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Workers' Compensation

by H. Michael Bagley*
and J. Benson Ward**

While there was no legislation impacting the Workers' Compensation Act during the 2013–2014 survey period,[1] the period featured notable decisions of the appellate courts involving core issues of the Act, including notice, average weekly wage, return to work, and change in condition.

I. MEDICAL TREATMENT

In *Zheng v. New Grand Buffet, Inc.*,[2] the Georgia Court of Appeals considered whether an employee may unilaterally change doctors–to a doctor not on the panel of physicians–when the employer continues to provide medical care and also addressed the timing for which an appeal must be filed with the superior court.[3] The claimant sustained an injury and began receiving medical care and income benefits. The claimant's authorized treating physician (ATP) issued a prospective full-duty work release as of one week of the appointment, depending on test results and a return evaluation. But instead of returning to the ATP as scheduled, the claimant presented to a doctor of her own choosing with whom she continued treatment. The employer subsequently suspended income benefits on the grounds that the claimant underwent a change in condition for the better, pursuant to the prospective regular-duty work release from the claimant's ATP. The claimant filed a hearing request

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1. For an analysis of Workers' Compensation during the prior survey period, see H. Michael Bagley & J. Benson Ward, *Workers' Compensation, Annual Survey of Georgia Law*, 65 MERCER L. REV. 311 (2013).

2. 321 Ga. App. 308, 740 S.E.2d 302 (2013).

3. *Id.* at 309, 312, 740 S.E.2d at 304, 306.

seeking, among other things, reinstatement of income benefits, payment of certain medical expenses, and a change of ATPs.[4]

The administrative law judge (ALJ) found that the employer's suspension of benefits was not improper, but reinstated benefits beginning shortly after the suspension date on the grounds that the employer did not prove the claimant had undergone a change in condition for the better. The claimant alleged that the insurance adjuster had represented that no panel of physicians existed, and so she was free to select any doctor of her choice as the ATP. However, the ALJ found that the employer had a valid panel of physicians and therefore should have the opportunity to offer the claimant treatment with another doctor of the employer's choice. The Appellate Division of the State Board of Workers' Compensation (the Appellate Division) adopted the ALJ's award, and the superior court did not issue an opinion within twenty days of the hearing. Thus, the decision of the State Board of Workers' Compensation (the Board) was affirmed by operation of law.[5]

The court of appeals found no error in the ALJ's findings, noting evidence existed to show that a valid panel of physicians was posted and explained to the claimant.[6] The court noted that the claimant's remedy, if she was dissatisfied with her ATP, was either to request a change of doctors with the employer or "petition the Board for approval to change, but [the claimant] was not entitled to change physicians unilaterally and require her employer to pay for it."[7] The court refused to consider the employer's purported cross-appeal, holding that section 34-9-105(b) of the Official Code of Georgia Annotated (O.C.G.A.)[8] requires a party to appeal the Board's final order within twenty days of that order and does not provide additional time for a cross-appeal.[9] Because the employer did not file a notice of appeal to the superior court within twenty days of the Appellate Division award, the court of appeals lacked jurisdiction to consider the appeal.[10]

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4. *Id.* at 308-10, 740 S.E.2d at 303-05.
5. *Id.* at 308-09, 311, 740 S.E.2d at 304-05.
6. *Id.* at 312, 740 S.E.2d at 306.
7. *Id.*
8. O.C.G.A. § 34-9-105(b) (2008).
9. *Zheng*, 321 Ga. App. at 313, 740 S.E.2d at 307; *see also* O.C.G.A. 34-9-105(b).
10. *Zheng*, 321 Ga. App. at 313, 740 S.E.2d at 307.

II. FRAUD AND NON-COMPLIANCE

Garcia v. Shaw Industries, Inc.[11] involved a claimant's civil suit against an employer for intentional infliction of emotional distress and defamation after the employer filed an administrative fraud complaint with the Board. The claimant, who was not a United States citizen, obtained employment with the name and Social Security number of another. While working for the employer, she sustained a compensable injury and began receiving benefits. After obtaining deposition testimony from the claimant that the name and Social Security number she had used were not hers, the employer fired her. The employer continued to pay temporary partial disability (TPD) benefits but filed a complaint with the fraud and compliance unit of the Board, alleging that the claimant made false and misleading representations for the purpose of obtaining workers' compensation benefits. Following communications between the fraud unit and counsel for the employer, the claimant was arrested after a deposition.[12]

The claimant brought a claim for intentional infliction of emotional distress and defamation.[13] The employer argued that its actions in filing the fraud complaint were protected from liability under O.C.G.A. § 34-9-24,[14] which "provides a safe harbor for persons who '[i]n the absence of fraud or malice' furnish the Board with information regarding suspected fraud."[15]

Declining to rule on whether the statute protected the employer from liability, the court of appeals held that the trial court correctly granted summary judgment because a rational jury could not reasonably conclude that the employer's conduct was extreme and outrageous as required for a claim of intentional infliction of emotional distress.[16] The defamation claim was barred by the one-year statute of limitations.[17]

III. LATE-PAYMENT PENALTY/CHANGE IN CONDITION

In *Reid v. Metropolitan Atlanta Rapid Transit Authority*,[18] the court of appeals addressed a claimant's request for late-payment penalties

11. 321 Ga. App. 48, 741 S.E.2d 285 (2013).
12. *Id.* at 48-50, 54, 741 S.E.2d at 286-87, 290.
13. *Id.* at 48, 741 S.E.2d at 286.
14. O.C.G.A. § 34-9-24 (2008).
15. *Garcia*, 321 Ga. App. at 50, 741 S.E.2d at 287 (quoting O.C.G.A. § 34-9-24(d)).
16. *Id.* at 52-54, 741 S.E.2d at 288-89.
17. *Id.* at 54-55, 741 S.E.2d at 290-91; *see also* O.C.G.A. § 9-3-33 (2007).
18. 323 Ga. App. 523, 746 S.E.2d 779 (2013).

made more than eight years after the last payment of indemnity benefits.[19] The claimant sustained a compensable injury and received a total of thirty-two indemnity payments, of which twelve were made untimely, before returning to work.[20] When, eight years later, the claimant requested payment by the employer of the 15% late-payment penalty under O.C.G.A. § 34-9-221(e),[21] the employer refused and the claimant requested a hearing.[22] Following stipulated facts, the ALJ found that the claim for statutory penalties constituted a change in condition under O.C.G.A. § 34-9-104[23] because additional benefits were requested, and the claim was therefore barred under that statute's two-year limitation period. This decision was affirmed by the Appellate Division and the superior court.[24]

The court of appeals reversed and applied the general statute of limitations, O.C.G.A. § 34-9-82,[25] instead of the change of condition statute of limitations.[26] The court noted that O.C.G.A. § 34-9-104(a) defines the term "change in condition" to be "a change in the wage-earning capacity, physical condition, or status *of an employee*," and then stated that the claimant was not alleging physical or economic change–though curiously the court ignored O.C.G.A. § 34-9-104(a)'s third prong, "a change in . . . status."[27] Instead, the court held that the applicable statute of limitations was the one contained in O.C.G.A. § 34-9-82, and thus as long as the initial claim for benefits was filed in a timely fashion, a claimant is not time-barred from requesting "payment of compensation which accrued and is owed."[28] The court noted that "some may view [its holding] as absurd," and intimated that the legislature should fix what the court perceived as a statutory deficiency.[29] The Georgia Supreme Court granted certiorari and, in September 2014, reversed the court of appeals.[30]

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19. *Id.* at 523-24, 746 S.E.2d at 780-81.
20. *Id.* at 523-24, 746 S.E.2d at 780.
21. O.C.G.A. § 34-9-221(e) (2008).
22. *Reid*, 323 Ga. App. at 524, 746 S.E.2d at 780.
23. O.C.G.A. § 34-9-104 (2008).
24. *Reid*, 323 Ga. App. at 524, 746 S.E.2d at 780-81.
25. O.C.G.A. § 34-9-82 (2008).
26. *Reid*, 323 Ga. App. at 527, 746 S.E.2d at 782.
27. *Id.* at 526, 746 S.E.2d at 782 (quoting O.C.G.A. § 34-9-104(a)) (internal quotation marks omitted).
28. *Id.* at 528, 746 S.E.2d at 782-83.
29. *Id.* at 528, 746 S.E.2d at 783.
30. Metro Atlanta Rapid Transit Auth. v. Reid, No. S13G1812, 2014 Ga. LEXIS 709 (Sept. 22, 2014), *reconsideration denied*, No. S13G1812, 2014 Ga. LEXIS 851 (Oct. 20, 2014).

IV. EXCLUSIVE REMEDY PROVISION

For the third consecutive year, this survey addresses the *Pitts* matter.[31] During this survey period, in *Estate of Pitts v. City of Atlanta* (*Pitts III*),[32] the court of appeals revisited the case upon remand from the supreme court.[33] The *Pitts* matter arose when a construction worker was struck and killed by a vehicle driven by the employee of another subcontractor on the project. The decedent's estate recovered a judgment against the subcontractor who employed the vehicle's driver, 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 grounds that the companies breached contractual duties in their subcontracts that required each subcontractor to carry a minimum amount in automobile liability insurance.[34] On remand, following an extended analysis and construction of the Owner's Controlled Insurance Policy and relevant terms, the court of appeals again concluded that the deceased employee was a "participant" in the construction project intending to benefit from the coverages provided by the master insurance program set forth in the Owner's Controlled Insurance Policy.[35]

Turning to the question of whether the exclusive remedy provision barred the estate's claims, the court referred to and upheld its analysis from *Estate of Pitts v. City of Atlanta* (*Pitts I*),[36] wherein the court concluded that the exclusive remedy provision did not apply to bar the estate from bringing suit against the subcontractor responsible for the accident because that subcontractor was not an employee of the worker's employer nor a party to any contract under which it provided workers' compensation benefits to the worker, and because the injury for which the estate sought damages was not a physical injury but rather the loss of access to insurance coverage due to the alleged breach of contract.[37]

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31. *See generally* Bagley & Ward, *supra* note 1, at 321-22; H. Michael Bagley & J. Benson Ward, *Workers' Compensation, Annual Survey of Georgia Law*, 64 MERCER L. REV. 341, 345-46 (2012).

32. 323 Ga. App. 70, 746 S.E.2d 698 (2013).

33. *Id.* at 70, 746 S.E.2d at 699; *see also* Archer W. Contractors, Ltd. v. Estate of Pitts (*Pitts II*), 292 Ga. 219, 230, 735 S.E.2d 772, 781 (2012).

34. *Pitts III*, 323 Ga. App. at 70-71, 746 S.E.2d at 699.

35. *Id.* at 76-84, 746 S.E.2d at 702-08; *see also* Estate of Pitts v. City of Atlanta (*Pitts I*), 312 Ga. App. 599, 603-04, 719 S.E.2d 7, 12 (2011).

36. 312 Ga. App. 599, 719 S.E.2d 7 (2011).

37. *Pitts III*, 323 Ga. App. at 87, 746 S.E.2d at 710; *Pitts I*, 312 Ga. App. at 605-07, 719 S.E.2d at 13-14.

In *Dawson v. Wal-Mart Stores, Inc.*,[38] the court of appeals addressed whether the Workers' Compensation Act (the Act)[39] covered an employee who was kidnapped and physically and sexually assaulted while walking across the employer's parking lot to begin her shift.[40] The employee brought a personal injury suit against the employer that was dismissed on the employer's motion for summary judgment.[41] The court of appeals affirmed, concluding that the exclusive-remedy provision barred the civil suit.[42] The court observed that the issue regarding whether assaults are subject to the exclusive-remedy provision–specifically whether the assault arose out of the employment–is fact specific.[43] As a general rule, an assault will arise out of the employment—and thus fall within the Act—when the intentional injury was not directed against the employee for personal reasons.[44] The court dismissed as speculation the employee's contention that a question of fact existed regarding whether the attack was personal because she resembled the attacker's girlfriend.[45] Instead, the court concluded that the employee and her attacker were previously unknown to each other, the attack was random, and the employee was walking from the parking lot into the store to commence her shift.[46] Accordingly, the court upheld the application of the exclusive-remedy provision.[47]

V. STANDARD OF REVIEW

Royal v. Pulaski State Prison[48] is the latest example in the long-standing series of cases holding that the findings of the Board are binding when supported by any evidence.[49] The claimant suffered an injury to her lungs after inhaling chlorine bleach fumes. The employer accepted the claim on a medical-only basis and provided medical care, and the claimant returned to work after missing only five days. Roughly three weeks after returning to work, the claimant saw her family doctor and was diagnosed as having pneumonia. After hospitalization, the

38. 324 Ga. App. 604, 751 S.E.2d 426 (2013), *cert. denied.*
39. O.C.G.A. tit. 34 ch. 9 (2008 & Supp. 2014).
40. *Dawson*, 324 Ga. App. at 604, 751 S.E.2d at 427.
41. *Id.* at 606, 751 S.E.2d at 428.
42. *Id.* at 609, 751 S.E.2d at 431.
43. *See id.* at 607, 751 S.E.2d at 429.
44. *See id.* at 607-09, 751 S.E.2d at 429-30.
45. *Id.* at 609, 751 S.E.2d at 430.
46. *Id.* at 609, 751 S.E.2d at 430-31.
47. *Id.* at 609, 751 S.E.2d at 431.
48. 324 Ga. App. 275, 750 S.E.2d 179 (2013).
49. *Id.* at 276, 750 S.E.2d at 180; *see also* Ray Bell Constr. Co. v. King, 281 Ga. 853, 854, 642 S.E.2d 841, 843 (2007).

claimant was released to return to work with the restriction of avoiding strong chemical fumes. The employer did not accommodate this restriction, the claimant ceased working, and after almost twenty months of leave her employment was terminated. The claimant alleged she was entitled to temporary total-disability (TTD) benefits and medical care because her sensitivity to strong chemical fumes was caused by her on-the-job accident. The employer contended that the claimant had recovered from her exposure and returned to work, and any subsequent disability was unrelated. After reviewing extensive medical evidence, the ALJ found that the claimant had numerous long-standing ailments, that the claimant had misrepresented facts to medical providers, and that she had been released to return to work after the inhalation injury and did in fact return to work. The ALJ concluded that the claimant had not met her burden of proving she was disabled as a result of the inhalation injury. The Appellate Division and the superior court affirmed.[50] The court of appeals held that the record contained some evidence to support the ALJ's conclusions, and therefore, the Board's findings were conclusive and binding.[51]

VI. AVERAGE WEEKLY WAGE

In *Cho Carwash Property, LLC v. Everett*,[52] the parties disputed the calculation of a brand-new employee's average weekly wage. The claimant, who had only worked three days before his accident, contended that he was hired to work full time (at least forty hours per week) and that he worked a full day on the first day of his employment and reduced hours on the second day because business was slow due to rain. The employer contended that the claimant was hired to work part-time, was in training at the time of the accident, and would only have become a full-time employee after training was complete.[53] The ALJ determined that neither subsection (1) nor (2) of O.C.G.A. § 34-9-260[54] was applicable for determining the average weekly wage, and instead calculated the "full-time weekly wage" based on the employer's testimony regarding hours of business for a full-time employee.[55] The Appellate Division accepted the ALJ's findings, the superior court affirmed, and the court of appeals agreed, ruling that some evidence existed to support

50. *Royal*, 324 Ga. App. at 276-79, 750 S.E.2d at 180-82.
51. *Id.* at 280, 750 S.E.2d at 183.
52. 326 Ga. App. 6, 755 S.E.2d 823 (2014).
53. *Id.* at 7, 755 S.E.2d at 823-24.
54. O.C.G.A. § 34-9-260(1)-(2) (2008).
55. *Cho Carwash Prop., LLC*, 326 Ga. App. at 7, 755 S.E.2d at 824.

the ALJ's calculation of average weekly wage, and therefore, the Board's findings must be upheld.[56]

VII. NOTICE

In *McAdoo v. Metropolitan Atlanta Rapid Transit Authority*,[57] the claimant, a bus driver for twenty-two years, began to experience pain in his lower back and right leg in May 2010 and sought treatment with his primary-care physician, who also treated him for diabetes. The claimant continued to work and began to drive by shifting his weight and using his left foot to operate the brakes until his supervisor told him that it was unsafe to switch feet and that he needed to "get [himself] taken care of." He eventually ceased working because of the pain on October 17, 2010, though it was not until April 18, 2011 that a doctor opined that the lower-back and right-leg pain were work-related. Following a hearing on the claimant's request for income and medical benefits, the ALJ found that the claimant sustained a gradual-onset spine injury because of his driving. The Appellate Division agreed and concentrated on the issue of notice, finding that notice was shown in the employer's instructions to the claimant to avoid driving with his left leg and to "get [himself] taken care of." Alternatively, the Appellate Division also concluded that the employer was not prejudiced even if notice was insufficient in October 2010.[58]

The superior court agreed that the date of injury was the last date worked and the injury arose out of the employment, but found that the claimant left work because of his diabetes. Further, the court found that any notice to the employer only pertained to the diabetes, and thus concluded that notice was insufficient and reversed.[59] The court of appeals disagreed, observing that notice must be construed liberally and noting that the Board found that either the claimant provided timely notice or had a reasonable excuse for not doing so, and thus the employer was not prejudiced.[60] Because some evidence existed to support the Board's conclusion, the superior court erred in reversing the Board's award based on failure to provide timely notice.[61] With respect to the employer's appeal on the issue of whether the injury arose out of the employment, the court similarly held that some evidence existed in

56. *Id.* at 8, 755 S.E.2d at 825.
57. 326 Ga. App. 788, 755 S.E.2d 278 (2014).
58. *Id.* at 788-90, 755 S.E.2d at 280-81.
59. *Id.* at 790, 755 S.E.2d at 281.
60. *Id.* at 791-92, 755 S.E.2d at 281-82.
61. *Id.* at 792, 755 S.E.2d at 282.

the record to support the Board's finding that the injury was job-related.[62]

VIII. CONVERSION FROM TTD TO TPD

In *Metropolitan Atlanta Rapid Transit Authority v. Thompson*,[63] the court of appeals considered whether an employer may include the time period during which a claimant performs light-duty work when determining whether the fifty-two-week period of O.C.G.A. § 34-9-104(a)(2) has been reached.[64] The claimant sustained a compensable injury and received benefits. When she was released to return to light-duty work, the employer served a Form WC-104, advising the claimant that her TTD benefits would be converted from TTD to TPD after fifty-two consecutive weeks at light-duty status. Shortly after the WC-104 was served, the claimant returned to work in the employer's transitional light-duty program, and the employer suspended TTD benefits. The employer withdrew the light-duty job after one year. As the claimant was unable to return to regular-duty work, she ceased working and the employer recommenced TTD benefits. Several months later, the employer filed a WC-2 suspending TTD benefits and commencing TPD benefits, pursuant to the WC-104.[65]

The claimant requested reinstatement of TTD benefits, to which the employer contended that under O.C.G.A. § 34-9-104(a)(2) it was permitted to unilaterally convert from TTD to TPD benefits because the claimant was not working and had remained at light-duty work status for fifty-two consecutive weeks. The ALJ found that the employer was not allowed to consider the period the claimant actually worked in determining when the fifty-two consecutive light-duty weeks had been reached, and the Appellate Division and superior court affirmed.[66] The court of appeals agreed that an employer cannot include the period of time an employee works when calculating the fifty-two-week period under O.C.G.A. § 34-9-104(a)(2).[67] In support of this conclusion, the court stated that the purpose of the statute—to give employees an incentive to return to work—is not met when an employer reduces the benefits of an employee who, through no fault of her own, is unable to return to work because the employer no longer made light-duty work

62. *Id.* at 793, 755 S.E.2d at 283.
63. 326 Ga. App. 631, 757 S.E.2d 228 (2014), *cert. granted.*
64. *Id.* at 631, 757 S.E.2d at 229-30; *see also* O.C.G.A. § 34–9-104(a)(2).
65. *Thompson*, 326 Ga. App. at 632, 757 S.E.2d at 230.
66. *Id.*
67. *Id.* at 634, 757 S.E.2d at 231.

available.[68] The court also affirmed the ALJ's award of attorney fees because evidence supported the ALJ's finding that the employer acted without reasonable grounds in its unilateral conversion from TTD to TPD.[69]

IX. BOARD RULE 240: RETURN TO WORK

In *Technical College System of Georgia v. McGruder*,[70] the court of appeals examined the effect of an employer's refusal to immediately recommence benefits, pursuant to Rule 240 of the State Board of Workers' Compensation,[71] after a failed light-duty job attempt.[72] The claimant sustained a compensable back injury while working as a custodian and received TTD benefits until she returned to work in a light-duty job as a phone operator, pursuant to a light-duty job offer made by the employer under O.C.G.A. § 34-9-240.[73] The claimant ceased working after nine days and returned on the tenth day with a letter from her primary-care physician stating that in addition to her work injury the claimant had other serious medical problems and "was unable to work in any job in any capacity."[74] The employer did not recommence benefits, and the claimant requested a hearing, seeking TTD benefits for the time since she left the light-duty job.[75]

After the hearing, the ALJ denied the request for benefits, finding that the light-duty work was within restrictions, and the claimant ceased working for reasons unrelated to the on-the-job injury. The ALJ also determined that Board Rule 240(c)(i),[76] which provides that an employer who does not immediately recommence benefits after a failed WC-240 job attempt has waived its defense of suitability of employment, exceeded the Board's rule-making authority and was invalid. On appeal, the Board vacated the ALJ's award and remanded. On remand, the ALJ found that the claimant had stopped working due to medical reasons unrelated to her work injury, but that the employer waived its defense of suitability of employment when it failed to reinstate benefits. The

68. *Id.* at 634-35, 757 S.E.2d at 232.
69. *Id.* at 636, 757 S.E.2d at 233.
70. 326 Ga. App. 469, 756 S.E.2d 702 (2014).
71. O.C.G.A. § 34 app. r. 240 (2008 & Supp. 2014).
72. *McGruder*, 326 Ga. App. at 469-70, 756 S.E.2d at 703.
73. *Id.* at 469, 756 S.E.2d at 703; *see also* O.C.G.A. § 34-9-240 (2008 & Supp. 2014).
74. *McGruder*, 326 Ga. App. at 469, 756 S.E.2d at 703.
75. *Id.*
76. O.C.G.A. § 34 app. r. 240(c)(i).

Appellate Division and the superior court both affirmed the ALJ's decision.[77]

On appeal, the court of appeals agreed that the claimant attempted the light-duty job for more than a week but less than fifteen days, and thus O.C.G.A. § 34-9-240(b)(1) expressly required the employer to reinstate benefits.[78] The employer's failure to do so resulted in a waiver of its defense of suitable employment.[79] The court also held that Rule 240 does not exceed the Board's rule-making authority.[80] Rule 240 only applies to an employer's position regarding "its obligation to reinstate TTD benefits for a compensable injury *it was already required to pay*."[81] The proper approach is for the employer to immediately reinstate benefits and seek a hearing to recover reimbursement of such benefits.[82]

X. ATTORNEY FEES

The court of appeals dealt with several attorney fee issues during the survey period. In *Cho v. Mountain Sweet Water, Inc.*,[83] the claimant sustained an injury and filed a hearing request seeking indemnity benefits, penalties under O.C.G.A. § 34-9-221(e),[84] attorney fees under O.C.G.A. § 34-9-108(b)(1) and (2),[85] and "other . . . additional penalties and attorney fees."[86] Accordingly, the Board issued a hearing notice which stated that "the issues to be determined included those listed on the claim notice as well as penalties pursuant to OCGA § 34-9-126."[87] The Board also issued an order requiring the employer to submit evidence of its compliance with O.C.G.A. § 34-9-120,[88] which requires employers to procure workers' compensation insurance.[89]

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77. *McGruder*, 326 Ga. App. at 470, 756 S.E.2d at 703-04.
78. *Id.* at 471, 756 S.E.2d at 704.
79. *Id.*
80. *Id.*
81. *Id.* at 472, 756 S.E.2d at 705.
82. *See id.*
83. 322 Ga. App. 400, 745 S.E.2d 663 (2013).
84. O.C.G.A. § 34-9-221(e) (2008 & Supp. 2014).
85. O.C.G.A. § 34-9-108(b)(1)-(2) (2008 & Supp. 2014).
86. *Mountain Sweet Water, Inc.*, 322 Ga. App. at 400, 745 S.E.2d at 664 (alteration in original).
87. *Id.*; *see also* O.C.G.A. § 34-9-126 (2008).
88. O.C.G.A. § 39-9-120 (2008).
89. *Mountain Sweet Water, Inc.*, 322 Ga. App. at 400, 745 S.E.2d at 664-65; *see also* O.C.G.A. § 34-9-120 ("Every employer subject to the compensation provisions of this chapter shall insure the payment of compensation to his employees . . . .").

At the hearing, the claimant argued he was entitled to attorney fees due to the employer's bad faith in refusing the claim and denying his employee status, but apparently did not argue entitlement to attorney fees because of the employer's lack of insurance. The ALJ did not award attorney fees, finding that the employer's defense of the claim was not unreasonable under O.C.G.A. § 34-9-108(b)(1), and did not address the availability of attorney fees under another section of the Act. The claimant requested an amended award to address attorney fees under O.C.G.A. § 34-9-126(b), but the ALJ found that the claimant had not raised the issue at the hearing and therefore waived any claims for attorney fees. The Appellate Division and the superior court both affirmed the ALJ's ruling.[90] The court of appeals upheld the ALJ's ruling under O.C.G.A. § 34-9-108(b)(1) but held that the claimant did not waive his claims for attorney fees and remanded to the ALJ for consideration of the attorney fee claims under O.C.G.A. §§ 34-9-108(b)(2) and 34-9-126(b).[91] In so holding, the court noted that the claimant's hearing request "stated each of the three grounds for a fee award," the ALJ award initially noted the claimant sought an award under O.C.G.A. § 34-9-126(b), "the Board's show cause order listed compliance with OCGA § 34-9-126 as an issue to be determined, and [the claimant's] attorney presented argument seeking attorney fees at the hearing."[92]

In *Heritage Healthcare of Toccoa v. Ayers*,[93] the employer fired the claimant the day after she reported an injury, refused payment but did not controvert the claim, eventually accepted the claim by paying accrued TTD and commencing weekly benefits, and paid the 15% late-payment penalty two days before the hearing. Consequently, the only issue before the ALJ was whether to assess attorney fees. The ALJ rejected the request for fees, but the Appellate Division found that the claimant's attorney was entitled to attorney fees under O.C.G.A. § 34-9-108(b)(1) and (2), and expenses under (b)(4),[94] and assessed attorney fees in a lump-sum amount based on the amount of TTD benefits from the date of the accident through the hearing date. On claimant's appeal, the superior court ruled that claimant's counsel was also entitled to add-on attorney fees of 25% of all future benefits and up to 25% of the late-payment penalty amount.[95] The court of appeals concluded that because the Board found that the employer's defense lacked reasonable

90. *Mountain Sweet Water, Inc.*, 322 Ga. App. at 400-01, 745 S.E.2d at 665.
91. *Id.* at 402-03, 745 S.E.2d at 666.
92. *Id.*
93. 323 Ga. App. 172, 746 S.E.2d 744 (2013).
94. O.C.G.A. § 34-9-108(b)(4) (2008 & Supp. 2014).
95. *See Ayers*, 323 Ga. App. at 172-76, 746 S.E.2d at 745-47.

grounds, O.C.G.A. § 34-9-108(b)(1) authorized assessed attorney fees up to 25% of weekly benefits, and the attorney fee of 25% provided for in the attorney-fee contract was a reasonable fee.[96] The court held that, in light of the Board's findings, the Board should have ordered the employer to pay add-on penalties of 25% on all future TTD payments as a reasonable quantum meruit fee.[97] The court also held that the attorney fee amount should have included 25% of the late-payment penalty paid to the claimant two days before the hearing because penalties under O.C.G.A. § 34-9-221 are part of the compensation.[98] The dissent argued that the Appellate Division properly determined the reasonable amount of the attorney's quantum meruit fee based upon the evidence before it, and the superior court erred in substituting its findings for those of the Appellate Division.[99]

96. *Id.* at 175-76, 746 S.E.2d at 747.

97. See *id.* at 177, 746 S.E.2d at 747-48. The dissent notes that the Appellate Division "determined that the claimant's attorney was entitled to 'quantum meruit' fees of 25 percent" of TTD benefits. *Id.* at 178, 746 S.E.2d 748 (Branch, J., dissenting).

98. *Id.* at 176-77, 746 S.E.2d at 747 (majority opinion).

99. *Id.* at 178, 746 S.E.2d at 748 (Branch, J., dissenting).

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