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Workers’ Compensation

by H. Michael Bagley*
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and
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I. INTRODUCTION

Perhaps the most interesting developments this survey period came from the many opportunities the Georgia Supreme Court had to tackle difficult issues in the workers’ compensation arena, especially when the court rarely hears workers’ compensation appeals. From what some would call drastic developments in the claimant’s burden of proof in change in condition cases, to an examination of Georgia’s long-standing requirement of a “physical injury” in psychological claims, the court was faced with some interesting legal arguments. Although these opinions may not require legislative intervention or clarification, the Chairman of the State Board’s advisory committee will no doubt continue to fine tune certain aspects of the Workers’ Compensation Act (the “Act”),¹ as

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the committee has done in previous survey periods. In the end, final word on some of these somewhat controversial issues (e.g., the compensability of mental-mental psychological claims) may come through the Georgia General Assembly.

II. ATTACK ON THE EXCLUSIVE REMEDY DOCTRINE

Judicially recognized exceptions to the exclusive remedy doctrine have been developed to deal rationally and consistently with matters clearly outside of the workers' compensation system, or to draw a distinct line for circumstances lying on the periphery. Unlike the exceptions traditionally recognized by Georgia courts, an exception involving the delivery of medical care would affect the most fundamental working part of the workers' compensation system. Statistics published by the State Board of Workers' Compensation ("Board") show that more than fifty-seven percent of all funds flowing through the system were for medical care in 1994. More importantly, while virtually every claim involved medical care, less than twenty-four percent of claims also resulted in the payment of disability benefits. Therefore, the implications of creating a new exception to the exclusive remedy doctrine for alleged delays in providing medical care are profound because there is a high probability that a new exception will result in an increase in litigation unprecedented in Georgia history. Practically every workers' compensation claim could generate a civil action. In fact, every workers' compensation claim could generate multiple civil actions for each alleged delay in medical care.

At the heart of this controversy is the court of appeals decision in Zurich American Insurance Co. v. Dicks. June Dicks sustained a work-related injury and was provided medical care by an authorized physician who certified that Ms. Dicks was totally disabled. The workers' compensation insurer arranged for an independent medical evaluation by another physician. After this physician opined that Ms. Dicks was not disabled, the employer not only suspended payment of disability

3. 1995 GA. STATE BD. OF WORKERS' COMPENSATION ANN. REP. 52. Five hundred twenty-one indemnity cases were reported with a date of injury in calendar year 1994. $172,304,909 in medical dollars were paid on lost time cases as of December 31, 1995. Another 166,356 cases were reported as medical-only claims. $45,683,902 were paid on medical-only cases. $384,292,131 were paid out on all cases (lost time and medical-only cases) as of December 31, 1995.
4. Id.
benefits, but also suspended the physical therapy that had previously been ordered by Ms. Dicks's authorized physician. The Administrative Law Judge ("ALJ") ordered all benefits restored and also awarded attorney fees to Ms. Dicks. However, Ms. Dicks then brought a civil action against the workers' compensation insurer alleging that her condition had been aggravated by the delay in receiving medical care.\(^6\)

In a six-to-three decision written by Chief Judge Dorothy Beasley, the whole court found that the exclusive remedy doctrine does not bar a civil suit alleging physical injuries from intentional delays in providing medical care for a work-related injury.\(^7\) The decision was based upon the erroneous conclusion that, "[t]o hold otherwise would leave Dicks and others similarly situated without legal remedy."\(^8\) This is a novel and heretofore unseen interpretation of the law in Georgia.

Although the court of appeals did not directly decide this issue in Jim Walter Homes, Inc. v. Roberts,\(^9\) the court in Dicks relied upon certain dicta in the Jim Walter Homes opinion.\(^10\) The key factor in the Jim Walter Homes decision was that it was a default case which created a factual scenario that would not normally exist—the employer could not challenge the allegation that the handling of medical care was outside the purview of the Act.\(^11\)

Contrary to the court of appeals' reasoning in Dicks and Jim Walter Homes, the Act does provide remedies for intentional delay of medical treatment. Not only can the Board "appoint one or more" physicians to "make any necessary medical examination,"\(^12\) or order a complete change of physician or treatment,\(^13\) but the Board can also assess attorney fees when authorized medical care is impeded "in whole or in part without reasonable grounds."\(^14\) The Board is also empowered to assess a penalty of up to twenty percent of the amount of any medical expense that is not paid within sixty days,\(^15\) and may also assess a civil

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7. Id. at 728, 470 S.E.2d at 281-82.
8. Id.
11. Id.
13. Id. § 34-9-201(e) (Supp. 1996).
15. Id. § 34-9-203 has been modified to empower the Board with authority to impose penalties for late payment of reasonable medical charges, but only in specific circumstanc-es. O.C.G.A. § 34-9-203(c) (Supp. 1996) reads as follows:

The board may, in its discretion, assess a penalty of up to 20 percent of reasonable medical charges not paid within 60 days from the date that the employer or the employer's workers' compensation insurance carrier receives the charges and
penalty of up to ten thousand dollars per violation for intentionally making any representation for the purpose of "the obtaining or denying of any benefit" under the Act.\textsuperscript{16} Furthermore, specifically addressing the issue of damages for an employee's potentially enhanced physical problems, to the extent that any delay in medical care prolongs the employee's period of disability, payment of temporary total disability benefits would be extended correspondingly.\textsuperscript{17} Additionally, greater recovery of permanent partial disability benefits could also result from an increase in the employee's permanent physical impairment caused by the delay.\textsuperscript{18} Finally, in contemplation of the most egregious intentional act by an employer, Official Code of Georgia Annotated ("O.C.G.A.") section 34-9-265(e) enhances death benefits by twenty percent for dependents of any deceased employee whose death "was the direct result of an injury proximately caused by the intentional act of the employer with specific intent to cause such injury."\textsuperscript{19}

Although the Georgia Supreme Court could not hear the \textit{Dicks} case due to that case's procedural posture, the court ultimately decided a similar question certified by the United States Court of Appeals for the Eleventh Circuit:

\begin{quote}
Does Georgia law recognize an independent cause of action apart from any remedy under the Georgia Workers' Compensation Act where an employer and/or insurer has intentionally delayed authorizing medical treatment to which an employee is entitled under the Act and where such delay has exacerbated a work-related physical injury?\textsuperscript{20}
\end{quote}

The court unanimously found that an independent cause of action in tort for the intentional delay of medical treatment in a workers' reports required by the board where there has been compliance with the requirements of law and board rules. Said penalty shall be payable to the medical provider.

17. \textit{Id.} \textsection 34-9-261. \textit{See, e.g., K-Mart Apparel Corp. v. Temples, 260 Ga. 871, 401 S.E.2d 5 (1991) (employer responsible for medical treatment following medical malpractice if malpractice resulted from treatment for the on-the-job injury; the consequences of malpractice are compensable in the form of resulting medical expenses and indemnity benefits).}
18. O.C.G.A. \textsection 34-9-263 (Supp. 1996). \textit{See, e.g., Davis v. General Motors Corp., 166 Ga. App. 401, 304 S.E.2d 402 (1983) (award of permanent partial disability benefits based upon allegation that claimant's disability had increased from 10% to 50% was supported by the evidence); Davis v. Cobb County, 106 Ga. App. 336, 126 S.E.2d 710 (1962) (an award is subject to change upon request for hearing based on a change of condition).}
compensation claim is "inconsistent with the public policy behind the statutory scheme," thereby barring the viability of any tort action on that theory.21 The court specifically reversed Zurich American Insurance Co. v. Dicks,22 in which the court of appeals reached a contrary conclusion, alluded to its previous decision in Bright v. Nimmo,23 which denied an independent action for the intentional delay of disability payments,24 and specifically addressed the issue of public policy, pointing out that the exclusive remedy provision is "the bedrock of the workers' compensation system" since it is the "quid pro quo for workers receiving a guaranty of prompt benefits for work-related injuries without regard to fault or common law defenses and without the delay inherent in tort litigation."25 The court further articulated the reality that workers' compensation "has never been intended to make the employee whole—it excludes benefits for pain and suffering, for loss of consortium, and it provides a cap on wage benefits."26 In the final analysis, the court reaffirmed that any exception to the exclusive remedy doctrine "must originate with the Legislature."27 With the Georgia Supreme Court's unequivocal decision in Doss, the exclusive remedy doctrine has withstood yet another attack.

Other developments this survey period show that the exclusive remedy doctrine is not always all encompassing. For example, in Coleman v. Columns Properties, Inc.28 the employee was injured in a fall and brought a premises liability suit. A prior workers' compensation claim had been denied because the employee failed to prove that her accident "arose out of and in the course of her employment."29 The Georgia Supreme Court held that because the workers' compensation decision

24. 267 Ga. at 312-13, 477 S.E.2d at 578.

where an employee's initial injury is made worse by the employer's intentional delay in authorizing treatment, the Act provides for penalties to punish the employer's conduct and permits the employee to seek benefits for the exacerbated injury. Because the Act provides penalties and allows for additional compensation, there is no logical reason for distinguishing intentional delay in payments from an intentional delay in authorizing treatment: Therefore, we reach the same conclusion as reached in Bright and hold that no independent cause of action arises from the intentional delay in authorizing treatment.

Id.

25. Id. at 313, 477 S.E.2d at 578.
26. Id.
27. Id.
29. Id. at 310, 467 S.E.2d at 329.
was not a binding determination on the employee's status as a non-invitee, the property owner's motion for summary judgment was properly denied.30 Also, actions by children of injured employees are not derivative of any work-related claim of the parent-employees and therefore will not be subject to the exclusive remedy rule.31 In Hitachi Chemical Electro-Products, Inc. v. Gurley, the court held that the employer's motion to dismiss was properly denied in an action by employees and their children alleging injuries to the children for negligent exposure of the parent-employees to hazardous chemicals.32

During this survey period, the Georgia Supreme Court also reversed a decision from the court of appeals and held that the exclusive remedy doctrine prevents a co-employee from being brought into an employee's action against a third party.33 In Weller v. Brown,34 the plaintiff was rear-ended while on the way to an employer-sponsored seminar. A co-employee was riding with the defendant to the seminar. After being sued, the defendant brought the co-employee into the suit by impleader.35 The court of appeals allowed the third-party complaint, even though the defendant and co-employee had received workers' compensation benefits.36 However, the supreme court held that the exclusive remedy doctrine precludes a defendant in a personal injury action from asserting a third-party contribution claim against a co-worker of the injured employee.37

III. LEGISLATIVE CHANGES

Once again, the 1996 Legislative Session saw a bill drafted by the Board's Legislative Subcommittee, House Bill 1291, become law.38

A. Heart Attacks and Strokes

A recent decision handed down by the court of appeals, Reynolds Construction Co. v. Reynolds,39 was legislatively corrected. It was the first case in which uncontradicted medical testimony did not prevail over

30. Id. at 312, 467 S.E.2d at 330.
32. Id. at 678, 466 S.E.2d at 869.
34. 266 Ga. 130, 464 S.E.2d 805 (1996).
35. Id. at 130, 464 S.E.2d at 805.
36. Id. at 131, 464 S.E.2d at 806.
37. Id.
lay testimony and the "natural inference through human experience."  The definition of "injury" in O.C.G.A. section 34-9-1 was modified to include victims of stroke and to require, as a precondition to recovery, evidence from a physician that the condition is "related to the work of employment at the time the condition occurred."

B. Independent Contractor Defined

Consistency in determining "independent contractor" status has been very difficult in Georgia's workers' compensation system for decades. Under the 1996 legislation, a new subsection (e) of O.C.G.A. section 34-9-2 was added to define independent contractors using the following criteria: (1) whether the person "[i]s a party to a contract, written or implied, which intends to create an independent contractor relationship;" (2) whether the alleged employer "[h]as the right to exercise control over the time, manner, and method of the work to be performed;" and (3) whether the alleged employee "[i]s paid on a set price per job or a per unit basis." If all criteria are met, an independent contractor relationship is created "unless otherwise determined by an Administrative Law Judge."43

C. Limited Liability Corporations

Corporate officers have long been able to opt out of workers' compensation coverage under O.C.G.A. section 34-9-2.1. The 1996 legislation specifies that limited liability companies are to be treated in the same manner. The new amendments also clarify that any employer subject to the Act before the filing of corporate exemptions shall remain subject to the Act without regard to the number of exemptions filed, unless all employees are exempted.46

D. Safety Rules

Despite the fact that O.C.G.A. section 34-9-17(a) contains a defense for the violation of any safety rule approved by the Board, the Board has

40. Id. at 25-26, 459 S.E.2d at 614.
42. Id. § 34-9-2(e)(1)-(3).
43. Id. § 34-9-2.
44. Id. § 34-9-2.1(a) (1992).
45. Id. § 34-9-2.1(a) (Supp. 1996).
46. Id. § 34-9-2.1(a)(3).
47. Id. § 34-9-17(a) (1992). No compensation is allowed for injury or death due to an employee's willful misconduct or for violation of a rule or regulation adopted by an employer and approved by the Board. Id.
never had the resources to fulfill this requirement and has never approved a safety rule. Therefore, this provision was deleted while all other defenses have been retained, including the wilful failure to use safety appliances.46

E. Payment of Penalties and Fines

The requirement that all penalties and costs be “made payable to the State of Georgia” was refined to require that payments be “made payable to the State Board of Workers’ Compensation.”49

F. Certification of Voluntary Rehabilitation Suppliers

Rehabilitation in noncatastrophic cases will remain voluntary, but in those cases, the parties electing to provide a rehabilitation supplier must utilize a supplier that holds one of the certifications or licenses specified in O.C.G.A. section 34-9-200.1(f) and be registered with the Board.50 The Board may also, in its discretion, issue special exceptions on a case by case basis.51

G. Guardianship

For decades, the Board has possessed the power to appoint guardians solely for the purpose of workers’ compensation under O.C.G.A. section 34-9-226.52 However, no procedural safeguards existed to ensure the competency or performance of any of the guardians.53 Such safeguards are already provided in the procedures for guardianship through the probate court.54 Section 34-9-226 was modified to remove the authority from the Board to appoint guardians for the purpose of workers’ compensation and require guardians duly appointed and qualified by the probate court of the county of residence of such minor or legally incompetent person.55

H. Coordination of Unemployment Compensation Payments

In addition to funding workers’ compensation coverage, employers are legally required to fund unemployment insurance.56 When both

48. Id. § 34-9-17(a) (Supp. 1996).
49. Id. § 34-9-18(f).
50. Id. § 34-9-200.1(f).
51. Id. § 34-9-200.1(h).
52. Id. § 34-9-226 (1992).
53. See id. § 29-5-1(b) (1993).
54. See id.
55. Id. § 34-9-226 (Supp. 1996).
56. Id. § 34-8-150(a) (1992).
benefits are collected simultaneously by an employee, the right to reimbursement has been vested in the Employment Security Administra-
tion. That agency was not well suited to monitor such overpayments. Therefore, section 34-9-243 was modified to allow the employer to take credit for any benefit paid under the Employment Security Law.

I. Temporary Total Disability Benefits
The maximum amount of temporary total disability benefits was increased from $275 to $300 per week. There was no corresponding increase in the amount of temporary partial disability benefits under O.C.G.A. section 34-9-262, and the maximum there will remain $192.50.

J. Impairment Ratings
The requirement that impairment ratings follow the “Guides to the Evaluation of Permanent Impairment” published by the American Medical Association (“AMA”) has been in effect for a number of years. As a housekeeping measure, that requirement was moved from section 34-9-1 and placed within section 34-9-263, which deals specifically with permanent partial disability. Further clarifying which edition must be used, the Act now specifies that the fourth edition of the AMA Guide is controlling. The provisions related to establishing ratings for phalanges, amputated extremities, and disability to the body as a whole under section 34-9-263(d), (e), and (f) were all deleted. Therefore, the AMA Guide, fourth edition, now provides the sole method for determining permanent partial disability.

K. Hazardous Occupations and Occupational Diseases
For decades, section 34-9-290 has contained the requirement that the Board report to the Department of Human Resources all occupations found to be hazardous, and all cases of occupational disease, on forms supplied to the Board by the Department of Human Resources.

57. Id. § 34-8-81.
58. Id. § 34-9-243(a) (Supp. 1996).
59. Id. § 34-9-261.
60. Id. § 34-9-262.
63. Id.
64. Id.
65. Id.
provision was never funded, and the Board never possessed the resources to comply with this provision. Therefore, as a housekeeping measure, this requirement was deleted.  

L. Attorney Fees Against the Subsequent Injury Trust Fund

In Georgia Subsequent Injury Trust Fund v. Muscogee Iron Works, the supreme court held that attorney fees of an employer or insurer were not recoverable from the Georgia Subsequent Injury Trust Fund ("SITF") because none of the statutory provisions of O.C.G.A. sections 34-9-350 through 34-9-367 expressly authorized the recovery of attorney fees. O.C.G.A. section 34-9-367 was modified to allow the assessment of attorney fees in those situations where it is proven by a preponderance of the evidence that the SITF has unreasonably failed or refused to accept, in whole or in part, a valid claim for reimbursement by an employer or insurer as provided for under the Act.

IV. PSYCHOLOGICAL INJURIES

During the last survey period, the writers suggested that the Georgia Supreme Court's opinion in Southwire Co. v. George "should be interesting in light of the fact that the chief justice is already on record as opposed to the long-standing physical injury requirement for claims of psychiatric disability." Although the Chief Justice continued his opposition by joining in a lengthy special concurrence written by Justice Sears, the supreme court made clear that the physical injury requirement, which was well established in Georgia law, is still intact.

Much of the controversy surrounding this case came from the suggestion by the court of appeals that "although [the claimant's] physical injury [was] not the cause of his mental disability, it [was] part of the reason for its continuation." In affirming the court of appeals, the supreme court held that a claimant is entitled to benefits for mental disability and psychic treatment which, while not necessarily precipitated by a physical injury, arose out of an accident in which a compensable

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69. Id. at 791, 462 S.E.2d at 368.
73. 266 Ga. at 743, 470 S.E.2d at 867 (Sears, J., concurring specially).
74. Id. at 741, 470 S.E.2d at 866-67.
75. 217 Ga. App. at 588, 458 S.E.2d at 363.
physical injury was sustained, when that injury contributes to the continuation of the psychic trauma.\textsuperscript{76} The physical injury need not be the precipitating cause of the psychic trauma; the injury is compensable if the physical injury contributes to the continuation of the psychic trauma.\textsuperscript{77} In concluding that the claimant should be compensated for psychic trauma precipitated by psychic stimuli, the supreme court held, the court of appeals substituted itself as a fact-finding body.\textsuperscript{78} The court remanded the case to the Board for reconsideration in light of the clarified standard for the mental disability claim.\textsuperscript{79}

V. CASE LAW DEVELOPMENTS

A. Accident Arising Out of Employment

In \textit{Lewis v. Chatham County Savannah Metropolitan Planning Commission},\textsuperscript{80} the claimant had permission to use the employer's vehicle for the combined purpose of doing personal banking, running an errand for the employer, and performing bank activities for the employer. Prior to completing her employer's banking, the claimant deviated from the errand route to have lunch, but then turned back toward the bank to conduct her employer's business. A collision occurred on the way to the bank. The Board held that the accident arose out of and in the course of employment, but the superior court reversed and concluded that the deviation was significant.\textsuperscript{81}

The court of appeals discussed the several distinct categories concerning the magnitude of deviations from employment.\textsuperscript{82} One is a "slight deviation" which is so closely connected with the employer's affairs that even though the employee may derive some benefit from it, it may be regarded as arising out of and in the course of employment.\textsuperscript{83} Another group of cases hold that when employees conclude their personal mission and resume the master's business before an injury occurs, the injury is viewed as arising out of and in the course of

\begin{thebibliography}{83}
\bibitem{76} 266 Ga. at 741, 470 S.E.2d at 866-67.
\bibitem{77} \textit{Id.} at 741-42, 470 S.E.2d at 866-67.
\bibitem{78} \textit{Id.} at 742, 470 S.E.2d at 867.
\bibitem{79} \textit{Id.}
\bibitem{81} \textit{Id.} at 534, 458 S.E.2d at 174.
\bibitem{82} \textit{Id.} at 534-35, 458 S.E.2d at 174.
\end{thebibliography}
employment. Because the categories are imprecisely defined, and placing each fact pattern into each category is a factual determination for the Board, the superior court erred in substituting its view on a factual issue. However, when a claimant sustains an injury while returning from a substantial geographic deviation, the claimant is not entitled to benefits because the accident does not arise out of and in the course of employment. For example, in South Georgia Timber Co. v. Petty, the claimant had a contract with South Georgia Timber to provide timber cutting services. South Georgia Timber deducted an amount from each check for workers' compensation coverage. On the date of the injury, the claimant had driven to Waycross, approximately thirty-five miles away from Folkston where South Georgia Timber is located, to meet with an insurance agent about the possibility of procuring her own coverage. The claimant took the agent to the job site and then drove the agent back to Waycross. While in Waycross, the claimant stopped at a mall to use the rest room and look for boots. Although she was planning to return to Folkston to deliver a check to her contract hauler, she was abducted by an armed assailant when she got back into her car. The claimant suffered injuries when she was thrown from her car.

The Board denied the claim, finding that the claimant was on a purely personal trip to obtain insurance for her own company. Moreover, the trip to the mall was a further deviation that placed her outside the scope of her employment with South Georgia Timber. However, the superior court relied on the claimant's testimony that she planned to return to Folkston to pay her contract hauler and held that she had returned to her duties for South Georgia Timber. The court of appeals reversed, agreeing with the Board's determination that the claimant deviated for purely personal reasons. Additionally, she was not reasonably expected to be at a Waycross shopping mall in the course of her employment. She had not returned to her duties when the assault took place because she was so far away from where she normally would have been to deliver the check.

85. 217 Ga. App. at 535, 458 S.E.2d at 175.
88. Id. at 497, 462 S.E.2d at 177.
89. Id. at 497-98, 462 S.E.2d at 177.
90. Id. at 499, 462 S.E.2d at 178.
91. Id., 462 S.E.2d at 178-79.
As a general rule, injuries from idiopathic falls on the job are not covered under the Act because they do not arise out of employment, although they occur in the course of employment. Under a narrow exception, when a claimant strikes some object specifically related to the work place, in the process of an idiopathic fall, such as a workbench, machinery, or equipment, the injuries are compensable because of the "increased risk" caused by the presence of the work-related object. In *Prudential Bank v. Moore*, a computer clerk struck her head on a floor baseboard when she fainted at work and claimed to suffer headaches, neck pain, carpal tunnel syndrome, and diplopia (double vision) as a result of the fall. The Board denied benefits, finding that the fall did not arise out of and in the course of employment. The superior court reversed.

The court of appeals held that to contrast hitting one's head on a floor baseboard, as opposed to hitting the floor directly, makes a distinction without a difference because a baseboard is a structural hazard that the claimant is equally exposed to apart from her employment. Because neither a wall nor a baseboard are peculiar to the employment, and therefore do not fit within the exception to noncoverage, the accident did not arise out of and in the course of employment.

Although the Act reaches employees whose injuries are the result of an aggravation of a pre-existing condition, the aggravation must arise out of and in the course of employment. There is no liability for a disability resulting from a new accident unrelated to the claimant's employment. For example, in *Shuman v. Engineered Fabrics*, the claimant herniated a disc in her neck in 1991 during the course of her employment as a parachute sewer. The employer accepted the injury as compensable and voluntarily commenced payment of benefits. In 1992, the claimant injured her lower back when her legs gave way.

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96. 219 Ga. App. at 847, 467 S.E.2d at 8.
97. Id. at 848, 467 S.E.2d at 9.
98. Id.
100. Id.
101. Id.
while squatting down to pick up an eggshell off her kitchen floor. The back injury subsequently required surgery. The ALJ determined that the injury was compensable, finding that the claimant's employment aggravated her pre-existing degenerative disc disease. However, the Appellate Division of the Board reversed, finding that the claimant sustained a specific "at home" accident and that degenerative disc disease alone is not a compensable injury in the absence of an employment-related event which aggravates the underlying condition. The superior court and court of appeals affirmed the Appellate Division. ¹⁰³

Similarly, in Fort Howard Paper Co. v. Hallisey, ¹⁰⁴ the claimant injured his back when he slipped, but did not seek medical treatment. He worked the remainder of his shift that day and his entire shift the following day. Three days after the injury, he played golf. After teeing off on the twenty-fourth hole, his back pain became so severe he had to discontinue the game. The next day, the claimant reported that he would not be coming to work because he injured his back playing golf. The orthopedic surgeon who treated him testified that the golf game aggravated his work injury. ¹⁰⁵ The Board awarded indemnity and medical benefits, finding that the golf outing did not cause the disabling injury but "temporarily aggravated and accelerated the symptoms from the injury." ¹⁰⁶ The court of appeals reversed. ¹⁰⁷

The court held that benefits are not properly awarded when an aggravation of the injury is due to the claimant's own negligent conduct outside the workplace, even though the initial injury was work-related. ¹⁰⁸ The court distinguished Terry v. Liberty Mutual Insurance Co., ¹⁰⁹ which held that an employee's negligence in sustaining a work-related injury is not a bar to compensation. ¹¹⁰ Instead, the court noted that an employee's conduct in negligently aggravating a work-related injury outside of the workplace may be a bar. ¹¹¹ As a general rule, every normal consequence that flows from the initial work-related injury also arises out of employment, but the employee is not relieved of all responsibility for subsequent conduct relating to the cause of the injury. ¹¹² If the claimant knows of the injury and nevertheless partici-

¹⁰³. Id. at 636-37, 469 S.E.2d at 848.
¹⁰⁵. Id. at 326, 471 S.E.2d at 232.
¹⁰⁶. Id.
¹⁰⁷. Id. at 327, 471 S.E.2d at 233.
¹⁰⁸. Id.
¹¹⁰. Id. at 584, 263 S.E.2d at 476.
¹¹². Id. at 327, 471 S.E.2d at 233.
pates in activities likely to produce a harmful result, the chain of causation is broken by the claimant's own negligence as a matter of law.\footnote{113}

B. Appeals

In \textit{Clinical Arts Home Care Services v. Smith},\footnote{114} the court of appeals considered a ruling from the Appellate Division which made reference to a de novo review of the record, but which was rendered subsequent to the adoption of a new standard for appeals. The ALJ found that the employee had suffered a new injury. The decision was appealed, and on August 30, 1994, the Appellate Division issued its award reversing the ALJ.\footnote{115} In doing so, the Appellate Division stated that it had conducted a de novo consideration of the evidence, which the court of appeals ruled was error. A new standard of review, preponderance of competent and credible evidence, had gone into effect two months before the Appellate Division's award was issued and, as such, that standard should have been applied.\footnote{116}

The case of \textit{Adivari v. Sears, Roebuck & Co.}\footnote{117} is a prime example of the risks pro se litigants face when handling their own workers' compensation claims. Adivari was dissatisfied with the denial of benefits by the Board and appealed the decision to the superior court which, in turn, dismissed for failure to comply with O.C.G.A. section 34-9-105.\footnote{118} Dissatisfied with this decision, Adivari mistakenly filed an "Application for Appeal" with the superior court clerk's office. An appeal in a workers' compensation matter beyond the superior court level is discretionary in nature and must be filed directly with the court of appeals.\footnote{119} Adivari's procedural error was costly.

C. Attorney Fees

While it might be reasonable to dispute a claim at the ALJ level, an appeal may be viewed as unreasonable even though the Appellate

\footnotesize{\begin{itemize}
  \item 113. \textit{Id.}
  \item 115. \textit{Id.} at 681-82, 462 S.E.2d at 759.
  \item 117. 221 Ga. App. 279, 471 S.E.2d 59 (1996).
\end{itemize}}
Division has the authority to reconsider the facts. In Richardson v. Air Products & Chemicals, Inc., the employer denied liability for the employee's chronic prostatitis, which the employee blamed on his job duties as a truck driver. The ALJ found for Richardson based on a medical opinion, and the employer appealed, arguing that chronic prostatitis did not meet the definition of a compensable injury. Noting that it was a well-established principle that an aggravation of a pre-existing condition is compensable under Georgia law, the Appellate Division assessed attorney fees for what it deemed an unreasonable appeal. The superior court reversed, but was in turn reversed by the court of appeals, which held that there was evidence in the record supporting the finding that Air Products appealed without reasonable grounds. The case was remanded to the superior court for a determination of whether that appeal was subject to an assessment of fees as well.

A different result was reached in Pet, Inc. v. Ward. There, the court of appeals held that the ALJ "completely ignored the evidence supporting" the employer's defense. Although the evidence may have allowed an award of compensation, it was not demanded, and the employer's defense in the matter was reasonable. As noted by the court of appeals, the Board "must prove by the record" that there is, in fact, evidence of unreasonableness in order to warrant an assessment of attorney fees under O.C.G.A. section 34-9-108(b)(1).

D. Change in Condition

The Georgia Supreme Court issued a significant decision during this survey period resolving an issue that has sharply divided the workers' compensation community in recent years—What is a claimant's burden of proof to show a change in condition? In Maloney v. Gordon County Farms, the court overruled two court of appeals cases.

121. Id. at 665, 458 S.E.2d at 696.
122. Id. at 666, 458 S.E.2d at 696.
124. Id. at 526, 466 S.E.2d at 48.
125. Id. at 527, 466 S.E.2d at 48.
126. Id. at 526, 466 S.E.2d at 48.
127. For a general discussion of the burden of proof debate, see Bagley et al., supra note 2, at 502-510.
which had established a more difficult (some argued impossible) burden of proof for employees attempting to prove a change in condition.

In Maloney, the claimant sustained a compensable injury and returned to light-duty work, but was subsequently terminated for a cause unrelated to her disability. Following unsuccessful attempts to obtain other suitable employment, she requested a hearing before the Board seeking the reinstatement of temporary total disability benefits on the grounds that her unsuccessful efforts to find suitable employment resulted in an economic change in condition. The claimant presented evidence that she had applied for, and was offered, a job with Burger King, but the offer was withdrawn when she informed the prospective employer that she was receiving benefits and was unable to perform strenuous duties. The claimant also testified that she disclosed her physical limitations on applications with five other employers and received no job offers. The ALJ reinstated benefits, and this decision was adopted by both the Appellate Division and the superior court. However, the court of appeals reversed, holding that the claimant's testimony regarding her failure to obtain employment was inadmissible hearsay, and therefore, the claimant failed to meet her burden of proof under the Aden's Minit Market standard.

The supreme court reversed, holding that in order to receive workers' compensation benefits based upon a change in condition, a claimant must establish by a preponderance of the evidence that: (1) she suffered a loss of earning power as a result of a compensable work-related injury; (2) she continues to suffer physical limitations attributable to that injury; and (3) she has made a diligent, but unsuccessful effort to secure suitable employment following termination. Once evidence is offered to establish the foregoing elements, the Board may draw reasonable inferences that, despite the claimant's good faith efforts, her inability to find suitable employment was proximately caused by the continuing disability. In particular, the supreme court overruled the requirements of Aden's Minit Market and other cases that required a claimant not only to show an inability to obtain suitable employment, but also why the employment was refused. The supreme court

130. 265 Ga. at 825-26, 462 S.E.2d at 607.
131. Id.
132. Id. at 828, 462 S.E.2d at 608-09.
133. Id.
135. 265 Ga. at 828, 462 S.E.2d at 609.
agreed that requiring a claimant to essentially prove an employer's motive and state of mind in refusing employment is too difficult a burden to impose.  

A number of cases decided subsequent to Maloney during this survey period focused on what constitutes a "diligent but unsuccessful" search for suitable employment. For example, in Sadeghi v. Suad, Inc., the claimant testified that he was unable to find suitable employment after looking for light-duty work at over one hundred places. Although the Board denied benefits, the court of appeals reversed based upon the supreme court's decision in Maloney, and remanded the case for a determination under the new burden of proof. Likewise, in Harrell v. Albany Police Department, the Appellate Division reversed the ALJ's determination that the claimant had made a sincere but unsuccessful attempt to return to work. The claimant had returned to work from a compensable injury, but was fired from his position as a corrections officer when he was caught sleeping on the job. Although the court of appeals found that the Appellate Division applied the erroneous Aden's standard, it upheld the Appellate Division's authority to make a separate determination regarding whether the claimant's effort to obtain suitable employment was diligent, and remanded the case for a ruling under the Maloney burden of proof.  

In L.C.P. Chemicals v. Strickland, the claimant sustained a compensable injury and returned to work for approximately one week, only to lose his job when the plant at which he was employed closed. In support of his claim for additional disability benefits, the claimant presented a record of work search listing a variety of inquiries he made following the closing of the plant. The claimant also testified as to several verbal inquiries that he made. The employer presented evidence, however, that while he was out of work, the claimant began campaigning for a position as county commissioner, raising ten to twelve thousand dollars, helped his girlfriend manage a trailer park, collected money for her and arranged repairs when needed, and was also a member of two bowling leagues, bowling two nights a week. The court of appeals found that the evidence supported the ALJ's findings that the claimant

136. Id.  
138. Id. at 93, 464 S.E.2d at 235.  
139. Id.  
141. Id. at 810, 466 S.E.2d at 683.  
142. Id. at 811-12, 466 S.E.2d at 683-84.  
144. Id. at 742-43, 472 S.E.2d at 472-73.
was “able to enjoy his recreational activities and run for public office” and that he did not appear to be actively searching for employment at the time of the hearing. The court also found that the mere fact the previous employer might not have been able to offer the claimant light-duty work did not relieve the claimant of proving that he made an otherwise diligent effort to obtain employment elsewhere. To date, the cases interpreting Maloney demonstrate that the Board has broad discretion in determining whether a “diligent” job search has been made in any given case.

Several other cases during this survey period dealt with the subject of change in condition, although none were as significant as the Maloney decision. In Pate v. Eastern Airlines, the claimant sustained a compensable injury while working as a baggage handler for Eastern Airlines. At the same time, the claimant was also operating a landscaping business. The income from the landscaping business was not included in the calculation of the claimant’s disability benefits, and the claimant continued to perform essentially supervisory tasks in the landscaping job after his accident. Although the employer contended that the claimant’s continued work for the landscaping business constituted a change in condition, the court of appeals held that because the claimant’s employment was “concurrent dissimilar employment,” the wages claimant earned in the landscaping business could not be considered in determining whether the claimant had undergone a change in condition. The court reasoned that because the claimant’s wages with the landscaping business were not calculated as a part of the claimant’s average weekly wage, they could not be used against him to determine a suspension of benefits. This holding seems unusual given the well-documented principle that the claimant bears the burden of demonstrating a change in condition when he has returned to work following a compensable injury. Presumably, the focus should have been on whether the claimant’s work in the landscaping business constituted a true return to work. Apparently, the court was impressed by the fact that the claimant’s duties with the landscaping business were very light in nature, and that the physical limitations from his

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145. Id. at 744, 472 S.E.2d at 473.
146. Id., 459 S.E.2d at 474.
148. Id. at 451, 462 S.E.2d at 154.
149. Id. at 452, 462 S.E.2d at 154.
150. Id.
151. Id.
compensable injury prevented his return to work to his job as a baggage handler.

In Chem Lawn Services v. Stephens,153 the court distinguished between an employer’s burden of proof to show a change in condition and the law regarding an aggravation of a pre-existing condition. Stephens injured his left knee at work, received workers’ compensation medical and disability benefits, subsequently returned to work, and was later terminated. The medical evidence presented at the hearing demonstrated that the claimant suffered from a pre-existing disease in both knees known as osteochondritis dissecans (“OD”) that developed over a long period prior to the accident. The blow to the knee sustained at work temporarily aggravated the claimant’s pre-existing condition, but the aggravation was resolved prior to the claimant’s return to normal-duty work. The employer alleged that subsequent knee problems were caused by a progressive worsening of the claimant’s pre-existing condition, rather than by the compensable injury. The ALJ characterized the issue as a change in condition and held that since the employer accepted the case as compensable, it was now prohibited from contending that the claimant’s pre-existing OD condition was not work-related.154 The court of appeals reversed, holding that a pre-existing condition which is aggravated by an on-the-job injury ceases to be compensable when the aggravation is no longer the cause of the disability.155

A similar issue was presented in Continental Grain Co. v. Thomas.156 Thomas was injured in 1989 when she inhaled phosphine gas. The employer voluntarily accepted the claim as compensable and commenced payment of disability benefits for both physical and psychological injuries resulting from the accident. The following year, the employer requested a hearing to suspend benefits based upon a change in condition for the better. Both the ALJ and the Appellate Division held that the claimant’s medical and psychological benefits should be terminated. However, the superior court reversed, finding that the claimant suffered solely a psychological injury and that the employer was estopped from controverting any further benefits because it failed to do so within sixty days of the date benefits were originally due, as required by O.C.G.A. section 34-9-221(h).157 The court of appeals reversed, finding that the employer was simply attempting to

154. Id. at 240-41, 469 S.E.2d at 377.
157. Id. at 241, 459 S.E.2d at 624.
demonstrate a change in the claimant's physical and psychological status, and was not controverting the case as a whole.\textsuperscript{158} The court also found that there was no evidence in the record that the claimant suffered solely a psychological injury. Furthermore, the employer presented deposition testimony of two doctors who concluded that the claimant was able to return to work from both a physical and psychological perspective.\textsuperscript{159} The court determined that there was sufficient evidence to support the Board's determination that benefits should be suspended, and therefore reinstated this decision.\textsuperscript{160}

\textbf{E. Change of Physician}

The court of appeals had two opportunities to address the 1994 amendments to O.C.G.A. section 34-9-201 during this survey period.\textsuperscript{161} In \textit{Porter v. Ingles Market, Inc.},\textsuperscript{162} the claimant suffered injuries to her neck and back. The employer initially accepted the claim as compensable, but subsequently objected to treatment by a psychiatrist. The claimant's approved treating physician referred her to the psychiatrist; however, she did not seek a change of physician under O.C.G.A. section 34-9-201(d).\textsuperscript{163} The ALJ determined that the psychiatric treatment was unauthorized, but the Appellate Division reversed, finding that the employer was responsible for the bills because it did not have a posted panel of physicians. The superior court affirmed a portion of the Board's decision, but remanded the case for the treating physicians to consider additional medical records indicating that the claimant suffered a prior injury.\textsuperscript{164} The court of appeals held that at the time the Board issued its decision, the claimant was required to petition the Board for a change of physician because the employer was providing medical care when the claimant began the psychiatric treatments.\textsuperscript{165} However, the 1994 amendments to O.C.G.A. section 34-9-201(b)(1), which are applied retroactively, allow the authorized treating physician to arrange any referral without prior Board approval.\textsuperscript{166}

\begin{itemize}
  \item \textsuperscript{158} \textit{Id.}
  \item \textsuperscript{159} \textit{Id.}
  \item \textsuperscript{160} \textit{Id.} at 242, 459 S.E.2d at 625.
  \item \textsuperscript{163} O.C.G.A. § 34-9-201(d) (Supp. 1996).
  \item \textsuperscript{164} 219 Ga. App. at 146, 464 S.E.2d at 213-14.
  \item \textsuperscript{165} \textit{Id.}, 464 S.E.2d at 213.
  \item \textsuperscript{166} \textit{Id.}
\end{itemize}
Similarly, in *Barnes v. City of Atlanta Police Department*\(^\text{167}\) the City initially controverted the compensability of the claim, but subsequently accepted the claim as compensable and only controverted payment for unauthorized medical treatment. The City claimed that medical treatment given pursuant to referrals was unauthorized under O.C.G.A. sections 34-9-200 and 34-9-201, which required Board approval for a change of physician or treatment. The Board held that the claimant was not required to seek Board approval for a change in physician or treatment because the City had initially controverted the compensability of the claim.\(^\text{168}\) The superior court reversed and remanded.\(^\text{169}\)

The court of appeals held that because the City had accepted the claim as compensable and was providing medical benefits at the time the referrals were made, the reasoning of *Capital Atlanta, Inc. v. Carroll*\(^\text{170}\) did not apply.\(^\text{171}\) Although the amended version of O.C.G.A. section 34-9-201 no longer requires Board approval for referrals made by the primary authorized treating physician, an unlimited chain of referrals is not allowed.\(^\text{172}\) Other medical practitioners to whom the claimant is referred are not allowed to arrange for additional referrals.\(^\text{173}\) Further, because the 1994 amendments to O.C.G.A. section 34-9-201 deal with the scope of the remedy and not with the compensability of the claim, the 1994 amendments are remedial and are properly applied retroactively.\(^\text{174}\)

What about when an employer controverts only a portion of the claim? Can an employee then simply choose her own doctor without seeking approval from the Board? The answer is no. In *Georgia Baptist Medical Center v. Moore*,\(^\text{175}\) the employer did not fully controvert the claim so as to entitle the claimant to seek treatment from a nonpanel physician. Rather, the employer accepted the claim as compensable, provided medical treatment by panel physicians, and only sought to controvert


\(^{169}\) 219 Ga. App. at 140, 464 S.E.2d at 610.


\(^{171}\) 219 Ga. App. at 140, 464 S.E.2d at 611.

\(^{172}\) *Id.* at 141, 464 S.E.2d at 611.

\(^{173}\) *Id.*


treatment by an unauthorized chiropractor. Under these circumstances, the court held, the claimant must petition the Board for approval under O.C.G.A. section 34-9-200(b) before seeking treatment. However, the court affirmed the Board's finding that the claimant was entitled to disability benefits, holding that although the chiropractor's records were not provided by an authorized treating physician, such evidence was competent and admissible.

F. Coverage

As seen in Underwood v. Dunn, failure to carry workers' compensation insurance can be costly. Mary Dunn, an employee of Prewett Industries, was injured on the job. After filing a claim for benefits, she not only discovered that her employer failed to have workers' compensation insurance, but that it was insolvent as well. After obtaining an award of benefits against her employer from the Board, she filed suit against two corporate officers for the amount she should have recovered in workers' compensation benefits on the grounds that they breached their statutorily imposed duty of maintaining workers' compensation insurance coverage. Dunn prevailed against the corporate officers personally, and an appeal was taken. The court of appeals upheld the judgment, holding that Dunn successfully established the necessary elements of her cause of action, which were: (1) a valid workers' compensation claim; (2) a valid Board award; and (3) the employer's insolvency. As noted by the court, the proper measure of damages is the amount equal to the workers' compensation award, which, in this case, included some stiff penalties.

G. Heart Attacks/Strokes

Perhaps one of the most controversial decisions to be issued during the recent survey period was Reynolds Construction Co. v. Reynolds. This case provided a focal point for the recent debate over the seeming

176. Id. at 171-72, 464 S.E.2d at 266-67.
177. Id. at 172, 464 S.E.2d at 266.
178. Id. at 172-73, 464 S.E.2d at 267.
180. Id. at 185-86, 470 S.E.2d at 781.
181. Id. at 186, 470 S.E.2d at 781.
182. Id., 470 S.E.2d at 782.
183. Id.
expansion of compensability in cases dealing with heart attacks and strokes.\textsuperscript{185}

Reynolds was a thirty-seven-year-old man who worked for a family-owned construction business. He suffered a disabling stroke allegedly caused by work-related mental worry and fatigue over a three-year period. The claimant alleged that his fatigue and stress resulted from his company’s ninety percent decrease in gross sales, creditors repossessing the company’s equipment, cancellation of company insurance policies for nonpayment of premium, and the company’s firing of nearly thirty employees. The claimant also testified that he personally guaranteed many of the company’s debts, was being pursued by numerous creditors, and would often work fifteen hours a day, seven days a week, when jobs were available. Although both the claimant and his brother testified to the extreme nature of the claimant’s work-related fatigue and stress, the claimant presented no medical evidence whatsoever to link this condition with his eventual stroke. However, the employer introduced medical evidence from the claimant’s treating physician stating that the claimant’s stroke was not directly attributable to any work-related activity, but was rather the result of arteriosclerosis.\textsuperscript{186} The ALJ applied the so-called “heart attack statute” contained in O.C.G.A. section 34-9-1(4), in analyzing the claimant’s heart attack claim. Through the “natural inference of human experience,” the ALJ found that the claimant’s stroke was work-related.\textsuperscript{187} According to the supreme court, the Board may use the “natural inference rule” to determine whether a heart attack claim is compensable based on three sources of evidence: medical evidence, lay evidence, and the “natural inference through human experience.”\textsuperscript{188} Both the Appellate Division and the superior court affirmed the ALJ’s decision.\textsuperscript{189} The court of appeals affirmed, holding that the ALJ’s “natural inference” did not disappear, and the testimony of credible lay witnesses was not rendered meaningless simply because medical evidence was offered that supported a different conclusion.\textsuperscript{190}

Interestingly, however, O.C.G.A. section 34-9-1(4) makes no specific references to strokes, but rather deals solely with “heart disease, heart


\textsuperscript{186} 218 Ga. App. at 24, 459 S.E.2d at 613.

\textsuperscript{187} \textit{Id}.


\textsuperscript{189} 218 Ga. App. at 23, 459 S.E.2d at 613.

\textsuperscript{190} \textit{Id}. at 25-26, 459 S.E.2d at 614.
attack, the failure or occlusion of any of the coronary blood vessels or thrombosis." On its face, the statute does not appear to apply in cases of stroke, which is a cerebrovascular condition as opposed to a coronary condition. Nevertheless, the court focused on the "natural inference rule" that has developed from the interpretation of the heart attack statute, and concluded that the ALJ was not bound to accept what the court described as a cursory medical opinion and thereby ignore the testimony of two credible lay witnesses.

As noted previously in this Article, the General Assembly specifically amended O.C.G.A. section 34-9-1(4), effective July 1, 1996, to both specifically include strokes in the heart attack statute and to require, as a precondition to recovery, evidence from a physician that the condition at issue is "related to the work of employment at the time the condition occurred." This amendment reflects the concern raised by the Reynolds decision's disregard of uncontradicted medical evidence in the face of lay testimony on the complex issue of whether a stroke is causally related to the amorphous concepts of chronic stress and fatigue. In all future cases relating to heart attacks and strokes, the employee will have to produce at least some medical evidence that demonstrates a causal relationship between the claimant's employment and the condition.

The court of appeals reversed an award of benefits based upon a fatal heart attack in Kines v. City of Rome. Kines, a twenty-two year veteran police officer, suffered a heart attack and died at home approximately thirty-six hours after his last work shift. Seeking workers' compensation death benefits, the decedent's widow presented the expert testimony of two doctors who had never treated the decedent, but who testified that the decedent's stress from his job was a significant factor in bringing on his heart attack. Relying on this testimony, the ALJ found that the decedent's heart attack was work-related and awarded benefits. The court of appeals reversed, finding that the hypothetical questions to which the expert witnesses responded were deficient because they did not disclose that the deceased's mother's

196. Id. at 733, 470 S.E.2d at 312.
family had a significant history of heart disease. The court believed that the facts omitted from the hypothetical questions resulted in misleading testimony, and therefore, the testimony provided by the experts was neither competent nor credible. Conversely, the court found evidence that the deceased had been involved in a four-year meretricious relationship and that his wife was pregnant at the time of his death. The court concluded these facts would cause more stress than a job the deceased had performed for twenty-two years without physical problems. Thus, the court of appeals affirmed the superior court’s reversal of the benefits award.

H. Newly Discovered Evidence

If Distribution Concepts Co. v. Hunt stands for anything, it is that information discovered after the evidentiary hearing must meet certain standards before it can be considered. While appealing his denial of benefits to the Appellate Division, Hunt filed a motion to remand for newly discovered evidence claiming that within ten days of the adverse award from the ALJ, he located a former coworker who reportedly would support his claim. The Appellate Division denied the motion and affirmed the denial of benefits. The superior court reversed, directing that the case be remanded to the ALJ for the taking of testimony from the witness. The court of appeals found this to be error and reversed. The testimony of the purported witness was cumulative, meaning it could not qualify as newly discovered evidence. The superior court is “without any authority to remand the case on account of newly discovered evidence,” particularly when it goes to the weight. The Appellate Division’s refusal to remand in such a case will not be disturbed unless it has manifestly abused its authority.

197. Id.
198. Id.
199. Id. at 734, 470 S.E.2d at 312.
202. Id. at 451, 471 S.E.2d at 541.
203. Id. at 449-50, 471 S.E.2d at 540-41.
204. Id. at 449, 471 S.E.2d at 540.
205. Id. at 451, 471 S.E.2d at 541.
206. Id.
207. Id. at 450, 471 S.E.2d at 541.
I. Permanent Partial Disability

As the employee discovered in *Metro Interiors, Inc. v. Cox*, apportionment of a pre-existing condition can be problematic when requesting benefits under O.C.G.A. section 34-9-263. Cox suffered hearing loss as a result of a fall in 1990. When treated for the condition, he told the otolaryngologist that he had suffered "slight" hearing loss before the accident. However, he had never been tested beforehand. Thus, although the Board found that the fall aggravated his hearing loss, it was unable to determine the extent of the aggravation. As a result, permanent partial disability ("PPD") benefits were denied. The superior court reversed and remanded for a determination of any PPD benefits which might be due. According to the court of appeals, this was error. Although apportionment was allowable, the burden of proof was on the employee to show the amount due. Not only had Cox been unable to establish the degree of his pre-injury hearing loss, but the ALJ also found that he was impeached when he tried to deny his pre-existing hearing loss at the hearing. Because the denial of benefits was based on evidence in the record, the Board's decision should have been affirmed by the superior court.

J. Procedure

O.C.G.A. section 34-9-103 allows the Appellate Division to "reconsider, amend, or revise the award to correct apparent errors and omissions." In *Gibson v. Lindale Manufacturing Co.*, the employee sought reconsideration of the Appellate Division's award affirming the denial of benefits. Relying on *Asplundh Tree Expert Co. v. Gibson*, the Appellate Division agreed and reversed itself, awarding benefits to Gibson. Lindale thereafter argued that "the entry of the additional findings of fact on reconsideration represented an unlawful de novo review of the compensability issue." The court of appeals disagreed,

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211. *Id.* at 399, 461 S.E.2d at 572.
212. *Id.* at 398, 461 S.E.2d at 571-72.
213. *Id.* at 398-99, 461 S.E.2d at 572.
217. 218 Ga. App. at 163, 460 S.E.2d at 544.
218. *Id.* at 164, 460 S.E.2d at 544.
noting that the Appellate Division did not conduct a new hearing, and "confined its reconsideration to the existing record and certain facts it erroneously omitted in its initial consideration of Gibson's claim." The Appellate Division was within its authority by issuing a revised award that complied, "legally and factually, with the previously considered record." The case was remanded to the superior court for review of the Board's award on the merits of the case.

K. Statute of Limitations

In *Atlantic Container Services v. Godbee*, the court of appeals was faced with the issue of whether payment of longshore benefits tolled the statute of limitations on an employee's workers' compensation claim. Noting that a claim is timely if:

filed within one year after injury, except that if payment of weekly benefits has been made or remedial treatment has been furnished by the employer on account of the injury the claim may be filed within one year after the date of the last remedial treatment furnished by the employer or within two years after the date of the last payment of weekly benefits,

the court held that payment of longshore benefits would toll the statute of limitations. Even though longshore benefits were furnished by a different carrier, the employer provided both "income benefits and remedial medical treatment for the earlier injury." Thus, the employee's claim was not time barred as to the first of two injuries even though it had been filed more than one year after the accident.

L. Subrogation

In *Rowland v. Department of Administrative Services*, the State Department of Administrative Services ("DOAS") paid workers'
compensation benefits to Young as the result of injuries Young sustained in an automobile collision while in the course of his employment. The accident was caused by Rowland's negligence. Unbeknownst to DOAS, Young settled his personal injury claim against Rowland without suit. Rowland did not know of Young's workers' compensation claim. DOAS subsequently sued Rowland under the assignment provision of the subrogation statute, O.C.G.A. section 34-9-11.1(b), summary judgment was granted to DOAS, and Rowland appealed.228

The court considered whether an employer has an independent cause of action against a tortfeasor, when the employee settles a cause of action against the tortfeasor and the tortfeasor has no knowledge of the employee's workers' compensation claim or the employer's subrogation lien.229 Under O.C.G.A. section 34-9-11.1(b), an employer has a lien against any tort recovery an employee receives; the statute does not confer to the employer an independent cause of action against the tortfeasor.230 Under the statute as it then read, only if the employee failed to bring a tort action against the tortfeasor within a year was the employee's right of action assigned to the employer.231 Since Young extinguished his claim against Rowland via settlement, there was no right of action to be assigned to DOAS.232 The court noted that if Rowland knew of the existence of Young's workers' compensation claim or the DOAS's assertion of a subrogation lien, the settlement would not have defeated the DOAS's subrogation right.233 However, as Rowland had no actual knowledge of the lien, the court rejected DOAS's claim that Rowland should be deemed to have constructive knowledge.234 The court observed that a driver involved in a collision does not necessarily fall into the scope of the Act.235 Even if he is covered by the Act, he may not have been in the scope of his employment at the time of the accident.236 Thus, it would be unjust to place constructive knowledge on a tortfeasor of the existence of a potential workers' compensation claim.237 The court concluded that the settlement did

228. Id. at 900, 466 S.E.2d at 925.
229. Id. at 901-02, 466 S.E.2d at 925-26.
231. 219 Ga. App. at 900-01, 466 S.E.2d at 925.
232. Id. at 901, 466 S.E.2d at 925.
233. Id. at 902, 466 S.E.2d at 926.
234. Id.
235. Id. at 903, 466 S.E.2d at 926.
236. Id.
237. Id., 466 S.E.2d at 927.
not extinguish the DOAS’s lien against Young to the extent he received more than full compensation for his injury.\textsuperscript{238}

Although the subrogation statute is not clear as to whether employers and insurers are required to file a motion to intervene,\textsuperscript{239} failure by a trial court to grant such a motion may be reversible error. For example, in \textit{Department of Administrative Services v. Brown},\textsuperscript{240} the plaintiff, a county worker, was injured in the course of her employment in an automobile collision with a tractor-trailer. As a result, DOAS paid the plaintiff over one-hundred thousand dollars in workers' compensation benefits. The plaintiff then commenced a negligence action against the truck driver and other parties, and DOAS filed a motion to intervene, which the trial court denied.\textsuperscript{241} The court of appeals reversed, finding that \textsuperscript{\textit{O.C.G.A. section 34-9-11.1}} grants a workers' compensation insurer the right to intervene in an action against a third-party tortfeasor brought by an employee to whom the insurer had paid benefits.\textsuperscript{242}

\textbf{M. Subsequent Injury Trust Fund}

Practitioners considering a settlement which may impact a claim for reimbursement against the Subsequent Injury Trust Fund ("SITF")\textsuperscript{243} should be aware that the appellate courts have strictly construed the statutory requirements of placing the SITF on notice of any settlement. In \textit{Altermatts Painting v. Subsequent Injury Trust Fund},\textsuperscript{244} the employer entered into an agreement with the SITF for reimbursement of its employee's claim. Prior to the Board's approval of the reimbursement agreement, the employer entered into a settlement agreement with the employee which was submitted to the Board for approval on the same day the Board approved the reimbursement agreement. The SITF sought to rescind the reimbursement agreement because the employer did not comply with \textsuperscript{\textit{O.C.G.A. section 34-9-363.1(b)}}. The employer failed to obtain the SITF's approval of the settlement agreement before submitting that agreement to the Board. The ALJ declared the reimbursement agreement null and void and ordered the employer to

\begin{itemize}
  \item \textsuperscript{238} Id.
  \item \textsuperscript{239} O.C.G.A. § 34-9-11.1 (Supp. 1996).
  \item \textsuperscript{240} 219 Ga. App. 27, 464 S.E.2d 7 (1995).
  \item \textsuperscript{241} Id. at 27-28, 464 S.E.2d at 8.
  \item \textsuperscript{242} Id. at 28, 464 S.E.2d at 8-9.
  \item \textsuperscript{243} The SITF is a governmental fund created by statute, O.C.G.A. § 34-9-350 to -367, to allow employers and insurers to obtain reimbursement once amounts paid on a compensable claim exceed the necessary thresholds, provided a subsequent injury merges with a pre-existing injury or condition. See \textsuperscript{\textit{O.C.G.A. §§ 34-9-351 & 34-9-360}} (1992 & Supp. 1996).
\end{itemize}
reimburse the SITF for any monies received under the agreement. The Board and the superior court affirmed. 245

The court of appeals held that when a reimbursement agreement between an employer and the SITF has been submitted to, but not yet approved by the Board, the employer must submit a settlement agreement first to the SITF for approval instead of submitting the stipulation directly to the Board. 246 O.C.G.A. section 34-9-363.1 imposes a duty on the employer or insurer to notify the SITF administrator of proposed settlement agreements made with the employee. 247 This duty is required because the SITF is ultimately financially responsible for payment of the settlement agreement. 248 Therefore, the SITF must be given an opportunity to adjust the reimbursement agreement based on the settlement agreement before the settlement agreement is submitted to the Board. 249 Settlements must be submitted first to the SITF, even when the reimbursement agreement has not yet been approved. 250

VI. CONCLUSION

As we suggested in last year's survey, the bulk of the challenges in workers' compensation law come in the everyday practice. In this year's survey period, mediation has continued to provide prompt and economical resolutions for a variety of issues, obviating the need for evidentiary hearings. In the next survey period, practitioners can expect clarification from the Georgia Supreme Court on what may be a case of first impression, not only in Georgia but in the nation: Whether a major defense for employers, the Rycroft defense, conflicts with the Americans With Disabilities Act. We look forward to reporting on this and other developments next year.

245. 219 Ga. App. at 358, 464 S.E.2d at 923.
246. Id.
248. 219 Ga. App. at 360, 464 S.E.2d at 924.
249. Id.
250. Id.