyd County Board of Education. This case, decided by a five to four majority of the court of appeals, potentially redefines when an individual becomes an employee subject to the coverage of the Workers’ Compensation Act.

North applied for a position as a substitute bus driver with the Floyd County Board of Education and began a two and a half week training
period which included both classroom and on-the-road assignments. North was neither paid during the training period nor assured she would ever be hired by the Board of Education. After riding with a driver on a route during the training period, North got off the bus, and on the way to her car slipped, fell on an embankment, and injured her ankle. When she filed a claim for workers' compensation benefits, the Board of Education defended on the grounds that North was not an employee covered under workers' compensation. The State Board denied the claim for benefits, finding that North failed to meet her burden to show that she was an employee of the Board of Education at the time of the injury. A five-judge majority of the court of appeals affirmed, but upon reasoning that is arguably different from prior decisions on this issue.

O.C.G.A. section 34-9-1(2) defines "employee" as: "Every person in the service of another under any contract of hire or apprenticeship, written or implied ...." The court of appeals has previously held that the chief test in determining whether or not an employer-employee relationship exists, for purposes of the Workers' Compensation Act, is whether or not the alleged employer had a right of control over the alleged employee. It is the mere right of control that indicates the existence of an actual employee relationship, regardless of whether or not the control was ever actually exercised. The court has also held that actual payment of wages is not necessary to form an employment relationship, nor does payment need to be monetary. In Tommy Nobis Center, Inc. v. Barfield, the court held that a non-profit corporation that trained handicapped persons participating in a job training partnership act was responsible for providing workers' compensation to the participants of the program.

In reviewing these cases, the majority in North disagreed that the unifying principle of the cases construing when an employment relationship begins for workers' compensation purposes is the employer's right of control. Instead, it focused on the benefit to the employer

260. Id., 442 S.E.2d at 810.
261. Id.
262. Id.
263. Id. at 595, 442 S.E.2d at 811.
267. Id. at 639, 176 S.E.2d at 927.
269. Id. at 394, 370 S.E.2d at 517.
270. 212 Ga. App. at 595, 442 S.E.2d at 811.
from the alleged employee's services: "The potential benefit flowing to Floyd County from North's training, however, the availability of another driver in a pool of substitute drivers, is not significant enough to demand a finding of an implied contract of employment in this case." The majority went on to find that, with respect to the issue of control, the State Board as finder of fact was within its authority to rely upon testimony from the Director of Transportation for the Board of Education that he did not exercise any control over North's activities, and would not unless and until she was hired. As the dissent points out, however, the import of the majority's decision is to favor what might be termed the "potential benefit" analysis as opposed to the right of control analysis. In so doing, the majority may well have opened the door to competing arguments, many based upon the same precedent, as to when an employment relationship begins for workers' compensation purposes.

K. Heart Attacks

In the past, heart attack cases have involved one of two factual scenarios. Either the heart attack was brought about by physically strenuous labor, or it resulted from stress or pressure associated with the job. In A & P Transportation v. Warren, the court of appeals laid the groundwork for a third scenario, which is lack of exercise and bad food.

Warren, a truck driver, felt pain in his chest while on a return trip for his employer. He thought it might have been his hiatal hernia, and on the day after concluding his trip he was treated by his personal physician for this condition. That afternoon he suffered a massive coronary infarction, which led to the filing of a workers' compensation claim.

The evidence revealed that not only was Warren overweight, but he suffered from hypertension, had been a heavy smoker for forty years and had a family history of heart problems. While acknowledging these risk factors, Warren nevertheless claimed that his heart condition had

271. Id. at 594, 442 S.E.2d at 811.
272. Id. at 595, 442 S.E.2d at 811.
273. 212 Ga. App. at 597, 442 S.E.2d at 813 (Blackburn J., dissenting).
276. Id. at 60, 443 S.E.2d at 857.
277. Id., 443 S.E.2d at 858.
278. Id.
been aggravated because of the nature of his employment. Specifically, he maintained that as an over-the-road truck driver he was forced to eat greasy and junk food, was denied the ability to exercise, and was subjected to both physical and mental stress.\textsuperscript{279} Despite the fact that the Act places a higher burden of proof on heart attacks, the ALJ found in Warren's favor, holding that he was "virtually destined" to have a heart attack because of certain factors, i.e., cigarette smoking, lack of exercise, and an unhealthy diet of high-cholesterol food, which put him at great risk.\textsuperscript{280} According to the ALJ, at least two of these factors, bad food and lack of exercise, were in part attributable to the lifestyle of a long-haul trucker.\textsuperscript{281} In a five to four decision, the court of appeals affirmed, holding that the "nature of the employment may, as in this case of long-haul truck driving, require long periods of stress without physical exercise, and without the availability of a healthy diet, all exacerbated by time constraints."\textsuperscript{282} Although noting that Warren was at risk for a heart attack because of other factors, including his personal habits, the majority, with two judges concurring specially, apparently felt obligated to affirm the award of benefits because of the findings of fact by the ALJ.\textsuperscript{283}

Unfortunately, the majority failed to analyze the facts of the claim under the heightened burden of proof for heart attacks, which is a preponderance of competent and credible evidence.\textsuperscript{284} This was not lost on four judges, however, and in an opinion authored by Judge Smith, the dissent stated that "[t]here is no showing that smoking, diet, or lack of exercise formed part of the usual duties of Warren's employment, or that his employer controlled his personal habits."\textsuperscript{285} Warren's decision to smoke, eat bad food and avoid exercise was purely personal.\textsuperscript{286} Indeed, and as pointed out by the dissent, it was "counter to the express instructions of his employer."\textsuperscript{287} As for the medical evidence, the treating cardiologist testified that Warren would have suffered his heart attack whether he worked or not.\textsuperscript{288}

This decision theoretically places employers at risk for workers' compensation liability because of the personal habits of their employees.

\begin{footnotes}
\item[279] \textit{Id.}
\item[280] \textit{Id. at 61-62, 443 S.E.2d at 859.}
\item[281] \textit{Id. at 62, 443 S.E.2d at 859.}
\item[282] \textit{Id. at 64, 443 S.E.2d at 860.}
\item[283] \textit{Id., 443 S.E.2d at 861.}
\item[284] \textit{O.C.G.A. § 34-9-1(4) (Supp. 1994).}
\item[285] 213 Ga. App. at 66, 443 S.E.2d at 862 (Smith J., dissenting).
\item[286] \textit{Id. at 66, 213 S.E.2d at 862.}
\item[287] \textit{Id.}
\item[288] \textit{Id. at 68, 443 S.E.2d at 863.}
\end{footnotes}
Although a non-smoking policy may be enforceable, few, if any, employees are going to be told what to eat and when to exercise. Trying to ascertain a risk for determination of premiums based on the behavior of employees would not only be a nightmare for both employers and insurers, but it may cause some employers to make hiring decisions which are illegal. The Americans With Disabilities Act ("ADA") likely would prohibit the consideration of risk factors such as those in Warren's case as a basis for hiring him as a trucker. The Act does not operate in a vacuum. By taking into account other policy considerations, employers and employees would be better served. The award of workers' compensation benefits to Warren because of his personal habits was short-sighted.

L. Judgments

The procedure for attacking an award of the State Board after the expiration of the time limits for appeal has troubled practitioners on several occasions during the past several years. The Act provides no means for doing so. Instead, it merely provides for converting an award into a judgment at the superior court level which can then be enforced. As the defendant discovered in Wade v. Harris when the time limit has expired for appealing an award of the State Board, it can be attacked only if judgment is procured. The proper forum is the superior court, and the proper manner is by filing a motion to set aside judgment pursuant to O.C.G.A. section 9-11-60.

In Wade, several alleged dependents filed a claim for workers' compensation benefits against George A. Harris, d/b/a George A. Harris Enterprises. No one from the employer appeared at the hearing before the State Board, and an award was issued in favor of the dependents. Months later the dependents petitioned for judgment on the award at the superior court level. Again, the employer failed to appear, and judgment was entered. For reasons unknown, the dependents thereafter moved for default judgment, and it was only then that George Harris appeared pro se, contending he was never

292. Id. at 883, 437 S.E.2d at 865.
295. Id., 437 S.E.2d at 864-65.
296. Id. at 882, 437 S.E.2d at 863.
served. Harris thereafter moved to open the default on several grounds, including that, individually, he was not a proper party. The superior court opened the default, and after receiving motions for summary judgment, granted Harris' request for dismissal individually on the grounds that the claim was filed against the corporate entity only. Judgment was thereafter entered against George A. Harris Enterprises, Inc.

The court of appeals reversed, specifically holding that default procedures were inapplicable. When a party seeks to convert an award of the State Board into a judgment the superior court's role is extremely narrow. The superior court may refuse to grant judgment only if the award is legally insufficient on its face. In this case the award was not legally insufficient, and the superior court had no authority to make factual findings contrary to those made by the ALJ. The case was remanded with direction that judgment be entered against “George A. Harris, d/b/a George A. Harris Enterprises, Inc.” If Harris thereafter desired to attack the judgment, he would be limited to one of three grounds set forth in O.C.G.A. section 9-11-60(d). He would also be entitled to present evidence in support of his motion to set aside.

M. Medical Treatment

In K-Mart Corp. v. Bright, the court of appeals was faced with the question of whether certain medical treatment, which was undoubtedly unauthorized, qualified as an emergency. The State Board held that while the employee's psychiatric treatment was rendered by an unauthorized provider, it in fact came during an emergency, which it defined as "an unforeseen occurrence or combination of circumstances

297. Id. at 883, 437 S.E.2d at 865.
298. Id.
299. Id. at 883-84, 437 S.E.2d at 865.
300. Id. at 884, 437 S.E.2d at 865.
301. Id.
302. Id. at 885, 437 S.E.2d at 866.
303. Id.
304. Id.
305. Id.
309. Id. at 658, 436 S.E.2d at 801.
which calls for immediate action or remedy; pressing necessity; exigency." Because there was some evidence that an emergency existed, the Board's award of medical benefits was affirmed.

As a general rule, the employer or insurer cannot require that an employee seek treatment from physicians on the posted panel if the claim is controverted in its entirety. Whether this occurred was at issue in *Nu Skin International, Inc. v. Baxter*. In this case the employer properly commenced indemnity benefits, but refused to pay certain medical bills because treatment was obtained from unauthorized providers. Except for one emergency room bill, the ALJ and the Full Board ruled that the employer and insurer were correct in refusing to pay. The superior court reversed on the grounds that refusal to pay the medicals amounted to a controvert of Baxter's claim. The court of appeals disagreed, holding that refusal to pay unauthorized medical treatment was not tantamount to a controvert of the entire claim. In this case the employer specifically stated on the first report of injury that it was contesting only the unauthorized medical treatment and "did not otherwise 'controvert' the claim . . . ."

N. Permanent Partial Disability

Loss of use of a body part because of a work-related accident entitles an employee to permanent partial disability (PPD) benefits. Total loss of vision to one eye computes to benefits of 150 weeks. The case of *Gaddis v. Georgia Mountain Contractors* reveals how modern medicine can allow for payment to be made on two occasions for total loss of vision to the same eye. Gaddis suffered an initial injury to his right eye in 1977. Although his vision was almost totally destroyed, it was significantly improved by a corneal transplant nine years later. While it is not clear when payment was made, Liberty Mutual paid for

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311. *Id.* , 436 S.E.2d at 803.
314. *Id.* at 33, 438 S.E.2d at 131.
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
320. *Id.* § 34-9-263(c)(13).
322. *Id.* at 126, 443 S.E.2d at 710.
total loss of vision. In 1988 he suffered a second injury to his right eye which destroyed the transplant.\textsuperscript{323} In 1990 an ALJ ordered Liberty Mutual to pay for full loss of vision despite a showing that Gaddis had already been paid for full loss of vision after the 1977 injury.\textsuperscript{324} Apparently, and while the decision is silent on this point, the order most likely was based on the fact that Gaddis' recovery from the corneal transplant had been negated by yet another accident. The Full Board affirmed.\textsuperscript{325} In 1992 Liberty Mutual filed a motion with the Board seeking an order that Gaddis repay the PPD benefits which he received for loss of vision stemming from the 1986 accident.\textsuperscript{326} This time the Board changed its mind, finding that he was not entitled to the benefits, and ordered him to repay Liberty Mutual.\textsuperscript{327} Although the superior court affirmed, the court of appeals reversed, holding that the Board had no authority to modify an award which was two years old.\textsuperscript{328} As a result, Gaddis was paid twice for total loss of vision to the same eye. Although it is difficult to understand how this could have happened, it undoubtedly goes back to the first accident. Liberty Mutual probably made payment for full loss of vision before the corneal transplant. While it could have taken credit for any overpayment of benefits made pursuant to O.C.G.A. section 34-9-243, the fact that Gaddis suffered a second accident which was distinct and apart from the first one precluded this possibility.

\textit{O. Rycroft Defense}

\textit{Fort Howard Corp. v. Devoe}\textsuperscript{329} was by far the most interesting decision in the application misrepresentations area during the current survey period. Not only does the decision present some interesting facts, but it provides some insight as to how the ADA requirements impact this defense.

Devoe applied for a position with Fort Howard Corporation and, during a multi-step hiring process, certified that he had never suffered from any back or spinal problems.\textsuperscript{330} Fort Howard, which had only heavy labor positions available for entry level employees, proved that it carefully screened applicants, even going so far as to show them the type

\begin{itemize}
  \item \textsuperscript{323} \textit{Id.}
  \item \textsuperscript{324} \textit{Id.} at 127, 443 S.E.2d at 710.
  \item \textsuperscript{325} \textit{Id.}
  \item \textsuperscript{326} \textit{Id.}
  \item \textsuperscript{327} \textit{Id.}
  \item \textsuperscript{328} \textit{Id.}, 443 S.E.2d at 711.
  \item \textsuperscript{329} 212 Ga. App. 602, 442 S.E.2d 474 (1994).
  \item \textsuperscript{330} \textit{Id.} at 603, 442 S.E.2d at 474-75.
\end{itemize}
of work required. During the application process, Devoe failed to disclose prior back problems stemming from a prior work-related accident and which resulted in substantial lost time. After suffering a back injury at Fort Howard, his claim was controverted on the grounds of application misrepresentation. Although a representative of Fort Howard testified that Devoe probably would not have been hired if its investigation had confirmed a history of back problems, she went on to admit that she did not “rely on the medical questionnaire for the ‘actual hiring decision.’”

Based on this statement, Devoe argued that the reliance factor was missing. The court of appeals agreed with the State Board, and held that his misrepresentation was a substantial factor in the decision by Fort Howard to “place [him] at the only work available, work which resulted in his injury.” This decision is absolutely consistent with the ADA, which prohibits certain pre-employment inquiries about a prospective employee’s physical condition. When Devoe was offered a job which he knew required heavy labor, he was under a duty to disclose his back condition because it put him at risk for an injury. Public policy favors truthfulness in the employment application process.

The other two decisions concerning application misrepresentation involved the third prong, which is a causal connection between the false representation and the injury. In Gordon County Farm v. Cope, the court of appeals upheld a denial of benefits by the State Board. The employee argued that an application misrepresentation should not apply since her pre-existing condition did not actually cause her fall. The Board and the court of appeals rejected this argument, holding that the defense applied because the injury was more severe than it would have been had she not suffered from a pre-existing condition. The court reached the opposite result in Capital Atlanta, Inc. v. Carroll. While the employee may have misrepresented a prior condition, which was noted to be a knee injury some fifteen years earlier, the treating

\[331. \text{Id. at 604, 442 S.E.2d at 475.} \]
\[332. \text{Id.} \]
\[333. \text{Id.} \]
\[335. 212 Ga. App. at 604, 442 S.E.2d at 475. \]
\[336. \text{Id.} \]
\[337. \text{Id. at 603, 442 S.E.2d at 474.} \]
\[339. \text{Id. at 812, 442 S.E.2d 896.} \]
\[340. \text{Id.}, 442 S.E.2d at 897. \]
\[341. \text{Id. at 813, 442 S.E.2d at 898.} \]
physician testified this prior condition had completely healed, involved a different part of the knee, had no significant relationship to the current accident, and made it no more significant than it otherwise would have been. Even if the employer shows that it would never have hired the employee had it known about the prior injury, it must still satisfy the third prong, which is a causal connection between the misrepresentation and the injury for which benefits are claimed.

P. Subsequent Injury Trust Fund

In Subsequent Injury Trust Fund v. Hanson Industries, the employee suffered from circulatory problems throughout most of her employment with Hanson Industries. She missed work intermittently because of the standing requirements associated with her position, and was paid workers' compensation benefits. In June of 1989, although the employee had been transferred to a lighter duty position in the plant, she contracted a bacterial infection which was "facilitated and exacerbated by her poor circulation." The employer readily agreed that the job aggravated the employee's condition, and began to pay her total disability benefits. At the same time it filed a claim against the Subsequent Inquiry Trust Fund ("SITF") seeking reimbursement. SITF disputed the claim, arguing that the employee suffered only one injury, which was the bacterial infection. The State Board and the court of appeals were unpersuaded. The employee's circulatory condition not only preexisted the bacterial infection, which was aggravated by her job duties, but it was a permanent impairment which, upon merging with the infection, resulted in substantially greater impairment. Having met the criteria of a valid claim, the employer and its insurer were entitled to reimbursement.

Q. Statute of Limitations

The four statute of limitation cases rendered during the survey period were evenly split between the one and two year periods. In Borden v. Holland, a case discussed above, the employee initially injured his

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343. Id. at 214, 444 S.E.2d at 593.
344. Id. at 215, 444 S.E.2d at 593.
346. Id. at 700, 440 S.E.2d at 89.
347. Id., 440 S.E.2d at 91.
348. Id. at 702, 440 S.E.2d at 92.
349. Id.
350. Id.
back on June 9, 1990. He was out of work for approximately two months and was paid under a salary continuation plan. Although Holland initially stated on his claim form that the disability was work-related, he subsequently changed it to reflect that it was not work-related. He returned to his regularly duties, working until his back pain forced him to quit on August 18, 1990. His claim was filed on August 5, 1991. The ALJ ruled it was timely, but the Full Board reversed, finding it was barred by the one year statute of limitations. The Full Board’s decision was affirmed by operation of law. The court of appeals reversed, holding that the Full Board failed to address the ALJ’s finding that Holland’s date of accident was actually August 18, 1990, the last day he worked. Although the court held that the Full Board’s failure to address the possibility of a fictional “new accident” resulted in no evidence in the record to support the denial of benefits, this seems rather unusual. The Full Board does not take additional evidence, and merely gives de novo review to the evidence submitted to the ALJ. Thus, there should have been sufficient evidence in the record to determine whether Holland’s condition deteriorated to the point at which he could no longer work in August of 1990. If the Full Board found as a matter of fact that this did not occur, then the court of appeals was obligated to affirm such a finding under the “any evidence” standard of review.

The one year statute was also called into question in Durham v. Twiggs County Board of Commissioners. Durham injured his right foot while operating a piece of machinery on June 1, 1988. He missed no time from work, at least initially, but did seek medical treatment. He was last seen for complaints of foot pain on August 29, 1988. In September of 1989, and over a year later, he returned to his personal physician complaining of an ulceration on the left foot. The physician referred Durham to a vascular surgeon who had treated him in 1987 for peripheral vascular disease in both legs. When he was seen by the vascular surgeon on October 2, 1989 Durham had two ischemic ulcers on his right foot. Conservative care failed and his right lower extremity was amputated. Durham last worked on October 27, 1989, but waited until April 2, 1990 to file his claim. The employer defended the claim on

352. Id. at 821, 442 S.E.2d 916-17.
353. Id.
354. Id.
355. Id.
358. Id. at 203, 435 S.E.2d at 688.
two grounds. The first defense was that the statute of limitations had expired with regard to the 1988 accident. The second was that Durham's disability in October of 1989 was unrelated to that accident and was instead caused by chronic peripheral vascular disease. The ALJ and the Full Board agreed and the court of appeals affirmed.

To prevail Durham needed to prove that his disability beginning in October of 1989 was at least partially due to the continued performance of job duties. In other words, he had to show that there was a fictional "new accident" on the last day of work. Unfortunately for Durham, his physician testified that this was not the case.

The most noteworthy decision involving the two year statute of limitations period was State v. Barge. In Barge, the employee suffered an injury to his left wrist on September 27, 1988. The treating physician initially indicated that there was no permanent impairment. The employee returned to work in February of 1989 on light duties and worked through July 23, 1990, at which time he took a leave of absence for health problems. He was terminated shortly thereafter when he failed to return to work. The treating physician assessed a permanent partial disability rating on September 27, 1991. When Barge filed his claim for additional indemnity benefits, the State of Georgia defended on the grounds that the two year statute of limitations had expired, and that he had not met his burden of proving that his disability was causally related to his work injury. As to the statute of limitations defense, the court of appeals held that because permanent partial disability benefits were "potentially due," the employee's claim could not be dismissed. However, with respect to the request for temporary total or temporary partial disability benefits, the court affirmed the Board's finding that Barge failed to meet his burden of proof.

The issue of potentially due benefits was encountered in a second decision, Watson v. Universal Ceramics, Inc., but this time a differ-

359. Id.
360. Id. at 204, 435 S.E.2d 690.
361. Id.
366. Id. at 308, 439 S.E.2d at 2.
367. Id. at 307, 439 S.E.2d 1.
368. Id.
369. Id.
ent result ensued. Watson suffered an injury to his left arm on November 13, 1981 which resulted in amputation below the elbow. He was paid a permanency rating for ninety percent loss of his arm, and last received indemnity benefits in 1986. In 1989, while working as a security guard for another employer, Watson began to lose time because of an “inability to perform his work duties with his right hand due to a developing arthritis condition.” On September 15, 1989 he filed for a hearing requesting benefits based on a change in condition. The ALJ found that the claim was not time barred because when benefits were last paid Watson was potentially due additional permanency benefits for loss of his entire arm. The Full Board reversed, and the superior court affirmed. The court of appeals in turn affirmed, noting that “potentially due” meant unpaid benefits in existence during the two year period after last payment of indemnity benefits. In this case there were no such unpaid benefits. Watson did not lose any time prior to September of 1989 because of his left arm. Furthermore, any increase in permanency benefits came after a second amputation which took place in 1990.

R. Statutory Employer

O.C.G.A. section 34-9-8(c) states that before pursuing a statutory employer, the employee should first institute his claim against his or her immediate employer. In Travelers Insurance Co. v. Southern Electric, Inc., the court of appeals faced a situation in which a workers' compensation carrier for a statutory employer made payments to an injured worker of an uninsured subcontractor. The payments were made without requiring that the employee first institute a claim against his immediate employer. When the carrier filed suit for indemnification, the immediate employer, Southern Electric, defended on the grounds that this right had been lost because payments had been made to the employee in complete disregard to the above code sec-

371. Id. at 135, 433 S.E.2d at 104.
372. Id. at 136, 433 S.E.2d at 105.
373. Id. The law changed, however, in 1990. For accidents occurring on or after July 1, 1990 the focus will not be on whether there are potentially due benefits, but whether two years have elapsed since the last payment. 1991 Ga. Laws 1409, 1410.
375. Id. at 137, 433 S.E.2d at 106.
376. Id., 433 S.E.2d at 105.
379. Id. at 718, 434 S.E.2d at 507.
The court of appeals was unimpressed, noting that the "human purpose of insuring immediate assistance would certainly not be furthered by holding that a statutory employer waives his right to recover from the immediate employer if it provides coverage where the liability is clear without insisting that the claimant first institute formal proceedings against the immediate employer." In this case the immediate employer not only admitted that it had no workers' compensation insurance, although it had consistently misrepresented this fact to the general contractor prior to the employee's date of injury, but it assisted in the very investigation which led to payment of benefits. Likewise, the court found very little merit in Southern Electric's argument that equitable estoppel applied. Because the entire situation was the "result of appellee's misconduct in failing to maintain workers' compensation coverage and then misrepresenting that it had such coverage," Southern Electric was in no position to invoke principles of equity as part of its defense.

In Guillman v. Georgia Power Co., the court of appeals was asked to decide whether an entity was in fact a statutory employer. Guillman, an employee of an independent contractor, was injured at a Georgia Power plant. He filed a tort claim against Georgia Power, but the trial court dismissed it on the grounds that he was a statutory employee of that entity. The court of appeals reversed, and citing a 1993 Georgia Supreme court decision, held that an owner, like Georgia Power, was not a statutory employer unless it "also serves as a contractor for yet another entity and hires another contractor to perform the work on the premises." The fact that Georgia Power had contracts with customers did not suffice.

Rothrock v. Jeter is important to practitioners not because of the results, but because of what may have been an oversight by the court of a 1991 change in the definition of an employee. Rothrock owned a

380. Id.
381. Id. at 719, 434 S.E.2d at 509.
382. Id. at 718, 434 S.E.2d at 509.
383. Id.
384. Id., 434 S.E.2d at 510.
386. Id. at 690, 440 S.E.2d at 83.
387. Id.
388. Id.
390. Id. at 691, 440 S.E.2d at 83-84.
391. Id., 440 S.E.2d at 84.
tractor-trailer which he leased to C & N Evans Trucking Company. Jeter, an employee of C & N, was injured while assisting Rothrock in uncoupling his rig. Jeter received benefits from C & N, and also filed a tort suit against Rothrock. Rothrock moved for a summary judgment on the grounds that he was Jeter's fellow employee and, therefore, immune to tort claims.\textsuperscript{393} Concluding that Rothrock did not enjoy tort immunity, the court of appeals noted in its decision that he was ""also a statutory employee of [C & N]."\textsuperscript{394} Effective July 1, 1991, the Georgia General Assembly modified O.C.G.A. section 34-9-1(2) to the effect that "an owner-operator as such term is defined in Code Section 40-2-87 shall be deemed to be an independent contractor."\textsuperscript{395} Assuming the accident occurred after July 1, 1991, Rothrock, an owner-operator, was definitely an independent contractor. Furthermore, he could not have been a statutory employee of C & N.

S. Sufficiency of Award

A misstatement of significant testimony is grounds ""for a referral back to the board of an award otherwise supported by evidence where it is possible that a proper understanding of the evidence might have caused the finder of fact to reach a different conclusion."\textsuperscript{396} In Stevens, the superior court reversed a denial of benefits by the State Board on the grounds that the ALJ's award reportedly "contained several grossly misstated facts."\textsuperscript{397} The court of appeals, after reviewing each of the reported misstatements, disagreed and reversed, upholding the Board's finding that the employee failed to show he suffered an accident arising out of and in the course of his employment.\textsuperscript{398} The fact that the ALJ specifically found that the employee failed to give notice to his supervisor on the date of the accident was not a significant misstatement even though the supervisor was on vacation that day.\textsuperscript{399} The record reflected prior accidents by the employee in which he gave notice to his supervisor of each, as well as a statement to the effect that his "superiors did not recall appellee ever giving notice of a work-related injury allegedly sustained on or about February 20th."\textsuperscript{400} In a subse-

\textsuperscript{393} Id. at 85, 441 S.E.2d at 89.
\textsuperscript{394} Id. at 86, 441 S.E.2d at 90.
\textsuperscript{397} Id. at 93, 441 S.E.2d at 92.
\textsuperscript{398} Id. at 95, 441 S.E.2d at 93.
\textsuperscript{399} Id. at 93, 441 S.E.2d at 91.
\textsuperscript{400} Id.
quent conversation, and at a time when the employee was having noticeable physical problems, he never mentioned that they were from a work-related accident.\textsuperscript{401} Additionally, and with regard to the ALJ's finding that "none of the treating physicians had any reference in their notes that this was a workers' compensation claim or that the claimant had been injured on the job," the employee argued that his chiropractor made such a notation.\textsuperscript{402} The court, focusing solely on the term "physician," rejected this contention, holding that a chiropractor was not a physician under the laws of Georgia and, as such, could not be the employee's treating "physician."\textsuperscript{403} By strictly construing the definition of physician the court found that the evidence did not contradict the ALJ's findings.\textsuperscript{404} A review of the facts set forth in the decision reveals that the case could have gone the other way. However, if there is any evidence to support the Board's findings, the appellate courts, including the superior court, are bound to affirm.\textsuperscript{405}

V. CONCLUSION

Apart from the developments discussed above, practitioners should keep a watchful eye on the effect of the national health care reform debate on workers' compensation. At the time this Article was written, the issue of whether or not to include workers' compensation in a national health care reform package, although heavily debated by various lobbying groups during the work by the Clinton health care task force, had been lost among the debate surrounding universal coverage and employer mandates. Certainly, the entry of managed care into Georgia's workers' compensation system will have a dramatic effect on medical treatment for compensable injuries. It remains to be seen whether or not workers' compensation in Georgia, and around the country, is overtaken by national health care reforms.

\textsuperscript{401} Id. at 92, 441 S.E.2d at 91.
\textsuperscript{402} Id. at 94, 441 S.E.2d at 92.
\textsuperscript{403} Id.
\textsuperscript{404} Id.