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Workmen's Compensation

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During the survey period, the appellate courts of Georgia decided about 35 cases and the U.S. Supreme Court denied certiorari in one; the General Assembly passed three workmen's compensation bills in 1975 and none in 1976; and the State Board of Workmen's Compensation opened eight offices throughout the state and staffed each with an administrative law judge (a new name for directors and deputy directors).

I. Legislation

The 1975 General Assembly enacted legislation to expand further the applicability of the Workmen's Compensation Act. The legislation added certain occupations and increased the maximum number of weeks and the maximum amount per week;[1] it brought under the act employees of county and district health agencies established under Georgia Code chapter 88-2;[2] and it clarified an overlap between the Workmen's Compensation Board and the Department of Labor, made internal organizational changes, designated directors and deputy directors as administrative law judges, and established procedural and evidentiary allowances.[3]

The 1976 General Assembly relieved us of further changes.

A. To Whom Applicable

The 1975 General Assembly made the act applicable to all county and independent school districts and eliminated the requirement that an employer, to be covered, be engaged in a business operated for gain or profit.[4] "For the purposes of Workmen's Compensation coverage only, employees of county and district health agencies, established under the provisions of Georgia Code Chapter 88-2, are deemed and shall be considered employees of the State of Georgia."[5]

Recognizing the obsolescence of steam as a "motive power," the legisla-

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1. Ga. Laws, 1975, p. 190 *et seq.*; Ga. Code Ann. §114-404 (Supp. 1976).
2. Ga. Laws, 1975, p. 1231.
3. Ga. Laws, 1975, p. 198; Ga. Code Ann. ch. 114-7 (Supp. 1976).
4. Ga. Laws, 1975, p. 190; Ga. Code Ann. §114-101 (Supp. 1976).
5. Ga. Laws, 1975, p. 1231; Ga. Code Ann. §114-101 (Supp. 1976).

ture struck that restriction from a reference to common carriers to which the act doesn't apply.[6]

Farm employees, domestic servants and employers with fewer than three employees still are not covered by the act, but they may be if the employer and employees agree. The protection and benefits to employers and employees and the low cost to the employer should encourage voluntary submission to the act.

B. Settlements

Conflicts and controversies arise even with liberal construction of a liberal act written in the greatest detail. The act always has encouraged settlement or compromise, subject to board approval, of bona fide disputes where both parties were represented by counsel. The 1975 legislature removed the requirement that both parties be represented[7] and authorized direct settlements and compromises between the employee and the employer or insurer constituting complete disposition of the claim. Any settlement, to be binding on either party, must be approved by the board.

C. Limit of Compensation

The maximum weekly compensation for *total incapacity* was increased from $80 to $95 for accidents occurring on or after April 1, 1975, and the limitation of 400 weeks for the maximum period of payments was removed.[8] The dollar limit was removed in 1974,[9] so now there is no limit on the total amount of benefits payable to an employee under this section.

The maximum weekly payment for *partial incapacity* was increased from $50 to $70, and the total compensation payable was increased from $15,000 to $24,500.[10] The change is applicable to accidents that occur on and after April 1, 1975.

D. Hernia

The legislature finally has corrected an error made long ago. Payments for permanent partial disability after hernia repair now are determined by the method used for other partial incapacity under Georgia Code §114-405 rather than by the method used for dependents of deceased employees under Code §114-413.[11] An ambiguity still exists in the provision in §114-

6. Ga. Laws, 1975, p. 192, *amending* GA. CODE ANN. §114-107.
7. Ga. Laws, 1975, p. 192; GA. CODE ANN. §114-106 (Supp. 1976).
8. Ga. Laws, 1975, p. 193; GA. CODE ANN. §114-404 (Supp. 1976).
9. Ga. Laws, 1974, p. 1145, *amending* GA. CODE ANN. §114-404. See Smith, *Annual Survey of Georgia Law: Workmen's Compensation*, 26 MER. L. REV. 289, 291 (1974) [hereinafter cited as Smith, *Workmen's Compensation*].
10. Ga. Laws, 1975, p. 194; GA. CODE ANN. §114-405 (Supp. 1976).
11. Ga. Laws, 1975, p. 200; GA. CODE ANN. §114-412 (Supp. 1976).

412 that "time loss only" is payable in non-fatal cases. But medical expenses also are paid in actual practice.

E. Death Benefits

Georgia Code §114-413 retains the 400-week limit for payments to dependents of a deceased employee and the same maximum weekly payment provided in §114-404. The limit on total compensation payable is changed and is made conditional: "The total compensation payable under this section to a surviving spouse as a sole dependent at the time of death and where there is no other dependent for one year or less after the death of the employee shall in no case exceed $32,500."[12] The previous limit was $27,500 and applied to every case.[13]

F. Medical Treatment and Vocational Rehabilitation

Cooperative efforts of several state agencies have provided various, geographically wide-spread facilities, and in 1975 the General Assembly enacted needed and humane requirements for vocational rehabilitation of employees who were unable to resume their regular jobs after injuries and were untrained for a new job.[14] The period for vocational rehabilitation may not exceed 52 weeks unless additional time "appears likely" to complete the training.[15] The reasonable cost of board, lodging and travel must be paid by the employer. Refusal to accept training may subject the employee to termination, reduction or suspension of his compensation.[16]

For the first time, the act provides for costs (within the dollar limit for medical) of replacing artificial members, prosthetic devices, and aids damaged or destroyed in a compensable accident, subject to the judgment of the board.[17] Broken eye-glasses, bent braces, broken arm hooks, and, in some instances, even damaged wheel chairs should be included without question.

g. The Board and Its Functions

Changes in the structure of the board, in the tenure, pay and pensions of its members, and even in the titles of directors and deputy directors are included in the amendments and additions to chapter seven of the act.[18] All three members of the board and all deputy directors now are "adminis-

12. Ga. Laws, 1975, p. 196; GA. CODE ANN. §114-413 (Supp. 1976). My lengthy study and serious analysis lead me to conclude that, grammatically and biologically, this cannot be.

13. Ga. Laws, 1974, p. 1152, *amending* GA. CODE ANN. §114-413. See Smith, *Workmen's Compensation*, *supra* note 9, at 292.

14. Ga. Laws, 1975, p. 196; GA. CODE ANN. §114-501 (Supp. 1976).

15. Ga. Laws, 1975, p. 196; GA. CODE ANN. §114-501 (Supp. 1976).

16. Ga. Laws, 1975, p. 197; GA. CODE ANN. §114-501 (Supp. 1976).

17. Ga. Laws, 1975, p. 196; GA. CODE ANN. §114-501 (Supp. 1976).

18. Ga. Laws, 1975, p. 201 *et seq.*; GA. CODE ANN. ch. 114-7 (Supp. 1976).

trative law judges."[19] The authority of the Commissioner of Labor over personnel of the board is revoked and is stated expressly to be advisory only.[20]

Amendments to Georgia Code §§114-707 and 114-708[21] allow physicians' reports to be admitted as evidence under certain conditions and provide that rules of evidence for civil proceedings in Georgia superior courts apply at hearings. At the request of a party, the full board may review the evidence and may hear witnesses or, if the board deems it advisable, parties or their representatives. Then the board will issue an award. The former provisions for appeal are made a part of §114-708.[22]

The remaining additions and changes in chapter seven lack enough public importance to include here.

II. Recent Georgia Decisions

A. *Dual Employees & Independent Contractors*

During the survey period, six cases dealt with the status of workers who were injured.

Georgia-Pacific Corp. v. Corbin[23] involved the developing labor-contracting business. Corbin sued Georgia-Pacific Corp. in tort and alleged that the negligence of one of its employees had injured Corbin while he was working on a Georgia-Pacific project. Corbin was an employee of Gates, who had agreed to be a front for Georgia-Pacific to get union labor on the job. Georgia-Pacific defended on the ground that Corbin was indeed its own employee and his sole remedy was under the act.[24] The jury found Georgia-Pacific was not the employee—$70,000 worth.

The facts in *Jackson v. J. B. Rush Construction Co., Inc.*[25] differ from those of *Georgia-Pacific*. Jackson worked for Sheffield, a subcontractor of Rush, and was injured in an industrial accident while engaged in his usual employment. He collected workmen's compensation benefits under Rush's policy. Then he sued Rush in tort and claimed that Sheffield had paid Rush the money for workmen's compensation insurance premiums. This arrangement, Jackson said, amounted to Sheffield's maintaining the workmen's compensation insurance; therefore, he should not be barred from a tort action against Rush.

The court granted Rush's motion for summary judgment, and on appeal, this was affirmed. Having chosen to collect workmen's compensation bene-

19. Ga. Laws, 1975, p. 205; Ga. Code Ann. §114-701.14 (Supp. 1976).
20. Ga. Laws, 1975, p. 206; Ga. Code Ann. §114-701.16 (Supp. 1976).
21. Ga. Laws, 1975, pp. 207-08.
22. Ga. Laws, 1975, p. 208.
23. 137 Ga. App. 37, 222 S.E.2d 862 (1975), *cert. applied for.*
24. *See* Ga. Code Ann. §114-103 (Supp. 1976).
25. 134 Ga. App. 445, 214 S.E.2d 710 (1975), *cert. denied.*

fits from the general contractor, the employee will not be permitted to bite the hand that feeds him. Two earlier cases[26] are distinguishable; there the employees collected workmen's compensation benefits from their direct employers, the subcontractors, and then sued the general contractors in tort. Such suits are permitted.

An attempt was made in *Chancy v. Pope*[27] to have a crop-duster pilot declared an independent contractor. The evidence showed that Chancy furnished the aircraft, all maintenance, a person to mix and load the dust into the plane, all advertising and all other business expense; he gave Pope, the pilot, instructions about the use of the plane, and required him to satisfy the customer.[28] All that indicated that Pope was an employee, not an independent contractor. Chancy argued that the pilot should have flown no higher than 500 feet, but just before the crash he was flying at 2,000 feet—not where he reasonably might be expected to be in the performance of his work.[29] The court concluded that he was in the air and that was where he reasonably might be expected to be.

Without reciting the facts in *Georgia Casualty & Surety Co. v. Brawley*,[30] the court affirmed the lower tribunals, which had held that where the employer and insurer had insured the person as an employee, not as an independent contractor, they were estopped to deny he was an employee entitled to benefits.[31]

In *United States Fire Insurance Co. v. City of Atlanta*,[32] an Atlanta plain-clothes detective was employed as a security guard at Weis Theatres, Inc., to help maintain order if the need arose. The Atlanta Police Department requires its members to devote full time and attention to police business and forbids their acceptance of employment or of a financial interest in any business without the permission of the Chief of Police.[33] Members are deemed to be on duty and subject to call at all times, even when they are off-duty.[34] The employee complied with all these rules. He was killed while he was trying to quell a disturbance at the theatre, where he was on duty as a security guard.

With a bit of logical rationalizing, the court found that the officer had dual employment; if he had not been at the theatre as a security guard, a police officer on duty would have been called, so the claimant's presence

26. Blair v. Smith, 201 Ga. 747, 41 S.E.2d 133 (1947), and Bli Const. Co. v. Knowles, 123 Ga. App. 588, 181 S.E.2d 879 (1971), *cert. denied*.

27. 136 Ga. App. 826, 222 S.E.2d 667 (1975).

28. *Id.* at 826-27, 222 S.E.2d at 668.

29. *Id.* at 827, 222 S.E.2d at 668. See discussion in the text accompanying note 64, *infra*.

30. 135 Ga. App. 763, 219 S.E.2d 176 (1985).

31. The court relied on GA. CODE ANN. §114-607 (1973), which says that an insurer who issues a policy covering an employee ordinarily exempt from the act may not plead the exemption as a defense.

32. 135 Ga. App. 390, 217 S.E.2d 647 (1975).

33. Atlanta Police Department Rules 481 and 618, cited *id.*

34. Atlanta Police Department Rule 482, cited *id.*

was advantageous to the city as well as to the theatre. The original award had been against the theatre only. The court of appeals reversed in part and remanded the case to the board to determine Atlanta's proportionate share.[35]

In *Howard Sheppard, Inc. v. McGowan*,[36] the claimant, McGowan, applied for employment as a truck driver. An employee rode with McGowan for one day and reported he did not pass a road test required by state regulations;[37] another employee reported the same for the second day. On the third day, McGowan was told to continue to drive and haul gravel. On his first trip out, he was apprehended for speeding; while returning to the quarry for his second load, he was killed in a collision at a railroad crossing. The employer contended he would not have hired McGowan because he did not qualify under the testing program. The speeding violation alone justified that conclusion, the employer argued.

The court held that the employer got paid for the gravel the claimant hauled and thereby benefited from his work. At least for purposes of the act, he was an employee who was killed in an accident that arose out of and in the course of his employment.[38]

No trend is indicated in these decisions. The courts simply applied new situations to old decisions and to the act.

B. Computation of Benefits

Four cases present four situations on computation of benefits.

The first two appeals in *Neal v. Insurance Co. of North America*[39] dealt with a change-of-condition award for partial disability in favor of the employer and the insurer. The case decided on the third appeal[40] held that the total number of weeks during which benefits are due must be computed under the code section on partial disability,[41] which has a time limit, rather than the section on total disability, which has no time limit.[42] A review of both sections shows four factors limiting partial-disability benefits: (1) the weekly amount is two-thirds of the difference between the average weekly wage before the accident and after the accident; (2) the maximum weekly benefit is $70; (3) in no case may the total collected exceed $24,500; (4) the total weeks for partial disability payment is 400, from which must be

35. The court was construing GA. CODE ANN. §114-607 (1973).

36. 137 Ga. App. 408, 224 S.E.2d 65 (1976). See discussion under "Practice and Procedure" in the text accompanying note 125.

37. Georgia Public Service Commission, Motor Carrier Safety Regulations, cited *id.* at 409.

38. 137 Ga. App. at 411, 224 S.E.2d at 68.

39. 125 Ga. App. 152, 186 S.E.2d 552 (1971), and Neal v. Howard Johnson, Inc., 126 Ga. App. 560, 191 S.E.2d 350 (1972), *cert. denied*, 411 U.S. 971 (1972).

40. 134 Ga. App. 854, 216 S.E.2d 626 (1975).

41. GA. CODE ANN. §114-405 (Supp. 1976).

42. GA. CODE ANN. §114-404 (Supp. 1976).

deducted the number of weeks in which total disability benefits were collected.

In *Williamson v. Gulf Insurance Co.*,[43] the court of appeals again stated that tips are to be considered wages in computing the average weekly wage. Even though tips are not paid by the employer, experience has shown that they are definitely considered by the employer and the employee in setting the wage for a job where tips usually are paid by customers. Regardless of whether tips are considered in computing premiums for the insurance coverage, the employee loses them during a disability period and is entitled to benefits computed on them.

Commercial Union Insurance Co. v. Brock[44] presents an interesting issue on computation of death benefits to the dependent parents of a minor killed on his job. The minor contributed his entire wage to a family common fund for the support and maintenance of the employee, his mother, his younger sister, and his younger brother, all of whom claimed partial dependency. His older sister was self-supporting and his stepfather received disability benefits, so neither claimed dependency. The mother gave the employee spending money from the common fund as he needed it.

In computing the amount of dependency, no deduction was made for the spending money or for the board and lodging of the employee. Computation of dependency was made on the entire wage.[45] I have no criticism of the court's basic holding that "[w]here a deceased employee contributed his *entire* wages to partial dependents, the workmen's compensation award is the same as that which would be granted for total dependency."[46]

However, the court of appeals avoids a provision of the act that requires the compensation to partial dependents to be computed on the proportion of the wages contributed to them.[47] It found a distinction between a wage-earner who contributes only a portion of his earnings to his dependents and one who contributes all his earnings but gets some back. "The mere fact that the family gives the minor employee son spending money out of the wages which he contributed to the common family fund[48] is not to be considered a diminution of the entire wage concept."[49] Thus the court (1) opens the temptation for the minor employee to make himself a withholding beneficiary before depositing his "net pay" and (2) overlooks the requirements of modern minors for large amounts of spending money that

43. 137 Ga. App. 79, 222 S.E.2d 885 (1975), *cert. applied for.*

44. 134 Ga. App. 903, 216 S.E.2d 700 (1975). See discussion in the text accompanying note 58, *infra*.

45. *See* GA. CODE ANN. §114-413(c) (Supp. 1976) and §114-414(c) (1973).

46. 134 Ga. App. at 903, 216 S.E.2d at 700, headnote 1.

47. Ga. Code Ann. §114-413(c) (Supp. 1976).

48. I interpret this to mean the family common fund, not to be an aspersion cast (or of caste) upon the family.

49. 134 Ga. App. at 903, 216 S.E.2d at 700, headnote 2.

might leave the fund with a net contribution of zero. I have to concede that the court's holding is applicable to married males; those common funds, unfortunately, are the first conception of modern wives.

The third part of the holding states: "Payments made in lieu of board and lodging by a minor employee are not to be deducted in computing the proportion of wages contributed to his partial dependents."[50] This is contrary to the statute, which omits all reference to the age of the employee and omits the "not" used by the court.[51] The court distinguished this decision and that in *Smith v. Travelers Insurance Co.*,[52] with the simple explanation that *Commercial Union* deals with a minor and *Smith* deals with an adult. With even less effect than a judge's doing so, I dissent.

Payments made to an employee by mistake or without an approved agreement[53] are gratuitous payments and are not recoverable from the employee or from the insurer responsible for payments. In *Continental Insurance Co. v. Hickey*,[54] the court so held. The proper insurer may take credit for payments made gratuitously by another insurer or by the employer, so that the employee does not have a double recovery.[55]

Here again, I find no trend indicated. Many factors must be considered when computing benefits owed to an injured employee.

C. *Dependents*

Three cases decided during the survey period present different points about dependents.

In *United States Fire Insurance Co. v. City of Atlanta*,[56] there was an illegitimate child of the wife of a plain-clothes detective. The detective was killed while he was on his extra job at a theatre. There was an argument that the child should not be considered a stepchild of the deceased because the child was illegitimate and because his dependency on the deceased detective had existed for less than three months prior to the accident.[57] But the court held that a stepchild of the father is conclusively presumed to be dependent.

In *Commercial Union Insurance Co. v. Brock*,[58] the deceased employee was a minor who had a mother and two siblings partially dependent upon

50. *Id.* at 903, 216 S.E.2d at 700, headnote 3.

51. GA. CODE ANN. §114-414(c) (1973).

52. 71 Ga. App. 24, 29 S.E.2d 709 (1944).

53. Workmen's Compensation Board Form No. 16.

54. 139 Ga. App. 31, ___S.E.2d ___ (1976).

55. *Id.*

56. 135 Ga. App. 390, 217 S.E.2d 647 (1975).

57. GA. CODE ANN. §114-414(c) in the fourth grammatical paragraph requires dependency to exist for three months prior to an accident, but that refers to dependents other than the wife and children.

58. 134 Ga. App. 903, 216 S.E.2d 700 (1975). The case was discussed under "Computation of Benefits" in the text accompanying notes 44-52, *supra*.

him while an older sibling and a stepfather were not dependent at all. Although I disagree with the court of appeals over the amount of benefits payable, the application of the facts to the two statutes providing for determination of dependency[59] properly results in this unusual situation in which some members of the family are dependent while others are not.

Flint River Mills v. Henry[60] is based on unusual facts. The employee sustained fatal injuries in an industrial accident on December 10, 1973; but almost three years later his dependents still have not received compensation benefits because of technical difficulties. At the time of his death, the employee had six natural children under age 18; their mother had died about two years earlier, and these children were living with their maternal grandmother in a house being purchased by their father, the deceased. Aside from their deceased mother's Social Security benefits, the deceased employee was the sole source of support for these children.

After his first wife's death, the deceased employee remarried. At the time of his death, he was living with his second wife and her six children—his stepchildren—under age 18. Their natural mother, the second wife, was employed. Some of these children were receiving Social Security benefits as a result of their father's death. It was undisputed that the deceased used his income for the support of his natural children and contributed nothing for the support of his second wife or her children. The deceased's natural children filed a workmen's compensation claim. On a motion by the employer, the deceased's widow and his stepchildren were made parties. At a hearing, the widow testified that she was not seeking workmen's compensation for herself or her children.[61] Other actions attacked the constitutionality of the provisions of Code §114-414, which established a conclusive presumption that stepchildren are wholly dependent upon a stepparent. The widow and her children did not answer this last suit.

Here we find the unique situation in which the widow and the stepchildren of the deceased seek no part of the benefits, but the employer and its insurer cannot pay benefits to the natural children of the deceased without subjecting themselves to double payment because of the conclusive presumption. The case was before the supreme court on the sole question of constitutionality, but the court would not decide the issue until administrative proceedings were complete. The dependency question remains unanswered.[62]

With our cultural development,[63] the future must hold some interesting

59. GA. CODE ANN. §114-413 (Supp. 1976) and §114-414 (1973).

60. 234 Ga. 385, 216 S.E.2d 895 (1975). See discussion under "Practice and Procedure" in the text accompanying notes 123-125, *infra*.

61. *Id.*

62. Attorney Ben Kirbo, who represents the natural children of the deceased, advised me in a telephone conversation that the case is on its way back to the supreme court.

63. Be it progressive or regressive or just abandoned, I have no comment.

questions on dependency that cannot be answered with conclusive presumptions or perhaps even with rebuttable presumptions. What is the dependency status of an unmarried law student who shares the bed, board and love of a friend of the opposite sex where the friend provides all the funds for this arrangement and then is killed in an industrial accident? Is there a presumption? If so, is it conclusive or rebuttable? Is it in favor of or opposed to dependency? (Presumptions on issues other than dependency are beyond the scope of this article.)

D. Negligence of Employee

Three cases give interpretations on §114-105, which disallows compensation for injury or death resulting from wilful misconduct of the employee.

In *Chancy v. Pope*,[64] a crop-duster pilot drank two cans of beer approximately six hours before the crash in violation of FAA regulations. He was flying at 2,000 feet over the airport even though the crop-dusting altitude normally is 500 feet. The court held that neither of these acts was shown to be the proximate cause of death.

In *Liberty Mutual Insurance Co. v. Bray*,[65] the findings of fact showed that the employee was crossing a public highway to get from his work area to a parking lot provided by the employer. He was crossing the highway 300 feet from a pedestrian crossing with traffic light controls when he was struck by a vehicle and sustained injuries to his head and both legs. The full board affirmed the deputy director's denial of compensation, but the superior court reversed; then the court of appeals reversed and reinstated the denial made by the full board.

Judge Stolz, speaking for the majority in a 5-4 decision, gave an in-depth review of the effect of violating penal statutes and reaffirmed the position of the court set forth in previous decisions.[66]

Technically, *Hanover Insurance Co. v. Rollins*[67] raised the same questions as the *Bray* case, and the court reached the same conclusion: Compensation benefits were denied. The employee was injured in a collision between his automobile and a farm tractor when the employee tried to pass the tractor on the crest of a hill. The tractor began a left turn, and the employee's car struck the left front wheel of the tractor. After setting forth the facts and specifying the violations of statutes dealing with operation of vehicles on the highway, the board found that employee's "actions as described above proximately caused the collision, and, therefore, the acci-

64. 136 Ga. App. 826, 222 S.E.2d 667 (1975). See discussion in the text accompanying notes 27-29, *supra*.

65. 136 Ga. App. 587, 222 S.E.2d 70 (1975).

66. Aetna Life Ins. Co. v. Carroll, 169 Ga. 333, 150 S.E. 208 (1929), and Pacific Indemnity Ins. Co. v. Eberhardt, 107 Ga. App. 391, 130 S.E.2d 136 (1963). See also Smith, *Workmen's Compensation*, *supra* note 9, at 306.

67. 136 Ga. App. 595, 222 S.E.2d 91 (1975).

dent and his injury are attributable to his wilful misconduct."[68]

Judge Clark, who dissented in *Bray* and concurred in *Rollins*, found a difference in the facts:

> In *Bray* the employee was crossing a country road to reach the company's parking lot. Here [*Rollins*] the employee violated those statutes which forbid motorists from passing another vehicle on a hill, crossing into the left lane of a highway marked with a yellow line to the right of the center line. Bray's conduct may have been negligence but should not be considered as malum in se. On the other hand, Rollins undertook the wilful and conscious doing of an act of a criminal or quasi-criminal nature which brought him within the statutory bar of "wilful misconduct."[69]

The results in both cases are required if irresponsible acts of employees are not to be condoned. The only difference I see between *Bray* and *Rollins* is that one was walking and the other was riding.

E. Change in Condition

Code §114-709, which allows awards to be changed because of "change in condition," usually is interpreted to mean a change in medical condition or, more recently, a change in economic condition when either type of change is great enough to affect the amount of benefits being paid. The section also provides that any board-approved agreement on a change in condition is conclusive, unless the agreement is obtained by fraud, accident or mistake.

In *Williamson v. Gulf Insurance Co.*,[70] the employee alleged that two agreements approved by the board had been obtained by fraud and mistake. In reversing and remanding the case, the court stated that the full board and the superior court had the authority to change the amount of the earlier settlement if it were based on fraud, accident or mistake, and that this could be done after a hearing on a change in condition. "A failure to include the tips in her total salary would require an award based on a change in condition," the court said.[71]

Handley v. Travelers Insurance Co.[72] affirmed a change in condition from 50% loss of use of the employee's left leg to a 20% loss of use—a change in medical condition. In a previous appeal,[73] a correction of an error in an approved agreement had been made, and the case had been remanded to the board for a determination of a change in medical condition.

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68. *Id.* at 596, 222 S.E.2d at 92.

69. *Id.* at 597, 222 S.E.2d at 93.

70. 137 Ga. App. 79, 222 S.E.2d 885, (1976), *cert. applied for*. See discussion in text accompanying note 43, *supra*.

71. *Id.* at 82, 222 S.E.2d at 888.

72. 137 Ga. App. 281, 223 S.E.2d 478 (1976).

73. 131 Ga. App. 797, 798, 207 S.E.2d 218 (1974).

Under §114-709, the board, on its own motion or on motion of either party, has the authority to hear evidence of a change in condition.

Travelers Insurance Co. v. Caldwell[74] dealt with a change in condition affirmed by the court of appeals even though medical experts differed over a degenerative spinal condition. The employee had suffered a knee injury 13 months earlier and alleged that the crutches, the cast and the weakness of her knee had caused her to slip and fall while taking a bath and later to fall down a flight of stairs. Some medical evidence at the hearing was presented to the effect that twisting of the spinal column caused by the weight of the cast during walking and the two falls could have exacerbated the arthritic condition. The employer countered with medical evidence that "physical exertions of a sexual nature" had exacerbated the spinal condition. It was held that the employee had sustained a change in condition under the act.[75]

Miller v. Argonaut Insurance Co.[76] is important, because it sets forth four requirements for a change-in-condition award to an employee. The employee must show (1) that the condition has changed for the worse; (2) that because of this change the employee is unable to work for any employer; (3) that because of inability to work the employee has a total or a partial loss of income; and (4) that the inability to work was proximately caused by the injury.[77]

Fleming v. United States Fidelity and Guaranty Co.[78] highlights the significance of a change in economic condition. The employee had suffered a compensable injury and had returned to work in a supervisory capacity rather than at his regular heavy work. Then he was laid off for a cause unrelated to his injury. The court held that a change in economic condition had occurred. The employee had returned to work before he was able to perform his regular duties, and he still was unable to perform them at the time of his termination. Situations like this need to be guarded, because they are susceptible to abuse.

F. Proximate and Remote Causes of Injuries

This topic is applicable to time, distance and events. The distinction between proximate and remote causes is not to be too rigorously pressed in the application of the Workmen's Compensation Act.[79] That principle has been followed, quoted and cited on numerous occasions by both appellate courts, and it was used as part of the basis for affirming the change of condition in *Travelers Insurance Co. v. Caldwell*,[80] in which the employee

74. 135 Ga. App. 640, 218 S.E.2d 653 (1975). See text accompanying note 80, *infra*.
75. *Id.* at 641-42, 218 S.E.2d at 654.
76. 136 Ga. App. 101, 220 S.E.2d 89 (1975).
77. *Id.* at 103, 220 S.E.2d at 91.
78. 137 Ga. App. 492, 224 S.E.2d 127 (1976).
79. Thomas v. United States Cas. Co., 218 Ga. 493, 494, 128 S.E.2d 749, 752 (1962).
80. 135 Ga. App. 640, 218 S.E.2d 653 (1975). See text accompanying note 74, *supra*.

developed a back condition 13 months after a knee injury.

Injuries occurring during lunch breaks and rest breaks continue to be perplexing;[81] each case is decided independently.

Establishing rules to determine whether the cause of an injury is proximate or remote when it occurs during a break must be a problem that neither the General Assembly nor the courts can solve. Some progress was made by the court of appeals in *Powell v. Hartford Accident & Indemnity Co.*,[82] which put on the employee the burden of establishing that his injury arose both out of and in the course of the employment. In *Powell*, the employee was injured during a coffee break. Although the time for the break was included in his pay, there was no evidence indicating the employer exercised or had the right to exercise any control over the employee during the break. The court specifically distinguished other cases in which there was some element of control by the employer.

In *City Council of Augusta v. Williams*,[83] a doctor's testimony that the employee's work-related emotional stress "might or could" have contributed to his heart attack was coordinated with the rule against pressing too vigorously the distinction between proximate and remote causes. The court affirmed an award granting compensation. A glance at the bases for the alleged "severe emotional stress" shows the inconsistencies and the impossibility of their real existence: "(1) he was fearful of losing his job, (2) his beat was too large for one man, (3) he was required to ride alone in his patrol car because the Augusta Police Department was understaffed, (4) only three days previously he had been transferred from the morning shift to the night shift, and (5) he had been required to attend court that morning."[84] If either (2) or (3) is true, there is no basis for (1); it appears that (5) is simply a part of the job, and (4) usually occurs in jobs requiring work around the clock.

Murray v. Hartford Accident & Indemnity Co.[85] presents an interesting study. The injury led to the amputation of the ring finger of the left hand, and the ultimate award was based on a percentage of loss of use to the entire hand. Although a finger is a part of the hand, each finger is a scheduled member with a separate rating under Georgia Code §114-406, as is the entire hand. The deputy director found that there was weakness and some pain in the hand but doubted that the condition could be attributed to the amputation of the ring finger; he awarded compensation for 100% loss of the third finger. Judge Marshall, for the court, said the evidence clearly showed the existence of a neuroma, a nerve tumor on the stub at the point of amputation, so the case had to be remanded for further

81. Smith, *Workmen's Compensation*, *supra* note 9, at 303.
82. 137 Ga. App. 187, 223 S.E.2d 236 (1976).
83. 137 Ga. App. 177, 223 S.E.2d 227 (1976).
84. *Id.*
85. 135 Ga. App. 870, 219 S.E.2d 472 (1975).

findings on the effect of the neuroma on the hand.[86] The testimony of two doctors leaves some question about the disability.[87]

Certainly the classic of all cases decided during the survey period is *General Accident Fire & Life Insurance Co. v. Sturgis*.[88] The employee became ill at work and was comatose an hour and a half later. He was taken to a hospital, where he remained unconscious until he died three days later. The record showed that on the morning of the illness the employee had been working near toxic chemicals, but it did not show how much he was exposed or whether he inhaled any toxic chemicals.

The pathologist who performed the autopsy stated, "[T]he man was suffering from an extensive pneumonia . . . , and in my opinion, this bacterial infection caused his death. . . . The pneumonia was caused by an organism called Diplococcus Pneumoniae, and this is the most common cause of lobular pneumonia. It occurs usually — it may occur spontaneously or in this particular instance I judged it to have caused pneumonia in a lung that had been damaged by inhalation of these noxious vapors. I think this is a not uncommon situation with inhalation of a noxious gas."[89]

First, the court held that "there is no question that the death arose 'in the course of the employment' because he was at work when he became ill."[90] Second,

> an accident "arises out of the employment" when it is apparent to the rational mind, upon consideration of all the circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. . . . While, ordinarily, an initial determination of this factual issue would be affirmed under the "any evidence rule" . . . that rule does not lend itself to this case.[91]

The court agreed with the employer that there was no evidence that the employee inhaled any noxious fumes. The pathologist assumed that he did because he worked at a place where such were regularly in use. "Ordinarily it is the rule of circumstantial proof that the facts from which the main fact is to be inferred must be proved by direct evidence. An inference resting only upon an inference is not permissible."[92]

The court upheld the refusal of the board to find that the employee inhaled any noxious fumes and stated: "indeed the record is barren of any evidence, medical or otherwise, of what might have precipitated the development of pneumonia. . . ."[93]

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86. *Id.* at 874, 219 S.E.2d at 475.

87. The attorney for the employer advised me that a settlement was made under GA. CODE ANN. §114-106, and that's a good ending.

88. 136 Ga. App. 260, 221 S.E.2d 51 (1975), *cert. denied.*

89. *Id.* at 260-61, 221 S.E.2d at 51.

90. *Id.* at 262, 221 S.E.2d at 52.

91. *Id.*

92. *Id. See also* Miller v. Gerber Products Co., 207 Ga. 385, 388, 62 S.E.2d 174 (1950).

93. 136 Ga. App. at 263, 221 S.E.2d at

Third, the court said "[t]he burden of proof in a workmen's compensation case is upon the claimant to show that the employee suffered an accidental injury which arose out of and in the course of his employment."[94]

There's the case—the court has said so. But, like many preachers who do not stop when they finish the sermon, the court continued and made a complete turn-around:

> The employee is aided in his burden by the well-established presumptions stated in the board's decision that when an employee is found dead in a place where he might reasonably have been expected to be in the performance of his duties, it is presumed that the death arose out of his employment . . . . Without attempting to accept some [cases] as precedent and to distinguish or reconcile others [cases cited], we simply find the presumption applicable to this case.[96]

What happened? There is "indeed no evidence" that the death arose out of the employment; no inference may be predicated on another inference; the burden of proof is on the claimant. But there is *another* presumption that ignores all that and says, like the first presumption, that when the employee is found dead in a place where he might reasonably have been expected to be in the performance of his duties, it is presumed that the death arose out of his employment.

We now have two presumptions that present a prima facie case for the employee, so the burden shifts to the employer to negate both presumptions, even though there is "indeed no evidence" to support either presumption. I would prefer to accept the doctor's presumption of inhalation of toxic fumes rather than to have the case decided exclusively upon two presumptions based on one single point.[97]

G. *Aggravation of Pre-existing Condition*

There are three factors to be considered under this topic: (1) aggravation of a disease under the occupational-disease section,[98] (2) aggravation of a previous injury or condition, whether initially from an industrial accident or otherwise, and (3) the effect of the statute of limitations.[99]

Chapter 114-8 is known as the occupational disease section and provides compensation benefits for a limited number of diseases generally resulting from specific categories of employment. Cases under this section are handled differently from the usual injury cases, as *Insurance Co. of North*

94. *Id.*
95. *Id.*
96. *Id.*
97. O, Death, where is thy sting? With haste to the job my body bring.
98. GA. CODE ANN. ch. 114-8 (1973).
99. GA. CODE ANN. §§114-305 and -306 (1973).

America v. Brannon[100] demonstrates. There the employee claimed aggravation of a pre-existing lung condition. In an interlocutory order, the board referred the case to the medical board,[101] which found simply that the employee "had a pre-existing disease which was aggravated by his employment." The employer appealed the decision and propounded interrogatories to the medical board.[102] The court of appeals found that the medical board made no finding about the date of disability or the causation or the employer's entitlement to apportionment, if any, under §114-805. The case was remanded to the State Board of Workmen's Compensation to refer the case to the medical board.[103] The apportionment section provides that an employer is liable only for that portion of the disability that is attributable to the employment.

The important portion of *Continental Casualty Co. v. Weise*[104] is the court's statement that "[i]t is well settled that the aggravation of a pre-existing infirmity, whether congenital or otherwise, is compensable. . . . [and] well settled that where a disability results which is objectively physiologically ascertainable, it is compensable although the onset of disability is imperceptible from day to day, and there is no one 'accident' at a specifiable time and place to which the result may be attributable."[105] In reversing the superior court and affirming the board's denial of compensation, the court stated that "contradictory evidence can authorize the denial of compensation [cites], as can the impeachment of the claimant [cites]."[106]

Sometimes an employee injured in an accident arising out of and in the course of his employment continues to work for the same employer. If the continuing employment aggravates the original injury over a short or long period of time to such an extent that the employee later is forced to stop work, the employee is considered to have sustained a second accidental injury arising out of and in the course of the employment on the date that he no longer was able to work.[107] It doesn't matter whether time was lost after the first injury. The same rule applies if, after the first injury, the employee goes to work for another employer where he aggravates the first injury to such an extent that he is required to terminate his employment. The rule also applies when the employee terminates his employment with the second employer because of the continued aggravation and then makes his claim for compensation against the original employer; he still is consid-

100. 137 Ga. App. 468, 224 S.E.2d 115 (1976).
101. *See* GA. CODE ANN. §114-819 (1973).
102. *See* GA. CODE ANN. §114-823(3) (1973).
103. 137 Ga. App. at 469, 224 S.E.2d at 116.
104. 136 Ga. App. 353, 221 S.E.2d 461 (1975).
105. *Id.* at 354, 221 S.E.2d at 462.
106. *Id.* at 354, 221 S.E.2d at 463.
107. Liberty Mut. Ins. Co. v. White, 139 Ga. App. 85, ___ S.E.2d ___ (1976), and Continental Ins. Co. v. Hickey, 139 Ga. App. 31, ___ S.E.2d ___ (1976).

ered to have sustained a "new" accident while employed by the second employer.[108]

H. Statute of Limitations

Since "employment" means "employment with the party from whom compensation is sought,"[109] the statute of limitations runs separately for each of the "two" injuries recognized when the employee keeps working after an injury and aggravates the condition.[110] It doesn't matter whether he changed jobs between the two periods of disability or kept working for the same employer. In neither case does the statute of limitations bar his claim if he presents it within one year of each "new accident."

In *Employers Insurance of Wausau v. Nolen*,[111] the insurer sent the employee several checks for benefits, and over the next year it made requests for agreement forms. A claim was not filed by the employee within one year from the date of the accident. A letter from the insurer to the employee in July 1973 asked that the forms be sent in. A longhand postscript across the bottom of the letter said, "They have nothing to do with the permanent disability."

When a claim was made more than one year after the accident, the courts held that the evidence supported the employee's testimony that telephone conversations and letters from the insurer misled him about the statute of limitations:

> The conduct of defendant and its insurance carrier may be such as to estop them from presenting the statutory limitation as a defense in bar of the claim for compensation, if the effect of such conduct was to *mislead* or deceive claimant, *whether intentional or not*, and induce him to withhold or postpone filing his claim petition until more than a year had elapsed from the occurrence of the accident.[112]

I. Notice

The Georgia Supreme Court, in *Schwartz v. Greenbaum*,[113] made a major change in the requirements of notice from the employee to the employer. The notice, the supreme court said, "need not be given with a view to claiming compensation, and is sufficient if it puts the employer on notice of the injury so that it may make an investigation if it sees fit to do so."[114]

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108. Smith, *Workmen's Compensation*, *supra* note 9, at 309, *citing* House v. Echota Cotton Mills, Inc., 129 Ga. App. 350, 199 S.E.2d 585 (1973).

109. *Id.*

110. See, *e.g.*, the cases cited at note 107, *supra*. The statute had run on action against the first employer in *House*. 129 Ga. App. at 352, 199 S.E.2d at 587.

111. 137 Ga. App. 205, 223 S.E.2d 250 (1976).

112. *Id.* at 207, 223 S.E.2d at 251.

113. 236 Ga. 476, 224 S.E.2d 38 (1976).

114. 236 Ga. at 477, 224 S.E.2d at 39.

Schwartz, the employee, had made a telephone call to his supervisor two days after Schwartz got out of the hospital, where he had been treated for a massive heart attack he had suffered at home. Two more days later, Schwartz had another heart attack and was sent back to the hospital. Relying on *Royal Indemnity Co. v. Coulter*,[115] the court of appeals held that the telephone call was not sufficient notice because Schwartz did not say that the injury arose out of and in the course of his employment.[116] On certiorari, the supreme court expressly overruled *Coulter*, reinstated a 1953 decision of the court of appeals,[117] and remanded *Schwartz*.

Liberty Mutual Insurance Co. v. Carnley,[118] decided by the court of appeals earlier in the survey period, held that there was no notice at all to the employer, so it was not affected by the supreme court's new ruling.

J. Evidence and Findings of Fact

At least ten cases decided during the survey period dealt with findings of fact and the evidence on which they were based. The superior court and the court of appeals are controlled by the so-called "any evidence rule," by which a case is affirmed if there is any evidence to support the findings of fact of the deputy director and the board.[119] If the findings of fact are based upon a misstatement of significant testimony, the finding will be set aside and the case remanded to the board for new findings if a proper understanding of the evidence might have caused the finder of fact to reach a different conclusion.[120]

Lowe v. Bituminous Casualty Co.[121] shows the extent to which the rule is applied. The employee sprained his back while lifting cross-ties but continued to work; when he complained to his foreman, he was given lighter work. Seven days after the sprain, his employment was terminated. On the tenth day after the injury (four days after termination), the employee sought medical treatment. The doctor testified that the employee should make a full recovery after two or three weeks. The deputy director made an award of four weeks.

In affirming the award, the court stated that there was evidence to support the award, even though the employee testified at the hearing that he was not working and had not worked since he had sprained his back. "The findings were authorized by the evidence and cannot be set aside," the court said.[122]

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115. 213 Ga. 277, 98 S.E.2d 899 (1957).
116. Schwartz v. Greenbaum, 136 Ga. App. 259, 221 S.E.2d 61 (1975).
117. Davison-Paxon Co. v. Ford, 88 Ga. App. 890, 78 S.E.2d 899 (1953).
118. 135 Ga. App. 599, 218 S.E.2d 307 (1975).
119. *See, e.g.*, Liberty Mut. Ins. Co. v. Carnley, 135 Ga. App. 599, 218 S.E.2d 307 (1975).
120. Blankenship v. Atlantic Steel Co., 137 Ga. App. 282, 223 S.E.2d 479 (1976).
121. 135 Ga. App. 792, 219 S.E.2d 31 (1975).
122. *Id.*

K. *Practice and Procedure*

One-third of the cases decided during the survey period contain some reference to practice and procedure, including appellate procedure.

In *Flint River Mills v. Henry*,[123] an attack was made on the constitutionality of the code section establishing a conclusive presumption that stepchildren are dependent upon a deceased stepfather.[124] The plaintiffs sought an injunction restraining the deputy director from entering an award based on that section. The plaintiffs should have raised the constitutional challenge in the hearing before the deputy director and then had the challenge ruled on in the appeal to the superior court. Although the deputy director is powerless to declare the act unconstitutional, resolution of the constitutional question can be made by judicial review on appeal to the superior court.[125]

Perhaps the most valuable information that could be relayed under this topic is found in *Howard Sheppard, Inc. v. McGowan*.[126] The court adopted from the brief of the appellant what the court designates as the criteria by which lawyers for both employers and employees should measure their cases before advising clients to appeal:

> 1. A finding of fact by director or deputy director of the State Board of Workmen's Compensation, when supported by any evidence, is conclusive and binding upon the court, and the judge of the superior court does not have any authority to set aside an award based on those findings of fact, merely because he disagreed with the conclusions reached therein [cites].
>
> 2. Upon appeal from an award of the State Board of Workmen's Compensation granting compensation, evidence will be construed in a light most favorable to party prevailing before the Board [cites].
>
> 3. Every presumption in favor of validity of award of Board of Workmen's Compensation should be indulged in by reviewing court [cites].
>
> 4. Neither Superior Court nor Court of Appeals has any authority to substitute itself as fact finding body in lieu of Board of Workmen's Compensation [cites].
>
> 5. Weight and credit to be given testimony of witnesses and conflicts in evidence are for determination by Workmen's Compensation Board [cites].
>
> 6. Hearing director and full board are vested with exclusive authority to weigh evidence in Workmen's Compensation Proceedings [cites].
>
> 7. Deputy director and the full Board of Workmen's Compensation as fact finders have exclusive prerogative of weighing evidence, including determinations of credibility of witnesses; the courts of appeal are bound by findings if supported by any evidence [cites].

123. 234 Ga. 385, 216 S.E.2d 895 (1975). See text accompanying note 60, *supra*.

124. GA. CODE ANN. §114-414(c) (1973).

125. 234 Ga. at 386, 216 S.E.2d at 897.

126. 137 Ga. App. 408, 224 S.E.2d 65 (1976). See text accompanying note 36, *supra*.

> 8. The board, in arriving at the truth, may apply all of rules of law with reference to the credibility of the witnesses testifying, their intelligence, their means and opportunity of knowing the facts to which they testify, the nature of the facts to which they testify, the probability or improbability of their testimony, their interest or want of interest, and their personal credibility so far as the same legitimately appears from the trial [cites].
>
> 9. The testimony of a witness is to be considered as a whole and not in disjointed parts. Nor is the Department of Industrial Relations (now Workmen's Compensation Board) bound in every way to accept the literal statements of a witness before it, merely because such statements are not contradicted by direct evidence. Implications inconsistent with the testimony may arise from the proved facts and in still other ways the question of what is the truth may remain an issue of fact, despite uncontradicted evidence in regard thereto [cites].[127]

L. Liability Above the Compensation Act

One case, *United States Fire Insurance Co. v. Day*,[128] dealt with an insurer's tort liability in inspections. Judge Clark quotes Johnnie Mercer, the Savannah native who wrote, "Accentuate the Positive." The insurer, Judge Clark said, "negative[d]" the allegation that its inspections were made for purposes other than its workmen's compensation underwriting. Having done this, the insurer was shielded from a tort action arising from an alleged negligent inspection.[129]

127. *Id.* at 410-11, 224 S.E.2d at 67-68.
128. 136 Ga. App. 359, 221 S.E.2d 467 (1975).
129. *Id.* at 363-64, 221 S.E.2d at 471.