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Workers' Compensation

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The 2011-2012 survey period[1] featured decisions of the appellate courts in areas ranging from medical privacy to diligent job searches, with only minor legislation impacting the Workers' Compensation Act.[2]

I. LEGISLATION

The legislative changes[3] enacted by the Georgia General Assembly impacting the Workers' Compensation Act were relatively minimal. The Act provides for a twenty percent penalty for income benefits paid under the terms of an award or settlement that are not paid within twenty days of becoming due, and section 34-9-221(f) of the Official Code of Georgia Annotated (O.C.G.A.)[4] was modified to allow the board to excuse failure to make timely payment if the failure is "due to conditions beyond the control of the employer."[5]

In order to facilitate the use of offsets in settlement documents, O.C.G.A. § 34-9-15(c)[6] was modified to allow either the board or "any party to the settlement agreement [to] require that the settlement

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1. For an 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*, 63 MERCER L. REV. 405 (2011).

2. O.C.G.A. tit. 34 ch. 9 (2008 & Supp. 2012).

3. Ga. H.R. Bill 971, Reg. Sess. (2012) (codified at O.C.G.A. tit. 34, ch. 9 (Supp. 2012)); Ga. H.R. Bill 548, Reg. Sess. (2012) (codified at O.C.G.A. § 34-9-1 (Supp. 2012)).

4. O.C.G.A. § 34-9-221 (2008 & Supp. 2012).

5. Ga. H.R. Bill 971 § 2.

6. O.C.G.A. § 34-9-15 (2008 & Supp. 2012).

documents contain language which prorates the lump sum settlement over the life expectancy of the injured worker."[7]

Changes were made to the Workers' Compensation Act (specifically to O.C.G.A. § 34-9-226)[8] that relate to the appointment of a guardian or conservator for a minor or incompetent claimant, including the modification of O.C.G.A. § 34-9-226(a) to provide authority for appointment of "a conservator or the equivalent thereof duly appointed by a court of competent jurisdiction outside the State of Georgia."[9] In addition, O.C.G.A. § 34-9-226(b) was modified to delete the word "temporary" and to eliminate the fifty-two week limit on any such board appointment of conservators for "administering workers' compensation rights and benefits" or for a guardian ad litem "to bring or defend an action under this chapter in the name of and for the benefit of said minor or legally incompetent person," and also increases to $100,000 the level at which the board loses authority to appoint a conservator for a minor or legally incompetent person for the purpose of settling that individual's workers' compensation claim.[10] Furthermore, O.C.G.A. § 34-9-226(b)(2) was amended to clarify that there is no need to appoint a conservator "where the natural parent is the guardian of a minor and the settlement amount is less than $15,000.00," along with a new provision that "[a]fter settlement, the board shall retain the authority to resolve disputes regarding continuing representation of a board appointed conservator of a minor or legally incompetent person . . . ."[11]

A number of changes were made to O.C.G.A. § 34-9-264,[12] which governs occupational loss of hearing caused by harmful noise.[13] The code section was modified to allow consideration of hearing losses at a 3000 cycles per second level in addition to 500, 1000, and 2000 cycles per second levels, and to allow multiple other technical changes in the amount of decibels and frequencies used to measure the losses of hearing deemed to constitute a compensable hearing disability.[14] It further adjusts the formula for measuring hearing impairment to allow for "each decibel of loss exceeding 25 decibels an allowance of 1 1/2 percent shall be made up to the maximum of 100 percent which is reached at 92 decibels."[15]

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7. Ga. H.R. Bill 971 § 1.
8. O.C.G.A. § 34-9-226 (2008 & Supp. 2012).
9. Ga. H.R. Bill 971 § 3.
10. *Id.*
11. *Id.*
12. O.C.G.A. § 34-9-264 (2008 & Supp. 2012).
13. *Id.*
14. Ga. H.R. Bill 971 § 4.
15. *Id.*

The definition of "employee" contained in O.C.G.A. § 34-9-1(2)[16] was revised to exclude "[i]ndividuals who are parties to a franchise agreement as set out by the Federal Trade Commission franchise disclosure rule, 16 C.F.R. 436.1 through 436.11 . . . ."[17]

II. PRE-AUTHORIZATION OF MEDICAL CARE

The Georgia Court of Appeals and Georgia Supreme Court addressed the impact and scope of the WC-205 board form this survey period. In *Mulligan v. Selective HR Solutions, Inc.*,[18] the claimant initially injured her back at work in September 2005, received treatment, and returned to work in July 2006. In May 2007, she re-injured her back while at home. The authorized treating physician (ATP) determined that surgery was necessary and sent a WC-205 form to the employer/insurer (employer), requesting pre-authorization. More than one month later, the employer returned the form, refusing to authorize surgery absent a second opinion; three days later the ATP performed surgery.[19]

The administrative law judge (ALJ) denied the claim for benefits, holding that the employee 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.[20] The Superior Court of Bibb County, Georgia reversed with respect to the issue regarding pre-authorization of medical treatment pursuant to Rule 205,[21] holding that the employer'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.[22]

Because the board's rule-making authority is limited, the court of appeals focused on whether a rule altering the burden of proof as to compensability in favor of the claimant is procedural or substantive, and it concluded that such a burden-shifting rule is substantive.[23] The court concluded that, to the extent Rule 205 precludes the employer from contesting the compensability of treatment, the Rule is invalid as to substantive rule-making, which impermissibly shifts the claimant's burden to prove that an injury is work-related.[24]

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16. O.C.G.A. § 34-9-1 (2008 & Supp. 2012).
17. Ga. H.R. Bill 548 § 1.
18. 289 Ga. 753, 716 S.E.2d 150 (2011).
19. *Id.* at 754, 716 S.E.2d at 152.
20. *Id.* at 754-55, 716 S.E.2d at 152.
21. O.C.G.A. § 34 app. r. 205 (2008 & Supp. 2012).
22. *Mulligan*, 289 Ga. at 755, 716 S.E.2d at 152.
23. *Id.* at 755-56, 716 S.E.2d at 153.
24. *Id.* at 755, 716 S.E.2d at 152.

The Georgia Supreme Court disagreed with the court of appeals's opinion that the board had exceeded its rule-making authority.[25] The supreme court held that the court of appeals considered Rule 205(b)(3)(a) in isolation and overlooked Rule 205(b)(1)(a)'s requirement that the medical treatment be paid in accordance with the Workers' Compensation Act (the Act) where the treatment or test was related to the on-the-job injury.[26] In other words, a failure to timely respond to a WC-205 does not do away with the threshold requirement that the medical care be for a compensable injury.[27] The supreme court agreed with the holding that evidence supported a ruling that the claimant did not sustain a second compensable injury, and so affirmed the decision on other grounds.[28] The court also noted that failure to timely respond to a WC-205 may still subject the employer to penalties and fees.[29]

III. WC-207

In *McRae v. Arby's Restaurant Group*,[30] the Georgia Court of Appeals concluded that the Act does not compel a claimant to authorize her treating physician to talk to the employer's attorney ex parte in exchange for receiving benefits in a compensable claim.[31] The claimant sustained a compensable injury, and during the course of her claim executed a WC-207 form, pursuant to O.C.G.A. § 34-9-207(b).[32] Counsel for the employer attempted to schedule an ex parte consultation with the doctor. The doctor declined to meet with the attorney until he provided express permission from the claimant. Counsel filed a motion seeking an order from the ALJ authorizing the doctor to meet with the employer's attorney privately or else removing the claimant's hearing request. The ALJ granted the motion, and when the claimant refused to sign such a release, the ALJ removed the hearing from the calendar. The board and the Superior Court of Fulton County affirmed the decision.[33]

The majority opinion quoted extensively from the recent decision of *Baker v. Wellstar Health Systems*,[34] which involved allegations of

25. *Id.* at 755-56, 716 S.E.2d at 153.
26. *Id.* at 756-57, 716 S.E.2d at 153-54.
27. *Id.* at 757, 716 S.E.2d at 153.
28. *Id.* at 757, 716 S.E.2d at 154.
29. *Id.* at 757 n.3, 716 S.E.2d at 154 n.3. As noted by the Georgia Supreme Court, Rule 205 was amended effective July 1, 2011. *Id.* at 757, 716 S.E.2d at 153-54.
30. 313 Ga. App. 313, 721 S.E.2d 602 (2011), *cert. granted.*
31. *Id.* at 313, 721 S.E.2d at 603.
32. *Id.* at 313-14, 721 S.E.2d at 603; *see also* O.C.G.A. § 34-9-207(b) (2008 & Supp. 2012).
33. *McRae*, 313 Ga. at 314, 721 S.E.2d at 603.
34. 288 Ga. 336, 703 S.E.2d 601 (2010).

medical malpractice, stating that considerations of medical privacy exist in workers' compensation cases as well.[35] The court stated that the Act does not require a physician to converse ex parte with opposing counsel, nor does the Act require a claimant to authorize the treating physician to converse ex parte with opposing counsel in exchange for continued receipt of benefits.[36] The court thus held that the Act did not require the claimant to authorize the treating physician to communicate ex parte with counsel for the employer in order to maintain benefits, and reversed the superior court.[37] The Georgia Supreme Court granted certiorari on April 24, 2012.

IV. THE "EXCLUSIVE REMEDY" DOCTRINE

The Georgia Court of Appeals examined the "exclusive remedy" doctrine multiple times during the survey period. In *Estate of Pitts v. City of Atlanta*,[38] a construction worker was struck and killed by a vehicle driven by the employee of another subcontractor on the project. The estate brought suit and recovered a judgment against the subcontractor whose employee drove the vehicle that struck the deceased worker, but the judgment was not satisfied because of a lack of insurance. The estate then brought suit against the city and several construction companies on the project on the grounds that the companies breached contractual duties in their subcontracts, which required that each subcontractor carry a minimum of $10 million in automobile liability insurance. The trial court granted summary judgment to the defendants, and the estate appealed.[39]

Among the arguments raised by the defendants was the exclusive remedy provision, which they contended barred the estate from seeking damages.[40] The court of appeals noted that the exclusive remedy provision did not bar the estate from bringing suit against the subcontractor responsible for the accident because that subcontractor was neither an employee of the worker's employer nor a party to any contract under which it provided workers' compensation benefits to the worker.[41] Because the injury for which the estate sought damages in the present matter was not a physical injury but rather the loss of access to insurance coverage due to the alleged breach of contract, the court found

35. *McRae*, 313 Ga. at 315, 721 S.E.2d at 604.
36. *Id.* at 316, 721 S.E.2d at 604.
37. *Id.* at 317, 721 S.E.2d at 605.
38. 312 Ga. App. 599, 719 S.E.2d 7 (2011).
39. *Id.* at 599-600, 719 S.E.2d at 9-10.
40. *Id.* at 605, 719 S.E.2d at 13.
41. *Id.* at 606, 719 S.E.2d at 14.

that the exclusive remedy provision did not apply.[42] While O.C.G.A. § 34-9-11.1[43] presumably would have barred a claim for personal injury, it did not bar the claim for breach of contract.[44]

In *Vratsinas Construction Co. v. Chitwood*,[45] the court of appeals applied the exclusive remedy doctrine to a personal injury claim brought by an employee of a subcontractor against the subcontractor's general contractor, holding that the tort claim was barred.[46] The plaintiff was an employee of a subcontractor hired by the general contractor. While working on the project the plaintiff suffered an electric shock and subsequent injuries to his arms, chest, and head. Instead of filing a workers' compensation claim, the plaintiff filed a lawsuit against the general contractor alleging negligent failure to maintain a safe worksite. The general contractor moved for summary judgment, arguing that the plaintiff's exclusive remedy was worker's compensation benefits, and appealed the superior court's denial of its motion.[47]

The court of appeals cited O.C.G.A. § 34-9-8(a)[48] for the proposition that the general contractor becomes the "statutory employer" of the employees of any subcontractors hired by the general contractor.[49] The court then observed that under O.C.G.A. § 34-9-11(a), the rights granted to employees in the Workers' Compensation Act exclude all other rights of the employee, including those at common law.[50] Since it was undisputed that the general contractor was the statutory employer of the plaintiff, the general contractor was immune to tort claims brought by the employee.[51]

Contrarily, in *PHF II Buckhead, LLC v. Dinku*,[52] the court of appeals recognized that a company which contracts out certain services to another company is *not* the statutory employer of the other company's employees.[53] In *Dinku*, the claimant was an employee of the parking services company hired by the operator of a hotel (PHF). When Dinku was hurt on the job, he filed suit against PHF for failure to maintain a

42. *Id.* at 606-07, 719 S.E.2d at 14.
43. O.C.G.A. § 34-9-11.1 (2008).
44. *Estate of Pitts*, 312 Ga. App. at 607, 719 S.E.2d at 14.
45. 314 Ga. App. 357, 723 S.E.2d 740 (2012).
46. *Id.* at 358, 723 S.E.2d at 742.
47. *Id.* at 357-58, 723 S.E.2d at 741-42.
48. O.C.G.A. § 34-9-8 (2008).
49. *Vratsinas*, 314 Ga. App. at 358, 723 S.E.2d at 742.
50. *Id.* at 358-59, 723 S.E.2d at 742; *see also* O.C.G.A. § 34-9-11(a).
51. *Vratsinas*, 314 Ga. App. at 360, 723 S.E.2d at 743.
52. 315 Ga. App. 76, 726 S.E.2d 569 (2012).
53. *Id.* at 80, 726 S.E.2d at 572-73.

reasonably safe premises.[54] The court determined that unlike a relationship between a general contractor and subcontractor, where the general contractor owes a duty of performance to the property owner and employs the subcontractor to that end, a mere property owner does not owe a duty of performance to a third-party and thus cannot be a "principal contractor" under O.C.G.A. § 34-9-8.[55] Because PHF did not owe a duty of performance to a third-party with regard to the work done by Dinku (or Dinku's direct employer), PHF was not the statutory employer of Dinku, and the exclusive remedy doctrine did not bar the suit.[56]

V. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

In *Stokes v. Coweta County Board of Education*,[57] the Georgia Court of Appeals dealt with the issue of deviation from employment in determining whether an accident was compensable.[58] The claimant, a school custodian, was responsible for unlocking the parking lot gate. On the day of her injury, upon unlocking the gate, she turned to see her vehicle rolling away from her, and ran after her car in an attempt to stop the vehicle. In so doing, she severely injured her foot, which was subsequently amputated.[59] While the ALJ awarded benefits, the state board concluded the claimant had deviated from her employment on a personal mission to save her own personal property, and the superior court affirmed.[60]

The court of appeals held that the board misapplied the law in determining there was a deviation from the course of employment when the claimant chased after her car.[61] The court focused on the facts that the claimant was performing her employment duties when the car began to roll, and that but for her fulfilling the requirements of her job, the accident would not have happened.[62] Her actions therefore did not constitute a deviation from her employment.[63]

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54. *Id.* at 77, 726 S.E.2d at 570.
55. *Id.* at 79-80, 726 S.E.2d at 572-73.
56. *Id.*
57. 313 Ga. App. 505, 722 S.E.2d 118 (2012).
58. *Id.* at 508-09, 722 S.E.2d at 121-22.
59. *Id.* at 507, 722 S.E.2d at 120-21.
60. *Id.* at 505, 510, 722 S.E.2d at 119, 122.
61. *Id.* at 510-11, 722 S.E.2d at 122-23.
62. *Id.* at 510, 722 S.E.2d at 122-23.
63. *Id.*

VI. SUBSEQUENT NON-WORK INJURY

In the case of *Flores v. Dependable Tire Co.*,[64] the Georgia Court of Appeals held that a claimant's injuries sustained in a car accident, which occurred en route from a doctor's appointment for a work-related injury, were not themselves compensable.[65] The claimant sustained a compensable back injury, and while in transportation provided by the employer, was involved in another accident and sustained further injuries to his back.[66]

The employer ceased paying for medical treatment on the grounds that the intervening accident was the cause of the present disability. The ALJ found that the car accident was work-related and did not constitute a change in condition, and the board affirmed; however, the superior court reversed.[67] On appeal, the court held that the employer was not liable for medical expenses resulting solely from the car accident.[68] The court further ruled that the injuries sustained during the claimant's trip to the doctor on the date of the wreck was voluntary, and thus not compensable, because the claimant was not traveling to or from work and because the employer neither required the appointment nor had any control over the appointment.[69]

VII. CREDIT FOR BENEFITS PAID/RES JUDICATA

In *North Fulton Regional Hospital v. Pearce-Williams*,[70] the doctrine of res judicata did not bar the employer from seeking a credit on its obligation to pay temporary total disability (TTD) based on temporary partial disability (TPD) payments made.[71] The claimant sustained a compensable injury in 1999 and received TTD until February 2003, at which time the employer reduced the claimant to TPD benefits pursuant to O.C.G.A. § 34-9-104(a)(2).[72] In 2008, the claimant filed a hearing request, alleging her injury was catastrophic, and thereby seeking TTD retroactive to February 2003. The ALJ found the injury catastrophic and awarded TTD benefits retroactive to the February 2003 suspension and reduction. The employer then made a lump-sum payment to the

64. 315 Ga. App. 311, 726 S.E.2d 776 (2012).
65. *Id.* at 314, 726 S.E.2d at 779.
66. *Id.* at 311, 726 S.E.2d at 777.
67. *Id.* at 312, 726 S.E.2d at 777-78.
68. *Id.* at 313, 726 S.E.2d at 778; *see also* O.C.G.A. § 34-9-204(a) (2008).
69. *Flores*, 315 Ga. App. at 314, 726 S.E.2d at 779.
70. 312 Ga. App. 388, 718 S.E.2d 583 (2011).
71. *Id.* at 392, 718 S.E.2d at 586-87.
72. *Id.* at 389, 718 S.E.2d at 584-85; *see also* O.C.G.A. § 34-9-104(a)(2) (2008).

claimant for all TTD benefits since February 2003, after taking credit for the TPD benefits it paid from February 2003 through April 2006.[73]

The claimant then filed another hearing request on the grounds that the employer was not permitted to take credit for the prior TPD payments, as it had not requested such a credit at the 2008 hearing. The claimant thus argued the issue was res judicata, and the employer was barred from re-litigating it. The ALJ agreed with the employer that the claimant was seeking a windfall; the employer was properly applying an offset for what it had already paid. The board affirmed, but the superior court reversed on the grounds that the issue was res judicata.[74]

The Georgia Court of Appeals examined the issues at the 2008 hearing as framed by the WC-14, which concerned the claimant's request for catastrophic designation and payment of TTD benefits, and the ALJ's order, which did not discuss any issue of the claimant seeking TTD benefits in addition to TPD benefits.[75] The employer was thus not required to raise that issue at the 2008 hearing.[76] The claimant argued that the employer was required to request its credit pursuant to O.C.G.A. § 34-9-243[77] and Board Rule 243.[78] However, the court explained that the employer's TPD payments did not fall within the scope of payments contemplated by § 34-9-243.[79]

VIII. SETTLEMENTS AND LATE PAYMENT PENALTIES

In *Brewer v. WellStar Health System*,[80] the parties reached a compromise settlement, which was approved by the board on July 7, 2009. However, around this time the board was experiencing issues with some parties not receiving its automated e-mail notice of stipulation approval, and here neither the employer/self-insurer, its servicing agent, nor their counsel received such notice and thus did not issue a settlement payment within twenty days after the board's approval.[81] The claimant requested the twenty percent late payment penalty, which the

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73. *N. Fulton Reg'l Hosp.*, 312 Ga. App. at 389, 718 S.E.2d at 585.

74. *Id.* at 390, 718 S.E.2d at 585.

75. *Id.* at 390-91, 718 S.E.2d at 586.

76. *Id.* at 391, 718 S.E.2d at 586.

77. O.C.G.A. § 34-9-243 (2008).

78. *N. Fulton Reg'l Hosp.*, 312 Ga. App. at 392, 718 S.E.2d at 586; *see also* O.C.G.A. § 34 app. r. 243 (2008).

79. *N. Fulton. Reg'l Hosp.*, 312 Ga. App. at 392, 718 S.E.2d at 586-87. In a concurring opinion, two justices concurred in the result only, with the result being that the case may not be cited as binding precedent. *Id.* at 392-93, 718 S.E.2d at 587 (Barnes, J., concurring).

80. 314 Ga. App. 234, 723 S.E.2d 526 (2012), *cert. granted.*

81. *Id.* at 234-35, 723 S.E.2d at 527.

ALJ granted.[82] But the board reversed, relying on the discretion granted under O.C.G.A. § 34-9-15(b),[83] and also based on the party's non-receipt of approval notice.[84] The Superior Court of Cobb County, Georgia affirmed the board.[85] The Georgia Court of Appeals reversed, holding that the discretion afforded in O.C.G.A. § 34-9-15(b) only applies to non-liability settlements and does not give the board discretion for determining whether the late payment penalty should be assessed on a compromise stipulation.[86] The Georgia Supreme Court granted certiorari on May 29, 2012.

IX. JUDICIAL REVIEW/AVERAGE WEEKLY WAGE

In *J & D Trucking v. Martin*,[87] the Georgia Court of Appeals dealt with the issue of attorney fees in the employer's handling of a claim with an average weekly wage dispute.[88] The claimant, a sole proprietor of a trucking business, was injured, underwent surgery, and was afterward disabled for three years. The employer requested a hearing on the grounds that the claimant failed to prove he received any wages from the employer, so there was no basis to compute the average weekly wage or compensation rate. The claimant deposited gross income from the business into his checking account, from which he paid business and personal expenses, and did not issue checks to himself for wages.[89]

The ALJ rejected the employer's argument that the claimant did not meet his burden of proving wages under O.C.G.A. § 34-9-260[90] because the business did not make specific wage or salary payments to the claimant.[91] Instead, the ALJ used the average gross and net incomes of the sole proprietorship during the thirteen weeks preceding the injury and found that the claimant proved he was entitled to the statutory maximum in TTD benefits under O.C.G.A. § 34-9-261.[92] The ALJ found that the employer failed to either timely controvert or commence payment under O.C.G.A. § 34-9-221, without reasonable grounds, and

82. *Id.* at 235, 723 S.E.2d at 527.
83. O.C.G.A. § 34-9-15(b) (2008 & Supp. 2012).
84. *Brewer*, 314 Ga. App. at 235, 723 S.E.2d at 527.
85. *Id.* at 235, 723 S.E.2d at 528.
86. *Id.* at 236, 723 S.E.2d at 528.
87. 310 Ga. App. 247, 712 S.E.2d 863 (2011).
88. *Id.* at 247, 712 S.E.2d at 864.
89. *Id.* at 248-49, 712 S.E.2d at 864.
90. O.C.G.A. § 34-9-260 (2008).
91. *J & D Trucking*, 310 Ga. App. at 248-49, 712 S.E.2d at 864-65.
92. *Id.*; *see also* O.C.G.A. § 34-9-261 (2008).

thus assessed attorney fees under O.C.G.A. § 34-9-108(b)(2).[93] On appeal, the board found that the ALJ correctly ruled the claimant met his burden of proving his average weekly wage, but it also found that the evidence did not support the ALJ's findings to support the conclusion that the employer failed without reasonable grounds to comply with O.C.G.A. § 34-9-221. The superior court reversed the board and reinstated the ALJ's award.[94]

The court of appeals observed that the board rejected the ALJ's findings of fact, but did not make any substituted findings of fact.[95] The board may substitute its own findings for those of the ALJ, and in fact, such findings cannot be disturbed on appeal when supported by any evidence, because the superior court and court of appeals do not have the power to find facts.[96] Alternatively, the board could have ruled on whether the facts found by the ALJ showed that the employer did not violate O.C.G.A. § 34-9-221 without reasonable grounds.[97] Because neither step was fully taken, the court remanded to the board for reconsideration.[98]

X. NOTICE AND OPPORTUNITY TO BE HEARD

In *Harris v. Eastman Youth Development Center*,[99] the claimant requested catastrophic designation and payment of a weight-loss program. The ALJ ruled against the claimant, and it also found that any back degeneration or pain was no longer related to the compensable knee injury. On appeal, the board vacated and remanded, instructing that the only issue was catastrophic designation and the ALJ should not address the compensability of the back pain. The ALJ issued a new order denying catastrophic designation and again finding the back problems related to personal issues and not to the knee injury. The board and superior court affirmed.[100]

The Georgia Court of Appeals held that the ALJ erred in determining the cause of the back issue because the claimant did not have notice or opportunity to be heard on that issue.[101] The issue to be determined

93. *J & D Trucking*, 310 Ga. App. at 249, 712 S.E.2d at 865; *see also* O.C.G.A. § 34-9-108(b)(2) (2008 & Supp. 2012).
94. *J & D Trucking*, 310 Ga. App. at 249-50, 712 S.E.2d at 865.
95. *Id.* at 250, 712 S.E.2d at 865.
96. *Id.*
97. *Id.* at 250 n.1, 712 S.E.2d at 865 n.1.
98. *Id.* at 250, 712 S.E.2d at 865-66.
99. 315 Ga. App. 643, 727 S.E.2d 254 (2012).
100. *Id.* at 643-45, 727 S.E.2d at 254-56.
101. *Id.* at 645, 727 S.E.2d at 256.

in the hearing before the ALJ was whether the claimant's injuries could be considered catastrophic, and this issue was distinct from whether the injuries were compensable in the first place, and, therefore, it was error for the ALJ to address the compensability of the back pain.[102] The case was remanded to the ALJ with instructions to make a ruling on the catastrophic nature of the injury only.[103]

In *Ready Mix USA, Inc. v. Ross*,[104] the employer did not attend the hearing and argued that the ALJ's award should be reversed because it was not properly served with a hearing notice.[105] Notwithstanding information possibly relied on by the ALJ that was not tendered into evidence at the hearing, the court of appeals held that the employer was provided with adequate notice of the hearing.[106] The employer also argued that the ALJ improperly admitted the claimant's medical evidence because the claimant did not provide a copy of those records to the employer at least ten days before the hearing, as required by Board Rule 102(E)(3)(b).[107] However, the court determined that this Rule did not mandate the exclusion of the medical records but rather gave the ALJ discretion to admit the records.[108]

At the commencement of the hearing before the ALJ in *Howard v. Peachbelt Health & Rehabilitation Center*,[109] where the claimant sought benefits with respect to two accident dates, the parties entered into a number of stipulations, including that the claimant had a work accident on the second accident date and sustained injuries. The ALJ considered evidence on whether the claimant injured herself on this second date in addition to her injury from the first accident date. It concluded that the second accident did not result in additional injury, only a renewal of symptoms from the first accident date. On appeal, the claimant argued that the ALJ failed to consider the stipulation, that she had no notice that the ALJ would not accept the stipulation, and that she had no opportunity to introduce evidence showing injury from this second accident.[110] The court of appeals agreed, ruling that the stipulation was conclusive as to the employee suffering an independent injury on the second accident date, and thus it was error for the ALJ to

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102. *Id.* at 646-47, 727 S.E.2d at 256-57.
103. *Id.* at 647, 727 S.E.2d at 257.
104. 314 Ga. App. 775, 726 S.E.2d 90 (2012).
105. *Id.* at 777, 726 S.E.2d at 92.
106. *Id.* at 776-78, 726 S.E.2d at 92-93.
107. *Id.* at 778-79, 726 S.E.2d at 93; O.C.G.A. § 34 app. r. 102(E)(3)(b) (2008 & Supp. 2012).
108. *Ready Mix USA*, 314 Ga. App. at 778-79, 726 S.E.2d at 93-94.
109. 314 Ga. App. 319, 723 S.E.2d 718 (2012).
110. *Id.* at 319-20, 723 S.E.2d at 719-20.

consider evidence regarding the existence of a new injury and to make a factual conclusion contrary to the stipulation.[111]

XI. FICTIONAL NEW ACCIDENT VS. CHANGE IN CONDITION

In *Shaw Industries v. Scott*,[112] the Georgia Court of Appeals explored the typically murky distinction between fictional new accidents and a change of condition.[113] The claimant sustained a compensable injury to her right foot in 1996, resulting in partial amputation for which she received TTD benefits while out of work. She returned to work approximately one year later in the employer's customer service department. The partial amputation and resulting prosthesis altered her gait, causing knee problems, and she underwent bilateral knee surgery in May 1997. She continued to work for the employer over the next twelve years, over which time her knee problems became progressively worse. She was diagnosed as having chondromalacia and osteoarthritis caused by the amputation and altered gait. In March 2009, her physician recommended she cease working to alleviate the knee pain, and in September 2009, she ceased working altogether on her doctor's recommendation. The claimant then requested benefits, arguing that her inability to work was the result of a fictional new injury in March 2009 when her doctor first took her out of work. Following a hearing, the ALJ agreed. The board and the superior court affirmed.[114]

On appeal, the court agreed with the employer that the claimant had sustained a change in condition and not a fictional new injury, and thus the claim for benefits was barred by the statute of limitations.[115] The court determined that the facts of this case placed it in line with those situations where the claimant was injured and awarded compensation, returned to work performing her normal duties, and as a result of wear and tear of ordinary life and performance of ordinary work tasks, her condition gradually worsened to the point of being unable to perform her ordinary work.[116] The court evidently placed little importance on the fact that she returned to work in a presumably light-duty desk job, stating that "the progressive aggravation of [her] injuries, which was caused by the performance of her work duties and which ultimately

111. *Id.* at 321, 723 S.E.2d at 720.
112. 310 Ga. App. 750, 713 S.E.2d 917 (2011).
113. *Id.* at 750, 713 S.E.2d at 917-18.
114. *Id.* at 751-52, 713 S.E.2d at 918.
115. *Id.* at 753, 713 S.E.2d at 919.
116. *Id.* at 752-53, 713 S.E.2d at 919.

resulted in her inability to work, can only be characterized as a change in condition."[117]

XII. FICTIONAL NEW ACCIDENT VS. CHANGE IN CONDITION/ DILIGENT JOB SEARCH

In *R.R. Donnelley v. Ogletree*,[118] the Georgia Court of Appeals reached a different result from that in *Scott*, and the court also held that the board may not impose further requirements on the claimant's *Maloney* burden.[119] The claimant in *Ogletree* sought reinstatement of TTD benefits from his former employer, claiming he sustained a fictional new injury and was unable to obtain suitable employment. The claimant had originally injured his neck and upper extremities in October 2002, underwent carpal tunnel surgery and received benefits, and then returned to light-duty work in June 2003. He worked in a variety of light-duty jobs that exceeded his work restrictions, and his pain increased and condition worsened. The claimant was laid off in April 2008 due to the employer's reduced workload, and he began searching for work within his restrictions. He submitted a list of twenty-four jobs for which he submitted applications, although he did not meet with any of these potential employers.[120]

In October 2008, he underwent a lumbar fusion and filed a claim requesting TTD beginning April 2008, based upon a fictional new accident as of the date of his layoff. The ALJ found that the claimant had sustained a fictional new accident and met his *Maloney* burden of a diligent but unsuccessful job search. The board affirmed the findings as to the fictional new accident, but it reversed the finding that the claimant had performed a diligent job search. The superior court reversed this second portion of the board's finding and reinstated the ALJ's award.[121]

The court of appeals first rejected the employer's argument that the claimant sustained a change of condition as opposed to a fictional new accident.[122] The claimant did not return to normal or ordinary work, but instead he had new circumstances imposed upon him in the form of light-duty work that exceeded his limitations.[123] Some evidence

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117. *Id.* at 753, 713 S.E.2d at 919.

118. 312 Ga. App. 475, 718 S.E.2d 825 (2011).

119. *Id.* at 481, 718 S.E.2d at 831; *see also* Maloney v. Gordon Cnty. Farms, 265 Ga. 825, 828, 462 S.E.2d 606, 608-09 (1995).

120. *Ogletree*, 312 Ga. App. at 475-77, 718 S.E.2d at 827-28.

121. *Id.* at 477, 718 S.E.2d at 828.

122. *Id.* at 479, 718 S.E.2d at 829.

123. *Id.* at 479, 718 S.E.2d at 830.

existed for the board to find that the date the disability manifested itself was the date the claimant ceased working.[124]

The court then turned to whether the claimant conducted a diligent job search.[125] The employer contended that the claimant did not satisfy his *Maloney* burden because he failed to show a diligent search, as concluded by the board.[126] The court held that the board relied upon an erroneous legal theory in making its findings, as it imposed the additional burden of securing interviews and in-person site visits with would-be employers.[127] On such grounds, the court held that the board's decision was properly reversed.[128] Finally, the court disposed of the employer's argument that the claimant did not provide notice of a lower back injury, based on the claimant's broadly-worded WC-14, hearing testimony, and the post-hearing briefs.[129]

XIII. DILIGENT JOB SEARCH

The Georgia Court of Appeals in *Brown Mechanical Contractors, Inc. v. Maughon*[130] reached the opposite result regarding the claimant's job search, concluding that contacting more than one hundred employers did not necessarily constitute a diligent search.[131] The claimant sustained a shoulder injury and continued working within his restrictions as a track hoe operator until he was laid off for reasons unrelated to his disability. The claimant then contacted in excess of one hundred would-be employers over the six-month period leading up to his hearing date. The ALJ found that the claimant conducted a diligent job search and awarded TTD benefits; however, the board vacated and denied.[132]

The board, in finding that the claimant's job search was not diligent, relied upon factors including the following: 110 searches over 144 "work days" is not sufficient; searching an average of less than once per day is not diligent; the claimant failed to follow up with twenty-two employers; he went periods of twenty-seven and eighteen consecutive days without searching; he lost two offered positions because of a purported need for surgery which had not been scheduled; and despite employment history in managerial or sales positions, the claimant sought physical labor jobs

124. *Id.* at 480, 718 S.E.2d at 830.
125. *Id.*
126. *Id.*; *see also Maloney*, 265 Ga. at 828, 462 S.E.2d at 608-09.
127. *Ogletree*, 312 Ga. App. at 481, 718 S.E.2d at 831.
128. *Id.*
129. *Id.* at 481-82, 718 S.E.2d at 831-32.
130. 317 Ga. App. 106, 728 S.E.2d 757 (2012).
131. *Id.* at 107, 728 S.E.2d at 758-59.
132. *Id.* at 107, 728 S.E.2d at 758.

and avoided retail jobs.[133] The superior court reversed and reinstated the ALJ's decision.[134]

The court of appeals summarized the standard of review for a diligent job search as calling for the claimant to prove diligent but unsuccessful efforts to obtain suitable employment, and leaving to the factfinder's discretion whether the claimant's disability is the proximate cause of the unemployment.[135] The court held that evidence existed to support the board's conclusion that the claimant's search was not diligent, namely the factors relied on by the board.[136] The court then distinguished *R.R. Donnelley v. Ogletree*,[137] where the board applied an erroneous legal theory in relying on factors outside the claimant's control such as sitting for interviews.[138]

XIV. CONTROVERTING CLAIMS

In *Crossmark v. Strickland*,[139] the Georgia Court of Appeals revisited a claim previously before the court in 2009, at which time it held that the superior court lacked jurisdiction to hear what was in effect an interlocutory appeal from a board decision remanding for additional proceedings on the validity of a notice to controvert.[140] The employer had voluntarily begun paying the claimant TTD benefits following an accident, but later controverted the claim and terminated the benefits. The ALJ denied the claim, finding that the claimant failed to show she had sustained a compensable injury. The employee appealed to the board, contending for the first time that the employer's notice to controvert was invalid because it failed to pay her all compensation due at the time of its notice to controvert in violation of O.C.G.A. § 34-9-221(h) and Board Rule 221.[141] The board vacated and remanded for additional proceedings as to the validity of the notice to controvert.[142]

Following a second hearing, the ALJ found that the employer's notice to controvert was invalid, awarding benefits and attorney fees. The board and the superior court affirmed.[143] The court rejected the argument that the board was not authorized to consider an argument by

133. *Id.* at 107, 728 S.E.2d at 758-59.
134. *Id.* at 107, 728 S.E.2d at 759.
135. *Id.* at 108-09, 728 S.E.2d at 759.
136. *Id.* at 110, 728 S.E.2d at 760.
137. 312 Ga. App. 475, 718 S.E.2d 825 (2011).
138. *Id.* at 481, 718 S.E.2d at 831; *Maughon*, 317 Ga. App. at 110, 728 S.E.2d at 760.
139. 310 Ga. App. 303, 713 S.E.2d 430 (2011).
140. *Id.* at 303-04, 713 S.E.2d at 432.
141. *Id.*; *see also* O.C.G.A. § 34-9-221(h).
142. *Crossmark, Inc.*, 310 Ga. App. at 304, 713 S.E.2d at 432.
143. *Id.* at 304-05, 713 S.E.2d at 432-33.

the claimant that was raised for the first time on appeal, and found support in the board's jurisdiction and authority to remand for additional proceedings.[144]

Turning to the substantive argument regarding the controvert, the court held that the controvert was invalid because the employer had underpaid TTD benefits by roughly $100/week and did not pay for the first seven days of benefits once the claimant remained out of work for twenty-one consecutive days.[145] Therefore, it could not contest the initial compensability of the claim without newly-discovered evidence or a change in condition.[146] Upon learning of a claim, an employer may either controvert a claim within twenty-one days (not paying benefits), or if it begins paying benefits, may controvert within sixty days of the date on which the first payment of benefits was due. However, if it takes this second approach, it must pay all compensation due to the claimant as of the filing of the controvert.[147] Finally, the court held that while the superior court employed the wrong standard of review, the decision was affirmed as being right for any reason.[148]

144. *Id.* at 305-06, 713 S.E.2d at 433-34.
145. *Id.* at 308-09, 713 S.E.2d at 435-36.
146. *Id.* at 308, 713 S.E.2d at 435.
147. *Id.* at 307-09, 713 S.E.2d at 435.
148. *Id.* at 309, 713 S.E.2d at 436.

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