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Workers' Compensation

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Unlike recent years, which saw significant changes in the Georgia Workers' Compensation Act through appellate decisions, the past survey period was most noteworthy for the actions of the Georgia Legislature. Following months of debate in a study committee, formed by State Senator Harold Dawkins and composed of representatives from industry, labor, insurance, self-insurers, and attorneys, the 1990 Georgia General Assembly passed amendments sponsored by Senator Dawkins and Senator Arthur "Skin" Edge that corrected some longstanding problems in Georgia's workers' compensation laws. This year's Article reviews this new legislation, as well as the appellate decisions affecting workers' compensation.

I. New Legislative Changes and Board Rules

The 1990 legislative session produced a number of significant amendments to the Georgia Workers' Compensation Act (the "Act").[1] This portion of the Article will survey the 1990 amendments to the Act (the "1990

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1. Georgia Workmen's Compensation Act, No. 814, 1920 Ga. Laws 167 (codified as amended at O.C.G.A. §§ 34-9-1 to -389 (1988 & Supp. 1990)).

amendments")[2] that affect the payment of income benefits, medical benefits, rehabilitation benefits, and the statute of limitations.

A. *Income Benefits*

The cornerstone of the 1990 legislation is an increase in the maximum temporary total disability[3] rate from $175 per week to $225 per week effective July 1, 1990.[4] This marks the first increase in maximum weekly benefits since 1986.[5] Employees entitled to temporary total disability benefits shall be paid a weekly benefit equal to two-thirds of the employee's average weekly wage, with a maximum payment not to exceed $225 per week.[6] Similarly, the general assembly increased the maximum weekly benefit paid for temporary partial disability[7] from $117 per week to $150 per week.[8]

In addition to raising disability rates, the legislature made significant changes affecting payment deadlines for employers and insurers. Prior to the 1990 amendments, employers and insurers had only fourteen days after the employer obtained knowledge of the employee's injury to pay all income benefits then due.[9] Acknowledging the difficult logistics of this relatively short time period, the legislature extended this period to twenty-one days after the employer has knowledge of the employee's injury.[10] Simultaneously, the legislature adopted a "mailbox" rule that considers weekly benefits paid when the employer mails them to the address specified by the employee or the address of record according to the file maintained by the State Board of Workers' Compensation (the "Board").[11] This "mailbox" rule legislatively modified the existing Board

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2. Act approved Apr. 11, 1990, No. 1340, 1990 Ga. Laws 1409 (codified as amended at O.C.G.A. §§ 34-9-13 to -262 (1988 & Supp. 1990)).

3. Total impairment of earning capacity triggers eligibility for temporary total disability benefits. O.C.G.A. § 34-9-261(a) (1988 & Supp. 1990); Hensel Phelps Constr. Co. v. Manigault, 167 Ga. App. 599, 307 S.E.2d 79 (1983).

4. O.C.G.A. § 34-9-261(b) (1988 & Supp. 1990).

5. *See* Act approved Apr. 2, 1985, No. 558, § 8, 1985 Ga. Laws 727, 735 (current version at O.C.G.A. § 34-9-261(b) (1988 & Supp. 1990)).

6. O.C.G.A. § 34-9-261(a) (1988 & Supp. 1990).

7. Eligibility for temporary partial disability benefits occurs when the disability to work is partial in character but temporary in nature. Holt's Bakery v. Hutchinson, 177 Ga. App. 154, 338 S.E.2d 742 (1985); Blevins v. Atlantic Steel Co., 172 Ga. App. 557, 323 S.E.2d 861 (1984).

8. O.C.G.A. § 34-9-262(b) (1988 & Supp. 1990).

9. O.C.G.A. § 34-9-221(b) (1988), *amended by* O.C.G.A. § 34-9-221(b) (Supp. 1990).

10. *Id.* § 34-9-221(b) (Supp. 1990).

11. *Id.*

rule that considered weekly benefits paid only upon receipt by the employee.[12]

Since the "mailbox" rule is contained in that portion of the Act dealing with income benefits paid without an award, it clearly applies to at least those circumstances.[13] Although there is no express statutory direction on whether the new language in section 34-9-221(b) of the Official Code of Georgia Annotated ("O.C.G.A.")[14] applies to the payment of income benefits made under the terms of an award, as opposed to those made voluntarily without an award from the Board, the ease of administration resulting from uniformity is a compelling reason for a consistent application of the rule to all payment of income benefits. Prior appellate pronouncements, however, mandating that benefits paid pursuant to an award are deemed paid when received by the employee, focused on subparagraph (f) of O.C.G.A. § 34-9-221 rather than subparagraph (b), in which the mailbox rule has been inserted.[15]

As an ameliorative measure for extending the due date and inserting the mailbox rule, the legislature amended the Act to reduce the time of incapacitation required to receive the first seven days of disability benefits from twenty-eight consecutive days of disability to only twenty-one.[16] Prior to the enactment of the new legislation, the law required twenty-eight consecutive days of disability before an employee received income benefits for the first seven calendar days of incapacity.[17]

In addition to modifying the amounts and timing of disability benefits, the amendments also attempt to correct the harsh effects of *Davis v. Union Camp Corp.*[18] The court in *Davis* addressed the issue whether an employee is entitled to receive workers' compensation disability benefits in addition to salary. The court of appeals held that when there is no disclosure on forms required to be filed with the Board showing that the employee made an informed election to receive his regular salary in lieu

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12. GA. BD. OF WORKERS' COMPENSATION R. 221(a) (O.C.G.A. tit. 34, at 158 (1988 & Supp. 1990)).

13. Under the mailbox rule, benefits mailed on the twenty-first day after the employer receives knowledge of injury would be timely under O.C.G.A. § 34-9-221(b) and would not subject the employer to the 15% penalty imposed on late payments under O.C.G.A. § 34-9-221(e) (1988 & Supp. 1990), even if the employee does not receive the check until sometime later. O.C.G.A. § 34-9-221(b) (1988 & Supp. 1990).

14. *Id.* § 34-9-221(b).

15. The court in Dykes v. Superior Elec. Contractors, 179 Ga. App. 793, 348 S.E.2d 120 (1986), held that the language of O.C.G.A. § 34-9-221(f) and GA. BD. OF WORKERS' COMPENSATION R. 221(a) & (f) mandated that benefits paid pursuant to an award are deemed paid when received by an employee. 179 Ga. App. at 794, 348 S.E.2d at 121.

16. O.C.G.A. § 34-9-220 (1988 & Supp. 1990).

17. *Id.* § 34-9-220 (1988), *amended by* O.C.G.A. § 34-9-220 (Supp. 1990).

18. 188 Ga. App. 36, 371 S.E.2d 898 (1988). For a general discussion, see Bagley, Kniffen & Blackmon, *Workers' Compensation*, 41 MERCER L. REV. 429, 460-61 (1989).

of workers' compensation benefits, the employer could not take credit for the salary paid to the employee under a salary continuation plan.[19] In an effort to correct the windfall resulting from such situations, the legislature amended O.C.G.A. § 34-9-243 to provide as follows:

> The payment by the employer or the employer's workers' compensation insurance carrier to the employee or to any dependent of the employee of any benefit when not due or of salary or wages during the employee's disability shall be credited against any payments of weekly benefits due; provided, however, that such credit shall not exceed the aggregate amount of weekly benefits due under this chapter.[20]

Conspicuous by its absence from the amendment is any condition precedent, such as those set forth in *Davis*, on the employer's right to a credit against weekly benefits due for any benefit, salary, or wages paid during the employee's disability. Therefore, under the new law, employers and their insurance carriers will not risk payment of workers' compensation disability benefits when providing employees with a salary continuation program.

The legislature also acted to give employers and other providers of disability benefits, such as group insurance companies, standing to recoup these funds when benefits are ultimately paid under workers' compensation.[21] A group insurance company or other disability provider that provides disability benefits to an individual who files a workers' compensation claim may notify the Board in writing that the provider should be a party in interest as a result of the disability benefits paid.[22] If the employee is entitled to benefits under the Act, the Board is authorized to order the employer, or the employer's workers' compensation insurance carrier, to repay the group insurance company or the disability benefits provider the funds that were expended.[23]

In the area of death benefits paid to dependents, the legislature took measures to correct an error, made in a previous amendment, concerning the determination of the dependency period of a spouse or partial dependent. In this regard, the legislature amended O.C.G.A. § 34-9-13(e) to provide that "[t]he dependency of a spouse and of a partial dependent shall terminate at age [sixty-five] or after payment of [four hundred] weeks of benefits, whichever provides greater benefits."[24] The language in the superseded statute mandated that the dependency of a spouse or of a

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19. 188 Ga. App. at 37, 371 S.E.2d at 900.
20. O.C.G.A. § 34-9-243 (1988 & Supp. 1990).
21. *Id.* § 34-9-244(a) (Supp. 1990).
22. *Id.* § 34-9-244(a).
23. *Id.* § 34-9-244(b).
24. *Id.* § 34-9-13(e) (1988 & Supp. 1990).

partial dependent would terminate after the payment of four hundred weeks of benefits or the age of sixty-five, whichever occurred first.[25]

B. *Medical Benefits*

While the employer is required to furnish medical care to an employee entitled to benefits under the Act,[26] it is also provided with a degree of control over medical care providers through the use of a properly posted panel of physicians on the employer's business premises.[27] Effective July 1, 1990, the legislature expanded the panel of physicians from three to four physicians.[28] Since the Board has determined that a group, professional association, or professional corporation is counted as one physician,[29] employers and insurers should be forewarned that simply providing a single facility with a number of physicians does not constitute a valid panel.

In addition to posting the panel of physicians, the employer is required to take reasonable measures to ensure that the employee understands the function of the panel and the right to select a physician therefrom.[30] The employer loses the right to control the selection of medical care providers, and the employee may select any physician to render service at the expense of the employer, when the employer fails to maintain the panel of physicians or to permit an employee to make a choice of a physician from the panel.[31]

While the right of the employer to require an employee to submit to an examination by a physician selected by the employer is an old fixture of the Act, the employee now has a similar right. As of July 1, 1990, the employee may exercise the right to a medical examination after the compensable injury is accepted and within sixty days after receipt of income benefits.[32] The statute specifies that the sixty day period runs from the receipt of "any" income benefits, and the employee must give the employer or insurer prior *written* notice of the medical examination.[33] A duly qualified physician must conduct the examination within the state of Georgia or within fifty miles of the employee's residence.[34] Consequently,

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25. Act approved Feb. 7, 1989, No. 7, § 34(2), 1989 Ga. Laws 14, 32.
26. O.C.G.A. § 34-9-200(a) (1988 & Supp. 1990).
27. *Id.* § 34-9-201(b).
28. *Id.*
29. GA. BD. OF WORKERS' COMPENSATION R. 201 (O.C.G.A. tit. 34, at 153 (1988 & Supp. 1990)).
30. O.C.G.A. § 34-9-201(b)(1) (1988 & Supp. 1990).
31. *Id.* § 34-9-201(e).
32. *Id.* § 34-9-202(e) (Supp. 1990).
33. *Id.*
34. *Id.*

employees residing out of state are restricted to physicians within fifty miles of the employee's residence. The statute requires that the medical examination shall not repeat any diagnostic test procedures that exceed the total cost of $250 and which a physician previously has performed since the date of injury, unless someone other than the employer or insurer pays for such diagnostic procedures.[35]

Disputes arising over fees for physicians or surgeons for services rendered under the Act are resolved through peer review.[36] The 1990 amendment to this procedure authorizes the party prevailing in the peer review to recover any of its filing costs.[37] The obvious goal of this modification is to discourage frivolous requests for peer review of medical charges.

In 1990 the legislature also targeted the roundly criticized rule pronounced in *Murray County Board of Education v. Wilbanks*.[38] In *Wilbanks* the court of appeals held that an employer could not discharge its obligation to pay medical expenses by making payments directly to a medical provider rather than to the claimant.[39] The 1990 modifications to O.C.G.A. § 34-9-200(a) effectuate a legislative reversal of *Wilbanks* by requiring the employer to furnish the employee entitled to workers' compensation benefits such medical, surgical or hospital care.[40] This modification was made in coordination with the amendment to O.C.G.A. § 34-9-206, which provides that the employer or insurer shall not be obligated to pay directly to the employee the expenses of medical treatment unless, and only to the extent, it is proven that the employee has paid for such medical treatment.[41]

The legislature adjusted the statutory mechanism for recoupment of medical expenses to include not only group health insurance companies and other health care providers, but also any party to a claim.[42] Consequently, an employee who pays for medical treatment and subsequently files a claim under the Act may give written notice to the Board during the pendency of the claim seeking reimbursement for the medical ex-

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35. *Id.*

36. *Id.* § 34-9-205 (1988 & Supp. 1990); GA. BD. OF WORKERS' COMPENSATION R. 203(b) (O.C.G.A. tit. 34, at 154 (Supp. 1990)).

37. O.C.G.A. § 34-9-205(c) (Supp. 1990).

38. 190 Ga. App. 611, 379 S.E.2d 559 (1989). For a detailed discussion, see Bagley, Kniffen & Blackmon, *supra* note 18, at 443.

39. 190 Ga. App. at 612, 379 S.E.2d at 560. The 1990 amendments to O.C.G.A. § 34-9-200(a) effectuate a legislative reversal of the decision in *Wilbanks*. These modifications require the employer to furnish the employee entitled to workers' compensation benefits only with medical, surgical, or hospital care, rather than "compensation for cost of" such medical, surgical, or remedial care. O.C.G.A. § 34-9-200(a) (1988 & Supp. 1990).

40. O.C.G.A. § 34-9-200(a) (1988 & Supp. 1990).

41. *Id.* § 34-9-206(b).

42. *Id.* § 34-9-206(a).

penses. The Board is authorized to order repayment provided the employer and insurer are held liable for the expenses.[43]

C. *Rehabilitation*

Prior to the 1990 legislative changes, the Board was required to make an assessment of the rehabilitation needs of the injured employee within forty-five days of notification of the employee's injury.[44] If the assessment resulted in a decision that rehabilitation was necessary to restore the employee to suitable employment, the Board notified the employer, insurer, and employee.[45] This notice then activated a fifteen-day period during which the employer or insurer could appoint a rehabilitation supplier or object on the grounds that rehabilitation was not necessary.[46] The employer had the exclusive right to appoint the vocational rehabilitation supplier, even when the employee's petition for the appointment of a vocational rehabilitation supplier raised the issue, and the Board had not made a determination of necessity.[47]

The 1990 amendments shift the responsibility for making the initial assessment of rehabilitation needs from the Board to the employer or insurer.[48] The employer or its insurer has the exclusive right to assess the injured employee's need for rehabilitation and to appoint a rehabilitation supplier, or state why rehabilitation is not necessary within the first ninety days following notification of injury.[49]

Failure to appoint a rehabilitation supplier within the ninety-day period provided in the Act results in the waiver of the employer's or insurer's exclusive right to do so.[50] It also allows any party to petition the Board for an assessment of the rehabilitation needs of the injured employee and for the appointment of a rehabilitation supplier when appropriate.[51] All parties have fifteen days from the date of service in which to object to the necessity of rehabilitation or request the designation of a different rehabilitation supplier.[52] If the Board then determines that rehabilitation is necessary, it will designate a supplier.[53] Any party may re-

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43. O.C.G.A. § 34-9-206(a) (1988 & Supp. 1990).
44. O.C.G.A. § 34-9-200.1(b) (1988), *amended by* O.C.G.A. § 34-9-200.1(b) (Supp. 1990).
45. O.C.G.A. § 34-9-200.1(b) (1988), *amended by* O.C.G.A. § 34-9-200.1(b) (Supp. 1990).
46. O.C.G.A. § 34-9-200.1(b) (1988), *amended by* O.C.G.A. § 34-9-200.1(b) (Supp. 1990).
47. O.C.G.A. § 34-9-200.1(b) (1988), *amended by* O.C.G.A. § 34-9-200.1(b) (Supp. 1990). *See* Walden v. Cutlery Corp. of America, 190 Ga. App. 363, 378 S.E.2d 697 (1989).
48. O.C.G.A. § 34-9-200.1(b)(1) (Supp. 1990).
49. *Id.*
50. *Id.* § 34-9-200.1(b)(2).
51. *Id.*
52. *Id.*
53. *Id.*

quest a change of rehabilitation supplier, and any other party may object within fifteen days from the date of service. The change of designated rehabilitation suppliers, however, can be accomplished only with the approval of the Board.[54]

D. Change in Condition Statute of Limitations

Without addressing the numerous appellate decisions that have struggled to define a "change in condition,"[55] the 1990 amendments represent a significant modification to the appellate case law that modified the suit limitations period for a claim seeking additional compensation based on a change in condition.

Both the legislature and appellate courts have addressed repeatedly this area of law during the last two decades. Pursuant to legislation that became effective on July 1, 1978, an employee could make application for additional compensation based upon a change in condition provided that the Board had not based a prior decision upon settlement, and provided further "that at the time of the application not more than two years [had] elapsed since the date of final payment of income benefits due under this chapter."[56] In *Holt's Bakery v. Hutchinson*,[57] the Georgia Court of Appeals ruled that when there is evidence to support a finding that a claimant was potentially due income benefits and had not been paid, the statute of limitations applicable to a change in condition action was tolled.[58] The concept of "potentially due income benefits" evolved to include only those situations in which there was evidence that the potential entitlement to benefits existed prior to the running of the contended limitations period.[59]

The 1990 legislative modification of O.C.G.A. § 34-9-104(b) addressed the erosion of any meaningful statute of limitations in change in condition situations and legislatively reversed *Holt's Bakery* and its progeny.[60] As of July 1, 1990, O.C.G.A. § 34-9-104(b) provides that the request for a change in condition hearing must be filed not more than two years from

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54. *Id.* § 34-9-200.1(b)(4); GA. BD. OF WORKERS' COMPENSATION R. 200.1(b)(3) (O.C.G.A. tit. 34, at 139 (Supp. 1990)).

55. *See, e.g.*, Bagley & Kniffen, *Change in Condition v. New Accident: Old Problems Revisited*, 40 MERCER L. REV. 961 (1989).

56. O.C.G.A. § 34-9-104(b) (1988), *amended by* O.C.G.A. § 34-9-104(b) (Supp. 1990).

57. 177 Ga. App. 154, 338 S.E.2d 742 (1985).

58. *Id.* at 160, 338 S.E.2d at 748.

59. *See* Justice v. R.D.C., Inc., 187 Ga. App. 198, 199, 369 S.E.2d 493, 495 (1988); Metropolitan Atlanta Rapid Transit Auth. v. Ledbetter, 184 Ga. App. 518, 519, 361 S.E.2d 878, 879 (1987).

60. O.C.G.A. § 34-9-104(b) (1988 & Supp. 1990).

the date "the last payment of income benefits pursuant to Code section 34-9-261 or 34-9-262 was actually made under this chapter."[61]

The general assembly enacted a separate statute of limitations[62] for claims regarding permanent partial disability benefits under O.C.G.A. § 34-9-263.[63] A party may file for benefits *solely* under section 34-9-263 not more than four years from the date of the last payment of income benefits pursuant to O.C.G.A. §§ 34-9-261[64] or 34-9-262.[65] Therefore, the only consideration in determining whether a claim is filed timely is the date of the last payment of temporary total or temporary partial disability benefits, rather than whether there were any additional potential benefits due.[66]

II. Case Law Developments

A. *Alcoholism/Drug Addiction*

As alcoholism and drug addiction have remained epidemic in American society, these conditions increasingly have found their way into the workers' compensation system. By one recent estimate, drug abusers are involved in four times as many accidents as nondrug users, absent two and one-half more times, and file five times as many workers' compensation claims.[67]

The Georgia Legislature sought to address the effect of drugs on the work place by amending O.C.G.A. § 34-9-17,[68] which had provided that "no compensation shall be allowed for an injury or death due to the employee's . . . intoxication."[69] The 1990 amendment provides that compensation should be denied when it is due to intoxication "by alcohol or being under the influence of marijuana or a controlled substance, except as may have been lawfully prescribed by a physician for such employee and taken in accordance with such prescription."[70] Although the legislature attempted to strengthen the "intoxication" defense, the 1990 amendment

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61. *Id.*
62. *Id.*
63. *Id.* § 34-9-263 (1988).
64. *Id.* § 34-9-261 (1988 & Supp. 1990).
65. *Id.* § 34-9-262.
66. This in effect reverses Bateman v. Merico, Inc., 190 Ga. App. 710, 379 S.E.2d 526 (1989), wherein the Georgia Court of Appeals held that the employee's refusal to accept permanent partial disability benefits tendered on behalf of the employer tolled the statute of limitations in O.C.G.A. § 34-9-104(b).
67. *Alcohol & Drugs in the Workplace: Costs, Controls, and Controversies*, Special Report (BNA), at 7-8 (1986).
68. O.C.G.A. § 34-9-17 (1988 & Supp. 1990).
69. O.C.G.A. § 34-9-17 (1988), *amended by* O.C.G.A. § 34-9-17 (Supp. 1990).
70. *Id.* 34-9-17 (1988 & Supp. 1990).

actually does nothing more than define what kind of intoxication must be present in order to bar compensation. In substance, this amendment has not strengthened an employer's defense to on-the-job injuries related to intoxication.

The 1989 court of appeals decision in *Fulmer Bros. v. Kersey*[71] reinforced the provisions of O.C.G.A. § 34-9-1(4).[72] The court held that this section prohibits the compensability of drug addiction unless caused by medications prescribed by an authorized treating physician for an otherwise compensable injury.[73] The court of appeals reasserted this principle in a different context in *Waffle House, Inc. v. Bozeman.*[74] After Bozeman sustained a compensable on-the-job injury, it was determined that he was addicted to certain drugs, and he was placed in several addiction recovery programs. Each time, however, he left the program without completing it. The employer, Waffle House, eventually obtained an order from the Board directing Bozeman to cooperate with medical treatment for detoxification. The employer later suspended benefits for Bozeman's failure to cooperate with the detoxification program, and Bozeman requested a hearing. The Administrative Law Judge (the "A.L.J.") ordered recommencement of income benefits and directed the employer to provide full detoxification care.[75]

The court of appeals reversed the A.L.J.'s order regarding payment of detoxification expenses, citing heavily from *Kersey*. The court disagreed with the Board's finding that the use of drugs or medicines prescribed by Bozeman's authorized physician caused his drug addiction, and that the compensable injury aggravated a pre-existing drug addiction.[76] The court found the evidence insufficient to overcome the bar mandated in O.C.G.A. § 34-9-1(4).[77] Without a finding that the medications prescribed by the authorized physician following a compensable injury caused the employee's drug addiction, the Board's order directing the employer to provide detoxification care was improper.[78]

Little v. Cox Enterprises[79] presents an example of how pre-existing alcoholism can lead to a compensable injury. Little injured his back on November 9, 1986, while working as a deliveryman for the Atlanta Journal and Constitution. He later reinjured his back on the job in 1987 and

71. 190 Ga. App. 573, 379 S.E.2d 607 (1989).
72. O.C.G.A. § 34-9-1(4) (1988 & Supp. 1990).
73. 190 Ga. App. at 575, 379 S.E.2d at 609. *See* Bagley, Kniffen, & Blackmon, *supra* note 18, at 429, 447.
74. 194 Ga. App. 860, 392 S.E.2d 48 (1990).
75. *Id.* at 860, 392 S.E.2d at 49-50.
76. *Id.*
77. *Id.* at 861, 392 S.E.2d at 50 (citing O.C.G.A. § 34-9-1(4) (1988 & Supp. 1990)).
78. *Id.*
79. 195 Ga. App. 211, 393 S.E.2d 57 (1990).

thereafter began coughing up blood. When doctors readmitted him to the hospital for back surgery, he began hemorrhaging profusely and required massive blood transfusions. Doctors later found the hemorrhaging to be "suggestive of" cirrhosis of the liver. The employer or insurer refused to pay for any medical treatment related to the hemorrhaging, contending that heavy drinking caused the cirrhosis of the employee's liver, and, therefore, the illness was not work-related. All five doctors involved in the employee's treatment, however, agreed that the medications he was taking for his back problems would have aggravated any pre-existing cirrhosis of the liver. Another physician indicated that the bleeding also could have resulted from prolonged lifting in addition to the medication.[80] Noting that there was no evidence that claimant had ever been treated for alcohol related behavior or disease, or that claimant had any past history of unusual bleeding, the court of appeals held that sufficient evidence existed for the Board to find that the medical treatment associated with the employee's hemorrhaging was causally related to the compensable injury.[81]

B. Any Evidence

The "any evidence" rule, which requires that decisions of the Board be affirmed on appeal when there is "any evidence" to support them,[82] has always proved to be a formidable adversary to any appellant in a workers' compensation case. The past survey period was no exception, although the rule surfaced in some unusual circumstances.

In *Selfridge v. Morrison Cafeteria Co.*,[83] the "any evidence" rule resulted in the affirmance of an award of benefits to an employee who contended that a stroke she sustained in 1987 was causally related to an on-the-job heart attack sustained four years earlier. In *Selfridge* the employee's cardiologist opined that the stroke was related to her four-year old heart condition because he believed the embolus, which caused the stroke, originated from a thrombus attached to the wall of her heart that had been discovered by a previous heart catheterization. While the physician acknowledged that the embolus that caused the stroke could have come from either the heart or the carotid arteries, he relied on studies showing no significant source for an embolus in the carotid arteries to conclude that the embolus must have originated at the heart defect caused by the 1983 heart attack.[84] The court of appeals concluded that

80. *Id.* at 213, 393 S.E.2d at 58.
81. *Id.*
82. *See* Howard Sheppard, Inc. v. McGowan, 137 Ga. App. 408, 224 S.E.2d 65 (1976).
83. 192 Ga. App. 469, 385 S.E.2d 137 (1989).
84. *Id.* at 470, 385 S.E.2d at 138-39.

the opinion of the employee's treating cardiologist was sufficient to uphold the Board's conclusion that the stroke was causally related to her prior work-related heart attack, and, therefore, the employer or insurer was responsible for payment of workers' compensation benefits.[85]

The "any evidence" rule also appeared in two "change in condition" cases. In both instances, the court found sufficient evidence to uphold the suspension of the employee's benefits. In *Johnson v. Northside Hospital*,[86] the employee sustained an injury to her neck and shoulder which ultimately restricted her from lifting more than twenty pounds. The employee returned to work, and the employer terminated her for failing to meet a deadline and for failing to improve her supervisory skills. She thereafter alleged that her accident-related physical restrictions prevented her from finding anything but a lower paying job. The A.L.J. denied payment of additional benefits, apparently finding that the disability associated with her accident at Northside Hospital did not restrict her ability to find employment.[87] Without commenting on the nature of the evidence before the Board, the court of appeals found sufficient evidence to warrant the Board's determination that the employee had not undergone a change in condition.[88]

In *Fairway Transportation v. Brewer*,[89] the employee challenged a suspension of his disability benefits based upon a normal duty work release. The A.L.J., and later the Full Board, found that the suspension of the employee's benefits was proper because his symptoms were attributable to a pre-existing condition rather than a work-related injury.[90] The court of appeals found that the medical evidence established without dispute that both the physician and a consulting neurosurgeon had released the employee to return to work prior to the suspension of benefits, and although the medical experts recommended physical therapy, they did not recommend any work restrictions.[91] The court held there was sufficient evidence for the Board to conclude that the employee had undergone a

85. *Id.*, 385 S.E.2d at 139.

86. 192 Ga. App. 316, 385 S.E.2d 14 (1989).

87. *Id.* at 317, 385 S.E.2d at 14. Some courts have held that even when an employer terminates an employee for cause, the employee remains entitled to disability benefits if residual disability from a compensable injury prevents his return to work. United States Fidelity & Guar. Ins. Co. v. Giles, 177 Ga. App. 684, 340 S.E.2d 284 (1986); King v. Piedmont-Warner Dev., 177 Ga. App. 176, 338 S.E.2d 758 (1985).

88. 192 Ga. App. at 317, 385 S.E.2d at 14.

89. 192 Ga. App. 871, 386 S.E.2d 674 (1989).

90. *Id.* at 871, 386 S.E.2d at 675.

91. *Id.* at 872, 386 S.E.2d at 675.

change in condition, and the employer's or insurer's suspension of benefits was proper.[92]

C. *Attorney Fees*

O.C.G.A. § 34-9-108(b) provides that attorney fees may be assessed when it is determined that a workers' compensation proceeding has been brought, prosecuted, or defended without reasonable grounds, or if an employer or insurer fails to comply with statutory procedures for timely payment of workers' compensation claims without reasonable grounds.[93] The question of what constitutes "unreasonable" conduct under this statute is a frequent source of litigation before the Board, and the court of appeals addressed it twice during the past survey period.

Grier v. Proctor[94] presents an example of a violation of O.C.G.A. § 34-9-221[95] that was reasonable and, therefore, did not compel an assessment of attorney fees. Claimant stopped receiving workers' compensation benefits and filed for a hearing with the Board. Claimant alleged that the suspension of his benefits was unreasonable and entitled him to add-on attorney fees. The A.L.J. issued a show-cause order, and the employer responded by noting that its self-insurance fund was experiencing "cash flow and excess reimbursement problems" that forced a temporary cessation of benefits. The employer further stated that he had communicated this problem to the Board, as well as to the Insurance Commissioner, and that he would resume the payment of benefits promptly along with a fifteen percent late penalty as provided by O.C.G.A. § 34-9-221(e).[96] The A.L.J. suspended action on the interlocutory order request upon a finding that the employer or self-insurer had recommenced benefits with the payment of a fifteen percent penalty.[97]

The court of appeals noted that an assessment of attorney fees under O.C.G.A. §§ 34-9-108(b)(1) or 34-9-108(b)(2) is a matter of discretion for the A.L.J. and the Board.[98] The court of appeals held the reasons set forth in the employer's response to the A.L.J.'s show-cause order "sup-

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92. *Id.*, 386 S.E.2d at 675-76. As the court noted, it previously held that a normal-duty work release constituted sufficient evidence for an employer or insurer to unilaterally suspend benefits. *See* McDonald v. Townsend, 175 Ga. App. 811, 334 S.E.2d 723 (1985); Pierce v. AAA Cabinet Co., 173 Ga. App. 463, 326 S.E.2d 575 (1985).

93. O.C.G.A. § 34-9-108(b) (1988).

94. 195 Ga. App. 116, 393 S.E.2d 18 (1990).

95. O.C.G.A. § 34-9-221 (1988 & Supp. 1990).

96. *Id.* § 34-9-221(e).

97. 195 Ga. App. at 116, 393 S.E.2d at 19.

98. *Id.* at 117, 393 S.E.2d at 20 (citing Copelan v. Burrell, 174 Ga. App. 63, 329 S.E.2d 174 (1985)).

port[ed] the conclusion that [the employer] had reasonable grounds for their actions."[99]

In *Waffle House, Inc. v. Bozeman*,[100] the court of appeals reaffirmed that a mere violation of O.C.G.A. § 34-9-221 is not sufficient for the assessment of attorney fees *unless* the action is unreasonable.[101] In *Waffle House*, the Board had issued an order directing the employee to cooperate with certain medical treatment and rehabilitation. The order further provided that the employer "shall be permitted to suspend benefits in the event of failure to cooperate." Later, the employer or insurer unilaterally suspended benefits upon determining that the employee was not cooperating with rehabilitation and was, therefore, in violation of the Board's order. When his benefits were suspended, the employee requested a hearing before the Board. The Board reinstated benefits, found the unilateral suspension "unlawful," and assessed attorney fees pursuant to O.C.G.A. § 34-9-108(b)(2).[102]

In reviewing the assessment of attorney fees, the court of appeals noted that a mere "unlawful" violation of O.C.G.A. § 34-9-221 was not the correct standard for awarding attorney fees.[103] Rather, it must be shown that the employer or insurer's violation of the Act's payment provisions was without reasonable grounds.[104] Therefore, a violation of section 34-9-221 that is based upon reasonable grounds will not give rise to an assessment of attorney fees.

Technically, the employer's or insurer's unilateral suspension of benefits based upon claimant's alleged lack of cooperation with rehabilitation violated O.C.G.A. § 34-9-221. The suspension of benefits also violated Board rule 200.1(d), which provides that a suspension of benefits on such grounds may only be made through an order of the Board after an evidentiary hearing.[105] The court found, however, that the employer's or insurer's violation of standard procedure was based upon the Board's previous order which reasonably could have been construed as "self-effectuating."[106] Even if the employer or insurer misinterpreted this language, the court concluded that its interpretation was not "without reasonable grounds" and, therefore, did not support an assessment of attor-

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99. *Id.* at 118, 393 S.E.2d at 20.

100. 194 Ga. App. 860, 392 S.E.2d 48 (1990).

101. *Id.* at 861, 392 S.E.2d at 50.

102. *Id.* at 860, 392 S.E.2d at 49-50.

103. *Id.* at 861, 392 S.E.2d at 50 (construing O.C.G.A. § 34-9-221 (1988 & Supp. 1990)).

104. *Id. See* Binswanger Glass v. Brooks, 160 Ga. App. 701, 288 S.E.2d 61 (1981); Union Carbide Corp. v. Coffman, 158 Ga. App. 360, 280 S.E.2d 140 (1981).

105. GA. BD. OF WORKERS' COMPENSATION R. 200.1(d) (O.C.G.A. tit. 34, at 145 (1988 & Supp. 1990)).

106. 194 Ga. App. at 861, 392 S.E.2d at 50.

ney fees.[107] During the past survey period the court of appeals reemphasized that any assessment of attorney fees must be accompanied by proof of unreasonableness on the part of the offending party.

D. Change in Condition

Once again, the court of appeals issued several decisions during the survey period falling under the wide-ranging topic of "change in condition."[108] Specifically, the court dealt with what is *not* a change in condition, reconsidered the shifting parameters of cases involving a "change in condition" versus a "new accident,"[109] and considered an important case regarding an alleged refusal of suitable employment.

Change in Condition. In *Paideia School v. Geiger*,[110] the court of appeals reviewed an unusual set of facts requiring it to state what a change in condition is *not*.[111] On October 11, 1985, the employee suffered a head injury while working for the employer. The next day the employee went to a hospital emergency room complaining of severe headaches. The employee lost no time from work and resumed his normal job activities. Over a year later, however, he began to experience head pains, dizziness, and blurred vision. In November 1986 the employee sought medical treatment from a physician not posted on the employer's panel of physicians. The employer terminated the employee's position in December 1986 for reasons unconnected with the previous injury. On March 1, 1987, the employee suffered a mild stroke while doing repair work on his truck and later filed a workers' compensation claim contending that the stroke was related to the head injury sustained two years earlier.[112]

The A.L.J. awarded benefits on the theory that the stroke was a "superadded injury"[113] to the original 1985 head injury.[114] On appeal, the superior court rejected the Board's theory regarding a superadded injury,

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107. *Id.*, 392 S.E.2d at 51.

108. The phrase "change in condition" refers to a change in either the claimant's physical condition or earning capacity that is predicated upon the compensable injury. O.C.G.A. § 34-9-104(a) (1988 & Supp. 1990); Hartford Accident & Indem. Co. v. Bristol, 242 Ga. 287, 248 S.E.2d 661 (1978); Employer's Ins. of Wausau v. Carnes, 148 Ga. App. 767, 252 S.E.2d 654 (1979).

109. *See generally* Bagley & Kniffen, *supra* note 55, at 961.

110. 192 Ga. App. 723, 386 S.E.2d 381 (1989).

111. *Id.* at 724, 386 S.E.2d at 383.

112. *Id.* at 723-24, 386 S.E.2d at 381-82.

113. A "superadded injury" is one that occurs as a direct result of the original, compensable injury, as when the original injury requires a skin graft to be taken from another part of the body. Noles v. Aragon Mills, 116 Ga. App. 560, 158 S.E.2d 261 (1967); *see also* City of Buford v. Thomas, 179 Ga. App. 769, 347 S.E.2d 713 (1986).

114. 192 Ga. App. at 723, 386 S.E.2d at 382.

but nevertheless held for the employee on the theory that the one-year statute of limitations did not bar the original 1985 claim because the employee filed within a year following the medical treatment in 1986.[115]

The court of appeals properly pointed out that the superior court's reasoning was flawed.[116] The medical treatment that the employee sought in 1986 did not take place within one year of the date of accident; therefore, the statute of limitations already had expired. Moreover, because claimant did not obtain medical treatment from the employer's posted panel, and because the employer did not otherwise authorize the treatment, it could not be deemed "provided" by the employer.[117]

After dispensing with the statute of limitations argument, the court addressed whether the employee's 1987 stroke could be considered a "superadded injury" or a "change in condition."[118] The court of appeals stated that the stroke was not compensable as a superadded injury because it was neither a change in condition nor an injury that occurred on the job.[119] The court cited numerous prior decisions holding that a change in condition action cannot lie without a previous award or agreement of compensation.[120] As the court implied, a superadded injury cannot be present without an original, compensable injury for which benefits have been paid.[121] The court also noted that the 1987 stroke clearly did not occur on the job and that the A.L.J. specifically found that the stroke did not result from any aggravation of the 1985 head injury caused by continued employment.[122] Since the stroke did not arise out of and in the course of claimant's employment, and since there was no original injury from which the stroke constituted a change in condition, the court stated it

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115. *Id.* The statute of limitations contained in O.C.G.A. § 34-9-82(a) (1988) provides:

> The right to compensation shall be barred unless a claim therefor is filed within one year after injury, except that if payment of weekly benefits has been made or remedial treatment has been furnished by the employer on account of the injury the claim may be filed within one year after the date of the last remedial treatment furnished by the employer or within two years after the date of the last payment of weekly benefits.

116. 192 Ga. App. at 724, 386 S.E.2d at 382-83.

117. *Id.*, 386 S.E.2d at 382.

118. *Id.*, 386 S.E.2d at 383.

119. *Id.*

120. *Id.* (citing Hartford Accident & Indem. Co. v. Mauldin, 147 Ga. App. 230, 248 S.E.2d 528 (1978)).

121. *Id.*

122. *Id.* at 723-24, 386 S.E.2d at 382-83.

could "ascertain no basis for an award of compensation," and thus denied benefits.[123]

Change in Condition Versus New Accident. In *Lockheed Missiles & Space Co. v. Bobchak*,[124] the court of appeals had another opportunity to consider the area of "change in condition versus new accident." Once again, the court struggled to delineate identifiable boundaries between these two types of workers' compensation claims while remaining sensitive to the case-by-case approach necessary for a just result.

The employee initially was injured in 1987 when he sustained a fracture to his left knee while in the employ of Gross Construction. Two months later, and after receiving workers' compensation disability and medical benefits, he returned to work for a new employer, Lockheed Missiles & Space Company. Several months later the employee began to experience additional problems with his knee, which he described, after climbing and descending a ladder at Lockheed, as a "tired and weak feeling." He later underwent additional surgery and filed a claim for workers' compensation benefits. The A.L.J. determined that the employee's second surgery, and the disability associated with it, were the result of a change in condition from the 1987 injury with Gross Construction. The members of the Full Board affirmed, but the superior court reversed, finding that the evidence demanded as a matter of law that the claim be treated as a new accident with Lockheed.[125]

The court of appeals reviewed evidence which indicated that the employee's knee problems began to worsen after climbing up and down a ladder at Lockheed.[126] Although noting earlier decisions which held that such circumstances constituted a new accident,[127] the court of appeals made an interesting acknowledgment:

> By the same token, we do not believe that in all cases where the worsening of a pre-existing condition can be traced to a "specific incident" occurring on the new job, that incident must necessarily be considered a "new accident." Rather, the determinative inquiry is whether the circumstances associated with the incident and with the new employment in general were "such as to independently aggravate the condition" or whether the renewed impairment instead resulted from the "wear and

123. *Id.* at 724, 386 S.E.2d at 383.

124. 194 Ga. App. 156, 390 S.E.2d 82 (1990).

125. *Id.* at 156-57, 390 S.E.2d at 83.

126. *Id.* at 156, 390 S.E.2d at 83.

127. *Id.* at 157-58, 390 S.E.2d at 83-84 (citing Beers Constr. Co. v. Stephens, 162 Ga. App. 87, 290 S.E.2d 181 (1982); Certain v. United States Fidelity & Guar. Co., 153 Ga. App. 571, 266 S.E.2d 263 (1980)).

> tear of ordinary life in connection with performance of *normal* duties . . . ."[128]

It is ironic that the court of appeals relied upon *Beers Construction Co. v. Stephens*[129] as authority for the proposition that the activities associated with a new job do not necessarily require a finding of a new accident. The court in *Beers* specifically held that in any circumstance in which the employee goes to work for another employer and performs the same or heavier type of work, the resulting disability

> is an aggravation of a pre-existing condition (new accident) *and must be presumed to be so*, unless in some rare case the evidence clearly and undisputably shows that the claimant's condition was not affected by the more strenuous, aggravating, supra normal work at the second employer but was undisputedly related only to the previous injury.[130]

The court pointed out that the A.L.J. found that the employee's job duties at Lockheed were *not* more strenuous than those he performed for Gross Construction.[131] Moreover, medical evidence demonstrated that the extent of his initial injury was such that additional surgical repair was not unusual, even in the absence of additional trauma.[132] The court of appeals held that even though the Board might have been authorized to find a "new accident," it was also within its authority to conclude that the employee had undergone a change in condition, and therefore the superior court was incorrect in reversing the Board's finding.[133]

Refusal of Suitable Employment. One of the means by which an employer can show that an employee has undergone a change in condition for the better is to show that the employee's physical condition has improved such that he is capable of returning to work within certain physical restrictions, and that employment suitable to his impaired work capacity is available.[134] Frequently, the question of whether employment offered by the employer is "suitable" becomes the subject of litigation before the Board.[135]

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128. *Id.* at 158, 390 S.E.2d at 84 (quoting Beers Const. Co. v. Stephens, 162 Ga. App. 87, 90-91, 290 S.E.2d 181, 183-84 (1982)).

129. 162 Ga. App. 87, 290 S.E.2d 181 (1982).

130. *Id.* at 91, 290 S.E.2d at 184 (emphasis added).

131. 194 Ga. App. at 158, 390 S.E.2d at 84.

132. *Id.*

133. *Id.*

134. Sadie G. Mays Memorial Nursing Home v. Freeman, 163 Ga. App. 557, 559, 295 S.E.2d 340, 342 (1982); Peterson/Puritan, Inc. v. Day, 157 Ga. App. 827, 829, 278 S.E.2d 674, 676 (1981).

135. Such litigation normally is also coupled with a contention by the employer that the claimant's benefits should be suspended pursuant to O.C.G.A. § 34-9-240 (1988), which pro-

In *Wise v. City of Adel*,[136] the employee sustained a compensable injury to his left elbow, and the employer voluntarily commenced workers' compensation benefits. When the employee's treating physician recommended a change to light-duty work, the employer offered him a job as a radio dispatcher for the city police department. The employee rejected this job because the reduced salary, even when combined with temporary partial disability benefits,[137] was less than he was able to make at the time of his accident.[138] The employer contended that the employee had unreasonably refused suitable employment and, therefore, was no longer entitled to disability benefits. The A.L.J. agreed with the employer, but the Full Board reversed, finding that the employee's refusal to return to work was justified. The superior court in turn reversed the Full Board, concluding as a matter of law that the light-duty job offered to the employee was suitable.[139]

Referring to a 1986 decision in *Clark v. Georgia Kraft Co.*,[140] the court of appeals noted that the Full Board has broad discretion in determining whether the refusal of proffered employment is reasonable.[141] Upon reviewing the record, the court determined that the Board had not abused its discretion in finding that the employee's refusal of employment was justified and concluded that the superior court had erred in reversing that decision.[142] In a special concurrence, Judge Beasley pointed out that "the justification for the employee's refusal need not be a lack of physical capacity for the job in its circumstances."[143] The court's decisions in both *Clark* and *Wise* point out that the justification for an employee's refusal to return to light-duty work may properly concern issues beyond the employee's mere physical capacity to perform the job.

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vides that "[i]f an injured employee refuses employment procured for him and suitable to his capacity, he shall not be entitled to any compensation at any time during the continuance of such refusal unless in the opinion of the board such refusal was justified." *Id.*

136. 195 Ga. App. 559, 394 S.E.2d 540 (1990).

137. Temporary partial disability benefits are paid pursuant to O.C.G.A. § 34-9-262(a) (1988 & Supp. 1990) and are calculated at two-thirds of the difference between the claimant's pre-accident average weekly wage and the postinjury average weekly wage, with a maximum of $117 per week. Effective July 1, 1990, the maximum weekly temporary partial disability rate is $150. Section 15, 1990 Act, *supra* note 2, at 1419 (codified at O.C.G.A. § 34-9-262(b) (1988 & Supp. 1990)).

138. 195 Ga. App. at 559, 394 S.E.2d at 541. A light-duty job would have required claimant to abandon another part-time job, thereby accounting for the reduction in income. *Id.*

139. *Id.*

140. 178 Ga. App. 884, 345 S.E.2d 61 (1986).

141. 195 Ga. App. at 559, 394 S.E.2d at 541.

142. *Id.* at 560, 394 S.E.2d at 541.

143. *Id.* (Beasley, J., concurring).

E. Coverage

In the only decision during the survey period regarding workers' compensation insurance coverage, the court of appeals reaffirmed that filings with the Board, regarding the initiation and cancellation of coverage, are evidence of such coverage, but are not conclusive in determining whether coverage actually existed on the date of an employee's accident.[144]

In *Morgan v. Palace Industries, Inc.*,[145] Liberty Mutual Insurance Company issued a policy of workers' compensation insurance to Palace Industries that was due to expire on January 5, 1987. Because of the nonpayment of premiums, Liberty Mutual issued a notice in October 1986 stating that it would cancel the policy effective November 4, 1986. After receiving a premium payment, Liberty Mutual reinstated coverage on November 11, 1986. Liberty Mutual again cancelled coverage for nonpayment, however, when the bank returned the employer's check for insufficient funds.[146]

Despite these problems, Liberty Mutual issued a renewal policy and offered to provide continuous coverage provided it received a renewal deposit by January 5, 1987. The employer never made a payment. As required by Board rule 126 as it existed in January 1987, Liberty Mutual filed a "Form B card" showing cancellation of the initial policy, but never filed a similar form canceling the renewal policy.[147] When the employer received a claim for workers' compensation arising out of an October 1, 1987 accident, it contended that the renewal policy issued by Liberty Mutual was still in effect since Liberty Mutual had never properly cancelled the policy with the Board.[148]

As of the October 1, 1987 accident, rule 126 required that insurers file forms with the Board, referred to as "A" cards and "B" cards, when insurers issue and cancel insurance coverage.[149] Previous decisions of the court of appeals had held that failure to properly file these forms with the Board operated to extend coverage, even when no premiums were being received.[150] The court of appeals rejected the employer's theory,[151] refer-

144. Morgan v. Palace Indus., 195 Ga. App. 80, 392 S.E.2d 315 (1990).

145. 195 Ga. App. 80, 392 S.E.2d 315 (1990).

146. *Id.* at 81, 392 S.E.2d at 317.

147. *Id.* at 81-82, 392 S.E.2d at 317.

148. *Id.* at 81, 392 S.E.2d at 317.

149. *Id.* For the current version of this rule, see GA. BD. OF WORKERS' COMPENSATION R. 126 (O.C.G.A. tit. 34, at 135 (1988 & Supp. 1990)).

150. International Indem. Co. v. White, 174 Ga. App. 773, 775-76, 331 S.E.2d 37, 39 (1985), *overruled by* American Centennial Ins. Co. v. Flowery Branch Nursing Center, 258 Ga. 222, 367 S.E.2d 788 (1988); Lumbermans' Mut. Casualty Co. v. Haynes, 163 Ga. App. 288, 289, 293 S.E.2d 744, 746 (1982), *overruled by* American Centennial Ins. Co. v. Flowery Branch Nursing Center, 258 Ga. 222, 367 S.E.2d 788 (1988).

ring to the supreme court's decision in *American Centennial Insurance Co. v. Flowery Branch Nursing Center*,[152] in which the court held that the filings required by rule 126 were merely evidence of coverage or cancellation, but were not conclusive on such findings.[153] The court of appeals noted that evidence in the record supported the A.L.J.'s conclusion that Liberty Mutual had terminated insurance coverage for nonpayment of premiums in January 1987, and therefore that no coverage was in effect at the time of the accident.[154]

Rule 126(a) now provides for the direct notification of coverage to the National Council on Compensation Insurance,[155] rather than providing for the direct notification of coverage through the filing of forms with the Board. The rationale behind *Flowery Branch* and *Morgan*, however, should apply equally to the current Board rule such that filings with the National Council on Compensation Insurance will provide evidence of coverage, but will not be conclusive on the subject. In this way, the Board will retain the authority to examine disputed coverage cases individually and to reach a just result.

F. Dependency

In *Williams v. Corbett*,[156] the court of appeals re-examined the troubling question of whether dependency resulting from a meretricious relationship can give rise to death benefits either through a presumption of dependency or through proof of dependency in fact.[157] Claimant lived with the employee approximately eleven years prior to his accidental death on the job. The two never married, nor did they establish a common law marriage.[158] The claimant, however, did use the employee's paycheck for their mutual support. The A.L.J. found that claimant's partial dependence entitled her to benefits under O.C.G.A. § 34-9-13(c) and (d). On appeal, however, the superior court reversed based on precedent establishing that dependency benefits cannot arise from a meretricious

151. 195 Ga. App. at 81, 392 S.E.2d at 317.

152. 258 Ga. 222, 367 S.E.2d 788 (1988).

153. *Id.* at 223, 367 S.E.2d at 789-90.

154. 195 Ga. App. at 82, 392 S.E.2d at 317.

155. GA. BD. OF WORKERS' COMPENSATION R. 126(a) (O.C.G.A. tit. 34, at 135 (1988 & Supp. 1990)).

156. 195 Ga. App. 85, 392 S.E.2d 310 (1990).

157. *Id.* at 86, 392 S.E.2d at 310-11.

158. Under Georgia law, three elements must be present for a common-law marriage: (1) the parties must be able to contract; (2) there must be an actual contract to marry that assumes a present intent to marry; and (3) the marriage must be consummated according to law. *See* Brown v. Brown, 234 Ga. 300, 215 S.E.2d 671 (1975); Scott v. Jefferson, 174 Ga. App. 651, 331 S.E.2d 1 (1985).

relationship.[159] The court of appeals granted a discretionary appeal to claimant to consider whether a showing of actual dependency is negated by a meretricious relationship.[160]

The court of appeals agreed with the superior court that the A.L.J. had erred in determining that the court's earlier rulings regarding meretricious relationships applied only in cases involving adultery.[161] In *Insurance Co. of North America v. Jewel*,[162] a badly divided court of appeals reversed an award of compensation to a claimant whose dependency was based upon adultery.[163] In reviewing this case, the court in *Corbett* noted that the holding was not limited to adultery, but rather applied "when the dependency itself grew out of a meretricious relationship."[164] The court also pointed to its decision in *Georgia Casualty & Surety Co. v. Bloodworth*,[165] in which it held that under circumstances involving a meretricious relationship "the claimant was not entitled to compensation even if she was actually dependent on the employee."[166]

Since it was not disputed that claimant was not married to the deceased employee either ceremonially or by common law, and since claimant's dependency arose from a meretricious relationship, the court of appeals held that as a matter of law she did not have a claim for dependency benefits, either as a presumed dependent or as an actual dependent under O.C.G.A. § 34-9-13(d).[167] As Judge Deen noted in a special concurrence, the decision raises the spectre of arguments concerning morality that so badly divided the court in *Jewel*.[168] The crux of the case, after all, was whether the dependency provisions of the Act should be interpreted so as to ignore conduct that Georgia law describes as both immoral and criminal. As Judge Deen pointed out,

> Possible potential criminal fornication and criminal adultery, which have to do with legal and moral acts, may be considered in the best-interest-of-the-child findings in custody and parental termination cases. Likewise legal and moral conduct relating to dependency are required by these

159. 195 Ga. App. at 85-86, 392 S.E.2d at 310 (citing Georgia Casualty & Sur. Co. v. Bloodworth, 120 Ga. App. 313, 170 S.E.2d 433 (1969); Insurance Co. of N. Am. v. Jewel, 118 Ga. App. 599, 164 S.E.2d 846 (1968)).

160. *Id.* at 85, 392 S.E.2d at 310.

161. *Id.* at 86, 392 S.E.2d at 310.

162. 118 Ga. App. 599, 164 S.E.2d 846 (1968).

163. *Id.* at 600, 164 S.E.2d at 847.

164. 195 Ga. App. at 86, 392 S.E.2d at 311 (citing Insurance Co. of N. Am. v. Jewel, 118 Ga. App. 599, 164 S.E.2d 846 (1968)).

165. 120 Ga. App. 313, 170 S.E.2d 433 (1969).

166. 120 Ga. App. at 314-15, 170 S.E.2d at 434.

167. O.C.G.A. § 34-9-13(d) (1988 & Supp. 1990); 195 Ga. App. at 86, 392 S.E.2d at 311.

168. 195 Ga. App. at 87, 392 S.E.2d at 311 (Deen, J., concurring).

> authorities to be considered in situations as in this present workers' compensation case.[169]

Not surprisingly, the Supreme Court of Georgia granted certiorari in this case on May 10, 1990.[170]

G. *Employment Relationships*

The court of appeals rendered a number of decisions during the survey period that greatly affect employment relationships as they relate to workers' compensation claims.

Borrowed Servant. In *Bennett v. Browning*,[171] the court of appeals ruled that a borrowed servant relationship does not necessarily mandate the joint payment provisions of O.C.G.A. § 34-9-224.[172] In *Browning*, Bennett directly employed the employee, who occasionally lent his services to D&L Materials. When this occurred, the employee was subject to the direct control of D&L Materials, which had the right to discharge him. D&L Materials paid Bennett for the employee's services. When the employee sustained an injury and sought workers' compensation benefits, the A.L.J. found that he was a "borrowed servant" of D&L Materials at the time of his injury and that D&L was liable for workers' compensation benefits. Moreover, the A.L.J. concluded that Bennett was not liable for workers' compensation benefits since the injury arose out of and in the course of the employee's work activity for D&L Materials.[173]

On appeal, the superior court revised the award of benefits in accordance with O.C.G.A. § 34-9-224, which states that:

> [w]henever any employee whose injury or death is compensable under this chapter shall at the time of the injury be in the joint service of two or more employers subject to this chapter, such employers shall contribute to the payment of such compensation in proportion to their wage liability to such employee . . . .[174]

Since Bennett paid all of the employee's wages, the practical effect of this ruling shifted the liability of workers' compensation benefits from D&L Materials to Bennett.

The court of appeals reversed, concluding that the evidence in the case "did not demand a finding that the employee was, at the time of his injury, in the *joint* employment of both appellant and appellee within the

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169. *Id.* (citations omitted).
170. *Id.* at 85, 392 S.E.2d at 310.
171. 196 Ga. App. 158, 395 S.E.2d 333 (1990).
172. O.C.G.A. § 34-9-224 (1988); 196 Ga. App. at 159, 395 S.E.2d at 334.
173. 196 Ga. App. at 158, 395 S.E.2d at 334.
174. O.C.G.A. § 34-9-224 (1988).

purview of O.C.G.A. § 34-9-224."[175] By application, therefore, the court of appeals has limited O.C.G.A. § 34-9-224 to those situations in which the claimant is truly working for two different employers at the time of the injury, rather than being under the direct control of only one employer. The holding, however, allows wide latitude for the Board to determine whether joint employment existed at the time of the injury or not.

The court of appeals also considered the borrowed servant doctrine in connection with a tort action involving an employee from a labor pool. In *Sheets v. J.H. Heathtree Service, Inc.*,[176] plaintiff worked for a labor pool that assigned him to work for defendant's tree service where he sustained an injury. Plaintiff received workers' compensation benefits from the labor pool, but then filed a civil action against defendant in tort.[177] The court of appeals noted that plaintiff's immediate employer, the labor pool, "[was] in the very business of temporarily 'loaning' its employees to others."[178] Once assigned to defendant, however, the labor pool relinquished its control, and the "special master" had the right to discharge plaintiff from the performance of his duties. As a result, plaintiff was defendant's borrowed servant at the time of the injury, and the exclusive remedy[179] barred plaintiff from asserting a tort action against defendant.[180]

Farm Labor. O.C.G.A. § 34-9-2(a)[181] provides that farm laborers specifically are exempted from coverage under the Act. In *Glen Oak's Turf, Inc. v. Butler*,[182] the court of appeals considered whether an individual employed to drive a truck and deliver the employer's crops to its customers was a "farm laborer" and therefore precluded from receiving workers' compensation benefits.[183] The employer, Glen Oak's, engaged solely in the business of farming and hired the employee to drive a truck and deliver its crops to various customers.[184] The court of appeals found that this work "was incidental to appellant's farming business," thus bringing the employee within the farm labor exclusion.[185] Therefore, the court reversed the award of benefits to the employee.[186]

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175. 196 Ga. App. at 159, 395 S.E.2d at 334-35.
176. 193 Ga. App. 278, 387 S.E.2d 155 (1989).
177. *Id.* at 278-79, 387 S.E.2d at 155.
178. *Id.* at 279, 387 S.E.2d at 155.
179. O.C.G.A. § 34-9-11 (1988 & Supp. 1990).
180. 193 Ga. App. at 279, 387 S.E.2d at 155.
181. O.C.G.A. § 34-9-2(a) (1988).
182. 191 Ga. App. 840, 383 S.E.2d 203 (1989).
183. *Id.* at 840, 383 S.E.2d at 203.
184. *Id.*
185. *Id.* at 841, 383 S.E.2d at 203.
186. *Id.*

Interestingly, the court took the opportunity to address the implications of this holding and to suggest that the legislature consider its application to modern agriculture.[187] The court concluded its opinion by noting that:

> [w]hether those employers who engage exclusively in farming on a large scale and their employees who are assigned to the marketing, but not the cultivation, of crops should be removed from the scope of the broad exemption of O.C.G.A. § 34-9-2(a) is a matter which must be addressed by the General Assembly, not by the Full Board or the courts.[188]

Independent Contractor/Employment not in the Usual Course of Trade. *Echo Enterprises, Inc. v. Aspinwall*[189] presented the court of appeals with questions concerning both the employee's alleged independent contractor status and the exclusion, provided in O.C.G.A. § 34-9-2(a), for employees "whose employment is not in the usual course of trade, business, occupation, or profession of the employer or not incidental thereto."[190] The employee worked as a general handyman for Echo Enterprises, which was in the business of land clearing and bridge building. Echo paid the employee on an hourly basis, but Echo Enterprises deducted neither income tax nor Social Security from his paychecks. Echo's group medical insurance covered the employee, but the employer did not exercise control over the manner and method of his work. At the time of his injury, the employee was not engaged in any maintenance work on Echo's premises, but rather was painting the personal residence of a co-owner of the company. The record established that the employee performed this work at Echo's direction and that the company paid the employee.[191]

The employer asserted that the employee was an independent contractor, rather than an employee, and, therefore, was not entitled to receive workers' compensation benefits.[192] As it has consistently ruled in the past, the court of appeals held that questions concerning whether a worker is an independent contractor or an employee are factual issues to be determined by the Board, whose conclusions in this regard cannot be disturbed when there is any evidence to support them.[193] The court concluded that the record demonstrated that Echo had the right to control the time,

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187. *Id.*, 383 S.E.2d at 204.

188. *Id.*

189. 194 Ga. App. 444, 390 S.E.2d 867 (1990).

190. O.C.G.A. § 34-9-2(a) (1988).

191. 194 Ga. App. at 444-46, 390 S.E.2d at 867-69.

192. *See* O.C.G.A. § 34-9-1(2) (1988 & Supp. 1990); Sanders Truck Transp. Co. v. Napier, 117 Ga. App. 561, 161 S.E.2d 440 (1978).

193. 194 Ga. App. at 445, 390 S.E.2d at 868 (citing Tommy Nobis Center v. Barfield, 187 Ga. App. 394, 370 S.E.2d 517 (1988)).

manner, method, and means of the employee's performance, even if it did not regularly choose to exercise that right.[194]

Alternatively, the employer contended that, at the time of the injury, the employee was not involved in employment "in the usual course of trade, business, occupation, or profession of the employer"[195] and, therefore, was not entitled to receipt of workers' compensation benefits.[196] The court of appeals affirmed the Board's rejection of this theory, finding instead that his duties as a general handyman were incidental to the usual course of the employer's business and that his painting a personal residence did not remove him from the scope of his employment with Echo, especially since he was painting the residence of a co-owner of the business at the direction of the company.[197] Considering this a case of first impression, the court held that "the proper construction of O.C.G.A. § 34-9-2(a) is as an exemption from eligibility for compensation of those persons who are initially employed for the specific purpose of engaging in activity that is not in the usual course of business of the employer."[198]

Statutory Employer. The Georgia Supreme Court granted certiorari in *Gray Building Systems v. Trine*[199] to determine whether the statutory employer provisions of O.C.G.A. § 34-9-8 apply to a contract for the sale of goods.[200] Gray Building Systems, which was involved in a construction job, ordered door and window lintels from David's Welding Service. The window lintels needed to be fabricated by a welder at the job site. The welding service made the lintels, but someone else installed them. Trine, an employee of David's Welding Service, was injured at the construction site, while unloading the supplies necessary to make the lintels. The Board found that Gray Building Systems was the "statutory employer" of Trine under this set of circumstances and, therefore, held them liable for workers' compensation benefits. The superior court affirmed, and the court of appeals denied an application for a discretionary appeal by Gray Building. The supreme court, however, granted certiorari and reversed.[201]

The supreme court reviewed O.C.G.A. § 34-9-8(a),[202] which provides that "[a] principal, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his subcontractors engaged upon the subject matter of the contract to the same

194. *Id.*
195. O.C.G.A. § 34-9-2(a) (1988).
196. 194 Ga. App. at 445, 390 S.E.2d at 868.
197. *Id.* at 445-46, 390 S.E.2d at 868-69.
198. *Id.* at 446, 390 S.E.2d at 869.
199. 260 Ga. 252, 391 S.E.2d 764 (1990).
200. *Id.* at 252, 391 S.E.2d at 765.
201. *Id.* at 252-53, 391 S.E.2d at 765.
202. O.C.G.A. § 34-9-8(a) (1988).

extent as the immediate employer."[203] The supreme court held that "[a] mere contract for the sale of goods does not make either the buyer or seller or both a 'contractor' as used in O.C.G.A. § 34-9-8."[204] The court could find "no evidence of a substantial service that was rendered in connection with the lintels sold by [claimant's] employer to appellant."[205] Since there was no undertaking by either party to render substantial services in connection with the goods sold, the supreme court found that as a matter of law, it was error to assess workers' compensation benefits against Gray Building Systems as a statutory employer.[206]

H. Exclusive Remedy

The exclusive remedy provisions of O.C.G.A. § 34-9-11[207] were again the subject of several court of appeals decisions during the survey period, few of which presented any real opportunity for the court to either expand or restrict the applicability of the doctrine. The court reaffirmed, for example, that the exclusive remedy provisions apply in lawsuits against co-employees.[208] Similarly, the court reapplied the exclusive remedy doctrine in independent contractor[209] and statutory employer[210] scenarios.

The court of appeals also took the opportunity to point out, in *Collins v. Sheller-Globe Corp.*,[211] that the exclusive remedy provision is not defeated by a plaintiff's lack of personal knowledge regarding the party's status as a statutory employer.[212] Southern Fiber Products employed Collins when he sustained an on-the-job injury. He then filed a civil action alleging that defendant Sheller-Globe had negligently designed and maintained the machinery causing the injury. Sheller-Globe moved for summary judgment upon a showing that Collins' employer, Southern Fiber, was a division of Northern Fiber Products, Sheller-Globe's wholly owned subsidiary.[213] The court of appeals found that Collins' lack of knowledge concerning this corporate structure created no issue of material fact that would affect either a determination regarding defendant's status as a stat-

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203. *Id.*
204. 260 Ga. at 253, 391 S.E.2d at 765.
205. *Id.*
206. *Id. See* Evans v. Hawkins, 114 Ga. App. 120, 150 S.E.2d 324 (1966).
207. O.C.G.A. § 34-9-11 (1988 & Supp. 1990).
208. Shank v. Phillips, 193 Ga. App. 393, 388 S.E.2d 5 (1989); Labelle v. Lister, 192 Ga. App. 464, 385 S.E.2d 118 (1989).
209. Peavy v. McInvale, 192 Ga. App. 155, 384 S.E.2d 246 (1989).
210. Capitol Fish Co. v. Tanner, 192 Ga. App. 251, 384 S.E.2d 394 (1989).
211. 194 Ga. App. 263, 390 S.E.2d 294 (1990).
212. *Id.* at 263, 390 S.E.2d at 294.
213. *Id.*

utory employer or the application of the exclusive remedy doctrine.[214] Furthermore, the court found it of no material significance that Northern Fiber might have lost its status as a wholly owned subsidiary.[215]

I. Group Insurance

In this era of high medical costs, practitioners in the workers' compensation field are witnessing a greater number of claims filed by group insurance carriers or other health care providers seeking reimbursement for payments made to an individual injured in a work-related accident. O.C.G.A. § 34-9-206 specifically allows this.[216] An attempt at reimbursement was taken to an extreme, however, in the case of *State Wholesalers, Inc. v. Parks*,[217] in which Blue Cross/Blue Shield of Georgia sought $32,622.29 against an employer and its workers' compensation carrier.[218]

In *Parks* the employee initially was injured in 1985, but did not seek workers' compensation benefits. Instead, he filed a claim with his group carrier, Blue Cross/Blue Shield, which paid for his medical treatment. In 1987 the employee suffered a second injury while working for a subsequent employer, State Wholesalers. He then brought a claim for a change in condition against the former employer for the 1985 accident as well as a claim against State Wholesalers for the 1987 accident on the grounds that he suffered a "new injury." Blue Cross/Blue Shield, the employee's group carrier, interposed a claim for reimbursement of all medical expenses it had paid since 1985.[219]

The Board ruled that the statute of limitations barred the 1985 claim. The Board, however, found in favor of the employee against State Wholesalers and its workers' compensation carrier, Atlantic Companies, on the ground that there actually had been a new injury in 1987. In this regard, the Board ordered State Wholesalers and Atlantic Companies to reimburse Blue Cross/Blue Shield even though the employee incurred some of the medical expenses prior to the 1987 injury.[220] The court of appeals reversed the decision, holding that State Wholesalers and Atlantic Companies could not be liable "for medical expenses incurred by claimant prior to the date of the 'new injury' on July 24, 1987."[221] The court of

214. *Id.*

215. *Id.*

216. O.C.G.A. § 34-9-206 (1988 & Supp. 1990); *see also* GA. BD. OF WORKERS' COMPENSATION R. 206 (O.C.G.A. tit. 34, at 156 (1988 & Supp. 1990)).

217. 194 Ga. App. 900, 392 S.E.2d 64 (1990).

218. *Id.* at 901, 392 S.E.2d at 65.

219. *Id.*

220. *Id.*

221. *Id.*, 392 S.E.2d at 66.

appeals remanded the case for a determination of the amount of benefits paid by Blue Cross/Blue Shield since July 24, 1987.[222]

J. Medical Treatment

A physician's unfortunate choice of words very well may release an injured employee from the requirement of seeking treatment from a medical provider on the posted panel, as the decision in *Bel Arbor Nursing Home v. Johnson*[223] demonstrates. The facts in *Johnson* are sketchy at best, which takes away from the true meaning of the decision, but the case suggests that use of the word "cured" or the phrase "dismissed from treatment" by the treating physician allows an injured employee to seek treatment from an unauthorized physician so long as the treatment is related to and necessitated by the on-the-job injury. Obviously, the court was concerned with the possibility that the employer had shirked its responsibility of providing adequate medical treatment as required under O.C.G.A. § 34-9-200.[224] This case, and its progeny,[225] should have no effect, however, on those instances in which the treating physician merely provides a normal duty work release or releases the employee on a return-when-needed basis. Actually, the decision should be limited to those instances in which the treating physician refuses to provide further medical care.

In *Thomas v. Harrison Poultry Co.*,[226] the court of appeals held that once the Board has granted a change in physician, the decision will stand so long as it is supported by any evidence.[227] In *Thomas* the superior court reversed the Full Board's grant of a request for change of physician on the ground that there was no "competent evidence that any current medical difficulties [were] attributable to the work related injury."[228] The court of appeals reversed, pointing not only to evidence that the medical treatment actually was due to the on-the-job injury, but that the authorized treating physician had told the employee that she was free to seek treatment from a "doctor of her choice."[229]

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222. *Id.* at 902, 392 S.E.2d at 66.

223. 192 Ga. App. 454, 385 S.E.2d 315 (1989).

224. O.C.G.A. § 34-9-200 (1988 & Supp. 1990).

225. Boaz v. K-Mart Corp., 254 Ga. 707, 334 S.E.2d 167 (1985); Georgia Power Co. v. Brasill, 171 Ga. App. 569, 320 S.E.2d 573 (1984), *aff'd*, 253 Ga. 766, 327 S.E.2d 226 (1985).

226. 194 Ga. App. 353, 390 S.E.2d 308 (1990).

227. *Id.* at 353-54, 390 S.E.2d at 308-09.

228. *Id.* at 353, 390 S.E.2d at 308.

229. *Id.* at 354, 390 S.E.2d at 309.

In *Atlanta Journal & Constitution v. Van De Venter*,[230] a decision which also involved the question of authorized medical treatment, the employee sprained his ankle while delivering newspapers. The employee initially was treated at Humana MedFirst, a medical provider on the posted panel. After three visits to Humana MedFirst, the employee "expressed a desire to see Dr. Stanley Kalish, a specialist recommended to him by his personal physician."[231] The Humana physician obliged, giving the employee a note to seek follow-up care with a "specialist" and specifically stating that any restrictions on the ability to return to work would be determined by this individual. The court of appeals agreed with the Board, which held that the employee was entitled to reimbursement for Dr. Kalish's treatment because of the referral by the authorized treating physician, Humana MedFirst. This was the case even though the employee requested the referral himself and designated the "specialist." The court distinguished *K-Mart Corp. v. Anderson*,[232] in which the employee failed to ask for permission, from either the employer or the Board, to change physicians.[233] On April 17, 1990, the court of appeals vacated *Van De Venter* and remanded the matter upon settlement between the parties.[234]

Although a return to normal duties, together with a denial for additional indemnity benefits by the Board, certainly does not mean that the employer will have no responsibility for providing additional medical treatment, it did have this effect in *Coastal Transport & Trading Co. v. Carpenter*.[235] In *Carpenter* the employee filed a request for reimbursement of approximately $4,000 in chiropractic care, which the A.L.J. denied. The A.L.J. had previously denied the employee's change of condition claim. In reaching a decision concerning the chiropractic bills, the A.L.J. relied on earlier findings made by the Board, which included a report from an orthopedic surgeon who felt that the employee lacked motivation and that a return to work was the best medicine. Although never noted as such, the Board must have felt that the chiropractic care was unreasonable and unnecessary and, therefore, not reimbursable under

230. Fulton County Daily Rep., Mar. 19, 1990, at 21B, col. 3 (Ga. Ct. App. Mar. 6, 1990) (No. 89A2112), *vacated*, Fulton County Daily Rep., Apr. 27, 1990, at 18B, col. 2 (Ga. Ct. App. Apr. 17, 1990).

231. Fulton County Daily Rep., Mar. 19, 1990, at 21B, col. 3.

232. 166 Ga. App. 421, 304 S.E.2d 526 (1983).

233. Fulton County Daily Rep., Mar. 19, 1990, at 21B, col. 4.

234. Fulton County Daily Rep., Apr. 27, 1990, at 18B, col. 2. Unfortunately, *Van De Venter* may nevertheless leave the door open for "engineered" referrals.

235. 195 Ga. App. 789, 395 S.E.2d 266 (1990).

O.C.G.A. § 34-9-200.[236] In reversing the superior court, the court of appeals affirmed the actions of the A.L.J.[237]

K. Payment of Benefits

In *Dan River, Inc. v. Carroll*,[238] the court of appeals held that a grace period granted by the legislature for payment of indemnity benefits did not create a substantive right.[239] When the employee was injured in March 1981, the employer had a grace period of fourteen days for the payment of indemnity benefits pursuant to O.C.G.A. § 34-9-221(e).[240] On July 1, 1985, the legislature amended section 34-9-221(e), doing away with the fourteen-day grace period and providing for a fifteen percent penalty in the event benefits were not paid when due.[241] The employee sought to have the fifteen percent penalty imposed on the employer for late payments after the effective date of the amendment, and the court of appeals agreed that he was able to do so, holding that the 1985 amendment did not create a new substantive right to receive the benefits, but only shortened the period of time within which the employer could make payment without a penalty.[242] According to the court of appeals, the grant of a grace period is a statutory privilege in which neither party has a vested right.[243]

The appellate courts have long held that an employer-insurer is not entitled to suspend indemnity benefits merely because an employee is incarcerated.[244] In *Mize v. Cleveland Express*,[245] the court of appeals, relying on *Scott Housing Systems v. Howard*[246] and *Sargent v. Brown*,[247] held that the employer-insurer may suspend benefits to an incarcerated, disabled employee upon an adjudication of guilt.[248] According to the court, any offer of suitable employment after that time would be ineffectual

236. O.C.G.A. § 34-9-200 (1988 & Supp. 1990).

237. 195 Ga. App. at 790, 395 S.E.2d at 267.

238. 192 Ga. App. 537, 385 S.E.2d 686 (1989).

239. *Id.* at 538, 385 S.E.2d at 688.

240. Act approved Apr. 10, 1978, No. 1473, § 10, 1978 Ga. Laws 2220, 2228 (current version at O.C.G.A. § 34-9-221(e) (1988 & Supp. 1990)).

241. Act approved Apr. 2, 1985, No. 558, § 7, 1985 Ga. Laws 727, 734 (current version at O.C.G.A. § 34-9-221(e) (1988 & Supp. 1990)).

242. 192 Ga. App. at 538, 385 S.E.2d at 688.

243. *Id.*

244. *See* Scott Hous. Sys. v. Howard, 256 Ga. 675, 353 S.E.2d 2 (1987) (the proper time to terminate benefits of an incarcerated employee would be upon adjudication of guilt).

245. 195 Ga. App. 56, 392 S.E.2d 275 (1990).

246. 256 Ga. 675, 353 S.E.2d 2 (1987).

247. 186 Ga. App. 890, 368 S.E.2d 826 (1988).

248. 195 Ga. App. at 56, 392 S.E.2d at 276.

since the employee "could not meaningfully accept."[249] The court in *Mize* does not address the situation in which there has been an adjudication of guilt and an appeal is pending. In that situation, the holding of *Scott Housing Systems* may still be in effect.

During the survey period the court of appeals once again examined O.C.G.A. § 34-9-221(h), which deals with termination of indemnity benefits that are being paid without an award.[250] In 1988 the court of appeals held that section 34-9-221(h) had the effect of a statute of limitations and, if benefits were paid in excess of sixty days without an award, the right to compensation could not be controverted except upon the ground of a change in condition or newly discovered evidence.[251] In *Carpet Transport v. Pittman*,[252] the court did not specifically address the distinction between "right" to compensation and "amount" of compensation. The court in *Leon Dawson/Crawford Forest Products v. Walker*[253] addressed the issue. In *Leon Dawson/Crawford*, the employer-insurer incorrectly calculated the employee's average weekly wage at the time of the injury, thereby making a substantial overpayment of benefits, which went on well over sixty days. The employer terminated benefits on June 2, 1986 based on a reported change in condition for the better. When the matter came on for a hearing, the Board not only found that the employee was still disabled, but held that the employer was estopped from reducing the amount of indemnity benefits to the correct level even though a legitimate error had been made.[254] The court of appeals reversed, limiting the extent of its decision in *Carpet Transport* and distinguishing the "right" to compensation as opposed to the "amount" of compensation.[255]

L. Parties

In *Morgan v. Palace Industries, Inc.*,[256] a case that was discussed earlier in this Article,[257] the court of appeals specifically held that the A.L.J. actually is granted the authority "to add or delete parties with or without motion."[258] In *Morgan* no insurance coverage existed for the entity that directly had employed the claimant, Henry Garrett. Garrett sought to

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249. *Id.*
250. O.C.G.A. § 34-9-221(h) (1988 & Supp. 1990).
251. Carpet Transport v. Pittman, 187 Ga. App. 463, 370 S.E.2d 651 (1988).
252. *Id.* at 463, 370 S.E.2d at 651.
253. 192 Ga. App. 887, 386 S.E.2d 690 (1989).
254. *Id.* at 887, 386 S.E.2d at 691.
255. *Id.* at 888, 386 S.E.2d at 691.
256. 195 Ga. App. 80, 392 S.E.2d 315 (1990).
257. *See supra* text accompanying notes 144-54.
258. 195 Ga. App. at 82, 392 S.E.2d at 317 (quoting O.C.G.A. § 34-9-102(c) (1988)).

add as a party the sole officer and shareholder of the company, Milton Morgan. The A.L.J. named Morgan as a defendant and he appealed, arguing that the Board was without power to do so.[259] The court of appeals affirmed, citing O.C.G.A. §§ 34-9-100(a)[260] and 34-9-102(c),[261] and held that "the A.L.J. had the jurisdiction and power to determine the legal question of whether Morgan was the alter ego of Palace Industries," Garrett's immediate employer.[262] The court of appeals indicated, however, that evidence must be taken for a finding that Morgan was actually an "employer" within the definition of O.C.G.A. § 34-9-1.[263] In the instant case, no evidence existed in support of the employee's argument of alter ego or disregard of the corporate entity by Milton Morgan.[264]

M. Procedure

As usual, a number of decisions during the survey period involved procedural issues. In *Sears, Roebuck & Co. v. Spell*[265] the superior court reversed an award of the full Board which found that an employee actually had undergone a change in condition for the better and, therefore, was no longer entitled to indemnity benefits. The Full Board based the award primarily on the opinion of a physician who, after viewing a videotape which showed the employee "building a deck on his residence and engaging in bending, stooping, heavy lifting, and using a hammer and power saw," found that the employee was able to return to work without any restrictions.[266] The employer-insurer argued that the superior court erred in reversing the Board's award, pointing out that the superior court failed to consider crucial evidence, namely the videotape. The court of appeals agreed, reversing the superior court and remanding the decision for "reconsideration of the record as a whole, including the omitted photographic evidence."[267]

In *Carden v. Arrow Co.*,[268] the court of appeals once again considered O.C.G.A. § 34-9-221(h),[269] but this time focused on the term "newly discovered evidence." In *Carden* the employee complained of a rash, hair loss, and nervousness and alleged that they were work-related. Employer-

259. *Id.* at 80-81, 392 S.E.2d at 316-17.
260. O.C.G.A. § 34-9-100(a) (1988).
261. *Id.* § 34-9-102(c).
262. 195 Ga. App. at 82, 392 S.E.2d at 317.
263. *Id.* (citing O.C.G.A. § 34-9-1(3) (1988 & Supp. 1990)).
264. *Id.*, 392 S.E.2d at 317-18.
265. 191 Ga. App. 851, 383 S.E.2d 207 (1989).
266. *Id.* at 851, 383 S.E.2d at 207.
267. *Id.* at 852, 383 S.E.2d at 208.
268. 193 Ga. App. 539, 388 S.E.2d 348 (1989).
269. O.C.G.A. § 34-9-221(h) (1988 & Supp. 1990).

insurer commenced indemnity benefits and provided medical treatment. Five months after the initiation of benefits, the treating physician conducted a third test which revealed that the employee's condition was *not* work-related. The employer-insurer then sought to controvert based on "newly discovered evidence."[270] The court of appeals held that the results of the third test were indeed "newly discovered evidence" since they were "not inconsistent with and impeaching" of the physician's previous lack of opinion concerning the employee's condition.[271] Furthermore, the court found that the employer-insurer had acted with due diligence.[272]

In a second decision involving "newly discovered evidence," an employee had requested a hearing before the Board for the purpose of opening the record which had been closed for almost six months. In *Cook v. Jordan Bradley Supply Co.*,[273] the Board denied the employee's request for disability benefits on March 4, 1988. More than six months later the employee requested a hearing before an A.L.J. for the purpose of opening the record for the introduction of newly discovered evidence. The Board denied the request and the employee took an appeal therefrom.[274] The court of appeals affirmed, holding that even though Board rule 103(d)[275] directed the Board to "apply the law of Georgia regarding the nature and character of newly discovered evidence required for the granting of a new trial,"[276] there was no authority in the Act for reopening a case upon a petition for rehearing on the ground of newly discovered evidence.[277]

In *Sanders v. Georgia-Pacific Corp.*,[278] the court of appeals again reiterated the principle that new arguments will not be entertained on appeal if the employee had the opportunity to do so at a hearing before the Board. In *Sanders* the employee attempted to argue on appeal an issue that, according to the court, could have been heard by the Board at a hearing held in 1985.[279] This amounted to a waiver, and the court of appeals refused to consider it.

The court of appeals also pointed out that the Board is a statutory creature, an administrative body, and, as such, it possesses only the jurisdiction, power, and authority given to it by the legislature. In *McDevitt &*

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270. 193 Ga. App. at 539-40, 388 S.E.2d at 349.
271. *Id.* at 540, 388 S.E.2d at 349.
272. *Id.*
273. 195 Ga. App. 604, 394 S.E.2d 400 (1990).
274. *Id.* at 604, 394 S.E.2d at 400.
275. GA. BD. OF WORKERS' COMPENSATION R. 103(d) (O.C.G.A. § tit. 34, at 131 (1988 & Supp. 1990)).
276. *Id.*
277. 195 Ga. App. at 605, 394 S.E.2d at 401.
278. 192 Ga. App. 439, 385 S.E.2d 101 (1989).
279. *Id.* at 439, 385 S.E.2d at 103.

Street Co. v. Trammell,[280] the employer-insurer appealed an award of benefits to an employee by an A.L.J. on the grounds of a change in condition. In January 1986 the superior court remanded the matter to the full Board for a determination of whether a physician had relied on opinion evidence in making findings and conclusions, and whether he had relied upon recognized guidelines in determining the employee's degree of disability. The court's remand did not indicate whether the court directed the Full Board to return the appeal to the superior court after its decision, or whether the superior court even retained jurisdiction over the appeal.[281]

On remand, the Full Board forwarded the case to an A.L.J. to receive evidence pursuant to the mandate of the superior court. After receiving evidence from the physician by way of deposition, the A.L.J. issued an award responding to all questions posed in the superior court's order. Dissatisfied with an award of temporary total disability benefits to the employee, the employer-insurer appealed to the Full Board, which reversed this portion of the A.L.J.'s decision in February 1987. Neither party appealed the Full Board's award. Eighteen months later, the employee moved for a decision on the remittal. When the superior court attempted to remand the case for a second time to the Full Board to accomplish the tasks set forth in its order of January 1986, the employer-insurer appealed, maintaining that the superior court was without power to do so.[282] The court of appeals agreed, holding that not only was there no authority for interlocutory appeals in workers' compensation cases, but also that there was no authority in the Act that authorized the Board to remit appeals to the superior court.[283] According to the court, the Full Board's award in February 1987, denying the employee compensation, was an appealable order and became final when no timely appeal was taken. As such, the superior court was without jurisdiction to act on the employee's motion for a decision on the remittal.[284]

In *Nelson v. Felton Pearson Co.*,[285] practitioners were warned that the sixty-day time period set forth in O.C.G.A. § 34-9-105(b)[286] is mandatory even though it may lead to unfair results. In *Nelson* the employer filed a notice of appeal with the clerk of the superior court of Fulton County on December 7, 1988, from an award of the Full Board. Unfortunately, thirty-eight days elapsed before the superior court received the record from the Board. When appellee's attorney finally contacted the calendar

280. 193 Ga. App. 646, 389 S.E.2d 3 (1989).
281. *Id.* at 646, 389 S.E.2d at 4.
282. *Id.* at 647, 389 S.E.2d at 5.
283. *Id.* at 648, 389 S.E.2d at 5.
284. *Id.*
285. 195 Ga. App. 92, 392 S.E.2d 274 (1990).
286. O.C.G.A. § 34-9-105(b) (1988 & Supp. 1990).

clerk to schedule a hearing within the sixty-day time period set forth in section 34-9-105(b), he was unable to give his opponent the statutorily required ten-day written notice. The superior court continued the matter to February 10, 1989, and after oral arguments, reversed the award of the Board.[287] The court of appeals, noting that inequities may result, reversed the superior court stating that the Board's decision automatically had been affirmed by operation of law because of the failure of the superior court to hear the case within sixty days of the filing of the notice of appeal.[288]

If a party opts for resolution of a dispute without a hearing, as allowed under Board rule 100,[289] then he must make certain that the case can be perfected with admissible documentary evidence. In *Grier v. Proctor*,[290] a case that was also discussed earlier,[291] the employee submitted a written request to an A.L.J. asking that an interlocutory order be issued requiring the employer, a member of an association of self-insurers, to show cause why indemnity benefits should not be resumed and further requesting assessment of a fifteen percent late penalty under O.C.G.A. § 34-9-221(e),[292] as well as a civil penalty of $250 under O.C.G.A. § 34-9-18(a).[293] No evidentiary hearing was ever requested, and both parties submitted arguments by brief.[294] The court of appeals affirmed the denial of the employee's request for a civil penalty and held that there was no evidence in the record that would authorize a finding of willfulness on the part of the employer.[295] The employee himself had waived any right to a full evidentiary hearing by opting for the alternative resolution.

N. Psychological Injuries

In *W.W. Fowler Oil Co. v. Hamby*,[296] the employee filed a workers' compensation claim alleging emotional and psychic problems stemming

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287. 195 Ga. App. at 93, 392 S.E.2d at 275.

288. *Id.*; *see also* AT&T Technologies v. Barrett, 195 Ga. App. 675, 395 S.E.2d 22 (1990). O.C.G.A. § 34-9-105(b) (1988 & Supp. 1990) provides that if no hearing is possible within the 60 day period, it must at least be set with 10 days notice given to the other side. The hearing may then be continued to a date certain by court order. The court, however, must decide the case within 20 days of the hearing; otherwise, the Board's decision is affirmed by operation of law.

289. GA. BD. OF WORKERS' COMPENSATION R. 100 (O.C.G.A. tit. 34, at 127 (1988 & Supp. 1990)).

290. 195 Ga. App. 116, 393 S.E.2d 18 (1990).

291. *See supra* text accompanying notes 94-99.

292. O.C.G.A. § 34-9-221(e) (1988 & Supp. 1990).

293. *Id.* § 34-9-18(a) (1988).

294. 195 Ga. App. at 117, 393 S.E.2d at 19.

295. *Id.*, 393 S.E.2d at 19-20.

296. 192 Ga. App. 422, 385 S.E.2d 106 (1989).

from an armed robbery. The employee, who was working as a clerk at a convenience store, was robbed on August 9, 1986. During the course of the robbery, the robber held a gun to the employee's head, and although he threatened her, the robber did not physically harm her. After the incident, as one would certainly expect, the employee developed psychological problems resulting in disability. The Board denied benefits on the ground that there had been no "discernible physical occurrence." The superior court reversed the Board, finding that merely being touched with the gun was sufficient to satisfy the "physical occurrence" requirement.[297] The court of appeals disagreed and held that a discernible physical occurrence meant "a physical injury or harm, not merely a touching that can be fixed in time."[298] The court denied benefits.

O. Settlement Agreements

The manner in which workers' compensation claims are settled between the parties is strictly controlled by O.C.G.A. § 34-9-15.[299] In *Justice v. Davidson Kennedy Co.*,[300] the parties entered into a settlement agreement and presented the Board with the necessary documents. Before the Board could approve the settlement, however, the employee was killed in an automobile collision unconnected with his employment. Thereafter, and before the Board's approval, the employer-insurer withdrew their consent. The employee's widow then sought to enforce the settlement agreement.[301] The Board refused and the court of appeals agreed, holding that section 34-9-15 imposed two conditions that were essential to a valid settlement between an employer and an employee: the time and manner of payment must be in accordance with the provisions of the Act, and the settlement must be approved by the Board.[302] In *Justice* there had been no Board approval and, therefore, either party had the right to withdraw its consent to the agreement.[303]

P. Statute of Limitations

Technically, two cases during the survey period involved the one-year statute of limitations set forth in O.C.G.A. § 34-9-82.[304] *Paideia School v.*

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297. *Id.* at 423, 385 S.E.2d at 107.

298. *Id.* at 422-23, 385 S.E.2d at 107 (citing Hanson Buick v. Chatham, 163 Ga. App. 127, 292 S.E.2d 428 (1982)).

299. O.C.G.A. § 34-9-15 (1988).

300. 194 Ga. App. 585, 391 S.E.2d 414 (1990).

301. *Id.* at 586, 391 S.E.2d at 414.

302. *Id.*, 391 S.E.2d at 415.

303. *Id.*

304. O.C.G.A. § 34-9-82 (1988).

Geiger[305] was discussed earlier in this Article.[306] The court in *Geiger* found the claim to be barred because the employee did not seek remedial medical care within one year of the injury.[307]

In *Harden v. Southeastern Meat Co.*,[308] there was a different result. The employee had worked for years in the employer's cooler and was therefore subjected to some very cold temperatures. In 1981 the treating physician initially diagnosed the employee to be suffering from asthma. In April 1985 the same physician wrote the employer advising that he now believed that the asthma attacks were related to the exposure to cold air on the job. On December 23, 1986, and after two hospitalizations for asthma attacks, the employee filed a claim for workers' compensation benefits. The employer controverted this on January 5, 1987.[309]

The A.L.J. awarded the employee disability income benefits retroactive to January 31, 1986 and further ruled that the employee was entitled to reimbursement of medical expenses "incurred subsequent to December 23, 1985 (one year prior to the filing of the claim)."[310] The court of appeals agreed, stating that because O.C.G.A. § 34-9-82 required that the claim be filed within one year of the accident or injury,

> it would follow logically that only those medical expenses incurred within that one-year period (or, depending on the date of the filing, for a shorter period, beginning with the date of the injury and extending to the date of the filing of the claim) should by implication be compensable under workers' compensation law.[311]

Q. Sufficiency of Award

In *Rice v. CIBA Vision Care*,[312] the court of appeals addressed the situation in which the Full Board makes additional or different findings and conclusions on an appeal of an award from an A.L.J. In *Rice* the employer appealed the A.L.J.'s award that directed payment of weekly benefits, certain medical treatment, and assessed add-on attorney fees. The Full Board found that the medical treatment was unauthorized, and that the employer's defense had been reasonable, thereby striking certain medical expenses, as well as the add-on attorney fees assessed below. The employee appealed, arguing that the Full Board erred because it failed to

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305. 192 Ga. App. 723, 386 S.E.2d 381 (1989).
306. *See supra* text accompanying notes 110-23.
307. 192 Ga. App. at 724, 386 S.E.2d at 382-83.
308. 196 Ga. App. 22, 395 S.E.2d 273 (1990).
309. *Id.* at 23, 395 S.E.2d at 273-74.
310. *Id.*, 395 S.E.2d at 274.
311. *Id.* at 24, 395 S.E.2d at 274.
312. 194 Ga. App. 528, 391 S.E.2d 30 (1990).

enter its own findings of fact in reversing the award of the A.L.J.[313] The court of appeals rejected this argument, holding that there was no authority requiring the Full Board to enter its own findings of fact when reversing an A.L.J.[314] Indeed, the court pointed to cases in which the Full Board had "articulated the same facts as the A.L.J. while reaching a different result."[315] In *Rice* sufficient evidence existed in the record to support either the findings of the A.L.J. or the findings of the Full Board. An appeal to the Full Board is a de novo review of all evidence, and the findings in the award are sufficient if they inform the parties of the disposition of the issues, thus enabling a party intelligently to prepare an appeal.[316]

III. Conclusion

The efforts of the Senate Study Committee and the 1990 Georgia Legislature have resulted in some far-reaching changes to the Georgia Workers' Compensation Act. In particular, the revisions affecting change in condition, the statute of limitations, and medical benefits promise to produce litigation on a number of points. Attorneys practicing workers' compensation law should take care to become familiar with the changes to the Act, and to examine them carefully for their potential applications.

313. *Id.* at 528, 391 S.E.2d at 31.
314. *Id.* at 529, 391 S.E.2d at 31.
315. *Id.*
316. *Id.*