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Workers' Compensation

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The 2010–2011 survey period[1] featured decisions of Georgia appellate courts in areas ranging from medical care to intervening accidents, with no significant legislation impacting the Workers' Compensation Act.[2]

I. SUSPENSION OF BENEFITS

S & B Engineers & Constructors Ltd. v. Bolden,[3] reinforced the longstanding principle requiring proper notice to the claimant of the basis for the suspension of benefits.[4] The claimant sustained a compensable injury to her left hand in June 2006 and began receiving temporary total disability (TTD) benefits. After her doctor reported that she could return to work with some restrictions in March 2007, the insurer unilaterally suspended indemnity benefits without notice on April 24, 2007.[5] The claimant filed a hearing request seeking reinstatement of benefits plus penalties and attorney fees.[6] The administrative law judge (ALJ) determined that the claimant was no longer disabled as of April 9, 2007, but awarded an additional ten days of temporary total disability benefits based upon the employer's failure to provide the ten

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1. For analysis of Georgia workers' compensation law during the prior survey period, see H. Michael Bagley & J. Benson Ward, *Workers' Compensation, Annual Survey of Georgia Law*, 62 MERCER L. REV. 383 (2010).

2. O.C.G.A. tit. 34, ch. 9 (2008 & Supp. 2011).

3. 304 Ga. App. 534, 697 S.E.2d 260 (2010).

4. *Id.* at 539, 697 S.E.2d at 263.

5. *Id.* at 535, 697 S.E.2d at 261.

6. *Id.* Although claimant originally sought total temporary disability beginning April 24, 2007, she amended her request, as she began working another job on May 9, 2008. *Id.*

day notice of suspension via a WC-2 form. The ALJ also awarded a late payment penalty and attorney fees but denied the claimant's request for an assessment of civil penalties.[7]

The claimant appealed to the Appellate Division of the Workers' Compensation Board (board), which found the claimant had no actual or constructive knowledge of the suspension and thus awarded her benefits through the date of the hearing plus a late payment penalty, but no assessed attorney fees or civil penalties.[8] Both parties appealed to the Superior Court of Chatham County, Georgia, which affirmed the appellate division's award, and the parties again filed cross appeals.[9] The Georgia Court of Appeals noted the mandatory language in section 34-9-221(i) of the Official Code of Georgia Annotated (O.C.G.A.),[10] requiring the employer to file a WC-2 with the board and provide the employee with notice.[11] While technical violations of the statute, such as providing less than ten days notice or stating the incorrect reason for suspension, will not prevent the employer/insurer from arguing that benefits are not due, they will subject the employer/insurer to potential liability for attorney fees.[12] The court distinguished those situations from the present case, where, as opposed to making a simple technical error in filling out the WC-2, the employer/insurer failed to file a WC-2 and provided no explanation for this failure.[13] The court did not determine whether constructive knowledge of the reason for suspension would relieve the employer/insurer of complying with the statute because there was no evidence in this case of any actual or constructive notice.[14]

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7. *Id.* at 536, 697 S.E.2d at 261.

8. *Id.* at 536-37, 697 S.E.2d at 261-62. The employer/insurer did not correct its violation of O.C.G.A § 34-9-221(i) and board Rule 221(i) until the hearing, so the appellate division determined that the ALJ committed error by limiting claimant's award to only ten days. *Id.* at 536, 697 S.E.2d at 261–62. In addition, the appellate division determined that, because the claimant did not have knowledge of the reason behind the suspension, she was entitled to benefits from the suspension date, April 23, 2007, until the hearing date, July 23, 2008, and a 15% penalty. *Id.* at 536-37, 697 S.E.2d at 262.

9. *Id.* at 534-35, 697 S.E.2d at 260-61.

10. O.C.G.A. § 34-9-221(i) (2008).

11. *S & B Eng'rs & Constructors Ltd.*, 304 Ga. App. at 537, 697 S.E.2d at 262.

12. *Id.* at 538, 697 S.E.2d at 262–63 (quoting Reliance Elec. Co. v. Brightwell, 284 Ga. App. 235, 238, 643 S.E.2d 742, 745 (2007)); *see, e.g.*, Sadie G. Mays Mem. Nursing Home v. Freeman, 163 Ga. App. 557, 559-60, 292 S.E.2d 340, 342-43 (1982) (reversing both the superior court's and appellate division's rulings that the employer did not show a proper termination of benefits when it incorrectly stated its reasoning behind the termination on the WC-2); *Reliance Elec.*, 284 Ga. App. at 239-40, 643 S.E.2d at 745 (reversing an award of benefits before the date of the hearing when the WC-2 form had only been filed a few days late).

13. *S & B Eng'rs & Constructors Ltd.*, 304 Ga. App. at 538, 697 S.E.2d at 263.

14. *Id.* at 540, 697 S.E.2d at 264.

The court thus affirmed the award of temporary total disability benefits until the claimant found new employment on May 9, 2008, and reversed the portion of the decision awarding benefits from May 9, 2008, to the date of the hearing on July 23, 2008.[15]

In reviewing the claimant's cross appeal, the court of appeals held there was no error in the appellate division's factual findings and holdings regarding the compensability of her carpal tunnel syndrome, the decision not to award her additional attorney fees, and the determination that the employer/insurer did not have to produce certain documents and correspondence requested by the claimant.[16]

II. REDUCTION OF BENEFITS

In *Imerys Kaolin, Inc. v. Blackshear*,[17] the court of appeals addressed the procedural requirements for unilaterally reducing temporary total disability (TTD) benefits to temporary partial disability (TPD) benefits. Here, the claimant sustained a compensable injury to both of his hands in 2001 and began receiving TTD benefits. The authorized treating physician (ATP) released him to return to light-duty work on June 11, 2001, and in January 2002, the employer/insurer informed the claimant that his TTD benefits would be reduced to TPD benefits as of June 4, 2002. Instead of reducing the claimant's benefits in 2002, the employer/insurer obtained a new light-duty release from the ATP, dated December 31, 2002, and based on an August 2002 evaluation. Based on this new release, the employer/insurer notified the claimant in January 2003, that his benefits would be reduced on December 31, 2003. The employer/insurer actually reduced the claimant's benefits to TPD in January 2004, and in February 2008, it suspended TPD benefits because the 350-week cap had been reached.[18] The claimant requested a hearing, arguing the employer/insurer did not provide timely notice of the unilateral reduction under O.C.G.A. § 34-9-104(a)(2),[19] and, therefore, the reduction was improper.[20]

The ALJ found that the employer/insurer had a duty to notify the claimant of the reduction within sixty days of June 11, 2001, and due to the failure to notify, "the ALJ reinstated [the claimant's] TTD benefits . . . back to the date of the unilateral reduction in January 2004."[21]

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15. *Id.*
16. *Id.* at 540-41, 697 S.E.2d at 264–65.
17. 306 Ga. App. 491, 702 S.E.2d 440 (2010).
18. *Id.* at 491-92, 702 S.E.2d at 441-42.
19. O.C.G.A. § 34-9-104(a)(2) (2008).
20. *Imerys Kaolin, Inc.*, 306 Ga. App. at 492, 702 S.E.2d at 442.
21. *Id.*

The appellate division agreed with the ALJ on all but one point, stating generally that a new release based on a subsequent examination would bring about a new sixty-day period during which a WC-104 might be filed.[22] The Superior Court of Twiggs County, Georgia, reinstated all of the conclusions and findings reached by the ALJ and further held that the employer/insurer's failure to file a WC-104 within sixty days of the initial release precluded it from filing a subsequent WC-104 "unless and until there was a change in [the claimant's] status."[23]

The court of appeals first addressed the superior court's additional holding requiring a change in status before filing a subsequent WC-104, reversing it as an incorrect interpretation of the statute.[24] The court of appeals held that the employer/insurer's WC-104 "notice [was] invalid, not because it [was] similar to a previous notice, but because it was issued more than [sixty] days from the time the restrictions were 'determined'" by an examination.[25] The statute and board rules require that the notice be sent within sixty days of examination, as opposed to within sixty days of an affirmation of a prior determination.[26]

III. PREAUTHORIZATION OF MEDICAL CARE

The Georgia Court of Appeals addressed the impact and scope of the WC-205 board form this year and determined the board had exceeded its rule-making authority in a decision that has since been affirmed by the Georgia Supreme Court.[27] In *Selective HR Solutions v. Mulligan*,[28] the claimant initially injured her back at work in September 2005, received treatment, and returned to work in July 2006. In May 2007, she reinjured her back while at home and, after seeing several doctors, she returned to the ATP from the 2005 injury. The ATP determined that surgery was necessary and sent a WC-205 form to the employer/insurer, requesting preauthorization. More than one month later, the employer/insurer returned the form and refused to authorize the surgery without a second opinion, and, three days later, the ATP performed surgery.[29]

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22. *Id.* at 492-93, 702 S.E.2d at 442.
23. *Id.* at 493, 702 S.E.2d at 442.
24. *Id.* at 494, 702 S.E.2d at 443.
25. *Id.* (internal quotation marks omitted).
26. *Id.* The notice came approximately five months after the last medical evaluation and over four months after the functional capacity evaluation (FCE), and thus did not fall within the requisite time period. *Id.*
27. Selective HR Solutions v. Mulligan, 305 Ga. App. 147, 151, 699 S.E.2d 119, 123 (2010), *aff'd*, No. S1061899, 2011 WL 4532528 (Ga. Oct. 3, 2011).
28. 305 Ga. App. 147, 699 S.E.2d 119 (2010).
29. *Id.* at 148-49, 699 S.E.2d at 121.

The ALJ denied her claim for benefits, finding the claimant had not shown a change in condition from her original injury and that she had not proven the recent back surgery was compensable, and the board affirmed.[30] The Superior Court of Bibb County, Georgia affirmed with respect to the change in condition issue, but with respect to the issue regarding preauthorization of medical treatment pursuant to Rule 205,[31] the court reversed.[32] The superior court held that the employer/insurer's failure to respond to the WC-205 form within five days automatically triggered the obligation for the employer to pay for the medical care. Both parties appealed.[33]

The employer/insurer argued that Board Rule 205's language, providing that the failure to respond to a WC-205 request within five days results in preapproval of the required procedure, must be read in conjunction with O.C.G.A. § 34-9-200(a)[34] and Rule 205(b)(1),[35] which "provide that [the] employee is entitled to medical benefits only when [such benefits] relate[] to an 'on the job injury.'"[36] Because the board's rule-making authority is limited, the court examined whether a rule altering the burden of proof as to compensability in favor of the claimant is procedural or substantive, concluding that such a burden-shifting rule is substantive.[37] The court concluded that, to the extent Rule 205 precludes the employer/insurer from contesting the compensability of treatment, the Rule "is invalid as substantive rule-making which impermissibly shifts the claimant's burden" to prove an injury is work-related.[38] The court noted that "[t]he [b]oard may [still] assess civil penalties and attorney fees for [the employer/insurer's] failure to timely respond to a [WC-205] request . . . where compensability of treatment is not in issue."[39] The court of appeals affirmed the ruling, stating that the claimant did not prove a work-related change in condition.[40] The

30. *Id.* at 149, 699 S.E.2d at 121.
31. O.C.G.A. § 34 app. r. 205 (Supp. 2011).
32. *Selective HR Solutions*, 305 Ga. App. at 149, 699 S.E.2d at 121.
33. *Id.* at 147-49, 699 S.E.2d at 120-22.
34. O.C.G.A. § 34-9-200(a) (2008).
35. O.C.G.A. § 34 app. r. 205(b)(1) (2010).
36. *Selective HR Solutions*, 305 Ga. App. at 150, 699 S.E.2d at 122.
37. *Id.* at 150-51, 699 S.E.2d at 122 (noting that claimant in workers' compensation case has burden of proof to show his or her injury compensable).
38. *Id.* at 151, 699 S.E.2d at 123.
39. *Id.* at 151 n.1, 699 S.E.2d at 123 n.1.
40. *Id.* at 148, 699 S.E.2d at 121.

Georgia Supreme Court affirmed the court of appeals decision on October 3, 2011.[41]

IV. INTERVENING ACCIDENT

Causation is normally a question of fact rather than law, and when the board's findings are supported by any evidence, they may not be altered on appeal.[42] In *Lowndes County Board of Commissioners v. Connell*,[43] the claimant injured his right knee in 2005 while executing a warrant, was diagnosed as having bursitis, and immediately returned to work. He injured the same knee in 2006 while executing another warrant and continued to work and meet all work and training requirements of his physically demanding job. In May 2007, the claimant injured his right knee while riding a four-wheeler at his home, resulting in a torn anterior cruciate ligament (ACL) and cartilage damage that necessitated surgery. He filed a workers' compensation claim seeking payment of his medical expenses and temporary total disability benefits, arguing in the alternative that either the tear was actually caused by the earlier work-related injury, the 2007 accident was a new accident brought on by gradual worsening due to work duties, or the new injury constituted a superadded injury.[44]

The ALJ determined the torn ACL was causally connected to the 2006 work-related accident and awarded medical expenses for treatment of that condition, but denied the claim for medical expenses resulting from the torn cartilage and for disability benefits for time missed following the 2007 accident. Both parties appealed. On appeal, the appellate division agreed with the denial of medical expenses for the torn cartilage and disability benefits, but reversed the decision with respect to the torn ACL. The Superior Court of Lowndes County, Georgia, agreed with the ALJ's decisions and concluded the appellate division erred in its partial reversal.[45]

In first examining whether the torn ACL was connected with the 2006 accident, the court of appeals concluded that some evidence existed to support the appellate division's finding that the torn ACL resulted from

41. Selective HR Solutions v. Mulligan, No. S1061899, 2011 WL 4532528 (Ga. Oct. 3, 2011).

42. Lowndes Cnty. Bd. of Comm'rs v. Connell, 305 Ga. App. 844, 844-45, 701 S.E.2d 227, 228-29 (2010) (quoting DeKalb Cnty. Bd. of Educ. v. Singleton, 294 Ga. App. 96, 96, 668 S.E.2d 767, 767 (2008)).

43. 305 Ga. App. 844, 701 S.E.2d 227 (2010).

44. *Id.* at 845-46, 701 S.E.2d at 229.

45. *Id.* at 847-48, 701 S.E.2d at 230.

the 2007 four-wheeler incident and not the 2006 accident.[46] In light of the claimant's burden of proving causation and the conflicting evidence presented by the parties, the court determined the finding was justified.[47] Turning to examine whether the torn ACL was compensable as a new accident resulting from the deterioration of his knee over time due to work, the court again cited the conflicting evidence as support for the appellate division to conclude the torn ACL was a distinct injury caused solely by the 2007 incident rather than by gradual deterioration of his knee condition due to the job.[48] Finally, the court of appeals agreed that the torn cartilage was not a compensable superadded injury as the elements for a superadded injury had not been met because the underlying disability, a torn ACL, was not work related.[49] Because neither the torn ACL nor the torn cartilage were compensable injuries, the claimant was not entitled to indemnity benefits.[50]

V. JUDICIAL REVIEW: THE ANY EVIDENCE RULE

The court of appeals dealt with a number of cases involving judicial review and the standard of review on appeal during this survey period. In *Brannon v. Garcia*,[51] the court of appeals confirmed the limited authority of the superior court with respect to a workers' compensation award.[52] In *Brannon*, the claimant filed a claim against "Brennan Roofing Company," no employer appeared at the subsequent hearing, and the ALJ awarded "Brennan Roofing Company" to pay benefits.[53] The claimant filed a "Petition to Adopt, Modify, and Enforce Order" with the Superior Court of Floyd County, Georgia, to enforce the award and styled the petition as "Daniel Garcia, Employee v. Brennan Roofing Co. [sic] Brannon Roofing Co., Employer, and Gary Brannon, Company Owner."[54] After the superior court made the award an order of the court, the claimant filed a motion "to correct a scrivener's error" by changing the name of the employer in the board's award from "Brennan Roofing Company" to "Brannon Roofing Company," and a separate motion to add Gary Brannon as a party defendant.[55] The superior

46. *See id.* at 848, 701 S.E.2d at 231.
47. *Id.* at 848, 701 S.E.2d at 230-31.
48. *Id.* at 849, 701 S.E.2d at 231.
49. *Id.* at 849-50, 701 S.E.2d at 232 (quoting Baugh-Carroll v. Hosp. Auth. of Randolph Cnty., 248 Ga. App. 591, 594, 545 S.E.2d 690, 694 (2001)).
50. *Id.* at 850, 701 S.E.2d at 232.
51. 307 Ga. App. 69, 703 S.E.2d 669 (2010).
52. *Id.* at 70-71, 703 S.E.2d at 670.
53. *Id.* at 70, 703 S.E.2d at 670.
54. *Id.*
55. *Id.* (internal quotation marks omitted).

court granted both of claimant's motions, and Gary Brannon appealed.[56]

The court of appeals agreed that the superior court exceeded its authority by modifying the award to add a party and change the employer's name.[57] The court explained that the authority of the superior court is limited to enforcement of the final award, and the court could not add a party or alter the named employer in the award.[58] The claimant's proper venue for requesting these changes was with the state board.[59]

In *Hughston Orthopedic Hospital v. Wilson*,[60] the claimant, a hospital employee, allegedly became sick from fumes while working on a floor where the hospital was installing new wallpaper. When she was unable to breathe due to the fumes, she was taken to the emergency room, fainted, and was admitted to the hospital for monitoring and care. She alleged that when she awoke, she was unable to walk or talk due to brain injury. However, a series of hospital tests revealed normal brain functioning. After leaving the hospital, she did not return to work, but instead saw several doctors, all of whom determined she had normal brain functioning, except for a doctor to whom her attorney referred her and who did not conduct any tests. The claimant subsequently filed a workers' compensation claim against the employer/insurer.[61]

In describing the claimant's demeanor while testifying at the hearing, the ALJ noted that, at times, the claimant appeared to feign a stutter, talked like a baby, spoke in a high-pitched tone, and appeared to speak in tongues.[62] The ALJ concluded that, while it was possible the claimant suffered a "temporary adverse reaction to the wallpaper chemicals, she had failed to prove . . . that her persistent symptoms and problems . . . were caused by a work-related chemical exposure."[63] The appellate division affirmed, but the Superior Court of Muscogee County, Georgia, reversed on grounds that the appellate division had misinterpreted the evidence before the court and improperly substituted one nonexpert opinion, its own opinion, for that of the medical experts.[64]

On appeal, the employer/insurer argued error by the superior court due to the reversal of the appellate division in light of the any evidence

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56. *Id.* at 69-70, 703 S.E.2d at 669-70.
57. *Id.* at 70, 703 S.E.2d at 670.
58. *Id.* at 70-71, 703 S.E.2d at 670.
59. *Id.* at 71, 703 S.E.2d at 670.
60. 306 Ga. App. 893, 703 S.E.2d 17 (2010).
61. *Id.* at 894, 703 S.E.2d at 18-19.
62. *Id.* at 894-95, 703 S.E.2d at 19.
63. *Id.* at 895, 703 S.E.2d at 19.
64. *Id.*

standard of review that was to be applied.[65] The court of appeals agreed, noting that factual questions are properly left to the state board rather than the superior court.[66] The court stated that "there was some evidence to support the [appellate division's] determination that [the claimant's] condition was not caused by a work-related chemical exposure," and it is properly the province of the trier of fact, the board, to weigh the credibility of witnesses, including expert witnesses, and reach a conclusion where facts contradict each other.[67] The court of appeals reversed the superior court's decision because it determined that the court "improperly substituted itself as the fact-finder in lieu of the [s]tate [b]oard."[68]

In *Home Depot v. McCreary*,[69] the claimant sustained a closed head injury in 2001 when a co-worker dropped a sheet of plywood that struck her on her eyebrow. She returned to work the next day and did not file a workers' compensation claim; however, she began experiencing cognitive difficulties necessitating medical attention and eventually concluded that her problems resulted from her 2001 injury. In January 2002, she sustained a compensable neck injury at work, ultimately quit working in June 2003 for disputed reasons, and began receiving temporary total disability benefits for the 2002 injury in July 2003.[70] Eventually, the claimant filed for benefits for her head injury, "contending she suffered a 'fictional new injury' when her symptoms became so bad she had to stop working in June 2003."[71] She later filed a claim for the 2001 incident and joined this claim with the claim for the fictional new injury.[72]

The ALJ granted her medical benefits for the 2001 injury but did not address the fictional new injury issue or the claim for income benefits, which were from June 2003, until her receipt of benefits in July 2003 for the 2002 neck injury. The appellate division reversed the ALJ, finding that the statute of limitations had run on the first injury and that no evidence supported the claim that working aggravated her head

65. *Id.*

66. *Id.* at 895, 703 S.E.2d at 19-20 (quoting City of Atlanta v. Roach, 297 Ga. App. 408, 411, 667 S.E.2d 426, 429 (2009)).

67. *Id.* at 895-96, 703 S.E.2d at 20.

68. *Id.* at 897, 703 S.E.2d at 21.

69. 306 Ga. App. 805, 703 S.E.2d 392 (2010).

70. *Id.* at 809, 703 S.E.2d at 395-96.

71. *Id.* at 809, 703 S.E.2d at 396.

72. *Id.* At the hearing, claimant "conceded that the statute had run on her 2001 injury, and argued instead that her continued employment aggravated her 2001 work-related head injury until she became unable to work in June 2003." *Id.*

injury.[73] The Superior Court of Oconee County Georgia set aside the appellate division's latter conclusion and remanded for consideration of the conflicting evidence in the record and "for clarification as to whether the doctrine of aggravation of a preexisting condition was considered."[74]

The court of appeals first disposed of the employer/insurer's contention that neither the appellate division nor the superior court had subject matter jurisdiction to consider whether the claimant sustained a fictional new injury in 2003 because the claimant did not cross appeal the ALJ's award.[75] After discussing the legislature's 1994 rewriting of O.C.G.A. § 34-9-103(a)[76] to remove the appellate division's ability to hear additional evidence, the court framed the issue before the appellate division as whether the ALJ properly ruled on the injury date, 2001 versus 2003, which fell within the scope of the board's subject matter jurisdiction.[77] The court further explained that the employer/insurer failed to raise this jurisdictional argument, although it had ample opportunity to do so, despite the employer/insurer's argument to the contrary.[78]

The court then addressed the employer/insurer's argument that the superior court erroneously vacated the appellate division's award when some evidence supported the decision.[79] The court noted that "erroneous applications of law to undisputed facts . . . are subject to the de novo standard of review" by the superior court.[80] Here, the superior court did not weigh the evidence but simply found that the appellate division was mistaken in holding that no evidence showed an aggravation; thus, the award contained an undisputed statement of fact necessitating a remand to correct the finding.[81]

In *Bonus Stores, Inc. v. Hensley*,[82] the claimant sustained a compensable back injury in March 2002, received temporary total disability benefits until November 2003, and then received temporary partial disability benefits through November 2008.[83] The claimant subsequently requested his injury be deemed "catastrophic," and the ALJ concluded

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73. *Id.* at 810, 709 S.E.2d at 396.
74. *Id.* (internal quotation marks omitted).
75. *Id.* at 805-06, 703 S.E.2d at 393-94.
76. O.C.G.A. § 34-9-103(a) (1998).
77. *Home Depot*, 306 Ga. App. at 806-07, 703 S.E.2d at 394–95.
78. *Id.* at 808, 703 S.E.2d at 395.
79. *Id.*
80. *Id.* at 809, 703 S.E.2d at 395 (quoting Gill v. Prehistoric Ponds, 280 Ga. App. 629, 629, 634 S.E.2d 769, 770 (2006)) (internal quotation marks omitted).
81. *Id.* at 810, 703 S.E.2d at 396.
82. 309 Ga. App. 129, 710 S.E.2d 201 (2011).
83. *Id.* at 129, 710 S.E.2d at 202.

the injury was catastrophic.[84] The appellate division allotted greater weight to the opinion of the doctors put forth by the employer and vacated the award, denying the claimant's request. The Superior Court of Greene County, Georgia, held that the appellate division incorrectly used a de novo standard of review and should have upheld the ALJ's findings and award based on the evidence.[85]

On appeal, the court stated that, though the appellate division is limited to the evidence heard by the ALJ, it still "must weigh the evidence[,] . . . assess the credibility of [the] witnesses," and determine whether the ALJ's findings were supported by a preponderance of the evidence.[86] Therefore, if the ALJ's findings were not supported by a preponderance of the evidence, then the appellate division could substitute its own factual findings for those of the ALJ, and the superior court erred in ruling otherwise.[87]

The court then addressed the employer/insurer's argument that the appellate division's holding was supported by a preponderance of the evidence and that the superior court, therefore, erred in reversing.[88] The court of appeals affirmed that the superior court is more limited in its appellate review than the appellate division because, if the factual findings of the appellate division are supported by any evidence, they are conclusive and binding.[89] Therefore, because the appellate division's findings were supported by some evidence, the superior court should not have substituted its judgment for the lawful judgment provided by the appellate division.[90]

In *Georgia Mountain Excavation, Inc. v. Dobbins*,[91] the claimant alleged to have sustained injuries on the job on several different occasions. He injured his back in February 2007 while lifting his toolbox from his truck, missed one month of work, and received benefits. He injured himself again three months later and received medical treatment. Finally, he allegedly injured his back on November 25, 2008, though the parties disputed whether or when the claimant provided notice to the employer of his third injury. Eventually, the employer fired the claimant after finding no coworkers who could corroborate whether

84. *Id.* at 129-30, 710 S.E.2d at 202-03.
85. *Id.* at 131, 710 S.E.2d at 203.
86. *Id.* at 131-32, 710 S.E.2d at 204 (emphasis omitted) (quoting *Home Depot*, 306 Ga. App. at 806, 703 S.E.2d at 394).
87. *Id.* at 132, 710 S.E.2d at 204.
88. *Id.*
89. *Id.*
90. *Id.* at 133, 710 S.E.2d at 205.
91. 309 Ga. App. 155, 710 S.E.2d 205 (2011).

the accident occurred. The ALJ awarded the claimant temporary total disability benefits.[92]

The appellate division determined the evidence did not support the ALJ's determination that a compensable injury occurred. The Superior Court of Fannin County, Georgia, concluded that the evidence did not support the appellate division's decision and reinstated the ALJ's award of benefits.[93]

The court of appeals concluded the superior court had simply disagreed with the factual findings of the appellate division.[94] However, the superior court must defer to the appellate division's factual findings so long as they are supported by evidence.[95] Because the record contained some competent evidence that supported the findings of the appellate division, the superior court erred in reversing.[96] The Superior Court of Carroll County, Georgia did not have the authority to substitute its own findings for those of the appellate division.[97]

In *McEwen v. Bremen Bowdon Investment Co.*,[98] the claimant experienced back pain while working. While both parties acknowledged that the claimant told her supervisor her back was hurting, the parties disputed whether the employer was informed that the pain was allegedly a result of her work. The claimant subsequently missed work because of her pain, and the employer fired her for absenteeism. When the claimant requested disability benefits and medical treatment, the ALJ determined that the back injury was compensable, as the injury was a product of her employment, and awarded temporary total disability and medical benefits. The appellate division reversed, based in part on the claimant's admission that she never alleged a job-related injury, and the superior court affirmed.[99]

The court of appeals determined that, while the appellate division may substitute its own factual findings for those of the ALJ, here, the appellate division based its decision on an erroneous finding of fact, namely that the employee admitted she did not allege a job-related injury.[100] In fact, this supposed admission of the claimant was not in the record, and the appellate division did not base its award on a determination that one witness–testifying regarding the allegations of

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92. *Id.* at 155-57, 710 S.E.2d at 205-07.
93. *Id.* at 157, 710 S.E.2d at 207.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. 309 Ga. App. 170, 709 S.E.2d 908 (2011).
99. *Id.* at 170-71, 709 S.E.2d at 909.
100. *Id.* at 171, 709 S.E.2d at 909.

a job-related injury–was more credible than another.[101] Because this admission was never made in the record, and because it was unclear whether the appellate division had considered all of the evidence, the case was remanded to the board for additional consideration.[102]

VI. CHANGE IN CONDITION

In *Master Craft Flooring v. Dunham*,[103] the claimant sustained a compensable neck injury in November 2004, missed six weeks, and then returned to light-duty work. He sustained a second work-related neck injury in May 2007, resigned his employment, and began working for another employer. Following a hearing, the ALJ ruled that the 2007 injury was a compensable aggravation of the 2004 injury. The ALJ found the claimant was entitled to medical treatment for the duration of the aggravation and temporary total disability benefits for the brief period the claimant was held out of work by his doctor. The ALJ also found that the resignation was voluntary and unrelated to any neck injury. The appellate division affirmed.[104]

The claimant filed another hearing request in 2008, arguing that he sustained an economic change in condition when he was laid off by his subsequent employer in January 2008 and was unable to find employment elsewhere due to his aggravated injury. The claimant sought disability benefits as of June 2008. The ALJ found that the claimant sustained a change in condition for the worse when laid off from the second employer in January 2008, he still had limitations resulting from the 2007 aggravation, and he conducted a diligent job search but was denied employment due to his injury. Based on video surveillance showing the claimant working without limitation a year after the layoff, the ALJ determined the claimant's condition had changed for the better and awarded temporary total disability benefits from January 2008 through March 2009.[105]

The appellate division concluded that the ALJ's findings were not supported by a preponderance of the evidence and, instead, focused on the contradiction between the claimant's testimony and other evidence, including the video surveillance, the subsequent employer's testimony indicating no knowledge of any work restrictions, no change in restrictions from the 2004 injury, and ambiguous medical records. The

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101. *Id.*

102. *Id.* at 171, 709 S.E.2d at 909-10 (quoting Times-Georgian v. Thompson, 201 Ga. App. 854, 856, 412 S.E.2d 871, 874 (1991)).

103. 308 Ga. App. 430, 708 S.E.2d 36 (2011).

104. *Id.* at 430-31, 708 S.E.2d at 37-38.

105. *Id.* at 430-32, 708 S.E.2d at 38.

appellate division determined the 2007 neck injury had returned to the preaggravation baseline. The Superior Court of Glynn County, Georgia, reversed the appellate division on grounds that the ALJ's award was supported by a preponderance of the evidence.[106]

The court of appeals recited the law governing a request for an economic change in condition, stating that the claimant must prove "a loss of earning power as a result of a compensable work-related injury; continue[d] . . . physical limitations attributable to that injury; and . . . a diligent, but unsuccessful effort to secure suitable employment following termination."[107] The ALJ may then draw reasonable inferences that the inability to find suitable employment was proximately caused by the ongoing disability.[108] The court also noted the appellate division's purview in assessing credibility, weighing evidence, and drawing its own factual conclusions.[109] In contrast, the subsequent appellate courts must evaluate whether the appellate division's findings are supported by any evidence.[110] With the issues so framed, the court of appeals held that the superior court erred in reversing because there was evidence in the record to support the appellate division's award.[111]

In *Veolia Environmental Services v. Vick*,[112] the court of appeals addressed the burden of proof in a change in condition case where the claimant received temporary partial disability benefits before his for-cause termination but thereafter sought temporary total disability benefits. The claimant, an equipment operator, signed the employer's drug and alcohol policy when hired, which included a requirement that an employee report the use of prescription medications to a supervisor. The claimant sustained a compensable injury in April 2007 and received indemnity benefits until he returned to work two months later. In March 2008, the claimant's doctor prescribed him morphine and, soon after, a coworker informed the employer that claimant was working while under the influence. Pursuant to the drug policy signed by the claimant, the employer asked the claimant not to return until he had a clearance letter from his doctor and, when the claimant failed to do so, the employer fired him.[113]

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106. *Id.* at 432-33, 708 S.E.2d at 38-39.

107. *Id.* at 433, 708 S.E.2d at 39 (quoting Maloney v. Gordon Cnty. Farms, 265 Ga. 825, 828, 462 S.E.2d 606, 608-09 (1995)).

108. *Id.* (quoting *Maloney*, 265 Ga. at 828, 462 S.E.2d at 609).

109. *Id.* at 433-34, 708 S.E.2d at 39 (quoting Lowndes Cnty. Bd. of Comm'rs v. Connell, 305 Ga. App. 844, 844, 701 S.E.2d 227, 228 (2010)).

110. *Id.* at 434, 708 S.E.2d at 40.

111. *Id.* at 434, 708 S.E.2d at 40–41.

112. 309 Ga. App. 658, 711 S.E.2d 40 (2011).

113. *Id.* at 658-59, 711 S.E.2d at 41.

The ALJ denied the claimant's request for temporary total disability benefits since his last day of work, finding he did not make a diligent job search, but awarded temporary partial disability benefits for the period of time the claimant was on restricted duty work, June 2007 through March 2008, and continuing after his last day of work because the employer/insurer failed to prove a change in condition for the better. The appellate division vacated the award of temporary partial disability benefits subsequent to March 2008. The Superior Court of Lowndes County, Georgia, remanded the case to the appellate division so it could place the burden of proof on the employer/insurer to show the claimant was not entitled to temporary partial disability benefits after March 2008.[114]

The court of appeals held that the superior court erred in placing the burden of proof on the employer/insurer to show the claimant was not entitled to benefits post-termination.[115] The employer/insurer did not claim any change of condition since the day of termination, but rather the claimant requested temporary partial disability benefits while on restricted duty and temporary total disability benefits since he was fired.[116] Thus, the claimant properly bore the burden to show his entitlement to the temporary total disability benefits requested by him after termination.[117] The court noted that once an employee is terminated for cause, the employee carries the burden of proving he cannot secure suitable employment elsewhere as a result of his previous injury.[118] Here, the ALJ found he had not made a diligent search for employment.[119] Therefore, the shifting of the burden onto the employer/insurer was improper and reversible error.[120]

VII. RELIEF FROM JUDGMENT

In *City of Atlanta v. Holder*,[121] the Georgia Court of Appeals revisited a case with a long procedural history stemming from the mistaken issuance of two awards from one settlement. The claimant in *Holder*, an Atlanta police officer for over twenty-four years, sustained numerous injuries during his employment, including a head and neck injury on

114. *Id.* at 659, 711 S.E.2d at 41.
115. *Id.*
116. *Id.* at 659, 711 S.E.2d at 42.
117. *Id.* at 660, 711 S.E.2d at 42.
118. *Id.* (quoting Gilbert/Robinson, Inc. v. Meyers, 214 Ga. App. 510, 511, 488 S.E.2d 246, 247 (1994)).
119. *Id.*
120. *Id.*
121. 309 Ga. App. 811, 711 S.E.2d 332 (2011).

January 16, 1993.[122] The claimant entered into and signed a "Stipulation and Agreement" with the employer/insurer on November 14, 2006, which listed fifteen dates of accident including January 6, 1993, but not the January 16, 1993, accident date.[123] However, there was language in which the parties agree that there have been no other accidents except those stated in the agreement. The state board approved the stipulation on January 23, 2007, and the employer/insurer subsequently issued payment.[124] There was also a second "Stipulation and Agreement," which was primarily identical to the first, but it listed the January 16, 1993, injury in place of the fifteen other incidents.[125] The second agreement was approved by the board on January 25, 2007. The claimant argued that he should also have been paid for this second agreement.[126]

After the claimant filed a demand for judgment on the second stipulation, which was denied by the Superior Court of Fulton County, Georgia and, in turn, reversed by the court of appeals,[127] the superior court entered an order granting the demand for judgment such that the employer/insurer were liable to pay under the second award as well.[128] The employer/insurer moved to set aside the judgment, including an affidavit from the board's former director of the settlement division attesting that the board made an internal mistake in issuing the second award. The motion was never addressed by the ALJ, and the claimant moved to enforce the judgment, after which the superior court granted claimant's motion but denied the motion to set aside.[129]

On appeal, the court agreed that the superior court erred in denying the motion to set aside because the claimant did not enter any evidence to rebut the evidence presented by the employer/insurer in its argument that the second stipulation was purely the result of a mistake.[130] Thus, the only evidence presented showed the claimant was not entitled to a second payment for the same injuries.[131] The court determined that it was the superior court, not the employer/insurer, who was at fault for the lack of an appeal of the award on the second stipulation

122. *Id.* at 811, 711 S.E.2d at 334.
123. *Id.*
124. *Id.* at 811-12, 711 S.E.2d at 334.
125. *Id.* at 812, 711 S.E.2d at 334.
126. *Id.*
127. *Id.* at 813, 711 S.E.2d at 335; Holder v. City of Atlanta, 294 Ga. App. 568, 669 S.E.2d 504 (2008).
128. *Holder*, 309 Ga. App. at 813, 711 S.E.2d at 335.
129. *Id.* at 813-14, 711 S.E.2d at 335-36.
130. *Id.* at 814-15, 711 S.E.2d at 336.
131. *Id.* at 815, 711 S.E.2d at 336.

because the superior court failed to issue a timely order on the initial appeal.[132] Additionally, the court held that the employer/insurer was not barred by res judicata because the prior appeals focused on the narrow issue of the superior court's failure to enter an order within the time allowed by law, and the issue of fraud or mistake was not previously litigated on the merits.[133] Therefore, the previous orders were open to a motion to set aside and, because the unrebutted evidence showed the second stipulation was entered due to a mistake, the superior court should have set aside the judgment.[134]

VIII. SUBROGATION

In *Austell Healthcare, Inc. v. Scott*,[135] the claimant was injured in a motor vehicle accident while on the job. The claimant sued several parties allegedly responsible for the crash, in addition to receiving workers' compensation benefits. The employer/insurer filed a subrogation lien to recover benefits and medical expenses paid. The trial court granted the employer/insurer's motion to intervene in the lawsuit and denied their motion requesting they be allowed to participate in discovery.[136] Eventually, the claimant settled his lawsuit and filed a motion to quash the employer/insurer's lien on grounds that he had not been fully compensated, pursuant to O.C.G.A. § 34-9-11.1(b),[137] as required by Georgia law.[138] The trial court granted the claimant's motion to extinguish the subrogation lien because the employer/insurer could not prove the employee had been fully compensated upon the receipt of the lump sum settlement.[139] The court also ordered the employer/insurer to pay attorney fees.[140]

The court of appeals agreed that the employer/insurer failed to carry their burden of proof showing the claimant was fully compensated because they presented no evidence at all on this point.[141] The employer/insurer apparently did not participate in a hearing in the underlying litigation, so there was no record for the court to review.[142]

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132. *Id.* at 815, 711 S.E.2d at 336-37.
133. *Id.* at 816, 711 S.E.2d at 337.
134. *Id.*
135. 308 Ga. App. 393, 707 S.E.2d 599 (2011).
136. *Id.* at 393-94, 707 S.E.2d at 600-01.
137. O.C.G.A. § 34-9-11.1(b) (2008).
138. *Austell Healthcare, Inc.*, 308 Ga. App. at 394, 707 S.E.2d at 601; O.C.G.A. § 34-9-11.1(b).
139. *Austell Healthcare, Inc.*, 308 Ga. App. at 394, 707 S.E.2d at 601.
140. *Id.*
141. *Id.* at 394-95, 707 S.E.2d at 601.
142. *Id.* at 395, 707 S.E.2d at 601.

The employer/insurer did not proffer sufficient evidence that the claimant was fully compensated and did not show that the trial court refused to consider such evidence.[143]

The court found no merit in the argument that the trial court failed to hold a requisite evidentiary hearing and noted that the employer/insurer did not present evidence from the court's hearing on the motion to quash the lien.[144] The court of appeals determined that the trial court's refusal to allow the employer/insurer to participate in discovery was not reversible error because the employer/insurer did not point to any pertinent evidence that was not produced during discovery.[145]

The court agreed that granting attorney fees was an abuse of discretion.[146] Where an employer/insurer intervenes in a claimant's suit against a third-party tortfeasor, after the claimant has settled or obtained a favorable verdict, "it is the trial court's duty to consider evidence and determine whether the [claimant] has been fully and completely compensated."[147] The trial court abused its discretion by allowing a lien viability hearing "only after a liability award" and then sanctioning the employer/insurer for the refusal to withdraw the lien.[148]

143. *Id.* at 395, 707 S.E.2d at 602.
144. *Id.* at 396, 707 S.E.2d at 602.
145. *Id.*
146. *Id.* at 396, 707 S.E.2d at 602-03.
147. *Id.* at 396, 707 S.E.2d at 602.
148. *Id.* at 396, 707 S.E.2d at 603 (internal quotation marks omitted).