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Workers' Compensation

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I. LEGISLATION

The Survey period featured limited legislation.[1] House Bill 1409[2] increased the maximum rate of temporary total disability benefits from $675 to $725 and increased the maximum rate of temporary partial disability benefits from $450 to $483.[3] Similarly, the maximum amount of death benefits payable to a sole surviving spouse was increased correspondingly from $270,000 to $290,000.[4]

While not an amendment directly to the Workers' Compensation Act (the Act),[5] it is noteworthy that House Bill 389[6] amends the definition of "employment" applicable to the "Employment Security Law."[7] This definition now includes services performed for wages unless the Department of Labor makes a contrary determination based upon evidence that such individual has been, and will continue to be, free from control or direction over the performance of such services, including a list

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1. For analysis of workers' compensation during the prior survey period, *see* H. Michael Bagley & J. Benson Ward, *Workers' Compensation*, *Annual Survey of Georgia Law*, 73 MERCER L. REV. 303 (2021), https://digitalcommons.law.mercer.edu/cgi/viewcontent.cgi?article=2709&context=jour_mlr [https://perma.cc/L2KU-WU3L].

2. Ga. H.R. Bill 1409, Reg. Sess., 2022 Ga. Laws 350 (codified at O.C.G.A. § 34-9-261 (2022)).

3. *Id.* §§ 1–2.

4. *Id.* § 3.

5. O.C.G.A. §§ 34-9-1 through 432 (2022).

6. Ga. H.R. Bill 389, Reg. Sess., 2022 Ga. Laws 499 (codified at O.C.G.A. § 34-8-35 (2022)).

7. O.C.G.A. § 34-8-35 (2022).

of characteristics to consider in making the determination of employment.[8]

II. STATUTE OF LIMITATIONS FOR CATASTROPHIC REQUEST

The case of *Sunbelt Plastic Extrusions, Inc. v. Paguia*[9] dealt with the timing of an employer/insurer's last payment of income benefits and whether a claimant timely requested designation of her injury as "catastrophic" or whether her request was barred by the statute of limitations.[10]

The claimant incurred a compensable injury on March 31, 2009, and received 400 weeks of income benefits, with the 400 weeks ending on November 29, 2016.[11] On November 20, 2018, the claimant filed a form with the Georgia Board of Workers' Compensation requesting that her injury be deemed catastrophic. The employer/insurer countered that the claimant's request for catastrophic designation and additional income benefit payments was barred by the two-year statute of limitations contained in Official Code of Georgia Annotated section 34-9-104(b),[12] arguing that it had mailed the last payment of income benefits to the claimant more than two years before November 20, 2018. At a hearing, the Administrative Law Judge rejected the employer/insurer's statute of limitations defense and found the claimant's injury was catastrophic, and the Appellate Division of the State Board of Workers' Compensation (Appellate Division) affirmed, as did the Houston County Superior Court.[13]

The Georgia Court of Appeals addressed the employer/insurer's argument that the claimant's request was barred because the last income benefit payment was actually made more than two years before the claimant filed the request at issue.[14] O.C.G.A. § 34-9-104(b) provides a two-year statute of limitations for a claimant to seek additional workers' compensation benefits due to a change in condition, and the claimant's request for catastrophic designation is a request for a change in condition.[15] Claims for additional income benefits are time-barred if not

8. Ga. H.R. Bill 389, 2022 Ga. Laws 499 § 1.

9. 360 Ga. App. 894, 862 S.E.2d 566 (2021).

10. *Id.* at 894–95, 862 S.E.2d at 567.

11. *Id.* at 894, 862 S.E.2d at 568.

12. O.C.G.A. § 34-9-104(b) (2022).

13. *Sunbelt*, 360 Ga. App. at 895, 862 S.E.2d at 568.

14. *Id.*

15. *Id.* at 895–96, 862 S.E.2d at 568 (citing Williams v. Conagra Poultry of Athens, 295 Ga. App. 744, 746, 673 S.E.2d 105, 107 (2009)); *see* O.C.G.A. § 34-9-104(b).

brought within two years of that cessation date.[16] The court deferred to the Appellate Division's determination that a payment is "actually made" under O.C.G.A. § 34-9-104(b) when it is mailed to the recipient.[17] Therefore, the court's inquiry focused on whether the employer/insurer proved that it mailed the last payment of income benefits to the claimant more than two years before she filed her request for catastrophic designation on November 20, 2018.[18]

At the hearing before the Administrative Law Judge, the employer/insurer presented the testimony of the claims adjuster as to the general procedure and steps she followed in mailing income benefit checks to the claimant: she completed an instruction form for her administrative assistant to issue a check for the claimant's last two weeks of income benefits, and these forms prompted the administrative assistant to create a check that was printed in the office, and ordinarily, the checks were picked up for mailing each afternoon.[19] The claims adjuster testified that she was not the person who created or mailed the checks, and that she did not know exactly when the administrative assistant created the check to the claimant or when the administrative assistant placed the check in the location from which the person from the post office picked it up, though the claims adjuster testified to her belief that the check was mailed on November 15, 2016—the date printed on the check.[20]

Based on this evidence, the Appellate Division found testimony of the insurer's routine practice for issuing payments and found the claims adjuster completed the claims payment authorization form for the claimant on November 14, 2016, a check was printed, and it was picked up for mailing.[21] However, the Appellate Division further held that the employer/insurer did not present evidence about the time that elapsed between the various steps. It did not prove its contention of a one-day interval between the completion of the form and the mailing of the check, as there was (1) no evidence that a one-day interval was part of the insurer's routine practice; (2) no evidence as to the time that passed between the administrative assistant's receipt of the claims payment authorization form and the creation of the check in the computer system; and (3) no evidence of the length of time between the creation of the check

16. *Sunbelt*, 360 Ga. App at 896, 862 S.E.2d at 568 (citing Roseburg Forest Prods. Co. v. Barnes, 299 Ga. 167, 169, 787 S.E.2d 232, 235 (2016)).

17. *Sunbelt*, 360 Ga. App. at 896, 862 S.E.2d at 568.

18. *Id.*

19. *Id.* at 896–97, 862 S.E.2d at 568–69.

20. *Id.*

21. *Id.* at 897, 862 S.E.2d at 569.

and the printing of the check. The Appellate Division determined that there was insufficient evidence to determine when the check was mailed, other than some time after November 14, 2016, and thus the employer/insurer did not present sufficient evidence to meet its burden of proving its affirmative defense.[22]

Before the court of appeals, the employer/insurer argued that it was erroneously required to present evidence of a mailing receipt to prove the date of mailing, even though O.C.G.A. § 34-9-104(b) imposes no such requirement.[23] However, the court of appeals disagreed and noted that the Appellate Division acknowledged that evidence of an insurer's routine practice regarding the issuance and mailing of checks can be used to prove how and when a specific check was mailed, only in this case the employer/insurer failed to meet its burden of proof because it did not introduce evidence of the time between each step of its routine practice in creating and mailing checks.[24] Because some evidence supported the Appellate Division's findings, the court held that the employer/insurer failed to prove its statute of limitation defense by a preponderance of the evidence.[25]

The court then addressed the claimant's argument that it overrule the holding in *Lane v. Williams Plant Services*,[26] that a payment is "actually made" under O.C.G.A. § 34-9-104(b) when it is mailed to the recipient.[27] Rather, the claimant argued that the statute of limitations in O.C.G.A. § 34-9-104(b) should begin to run on the date benefits are suspended as shown in the WC-2 form filed with the State Board, as opposed to the date the check is mailed. The claimant contended that the current interpretation of the statute is unconstitutional because it deprives claimants of notice in violation of the Equal Protection and Due Process Clauses of the Georgia and United States Constitutions and that from a practical standpoint, this interpretation grants employer/insurers control over the statute of limitations based on when the employer mails the last payment of benefits.[28]

The court observed that the present case demonstrated that the rule in *Lane* can be problematic in practice, as there can be uncertainties in confirming when a payment was mailed, and the purpose of statutes of limitation are ill-served when the date a limitation period began to run

22. *Id.*
23. *Id.* at 898, 862 S.E.2d at 569.
24. *Id.* at 898, 862 S.E.2d at 569–70.
25. *Id.* at 898, 862 S.E.2d at 570.
26. 330 Ga. App. 416, 766 S.E.2d 482 (2014).
27. *Sunbelt*, 360 Ga. App. at 898, 862 S.E.2d at 570.
28. *Id.* at 898–99, 862 S.E.2d at 570.

becomes a litigated question of fact.[29] The court also suggested that the rule in *Lane* could be subject to manipulation where an employer/insurer combines the last two weekly payments to shorten the limitation period.[30] Nonetheless, the court declined to reconsider *Lane* under principles of judicial restraint, as it was unnecessary to overrule that prior decision to decide the pending case, and left the matter as one to be considered by the General Assembly.[31]

III. DEATH AND DEPENDENCY BENEFITS

In *Baxter v. Tracie McCormick, Inc.*,[32] an employee's surviving spouse sought to avoid the statutory cap on death benefits by arguing that her deceased mother-in-law was a partial dependent.[33] The deceased employee died in a work-related accident in 2012 and left behind a wife but no minor children and no other potential dependents. Accordingly, after his widow filed a claim for workers' compensation benefits, she began receiving full benefits pursuant to O.C.G.A. § 34-9-13(c).[34] After the employer/insurer paid the statutory maximum of $150,000 in death benefits to a sole surviving spouse under O.C.G.A. § 34-9-265(d),[35] it suspended her benefits in 2018. The widow requested a hearing with the State Board, arguing that O.C.G.A. § 34-9-265(d)'s cap on death benefits did not apply to her because she was not the sole dependent on the date of accident, as the deceased employee's mother was a partial dependent. The widow's mother-in-law had never brought a claim for death benefits before she passed away in 2017. The Administrative Law Judge found that the widow's mother-in-law was a partial dependent of the deceased employee, but never qualified as a dependent during her lifetime; the Appellate Division affirmed, as did the Fulton County Superior Court.[36]

The Georgia Court of Appeals observed that the widow, as the surviving spouse, was presumed under O.C.G.A. § 34-9-13(b)(1)[37] to be wholly dependent on the deceased employee, and under O.C.G.A. § 34-9-13(d)[38] when there is a whole dependent, then partial dependents

29. *Id.*
30. *Id.*
31. *Id.* at 899–900, 862 S.E.2d at 570–71.
32. 360 Ga. App. 445, 861 S.E.2d 406 (2021).
33. *Id.* at 445, 861 S.E.2d at 406.
34. *Id.* at 445, 861 S.E.2d at 407; *see* O.C.G.A. § 34-9-13(c) (2022).
35. O.C.G.A. § 34-9-265(d) (2022).
36. *Baxter*, 360 Ga. App. 445–46, 861 S.E.2d at 406–07.
37. O.C.G.A. § 34-9-13(b)(1) (2022).
38. O.C.G.A. § 34-9-13(d) (2022).

cannot recover benefits.[39] Consequently, the mother-in-law was never eligible to receive benefits.[40] The mother-in-law had not qualified as a dependent while alive and had not made a claim for any benefits while alive.[41] The court of appeals also noted that the State Board of Workers' Compensation's determination that a posthumous claim of partial dependency would not disturb O.C.G.A. § 34-9-265(d)'s statutory cap on the amount of death benefits a sole surviving spouse may receive and was a reasonable interpretation of the Act.[42]

IV. STANDARD OF REVIEW

In *Padco Contracting, Inc. v. Hernandez*,[43] the claimant had a compensable claim after he fell from a scaffolding while working at his employer's construction site, injuring his right and left legs and his spine.[44] The claimant received workers' compensation income benefits and medical treatment, including for his lower left and right legs and his lumbar spine, and eventually his injury was designated "catastrophic."[45] When the claimant also sought treatment for his thoracic spine and his cervical spine, the employer/insurer denied this treatment. The claimant requested a hearing to pursue medical treatment for his thoracic and cervical spine, and the employer/insurer requested a change of authorized treating physician.[46]

The Administrative Law Judge found that the cervical and thoracic spine conditions were compensable and denied the employer/insurer's request for a change of physician.[47] The Appellate Division affirmed the finding that the thoracic spine condition was compensable, but ruled that the cervical spine condition was not. It found insufficient evidence of a causal relationship between the cervical injury and the work accident, but granted the employer/insurer's request for a change of physician. The claimant appealed to the Rockdale County Superior Court, which affirmed the change of physician request but reversed the Appellate Division's finding that the cervical spine injury was not compensable.

39. *Baxter*, 360 Ga. App. at 447, 861 S.E.2d at 408 (citing Stevedoring Servs. of Am. v. Collins, 247 Ga. App. 149, 542 S.E.2d 134 (2000)).

40. *Baxter*, 360 Ga. App at 448–49, 861 S.E.2d at 409.

41. *Id.* at 448, 861 S.E.2d at 408.

42. *Id.* at 449, 861 S.E.2d at 409.

43. 360 Ga. App. 765, 861 S.E.2d 459 (2021).

44. *Id.* at 765, 861 S.E.2d at 460.

45. *Id.* at 766, 861 S.E.2d at 460.

46. *Id.*

47. *Id.*

The superior court concluded that the Appellate Division failed to consider medical evidence indicating a cervical condition prior to 2016.[48]

In its decision, the Georgia Court of Appeals first addressed the legal framework governing workers' compensation appeals, noting that the Appellate Division has broad authority to review an Administrative Law Judge's findings and may draw different factual conclusions based on its review of the record and analysis of the evidence; it may also substitute its own alternative findings.[49] However, neither the superior court nor the court of appeals may substitute itself as a factfinding body in lieu of the Appellate Division; instead, those reviewing courts must determine whether the Appellate Division's findings are supported by any evidence.[50]

With this standard of review in mind, the court held that the superior court erroneously conducted a *de novo* evidentiary review, instead of applying the "any-evidence" standard of review.[51] A subsequent appellate court may determine whether the Appellate Division improperly applied the law to undisputed facts or reached a decision based on an erroneous legal theory, however that was not the issue at hand in the present appeal.[52] Because at least some evidence supported the Appellate Division's finding that the claimant's cervical condition was not related to his 2008 accident, such a finding should be upheld on appeal, even though the record contained competing evidence.[53]

V. STANDARD OF REVIEW AND CHANGE OF CONDITION

In *Express Employment Professionals v. Barker*,[54] the claimant fell at work and was treated for pain, including that in his left hip and back, and the claim was accepted as compensable with the employer/insurer paying the claimant income benefits.[55] After less than three months of medical treatment and receipt of income benefits, the claimant was placed at maximum medical improvement by a treating physician and released to full-duty work on October 26, 2018. The employer/insurer then suspended paying further income benefits. The claimant subsequently saw additional doctors, two of whom indicated that he continued to have low back pain as a result of his work injury. Prior to a

48. *Id.*
49. *Id.* at 766–67, 861 S.E.2d at 460–61.
50. *Id*. at 767, 861 S.E.2d at 461.
51. *Id*.
52. *Id.* at 768, 861 S.E.2d at 461.
53. *Id*. at 768–69, 861 S.E.2d at 462.
54. 361 Ga. App. 38, 862 S.E.2d 594 (2021).
55. *Id.* at 38–39, 862 S.E.2d at 595–96.

hearing before the Administrative Law Judge, the claimant fell at home in April 2019 and landed in the same area impacted in his work injury. He then sought treatment from another doctor for low back pain.[56]

At a hearing on the claimant's request for recommencement of income benefits, the Administrative Law Judge found that the claimant underwent a change in condition for the better on October 26, 2018, and did not require further medical treatment nor have any disability as a result of his work accident and injury.[57] The judge further found that the claimant's fall at home in April 2019 was an unrelated intervening accident that was the cause of any current injury or disability which broke the chain of causation as contemplated by O.C.G.A. § 34-9-204(a).[58] The Appellate Division affirmed, however, the Carroll County Superior Court reversed the finding that the claimant had a subsequent intervening accident that broke the chain of causation and ruled that such a conclusion was inconsistent with the finding that the claimant had undergone a change of condition for the better on October 26, 2018.[59]

On appeal, the Georgia Court of Appeals ruled that the superior court improperly reversed the Appellate Division's finding because under the any-evidence standard of review, some evidence supported the Appellate Division's ruling.[60] Because some of the competing evidence included the medical opinion that the claimant had recovered from his work accident by October 26, 2018, it was error for the superior court to reverse the Appellate Division's finding that the claimant underwent a change of condition for the better.[61] Further, the court held that evidence existed to show that the claimant had a non-work-related fall at home in April 2019 where he again landed on his left hip and buttocks; this evidence supported the Appellate Division's finding that the claimant incurred a subsequent intervening accident which broke the chain of causation.[62] Last, the court observed that the findings of a change in condition for the better and a subsequent intervening accident which broke the chain of causation were not inconsistent, and again these conclusions were

56. *Id.* at 39, 862 S.E.2d at 596.

57. *Id.* at 40, 862 S.E.2d at 596.

58. *Id.*; *see* O.C.G.A. § 34-9-204(a) (2022). Section 34-9-204(a) provides that "[n]o compensation shall be payable for the . . . disability of an employee . . . insofar as his or her disability, may be aggravated, caused, or continued by a subsequent nonwork related injury which breaks the chain of causation between the compensable injury and the employee's disability." *Id.*

59. *Express Emp. Pros.*, 361 Ga. App. at 40, 862 S.E.2d at 596.

60. *Id.*

61. *Id.* at 41, 862 S.E.2d at 596–97.

62. *Id.* at 41, 862 S.E.2d at 597.

supported by evidence.[63] Accordingly, the any-evidence standard of review required affirming the Appellate Division's findings.[64]

VI. SCHEDULED LUNCH BREAK EXCEPTION

Because the Supreme Court of Georgia ruled in the previous survey period that an injury occurring on an employer's premises during an ordinary unpaid lunch break was compensable in *Frett v. State Farm Employee Workers' Compensation*,[65] during this Survey period, the Georgia Court of Appeals was compelled to reverse its earlier decision in *Daniel v. Bremen-Bowdon Investment Co.*[66] That decision was in turn based on the yet-to-be-reversed court of appeals' decision in *Frett v. State Farm Employee Workers' Compensation*.[67]

The claimant in *Daniel* left her work station for her regularly scheduled lunch break—during which time she was free to spend her time as she wished—and was walking down a public sidewalk to the company-owned parking lot when she tripped and fell, injuring herself.[68] The employer denied the claim, and the Administrative Law Judge relied upon *Rockwell v. Lockheed Martin Corp.*[69] to rule that the ingress and egress rule rendered the injury during the scheduled break compensable. The Appellate Division reversed, concluding that the injury did not arise out of her employment because it occurred while she was on a regularly scheduled break. The Carroll County Superior Court affirmed, and the court of appeals originally affirmed.[70] However, after the decision in *Frett I*, the court of appeals reconsidered the application of the regularly scheduled lunch break in *Daniel.*[71]

The court of appeals followed *Frett I* to conclude that the claimant's accident both occurred in the course of employment, which was not in dispute, and arose out of the employment given that the regularly scheduled lunch break exception did not apply to the ingress and egress

63. *Id.* at 42, 862 S.E.2d at 597.

64. *Id.*

65. 309 Ga. 44, 844 S.E.2d 749 (2020) (hereinafter *Frett I*).

66. 360 Ga. App. 716, 860 S.E.2d 229 (2021).

67. 358 Ga. App. 138, 854 S.E.2d 347 (2021) (hereinafter *Frett II*).

68. *Daniel*, 360 Ga. App. at 716, 860 S.E.2d at 230.

69. 248 Ga. App. 73, 545 S.E.2d 121 (2001).

70. *Daniel*, 360 Ga. App. at 718, 860 S.E.2d at 231 (citing *Frett II*, 358 Ga. App. at 138, 854 S.E.2d at 348).

71. *Daniel,* 360 Ga. App. at 718, 860 S.E.2d at 231 (citing *Frett I*, 309 Ga. at 62, 844 S.E.2d at 763).

rule.[72] Thus, the superior court's decision affirming the Appellate Division's denial of benefits was reversed.[73]

VII. SUBROGATION

In *Bush v. Liberty Mutual Insurance Co.*,[74] the estate of an injured employee brought an action against the insurer for breach of fiduciary duty for an alleged failure to protect the estate's interest in the insurer's subrogation action against another driver under O.C.G.A. § 34-9-11.1.[75]

There, the employee was in a work-related motor vehicle accident in 2013, and the employer/insurer accepted the workers' compensation claim, commencing income benefits and medical treatment.[76] The employee also hired counsel to pursue a personal injury claim against the other driver, and the insurer notified employee's counsel of its subrogation lien pursuant to O.C.G.A. § 34-9-11.1. The employee settled his workers' compensation claim in 2015, and then passed away a few months later, ostensibly for reasons unrelated to the car accident. Shortly before the statute of limitations for the personal injury action expired, the insurer sued the other driver involved in the motor vehicle accident in its own name under O.C.G.A. § 34-9-11.1, as neither the employee nor his estate had brought an action against the other driver. Shortly before trial, the insurer settled the subrogation action for less than its subrogation lien, and the employee's estate did not timely intervene. The estate later filed suit, contending that the insurer breached its fiduciary duty to protect the estate's interest in the subrogation action, and the Troup County Superior Court granted the insurer's motion for summary judgment.[77]

On appeal, the Georgia Court of Appeals determined there was no fiduciary duty imposed on an insurer under O.C.G.A. § 34-9-11.1, noting other duties expressly created for an insurer including notice requirements, but no duty on an insurer to protect the employee's legal interests in its subrogation action brought under that statute.[78] The court observed that the insurer's subrogation action is a derivative one, and the employee has the exclusive right to bring an action for a year; subsequently, an employee may intervene in an action brought by the

72. *Daniel,* 360 Ga. App. at 718, 860 S.E.2d at 231.
73. *Id.* at 719, 860 S.E.2d at 231.
74. 361 Ga. App. 475, 864 S.E.2d 657 (2021).
75. *Id.* at 476, 864 S.E.2d at 659; *see* O.C.G.A. § 34-9-11.1 (2022).
76. *Bush*, 361 Ga. App. at 477, 864 S.E.2d at 659.
77. *Id.* at 477–78, 864 S.E.2d at 659–60.
78. *Id.* at 478–79, 864 S.E.2d at 660.

insurer.[79] The court noted that a reading of the statute which leaves the onus to protect the employee's interests on the employee, rather than shifting that responsibility to an insurer or employer, makes practical sense in the context of the statutory scheme.[80] The court also observed that often the interests of the insurer and employee in subrogation actions are not aligned, as the insurer may have little incentive to pursue recovery above the amount of its subrogation lien whereas generally the employee would want to maximize recovery. These competing incentives can result in different litigation decisions.[81] Further, the insurer had a contractual relationship with the employer, not with the employee.[82] Therefore, the court of appeals agreed with the trial court that O.C.G.A. § 34-9-11.1 does not impose a fiduciary duty on the insurer to act in the best interests of the employee.[83]

VIII. INSOLVENCY POOL

In the case of *Palmer v. Georgia Insurers Insolvency Pool*,[84] the Georgia Court of Appeals held that the Georgia Insurers Insolvency Pool did not have authority to bring a parallel action in the DeKalb County Superior Court that directly implicated a pending workers' compensation claim.[85]

The claimant in *Palmer* incurred a work-related accident in July 2017 as the result of a motor vehicle accident.[86] Her workers' compensation claim was accepted as compensable, and she received medical treatment and income benefits. Later that year, the workers' compensation insurer for the claimant's employer became insolvent, and pursuant to the Georgia Insurers Insolvency Pool Act,[87] the Georgia Insurers Insolvency Pool became responsible for her claim. The Insolvency Pool had paid just under $25,000 on her claim. The claimant also submitted claims to the at-fault driver's automobile liability insurer and to her own automobile liability insurer. The claimant settled her personal injury claims with the carriers for $25,000 and $50,000, respectively. After her counsel informed the Insolvency Pool of the funds recovered, the Insolvency Pool filed suit against the claimant seeking (1) a set-off of the $75,000 that the claimant received from other insurers, (2) a ruling that it is not obligated to issue

79. *Id.* at 479, 864 S.E.2d at 661.
80. *Id.* at 480, 864 S.E.2d at 661.
81. *Id.*
82. *Id.* at 481, 864 S.E.2d at 662.
83. *Id.*
84. 361 Ga. App. 803, 865 S.E.2d 623 (2021).
85. *Id.* at 803, 865 S.E.2d at 624.
86. *Id.*
87. Georgia Insurers Insolvency Pool Act, O.C.G.A. §§ 33-36-1 through 10 (2022).

any payments on the workers' compensation claim until the set-off amount is reached, and (3) a refund from the claimants for all amounts the Insolvency Pool paid on her workers' compensation claim. The Insolvency Pool argued that O.C.G.A. §§ 33-36-14(a)[88] and (b)[89] as well as the decision in *Georgia Insurers Insolvency Pool v. DuBose*[90] authorized its requested relief. The superior court granted the Insolvency Pool's motion for summary judgment, and the claimant appealed.[91]

The court of appeals first discussed the Insolvency Pool Act, noting that the Insolvency Pool is "intended to be a safety net for those whose insurers go out of business" and provides benefits "only when there is no other insurance available"; therefore a claimant may not necessarily receive the same recovery from the Insolvency Pool as she may have received from a solvent insurer.[92] The Insolvency Pool is authorized to bring an action to recover amounts paid to a claimant "in excess of the amount authorized" by the Insolvency Pool Act.[93] O.C.G.A. § 33-36-14(a)'s set-off provision reads as follows:

> Except as provided for in Code Section 33-36-20, any person having a claim against a policy or an insured under a policy issued by an insolvent insurer, which claim is a covered claim and is also a claim within the coverage of any policy issued by a solvent insurer, shall be required to exhaust first his or her rights under such policy issued by the solvent insurer. The policy of the solvent insurer shall be treated as primary coverage and the policy of the insolvent insurer shall be treated as secondary coverage and his or her rights to recover such claim under this chapter shall be reduced by any amounts received from the solvent insurers.[94]

While the set-off provision was discussed in *DuBose*, the court of appeals' holding in that case was limited to establishing what amounts received by a claimant from another insurer may be considered in determining the set-off amount under O.C.G.A. § 33-36-14(a).[95] The court of appeals observed in the present case that *DuBose* did not authorize the Insolvency Pool to bring a parallel action in the superior court to obtain

88. O.C.G.A. § 33-36-14(a) (2022).

89. O.C.G.A. § 33-36-14(b) (2022).

90. 349 Ga. App. 238, 825 S.E.2d 606 (2019).

91. *Palmer*, 361 Ga. App. at 803–04, 865 S.E.2d at 624.

92. *Id.* at 804, 865 S.E.2d at 625 (quoting *Dubose*, 349 Ga. App. at 246, 825 S.E.2d at 613).

93. *Palmer*, 361 Ga. App. 804, 865 S.E.2d at 625.

94. O.C.G.A. § 33-36-14(a).

95. *Palmer*, 361 Ga. App. at 805, 865 S.E.2d at 625 (citing *Dubose*, 349 Ga. App. at 241, 825 S.E.2d at 610).

a refund of benefits paid in connection with a pending workers' compensation claim or to alter the payment obligations imposed on the Insolvency Pool under the Workers' Compensation Act.[96]

Further, O.C.G.A. § 33-36-14(a) does not create an independent cause of action allowing the Insolvency Pool to file suit to enforce the set-off provision, and O.C.G.A. § 33-36-14(b) may create an independent cause of action but this is limited to the amount paid a claimant "in excess of the amount authorized" by the Insolvency Pool Act.[97] Because the claimant's workers' compensation claim remained pending before the State Board of Workers' Compensation with no specific decision from the Board as to the amount of benefits to which the claimant was entitled, the court concluded that the Insolvency Pool could not yet establish that its payments to the claimant exceeded the amount authorized by the Insolvency Pool Act.[98]

Rather than bring a parallel action in superior court, the Insolvency Pool's remedy would be before the State Board of Workers' Compensation.[99] The court of appeals ruled that the resolution of the Insolvency Pool's claims fell within the subject matter jurisdiction of the State Board, as the claims are ancillary or directly related to the resolution of the claimant's pending claim for workers' compensation benefits.[100] The court vacated the superior court's grant of summary judgment to the Insolvency Pool and remanded to the superior court with direction to dismiss the Insolvency Pool's complaint, noting that the Insolvency Pool must litigate the issues before the State Board.[101]

IX. INTERLOCUTORY APPEALS

In *Newton County Board of Education v. Nolley*,[102] the Georgia Court of Appeals disallowed a request for an interlocutory appeal past the Appellate Division when the underlying workers' compensation claim remained pending before the State Board's trial division.[103]

The claimant in *Nolley* sustained a compensable injury in 2008, for which he received temporary total disability (TTD) income benefits until May 2016, and then received permanent partial disability (PPD) benefits

96. *Palmer*, 361 Ga. App. at 805, 865 S.E.2d at 625–26.
97. *Id.* at 806, 865 S.E.2d at 626.
98. *Id.*
99. *Id.*
100. *Id.* at 806–08, 865 S.E.2d at 626.
101. *Id.* at 808–09, 865 S.E.2d at 627–28.
102. 363 Ga. App. 625, 871 S.E.2d 884 (2022).
103. *Id.* at 625, 871 S.E.2d at 885.

until September 2016.[104] In November 2016, the claimant requested a hearing to have his claim designated catastrophic and seeking further TTD benefits. He filed another request for catastrophic designation of the claim approximately six months later, then his hearing request was removed from the docket. In October 2018, the claimant filed a new hearing request, but again removed that hearing request from the active docket. Finally, the claimant renewed his hearing requests in July and December 2020, and the employer/insurer contested these new filings for TTD benefits on grounds that O.C.G.A. § 34-9-104(b)'s two-year statute of limitations barred any further claim for income benefits.[105] The Administrative Law Judge found that the claimant's November 2016 hearing request "continue[d] to be viable, and [wa]s not barred by the change-in-condition statute of limitations," and both the Appellate Division and Newton County Superior Court affirmed.[106]

The employer/insurer sought discretionary review of the order; however, the court of appeals ruled that the superior court did not have jurisdiction to review the decision of the Appellate Division.[107] Section 34-9-105(b)[108] provides for appeals from final awards and judgments, but the court noted that the Workers' Compensation Act does not provide for interlocutory appeals.[109]

The court of appeals observed that the case remained pending before the trial division of the State Board of Workers' Compensation because the Administrative Law Judge found that the claimant's hearing request "continue[d] to be viable" and the Appellate Division adopted and affirmed this award.[110] With the case confirmed to be pending before the trial division, the court of appeals held that the superior court should have declined review, as it was an unauthorized interlocutory appeal.[111] The court reversed the superior court's decision, instead directing it to dismiss the appeal as premature.[112]

104. *Id.* at 626, 871 S.E.2d at 885.
105. *Id.*
106. *Id.*
107. *Id.*
108. O.C.G.A. § 34-9-105(b) (2022).
109. *Newton*, 363 Ga. App. at 626, 871 S.E.2d at 885.
110. *Id.* at 626–27, 871 S.E.2d at 885–86.
111. *Id.* at 627, 871 S.E.2d at 886.
112. *Id.*