Mercer Law Review

Volume 32
Number 1 *Annual Survey of Georgia Law*

Article 16

12-1980

Workers' Compensation

Robert R. Potter

Workers' Compensation

By Robert R. Potter*

This survey article covers a two-year period ending May 31, 1980. During that time, the appellate courts reviewed over 150 cases involving workers' compensation, a selected number of which are discussed and analyzed in this article. Legislative changes have been few since the sweeping revisions which became effective July 1, 1978. The most significant revision was a procedural one limiting appeals in workers' compensation cases beyond the superior court level.[1] Appeals to the court of appeals are no longer as a matter of right, but are discretionary in the nature of a petition for certiorari. This law, which became effective July 1, 1979, has drastically reduced the number of opinions from the court of appeals, the unfortunate by-product of which is less uniform interpretation of the workers' compensation laws. Other legislative changes will be discussed along with the cases reviewed below.

I. Employer-Employee Relationship

The issues in the following cases include whether a claimant is an employee or an independent contractor, whether an employer is estopped to deny employment, and whether a particular employer is subject to the workers' compensation laws.

A. Employee or Independent Contractor

In *Worrell v. Yellow Cab Co.*,[2] a taxi cab driver was injured while responding to a call from the company dispatcher. The company contended that the driver was an independent contractor ineligible for workers' compensation benefits because she leased the vehicle from the company, and

* Associate with Swift, Currie, McGhee & Hiers, Atlanta. Mercer University (A.B., 1970; J.D. 1977). Member of State Bar of Georgia. Contributing Author, Georgia Lawyers Basic Practice Handbook (2d ed. 1979).

1. Ga. Code Ann. § 6-701.1 (1979).

2. 146 Ga. App. 748, 247 S.E.2d 569 (1978). *See also*, University Cab, Inc. v. Fagan, 150 Ga. App. 404, 258 S.E.2d 21 (1979).

was therefore not an employee. The court relied upon an Atlanta ordinance[3] designed, in part, to preclude licensed taxi cab companies from escaping liability in workers' compensation cases by allowing independent contractors to operate such vehicles. The ordinance was the key to the decision, and similar situations not involving a like ordinance would probably reach the opposite result.

The employee-independent contractor issue frequently arises in cases involving the trucking industry. In *Ratliff v. Liberty Mutual Insurance Co.*,[4] the court utilized several rules of construction to lay the groundwork for awarding compensation which had been denied below. The claimant had been an employee driver for Builders Transport for five years, and was paid on a mileage basis. Builders Transport also utilized a number of tractors leased by owner-operators who were denominated contractors and who were paid seventy percent of the revenue generated by their activities. In April, 1976, the claimant supplied a tractor (owned by his brother and sister-in-law) and continued to drive for Builders Transport, but under the seventy percent pay arrangement. The claimant was then injured.

The court seized upon a clause in the form contract and interpreted that clause to mean that the contractor may be an employee of the lessor for workers' compensation purposes. It relied as well upon a supplemental agreement which allowed the contractor's employees to be covered under Builders Transport's master policy, rather than separately covered by workers' compensation insurance furnished by the contractor. It is crucial in these cases to examine thoroughly any written or oral agreement between the lessor and lessee, as well as to examine any course of conduct outside of such agreements.

The supreme court reviewed two trucking cases ostensibly to examine the "statutory employer" provision in Georgia Code Ann. section 114-112. In *Holt v. Travelers Insurance Co.*,[5] the writ of certiorari was dismissed in a four to three vote without written explanation. The case is mentioned here because of the split vote, and the extensive discussion of statutory employer in Justice Hill's dissenting opinion.

In *Farmer v. Ryder Truck Lines*,[6] the supreme court again discarded the statutory employer provision of section 114-112, after noting that the applicability of that provision was one of the concerns in granting certiorari "in light of *Holt*."[7] However, unlike *Holt*, the court did not stop there. Justice Hill wrote the opinion which found Ryder to be a statutory

3. ATLANTA, GA., CODE §§ 34 to 39 (1965).
4. 149 Ga. App. 211, 253 S.E.2d 799 (1979).
5. 244 Ga. 857, 262 S.E.2d 139 (1979).
6. 245 Ga. 734, 266 S.E.2d 922 (1980).
7. *Id.* at 736, 266 S.E.2d at 924.

employer on other grounds. The claimant drove a truck for Dan Martin, who leased four trucks, including this one, to Hames Trucking Company. Martin, who had no workers' compensation insurance, received a percentage of shipping charges on all outbound loads from Hames. He was entitled to all revenues from return loads. Upon delivering a load from Hames to Chicago, the claimant went to Ryder Truck Lines, a regulated carrier in Chicago, and obtained a return load to Georgia. The claimant signed a one-way trip lease on behalf of Martin and was injured enroute from Chicago to Georgia.

The full board found that no employer-employee relationship existed between the claimant and either Hames or Ryder. The court of appeals agreed.[8] The court examined the "control" provisions of the truck lease and found them to be mandated by Congress, and not intended to affect the "ministerial" aspects of the relationship between the lessor and the driver, or to make the driver an employee of the regulated carriers. It then held that the nature of the relationship between the claimant and Ryder was not an employee-employer relationship.

The supreme court accepted those arguments rejected by the court of appeals.[9] While it discussed other aspects of control between Ryder and the claimant, it found the ICC mandated language included within the trip lease to be controlling. This language gave the lessor such a "right of control" as to establish a statutory employer status. In so holding, the court has allowed language mandated by Congress to establish a relationship not intended by either party. While the court paid lip service to the traditional elements of the established test, an objective application of that test to the facts would result in a finding of no employer-employee relationship.

B. Estoppel to Deny Employment Relationship

In *Hartford Insurance Group v. Voyles*[10] and *Gulf American Fire & Casualty Co. v. Taylor*,[11] the court applied the equitable principle of estoppel. In neither case did the court actually utilize the estoppel doctrine in Georgia Code Ann. section 114-607.

In *Voyles*, the claimant and Stone installed cornice and siding for Redding on a running foot and square foot pay basis. The two workers were not included on Redding's payroll, social security and income taxes were not deducted from their pay, and there was no evidence that Redding exercised any control over the cornice and siding work. However, Voyles

8. Farmer v. Employers Ins. of Wausau, 152 Ga. App. 608, 264 S.E.2d 26 (1979).
9. 245 Ga. at 741, 266 S.E.2d at 926.
10. 149 Ga. App. 517, 254 S.E.2d 867 (1979).
11. 150 Ga. App. 179, 257 S.E.2d 44 (1979).

and Stone had worked exclusively for Redding for three years and deductions had been made from their pay for workers' compensation purposes even though those deductions were never actually paid to Redding's workers' compensation carrier. The majority opinion stated that it was implicit in the circumstances that Voyles relied upon the declaration that he was covered by workers' compensation insurance and that Redding was therefore estopped to disavow this declaration. The court relied on Georgia Code Ann. section 114-607 in holding the insurer liable for all of the employer's exposure under the workers' compensation law, notwithstanding the fact that no premiums were ever received for Voyles. The dissenters argued the inapplicability of Georgia Code Ann. section 114-607, and argued further that even if funds were remitted to the insurer, then coverage would have been for employees of the subcontractors Voyles and Stone, and not for themselves as individuals.[12]

In *Taylor,* deductions were also made from the claimant's pay for workers' compensation premiums, and those deductions were actually paid to the insurer. The claimant was specifically told that the deductions were to provide him with workers' compensation coverage. Here the court stated it was not relying upon Georgia Code Ann. section 114-607, but rather upon the equitable principle of estoppel "that where a party by his declaration leads another to act or fail to act in a reliance upon those declarations he may not later disavow them."[13]

C. When Is Employer Subject to the Act?

In the trial of most workers' compensation cases, it is routinely stipulated that the employer is subject to the Act. This includes an admission that the employer has three or more employees "regularly in service . . . in the same business within this State."[14] Two cases turned upon the claimant's burden to prove this element of this case when not routinely stipulated.

In *Goolsby v. Wilson,*[15] a Tennessee company, Hiawassee, purchased some beer from Pabst in Perry, Georgia. Hiawassee contracted with Henry to transport the beer, and Henry hired Wilson, for whom the claimant's deceased worked. The claimant's deceased was killed in route to Tennessee in the performance of a trip lease between Wilson and Henry. The board denied the claim on the basis of the claimant's failure to prove Wilson and Henry had three employees within Georgia, thereby being subject to the worker's compensation laws. This was essentially an

12. 149 Ga. App. at 521-24, 254 S.E.2d at 869-71.
13. 150 Ga. App. at 181, 257 S.E.2d at 869.
14. GA. CODE ANN. § 114-107 (1975).
15. 150 Ga. App. 611, 258 S.E.2d 216 (1979).

"any evidence" case at the appellate level; it is included here to emphasize the necessity of proving this element of a claimant's case when dealing with small or out-of-state employers.

In *Denis Aerial Ag-Plicators v. Swift*,[16] the court addressed the issue of whether or not a sole stockholder or a major stockholder is to be counted or excluded as an employee in order to determine eligibility under the Act pursuant to Georgia Code Ann. section 114-107. The court rejected use of the dual capacity doctrine which provides that certain corporate executives are employees while performing some jobs, and are not employees while performing others. It stated that the entrepreneur who starts his own business and incorporates it, but continues to do some labor, generally *is* the corporation. The court held that under the workers' compensation laws, such a person who directs policy and manages the affairs of the corporation, although he also labors for it, is not an employee. Where there is such an identity between the alleged employee and the corporation that it deprives the corporation of the power to control the relationship of the employer and employee, then the alleged employee cannot be counted as an employee under section 114-107.

II. Arising Out Of and In The Course of Employment

The crux of many worker's compensation cases is whether or not the accident occurred in the course of employment and arose out of that employment. Several cases decided during the survey period provide guidance on this issue.

A. Going to and from Work

While the general rule is that injuries sustained by an employee while going to and returning from work are not compensable,[17] there are numerous exceptions. In appellate cases in the survey, three claimants were denied compensation under the general rule and one successfully invoked an exception.

In *Federal Insurance Co. v. Horner*,[18] the court applied the general rule even though claimant Horner was given gasoline for his own vehicle to go to various places of business. He was injured enroute from his home to the office on a direct trip during which no such errand was contemplated or performed. In *Batten v. Commercial Union Insurance Co.*,[19] the claimant was also merely commuting from home to work, and it was of no im-

16. 154 Ga. App. 742, _ S.E.2d _ (1980).
17. Corbin v. Liberty Mut. Ins. Co., 117 Ga. App. 823, 162 S.E.2d 226 (1968).
18. 148 Ga. App. 15, 251 S.E.2d 26 (1978).
19. 147 Ga. App. 339, 248 S.E.2d 682 (1978).

portance that he was told to report to work two hours early for tasks different from his usual duties. These tasks did not begin until he arrived on the employer's premises, and he was not on call. The claimant in *Travelers Insurance Co. v. Purcell*[20] was killed on her way home from her job as a teacher. Even though she sometimes used her car to visit parents and to take children home, for which she was reimbursed by her employer, she was held to be within the general rule.

However, in *West Point Pepperell, Inc. v. McEntire*,[21] the claimant utilized the reasonable ingress and egress exception to avoid the general rule. While proceeding across a street from the company premises to a company owned and controlled parking lot, an employee is allowed a reasonable time for egress during which she remains in the course of her employment.[22]

B. After Work Activities

In two cases, injuries during softball games were held to be non-compensable as being outside the course of employment. In *Crowe v. Home Indemnity Co.*,[23] the claimant was injured during softball practice with a number of other employees. The practice was not on employer premises and occurred after working hours. The members of the softball team wore uniforms with the initials GSF representing the employer, Golden State Foods, but members paid for their own uniforms, and the employer actually received no benefits from the softball team. Compensation was denied and the court of appeals affirmed. The court adopted as a basis for determination in such cases the following test, any element of which, if present, would be a sufficient basis to award compensation:

> Recreational or social activities are within the course of employment when (1) they occur on the premises during a lunch or recreation period as a regular incident of the employement; or (2) the employer, by expressly or impliedly requring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) the employer derives substantial direct benefits from the activities beyond the intangible values of improvement in employee health and morale that is common in all kinds of recreation and social life.[24]

---

20. 152 Ga App. 279, 262 S.E.2d 566 (1979).

21. 150 Ga. App. 728, 258 S.E.2d 530 (1979).

22. *McEntire* was distinguished from Liberty Mut. Ins. Co. v. Bray, 136 Ga. App. 587, 222 S.E.2d 70 (1975), in which compensation was denied on the basis that claimant Bray was "jaywalking" at the time of the injury, thereby violating a penal statute.

23. 145 Ga. App. 873, 245 S.E.2d 75 (1978).

24. *Id.* at 873, 245 S.E.2d at 76, *quoting* A. LARSON, WORKMAN'S COMPENSATION LAW § 22 (1979 Rev.).

In *City Council of Augusta v. Nevils*,[25] decided eleven months after *Crowe*, the court of appeals, by a panel on which none of the judges who decided *Crowe* sat, amazingly stated: "There are no Georgia authorities which directly treat the issue of whether an employee's injury suffered while participating on a company-related athletic team is work-connected so as to be compensable."[26] This subsequent panel went on to cite a list of four variables "useful" in determining compensability.[27]

C. *Positional Risk*

In *National Fire Insurance Co. v. Edwards*,[28] the court adopted the positional risk theory which states that for an injury to be compensable, it is only necessary for the claimant 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 irrespective of his employment. This claimant was injured when a portion of the building in which he was working collapsed because of a windstorm or tornado. An award of compensation was affirmed.

D. *Presumption That Death Arose out of Employment*

In *Odom v. Transamerica Insurance Co.*,[29] presiding Judge Quillian wrote in a straightforward manner: "This court has completely confused this issue [of the applicability of the presumption of death arising out of employment]."[30] The issue is now clarified. The presumption itself is as follows: when an employee is found dead in a place where he might reasonably be expected to be in the performance of his duties, it is presumed that the death arose out of his employment. The presumption is to be applied, however, *only* when the death is unexplained. In this case, the death was explained via the death certificate, and the presumption did not arise.

---

25. 149 Ga. App. 688, 255 S.E.2d 140 (1979). Both *Crowe* and *Navils* rely upon Larson, though the two panels cite different sections of the same treatise. The sounder test is the more definite one cited in *Crowe*.

26. *Id.*

27. *Id.* The four variables listed by the court—

(1) Did the accident occur on or off the employer's premises and was it suffered in or out of working hours, (2) to what extent was the team organized on the employer's initiative, (3) what, if any was the amount of the employer's contribution, in money or equipment, to the team, and (4) did the employer derive any benefit from the employee's participation on the team? — were taken from 1A LARSON, *supra* § 22.24 (1979 Rev).

28. 152 Ga. App. 566, 263 S.E.2d 455 (1979).

29. 148 Ga. App. 156, 251 S.E.2d 48 (1978).

30. *Id.*

E. Continuous Employment

The term "continuous employment" most often arises in traveling employee cases. In *United States Fidelity & Guaranty Co. v. Navarre*,[31] the board denied compensation on the basis that the employee was not paid *per diem* or allowed an expense account for being away from home, and that the employee was free to leave the job site or return home as desired. The court of appeals affirmed the superior court which had reversed and remanded the case. The proper test is whether an employee while working away from his home is required by his employment to lodge and work within an area geographically limited by the necessity of being available for work on the employer's job site. If so, the employee remains in continuous employment.

In *Barge v. City of College Park*,[32] a five-to-four decision, the term was applied to avoid the going and coming rule. Officer Barge was killed on his way to work in an apparent ambush. The court applied the rule of continuous employment and stated that the officer was "no less an employee than a bus driver, traveling salesman, or a member of a construction crew working various and sundry hours away from home."[33]

F. Heart Attacks and Heart Disease

The most important heart attack case of the survey period is *Guye v. Home Indemnity Co.*,[34] in which the supreme court clarified the evidentiary standard in such cases. The court held that the "natural inference from human experience"[35] constitutes sufficient evidence as to causation to satisfy the preponderance of the evidence requirement of Georgia Code Ann. section 114-102, where there is no medical evidence to the contrary. The court did not reach the question of whether the natural inference can prevail even against uncontradicted medical opinion of no causation, nor has any later case reached this issue.

However, in *Thomas v. United States Casualty Co.*,[36] the court made essentially that holding shortly before passage of the 1963 amendment to Georgia Code Ann. section 114-102. Because the amendment followed the

---

31. 147 Ga. App. 302, 248 S.E.2d 562 (1978).

32. 148 Ga. App. 480, 251 S.E.2d 580 (1978).

33. *Id.* at 482, 251 S.E.2d at 582.

34. 241 Ga. 213, 244 S.E.2d 864 (1978). *See also* State v. Kirby, 150 Ga. App. 595, 258 S.E.2d 277 (1979).

35. 241 Ga. at 217, 244 S.E.2d at 867.

36. 218 Ga. 493, 128 S.E.2d 749 (1962). The court of appeals in Home Indem. Co. v. Guye, 143 Ga. App. 494, 238 S.E.2d 549 (1977) found that there was no allowable inference under the 1963 amendment and that there was otherwise insufficient eviden e regarding causation.

evidentiary language of its predecessor, it is likely that the appellate courts will eventually reaffirm *Thomas* and allow the inference to prevail against uncontradicted medical evidence to the contrary. The apparent special statutory burden on the claimant in heart attack cases is therefore of no real substance.

G. Wilful Misconduct

Four cases in the survey period dealt with the specific elements of the wilful misconduct defense. The burden in asserting such a defense is upon the employer, who must prove not only misconduct, but that such misconduct was "wilfull". The court held in *Travelers Insurance Co. v. Gaither*,[37] that a violation of a "penal statute" is not per se wilful misconduct. Often, this defense is asserted in cases involving injuries from traffic accidents where the claimant violates a traffic statute by speeding, running a red light, or, as in this case failing to stop at a railroad crossing when an approaching train is visible and hazardously close. Such a violation is not enough to carry the burden without some showing of "wilfulness".

Another essential, and often overlooked, element of this defense is that the wilful misconduct must be the proximate cause of the claimant's injuries. Proof of drinking on the job or drunkenness on the job is not enough. In *Bloodworth v. Continental Insurance Co.*,[38] the court reversed and remanded a denial of compensation based on the board's failure to make a determination as to whether or not the intoxication of the claimant was the proximate cause of the injury.

In *Reynolds v. Georgia Insurance Co.*,[39] the board had found that the employee's wilful misconduct due to his intoxication was the proximate cause of his death. The claimant asserted that the employee was an alchoholic, that that fact was known to the employer, and that the employer had therefore waived this defense. The court discarded the claimant's public policy argument and held that the provisions of Georgia Code Ann. section 114-105 are not waivable.

III. Statute of Limitations

In *James v. Brown Transport Corp.*,[40] there was a finding of fact that the payment of hospital bills, the promises of further hospitalization, and the receipt of a check marked as workers' compensation caused the claim-

37. 148 Ga. App. 251, 251 S.E.2d 66 (1978).
38. 151 Ga. App. 576, 260 S.E.2d 536 (1979).
39. 149 Ga. App. 162, 253 S.E.2d 839 (1979).
40. 148 Ga. App. 32, 251 S.E.2d 42 (1978).

ant not to file his claim within the statutory period. The full board denied compensation based on existing law. The court of appeals reversed and held that proof of actual fraud is not essential to toll the one year statute of limitation. It failed to distinguish or overrule the previous authority, but simply held that such actions by the employer, whether intentional or not, were enough to toll the statute.

On certiorari, the supreme court affirmed and clarified the confusion by specifically disapproving five cases and approving two others.[41] It held that where an employee relies on statements of his employer or the insurance carrier "that he will be taken care of, that all is well and he needn't worry,"[42] such conduct on the part of the employer or insurance carrier estops them from asserting the statute of limitation as a bar.

IV. Change in Condition—Burden and Standard of Proof

A. *Burden of Proof*

Since the implementation of the 1978 direct payment system, the procedural mechanics of a change in condition case have shifted with board policy. Previously, the employer and insurance carrier could not unilaterally suspend benefits, but rather were required to file for a hearing and await adjudication. Now, if the employer and insurance carrier contend that a change in condition has occurred, they unilaterally suspend benefits, and if the employee disagrees, it is his responsibility to request a hearing. Likewise, it is the employee's responsibility to request a hearing if he has actually returned to work and later becomes disabled again, and the employer and insurance carrier do not voluntarily reinstitute benefits.

It is the policy of the board that if the employee has actually returned to work after having received compensation, and then alleges further inability to work, then the burden of proof is upon the employee. If, however, the employer and insurance carrier suspend benefits based upon the employee's alleged ability to return to work, then the burden is upon the

---

41. Brown Transp. Corp. v. James, 243 Ga. 701, 257 S.E.2d 242 (1979). The supreme court disapproved: Day v. Bituminous Cas. Corp., 141 Ga. App. 555, 234 S.E.2d 142 (1977); Hartford Accident & Indem. Co. v. Snyder, 126 Ga. App. 31, 189 S.E.2d 919 (1972); United States Cas. Co. v. Owens, 109 Ga. App. 834, 137 S.E.2d 543 (1964); Indemnity Ins. Co. v. O'Neal, 104 Ga. App. 305, 121 S.E.2d 689 (1961); and Welchel v. American Mut. Liab. Ins. Co., 54 Ga. App. 511, 188 S.E.2d 357 (1936). The court approved: Employer's Ins. v. Nolen, 137 Ga. App. 205, 223 S.E.2d 250 (1976) and Cotton States Ins. Co. v. Stoddard, 126 Ga. App. 217, 190 S.E.2d 549 (1972). *See also,* Perkins v. Aetna Cas. & Sur. Co., 147 Ga. App. 662, 249 S.E.2d 661 (1978) and Patton v. Refrigerated Transp. Co., 149 Ga. App. 302, 254 S.E.2d 391 (1979), in which the court held that the employers were estopped from relying on the statute of limitations.

42. 243 Ga. at 702, 257 S.E.2d at 243.

employer and insurance carrier to justify their suspension of benefits.

B. Standard of Proof for an Employee

At the beginning of the survey period, the change in condition standard of proof for an employee required him to show: (1) that his condition had changed for the worse; (2) that because of the change he was unable to continue to work; (3) that because of his inability to work, he had either a total or partial loss of income; and (4) that the inability to work was proximately caused by the previous accidental injury.[43]

The standard was reviewed by the supreme court in *Hartford Accident & Indemnity Co. v. Bristol.*[44] The claimant was injured while performing his regular strenuous duties. He returned to work performing lighter truck driving duties until he was terminated because his employer could no longer provide a truck for him to drive. The court of appeals held that when a claimant, following an injury, returns to light work in accordance with doctor's orders and is ultimately discharged because the employer could no longer provide him with work which he was physically capable of performing, then he is entitled to compensation because of an economic change of condition.[45] The supreme court affirmed, stating that the employee was required under Georgia Code Ann. section 114-709 to show that his inability to secure suitable employment elsewhere was proximately caused by his previous accidental injury. The employee is not required to show that his medical or physical condition has changed for the worse. Cases holding to the contrary were specifically disapproved to that extent.[46]

In *Continental Insurance Co. v. Lamar,*[47] there was evidence that the claimant had voluntarily quit her job. The court held that this would not bar her entitlement to compensation. The relevant issue was simply whether the claimant was still disabled as a result of the injury on the job.

In *F. & G. Insurance Underwriters, Inc. v. Raines,*[48] the court held that a claimant who is only partially disabled, but who was terminated for reasons unrelated to his employment, is thereafter entitled to compensation for total disability. Further, the claimant's testimony that he would still be working if he had not been fired is some evidence of his ability to

43. Brown v. Gulf Ins. Co., 141 Ga. App. 819, 234 S.E.2d 552 (1977).

44. 242 Ga. 287, 248 S.E.2d 661 (1978).

45. Hartford Accident & Indem. Co. v. Bristol, 145 Ga. App. 796, 245 S.E.2d 7 (1978).

46. Those cases disapproved include Miller v. Argonaut Ins. Co., 136 Ga. App. 101, 220 S.E.2d 89 (1975), Roland v. Cotton States Mut. Ins. Co., 133 Ga. App. 442, 211 S.E.2d 395 (1974), and Brown v. Gulf Ins. Co., 141 Ga. App. 819, 234 S.E.2d 552 (1977).

47. 147 Ga. App. 487, 249 S.E.2d 304 (1978).

48. 147 Ga. App. 675, 250 S.E.2d 58 (1978).

work, but such evidence would not prevent a finding of partial disability and entitlement to total disability, because of the employer's failure to provide the employee with work suitable to his condition.

The crucial element in these cases is the claimant's proof of diminished capacity to labor. Without such a showing, he would simply be in the same position as any other employee subject to termination or layoff under hard economic times. There is, of course, some danger of abuse by malingering manifestation of subjective symptoms when a layoff approaches. With some testimony from the employee regarding partial disability, the employer presumably must prove a complete recovery with no disability whatsoever.

The termination and layoff of Bristol and Raines is distinguishable from the alleged voluntary resignation of Lamar. In the former two cases, there was simply no work available, and while the employee would presumably have continued to work for the same employer, with his termination or layoff he had no work available to him suitable to his impaired capacity. However, if Lamar did, in fact, resign, then the "unavailability" of work suitable to her capacity was brought about by her own actions. The issue then should be not whether Lamar has some impaired condition, but whether she could perform the job that she was doing at the time of the resignation. If there is a refusal, through resignation or otherwise, to perform an available suitable job, then the employee should not be entitled to any kind of compensation whatsoever pursuant to Georgia Code Ann. section 114-407.[49]

C. *Standard of Proof of Employer*

The standard of proof required of the employer and insurance carrier to show a change in the employee's condition is unclear. The court of appeals has struggled with just what constitutes "an economic change in condition occasioned by the employee's return or ability to return to work for the same or any other employer."[50] In *Southern Cotton Oil Co. v. Lockett*,[51] the court stated: "[t]he burden on the employer is to show the availability of work. The employer is not required to prove that the claimant had received a specific job offer."[52] As a practical matter, it is often impossible to satisfy the work availability requirement without actually showing a job offer. In *Spell v. Travelers Insurance Co.*,[53] the court unsuccessfully attempted to clarify this requirment. It drew a distinction

49. *See* note 58 *infra* and accompanying text.
50. GA. CODE ANN. § 114-709 (1973).
51. 150 Ga. App. 835, 258 S.E.2d 644 (1979).
52. *Id.* at 836-37, 258 S.E.2d at 645.
53. 147 Ga. App. 160, 248 S.E.2d 292 (1978).

between work availability and job offer, but then stated there was no question in that particular case as to work availability since the employee testified that his previous employer had offered him a job. The thin line between work availability and job offer in terms of practical evidence makes this a fine distinction indeed.

The court in *Lockett* relied upon *Hercules, Inc. v. Adams*,[54] which set forth a three point requirement for the employer to show: (1) a physical change in the claimant 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. The employer in *Lockett* argued that reliance upon *Hercules* is misplaced when the claimant is no longer laboring under any physical disability. The court declined to address this argument on the basis that the court had, as a matter of fact, found some lingering disability. This unaddressed argument is well-founded. When the claimant has completely recovered to his pre-injury physical condition, then his economic potential has also returned to his pre-injury status. There should be no obligation to show a job offer or work availability under those circumstances. As much was held in *Jackson v. Seaboard Fire & Marine Insurance Co.*,[55] in which the court of appeals specifically stated that the employer need only prove the claimant's ability to return to work, not that a current job offer of employment or reemployment existed. If, however, the employee still has some diminished capacity to labor, though he does have the ability to return to some form of work, then the requirements of *Hercules* should apply.

In *Cutler v. Southern Bell Telephone & Telegraph Co.*,[56] the court stated that an employee's willingness and ability to return to his former employment, from which he had been terminated, does not preclude a finding of continued entitlement to compensation based upon his inability to secure other suitable employment because of his previous accidental injury.

The court reached a similar result in *DeKalb County Merit System v. Johnson*,[57] in which the employee refused a position as a truck driver. The claimant failed to testify or even to appear at the hearing, though he was represented by counsel throughout the proceedings. The court ruled that in order to suspend benefits, the refused employment must be suitable to the employee's capacity, and that there was no evidence presented in this regard. The employer, therefore, failed to meet its burden in justi-

54. 143 Ga. App. 91, 237 S.E.2d 631 (1977).

55. 144 Ga. App. 531, 241 S.E.2d 636 (1978). The court cited Hopper v. Continental Ins. Co., 121 Ga. App. 850, 176 S.E.2d 109 (1970), and neither *Hopper* nor *Jackson* have been overruled or disapproved.

56 152 Ga. App. 424, 263 S.E.2d 230 (1979).

57. 151 Ga. App. 405, 260 S.E.2d 506 (1979).

fying the suspension.

In *McDaniel v. Roper Corp.*,[58] the court found the refused work to be suitable. It held that compensation was therefore justifiably suspended. Here, however, the employee refused "light work" not because of any physical disability, but because she did not want to work on the second shift.

V. Change in Condition or New Accident

The survey period was particularly active with cases involving the determination of whether an employee's injury was related to a change in condition or to a new injury. The standard of determination had shifted often and, seemingly, each case turned on its own peculiar set of facts. However, in *Central State Hospital v. James*,[59] the court, after acknowledging the confusion in the area, set forth three "examples" to clarify what constitutes a change in condition and what constitutes a new injury. The first example is a constructive or fictional new accident to avoid the bar of the statute of limitations. This situation arises when there is a non-disabling injury, but continued work gradually worsens the claimant's condition to the point that he is forced to cease work. The date of this "new accident" is the date that the claimant's actual disability manifests itself.

The second example is that of a new injury and the third example is of a change in condition. The distinguishing feature of a new injury is a "specific job related incident."[60] When there is such an incident which aggravates a pre-existing condition and at least partially precipitates the employee's disability, then a new injury has occurred as of the date of the specific incident. When there is no such specific job-related incident, but rather the employee's disability is a result of gradual worsening or deterioration, then a change in condition has occurred. While the examples in *James* have been instructive, and widely cited,[61] they are by no means applicable to every situtation.

---

58. 149 Ga. App. 864, 256 S.E.2d 146 (1979).

59. 147 Ga. App. 308, 248 S.E.2d 678 (1978).

60. *Id.* at 309, 248 S.E.2d at 679.

61. For examples of a fictional new injury, *see* Hartford Ins. Group v. Stewart, 147 Ga. App. 733, 250 S.E.2d 184 (1978), N. L. Industries v. Childs, 150 Ga. App. 866, 258 S.E.2d 667 (1979), Home Ins. Co. v. McEachin, 151 Ga. App. 567, 260 S.E.2d 560 (1979), and Carriers Ins. Co. v. Myers, 151 Ga. App. 674, 261 S.E.2d 423 (1979). For a new injury by virtue of a specific incident, *see* City of Atlanta v. Thornton, 150 Ga. App. 571, 258 S.E.2d 192 (1979), Aetna Cas. & Sur. Co. v. McKenzie, 152 Ga. App. 445, 263 S.E.2d 201 (1979) and Home Indem. Co. v. Howard, 153 Ga. App. 340, 265 S.E.2d 75 (1980). For a change in condition, *see* Zurich Am. Ins. Co. v. Sargent, 147 Ga. App. 672, 250 S.E.2d 11 (1978) and Hartford Accident & Indem. Co. v. Troglin, 148 Ga. App. 715, 252 S.E.2d 213 (1979).

In *Certain v. United States Fidelity & Guaranty Co.*,[62] the court encountered a factual situation that did not fit squarely within one of the *James* examples. It therefore created a new standard. The reported facts are that the claimant was injured while performing strenuous work, received compensation, and returned to work. After a second, similar injury, the employer assigned the employee to "light work" which he was capable of performing and which he did perform for two days before quitting to go to work for another employer. After five months of performing the same type strenuous work, which he had been forbidden to perform for the first employer for medical reasons, the employee's condition worsened to the point of total disability even though he had not had another accident or incident on the job. The court coined a new phrase, "intervention of new circumstances,"[63] and applied that phrase in the resolution of this case. The court held:

> Consistent with the rationale of *James*, supra, we are satisfied that where there is no actual new accident, ordinarily the distinguishing feature that will characterize the disability as either a "change of condition" or a "new accident" is the intervention of new circumstances. If the claimant leaves the old employer and goes to work in a different environment with a new employer, there are new circumstances with a new employer; and this is particularly true when the activity performed for the new employer exceeds the limits of the light duty offered by the old employer. Where the inability to continue to work occurs with the new employer, there are such "new" circumstances that we conclude there has been a new accident as of the date of the inability to work.[64]

A literal reading of the court's holding would not require any light duty with the old employer, but without some increase in the nature of the claimant's activities, there would be nothing to distinguish a new injury from a change in condition other than a change in employers.[65]

VI. Medical Benefits

In *General Insurance Co. v. Bradley*,[66] the court of appeals held that a

---

62. 153 Ga. App. 571, 266 S.E.2d 263 (1980).

63. *Id.* at 573, 266 S.E.2d at 264.

64. *Id.*

65. The holding in *James* moved away from the aggravation theory of a new injury outlined in Garner v. Atlanta Bldg. Sys., Inc., 142 Ga. App. 517, 236 S.E.2d 183 (1977). The holding in *Certain*, though not articulated as such, is a swing back toward the aggravation theory. If one fact has been established through the opinions in this area in the past few years, it is that there is no set rule to apply to these two employer or two insurer cases. Absolute reliance upon the most recent case may be unwise.

66. 152 Ga. App. 600, 263 S.E.2d 446 (1979).

claim for additional medical benefits is not subject to the two-year statute of limitations of Georgia Code Ann. section 114-709. The claimant sought medical treatment, but not additional compensation, after the two-year limitation had run. The employer and the insurance carrier contended that medical benefits are included within the term "compensation" and, as such, are subject to the two-year limitation. After a lengthy review of the statutory history of both sections 709 and 501, the court discarded this argument and found no limitation whatsoever applicable to additional medical benefits.

Bradley interpreted the pre-1978 law. Georgia Code Ann. section 114-709, as amended by 1978 Ga. Laws, 2220, 2233, now specifically applies to "income benefits" only. It is clear that there is no statute of limitation regarding a claim for additional medical treatment. Such treatment, of course, must be shown to be related to the injury.

In *Insurance Co. of North America v. Money*,[67] the court declined to authorize a daughter's home care as medical treatment or other care for which the expenses must be paid by the employer and the insurance carrier. After hospital confinement, the claimant's physician advised her that she should have someone assist her at home during her recovery. The claimant's daughter, who lived out-of-state, moved in with the claimant to provide this service. The board directed that the daughter be paid $450.00 for her services. The court found that the cost was reasonable, but that Georgia Code Ann. section 114-501 includes no authorization for the payment of "non-medical personnel".[68] The daughter's services were not "treatment" nor were they "other care as herein specified [in the statute]."[69] While such a ruling seems somewhat harsh, a contrary ruling would open the door for widespread abuse.

VII. Computation of Benefits

A. *Section 404*

In the event an employee has not worked "substantially the whole of thirteen weeks immediately preceding the injury,"[70] the wages of a "similar employee in the same employment"[71] are to be used to compute the applicable compensation rate. The court held in *Insurance Co. of North America v. Schwandt*,[72] that it is error to utilize the "full time weekly

67. 152 Ga. App. 72, 262 S.E.2d 240 (1979).
68. *Id.*, 262 S.E.2d at 241.
69. *Id.* at 73, 262 S.E.2d at 241.
70. Ga. Code Ann. § 114-402 (1973).
71. *Id.*
72. 151 Ga. App. 842, 261 S.E.2d 755 (1979).

wage"[73] of the injured employee for this computation so long as there is evidence of the wages of a similar employee which can be reasonably and fairly applied.

B. Section 405

In *West Point Pepperell v. Green*,[74] the employee returned to work after an injury and thereby had a change in condition from total to partial disability as she worked for lesser wages in a different job suitable to her impaired condition. The board computed her compensation rate in accordance with Georgia Code Ann. section 114-405 and authorized compensation even for lost time which occurred because the entire plant was closed down. The employer asserted that the employee was not entitled to partial disability during this time as she would have missed the time had she been in her old job and had she never been injured. While the court recognized the logic in this argument, it nonetheless held that the only method for computing partial disability compensation is to use the average weekly wage before and after the injury and to pay two-thirds of the difference in accordance with section 114-405.

The concurrent similar employee theory can be utilized by the claimant to combine additional sources of earnings to increase his average weekly wage and compensation rate. However, in *Owens-Illinois, Inc. v. Lewis*,[75] the court's finding of no concurrent similar employment benefited the employee in a unique way. The employer urged that the employee had undergone a change in condition from total disability to partial disability based upon his actual work in his own water purification business subsequent to his injury. The employee had worked in this business even while employed as a machinist for Owens-Illinois, and he continued his own business after his injury and while drawing compensation. The board had found that the employee only performed as a supervisor in his water purification business and the court of appeals held that finding to be an implied finding of concurrent, but dissimilar employment.

Earnings from this business were not included in the claimant's compensation rate, and such earnings likewise did not entitle the employer to reduce the employee's benefits from total to partial disability. There was, therefore, no change in condition. The employee was able to perform in his own business before and after his injury, and his continuing ability to perform as a supervisor did not affect his entitlement to compensation.

---

73. GA. CODE ANN. § 114-402 (1973).
74. 148 Ga. App. 625, 252 S.E.2d 55 (1979).
75. 150 Ga. App. 640, 258 S.E.2d 293 (1979).

C. Section 406

In *Owens-Illinois, Inc. v. Douglas,*[76] the court affirmed a finding of 52.5 percent disability to the claimant's left arm under the pre-1978 version of Georgia Code Ann. section 114-406. The employer argued that the injury was to the claimant's left shoulder and that any resulting loss of use in the left arm was not compensable as a specific member disability. It urged that the exact situs of the injury must be in the member for which compensation is sought. The court rejected this argument and held that the result of the injury (loss of use of the arm) is the crucial finding and that the exact situs of the injury (physical impact to the shoulder) is unimportant.

The court in *Pye v. Insurance Co. of North America,*[77] clarified the method of computation of compensation for a partial finger loss in pre-1978 injuries. The "substantially all" clause in former Georgia Code Ann. section 114-406(f) was interpreted to mean at least one-half of the phalange. The present code section in this regard, Georgia Code Ann. section 406(d), clarifies any confusion as to post-July, 1978 injuries. Now, loss of a distal phalange results in an award of compensation for one-half of that particular digit, and loss of more than the distal phalange results in total compensation for the digit.

D. Employer's Right to Recover Overpayments

In *Seaboard Fire & Marine Insurance Co. v. Smith,*[78] the court of appeals held that overpayments retroactively established by a change in condition award can be recovered in a direct suit by the employer against the claimant in superior court. In doing so, the court specifically overruled *Pacific Employer's Insurance Co. v. King,*[79] in which the same court held that the state board lacked authority to direct an employee to repay his former employer upon a finding of a retroactive change in condition. The court acknowledged an error in its analysis in the *King* case, analyzed the applicable language in Georgia Code Ann. section 114-709, and found that the board did have the authority under the applicable statute to award retroactive benefits. The superior court was not usurping the function of the board, but was simply giving effect to the board's finding. The present version of Georgia Code Ann. section 114-709, which became effective July 1, 1978, specifically authorizes the board to order the employee or beneficiary to repay overpayments to the employer. If there

76. 151 Ga. App. 408, 260 S.E.2d 509 (1979).
77. 146 Ga. App. 365, 246 S.E.2d 400 (1978).
78. 146 Ga. App. 893, 247 S.E.2d 607 (1978).
79. 133 Ga. App. 458, 211 S.E.2d 396 (1974).

are no further income benefits due, this repayment would take the form of a direct reimbursement. When there are future income benefits due, such overpayments will be recovered by shortening the period of future weekly income benefits, by reducing the weekly benefits, or both.

VIII. PROCEDURE

A. *Time for Filing of Appeals*

Two cases dealt with the time requirement for appealing to the full board. This is an informal procedure satisfied by letter or formal appeal pleading, but the thirty-day time limit is strictly construed. *Favors v. Travelers Insurance Co.*[80] is instructive to the extent that it indicates in dictum that the thirty days within which to file an appeal from a decision of an administrative law judge begins to run from the date of the "notice of award". The three-day extension afforded under Georgia Code Ann. section 81A-106(e) is not applicable to such an appeal.

In *Argonaut Insurance Co. v. Hamilton,*[81] the court held that receipt by the Capitol Hill Post Office on the 30th day and delivery to the board on the following day did not meet the time limitation. Hand delivery of an appeal might not only be prudent, but might be essential as the 30th day approaches. Errors or delays in the post office will be paid for by the would-be appellant.

B. *Necessary Findings of Fact*

There were a surprising number of successful appeals based not on the merits of the case, but on the absence of sufficient findings of fact by the board. In three cases, *Malone v. Fireman's Fund Insurance Co.,*[82] *Carrie v. Continental Insurance Co.,*[83] and *Cincinnatti Insurance Co. v. Roberts,*[84] the court held that the findings of fact of the board did not meet the test cited in *Fireman's Fund Insurance Co. v. Hester*:[85]

> The Georgia Workmen's Compensation Act (Code § 114-707) requires that an award of the Board of Workmen's Compensation shall be accompanied by a statement of findings of fact upon which it is made in order that the losing party may intelligently prepare his appeal and that the cause may thereupon be intelligently reviewed. To fulfill this requirement, the findings of fact must consist of a concise but comprehensive

80. 150 Ga. App. 741, 258 S.E.2d 554 (1979).
81. 146 Ga. App. 195, 245 S.E.2d 882 (1978).
82. 147 Ga. App. 264, 248 S.E.2d 544 (1978).
83. 147 Ga. App. 544, 249 S.E.2d 349 (1978).
84. 148 Ga. App. 60, 251 S.E.2d 87 (1978).
85. 115 Ga. App. 39, 153 S.E.2d 622 (1967).

> statement of the cause and circumstances of the accident as found to be true by the Board of Workmen's Compensation and similar findings of fact upon any material issue in the case.[86]

In two cases, *Liberty Mutual Insurance Co. v. Nobles*[87] and *Independent Life Insurance Co. v. Smith*,[88] the board's findings referred to specific medical evidence, while failing to mention, in any way, other medical evidence which was a part of the record. The court held that the board was not bound to accept the omitted medical opinions, but it was bound to consider that testimony. The absence of any reference whatsoever to the particular medical opinion in question raised some doubt that it was considered at all. Both cases were remanded for further consideration.

IX. Exclusive Remedy

The breadth of the exclusive remedy provision in Georgia Code Ann. section 114-103 was tested numerous times in the survey period, and most attempts to avoid this provision failed. In *Smith v. White Lift, Inc.*,[89] the employee sued his employer in common law after futile attempts to collect the amounts awarded him by the state board of workers' compensation. His employer was uninsured, and the plaintiff's theory of recovery was his employer's negligent failure to purchase workers' compensation insurance. The superior court dismissed, and the court of appeals affirmed. Notwithstanding the employer's failure to carry insurance, the employee's sole remedy remains within Title 114.

In *Williams v. Byrd*,[90] the husband and wife plaintiffs asserted a due process constitutional attack against the provision, and Mr. Williams also asserted an exemption as the injured employee's husband. Both theories failed.

In *Fox v. Stanish*[91] and *Freeman v. Ryder Truck Lines, Inc.*,[92] the court of appeals and supreme court, respectively, held that an employee injured in the course of his employment in an automobile accident is barred from any remedy against his employer except that provided by the workers' compensation law. In *Fox*, the defendant owner-operater of the insured vehicle was the employer of the plaintiff occupant. The employer was required to carry workers' compensation insurance but failed to do so. Nonetheless, the employee's sole remedy against her employer was

86. *Id.* at 39, 153 S.E.2d at 626.
87. 147 Ga. App. 81, 248 S.E.2d 160 (1978).
88. 150 Ga. App. 121, 257 S.E.2d 29 (1979).
89. 145 Ga. App. 596, 244 S.E.2d 117 (1978).
90. 242 Ga. 80, 247 S.E.2d 874 (1978).
91. 150 Ga. App. 537, 258 S.E.2d 190 (1979).
92. 244 Ga. 80, 259 S.E.2d 36 (1979).

under worker's compensation. She was precluded from bringing a tort action and was precluded from requiring payments under the No-Fault Act.[93]

In *Freeman*, the employer defendant was self-insured for workers' compensation, no-fault, and liability claims. The supreme court interpreted a provision in the No-Fault Act, Georgia Code Ann. section 56-3409b(a), which the plaintiff asserted had impliedly repealed section 114-103. The court found no repeal by implication and held that the plaintiff could recover under his own no-fault policy, but that Georgia Code Ann. section 114-103 precludes recovery of no-fault benefits from his employer.

Effective April 12, 1979, Georgia Code Ann. section 56-3409b was amended to provide a correlation of no-fault benefits and workers' compensation benefits. The intent was to make whole an employee injured in an automobile accident on the job, but not to allow him to recover a combination of benefits in excess of his actual wages. For such injuries occurring after April 12, 1979, an employee is entitled to the normal workers' compensation benefit *plus* such no-fault benefits as would allow the employee to recover his actual wages or the statutory maximum, whichever is less.[94] For such accidents occurring before April 12, 1979, the holdings in *Fox* and *Freeman* prevent the employee from suing his employer in tort, but the possibility of a direct contract action against the employer's insurance carrier would not appear to be precluded.

The exclusive remedy also precludes recovery in common law for disfigurement. In *Nowell v. Stone Mountain Scenic Railroad*,[95] the employee received burns to her neck and chest during staged entertainment. However, this resulted in no physical or economic disability so she received no compensation, nor could she sue her employer in common law. The court noted that Georgia is in the minority of states which do not allow workers' compensation for non-disability producing disfigurement, but this factor did not affect the exclusive remedy provision.

While the exclusive remedy provision is broad, it does have some limits. In *Brannon v. Georgia Bureau of Investigation*,[96] the court allowed an

---

93. Georgia Motor Vehicle Accident Reparations Act, GA. CODE ANN. Ch. 56-34B.

94. The following are examples of payments when an employer carries both workers' compensation and basic no-fault, and an employee's injury entitles him to correlation of those benefits:

1. A.W.W. of $150.00. Claimant would receive $100.00 in compensation and $50.00 in no-fault to equal his normal wages;
2. A.W.W. of $300.00. Claimant would receive $110.00 maximum in compensation and $190.00 in no-fault to equal his normal wages;
3. A.W.W. of $400.00. Claimant would receive $110.00 maximum in compensation and $200.00 maximum in no-fault for maximum combined benefit of $310.00.

95. 150 Ga. App. 325, 257 S.E.2d 344 (1979).

96. 146 Ga. App. 524, 246 S.E.2d 511 (1978).

employee to receive compensation benefits at the same time as he was receiving a disability retirement pension from the same employer. The contractual right to a pension because of a permanent disability caused by an on-the-job injury is not such a right or remedy as is excluded by Georgia Code Ann. section 114-103.

In *Newton v. Liberty Mutual Insurance Co.*,[97] the plaintiff sued the insurer on the basis of negligent inspection. The court held that the insurer is entitled as the employer's alter ego to the immunity status afforded by Georgia Code Ann. section 114-103 when the insurer conducts an inspection in its role as workers' compensation carrier. However, when the insurer issues both workers' compensation and public liability policies, as here, it remains entitled to the immunity status only if it limits its inspection of the insured's premises to its role as workers' compensation carrier. Whether the insurer did limit the inspection was determined to be a factual question, and summary judgment was reversed.

97. 148 Ga. App. 694, 252 S.E.2d 199 (1979).