Workers' Compensation

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The 1997-98 survey period was marked by a relatively calm legislative session with respect to workers' compensation, in sharp contrast to the significant legislation that has reshaped the Georgia's Workers' Compensation Act this decade. As usual, however, the appellate courts were active in the workers' compensation arena, issuing decisions over a broad range of issues. In particular, significant rulings affected change in condition cases, the intoxication defense, and the ongoing issue of psychological injury.

I. LEGISLATION

As it has virtually every year this decade, the 1998 General Assembly made a number of amendments to the Georgia Workers' Compensation

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Act ("the Act").\footnote{O.C.G.A. § 34-9-1 (1998).} For the first time in many years, however, the maximum rate for disability benefits was not increased and was left at the levels established in 1997.\footnote{See id. §§ 34-9-261, -262.} Although none of the 1998 amendments can be considered as significant as some of the dramatic changes made in recent years, a number of amendments specifically impact the litigation of workers' compensation cases and are therefore required reading for practitioners in this area.

A. Admissibility of Evidence

An amendment to O.C.G.A. section 34-9-102 now allows laboratory test reports, performed pursuant to O.C.G.A. section 34-9-415, into evidence with an accompanying affidavit from the laboratory confirming authenticity.\footnote{Id. §§ 34-9-102, -415.} In addition, the amendment excludes the applicability of O.C.G.A. section 24-3-18 from workers' compensation claims.\footnote{Id. § 24-3-18.} The amendment will simplify the trial of intoxication cases under O.C.G.A. section 34-5-17 by obviating the need for authenticating laboratory results through witness testimony.\footnote{Id. § 34-5-17.}

B. Calculation of Average Weekly Wage

O.C.G.A. section 34-9-260 was amended to change the calculation of the average weekly wage of the Georgia National Guard serving on state active duty to the greater of: (1) seven-thirtieths of the monthly pay and allowances of the individual at the time of the injury, adjusted for appropriated increases in such monthly pay and allowances; or (2) the average weekly wage of the individual in his or her other employment at the time of the injury, or if such individual worked at the time of the injury for more than one employer, the combined average weekly wage of the individual in such multiple employment.\footnote{Id. § 34-9-260.}

C. Calculation of Temporary Partial Disability Benefits

O.C.G.A. section 34-9-104 was amended regarding the calculation of temporary partial disability benefits when an employee had experienced a change in condition and had been released to light duty by the authorized treating physician.\footnote{Id. § 34-9-104.} The amount of temporary partial disability benefits shall be the maximum allowed under O.C.G.A. section
34-9-262 unless the employee was receiving less than such maximum amount, in which event the employee would continue to receive benefits as provided by section 34-9-261. This amendment resolves an uncertainty created by the so-called "statutory change in condition" when O.C.G.A. section 34-9-104(a)(3) was created in 1992 and legislatively overrules case law to the contrary.

D. Penalty for Wrongly Retaining Benefits

An amendment to O.C.G.A. section 34-9-21 deletes the current penalty provisions and adds penalties for any employee who is convicted of the misdemeanor offense of knowingly and wilfully receiving and retaining benefits to which he or she is not entitled. The offense is punishable by a fine not to exceed $10,000 and no less than $1,000, or one year of imprisonment, or both.

E. Change of Physician

O.C.G.A. section 34-9-201 was amended to delete the sixty day requirement imposed on an employee to unilaterally change physicians when a conformed panel is used. The amendment allows an employee to make a one-time unilateral change of physician at any time during the pendency of the claim.

F. Suspension of Benefits

An amendment to O.C.G.A. section 34-9-204 deletes language authorizing the suspension of income benefits for an employee's unreasonable refusal to undergo surgical procedures. The amendment also adds a provision authorizing the suspension of benefits if an employee has a subsequent nonwork-related injury which breaks the chain of causation between the compensable injury and the employee's disability. This amendment responds to the supreme court's decision in Hallisey v. Fort Howard Paper Co.

8. Id. § 34-9-261 to -262.
11. Id.
12. Id. § 34-9-201.
13. Id.
14. Id. § 34-9-204.
15. Id.
G. Reimbursement

An amendment to O.C.G.A. section 34-9-265 authorizes an insurer or self-insurer to obtain reimbursement when death benefits have been paid to the State Board of Workers' Compensation in error.\(^\text{17}\)

H. Self-Insured Guaranty Trust Fund

Amendments by the General Assembly made housekeeping changes to the provisions relating to the Self-Insurers Guaranty Trust Fund ("the Fund").\(^\text{18}\) The legislation authorizes the Fund to levy penalties and fines against self-insured employers.\(^\text{19}\) In addition, it requires the Board of Trustees of the Fund to use the security deposit of a participant to pay the workers' compensation obligation assumed by the Fund.\(^\text{20}\)

An amendment to O.C.G.A. section 34-9-385 authorizes the Board of Trustees to direct the Fund to honor and pay any contractual arrangement between an attorney and an employee, provided that application is made and all parties are given notice and time to make any objections.\(^\text{21}\)

I. Audits of Group Self-Insurance Funds

O.C.G.A. section 34-9-172 was amended to authorize the Commissioner of Insurance to contract with private examiners to conduct the mandatory audits of group self-insurance funds to verify the solvency of the funds.\(^\text{22}\) The self-insurance funds are still required to pay the cost of the examination.\(^\text{23}\) This allows the Commissioner of Insurance to hire experienced auditors and, as a result, reduce the overall cost of mandatory fund audits.

J. Drug-Free Workplace

O.C.G.A. section 34-9-411 was amended by adding sections 34-9-411(7.1) and 34-9-411(14.1) to include self-insured employers and group self-insured employers in the definitions applicable to drug-free workplace programs.\(^\text{24}\) O.C.G.A. section 34-9-412.1 was added to authorize the State Board to certify self-insured employers or employer

\(^{18}\) Id. § 34-9-380 to -389.
\(^{19}\) Id. § 34-9-384.
\(^{20}\) Id. § 34-9-387.
\(^{21}\) Id. § 34-9-388.
\(^{22}\) Id. § 34-9-172.
\(^{23}\) Id.
\(^{24}\) Id. § 34-9-411.
members of a group self-insurance fund as “drug-free” workplaces if all the requirements of section 34-9-413 are met. The purpose of these changes is to allow all employers within the state who have been certified as drug-free by the State Board to obtain a 0.2% reduction in the employers’ contributions to unemployment tax.

II. PADGETT V. WAFFLE HOUSE: A RETALIATORY DISCHARGE REMEDY IN GEORGIA?

Perhaps the most significant decision in the survey period was the supreme court’s holding in Padgett v. Waffle House, Inc. that a claimant may prove a change in condition by demonstrating a compensable injury was the proximate cause of the claimant’s termination from employment. In reversing the court of appeals, the supreme court interjected an entirely new line of inquiry into the workers’ compensation system: whether an employer’s motivation in terminating the employment of a worker who has previously suffered an on-the-job injury is retaliation for a workers’ compensation claim. Although limited to cases in which the claimant has the burden of proof to demonstrate a change in condition, this holding promises to open a Pandora’s box of litigation in the workers’ compensation system.

Scarlett O’Hara Padgett suffered a work-related injury while working for Waffle House in February 1993 and received disability benefits until she returned to light-duty work for Waffle House in November 1993. Padgett continued to perform light-duty work for nearly a year, receiving temporary partial disability benefits pursuant to O.C.G.A. section 34-9-262. Waffle House terminated Padgett’s employment in September 1994 based upon three separate violations of company policy: (1) fraudulently inflating commissions, (2) using profanity, and (3) sitting in customer seating. The Administrative Law Judge (“ALJ”) found that claimant met her burden of proof as to a change in condition by her demonstration that one of these three violations, namely sitting in customer seating, was related to her compensable injury. The ALJ,

25. Id. § 34-9-412.1.
26. Id.
28. Id. at 106, 498 S.E.2d at 501.
30. 269 Ga. at 106, 498 S.E.2d at 501.
31. Id. at 107, 498 S.E.2d at 501.
32. Id.
33. Id.
therefore, concluded that claimant met her burden of proof demonstrat-
ing a change in condition.\textsuperscript{34}

The court of appeals reversed, holding that the supreme court's ruling in \textit{Maloney v. Gordon County Farms}\textsuperscript{35} required claimant to demonstrate a diligent but unsuccessful search for suitable employment in order to meet her burden of proof.\textsuperscript{36} The court of appeals specifically held that the cause of claimant's termination was not a proper subject of inquiry into whether claimant had suffered a change in condition.\textsuperscript{37}

The supreme court reversed, however, holding that the requirement of a "diligent but unsuccessful job search" does not apply if the claimant establishes that the compensable injury was the proximate cause of the subsequent termination:

The concern addressed in \textit{Maloney} is that benefits should be awarded only where the economic change for the worse is proximately caused by the work-related injury. Proof of a diligent job search allows the Board to infer this critical causal connection where the termination is for reasons wholly unrelated to the injury. However, by proving that the work-related injury is the proximate cause of the termination, the claimant establishes the causal link between injury and worsened economic condition. The causal link is the important element rather than the method of proving it.\textsuperscript{38}

Having reached this conclusion, the supreme court remanded the case for a determination of whether claimant's compensable injury was the "proximate cause" of her subsequent termination.\textsuperscript{39}

For the first time, therefore, the supreme court has interjected the myriad questions that surround an employee's termination into the workers' compensation system. Unfortunately, the court gave little guidance regarding how a "causal connection" between a previous compensable injury and subsequent employment termination should be determined, noting simply that proximate cause is "more than incidental cause."\textsuperscript{40} The fact that two of the three stated reasons for claimant's termination did not relate to her compensable injury failed to persuade the court that a factual issue remained as to the proximate cause of claimant's termination because the court remanded the case for further

\textsuperscript{34} Id.
\textsuperscript{35} 265 Ga. 825, 462 S.E.2d 606 (1995).
\textsuperscript{36} Id. at 828, 462 S.E.2d at 608.
\textsuperscript{37} \textit{Waffle House}, 225 Ga. App. at 145, 483 S.E.2d at 132.
\textsuperscript{38} 269 Ga. at 106, 498 S.E.2d at 501 (citation omitted).
\textsuperscript{39} Id. at 107, 498 S.E.2d at 502.
\textsuperscript{40} Id., 498 S.E.2d at 501-02.
deliberation on this issue.\textsuperscript{41} The question remains, therefore, whether proximate cause can be established if there is some evidence that claimant's prior injury played any role in the decision to terminate claimant's employment.

Many other jurisdictions have recognized, either by statute or by judicial decision, a cause of action for "retaliatory discharge," which occurs when a worker's employment is terminated in retaliation for the pursuit of a workers' compensation claim.\textsuperscript{42} In prohibiting discrimination against the disabled, the Americans with Disabilities Act\textsuperscript{43} essentially implements a federal retaliatory discharge statute. The decision in Padgett, however, introduces for the first time into Georgia's workers' compensation system the concept that an employer's termination of an employee can have a direct effect on that employee's receipt of workers' compensation benefits. Previously, the reasons behind a claimant's termination were irrelevant to a claim for additional disability benefits except to show that the employer would no longer make work available.\textsuperscript{44} Indeed, the court of appeals relied upon its prior decision in Gilbert/Robinson, Inc. v. Meyers\textsuperscript{45} for the proposition that Padgett's termination was irrelevant to a consideration of whether she had undergone a "change in condition"\textsuperscript{46} entitling her to additional disability benefits.\textsuperscript{47} The supreme court, however, specifically distinguished Meyers because the claimant in that case was terminated by a subsequent employer.\textsuperscript{48} The court did not mention numerous other decisions\textsuperscript{49} in which claimants were terminated by the same employers that provided workers' compensation benefits. Presumably these cases are distinguishable under the court's new ruling because none of them indicate that termination was for a cause related to the compensable injury.

\textsuperscript{41} Id., 498 S.E.2d at 502.
\textsuperscript{42} See 6 ARTHUR LARSON, THE LAW OF WORKERS' COMPENSATION § 68.36 (1998).
\textsuperscript{44} See Aden's Minit Market v. Landon, 202 Ga. App. 219, 413 S.E.2d 738 (1991) (claimant terminated from job with subsequent employer when it learned she was also drawing disability benefits from previous employer); Evco Plastics v. Burton, 200 Ga. App. 121, 407 S.E.2d 60 (1991) (claimant terminated for failing to report to work, allegedly because knee pain precluded her from performing job); Brown v. Gulf Ins. Co., 141 Ga. App. 819, 234 S.E.2d 552 (1977) (claimant terminated by Georgia Power because he reconnected the electricity to his home after it had been disconnected for nonpayment of his bill).
\textsuperscript{46} O.C.G.A. § 34-9-104(a) (1998).
\textsuperscript{47} Waffle House, 225 Ga. App. at 145, 483 S.E.2d at 132.
\textsuperscript{48} 269 Ga. at 107, 498 S.E.2d at 501.
\textsuperscript{49} See cases cited supra note 44.
Clearly an employer should not be able to benefit from terminating an employee in retaliation for a compensable injury on the job. Without specific guidelines, however, determinations as to an employer’s motive for terminating a previously injured worker can be left to sheer speculation and conjecture rather than clear, evidentiary findings. For this and other reasons, the supreme court has previously rejected a public policy exception to the long established at-will employment doctrine based upon an alleged retaliatory discharge for asserting a workers' compensation claim. The mere fact that a termination occurs after a worker has, at some time in the past, sustained an on-the-job accident should not give rise to an inference that the termination was proximately caused by the previous compensable injury.

The decision in Padgett leaves unanswered numerous questions as to what level of inquiry is proper to determine the proximate cause of claimant's termination for the purposes of a change in condition hearing. For example, should Ms. Padgett, upon the remand of her case, be allowed to inquire about her employer's termination of other employees who were injured at work to determine statistical evidence regarding the termination of injured workers? If so, should this inquiry be limited to her place of employment, or can it extend to other locations managed by her employer? How far back in time should such an inquiry be considered relevant? Is it sufficient to show that any part of her termination was related to her compensable injury, or does “more than incidental cause” mean that the compensable injury must have played a primary role in the decision to terminate? Undoubtedly, each of these questions will be the subject of much litigation before the State Board of Workers' Compensation and will, at some point, need to be addressed by Georgia's appellate courts.

III. INTOXICATION AND DRUG TESTING II

In last year’s article, we reported on the court of appeals holding in Thomas v. Diamond Rug & Carpet Mills, and its substantial effect on the intoxication defense found in O.C.G.A. section 34-9-17(b). In the most recent survey period, the Georgia Supreme Court granted certiorari

50. As noted above, the Americans with Disabilities Act already provides a federal remedy against an employer who terminates a worker with a disability as defined by the ADA. See supra note 43.
in this case and reversed the court of appeals. In so doing, the supreme court ended the debate regarding how much notice an employee must be given regarding the potential consequences of refusing a post-accident drug screen test and clarified potential constitutional issues raised in the court of appeals decision.

Claimant in *Thomas* drove a forklift into a wall, causing injuries to his left foot and ankle. Less than an hour before the accident, a supervisory employee observed Thomas smoking what appeared to be a marijuana pipe. A registered nurse at the hospital where treatment was provided asked claimant to provide a urine specimen for the workers' compensation drug screen test. Claimant refused this request and three similar requests made during the week he was hospitalized, despite his admitted awareness that the employer required workers to submit to drug testing after a work-related injury and that he could be terminated for refusing. Thomas claimed, however, that he had not been told his refusal could result in the denial of workers’ compensation benefits.

The court of appeals held that Thomas was entitled to workers’ compensation benefits because he was given no notice that his refusal of a post-accident drug screen could result in the denial of his workers’ compensation claim. Specifically, the court of appeals held that such notice was required by the Drug-free Workplace Act and “fundamental standards of due process.”

The supreme court rejected both of the court of appeals bases for its ruling. First, the supreme court noted that, in establishing a rebuttable presumption of intoxication, O.C.G.A. section 34-9-17(b)(3) refers only to the manner of performance of the scientific test in referring to the Drug-free Workplace Act. The court held that the mere reference to the testing procedure contained in the Drug-free Workplace Act did not also incorporate other provisions within that statute, including the notice provisions of O.C.G.A. section 34-9-414. The court also noted that, as a self-insured employer, Diamond Rug & Carpet could not have taken advantage of the Drug-free Workplace Act provisions because this statute merely provides a reduced premium to

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55. *Id.* at 403-04, 486 S.E.2d at 665-66.
56. *Id.* at 406, 486 S.E.2d at 667.
58. 226 Ga. App. at 405, 486 S.E.2d at 667.
59. 269 Ga. at 561, 501 S.E.2d at 819.
60. *Id.*
61. *Id.*
insured employers that comply with the Act's provisions.\textsuperscript{62} The court therefore implicitly recognized not only that the "notice" provisions of the Drug-free Work Place Act do not extend to the intoxication defense found in O.C.G.A. section 34-9-17, but also that constitutional principles do not impose a notice requirement on the rebuttable presumption included within this defense.\textsuperscript{63}

The supreme court found neither due process nor equal protection principles require a notice standard to be read into the portion of O.C.G.A. section 34-9-17 that creates a rebuttable presumption of intoxication where a claimant either tests positive for a defined level of intoxication or refuses a reliable post-accident drug test.\textsuperscript{64} The court noted that establishment of a conclusive presumption from drug tests might violate due process requirements.\textsuperscript{65} A rebuttable presumption, however, was held to be valid provided that a rational connection exists between what was proved and what was to be inferred: "Certainly, it is not unreasonable to infer that an employee who 'unjustifiably' refused to undergo a 'reliable, scientific test' performed in the 'manner' prescribed by O.C.G.A. § 34-9-415 was under the influence of alcohol or drugs and that this use of alcohol or drugs caused the injury."\textsuperscript{66} The rebuttable presumption in O.C.G.A. section 34-9-17(b), therefore, merely shifts the burden of proof from the employer to the claimant in certain circumstances to demonstrate either that the claimant was not intoxicated at the time of the accident or that the intoxication was not the cause of the injury.\textsuperscript{67} This presumption does not preclude a claimant from recovering workers' compensation benefits when there is evidence, either through a drug test or the unreasonable refusal of a drug test, that claimant was intoxicated at the time of the injury.\textsuperscript{68} Rather, in these limited circumstances, the burden simply shifts to the employee to demonstrate that intoxication was not the cause of the injury, a matter of proof that is particularly within claimant's sphere of knowledge.\textsuperscript{69}

The supreme court also rejected the notion that equal protection requires an employee to be given notice of the potential consequences of refusing a post-accident drug test.\textsuperscript{70} The court noted that the rebutta-
ble presumption in O.C.G.A. section 34-9-17 applies equally to all employees, without regard to whether their employers are within the scope of the Drug-free Work Place Act. The court found that the Drug-free Work Place Act’s applicability only to insured employers, as opposed to self-insured employers, did not create an impermissible disparity among injured workers, particularly because the only effect of the Drug-free Work Place Act is to provide a reduced premium to employers who follow its provisions.

Chief Justice Benham, joined by Justice Hunstein, dissented, noting that requiring an employer to give notice of the potential consequences of refusing a post-accident drug test is not a heavy burden, especially given the number of other notices that are required in the area of workers’ compensation. As the majority noted, however, such notice is not required by O.C.G.A. section 34-9-17, and the fact this statute refers only to the “manner” of performance of the post-accident drug test “strongly implies the exclusion of the Act’s other provisions.” Unless and until the Georgia Legislature imposes a notice requirement within O.C.G.A. section 34-9-17, employers will not be required to inform their employees that an unreasonable refusal of a post-accident drug test can potentially result in a denial of workers’ compensation benefits.

IV. OTHER CASE LAW DEVELOPMENT

A. Credit for Overpayment

An employer who pays an injured employee pursuant to a disability plan, wage continuation plan, or a disability insurance policy is entitled to take credit against any workers' compensation payments due to the injured employee, up to the amount that such plan or policy is funded by the employer. Employers must give ten days notice of the intent to take this credit prior to a hearing, by use of a Form WC-243. In Webb v. City of Atlanta, the employer did not follow the above procedures but instead sought to take a credit after the fact.

Webb was awarded temporary total disability (“TTD”) benefits in 1994 after a hearing while simultaneously receiving benefits under a city-funded plan. The City did not raise the credit issue at the hearing but

71. Id.
72. Id.
73. Id. at 563, 501 S.E.2d at 821.
74. Id. at 561, 501 S.E.2d at 819.
months later unilaterally suspended payment of TTD benefits to Webb in an attempt to take credit for the overpayment. The court of appeals did not dispute the employer's right to take a credit, but found that the City should have raised the issue at the hearing. By failing to do so, the City lost its entitlement to take the credit; the award of benefits to employee was res judicata; and the attempt to "correct" the error a year later by unilaterally suspending benefits was held to be improper.

In addition to taking a credit for employer-funded disability benefits, the employer may also be entitled to obtain reimbursement from an employee for workers' compensation disability benefits paid when not owed. In *Bahadori v. Sizzler* #1543, Sizzler paid benefits to its employee until he moved to South Carolina and began working for S & S Cafeterias. Two years later, he filed a claim for a change in condition against Sizzler, alleging that additional benefits were due because of his renewed inability to work from September to December 1992, as a result of the on-the-job injury. Sizzler voluntarily paid this claim, but investigated a third claim for benefits filed by Bahadori and found that he had actually been working continuously for S & S, even while receiving TTD benefits.

Sizzler requested a hearing to controvert Bahadori's claim and to seek reimbursement of the benefits it paid on the second claim. Bahadori withdrew his third claim for benefits and argued that his dismissal of the third claim meant that Sizzler could not come after him for reimbursement because adjudication of overpayment issues could only take place in conjunction with a change in condition hearing. The court of appeals disagreed, however, stating that the Board's power to order repayment of benefits is not limited to change in condition cases. It noted that O.C.G.A. section 34-9-104(d), which authorizes the Board to adjudicate overpayment claims, is not tied to section 34-9-104(b) regarding change in condition cases, and the legislative intent in enacting this provision was to eliminate the need for an employer or insurer to bring a civil action to recover any overpayment. The court

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78. *Id.* at 278-79, 491 S.E.2d at 493.
79. *Id.* at 279, 491 S.E.2d at 493.
80. *Id.* at 279-80, 491 S.E.2d at 493-94.
82. *Id.* at 52, 505 S.E.2d at 24.
83. *Id.* at 52-53, 505 S.E.2d at 24.
84. *Id.* at 53, 505 S.E.2d at 24.
85. *Id.* at 54, 505 S.E.2d at 25.
also pointed to prior decisions ordering repayment of benefits in the absence of a finding of a change in condition.\(^8\)

Bahadori's second argument was that the employer was barred from recovery by the two-year statute of limitations period in O.C.G.A. section 34-9-104(b) which governs change in condition cases.\(^7\) The court of appeals also rejected this argument.\(^8\) Again, it stated that O.C.G.A. section 34-9-104(d) is not tied to section 34-9-104(b), such that the two-year statute of limitations provision does not apply to reimbursement cases.\(^9\) Finally, the court reasoned that imposing a two-year statute of limitations upon reimbursement claims would result in an anomaly: such claims are in the nature of an action for money had and received, for which the applicable statute of limitations is four years.\(^9\) The court ordered Bahadori to reimburse Sizzler and their insurer for the benefits paid to him.\(^9\)

B. Aggravation of Pre-existing Condition

The definition of "injury" specifically includes "the aggravation of a pre-existing condition by accident arising out of and in the course of employment."\(^9\) However, each case is factually specific and thus, will depend heavily upon the medical evidence and the employee's own statements.

An employer will be responsible for treatment rendered due to the aggravation of a psychological condition when it is aggravated by a physical injury.\(^9\) In Logan v. St. Joseph Hospital,\(^9\) the employee injured her neck while lifting a trash bag.\(^9\) A couple of years later, her treating physician, a neurosurgeon, released her to return to work and her temporary total disability benefits were suspended. Around that same time, a psychologist interviewed her in connection with her application for Social Security disability benefits and found that she suffered from chronic pain syndrome and major or severe depression. The psychologist recommended psychotherapeutic treatment, which the

\(^{86}\) Id. at 53-54, 505 S.E.2d at 24-25.
\(^{87}\) Id. at 54, 505 S.E.2d at 25.
\(^{88}\) Id.
\(^{89}\) Id. at 55, 505 S.E.2d at 25.
\(^{90}\) Id.
\(^{91}\) Id., 505 S.E.2d at 26.
\(^{93}\) Id. § 34-9-1(4) states in pertinent part: "'Injury' and 'personal injury' shall include the aggravation of a preexisting condition by accident arising out of and in the course of employment . . . ."
\(^{95}\) Id. at 856, 490 S.E.2d at 486.
neurosurgeon later also recommended, but the employer refused to pay for the treatment.96 The ALJ denied Logan’s request for psychological treatment, holding that “the weight of the evidence is not sufficient to establish that any treatment... would be related to the employee’s prior job injury, nor would it be reasonable and necessary to effect a cure, give relief and return this employee to suitable employment.”97 The appellate division reversed the ALJ, finding that the employee had a personality disorder which prolonged her pain for longer periods of time than that felt by the average person and that she would benefit from treatment.98

The court of appeals accepted the case after the superior court reversed the appellate division.99 Finding that the superior court erred in reversing the Board, the court reiterated the long-standing “rule” that the employer takes the employee as it finds her,100 and therefore must pay for the sequela of her original injury.101

In Scapa Dryers Fabrics v. Murphy,102 the employee’s testimony and medical evidence failed to support her claim that her job activities either caused her pain or aggravated her injuries from a car accident. Murphy injured her back and leg in a car accident in 1984 but continued working for Scapa from 1984 to 1995.103 After she stopped working in March 1995, she told Scapa her condition was job-related.104 The ALJ and the appellate division denied the claim, but the superior court reversed.105 The court of appeals relied upon several grounds to reverse the superior court and reinstate the Board’s decision.106

The court determined that the Board properly considered statements the employee made on her insurance claims forms which indicated the condition did not result from a work injury.107 The fact that a supervisor told the employee to mark “sickness” rather than “job-related injury” did not impact the claim because the employee herself told the supervisor that her pain arose out of a car accident and the employee actually filled out and signed the forms herself.108 The court also noted that

96. Id.
97. Id.
98. Id. at 857, 490 S.E.2d at 486.
99. Id. at 858, 490 S.E.2d at 487.
103. Id. at 48, 491 S.E.2d at 147.
104. Id.
105. Id. at 49, 491 S.E.2d at 148.
106. Id. at 50-51, 491 S.E.2d at 148-49.
107. Id. at 50, 491 S.E.2d at 148.
108. Id., 491 S.E.2d at 148-49.
the medical evidence did not reflect complaints by the employee that her back injury was either caused by or aggravated by her work activities.\textsuperscript{109} The employer will be responsible for the employee's disability only as long as the work-related aggravation lasts.\textsuperscript{110} In \textit{Worthington Industries v. Sanks},\textsuperscript{111} the employee aggravated a congenital back problem while working for Worthington in 1995.\textsuperscript{112} After physical therapy and medical treatment, he returned to normal work.\textsuperscript{113} "On January 18, 1996, his physician determined that he had reached maximum medical improvement even though he continued to suffer pain 'aggravated by prolonged sitting' as a full-time college student."\textsuperscript{114} In July 1996 the employee was fired for reasons unrelated to the injury.\textsuperscript{115}

The ALJ and the appellate division determined that, after the employee reached maximum medical improvement, "his on-the-job injury had resolved and was no longer the cause of any disability."\textsuperscript{116} The employer carried its burden of proving the "injury-induced aggravation had subsided" as of January 18, 1996.\textsuperscript{117} However, the superior court reversed the Board, finding that the employer must show that the employee had returned to his pre-existing physical condition.\textsuperscript{118}

The court of appeals reversed the superior court, finding that the employer "needed only to establish that benefits were terminated because [Sanks'] present disability was not causally connected with his employment."\textsuperscript{119} The medical evidence allowed the ALJ and the appellate division to infer that the employee's continued pain and disability had no causal relation to his prior injury at Worthington.\textsuperscript{120} Instead, the problems were unrelated aggravations of his congenital

\begin{itemize}
  \item \textsuperscript{109} \textit{Id.} at 51, 491 S.E.2d at 149.
  \item \textsuperscript{110} O.C.G.A. § 34-9-1(4) (1998) states that the injury is compensable "only for so long as the aggravation of the preexisting condition continues to be the cause of the disability; the preexisting condition shall no longer meet this criteria when the aggravation ceases to be the cause of the disability."
  \item \textsuperscript{111} 228 Ga. App. 782, 492 S.E.2d 753 (1997).
  \item \textsuperscript{112} \textit{Id.} at 782, 492 S.E.2d at 754.
  \item \textsuperscript{113} \textit{Id.} at 783, 492 S.E.2d at 754.
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} \textit{Id.}
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} \textit{Id.}
  \item \textsuperscript{118} \textit{Id.}
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} \textit{Id.} at 784, 492 S.E.2d at 754.
\end{itemize}
The superior court was not authorized to substitute its own reading of the evidence for that of the Board.

C. Deviation from Employment Duties

In a case of first impression, the court of appeals addressed whether the Act applies to employees who deviate from their duties and are injured while acting as Good Samaritans. In *Olde South Custom Landscaping, Inc. v. Mathis,* the employee was a foreman for a landscaping company. He was returning to the office in a company truck when he noticed an elderly couple stranded in the emergency lane. The elderly man was trying to push the couple's car. Exiting the freeway two exits later, the employee returned to help the couple. While trying to push the couple's car, he suffered a fractured vertebra and was paralyzed.

The employer refused to pay benefits, arguing that the employee deviated from his duties. The ALJ agreed with the employer that the employee's deviation provided no benefit to the employer and noted that a Good Samaritan exception to the deviation rule should be enacted by the legislature. The appellate division reversed, relying in part upon a Florida decision, which found injuries sustained by a truck driver who stopped to assist motorists involved in a head-on collision were compensable. The superior court affirmed the appellate division.

The court of appeals noted that the Good Samaritan Rule is an extension of the "positional risk doctrine." For an injury to be compensable under the positional risk doctrine, it is only necessary for the employee to prove that "his work brought him within range of the danger by requiring his presence in the locale where the peril struck, even though any other person present would have also been injured

121. *Id.*
122. *Id.*, 492 S.E.2d at 755.
125. *Id.* at 317, 494 S.E.2d at 16.
126. *Id.*
127. *Id.*
128. *Id.*
131. *Id.* at 318, 494 S.E.2d at 16.
irrespective of his employment." However, the Good Samaritan Rule is also an exception to the deviation rule, which provides that:

when an employee "steps aside from his employer's business to do some act of his own, not connected with the employer's business, the relationship of employer and employee... is... completely suspended, and an accident occurring at that time, ... does not arise out of the employment within the meaning of the Workman's Compensation Act."  

In Mathis the court of appeals found that there was no authority in Georgia to adopt the Good Samaritan Rule, and that such a liberal interpretation of the Workers' Compensation Act was best left to the legislature. The court was sympathetic to the employee's injuries and recognized the employee's sense of decency, compassion, and morality. However, the court declined to force the employer to bear the costs incurred when its employee stepped aside from his job duties and made the rescue attempt.

D. Standard of Review

The appellate courts always address a few cases that deal with the standard of review. When the appellate division reverses the ALJ, it must follow the mandate of O.C.G.A. section 34-9-103 which states that findings of the ALJ "shall be accepted by the appellate division where such findings are supported by a preponderance of competent and credible evidence contained within the records." The supreme court recently clarified in Bankhead Enterprises v. Beavers that O.C.G.A. section 34-9-103(a) permits the appellate division to vacate an ALJ's findings of fact and conclusions of law and substitute alternative findings when the ALJ's findings were not supported by a preponderance of the competent and credible evidence. According to Beavers, the appellate division must weigh the evidence and assess the credibility of the witnesses, and if it determines the ALJ's award is supported by a preponderance of admissible evidence, the ALJ's award will be accept-

133. 229 Ga. App. at 318, 494 S.E.2d at 17 (quoting Hartford Accident & Indem. Co. v. Souther, 110 Ga. App. 84, 85, 137 S.E.2d 705, 706 (1964)).
134. Id. at 319-20, 494 S.E.2d at 17-18.
135. Id. at 320, 494 S.E.2d at 18.
138. Id. at 507, 480 S.E.2d at 841.
If not, the appellate division may substitute its own findings and enter an award accordingly.\textsuperscript{139}

Although the supreme court revisited the issue of the Board's standard of review in \textit{Syntec Industries, Inc. v. Godfrey},\textsuperscript{141} including a constitutional challenge that O.C.G.A. section 34-9-103 violated due process by impermissibly shifting the burden of proof, the court summarily denied the appeal, citing \textit{Bankhead}.\textsuperscript{142}

A more typical challenge to the standard of review was addressed in \textit{Russ v. American Telephone & Telegraph}.\textsuperscript{143} In that case, the ALJ denied the employee's claim for benefits, finding she did not meet her burden of making a diligent search for suitable employment. The appellate division substituted its own award for that of the ALJ, finding the employee did prove by a preponderance of the evidence that she made a diligent job search.\textsuperscript{144} The superior court reversed the appellate division, and an appeal followed.\textsuperscript{145}

The court of appeals noted that the superior court erred in returning to the original findings of the ALJ.\textsuperscript{146} The superior court's role was simply to review the appellate division's award.\textsuperscript{147} Even though the evidence was in conflict, the appellate division's award was supported by some evidence, and therefore the superior court was bound by the "any evidence" standard to simply uphold the award of the appellate division.\textsuperscript{148}

In two other cases, the appellate division substituted its own award for that of the ALJ. In both \textit{Johnson v. Weyerhaeuser Co.}\textsuperscript{149} and \textit{Owens-Brockway Packaging, Inc. v. Hathorn},\textsuperscript{150} the superior court exceeded its powers when it reversed the appellate division. The court of appeals reiterated that the superior court's duty was simply to affirm the appellate division if any evidence supported the appellate division's substituted findings.\textsuperscript{151}

\textsuperscript{139} \textit{Id.} \textsuperscript{140} \textit{Id.} \textsuperscript{141} 269 Ga. 170, 496 S.E.2d 905 (1998). \textsuperscript{142} \textit{Id.} at 171, 496 S.E.2d at 906. \textsuperscript{143} 228 Ga. App. 858, 493 S.E.2d 46 (1997). \textsuperscript{144} \textit{Id.} at 859, 493 S.E.2d at 47. \textsuperscript{145} \textit{Id.} \textsuperscript{146} \textit{Id.}, 493 S.E.2d at 47-48. \textsuperscript{147} \textit{Id.} at 859-60, 493 S.E.2d at 47-48. \textsuperscript{148} \textit{Id.}, 493 S.E.2d at 48. \textsuperscript{149} 231 Ga. App. 627, 499 S.E.2d 916 (1998). \textsuperscript{150} 227 Ga. App. 110, 488 S.E.2d 495 (1997). \textsuperscript{151} See, e.g., \textit{Johnson}, 231 Ga. App. 627, 499 S.E.2d 916; \textit{Hathorn}, 227 Ga. App. 110, 488 S.E.2d 495.
E. Attorney Fees

Attorney fees may be assessed by the superior court. In *Vulcan Materials Co. v. Pritchett*, the employer appealed the Board's decision ordering it to resume payment of temporary total disability benefits and to pay medical bills, and also appealed the assessment of attorney fees by the superior court. The employer contended that the superior court erred in finding its appeal "frivolous" and should not have awarded the employee attorney fees under O.C.G.A. section 9-15-14. However, the court of appeals affirmed, finding that the superior court is authorized to award attorney fees if a party appeals without substantial justification. Because the imposition of sanctions was a matter of trial court discretion, the court of appeals reviewed the ruling for abuse of discretion only and declined to find that the superior court abused its discretion.

F. Borrowed Servant

In a tort case involving the employee of a temporary service, the "borrowed servant doctrine" was invoked to obtain summary judgment for the borrowing employer ("special master"). In *Preston v. Georgia Power Co.*, the employee ("servant") was hired by ProTemps ("general master") and assigned to work for Ashland Chemical ("special master"). After his injury, the employee filed a tort suit against Ashland Chemical and another entity. Ashland Chemical contended that it was protected by the application of the workers' compensation tort bar because Preston was its borrowed servant at the time of his injury. The trial court granted summary judgment to Ashland, and Preston appealed.

The court of appeals recognized the three elements of the borrowed servant doctrine: "(1) the special master had complete control and

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153. Id. at 532, 489 S.E.2d at 561.
reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position.
155. 227 Ga. App. at 532, 489 S.E.2d at 561.
156. Id.
158. Id. at 449, 489 S.E.2d at 575.
159. Id.
direction of the servant for the occasion; (2) the general master had no such control; and (3) the special master had the exclusive right to discharge the servant. Based upon the evidence, the court found that even if ProTemps retained some authority to remove Preston from his position at Ashland Chemical, the actual inquiry should be whether Ashland Chemical could have unilaterally discharged Preston (1) from working on a specific task it assigned and (2) from actually working for Ashland Chemical.

Undisputed testimony showed that Ashland Chemical had the unilateral authority to discharge Preston from work assignments and had in fact moved him the morning of the accident from labeling cans to cleaning rail cars. Because of this right, summary judgment for Ashland Chemical was proper.

A similar result was reached in Lewis v. Georgia-Pacific Corp. All three prongs of the borrowed servant doctrine were met, and therefore the employee's tort claim against the special master was barred based upon the exclusive remedy provisions of the Workers' Compensation Act.

G. Change in Condition

Each year, several change in condition cases are accepted by the court of appeals. In Webb v. City of Atlanta, the city argued that its payment of disability benefits to an employee under a city-sponsored disability plan constituted a change in condition. The facts of the case showed that in September 1994 an ALJ ordered the city to pay temporary total disability benefits to the employee. The city did not appeal, but in May 1995, the city unilaterally suspended the employee's workers' compensation benefits. The city argued that because the employee received benefits under a city-sponsored disability plan during the entire time that he had received workers' compensation benefits, the city was entitled to a credit for the workers' compensation benefits already paid. Both the ALJ and the appellate division rejected the city's argument, noting that the city had not raised the issue of the credit at the first hearing in September 1994. Thus, the doctrine of

160. Id. at 451, 489 S.E.2d at 576.
161. Id. at 451-52, 489 S.E.2d at 576.
162. Id. at 452, 489 S.E.2d at 577.
163. Id.
165. Id. at 201, 496 S.E.2d at 280.
167. Id. at 278-79, 491 S.E.2d at 493.
168. Id. at 279, 491 S.E.2d at 493.
res judicata prevented the issue of set-off from being raised at the subsequent hearing.\textsuperscript{169} However, the superior court reversed the Board.\textsuperscript{170}

The court of appeals noted that a change in condition is "a change in the wage-earning capacity, physical condition, or status of an employee . . . which change must have occurred after the date on which the wage-earning capacity, physical condition, or status of the employee . . . was last established by award . . . ."\textsuperscript{171} The court of appeals found that the superior court should not have substituted its judgment for that of the Board.\textsuperscript{172} Although increases in the city-sponsored disability payments could constitute improvements in economic condition, the city did not cite any authority showing that such payments affected the employee's wage-earning capacity.\textsuperscript{173}

\textbf{H. Change in Condition Versus New Accident}

The court of appeals revisited this ever-confusing area of law in Guarantee Mutual Insurance Co. v. Wade Investments.\textsuperscript{174} The court was asked to decide which insurer would be responsible for an employee's carpal tunnel syndrome when she finally ceased working.\textsuperscript{175} Duckett was an employee of a dry cleaning business. In August 1993 she hurt her neck at work and after some months out, returned to work in October 1994, keying customer and inventory data for the company. She began to experience problems with her hands and was diagnosed in October 1995 with bilateral carpal tunnel syndrome. Guarantee Mutual was the employer's workers' compensation carrier through December 16, 1995. Gerber Life Insurance took over the coverage after that date. In January 1996 her doctor recommended surgery, but the employee declined and kept working. She finally stopped working due to a worsening of her condition on March 27, 1996.\textsuperscript{176}

The ALJ and the appellate division found that the carpal tunnel syndrome was caused by the job, and although the employee first developed the condition while Guarantee Mutual was on the risk, she did not become disabled until March 27, 1996, when Gerber Life was the

\begin{thebibliography}{99}
\item 169. \textit{Id.}
\item 170. \textit{Id.}
\item 171. \textit{Id.} at 280, 491 S.E.2d at 494 (quoting O.C.G.A. § 34-9-104(a) (1996)).
\item 172. \textit{Id.}
\item 173. \textit{Id.} at 280-81, 491 S.E.2d at 494.
\item 175. \textit{Id.} at 328, 499 S.E.2d at 926.
\item 176. \textit{Id.}
\end{thebibliography}
The Board concluded that the employee had sustained a new accident and injury as of March 27, 1996, and found Gerber Life responsible for the claim.\textsuperscript{178} The superior court reversed the Board, finding no new accident occurred after Gerber Life became the carrier.\textsuperscript{179} In reversing the superior court and reinstating the Board's award, the court of appeals noted that although the employee did not literally sustain a new injury on March 27, 1996, she became unable to work on that date.\textsuperscript{180} Although the seminal case in this area, \textit{Central State Hospital v. James},\textsuperscript{181} attempted to set out a bright-line test, the court in recent years seemingly followed a "causation analysis" in determining which employer accepts liability.\textsuperscript{182} The court seems to be demonstrating once again with \textit{Wade} that these issues are questions of fact for the ALJ that should not be disturbed on appeal.

\section*{I. Change in Condition: The Employee’s Maloney Burden}

The court of appeals reviewed several cases concerning whether an employee seeking to recover additional disability benefits had established a change in condition consistent with the requirements of \textit{Maloney v. Gordon County Farms}.\textsuperscript{183} To meet the burden of proof under \textit{Maloney}, the employee must prove each element of a three-prong test: (1) a loss of earning power as a result of a compensable work-related injury, (2) physical limitations attributable to that injury, and (3) a diligent but unsuccessful effort to secure suitable employment.\textsuperscript{184}

As is clear from \textit{Russ v. American Telephone & Telegraph},\textsuperscript{185} different judges may render different opinions in their review of the same evidence. Nancy Russ suffered a compensable back injury in April 1991 but returned to full-time work at AT&T. She was laid off in March 1994 and subsequently sought total disability benefits due to a change in condition. The ALJ found that the employee did not make a diligent job search and denied her reinstatement of benefits.\textsuperscript{186} The appellate
division, however, determined that the employee proved by a preponderance of the evidence that she did make a diligent unsuccessful job search.\textsuperscript{187} Relying upon evidence in the record that the employee applied and interviewed for jobs with other employers and sent resumes to employers whose names a rehabilitation counselor provided, the appellate division substituted its award for that of the ALJ and allowed the employee to recover disability benefits.\textsuperscript{188} The court of appeals relied upon the "any evidence" standard in upholding the Board's award.\textsuperscript{189}

In another Maloney case, the issue was whether the employee was totally disabled or whether she had light duty restrictions.\textsuperscript{190} In West Marietta Hardware v. Chandler,\textsuperscript{191} the employee was injured on September 13, 1993 when two metal shelves fell on her, hitting the left side of her head. After two weeks off, the employee returned to work. Although she had many complaints associated with the incident, she continued with her job until she voluntarily resigned in February 1995.\textsuperscript{192}

The employee began treatment in August 1994 with Dr. Donald Orr, who diagnosed her with thoracic outlet syndrome.\textsuperscript{193} On May 8, 1995, Dr. Orr instructed the employee not to return to work "while additional investigation for this disorder [was] pursued."\textsuperscript{194} An independent evaluation by Dr. Robert Gilbert resulted in a rejection of the thoracic outlet diagnosis.\textsuperscript{195} Dr. Gilbert also found that the employee could perform normal duties.\textsuperscript{196} The employee requested a hearing for reinstatement of benefits. The ALJ and the appellate division found that because Dr. Orr declared her totally disabled, the employee did not have to meet the Maloney burden of making a sincere search for suitable employment.\textsuperscript{197}

The employer appealed, pointing to Dr. Orr's deposition testimony that the employee could do some work, provided it was not repetitive.\textsuperscript{198} The court of appeals found that, although there was some evidence that

\begin{itemize}
\item \textsuperscript{187} Id. at 860, 493 S.E.2d at 48.
\item \textsuperscript{188} Id.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} West Marietta Hardware v. Chandler, 227 Ga. App. 436, 489 S.E.2d 584 (1997).
\item \textsuperscript{191} 227 Ga. App. 436, 489 S.E.2d 584 (1997).
\item \textsuperscript{192} Id. at 436-37, 489 S.E.2d at 585.
\item \textsuperscript{193} Id. at 437, 489 S.E.2d at 585.
\item \textsuperscript{194} Id.
\item \textsuperscript{195} Id., 489 S.E.2d at 586.
\item \textsuperscript{196} Id.
\item \textsuperscript{197} Id. at 437-38, 489 S.E.2d at 586.
\item \textsuperscript{198} Id. at 438, 489 S.E.2d at 586.
\end{itemize}
the employee was able to do light work, the Board was authorized to conclude that the employee "was totally disabled and need not engage in a purposeless demonstration of that disability by seeking work she could not perform." 199

In *Risner v. Bulk Equipment Manufacturing, Inc.*, 200 the employee suffered a back injury on May 30, 1995. He returned to work at a light duty janitorial job until December 18, 1995. On that day, he complained about his back hurting and went home early. He returned to work two days later and was terminated because he failed a drug test. He subsequently filed a claim for temporary total disability benefits. 201

The ALJ found that the employee continued to suffer physical limitations attributable to the back injury and that he made a diligent but unsuccessful job search after January 12, 1996. 202 Nevertheless, the ALJ denied the claim because the employee lost his job for cause. 203 He had, therefore, not shown that a diminution in his earning power was due to his injury. 204 The appellate division reversed, finding that an employee who is terminated for cause can still prove a change in condition and entitlement to benefits by showing that, as a result of the continuing disability, the employee was unable to find suitable work. 205

The superior court reversed the appellate division, and the court of appeals accepted the case to review whether the appellate division properly based its award on evidence in the record. 206 The court of appeals noted the law allows an employee who was terminated for cause to recover disability benefits by showing that the inability to obtain other suitable employment was due to a continuing disability attributable to a work-related injury. 207 Judge Beasley, concurring specially, pointed out that *Maloney* was about inferences, 208 and that while the ALJ did not infer from the evidence that the employee's lack of success in finding a job was due to the job-related injury, the appellate division apparently drew that inference from evidence of Risner's physical condition and unsuccessful job search. 209

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199. *Id.*
201. *Id.* at 529, 494 S.E.2d at 304.
202. *Id.*
203. *Id.*, 494 S.E.2d at 304-05.
204. *Id.*, 494 S.E.2d at 305.
205. *Id.*
206. *Id.* at 529-30, 494 S.E.2d at 305.
207. *Id.* at 530, 494 S.E.2d at 305.
209. 229 Ga. App. at 530-31, 494 S.E.2d at 305-06.
J. Change in Condition: The Employer’s Burden of Proof

If an employee is released to normal-duty work by the authorized treating physician, the employer has the burden of proof at the hearing.\(^{210}\) The burden of proof in a change in condition case is on the employer when the employer unilaterally suspends benefits on the basis that an employee's authorized treating physician released him to return to work.\(^{211}\) In *Vulcan Materials Co. v. Pritchett*,\(^{212}\) the ALJ improperly placed the burden of proof upon the employee to prove his continuing disability.\(^{213}\)

In a change in condition case which authorizes the employer to suspend benefits based upon an employee's actual return to work, the employer has the burden of proving (1) a physical change in the employee for the better, (2) an ability to return to work because of the change, and (3) the availability of work to decrease or terminate loss of income.\(^{214}\) In *Smith v. Brown Steel*, employee sustained a back injury and after surgery was given light duty restrictions. Based upon an alleged return to work, the employer unilaterally suspended benefits.\(^{215}\)

At the hearing, the ALJ properly placed the burden of proving the employee's change in condition upon the employer.\(^{217}\) The evidence showed that the employee visited construction sites and occasionally helped workers lift objects. The employee testified that he was not working but explained that he was trying to learn building codes so he could someday work as a contractor. Although additional evidence showed that the employee could regularly play golf, go deer hunting with a bow, and ride a jet ski, the ALJ concluded that the employee had not actually returned to work. Because the employee had not been released to regular duty work, and Brown Steel could not show the availability


\(^{213}\) Id. at 532, 489 S.E.2d at 561.


\(^{216}\) Id. at 698, 503 S.E.2d at 592.

\(^{217}\) Id. at 700, 503 S.E.2d at 593.
of other suitable work, the ALJ found that Brown Steel had not proved a change in condition for the better.\textsuperscript{218}

\textbf{K. Controverting Benefits}

The court of appeals addressed a procedural issue involving controverting benefits in \textit{Cumberland Distribution Services, Inc. v. Fuson}.\textsuperscript{219} The employee suffered a neck injury on June 9, 1995. After his termination for cause on October 31, 1995, he sought disability benefits, and the employer commenced benefits. When the employer subsequently learned that the employee was working, it suspended benefits on April 9, 1996, based upon a change in condition—Fuson's return to work. As the case was investigated, the employer learned that Fuson had a history of prior neck problems dating back to four days before the alleged June 9, 1995 injury. Based upon this newly discovered evidence, the employer controverted the entire case on May 14, 1996.\textsuperscript{220}

At a hearing, the ALJ concluded the evidence was insufficient to support a suspension of benefits based upon the alleged return to work.\textsuperscript{221} However, the ALJ found that Fuson lied about his previous neck problems and an earlier workers' compensation claim.\textsuperscript{222} Because the newly discovered evidence established that Fuson's neck problem pre-existed his work for Cumberland, the ALJ found that Cumberland was authorized to suspend benefits on April 9, 1996 and assessed a total of $15,000 in civil penalties against Fuson for having advanced fraudulent claims.\textsuperscript{223}

Fuson appealed, arguing that O.C.G.A. section 34-9-221(i) required the employer to give him ten days notice before “suspending” his benefits on April 9, 1996.\textsuperscript{224} The superior court agreed with the employee, and the court of appeals accepted the case for review.\textsuperscript{225} The employee argued that the employer failed to pay all benefits due before filing its notice to controvert.\textsuperscript{226} However, the court of appeals noted that because the suspension of benefits on April 9, 1996 related to the alleged return to

\begin{thebibliography}{226}
\bibitem{218} Id. at 698-99, 503 S.E.2d at 593.
\bibitem{220} Id. at 380, 492 S.E.2d at 3.
\bibitem{221} Id.
\bibitem{222} Id.
\bibitem{223} Id. at 380-81, 492 S.E.2d at 3.
\bibitem{224} Id. at 381, 492 S.E.2d at 4.
\bibitem{225} Id., 492 S.E.2d at 3.
\bibitem{226} An employer may not file a controvert (after the case has been accepted and benefits thereafter paid without an award) unless it pays all benefits due, including penalties, before filing the notice to controvert. Cartersville Ready Mix Co. v. Hamby, 224 Ga. App. 116, 479 S.E.2d 767 (1996).
\end{thebibliography}
work, the employer did not have to give ten days notice. The court of appeals pointed out that because Fuson's benefits were already suspended at the time the insurer discovered the basis for controverting the entire claim, and even though the employer did not actually prevail on this theory at the hearing, the ten-day advance notice requirement of O.C.G.A. section 34-9-221(i) was inapplicable as to the controvert.

L. Coverage

The court addressed several cases involving workers' compensation coverage issues. In *Home Insurance Co. v. Sunrise Carpet Industries*, the trial court determined that Home's suit to recover additional premiums was without merit. When Home attempted to obtain additional premiums from Sunrise, the court of appeals found that Home did not comply with the provisions of its own contract nor with NCCI regulations which require that an increase in premium may not be demanded in the last ninety days of coverage. The court of appeals affirmed the trial court's grant of summary judgment to Sunrise.

In *United States Fidelity & Guaranty Co. v. Paul Associates, Inc.*, an insurer brought an action against an insurance agent, an insured, and its principals to recover for negligently misrepresenting that the insured qualified for coverage through the assigned risk pool. The insurer sought to recover premiums from the insured and principals. After a jury verdict in favor of USF&G on the breach of contract claim, negligent misrepresentation, and contributions from the principals, an appeal followed. The court of appeals affirmed the trial court, finding (1) that the insurer had a right to rely on representations in the insurance application without conducting an independent investigation,

227. 228 Ga. App. at 382, 492 S.E.2d at 4. "Suspension of benefits at any time on the grounds of change in condition requires advance notice of 10 days unless the employee has actually returned to work." GA. BD. OF WORKER'S COMPENSATION R. 221(i)(1) (1998).
228. 228 Ga. App. at 382, 492 S.E.2d at 4.
230. Id. at 271, 493 S.E.2d at 644.
231. Id. Any ambiguities in an insurance contract will be strictly construed against the insurer as the drafter of the contract. Hulsey v. Interstate Life, 207 Ga. 167, 60 S.E.2d 353 (1950).
232. 229 Ga. App. at 272, 493 S.E.2d at 644. NCCI Manual Rule IV(G)(2)c prohibits any change in classification of employees in the last ninety days of coverage if the change in classification would increase the premiums.
235. Id. at 243-44, 496 S.E.2d at 285-86.
(2) that the jury was authorized to return separate verdicts against the agent and principals, (3) that the principals could be held liable to the insurer for the pre-incorporation expenses of the insured, and (4) that the insured's failure to pay premiums did not relieve the agent of liability for negligent misrepresentation. This case demonstrates the responsibility that employers and even agents have to submit accurate applications and supporting documentation for workers' compensation coverage and the consequences that can result when an insured fails to comply with contractual obligations.

In *T&R Custom, Inc. v. Liberty Mutual Insurance Co.*, the court of appeals agreed with the trial court that an independent insurance broker (Venture) was not an agent of the insurer (Liberty) for the purpose of collecting premiums from the employer. Despite the contention that T&R paid the premiums to Venture, and that Venture acted in a dual capacity as an agent for both the insurer and the insured, the evidence and the law supported a finding that Venture was not Liberty's agent for the collection of premiums.

**M. Exclusive Remedy**

In recent years, there have been attempted attacks upon the exclusive remedy doctrine. This year was certainly no exception. However, in the wake of the Georgia Supreme Court's decision in *Doss v. Food Lion, Inc.*, the courts have appeared to wholeheartedly re-embrace the idea that the exclusive remedy for any damages arising out of or in the course of employment is found in the Workers' Compensation Act.

In *Potts v. UAP-GA AG CHEM, Inc.*, the widow of the deceased employee received workers' compensation benefits but also brought a

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236. *Id.* at 244-48, 496 S.E.2d at 286-89.
238. *Id.* at 144-45, 488 S.E.2d at 706-07.
239. T&R asserted that it paid the premium to Venture. Venture filed bankruptcy in July 1993 and its principal, Conway, was indicted on 35 counts of theft by deception and pleaded guilty to three of those counts. He was ordered to pay $83,273 in restitution. 227 Ga. App. at 144 n.1, 488 S.E.2d at 706 n.1.
242. 267 Ga. 312, 477 S.E.2d 577 (1996). The court held that the exclusivity provisions of the Workers' Compensation Act precluded an independent cause of action for intentional delay in authorizing medical treatment. *Id.* at 313, 477 S.E.2d at 578.
244. *Id.* at 244-48, 496 S.E.2d at 286-89.
claim against the employer for wrongful death, intentional infliction of emotional distress, and fraud.246 Addressing whether claims based upon the widow's allegations that the fatal chemical poisoning was intentionally inflicted by a co-worker were viable, the court of appeals noted the Workers' Compensation Act was the sole remedy both for injuries negligently inflicted on the job and for injuries intentionally inflicted on the job—so long as the tortious act was related to the employer's business.248 Thus, the widow's claims were held to be barred.247

Flint Electric Membership Corp. v. Ed Smith Construction Co.248 involved an indirect attempt to hold an employer liable outside the bounds of the Workers' Compensation Act. In that case, Lee was shocked while working for Ed Smith Construction Company.249 He and his wife brought a claim against Flint for violations of the High-voltage Safety Act.250 Flint impleaded the construction company, as provided under the indemnity provisions of that Act.251 The court of appeals held that the High-voltage Safety Act was not an exception to the exclusive remedy provisions of the Workers' Compensation Act and affirmed the trial court's grant of summary judgment to the employer.252

Finally, in Holton v. Georgia Power Co.,253 the court of appeals held that a statutory employer was also protected by the exclusive remedy provision of the Workers' Compensation Act.254

N. Farm Laborers Exemption

The issue of whether an employee is a farm laborer who is exempt from coverage under the Workers' Compensation Act does not arise often.255 However, in 1997 the court of appeals in J & C Poultry v. Reyes-Guzman256 determined, as a matter of law, that an employee of a company responsible for gathering, boxing, and loading chickens is not

245. Id. at 841, 490 S.E.2d at 432.
246. Id. at 845-46, 490 S.E.2d at 435.
247. Id.
249. Id. at 838, 495 S.E.2d at 137.
251. Id. § 46-3-40(b).
252. 229 Ga. App. at 839-40, 495 S.E.2d at 137.
254. Id. at 136-37, 491 S.E.2d at 209.
255. O.C.G.A. § 34-9-2(a) (1998) provides: "This chapter shall not apply to... farm laborers... nor to employers of such employees... ."
a farm laborer. Guzman performed all of the above duties for J & C, a company hired by a chicken processor to transport its chickens from the farms where they were raised. In finding that Guzman was not a farm laborer, the court started with the well-established rule that farm labor includes all direct and incidental activities involving agriculture or management of livestock. Yet, the court pointed out that “intensive specialization, if carried too far, is enough to transform agriculture to commerce.” Because Guzman’s employer was a company that had nothing to do with the actual raising, feeding, or management of chickens, the court concluded that he was engaged in commerce, not agriculture.

O. Fraud

The Board’s fraud and compliance unit was created in 1995. This year brought one court of appeals decision confirming that the Board and the courts mean business when it comes to investigating potential workers’ compensation fraud. In Bahadori v. Sizzler #1543, Bahadori was injured while working at Sizzler. He then moved to South Carolina and took a job at S & S Cafeterias. Although he claimed and received additional temporary total disability benefits due to his alleged inability to continue working at S & S as a result of the Sizzler injury, he actually worked for S & S during that period. The Board referred Bahadori’s case to the fraud unit for investigation. Bahadori claimed the fraud unit had no authority to investigate his case because the unit was not established until three years after his fraud occurred. The court rejected this argument outright, stating that nothing in O.C.G.A. section 34-9-24 limits the fraud unit to investigation of only those frauds that occur after July 1, 1995, and that Bahadori had produced no legal authority in support of his position.

P. Impeachment

Whether the employee or employer prevails in a workers’ compensation case often boils down to a simple matter of credibility. Proper use
of impeachment evidence is therefore crucial and central to any workers’ compensation hearing. In *West Marietta Hardware v. Chandler*, the employer attempted to defeat the employee’s claim for change in condition by offering evidence that the employee had falsified her separation notice and used it to obtain unemployment benefits. The ALJ found that “there must be inconsistent statements bearing on material facts of the case at hand or proof of a crime involving moral turpitude” in order for the employee to be impeached, and because neither was the case, the ALJ refused to consider the evidence presented by the employer.

The court of appeals disagreed, stating that, in addition to the various statutory methods of impeaching a witness, a party can also impeach by showing “anything which in the slightest degree affects the credit of an opposing witness,” including a collateral issue that is only indirectly material to the issues in the case at hand. The court therefore remanded the case to the Board for a determination, under the correct legal principles, of whether the employee was effectively impeached.

Q. *Psychological Injury*

Once a hot topic in Georgia workers’ compensation law, the category of psychological injury has cooled somewhat following the supreme court’s decision in *Southwire v. George*. That case reaffirmed the long-standing rule that a purely mental or psychological injury, unaccompanied by any physical injury, is not compensable under the Workers’ Compensation Act. The case of *Logan v. St. Joseph Hospital* follows *George* and its predecessors insofar as Logan’s psychological problems were held to be compensable based upon their outgrowth from an on-the-job neck injury.
The supreme court went a step further in *Abernathy v. City of Albany*, declining, albeit by only a slim majority, to award compensation for a mental injury wholly unaccompanied by any kind of physical harm. Abernathy worked as a park maintenance supervisor. When flood waters lifted several hundred caskets from the ground and carried them off with the current, he was given the unfortunate job of retrieving the corpses, which resulted in gruesome physical contact with the bodies. The experience left him with post-traumatic stress disorder, and he sought workers' compensation benefits. Although the entire court sympathized with the horror of what Abernathy had seen, the majority denied the claim because no actual physical injury befell him. Chief Justice Benham and Justices Sears and Hunstein dissented, however, stating that they would find such an injury to be compensable, regardless of the lack of any physical harm. Thus, the next time this issue is visited, a purely psychological injury may be compensable in this state if the supreme court's ideological makeup has since changed.

R. Requests for Admission

Although *Rocor International v. Guyton* falls into this category on its face, the decision is not so much about requests for admission as it is about the nature of the workers' compensation system. Guyton filed a workers' compensation claim against Rocor after he became disabled from a heart attack. The ALJ determined that his actual employer was DonCo Carriers, a subsidiary of Rocor, and a new hearing was held. Rocor previously failed to answer requests for admission served upon it. In denying Guyton benefits, however, the ALJ gave no weight to the employee's unanswered requests for admission, deeming them a nullity. The superior court believed this was error and reversed. The superior court relied upon well-settled law that requests for admission, if not timely answered or objected to, are deemed conclusively admitted. Because DonCo brought no formal motion to

277. *Id.* at 91, 495 S.E.2d at 16.
278. *Id.* at 90, 495 S.E.2d at 16.
279. *Id.* at 91, 495 S.E.2d at 16.
280. *Id.* at 94, 495 S.E.2d at 18.
282. *Id.* at 759, 494 S.E.2d at 571-72.
283. *Id.*, 494 S.E.2d at 572.
284. *Id.*
285. *Id.*
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withdraw the admissions, the employee had been denied an opportunity to argue that withdrawal would prejudice his case.287

The court of appeals acknowledged the above legal principles but found them not to be controlling.288 Instead, the court stated the Workers' Compensation Act was designed to furnish a speedy, inexpensive, and final resolution of claims without protracted litigation.289 The binding nature of the findings of fact made by the ALJ and the full Board accomplished this goal.290 Although there was no formal, written motion to withdraw the admissions, the court pointed out that this very motion was made orally at the hearing by counsel for DonCo, and Guyton was allowed to respond in his brief.291 Thus, in the informal, streamlined proceedings before the Board, some of the rigors that exist in the Civil Practice Act can apparently be relaxed in favor of accomplishing the goals of the workers' compensation system.

S. Statutory Employer

In the two cases addressing statutory employers this year, both outcomes turned upon the statutory employer's relationship to the premises where the injury occurred.

In Holton v. Georgia Power Co.,292 the employee received workers' compensation benefits from his immediate employer, CIMCO, but attempted to bring a tort claim against Georgia Power, which owned and maintained the property where he was injured. Georgia Power defended, claiming it was the statutory employer of Holton pursuant to O.C.G.A. section 34-9-8, and that it was thereby insulated from tort liability to him.293 The court of appeals agreed.294 It noted that, generally, an owner in control of premises is not a statutory employer.295 In this case, however, Georgia Power not only owned and controlled the premises but also contracted to perform maintenance of the premises.296 This maintenance work was sublet to CIMCO, and Holton was injured under those circumstances.297 Consequently, Georgia Power

287. 229 Ga. App. at 759-60, 494 S.E.2d at 572. See also O.C.G.A. § 9-11-36(b).
288. 229 Ga. App. at 760-61, 494 S.E.2d at 573.
289. Id. at 761, 494 S.E.2d at 573.
290. Id.
291. Id.
293. Id. at 136, 491 S.E.2d at 209.
294. Id. at 137, 491 S.E.2d at 209.
295. Id. at 136, 491 S.E.2d at 209.
296. Id., 491 S.E.2d at 208.
297. Id.
was the statutory employer, and Holton's sole remedy was under the Workers' Compensation Act.\textsuperscript{298}

In \textit{Beers Construction Co. v. Doyle},\textsuperscript{299} the court of appeals highlighted the legal requirement that the statutory employer theory is applied only when "the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are otherwise under his control or management."\textsuperscript{300} Beers subcontracted with Nix to provide millwork and cabinetry for a hospital project. Doyle, an employee of Nix, severed three fingers while cutting cabinet pieces at Nix's workshop. When Nix proved to be uninsured for workers' compensation accidents, Doyle brought a claim against Beers as the statutory employer.\textsuperscript{301} However, because the accident took place in Nix's workshop, where Beers had no actual management or control and could not affect the risks, the tort claim was dismissed.\textsuperscript{302}

\textbf{T. Subrogation}

Subrogation returned to Georgia's Workers' Compensation Act in 1992,\textsuperscript{303} and the case law is slowly fleshing out the specific parameters of this right. The past year brought several important subrogation decisions.

In \textit{Bartow County Board of Education v. Ray},\textsuperscript{304} the court of appeals addressed how the employer should prove that an employee is fully and completely compensated\textsuperscript{305} such that its subrogation lien could be satisfied.\textsuperscript{306} In that case, the jury gave Ray a general verdict for $175,000. Her employer, the school board, intervened in the third party action and asserted its subrogation lien. Because Ray received more than her special damages, the school board argued they were entitled to satisfaction of their lien.\textsuperscript{307} The court of appeals disagreed.\textsuperscript{308} It noted that the employer presented no evidence on the issue of full and complete compensation.\textsuperscript{309} The court stated that, simply because a jury's award exceeds the amount of special damages, it could not be

\begin{itemize}
  \item \textsuperscript{298} Id. at 137, 491 S.E.2d at 209.
  \item \textsuperscript{299} 230 Ga. App. 593, 496 S.E.2d 921 (1998).
  \item \textsuperscript{300} Id. at 594, 496 S.E.2d at 921. \textit{See} O.C.G.A. § 34-9-8(d) (1998).
  \item \textsuperscript{301} 230 Ga. App. at 594, 496 S.E.2d at 921.
  \item \textsuperscript{302} Id. at 595, 496 S.E.2d at 922.
  \item \textsuperscript{303} O.C.G.A. § 34-9-11.1 (1998).
  \item \textsuperscript{304} 229 Ga. App. 333, 494 S.E.2d 29 (1997).
  \item \textsuperscript{305} O.C.G.A. § 34-9-11.1(b).
  \item \textsuperscript{306} 229 Ga. App. at 334, 494 S.E.2d at 30.
  \item \textsuperscript{307} Id. at 333-34, 494 S.E.2d at 30.
  \item \textsuperscript{308} Id. at 334-35, 494 S.E.2d at 30-31.
  \item \textsuperscript{309} Id. at 335, 494 S.E.2d at 31.
\end{itemize}
presumed that the jury had fully and completely compensated the employee for all losses.\textsuperscript{310} Even though it is not specifically required by the statute, the better and more logical practice was to request a special verdict form asking the jury if its verdict made the employee whole.\textsuperscript{311}

The trial court in \textit{Sommers v. State Compensation Insurance Fund}\textsuperscript{312} found that the employee was made whole, and satisfaction of employer's subrogation lien was ordered.\textsuperscript{313} However, Sommers appealed and sought to prevent the employer from taking any part of her recovery. She argued the trial court was wrong to allow the intervention.\textsuperscript{314} The court of appeals rejected this argument outright, stating that O.C.G.A. section 34-9-11.1 gives the employer an absolute right to intervene if it chooses to do so, and that it may intervene even after the expiration of the statute of limitations.\textsuperscript{315} Sommers also argued that only a jury could make a determination of whether the employee was made whole.\textsuperscript{316} Because Sommers agreed to have the jury remain unaware that she received collateral benefits from her employer, the court found that she had waived the right to have a jury address this issue, "even if ever there was such a right."\textsuperscript{317} Because the evidence supported the judge's decision, the court of appeals affirmed the judgment granting satisfaction of the subrogation lien.\textsuperscript{318}

In \textit{Stewart v. Auto-Owners Insurance Co.},\textsuperscript{319} the court of appeals dealt with the issue of what payments to an employee could be subject to a subrogation lien. Stewart received workers' compensation benefits from Auto-Owners, her employer's workers' compensation carrier, and also sought payment from her own insurance company under her uninsured motorist ("UM") policy.\textsuperscript{320} Auto-Owners asserted a subrogation lien against the money Stewart received under her UM policy, but the court held that UM benefits are not subject to such a lien.\textsuperscript{321} The court stated that those payments were not a recovery from a negligent third party but were made pursuant to a contractual obligation arising

\textsuperscript{310. Id.} \\
\textsuperscript{311. Id.} \\
\textsuperscript{312. 229 Ga. App. 352, 494 S.E.2d 82 (1997).} \\
\textsuperscript{313. Id. at 352, 494 S.E.2d at 84.} \\
\textsuperscript{314. Id.} \\
\textsuperscript{315. Id. at 352-53, 494 S.E.2d at 84.} \\
\textsuperscript{316. Id. at 352, 494 S.E.2d at 84.} \\
\textsuperscript{317. Id. at 354, 494 S.E.2d at 85.} \\
\textsuperscript{318. Id. at 355, 494 S.E.2d at 86.} \\
\textsuperscript{319. 230 Ga. App. 265, 495 S.E.2d 882 (1998).} \\
\textsuperscript{320. Id. at 265, 495 S.E.2d at 883.} \\
\textsuperscript{321. Id. at 268, 495 S.E.2d at 888.}
under Stewart's own car insurance policy. \textsuperscript{322} Nothing in the subrogation code section authorizes an insurer to assert a subrogation lien against UM payments. \textsuperscript{323}

\textbf{U. Superior Court Appeals}

There were several decisions this year regarding appeals to the superior court. In \textit{Truckstops of America, Inc. v. Engram}, \textsuperscript{324} the court of appeals answered the question of whether the July 1, 1997 amendment to O.C.G.A. section 34-9-105, regarding the scheduling of a hearing or entry of an award within sixty days of the date of docketing of the appeal, has retroactive effect. \textsuperscript{325} The court held that the amendment does not, noting that statutory amendments generally prescribe only for the future unless a contrary intent is shown. \textsuperscript{326} The court also pointed out that giving the amendment retroactive effect in this case would deprive the employer of a victory that had already been final for over a year. \textsuperscript{327}

In \textit{Pine Timber Trucking Co. v. Teal}, \textsuperscript{328} the issue was whether an order was timely entered by the superior court. The superior court held a hearing on December 18, 1996 and reversed the full Board's decision in an order dated January 9, 1997. \textsuperscript{329} The court of appeals held that the superior court's order was a nullity because it was not entered within twenty days of the hearing, as prescribed by O.C.G.A. section 34-9-105(b). \textsuperscript{330}

Finally, \textit{Gilman Paper Co. v. Davis} \textsuperscript{331} stands for the proposition that there is no appeal to the superior courts from an interlocutory order of

\begin{itemize}
\item \textsuperscript{322} \textit{Id.}
\item \textsuperscript{323} \textit{Id.}, 495 S.E.2d at 884.
\item \textsuperscript{324} 229 Ga. App. 616, 494 S.E.2d 709 (1997).
\item \textsuperscript{325} O.C.G.A. § 34-9-105(b) (1998) previously stated, in relevant part:
\textit{The case so appealed may then be brought by either party upon ten days' written notice to the other before the superior court for a hearing upon such record, ... provided, however, if the court does not hear the case within 60 days of the date of docketing in the superior court, the decision of the board shall be considered affirmed by operation of law ... .}
\item \textsuperscript{326} 229 Ga. App. at 617, 494 S.E.2d at 711.
\item \textsuperscript{327} \textit{Id.} at 618, 494 S.E.2d at 712.
\item \textsuperscript{328} 230 Ga. App. 362, 496 S.E.2d 270 (1998).
\item \textsuperscript{329} \textit{Id.} at 362, 496 S.E.2d at 271.
\item \textsuperscript{330} \textit{Id.} at 362-63, 496 S.E.2d at 271. O.C.G.A. § 34-9-105(b) (1998) states, in pertinent part: "[T]he decision of the board shall be considered affirmed by operation of law if no order of the court disposing of the issues on appeal has been entered within 20 days after the date of the continued hearing."
\item \textsuperscript{331} 230 Ga. App. 364, 496 S.E.2d 469 (1998).
\end{itemize}
the Board. On the contrary, only a final award—one either granting or denying compensation—can be appealed to the superior court pursuant to O.C.G.A. section 34-9-105. Thus, an interlocutory order reinstating Gilman's benefits pending an evidentiary hearing was held to have been improperly heard by the superior court, and the employer's appeal was dismissed.

V. Superadded Injury

In those superadded injury cases which have been reported, the claim of a mental or physical condition superimposed upon the original on-the-job injury was rejected more times than not. The recent court of appeals decision in *J.M. Huber Corp. v. Holliday* is no exception. Holliday suffered a compensable left knee injury in 1985 while working for Huber. He returned to work in a fairly sedentary job, suffering from occasional popping and instability in his knee. Ten years later, while walking in the woods for recreation, Holliday's right foot got caught in some vines. He shifted his weight to his left leg, the left knee gave out, and he fractured his patella.

The ALJ found that the fracture constituted "a new injury, separate and distinct from [Holliday's] original knee condition." However, the ALJ then concluded that it was a superadded injury because the weakened condition of Holliday's left knee was the proximate cause of the fall. The court of appeals found this to be a misapplication of the superadded injury theory, which covers an injury that "generally arises as a natural consequence of, or directly from, the original event and is not the result of a new event or accident." That being the case, the fractured patella could not be a superadded injury because of the ALJ's finding of a new accident. Finally, the court of appeals pointed out that superadded injury involves an injury, disorder, or condition to a different part of the body from the one originally injured. Because this was the same knee originally injured in 1985, Holliday's claim was not viable.
Even though the court rejected Holliday's superadded injury argument, it did not go so far as to invalidate the theory, as the employer urged.\textsuperscript{343} The court responded that "there will certainly be those cases in which the application of the superadded injury theory is necessary to effect the humane, remedial purposes of the Workers' Compensation Act."\textsuperscript{344}

V. CONCLUSION

Practitioners should be especially mindful of the legislative amendments affecting the admissibility of evidence in workers' compensation cases and the calculation of certain benefits. In addition, it can be anticipated that the court of appeals will issue new decisions further delineating the scope of the decision in Padgett\textsuperscript{345} and its effect on post-accident employment terminations.

\textsuperscript{343} Id. at 6-7, 491 S.E.2d at 76.
\textsuperscript{344} Id. at 7, 491 S.E.2d at 76.