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Workers' Compensation

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The 2015 – 2016 survey period featured decisions of the appellate courts impacting the workers' compensation system on issues ranging from willful misconduct to statutes of limitations.[1]

I. LEGISLATIVE UPDATE

The 2016 legislative session marked yet another in a long tradition of sessions heavy on amendments to the Workers' Compensation Act,[2] almost exclusively the result of legislation proposed by the collaborative efforts of the State Board of Workers' Compensation's Legislative Advisory Council. House Bill 818 passed both houses and was signed into law by the Governor, with the changes becoming effective on July 1, 2016.[3]

The most notable amendments to the Act increase the maximum for temporary total disability (TTD) benefits from $500 to $575 per week,[4] while also increasing the maximum for temporary partial disability benefits from $367 to $383 per week.[5] Similarly, the maximum dependency benefit for a sole dependent surviving spouse was increased from $220,000 to $230,000.[6]

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1. For an analysis of Workers' Compensation law during the prior survey period, see H. Michael Bagley & J. Benson Ward, *Workers' Compensation, Annual Survey of Georgia Law*, 67 MERCER L. REV. 287 (2015).
2. O.C.G.A. § 34-9-11(a) (2008 & Supp. 2016).
3. Ga. H.R. Bill 818, Reg. Sess. (2016) (amending O.C.G.A. tit. 34 ch. 9 (Supp. 2016)).
4. O.C.G.A. § 34-9-261 (2008 & Supp. 2016).
5. O.C.G.A. § 34-9-262 (2008 & Supp. 2016).
6. O.C.G.A. § 34-9-265(d) (2008 & Supp. 2016).

The amended act removed any doubt that the State Board of Workers' Compensation has the discretion to deny self-insured status to an employer, making it clear that self-insured status is at the sole discretion of the board.[7] The highlight of several related amendments regarding the Self-Insurer's Guarantee Trust Fund was that professional employer organizations (PEO) joined the list of entities deemed ineligible for self-insured status.[8]

Finally, the most notable administrative housekeeping measure was clarification that administrative law judges (ALJ) are subject to the Georgia Code of Judicial Conduct,[9] tracking language already in place regarding the Appellate Division of the State Board of Workers' Compensation (Appellate Division).[10]

II. STATUTE OF LIMITATIONS

In *Barnes v. Roseburg Forest Products Co.*,[11] the Georgia Court of Appeals addressed statute of limitations implications in a catastrophic claim. The claimant had a 1993 accident resulting in amputation of his left leg below the knee. The claim was accepted as "catastrophic," and he received TTD benefits. The claimant returned to light duty work for the employer in 1994 after he was fitted with a prosthetic leg, and TTD benefits were suspended. The claimant continued working through a change in ownership of the employer until he lost his job in a reduction in force in September 2009. He sought medical treatment for his knee in November 2009, and in December 2011, he was fitted for a new prosthetic leg. In August 2012, the claimant requested a hearing under the 1993 accident date seeking recommencement of TTD benefits in his catastrophic claim. In November 2012, the claimant filed a claim against the entity who bought the business from the 1993 employer, alleging a fictional new injury based on his last date worked: September 11, 2009.[12]

The ALJ for the State Board of Workers' Compensation denied both claims—the request under the 1993 catastrophic claim was denied as barred by the change of condition statute of limitations in Official Code of Georgia Annotated (O.C.G.A.) section 34-9-104(b),[13] and the one-year

7. O.C.G.A. § 34-9-121(a) (2008 & Supp. 2016).

8. O.C.G.A. §§ 34-9-381(8)(E), 382(d)(5) (2008 & Supp. 2016).

9. GA. CODE OF JUDICIAL CONDUCT (2016).

10. O.C.G.A. § 34-9-47(c) (2008 & Supp. 2016).

11. 333 Ga. App. 273, 775 S.E.2d 748 (2015), *rev'd sub nom.* Roseburg Forest Prods. Co. v. Barnes, 299 Ga. 167, 787 S.E.2d 232 (2016).

12. *Id.* at 273-76, 775 S.E.2d at 748-50.

13. O.C.G.A. § 34-9-104(b) (2008 & Supp. 2016).

statute of limitations in O.C.G.A. § 34-9-82[14] barred the 2009 fictional new injury claim.[15] The Appellate Division affirmed, as did the superior court.[16]

The court of appeals disagreed as to both issues. With respect to the 1993 claim, the court held that the request for recommencement of TTD benefits in the catastrophic claim was not barred by the two-year statute of limitation in O.C.G.A. § 34-9-104(b).[17] The court stated, "it is clear that the legislature intended to treat workers who received catastrophic injuries differently from workers who were less severely injured, allowing the former to receive benefits indefinitely so long as they remain catastrophically injured."[18] As to the claimed fictional new injury in 2009, the court held that O.C.G.A. § 34-9-82's one-year statute of limitation was tolled by the December 2011 medical treatment.[19]

It should be noted that, subsequently to the survey period covered in this Article, the Georgia Supreme Court reversed the court of appeals on both issues.[20]

In *Bell v. Gilder Timber Co.*,[21] the claimant sustained a compensable injury in 1992, thereafter undergoing cervical fusion surgery and receiving TTD benefits until he returned to work. The claimant was not assigned a permanent partial impairment rating following his surgery or upon his return to work. He continued working until 2009 when he retired, but during that time period he continued to receive medical treatment, including a second surgery. Following the second surgery, the claimant's doctor assigned a permanent partial impairment rating of 15% to the body as a whole, and the claimant requested corresponding permanent partial disability (PPD) benefits. The ALJ denied the request for PPD benefits, as it was barred under O.C.G.A. § 34-9-104(b)'s statute of limitation because the request came more than four years after the claimant was last paid income benefits.[22] The Appellate Division and the superior court both affirmed.[23]

On appeal, the claimant argued that the court should create an exception to O.C.G.A. § 34-9-104(b)'s four-year statute of limitations on PPD

14. O.C.G.A. § 34-9-82 (2008).
15. *Barnes*, 333 Ga. App. at 275, 775 S.E.2d at 750.
16. *Id.*
17. *Id.* at 277, 775 S.E.2d at 751.
18. *Id.*
19. *Id.* at 277-79, 775 S.E.2d at 751-52.
20. Roseburg Forest Prods. Co. v. Barnes, 299 Ga. 167, 787 S.E.2d 232 (2016).
21. 337 Ga. App. 47, 785 S.E.2d 682 (2016).
22. *Id.* at 47-48, 785 S.E.2d at 683-84.
23. *Id.* at 48, 785 S.E.2d at 684.

benefits. He argued that application of the statute would create a harsh and inequitable result for an employee who returned to work following a compensable claim.[24] While the court of appeals agreed that applying the statute to the claimant's case would result in "a harsh and inequitable result," the court did not agree that such an outcome justified creating a judicial exception to the statute of limitations.[25] The wording of the statute is clear and unambiguous, and accordingly the court followed the plain and ordinary meaning and declined to engraft onto the statute any exception, deferring instead to the Georgia General Assembly to contemplate any revision to the statute.[26]

III. WILLFUL MISCONDUCT

In *Burdette v. Chandler Telecom, LLC*,[27] the claimant was a cell tower technician who—notwithstanding explicit instructions to the contrary from his supervisor and lead hand—descended a cell tower by "controlled descent," more akin to rappelling than to climbing down. The claimant was injured during his controlled descent when he fell. The ALJ found that the claimant was barred from recovering workers' compensation benefits because he engaged in "willful misconduct" within the meaning of O.C.G.A. § 34-9-17(a)[28] in defying his supervisor's instruction to climb down the tower instead of using controlled descent.[29] The Appellate Division affirmed and adopted the ALJ's findings, and the decision was affirmed by operation of law on appeal to the superior court.[30]

The court of appeals noted that O.C.G.A. § 34-9-17[31] does not define "willful misconduct," and that the Georgia Supreme Court has stated that willful misconduct "involves conduct of a quasi-criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences."[32] The court held that, while the claimant deliberately violated a work rule and his supervisor's express instructions and instead engaged in a hazardous act, disregarding a work rule was not

24. *Id.*

25. *Id.* at 49, 785 S.E.2d at 684.

26. *Id.* at 49, 785 S.E.2d at 684-85.

27. 335 Ga. App. 190, 779 S.E.2d 75 (2015), *cert. granted* (May 9, 2016).

28. O.C.G.A. § 34-9-17(a) (2008 & Supp. 2016).

29. *Burdette*, 335 Ga. App. at 191-92, 779 S.E.2d at 76-77.

30. *Id.* at 192, 779 S.E.2d at 77.

31. O.C.G.A. § 34-9-17 (2008 & Supp. 2016).

32. *Burdette*, 335 Ga. App. at 194, 779 S.E.2d at 79 (quoting Aetna Life Ins. Co. v. Carroll, 169 Ga. 333, 342, 150 S.E. 208, 212 (1929)).

conduct of a quasi-criminal nature, and thus the denial of benefits was improper.[33]

IV. ARISING OUT OF THE EMPLOYMENT AND EXCLUSIVE REMEDY

During this Survey period, the court of appeals again dealt with the distinction between idiopathic injuries and those that arise out of employment. In *Sturgess v. OA Logistics Services, Inc.*,[34] the court analyzed this issue in the context of a tort suit and thus there was an exclusive remedy issue to address. The deceased employee in *Sturgess* drove a forklift at a warehouse operated by OA Logistics Services (OA). When his forklift ran out of fuel, he went to an office area to ask about refueling and waited outside the office for a supervisor. While the deceased employee waited outside the office with his back turned, a coworker entered the office and forcibly attempted to kiss a female employee in the office who pushed him off. The coworker walked out of the office, produced a hand gun, shot the deceased employee in the back of the head, re-entered the office, and sexually assaulted the female employee. The deceased employee, who was a family friend of the female employee, had not been aware of the assault, had not attempted to intervene, and had not interacted with the shooter before that occasion. The mother of the deceased employee filed a civil suit against the shooter, OA, and the staffing agency who placed workers at OA's warehouse, among others.[35]

OA and the staffing agency moved for summary judgment on the ground that the exclusive remedy provision of the Workers' Compensation Act bars the tort claims. The trial court granted summary judgment on that ground, and the plaintiff appealed to the court of appeals.[36]

Under O.C.G.A. § 34-9-11(a),[37] the Act provides the exclusive remedy for injuries arising out of and in the course of employment. An assault on an employee is compensable under the Act where the attack is not directed solely for reasons personal to the employee, which again involves the analysis of whether the injuries arose out of and in the course of the employment.[38] As it was undisputed that the death occurred in the course of the employment, the court looked to whether the accident causing the death arose out of the employment.[39]

33. *Burdette*, 335 Ga. App. at 195-96, 779 S.E.2d at 79-80.
34. 336 Ga. App. 134, 784 S.E.2d 432 (2016), *reconsideration granted* (Mar. 10, 2016).
35. *Id.* at 134-36, 784 S.E.2d at 434-35.
36. *Id.* at 134, 784 S.E.2d at 435.
37. O.C.G.A. § 34-9-11(a) (2008 & Supp. 2016).
38. *Sturgess*, 336 Ga. App. at 135, 784 S.E.2d at 435.
39. *Id.* at 136, 784 S.E.2d at 435-36.

Citing a recent 2013 court of appeals decision, the court noted that an accident arises out of the employment when there is a causal connection between the conditions under which the employee worked and the injury, and when the accident results from a risk reasonably incident to the employment:

> [I]f the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment.[40]

An injury does not arise from employment where the injury resulted from a hazard to which the employee is equally exposed outside of employment.[41]

The court of appeals then approvingly discussed the "positional risk doctrine," which stands for the proposition that an injury arises out of the employment when the employment brings an employee within range of the risk by requiring his or her presence in the place where the risk occurs, even though another person present would be injured even if he or she was not an employee.[42] This doctrine is distinguished from the "peculiar risk doctrine," as the former does not require the risk to be unique to the employment. Rather, an injury may arise out of the employment where the work brings the employee to a location and time where he or she confronts the risk, and the risk which causes the injury is not common to the public without regard to the location.[43]

Following this emphasized importance on the employment placing the employee in a location that exposed him or her to the risk (regardless of whether this risk is common to the general public), the court went on to conclude that the deceased employee's employment placed him in a location that exposed him to being shot.[44] The risk of being shot was not peculiar to this workplace, but it was connected to the workplace due to where the shooting occurred. Thus, the court held that the specific facts of this case compelled the finding that the accident arose out of the employment.[45]

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40. *Id.* at 136, 784 S.E.2d at 436 (quoting Dawson v. Wal–Mart Stores, Inc., 324 Ga. App. 604, 607, 751 S.E.2d 426, 429 (2013)).

41. *Id.*

42. *Id.* at 137, 784 S.E.2d at 436.

43. *Id.* at 137-38, 784 S.E.2d at 436-37.

44. *Id.* at 138, 784 S.E.2d at 437.

45. *Id.* at 139, 784 S.E.2d at 437.

The plaintiff further argued that the exclusive remedy provision should not apply because the staffing company was not a statutory employer under O.C.G.A. § 34-9-11(c).[46] Specifically, the deceased employee's mother argued that the deceased employee worked for several months at OA with no planned end to his term, and thus the staffing company did not meet the statutory definition of a temporary help contracting firm.[47] The court disagreed, noting that the deceased employee was not considered a regular long-term employee, and there was no clear proof of deviation from a typical temporary staffing arrangement.[48] Accordingly, the court affirmed the trial court's grant of summary judgment and ruling that the Workers' Compensation Act provided the deceased employee's mother's exclusive remedy with respect to OA and the staffing company.[49]

V. STANDARD OF REVIEW

In *J & R Schugel Trucking, Inc. v. Logan*,[50] the claimant sustained an injury while working in Georgia for her employer, which was located in Minnesota. She briefly received workers' compensation benefits under Minnesota law until the benefits were suspended due to lack of evidence of disability, and she subsequently filed a workers' compensation claim in Georgia seeking recommencement of income benefits and medical care under Georgia law. The employer controverted the claim on the basis that there was no evidence of any continued disability and no need for further medical treatment. The ALJ ruled that the claimant was no longer disabled but was still entitled to ongoing medical benefits.[51] The Appellate Division affirmed the ALJ's ruling that there was no disability, and substituted alternative findings that the claimant was similarly not entitled to further medical benefits.[52] The superior court set aside the Appellate Division's decision as contrary to law, and the employer appealed to the court of appeals.[53]

The court noted that the record below contained two hearings before the ALJ: one held on June 18, 2014 and a reconvened hearing on June 30, 2014.[54] In the first hearing, the ALJ ordered the employer to pay for

46. O.C.G.A. § 34-9-11(c) (2008 & Supp. 2016).
47. *Sturgess*, 336 Ga. App. at 139-40, 784 S.E.2d at 438.
48. *Id.* at 140, 784 S.E.2d at 438.
49. *Id.*
50. 336 Ga. App. 899, 785 S.E.2d 581 (2016).
51. *Id.* at 899, 785 S.E.2d at 581.
52. *Id.*
53. *Id.*
54. *Id.* at 900, 785 S.E.2d at 582.

another medical evaluation of the claimant and provide a copy of the report for the ALJ's consideration as to further medical treatment. This visit apparently occurred but the report was not included in the record at either hearing. At the reconvened hearing, the ALJ concluded by closing the record, save for post-hearing briefs from the parties. The claimant's post-hearing brief alluded to the recent medical evaluation, but did not address any medical opinions from that evaluation, nor did the claimant subsequently attempt to submit the medical report after the hearing. In fact, the claimant's appellate brief asserted that the claimant would present the report at a subsequent hearing before the ALJ. The superior court concluded that the ALJ had held the hearing record open to include this medical report but the ALJ later refused to include it, and this was contrary to law.[55]

Because the Appellate Division may substitute its own findings of fact for those of the ALJ, and because the superior court must not disturb those findings of fact so long as there is any evidence to support them, the court of appeals held that the superior court erred in reversing the Appellate Division when some evidence did exist to support the Appellate Division's findings.[56]

VI. AVERAGE WEEKLY WAGE

In *Fulton County Board of Education v. Thomas*,[57] the Georgia Supreme Court addressed the issue of calculating the average weekly wage of a claimant who also had a temporary second job during the relevant thirteen-week period. The claimant was employed with the county as a school bus driver and drove during the nine-month school year, but was paid a salary over a twelve-month period. During summer vacation, she worked a second job where she drove new school buses from Atlanta to other parts of the country. This employment ended shortly before she resumed driving for the county at the start of the new school year.[58] The claimant sustained a compensable injury in October 2011, and the parties disputed the correct calculation of her average weekly wage under O.C.G.A. § 34-9-260.[59] Specifically, the claimant contended that her wages from her summer job should be included in the calculation of her

55. *Id.*
56. *Id.* at 901, 785 S.E.2d at 582-83.
57. 299 Ga. 59, 786 S.E.2d 628 (2016).
58. *Id.* at 59-60, 786 S.E.2d at 629.
59. O.C.G.A. § 34-9-260 (2008 & Supp. 2016).

average weekly wage from the thirteen-week period preceding her date of injury.[60]

The ALJ found that the claimant's summer job constituted concurrent similar employment, and thus those wages should be included in the calculation of the average weekly wage.[61] The Appellate Division reversed, finding that, though the summer employment was similar to her employment with the county, it was not concurrent, because the summer job ended before the date on which the claimant sustained her injury, and so those earnings should not be considered when calculating the average weekly wage. The superior court affirmed.[62] The court of appeals disagreed, holding that the summer employment was concurrent employment, because the claimant was working as a bus driver for substantially the whole of the thirteen weeks preceding the injury.[63]

The Georgia Supreme Court first analyzed the wording of the statute, noting that O.C.G.A. § 34-9-260(1)[64] provides the method of calculation if the employee "shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of 13 weeks immediately preceding the injury,"[65] in which case the average weekly wage is based on the total amount of wages earned in such employment during that thirteen-week period.[66] The court placed importance on the use of the term "employment"—rather than "employer"—in this context, stating that the focus is on the nature of the work and not the identity of the employer.[67] The court noted that the claimant's employment was as a school bus driver and that she performed this work for substantially the whole of the thirteen-week period, first in her summer job and then in her job driving for the county, and thus the facts fell within O.C.G.A. § 34-9-260(1).[68]

The court then addressed the question of whether the summer employment wages should be included in the average weekly wage calculation under the "concurrent similar employment doctrine."[69] The court observed the absence of reported case decisions on all fours with the present

60. *Fulton Cty. Bd. of Educ.*, 299 Ga at 59-60, 786 S.E.2d at 629.
61. *Id.* at 60-61, 786 S.E.2d at 630.
62. *Id.* at 61, 786 S.E.2d at 630.
63. *Id.*
64. O.C.G.A. § 34-9-260(1) (2008 & Supp. 2016).
65. *Fulton Cty. Bd. of Educ.*, 299 Ga. at 62, 786 S.E.2d at 630-31.
66. *Id.*
67. *Id.* at 62, 786 S.E.2d at 631.
68. *Id.*
69. *Id.* at 60, 786 S.E.2d at 630.

case, where the claimant was not simultaneously employed with another employer on the date of the injury.[70] Noting that the statute itself simply refers to employment during the thirteen-week period, the court found no basis to require simultaneous employment on the date of injury as a condition for applying the concurrent similar employment doctrine.[71] The court held that the concurrent similar employment doctrine only required a concurrence of similar jobs within the thirteen-week period.[72]

Thus, when determining the average weekly wage of a claimant who worked substantially the whole of the thirteen weeks under O.C.G.A. § 34-9-260(1), one should look to all wages earned during the thirteen weeks in performing work in the same line of employment, including work for other employers, regardless of the claimant's employment status with the other employers on the date of injury.[73]

VII. SUBROGATION

A decision during the survey period demonstrated that an employer's recovery through subrogation remains an uphill climb. In *Best Buy Co. v. McKinney*,[74] the claimant fell from a forklift and sustained injuries to his face and brain, including permanent facial disfigurement. The employer accepted the claim as compensable and commenced income benefits and medical treatment. The claimant filed a civil suit against parties allegedly involved in the manufacture and maintenance of the forklift, and the employer intervened to protect its subrogation lien. The claimant settled with the tort defendants and dismissed his civil suit, and the employer requested an evidentiary hearing before the trial court to enforce its lien. At the evidentiary hearing, the employer offered evidence as to the amount of workers' compensation benefits paid, and presented testimony from an attorney with the aim of demonstrating that the claimant had been fully and completely compensated as compared with other reported tort cases involving plaintiffs with head injuries. The trial court was not persuaded, and it denied the employer's motion to enforce its subrogation lien, finding instead that the employer failed to prove that the claimant had been fully and completely compensated for his economic and noneconomic losses.[75]

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70. *Id.* at 63, 786 S.E.2d at 631-32.
71. *Id.* at 63, 786 S.E.2d at 632.
72. *Id.* at 64, 786 S.E.2d at 632.
73. *Id.*
74. 334 Ga. App. 42, 778 S.E.2d 51 (2015).
75. *Id.* at 42-44, 778 S.E.2d at 52-53.

On appeal, the court noted that an employer seeking to enforce a subrogation claim against an employee's recovery must both demonstrate that the injured employee has been fully and completely compensated for his economic and noneconomic losses, and clearly show that portion of the employee's recovery against the third party which was meant to compensate him for his economic losses versus his noneconomic losses.[76] A trial court cannot enforce a lien against any portion of the recovery meant to compensate the employee for noneconomic losses.[77] This is a question for the trial court, and the court of appeals will defer to the trial court's determination unless clearly erroneous. The court of appeals agreed with the trial court's finding that the employer did not meet its burden of showing the claimant had been fully and completely compensated, and it failed to prove full and complete compensation as it did not show what portion of the settlement proceeds was for economic losses versus noneconomic losses.[78] Accordingly, the court affirmed the denial of the motion to enforce the subrogation lien.[79]

VIII. ATTORNEY FEES

The court of appeals again dealt with an attorney fee dispute during this survey period. In *Cruz v. Paredes*,[80] the claimant sustained an injury, signed an attorney fee contract with counsel, and was subsequently awarded TTD benefits.[81] After he terminated this counsel and retained a new attorney, former counsel filed an attorney lien per Board Rule 108(e)[82] and then filed for approval of the attorney fee pursuant to Board Rule 108(a).[83] The ALJ approved the fee contract and awarded former counsel 25% of the TTD benefits, and the Appellate Division affirmed.[84] On appeal, the superior court reversed on the ground that former counsel could not collect fees because they were terminated before submitting their attorney fee approval form.[85] On discretionary appeal, the court of appeals held that the pertinent provision in the fee contract was ambiguous, and the court remanded the case for the superior court to apply

76. *Id.* at 44-45, 778 S.E.2d at 53-54.
77. *Id.*
78. *Id.* at 48, 778 S.E.2d at 55.
79. *Id.* at 50, 778 S.E.2d at 57.
80. 333 Ga. App. 857, 777 S.E.2d 702 (2015).
81. *Id.* at 857, 777 S.E.2d at 703.
82. Ga. Bd. Workers' Comp. R. 108(e) (2013).
83. Ga. Bd. Workers' Comp. R. 108(a) (2013).
84. *Cruz*, 333 Ga. App. at 857, 777 S.E.2d at 704.
85. *Id.*

rules of contract construction, including consideration of extrinsic and parol evidence.[86]

86. *Id.* at 859-60, 777 S.E.2d at 705.