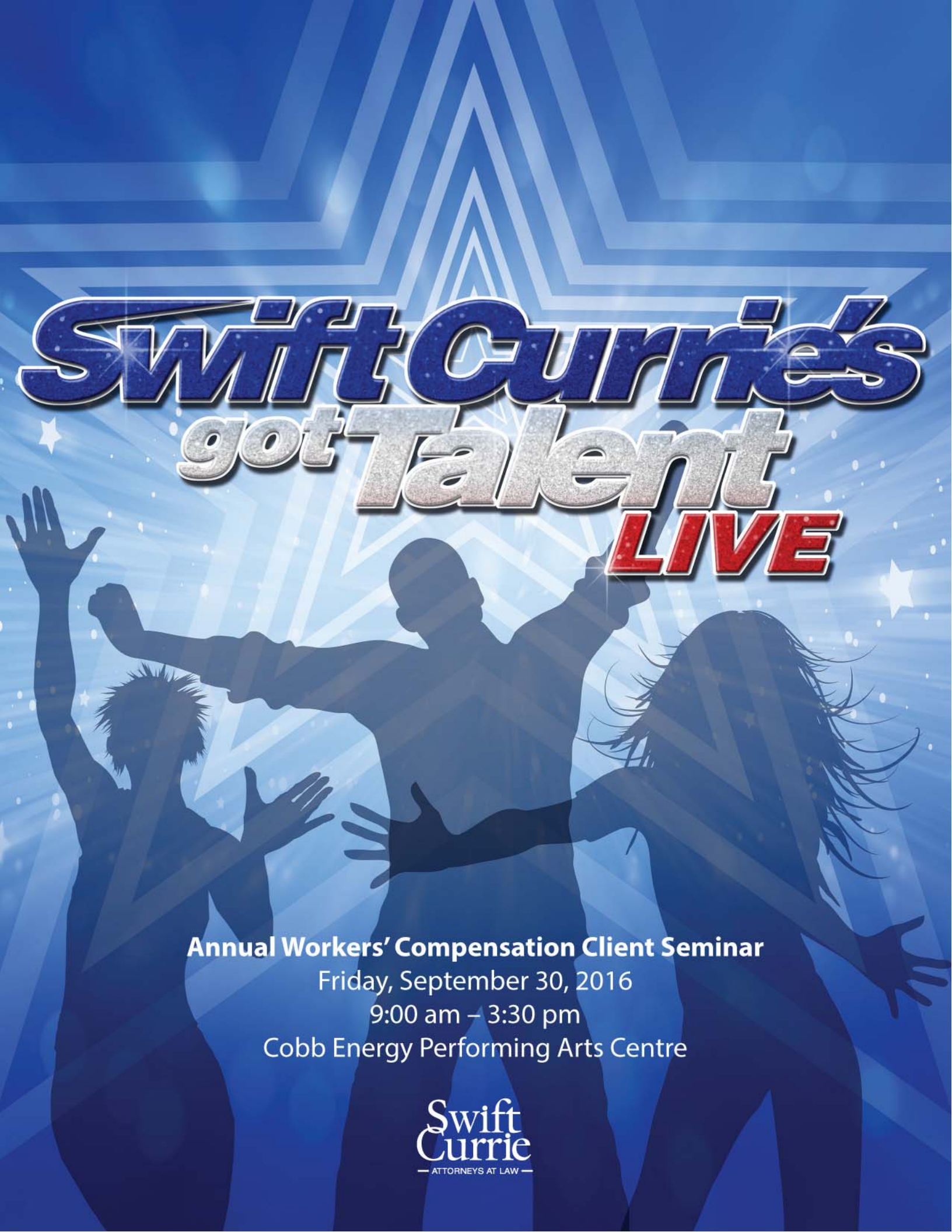

Annual Workers' Compensation Client Seminar

Friday, September 30, 2016

9:00 am – 3:30 pm

Cobb Energy Performing Arts Centre

Swift Currie

— ATTORNEYS AT LAW —

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Swift Currie's Got Talent

September 30, 2016

Cobb Energy Performing Arts Centre

Based on more than 50 years of representing clients in Georgia, Alabama and throughout the country, Swift, Currie, McGhee & Hiers, LLP, has evolved into a law firm capable of handling all areas of civil law and litigation. With over 100 attorneys, Swift Currie possesses the resources and abilities to tackle the most complex legal problems, while at the same time providing our clients with individualized, prompt and cost-effective service. Our law firm has a wealth of experience across numerous practice areas, and our depth of legal talent allows us to tailor such strengths to individual cases. Our firm's philosophy is to provide our clients with creative, aggressive and professional representation of their interests. We also strive to conduct ourselves in a manner consistent with the legacy of our four founding partners. No matter the issue in dispute, Swift Currie has attorneys ready to assist you. We believe we have a well-deserved reputation for high-quality legal services and dedicated attorneys. Finding creative solutions to complex problems – that is our commitment to our clients.

Seminar Agenda

Friday, September 30, 2016

9:30 am – 9:40 am	**Welcome and Introduction** *R. Briggs Peery*
9:40 am – 10:00 am	**We've Got Work: Navigating the WC-240 Process** *S. Elizabeth Wilson*
10:00 am – 10:20 am	**Medical Case Management and Board Rule 200.2: Now a Stronger Arrow in the Quiver** *K. Mark Webb*
10:20 am – 10:40 am	**You May Have Talent but You Also Need to Know the Law — 2016 Case Law and Legislative Updates** *Marc E. Sirotkin and Mark E. Irby*
10:40 am – 10:55 am	**Break**
10:55 am – 11:15 am	**"You're Fired" — How a Termination Can Affect a Workers' Compensation Claim** *Preston D. Holloway*
11:15 am – 11:35 am	**A Budding Star: Medical Marijuana in Workers' Compensation** *Richard A. Phillips*
11:35 am – 12:00 pm	**Does Out of Sight Mean Out of Mind? The Effects a Claimant's Move Can Have on a Compensable Claim** *M. Ann McElroy*
12:00 pm – 1:00 pm	**Complimentary Lunch**
1:00 pm – 2:15 pm	**Legal Triage**
2:15 pm – 2:30 pm	**Break**
2:30 pm – 2:55 pm	**Claimant's Got Talent — The Recorded Statement and the Art of Storytelling** *W. Bradley Holcombe*
2:55 pm – 3:20 pm	**Now You See Me, Now You Don't: Workers' Compensation Issues with Remote Employees** *Amanda M. Conley*
3:20 pm – 3:30 pm	**Seminar Wrap Up/Door Prizes**

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We've Got Work: Navigating the WC-240 Process

By S. Elizabeth Wilson

S. Elizabeth Wilson

Partner

S. Elizabeth (Beth) Wilson practices primarily in the area of workers' compensation defense. Prior to joining the firm, Ms. Wilson practiced workers' compensation defense with another Atlanta firm and served as staff counsel for an insurance company.

Ms. Wilson has written numerous papers and presented at various seminars on a wide array of topics, ranging from common defenses to Medicare Set Asides. Ms. Wilson frequently presents to employer and insurers throughout the Southeast on workers' compensation defense strategies. Ms. Wilson received her B.A. in History from the University of Kentucky and her J.D. from Cumberland School of Law.

Ms. Wilson is a member of the State Bar of Georgia and the Workers' Compensation Section of the State Bar and is active with Kids' Chance. Kids' Chance is a nonprofit corporation which provides scholarships for children of permanently or catastrophically injured or deceased workers. She is a current member on the committee that organizes an annual fundraiser for Kids' Chance. Ms. Wilson was named a Georgia Super Lawyer Rising Star by *Atlanta Magazine* 2010-2013.

We've Got Work: Navigating the WC-240 Process

To successfully return an injured worker to suitable employment, there are many avenues the employer/insurer can pursue. To help explain the process and ensure strict compliance with the legislative intent of O.C.G.A § 34-9-240, this paper will provide a comprehensive overview of the return to work process and the pitfalls to avoid to mitigate exposure. Successfully using O.C.G.A. § 34-9-240 and Board Rule 240 can make the difference between a continuing obligation to pay a claimant who is capable of working and severing future income benefits.

FIRST STEP — LIGHT DUTY RELEASE

When an employee is receiving temporary total disability (TTD) benefits and the authorized treating physician indicates the employee is capable of returning to work within certain restrictions, it is possible to offer the employee a suitable job and, potentially, suspend payment of benefits. O.C.G.A. § 34-9-240(a) states:

> If an injured employee refuses employment procured for him or her and suitable to his or her capacity, such employee shall not be entitled to any compensation, except benefits pursuant to Code Section 34-9-263, at any time during the continuance of such refusal unless in the opinion of the board such refusal was justified.

Thus, the employer can offer a suitable job which the employee must, in good faith, attempt to perform. Recently, the legislature clarified what was considered to be a "good faith attempt." Effective July 1, 2013, O.C.G.A. § 34-9-240(b)(1) was amended to reflect that an employee must attempt the proffered job for at least eight cumulative hours or one scheduled workday, *whichever is greater*. This will be discussed in greater detail below.

Availability of Light Duty Work

If the employee's authorized treating physician indicates, following a physical examination within the last 60 days, the employee is capable of performing light duty work, the next step is to start documenting the return to work process. This begins by establishing work is available for the employee that is suitable to the his/her restrictions.

It is imperative the employer/insurer, along with counsel if involved, work closely to identify a job available for the employee. There are three possible ways to make work available. First, there may be a position already available which is less physically demanding than the employee's work-related restrictions. For example, a "greeter" position in a large retail store may be available for a stockroom clerk whose torn rotator cuff temporarily precludes the ability to lift heavy objects. Second, there may be a position which can be easily modified to suit the employee's work-related restrictions. An employee suffering from a neck condition, for example, may be offered a position logging delivery trucks on the third shift.

Third, the employer may create a position on an "ad-hoc" basis specially suited to the employee's work-related restrictions. Under Georgia law, there is no legal impediment to creating a position specially tailored to the employee's restrictions.[1] In other words, the position need not already exist for the offer to be legitimate. For example, an employee who suffers from a herniated disc and cannot stand or sit for more than 30 minutes may be offered a position sorting colored paper clips. The creativity that can be used is only limited by the employer's ability and willingness to suffer through the decreased productivity.

The position must remain available. In *Universal Ceramics Inc. v. Watson*, the Court of Appeals held "the [employee's] refusal does not forever ban receipt of future compensation should the availability of suitable light work cease."[2] Similarly, the employer in *Coats & Clark, Inc. v. Thompson*[3] admitted that the job position offered was no longer available because the employee had refused same. As a result, the employee was entitled to recommencement of benefits beginning the date the employer closed out the position.

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1 There may be legal implications of the American's with Disabilities Act or Georgia Labor law.

2 177 Ga. App. 345, 339 S.E.2d 304 (1985).

3 166 Ga. App. 669, 305 S.E.2d 415 (1983).

In *Trent Tube v. Hurston*,[4] the employee initially refused to attempt the light duty position offered and his TTD benefits were terminated. Two years after the initial offer of the position, the employee wrote to the employer that he wished to attempt the position. The result was the same as the previously mentioned cases. The employer did not keep the position open and the employee was entitled to recommencement of benefits. Therefore, it is imperative that the employer maintain the availability of the offered position.[5]

Suitability of Light Duty Work

The job must also be suitable to the employee's "physical limitations or restrictions."[6] This involves identifying, modifying or creating a position, the physical demands of which do not exceed the limitations identified by the treating physician. It also involves assuring the position is one the employee is qualified to perform.

The employer bears the burden of proving that the offered position is suitable.[7] Pursuant to Board Rule 240, the employer must provide a description of the essential job duties to be performed, including the hours to be worked, the rate of payment and a description of the essential tasks to be performed. The most effective method of ensuring compliance with this requirement is to complete a WC-240A. Whether a WC-240A is used or not, the critical issue is to identify with particularity the work-related activities of the proffered position. Each of the functions listed on the form are important.

Any discrepancy between the description of the work-related activities and the expectations of the direct supervisor will likely result in a failed attempt to perform the proffered position. Many light duty, return-to-work offers have been ultimately unsuccessful because the direct supervisor is unaware of the employee's specific restrictions. After several days of attempting a light duty job where the direct supervisor unwittingly compels the employee to perform at a level that exceeds the restrictions, the employee will stop working and complain that he or she is unable to perform the job. Therefore, the employer must ensure the position offered is, and remains, available to the employee and must ensure the position (as described on the WC-240A or equivalent *and* as performed) is suitable to the employee's physical abilities.

Doctor Approval of Light Duty Position

Once the position has been identified and described, the remaining steps are spelled out in the board rules and strict compliance is mandated for a successful return to work. Board Rule 240 requires the "written approval of the authorized treating physician(s) of the essential job duties to be performed." The authorized treating physician must have *actually examined* the employee no more than 60 days prior to the date the position is approved and a description of the position must be sent to the employee at the same time it is submitted to the physician for approval. The employee's treating physician must approve the position as it has been described before the position may be officially offered to the employee.

EMPLOYEE'S RETURN TO WORK

When the light duty job has been approved by the authorized treating physician, the employer may then offer the position to the employee. Board Rule 240 requires the employer to offer the position by sending the employee a completed Form WC-240 and position description.[8] This must be done no less than 10 days before the employer expects the employee to report to work and no more than 60 days after the authorized treating physician has approved the position description.[9]

The employee is then obligated to accept the offered position and attempt the offered position for at least eight hours or one scheduled workday, *whichever is greater*. If he/she refuses to accept the position, "then the employer may unilaterally suspend

4 261 Ga. App. 525, 583 S.E.2d 198 (2003).

5 There may be other reasons to withdraw the offer of suitable employment. If it is suspected that the employee's change of mind is disingenuous and calculated to negatively affect the morale of the work place or to manufacture a second injury, then the recommencement of benefits resulting from the unavailability of the originally offered position may be the lesser of two evils.

6 *City of Adel v. Wise*, 261 Ga. 53, 401 S.E.2d 522 (1991).

7 *DeKalb Co. Merit Sys. v. Johnson*, 151 Ga. App. 405, 260 S.E.2d 506 (1971).

8 WC-240A or equivalent.

9 Board Rule 240(b)(1).

benefits."[10] To suspend benefits, the employer must file a WC-2 along with the WC-240 and a statement that the employee "did not attempt the proffered job."[11] Then, the burden shifts to the employee to prove continued entitlement to benefits.

Refusal of Suitable Employment

If the proper steps have been followed as outlined above, the employee will be obligated to return to work as required by O.C.G.A. § 34-9-240(a) and (b). Sometimes, the employee refuses to return despite the work release provided by the authorized treating physician. In those cases, the question becomes, "What is the basis for the employee's refusal?"

When the claimant refuses to return to work, benefits may be unilaterally suspended by filing a WC-2 which indicates benefits are being suspended due to the previously filed WC-240 form. However, there is an important caveat that may make the employee's refusal to return to work justified. To determine whether the refusal was justified, one must look at: (1) whether the position the employer made available to the employee was suitable to the employee's capacity; and (2) whether in the Board's opinion the employee's refusal of the job is without justification.[12]

Another possible scenario is an employee who actually returns to work but contends inability to perform the light duty job. In these situations, the number of days the employee returned to work plays a role. If the employee is unable to work 15 or more working days, benefits must be reinstated immediately and a WC-2 should be filed. It is important to note the failure to recommence benefits immediately shall result in the waiver of the defense that the light duty employment was suitable work for the employee for so long as benefits remain unpaid.

If the employee failed to complete 15 days of light duty work, a hearing may be requested to decide whether the employee's refusal was improper and the suspension of benefits is appropriate. If a judge ultimately determines the employee's refusal was unjustified, benefits may be suspended and a credit could be obtained for the benefits paid during the claimant's unjustified refusal to perform the light duty job.

In some instances, the employee's refusal to perform the light duty job is justified. As discussed above, there are two primary considerations for assessing whether the employee's refusal to perform the light duty work was justified. In terms of suitability or capacity, the most important consideration is whether the employee's physical limitations and restrictions permit him or her to perform the light duty job.[13] The second consideration involves an analysis of whether the employee has the skill and ability to perform the job.[14] For example, the Board would probably find an office worker's refusal to perform even light, manual labor justifiable.

Alternatively, if skill or ability are non-issues, the Board must assess the light duty job's potential for disrupting the employee's life due to geographic change or travel conditions.[15] Thus, the Board might decide that an employee's refusal to perform a light duty job that requires him or her to travel great distances is justifiable. The facts of a particular case will govern whether the refusal was justified.

Undocumented Workers

If the employee is an undocumented worker, there are additional considerations. In 2004, the Georgia Court of Appeals announced in a pair of workers' compensation appeals that federal law prohibiting the hiring of undocumented workers does not remove an employer's responsibility to pay workers' compensation benefits.[16] Essentially, one of the legal theories asserted was that because federal law prohibits hiring undocumented workers, such workers are not entitled to wage benefits. However, Georgia courts have broadly interpreted the Workers' Compensation Act as entitling injured workers with compensable injuries to wage benefits regardless of immigration status.

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10 O.C.G.A. § 34-9-240(b)(2).

11 *Id.* and Board Rule 240(b)(1).

12 *See City of Adel v. Wise,* 261 Ga. 53, 401 S.E.2d 522 (1991).

13 *Id.* at 55.

14 *Id.* at 56.

15 *Id.*

16 *Wet Walls, Inc. v. Ledezma*, 266 Ga. App. 685, 598 S.E.2d 60 (2004); *Cont'l Pet Techs. v. Palacias*, 269 Ga. App. 561, 604 S.E.2d 627 (2004); *Earth First Grading v. Gutierrez,* 270 Ga. App. 328, 606 S.E.2d 332 (2004).

Refusal to Work – Undocumented Workers

In one notable case involving an undocumented worker, the employer offered a truck driving job to the injured employee.[17] A condition for performing the job was that the undocumented worker provide proof of eligibility to drive the vehicle (e.g., a driver's license). However, the employee could not provide a valid driver's license. The employee ultimately argued that his refusal to perform the light duty truck driving position was justified because it was not suitable.

In holding that the position was suitable, the Court of Appeals observed that the employee was not physically incapable of driving, nor did he lack the skill to do so; rather, the impediment that kept him from driving was a legal one. As the court observed, the issue was not "his ability to drive a car[,] but his inability to acquire a Georgia driver's license because of his illegal status."[18]

Martines itself, and with creativity, provides options to employers in dealing with complications of an undocumented worker with a light duty release.

CONCLUSION

While numerous issues may arise when one seeks to return an employee to work, following the correct procedure is imperative and will certainly help minimize exposure, shorten the length of the claim and provide leverage which may force the employee to resolve his or her claim. It is important to follow the appropriate procedures or face the risk of continued benefits and additional exposure.

17 *Martines v. Worley & Sons Constr.*, 278 Ga. App. 26, 628 S.E.2d 113 (2006).

18 *Id.* at 29.

Medical Case Management and Board Rule 200.2: Now a Stronger Arrow in the Quiver

By K. Mark Webb and Jonathan G. Wilson

K. Mark Webb

Partner

K. Mark Webb's practice is focused in the area of worker's compensation defense. He has represented numerous insurance companies, self-insured employers and third-party administrators in defense of workers' compensation claims as well as subrogation litigation against third party tortfeasors. Prior to joining the firm, Mr. Webb practiced workers' compensation defense with another Atlanta area law firm.

Mr. Webb received his B.A. in History from the University of Georgia and his J.D. from Cumberland School of Law. While attending law school, Mr. Webb was the recipient of the James L. Hughes Memorial Law Scholarship and Scholar of Merit Awards in Constitutional Law II and Juvenile Justice. Mr. Webb was named a Georgia Super Lawyer Rising Star by *Atlanta Magazine* in 2013.

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Associate

Jonathan G. Wilson concentrates his practice in the area of workers' compensation defense. Mr. Wilson represents employers, insurers, self-insureds and third-party administrators in workers' compensation claims throughout Georgia. Prior to attending law school, Mr. Wilson worked as a paralegal in Savannah, Georgia.

Mr. Wilson received his B.A. in public relations from Berry College. He received his J.D., *cum laude*, from Mercer University's Walter F. George School of Law, where he was the Administrative Editor of the *Mercer Law Review* and recipient of two CALI awards in summary judgment practice and labor arbitration.

Medical Case Management and Board Rule 200.2: Now a Stronger Arrow in the Quiver

WHAT IS BOARD RULE 200.2 AND DOES BOARD RULE 200.2 HELP OR HURT EMPLOYERS, INSURERS AND SERVICING AGENTS?

Board Rule 200.2 alters the medical case management landscape, insofar as it now allows third-party medical case managers to assist the claims handler in the background of the claims handling process, even when the claimant revokes his or her consent to have the medical case manager work with him or her directly. Therefore, rather than the claims handler bearing the full responsibility of communicating with physicians and other medical providers to accomplish important tasks, employers/insurers now always have the option of enlisting the assistance of a medical case manager to facilitate communication and, in that fashion, assist with many important tasks which could reduce the workload on the claims handler and result in better claim outcomes.

THE ROLE OF MEDICAL CASE MANAGERS IN WORKERS' COMPENSATION CLAIMS

Employers and insurers have utilized third-party medical case managers (also commonly referred to as "nurse case managers") for many years to maintain control over claimants' medical care, facilitate appropriate treatment and transition claimants back to suitable employment. Studies measuring the impact of medical case managers in workers' compensation claims have shown the involvement of medical case managers often leads to reduced disability days and medical costs, particularly in complex claims.[1] There is also an added cost in using medical case managers which has to be considered as well. However, in terms of the overall picture, there is little question medical case managers can be an effective tool for employers/insurers, which is why they are viewed by many claimants' attorneys as an extension of the claims adjuster and why many claimants' attorneys take steps in an effort to exclude their involvement.

Medical case managers can play a significant role in terms of communicating with treating physicians and ensuring correct information is provided to physicians. It is often useful to have medical case managers provide an accurate summary of a claimant's pertinent background information to the physician, as it is not uncommon for a claimant to change their version of events. To that end, medical case managers can ensure the claimant's initial account of the accident is accurately reported to all medical providers with which the claimant comes in contact throughout the pendency of the workers' compensation claim period. Similarly, medical case managers can also be useful with relaying information to physicians concerning the parts of the body the claimant has injured, and assist in preventing the employer/insurer from paying for care of conditions that may not be caused by the on-the-job accident.

Involving competent and conservative physicians in the care process is another area where medical case managers can play a significant and helpful role. In those cases where an authorized treating physician feels a referral to a specialist is appropriate, the medical case manager monitoring the claim can encourage a referral to a conservative specialist, rather than a specialist that the claimant or his or her attorney might suggest. Where conservative physicians are utilized, the employer/insurer is much more likely to avoid unnecessary or excessive medical care and return a claimant to suitable employment. In the quest to return a claimant to suitable employment, it can be helpful for medical case managers to meet with a claimant's supervisor to arrange for modified duty or worksite modifications to enable the claimant to return to work sooner rather than later. Moreover, medical case managers can assist with obtaining approval of a light duty position by the authorized treating physician.[2] In this fashion, the medical case manager can minimize the delay in returning a claimant to suitable employment, and in so doing, reduce exposure.

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1 *See* Business Insurance, http://www.businessinsurance.com/article/99999999/NEWS080101/399999965 (last visited July 29, 2016).

2 Board Rule 200.2 specifically states, "The medical case manager may assist with approval of job descriptions only as consistent with O.C.G.A. § 34-9-240 and Board Rule 240."

PRIOR STATE OF AFFAIRS UNDER GEORGIA LAW

It has always been the case that rehabilitation benefits, including the provision of a rehabilitation supplier, are only mandatory in claims that have been designated "catastrophic."[3] However, as things previously stood, rehabilitation supplier services could only be provided in non-catastrophic cases if there was a written agreement between the parties and, outside the context of a claim involving a managed care organization, any third-party individual providing medical case management was viewed by the State Board as a rehabilitation supplier.[4] Therefore, while employers/insurers regularly attempted to utilize medical case managers in non-catastrophic claims, claimants could refuse to give consent or revoke consent at any time. As such, medical case managers could no longer stay involved. A somewhat narrow exception was carved out of this rule. Along these lines, where the individual supplying the medical case management services was an employee of the employer, insurer or servicing agent, that individual could provide medical case management services without the consent of the employee. This exception was carved out in recognition of, and to avoid interfering with, employers/insurers' right to defend against workers' compensation claims.

Under the above framework, employers/insurers were very often precluded in non-catastrophic claims from utilizing individuals employed by the many companies that offer rehabilitation supplier and case management services. In many instances, the revocation of consent for third-party medical case management services would occur when claimants would hire an attorney. Indeed, most initial letters sent by claimants' attorneys to employers/insurers advising as to their representation would also include boilerplate language revoking any prior consent to medical case management. This had the effect of interfering with many employers/insurers' ability to utilize a valuable tool in the claims handling process.

BOARD RULE 200.2 IN FULL

Board Rule 200.2 was put into effect on January 1, 2016. The full text is as follows:

> In claims involving non-catastrophic injuries, employers/insurers may voluntarily utilize qualified medical case managers to provide telephonic or field medical case management services. Qualified medical case managers must possess certification or licensure of at least one licensing agency contained in Board Rule 200.1(I)(A). Such medical case management services may be provided at the expense of the employer/insurer. Consent of the employee or the employee's attorney shall be required for any medical case manager to work with the injured worker. Consent shall be in writing when attending any medical appointment. Where consent is required, it may be withdrawn and the employee shall be informed in writing that such consent may be refused. *Consent of the employee shall not be required for such qualified medical case manager to contact the treating physician for purposes of assessing, planning, implementing and evaluating the options and services required to effect a cure or provide relief.* All communications are subject to the provisions of Rule 200.1(II)(D). Nothing in this rule shall be construed to allow or promote utilization review on the part of the medical case manager. The medical case manager may assist with approval of job descriptions only as consistent with O.C.G.A. § 34-9-240 and Board Rule 240. Violations of this rule may be referred to the Rehabilitation Division for peer review as contemplated by Rule 200.1(IV).[5]
>
> Case managers may be involved in cases where the employer/insurer has contracted with a certified workers' compensation managed care organization (WC-MCO). These case managers shall operate pursuant to the provisions of O.C.G.A. § 34-9-208 and Board Rule 208.
>
> Nothing contained in this Rule shall apply to a direct employee of the insurer, third party administrator or employer, or to an attorney representing a party, provided that their specific role is identified.

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3 O.C.G.A. § 34-9-200.1.

4 *Id. See also* State Board of Workers' Compensation website, http://sbwc.georgia.gov/managed-care-rehabilitation (last visited July 26, 2016).

5 (emphasis added).

SIGNIFICANCE OF BOARD RULE 200.2

Board Rule 200.2 is procedurally remarkable in that it is an entirely new Board Rule rather than an amendment of an existing rule. The first provision makes clear that Board Rule 200.2 does not apply in catastrophic claims. Additionally, the rule requires a medical case manager to be certified or licensed in accordance with Board Rule 200.1(I)(A). This means the medical case manager must "hold one of the following certifications or licenses: (1) Certified Rehabilitation Counselor (CRC); (2) Certified Disability Management Specialist (CDMS); (3) Certified Rehabilitation Registered Nurse (CRRN); (4) Work Adjustment and Vocational Evaluation Specialist (WAVES); (5) Licensed Professional Counselor (LPC); (6) Certified Case Manager (CCM); (7) Certified Occupational Health Nurse (COHN); or (8) Certified Occupational Health Nurse Specialist (COHN-S)."[6]

Next, Board Rule 200.2 states the claimant's consent is still required for a medical case manager to "work ***with*** the injured worker," and this consent must be in writing when the medical case manager attends an appointment with the claimant.[5] In addition, the medical case manager must inform the claimant "in writing that such consent may be refused."[6] Furthermore, where the claimant provides consent, Board Rule 200.2 states this may later be withdrawn. As such, the new Board Rule 200.2 does not change the requirement for obtaining the claimant's consent for meetings where both the medical case manager and claimant are present.

However, the most significant portion of this Board Rule is that which holds claimants and their counsel cannot prevent a medical case manager from communicating with a "treating physician for purposes of assessing, planning, implementing and evaluating the options and services required to effect a cure or provide relief."[7] In effect, this means a medical case manager may contact a medical provider either by telephone, in writing or even a face-to-face meeting (so long as the claimant is not present) without obtaining the claimant's prior consent. As such, where a claimant hires an attorney and simultaneously attempts to withdraw consent for medical case management services, that revocation will no longer have the effect of completely precluding the employer/insurer from providing medical case management services.

Additionally of note, Board Rule 200.2 holds, "All communications are subject to the provisions of Rule 200.1(II)(D)," which compels the medical case manager to "simultaneously provide copies of all correspondence, written communication, and documentation of oral communications with the treating physician to all parties and their attorneys." The inclusion of this provision in Board Rule 200.2 brings an element of transparency to meetings held by medical case managers and treating physicians without the claimant's presence. As such, employers/insurers should keep in mind any written documentation of a medical case manager's contact with a treating physician must be disclosed.

THE BOTTOM LINE WITH BOARD RULE 200.2

The primary benefit of Board Rule 200.2 is the employer/insurer's ability to utilize a qualified, third-party medical case manager to directly communicate with medical providers, regardless of whether the claimant consents, so long as the medical case manager's communications are "for purposes of assessing, planning, implementing and evaluating the options and services required to effect a cure or provide relief."[8] From a practical standpoint, this means medical case managers may still be involved, at least to some degree, in cases where the employer/insurer wishes to utilize a medical case manager, but the claimant does not consent.

In light of the above, the employer/insurer now has the absolute ability to utilize partial case management services with a third-party medical case manager. While this partial case management does not include the ability to work directly with the claimant or attend medical appointments, the ability of a medical case manager to communicate with medical providers is not subject to the permission of the claimant. Moreover, much can be accomplished by way of communication, which can ease the load on the claims handler and improve claim outcomes. The medical case manager's ability to communicate with medical providers can enable employers/insurers to quickly obtain information about the claimant's treatment. Additionally, medical case managers will be able to provide timely, accurate information about the claim to treating physicians, along with acting as an intermediary to facilitate appropriate referrals and arrange for suitable light duty work for the claimant. Furthermore, where appropriate, medical case managers can help "grease the wheels" in terms of keeping medical treatment moving when it comes to simple scheduling matters and avoiding delays. Overall, while Board Rule 200.2 does not provide a sea of change with regard to those rights afforded to an employer/insurer, there is no question it opens the door for the use of a valuable tool in the claims handling process.

6 Board Rule 200.1(I)(A).
7 *Id.* (emphasis added).
8 Board Rule 200.2.
9 Board Rule 200.2.
10 *Id.*

You May Have Talent But You Also Need to Know the Law — 2016 Case Law and Legislative Updates

By Marc E. Sirotkin and Mark E. Irby

Marc E. Sirotkin

Associate

Marc E. Sirotkin joined Swift, Currie, McGhee & Hiers, LLP, in 2012 as an associate in the workers' compensation defense practice. Prior to joining the firm, Mr. Sirotkin worked for over four years in the field of workers' compensation defense, general civil litigation and subrogation law for another defense firm in the Atlanta area. Before that, he worked as an associate for a domestic litigation practice in Sandy Springs, Georgia.

Mr. Sirotkin received his J.D. from Georgia State University in 2006. While in law school, he was a member of the Jessup Moot Court team, served as a summer law clerk for United States Magistrate Judge Linda T. Walker in the District Court for the Northern District of Georgia, and served as a legal intern with the United States Trustee's Program in the United States Department of Justice. Mr. Sirotkin received a Master of Historic Preservation degree from the School of Environmental Design from the University of Georgia in 2001, and a Bachelor of Arts degree from Wake Forest University in 1998.

Mr. Sirotkin is a member of the State Bar of Georgia Workers' Compensation Section, Young Lawyer's Division, and the Cobb County Bar Association.

Mark E. Irby

Associate

Mark E. Irby advises adjusters, managers and employers on the process and administration of workers' compensation law. He has developed a strong understanding of how to effectively counsel companies and has particular experience with construction companies, manufacturers, retailers, health care professionals and the trucking and transportation industry.

Mr. Irby is proficient in taking depositions of claimants, employer witnesses and expert witnesses, including numerous doctors' depositions. He serves clients by efficiently preparing them for hearings or mediations and the quick resolution of files.

Prior to joining the firm, Mr. Irby practiced at another Atlanta defense firm where his primary focus was defending employers and insurers in workers' compensation claims. Mr. Irby is licensed in both Georgia and Alabama. Prior to moving to Atlanta in 2007, he practiced at a Montgomery, Alabama, firm for 2 years where he focused on insurance defense litigation, general liability, premises liability, contract issues and employment law. During law school, he gained valuable experience while clerking at several large firms in Birmingham, Alabama.

You May Have Talent but You Also Need to Know the Law — 2016 Case Law and Legislative Updates

There have been many important statutory changes in 2016 and important decisions from the Georgia Court of Appeals and Georgia Supreme Court in the past year. The case law and statutory changes cover a breadth of topics, as discussed in detail below, and include willful misconduct, statute of limitations for PPD benefits, changes to the maximum TTD and TPD rates, average weekly wage issues involving concurrent similar employment, statute of limitations on catastrophic claims, and even a case about the compensability of a claim involving the alleged murder of an innocent, bystanding employee.

STATUTORY 2016 UPDATE

Change in the TTD/TPD Benefit Rates

As is becoming a trend in Georgia in recent years, the State has again amended O.C.G.A. § § 34-9-261 and 34-9-262, raising the maximum compensation rates for accidents occurring on or after July 1, 2016, respectively. As of this date, the maximum compensation rates are $575 per week and $383 per week for temporary total disability (TTD) and temporary partial disability (TPD) benefits, respectively. This is a $25 weekly increase from last year's TTD rate of $550 per week, and a $16 weekly increase from last year's TPD rate of $367 per week. This will have no retroactive effect on accidents occurring prior to this date, but will only affect claims with accident dates of July 1, 2016, or thereafter. As you can see, 52 weeks of TTD now has a value of $29,900 at the new max comp rate, as opposed to the max comp rate prior to July 1, 2013, which was $500 per week and equated to $26,000 for 52 weeks of TTD benefits. It remains too early to tell if the Georgia Legislature will initiate an additional increase to the maximum TTD/TPD rates for July 1, 2017 accident dates, or thereafter. We will continue to keep you informed of any changes to Georgia law on this issue.

Change in Death Benefits Rate

The maximum compensation payable to a surviving spouse as sole dependent at the time of the employee's death has been increased under O.C.G.A. § 34-9-265(d). The rate increased from $220,000 to $230,000 and is effective as of July 1, 2016. Again, we are seeing a growing trend as this statute was amended in 2015 to increase the cap on benefits from $150,000 to $220,000. The increase from 2015 to 2016 was not as substantial as the prior year.

Changes in Qualifications for Self-Insured Status and the Self-Insured Guaranty Trust Fund

Changes were enacted to two statutes to clarify the State Board's authority to grant or deny self-insurance status based upon the applicant's exposure, liability and financial ability to pay. This will assist the Board in clarifying which applicants are truly qualified for coverage under the Georgia Self-Insurer's Guaranty Trust Fund in the event of insolvency and to achieve consistency in the definition of certain terms. Under O.C.G.A. § 34-9-121(a), the revisions to this provision require a self-insured employer to provide the Board with sufficient information to help the Board "make an adequate assessment of the employer's workers' compensation exposure and liabilities," and determine whether the employer can adequately pay compensation "directly in the amount and manner and when due." Revisions to O.C.G.A. § 34-9-381, for definitions under the Georgia Self-Insurer's Guaranty Trust Fund, clarify terminology by removing the terms "Professional Employment Organization" (PEO) and "Assigned Staffing Organization" (ASO) as self-insurers under the Georgia Self Insurer's Guaranty Trust Fund.

Encouragement of Work-Based Learning Programs

As of July 1, 2016, under O.C.G.A. § 34-9-40.3, certification as a work-based learning employer (providing work-based learning opportunities to students 16 years of age and older), and notification to the respective insurer, provides the employer with an optional premium reduction of up to five percent. This can also apply to self-insureds who comply with O.C.G.A. § 34-9-431. Work-based terminology was further defined under the Act with the addition of several new code sections.

CASE LAW UPDATE

Willful Misconduct Defense for Willful Failure to Utilize Safety Equipment Under O.C.G.A. § 34-9-17(a)

In *Burdette v. Chandler Telecom, LLC*,[1] the Court of Appeals issued a decision narrowly construing the meaning of "willfulness" under O.C.G.A. § 34-9-17(a), making it even more difficult for an employer/insurer to successfully assert this affirmative defense, which if successful, would be a total bar to recovery by the employee. Unfortunately, the statute is silent as to the exact definition of "willfulness," and we therefore look to case law for guidance.

In *Burdette*, a cell tower technician fell while descending a tower and sustained multiple injuries. The employer had a policy in place prohibiting controlled descent of a tower in a manner similar to rappelling. The injured worker used controlled descent in violation of the policy and orders from his supervisor not to use this method for descents. The employer defended this claim for benefits filed by the injured worker the affirmative defense based on willful misconduct. Specifically, under O.C.G.A. § 34-9-17(a), "No compensation shall be allowed for an injury or death due to the employee's willful misconduct, including . . . the willful failure or refusal to use a safety appliance or perform a duty required by statute." This defense required the employer to prove, by preparation of the evidence, that willful misconduct was a proximate cause of the injury.[2]

A hearing was held and the administrative law judge (ALJ) agreed with the employer and barred the claimant from recovery under the willful misconduct defense. The Appellate Division affirmed the trial division's findings. The Superior Court of Putnam County failed to timely consider the appeal within the statutory 60-day period. Accordingly, the Board approved the decision by operation of law and the injured worker appealed to the Court of Appeals.

The Court of Appeals reversed the lower courts and found the willful misconduct defense did not apply to this situation as the actions of the injured worker were not sufficient to constitute willful misconduct under the statute. Here, the Court of Appeals strengthened the bar to successfully argue a "willful misconduct" defense, finding the alleged conduct must arise to the level of a "quasi-criminal" nature and go beyond the mere violation or disregard of a safety rule.[3] The court cited the case of *Aetna Life Insurance Co. v. Carroll*,[4] which states:

> Mere violation of rules, when not [willful] or intentional, is not [willful] misconduct, within the meaning of the laws upon the subject of workmen's compensation. There must be something more than thoughtlessness, heedlessness, or inadvertence in violating a rule or order of the employer, to constitute [willful] misconduct. There must be a [willful] breach of the rule or order. The mere violation of rules, when not [willful] or intentional, is not '[willful] misconduct.' If the workman is acting within the scope of his employment, mere disregard of a rule or order does not become such misconduct, unless the disobedience be in fact [willful] or deliberate, and not a mere thoughtless act, done on the spur of the moment.

Even though the injured worker engaged in a hazardous act in which danger was obvious, he did not know the likely or probable results of using controlled descent would lead to sustaining a serious injury. As a result, the employer did not satisfy its burden of proof because the claimant's behavior did not arise to the level of a quasi-criminal act, and the mere violation of a work rule or instructions and engaging in a hazardous act was insufficient to constitute willful misconduct to bar recovery entirely. The case is currently on appeal to the Georgia Supreme Court at the time of publication of this paper.[5]

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1 335 Ga. App. 190, 779, S.E.2d 75 (2015).

2 *See Commc'ns, Inc. v. Cannon,* 174 Ga. App. 820, 331, S.E.2d 112 (1985).

3 *See Wilbro v. Mossman,* 207 Ga. App. 387, 427, S.E.2d 857 (1993).

4 169 Ga. 333, 150 S.E. 208 (1929).

5 The Georgia Supreme Court granted certiorari as of May 9, 2016, and oral arguments are scheduled for September 13, 2016. The case number at the Supreme Court of Georgia is S16G0595.

Does the Statute of Limitation Period to Perfect a Claim for PPD Benefits Have a Tolling Exception?

In *Bell v. Gilder Timber Co.,*[6] the Court of Appeals reviewed a request by the injured worker for payment of PPD benefits even though more than four years had passed since the employer last paid TTD/TPD benefits on the claim. The ALJ denied the claimant's claim for PPD benefits. The Appellate Division affirmed the lower decision, as did the Superior Court of Laurens County. In his appeal, the claimant argued there should be an exception to the general rule found at O.C.G.A. § 34-9-104(b), which requires a claim for PPD benefits must be made by the claimant within four years of the last date for which TTD/TPD benefits were paid.

This case involved a "typical" fact pattern whereby an injured worker is paid income benefits and then goes back to work for a substantial period of time without issue, at which time his income benefits are lawfully suspended. After returning to work, the claimant experienced additional problems with his injured neck and ultimately underwent surgery, at which time he was assigned a PPI rating by his authorized treating physician. He then filed a claim for PPD benefits with the Board which was ultimately denied due to the provisions of O.C.G.A. § 34-9-104(b). Knowing full well he missed the statute of limitation window to request PPD benefits, the claimant argued there should be an exception as applying the statute of limitations leads to "an absurd and inequitable result in that an employee with an otherwise meritorious claim for PPD benefits would be barred from receiving those benefits because he chose to return to work"[7] as opposed to a worker who stayed out of work and kept receiving income benefit checks, and therefore would not be barred in the same scenario.

Though the court agreed with the claimant that the statute created a "harsh and inequitable result,"[8] they did not agree with his logic to create an exception to the statutory provision. The court then analyzed this "policy" argument under statutory construction, confirming the court will consider the plain text of the statute and apply its ordinary meaning. The court encouraged the claimant to address this change with the General Assembly as "courts cannot engraft on such statutes exceptions not contained therein."[9]

Calculating the Average Weekly Wage (AWW) – Concurrent Similar Employment

In *Thomas v. Fulton County Board of Education*,[10] the Supreme Court examined the issue of concurrent employment and how to properly calculate the "average weekly wage," as defined in O.C.G.A. § 34-9-260.

The claimant worked as a school bus driver for the Fulton County Board of Education, driving the bus only nine months out of the year. She did not drive for Fulton County during the summer months. She worked for a second employer during the Summer of 2011, driving new school buses across the country. Her second employer paid her based on mileage and other factors over the months of June and July 2011, with her last three trips taking place during the 13-week period preceding her October 19, 2011 date of injury with Fulton County Board of Education.

The claim was accepted as compensable, but a dispute arose over the correct and appropriate method for calculating the average weekly wage (AWW). The claimant asserted the AWW should be increased due to alleged current and similar employment related to her summer job with the second employer. The claimant further contended the AWW should be $593.32. She reached this figure by adding together all of the wages from both jobs during the 13-week period and dividing that figure by 13. On the other hand, Fulton County Board of Education argued the claimant did not have both concurrent and similar employment, primarily because the employment was not concurrent and had ended prior to the commencement of the school year. Furthermore, Fulton County Board of Education argued the AWW should be determined by calculating the employee's "full time weekly wage" based on her contract for employment under O.C.G.A. § 34-9-260(3) by applying her hourly pay rate to her contract requirement of 25 hours a week, resulting in an AWW of $465.00. Moreover, Fulton County Board of Education argued the claimant had not met her burden of proof to show sufficient evidence needed to provide a proper basis for calculating the AWW of her employment with her summer employer.

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6 337 Ga. App. 47, 785 S.E.2d 682 (2016).

7 *Id.*

8 *Id.*

9 *Id.*

10 331 Ga. App. 828, 771 S.E.2d 482 (2015).

The ALJ determined the AWW should be increased to $593.32 by including the wages from the three trips with her second employer during the 13-week period that preceded the accident date. The ALJ held the claimant's two jobs constituted concurrent and similar employment and noted the term "concurrent" does not mean "contemporaneous." By making this ruling, the ALJ found the claimant's summer employment, approximately 12 weeks before the date of injury, was sufficient to be "concurrent." In regard to which method should be used to calculate the AWW for the Fulton County employment, the ALJ applied O.C.G.A. § 34-9-260(1).

The Fulton County Board of Education appealed the ALJ's decision to the Appellate Division of the State Board of Workers' Compensation. The Appellate Division held the claimant's employment with the second employer for her summer work ended prior to the work injury. Thus, the Appellate Division found she was not employed concurrently with another employer at the time of her injury with the Fulton County Board of Education.

The Appellate Division also found the preponderance of competent and credible evidence established the claimant's AWW with the Fulton County Board of Education was $337.62. The Appellate Division agreed with the ALJ that the first method utilizing 13 weeks of wages should be used to determine the claimant's AWW. The Appellate Division relied on the Court of Appeals' definition of "wages" in *Atlanta Journal & Constitution v. Sims*,[11] stating "any payment by the employer to the employee for services rendered in the course of employment that constitutes a net economic gain to the employee." The Appellate Division also found that, as noted in *Sims*, "the purpose of the Georgia workers' compensation law was to compensate an employee 'fully for lost future earnings.'" Finally, the Appellate Division found an AWW of $337.62 was the most fair and accurate amount to use for the weekly income because this represented what the employee reasonably would expect to receive had she not been injured. In coming to this calculation, the Appellate Division found the evidence established the claimant earned $1,463.00 per month with the Fulton County Board of Education, multiplied the same by 12 months and then divided by 52 weeks. Because the Appellate Division found that the summer employment with QDA was not concurrent, the Appellate Division made no final findings of fact regarding the sufficiency of the evidence presented by the claimant regarding her wages from the second employer for her summer employment.

The Superior Court affirmed the Appellate Division's Award, and the claimant then appealed to the Court of Appeals of Georgia. The Court of Appeals reversed the Superior Court and the State Board Appellate Division decision regarding "concurrent" employment and the State Board's application of O.C.G.A. § 34-9-260(1), and remanded the case for further proceedings in accordance with their opinion. Included in their findings, the Court of Appeals found "concurrent" could mean the point where one job intersects another despite their acknowledgement that the court in *St. Paul-Mercury Co. v. Idov*,[12] interpreted "concurrent" somewhat differently. The Court of Appeals found the claimant's AWW should have been computed using all of the earnings she received from both employers during the 13 weeks preceding her injury date.

The Supreme Court of Georgia granted the Fulton County Board of Education their Petition for Writ of Certiorari. The Supreme Court determined this dispute centered on whether subsection (1) of O.C.G.A. § 34-9-260 is applicable in the calculation of AWW, and whether the claimant's wages from her summer employment with the second employer were properly included in the calculation of her AWW. In making this decision, the Supreme Court was persuaded by the fact the claimant worked as a bus driver for both jobs within the 13 weeks prior to her injury, and found it was essentially irrelevant that it was for two different employers if she was performing the same job during the 13-week period. They added that subsection (1) should be applied "if the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of 13 weeks immediately preceding the injury." The use of the term "employment" rather than "employer" was the point of reference in the statute they found particularly persuasive. Thus, the Supreme Court held the facts fell within the scope of subsection (1) and the 13 weeks should be used.

The next determination was whether the claimant's summer wages with the second employer for her summer job should be included in the calculation of her AWW under the "concurrent similar employment" doctrine. The Supreme Court acknowledged there is no Georgia case law examining the meaning of "concurrent" in the same context as the instant case, as it appeared all reported cases have uniformly involved cases in which the claimant was simultaneously employed with multiple employers at the time the injury occurred. Yet, the Supreme Court stated there was no basis in the text of the statute for requiring such simultaneity

11 200 Ga. App. 236, 407 S.E.2d 464 (1991).

12 88 Ga. App. 697, 77 S.E.2d 327 (1953).

as an absolute condition to the doctrine's application. Thus, the Supreme Court found the "concurrent similar" doctrine requires a "concurrence" of similar jobs within the 13-week period when applied in conjunction with subsection (1) of O.C.G.A. § 34-9-260.

Essentially, the Supreme Court expanded the doctrine from simultaneity to the 13-week period prior to the injury date. As a result, the claimant's wages "earned" for work performed for another employer in the same line of employment during the 13 weeks should be included in the calculation of the AWW. Therefore, the Supreme Court held the Court of Appeals correctly determined her work with her second employer qualified as concurrent similar employment, such that the calculation of her AWW should include wages "earned" from the second employer during the 13-week period preceding her injury.

Exclusive Remedy/Whether Injuries Incurred from a Willful Act "Arose Out Of" and "In The Course and Scope" of Employment/Positional Risk Doctrine

In *Sturgess v. OA Logistics Services, Inc.*,[13] the Court of Appeals examined whether the murder of an innocent bystanding employee constituted an injury that "arose out of" and "in the course and scope of" the decedent's employment. In analyzing this claim, the court further emphasized previous holdings on the positional risk doctrine, provided additional analysis on the applicability of the exclusive remedy doctrine as it relates to temporary contracting firms and explained what constitutes a temporary contracting firm under the Act.

The facts in *Sturgess* reflected the claimant's son was employed by OA Logistics as a forklift driver on February 24, 2012. The forklift operated by the decedent ran out of fuel, so the decedent went to an office to inquire about refueling. As the decedent waited outside the office with his back turned, a co-worker entered the office and forcibly tried to kiss a female co-worker. After the female co-worker pushed the assailant away, the assailant produced a hand gun and shot the decedent in the back of the head, re-entered the office and proceeded to sexually assault the female co-worker. The assailant then passed out during the ensuing struggle with the female co-worker, and she fled to warn other employees in the warehouse. According to the female co-worker, the decedent was a family friend who was unaware of the assault, had not attempted to intervene and had never interacted with the assailant before that occasion.

The mother of the decedent then sued OA Logistics, StaffChex (a temporary staffing firm), the assailant and the supplier of the gun. Among the allegations were claims that OA Logistics and StaffChex were negligent in the hiring process, resulting in the murder of the decedent and the sexual assault of the female co-worker. The assailant previously applied for a position with StaffChex using an alias name. Certain portions of his application were incomplete and his purported photo identification appeared different from his actual appearance. OA Logistics required StaffChex to perform criminal background checks but the assailant had already begun working at OA Logistics before his background check was completed. The criminal background check on the alias showed no criminal history despite the fact the assailant had a felony criminal background. The murder took place prior to the return of the criminal background check.

StaffChex and OA Logistics moved for summary judgment to bar the claimant's tort claims based on the exclusive remedy provisions of the Workers' Compensation Act. The claimant contended the trial court erred by concluding the decedent's death arose out of and in the course and scope of his employment. The court noted the Workers' Compensation Act is the exclusive remedy for injuries "arising out of and in the course and scope of employment" under O.C.G.A. § 34-9-11(a). The court noted a felonious assault by a third party upon an employee is treated as an accident covered by the Act, so long as the willful act is not directed against the employee for reasons personal to the employee. In order to consider whether the assault occurred for reasons personal to the employee, the court considered whether the injuries of which the employee complained (1) arose out of and (2) in the course of his employment. If those two conditions were met, then the claimant's tort claims would be barred by the exclusive remedy provisions.

The Court of Appeals found it was beyond dispute the decedent's death arose in the course of his employment because it occurred while he was on duty performing his job functions at the employment location. Thus, the focus turned to whether the decedent's death "arose out of" his employment. The court cited *Burns International Security Services Corp. v. Johnson*,[14] in stating, "[t]he words 'arising out of' mean that there must be some causal connection between the conditions under which the employee worked and the injury he received. The causative danger must be incidental to the character of the employment, and not independent of the relation of master and servant. The accident must be one resulting from a risk reasonably incident to the employment."

[13] 336 Ga. App. 134, 784 S.E.2d 432 (2016) (*reconsideration granted).*

[14] 284 Ga. App. 289, 643 S.E.2d 800 (2007).

The claimant argued there was no connection between the shooting and the decedent's employment. StaffChex on the other hand, argued the murder arose out of the decedent's employment under the positional risk doctrine. The court noted the positional risk doctrine holds an accidental injury arises out of the employment when the employee proves that his work brought him within range of the danger by requiring his presence in the locale when the peril struck, even though any other person present would have also been injured irrespective of his or her employment.[15]

The court further cited the *Chaparral Boats* holding, noting the risk does not have to be peculiar to the employment where a causal connection between the employment and the injury is otherwise established by evidence that a condition of the employment required the employee's presence at a location and a time where the employee confronted the risk.[16] The doctrine is also consistent with the rule that an injury arises out of the employment only when it is "peculiar" to the employment in the sense between the condition of the employment and the injury. The court added that prior case law makes clear the positional risk doctrine does not apply where the risk which causes the employee's injury is also common to the general public without regard to such conditions and occurs independently of place, employment or pursuit. The court further opined an idiopathic injury in the workplace, such as a sudden knee failure, that could have happened at any time and place, would not be work related within the scope of the Act. Yet the court again emphasized the holding in *Chaparral Boats,* which states the injury arises out of the employment if a duty related to the employment placed the employee in a locale which exposed the employee to a common risk, even where the risk which caused the injury to the employee is common to the public at large, and therefore not peculiar to the employment.

The court held in *Sturgess* it was undisputed the decedent's employment placed him in a locale that unfortunately exposed him to being shot by the assailant. As a result, the court held the risk of being shot, while not peculiar to the workplace, was still connected to his workplace by virtue of where the shooting took place. The court's holding was based on the *Chaparral Boats* analysis, which states, "an injury arises out of the employment under the positional risk doctrine if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where he was injured." Therefore, the court concluded the trial court correctly ruled the decedent's death resulted from an accident that arose out of and in the course of his employment.

The claimant further argued even if the accident was within the scope of the decedent's employment, the exclusive remedy provision would still not apply because StaffChex was not a traditional employer and did not fit the definition of a "temporary help contracting firm." O.C.G.A. § 34-9-11(c) states, "immunity provided by the Act shall apply and extend to the businesses using the services of a temporary help contracting firm, as such term is defined in Code Section 34-8-46." The *Sturgess* Court further cited O.C.G.A. § 34-8-46 in noting "[e]mployment with a temporary help contracting firm is characterized by a series of limited-term assignments of an employee to a third party, based on a contract between the temporary help contracting firm and the third party." The claimant argued StaffChex would not qualify as a temporary contracting firm because there was no evidence of a planned end for the decedent, and he had only been working for the employer "for a couple of months." The court refuted this argument by stating the decedent's ongoing two-month stint did not demonstrate any deviation from the typical temporary staffing arrangement contemplated by O.C.G.A. § 34-8-46. They based this holding on the undisputed fact the decedent worked at OA Logistics under its supervision as part of StaffChex's regular business of contracting with third parties to provide employees on a temporary basis, which was memorialized in a contract between StaffChex and OA Logistics.

Statute of Limitations for Catastrophic Claims/Change in Condition/Fictional New Accident

In *Roseburg Forest Products Company v. Barnes,*[17] the Supreme Court reversed the Court of Appeals with respect to the proper interpretation of the statute of limitations as it relates to "change in condition," fictional new accident and catastrophic claims. In this case, the claimant required an immediate, partial amputation below the knee after an accident in August 1993, when he went through rotten flooring and landed in an auger. The claim was accepted as catastrophic and temporary total disability (TTD) benefits were then commenced. The claimant's TTD benefits were suspended in January 1994, when he returned to light duty work. His permanent partial disability (PPD) benefits were subsequently paid in full by May 1998. The claimant did not receive any income benefits beyond 1998. In 2006, the employer sold the company to a new employer, Roseburg Forest Products Company. The claimant continued to work light duty for the new employer. In 2008, the claimant's light duty position was eliminated, but he continued

[15] *See Sturgess*, 336 Ga. App at 137, 784 S.E.2d 436; citing *Chaparral Boats, Inc. v. Heath,* 269 Ga. App. 339, 341, 696 S.E.2d 567, 569 (2004), *quoting Nat. Fire Ins. Co. v. Edwards*, 152 Ga. App. 566, 567, 263 S.E.2d 455, 456 (1979).

[16] Sturgess, 336 Ga. App at 137, 784 S.E.2d 436.

[17] 299 Ga. 167, 787 S.E.2d 232 (Ga. 2016).

to work for Roseburg in a position that was more physically demanding. The new position exacerbated his injured leg and caused swelling near the prosthesis.

On September 10, 2009, the claimant was laid off. He requested a recommencement of his TTD benefits as of September 11, 2009. The claimant consulted a doctor for his chronic knee pain on November 13, 2009. He was then fitted for a new prosthetic leg on December 6, 2011, which was paid for by the former insurer for Roseburg Forest Products Company.

In August 2012, the claimant filed a formal request for a recommencement of TTD benefits, asserting the original August 13, 1993 date of accident and contending he remained catastrophically injured, despite his years of light duty work. This claim was controverted based on the contention the request for TTD benefits was time-barred by the change in condition statute of limitations under O.C.G.A. § 34-9-104. In November 2012, the claimant proceeded to file a separate Notice of Claim under a fictional accident date of September 11, 2009. The ALJ denied both claims as barred by the applicable statute of limitations set forth in O.C.G.A. §§ 34-9-104(b) and 34-9-82. The Appellate Division and Superior Court then affirmed the decision.

The Court of Appeals reversed and remanded the matter finding both of the claimant's claims were not barred by the applicable statute of limitations. Regarding the two-year statute of limitations for a change in condition, the Court of Appeals reasoned the Act did not contemplate a situation in which an employee with a catastrophic injury returns to work with limitations and requests TTD benefits after his job has been eliminated more than two years after the last benefit payment was issued. The Court of Appeals also held the fact O.C.G.A. § 34-9-261 places a 400-week cap on TTD benefits for non-catastrophic injuries, but allows payment of weekly benefits "until such time as the employee undergoes a change in condition for the better" for catastrophic injuries, shows the Legislature intended to treat catastrophic claims differently.

In considering the one-year statute of limitations under O.C.G.A. § 34-9-82(a), the Court of Appeals pointed out the last remedial treatment furnished by the employer was on December 2011, which was less than one year before the employee filed his notice of claim on November 30, 2012, for the September 11, 2009 fictional accident date. Although the remedial treatment was paid by the first insurer, not the second insurer, the Court of Appeals determined the first insurer was the "alter-ego" of the employer. As such, the Court of Appeals found the employer provided remedial treatment in 2011, and the statute was tolled for one year following treatment. Therefore, the Court of Appeals concluded the claimant timely filed his claim in 2012 against the employer, and medical treatment furnished by one of the employer's insurers on behalf of the employer is medical treatment provided by the employer.

In reversing the Court of Appeals, the Supreme Court had a stricter interpretation of O.C.G.A. § 34-9-104. The Supreme Court noted once an employer ends the payment of TTD to an employee, that employee must file a claim for any additional TTD benefits within two years of the cessation date. If the employee fails to do so, the claim will then be time-barred. Since the claimant waited until 18 years after his last payment of TTD benefits to file a claim for recommencement, the Supreme Court held his claim was time barred under O.C.G.A. § 34-9-104. Thus, the claimant filed his claim for recommencement 16 years too late. The Supreme Court made this finding notwithstanding the fact the claimant was entitled to receive TTD benefits indefinitely since his 1993 injury was designated at "catastrophic."

The Supreme Court used similar analysis in reversing the Court of Appeals' interpretation of O.C.G.A. § 34-9-82(a). The Supreme Court held regardless of the substantive merits, or lack thereof, of the claimant's fictional new injury claim, the claimant was required to file his claim for a fictional new injury within one year of the alleged injury date or within one year of remedial treatment being provided since no weekly benefits were paid to the claimant in connection with the alleged injury. Once the claimant received medical treatment for chronic knee pain on November 13, 2009, his time period to file a claim for his fictional injury date extended one year to November 13, 2010. Yet, the court noted the claimant did not file his claim until November 30, 2012, which was over two years late. As a result, the Supreme Court held the claimant's claim for a fictional new injury was time barred under O.C.G.A. § 34-9-82(a).

It is significant to point out the Supreme Court determined the additional remedial treatment the claimant received in December 2011 did not revive his claim, which had already become time-barred in November 2010. Thus, once a claimant misses the window under the statute of limitations, the claim is time-barred forever under this ruling. The Supreme Court noted the Court of Appeals' analysis would essentially render the one-year statute of limitations under O.C.G.A. § 34-9-82(a) meaningless, as it would allow an injured employee to simply revive a stale claim at any time by seeking remedial treatment. The impact of this case was important for the workers' compensation industry, as it provides a clearly defined defense for employers and insurers against all claims that fall well outside of the statutory window.

"You're Fired" — How a Termination Can Affect a Workers' Compensation Claim

By Preston D. Holloway

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Preston Holloway concentrates his practice in the area of workers' compensation defense, representing employers, insurers, self-insurers and third party administrators in numerous workers' compensation claims throughout the state of Georgia. Mr. Holloway frequently presents to employers and insurers on workers' compensation defense strategies and he has spoken nationally on issues regarding Medicare Set Asides.

Mr. Holloway takes great pride in working directly with his clients on successfully resolving what are often times complicated an difficult claims. Mr. Holloway is proficient in all phases of litigation and has deposed countless witnesses, including numerous doctors' depositions. Although Mr. Holloway has defended many workers' compensation claims at the hearing level, he also realizes the importance of alternative dispute resolution and his number one priority is to provide his clients with aggressive yet efficient representation.

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"You're Fired" — How a Termination Can Affect a Workers' Compensation Claim

CAN AN EMPLOYEE'S TERMINATION TRIGGER ENTITLEMENT TO TEMPORARY TOTAL DISABILITY BENEFITS?

An employee who has been terminated by his employer can often times make a viable claim for income benefits under Georgia law. When an employee is terminated because the employer is unable to accommodate work restrictions related to an on-the-job injury, this is generally considered to be a termination for reasons related to that injury. According to the Georgia Court of Appeals in the case of *Padgett v. Waffle House*, the employee would be entitled to income benefits as of the date of termination and would not have the burden to show a diligent, but unsuccessful job search to establish entitlement to such income benefits.[1]

Alternatively, when an injured employee has been terminated for reasons unrelated to the work injury, in other words when the termination is for just cause, there are two scenarios which will qualify the employee to receive ongoing income benefits. It has been well established in Georgia that a termination for just cause will not, in any way, bar an injured employee from recovering workers' compensation income benefits from the date of termination forward.[2] However, in situations where an injured employee has been terminated for just cause, the employee will have the burden of proving his inability to secure suitable employment is proximately related to his on-the-job injury. It is worth noting that the employee is not required to show his medical or physical condition has changed for the worse.[3] There are generally two scenarios where the employee can meet his burden of proving entitlement to ongoing disability income benefits.

The first way an injured employee can prove entitlement to ongoing disability income benefits is to show that, at some point following the termination, he became completely unable to work as a result of the on-the-job injury with the employer from whom income benefits are sought. In such situations the employee needs to only prove he is totally disabled, and there is no requirement that he searches for suitable employment.[4] If an employee can show he is totally disabled, or on no-work status according to the authorized treating physician, he will be entitled to receive ongoing disability income benefits regardless of his termination. The logic behind this is that an employee who is on no-work status will be unable to find suitable employment with another employer by virtue of their no-work status, so there is no question that the injured employee's inability to find work is related to his on-the-job injury.

Even if the injured employee cannot prove he is totally disabled, or demonstrate to the court the termination was for reasons related to his injury (because he was terminated for cause), the injured employee can still prove entitlement to ongoing disability income benefits if the employee can show: (1) there was a loss of earning power; (2) there are ongoing physical limitations due to the compensable on-the-job injury; and (3) he has made a diligent, but unsuccessful search for suitable light duty work following the termination.[5] When the injured employee proves these three prerequisites, the State Board has the discretion to make a reasonable inference that the inability to secure suitable employment elsewhere was proximately caused by his or her compensable, on-the-job injury without requiring the employee to necessarily prove the same.[6]

Questions often arise as to what constitutes a diligent job search in order to satisfy the claimant's burden of proof. In *Maloney*, the court agreed a job search consisting of six prospective employers was a sufficient search for suitable employment as to entitle the claimant to ongoing income benefits.[7] However, recently we have seen the Board raise this burden to require weekly or even daily job searches, depending on the administrative law judge assigned to the claim. The question of whether the claimant has carried the burden of proving a diligent, but unsuccessful job search should include analysis of how soon after the termination the claimant began to look for work; how many employers the claimant applied for work with; whether the claimant reported to

1 *Padgett v. Waffle House*, 269 Ga. 105, 498 S.E.2d 499 (1998).
2 *Minter v. Tyson Foods, Inc.,* 271 Ga. App. 185, 609 S.E.2d 137 (2004).
3 *Hartford Accident & Indemnity Co. v. Bristol*, 242 Ga. 287, 248 S.E.2d 661 (1978).
4 *Richardson v. Dennis, Corry, Porter & Thornton*, 216 Ga. App. 476, 454 S.E.2d 643 (1995).
5 *Maloney v. Gordon Co. Farms*, 265 Ga. 825, 462 S.E.2d 606 (1995).
6 *McEver v. Worrell Enters.,* 223 Ga. App. 627, 478 S.E.2d 445 (1996).
7 *Maloney*, 265 Ga. at 825, 462 S.E.2d at 606.

the prospective employers he suffered a work-related injury with ongoing, physical limitations; whether the physical limitations reported to the prospective employer were accurate; whether the claimant arbitrarily limited his work to certain types of jobs even though he may be qualified to perform other types of work as well; and, whether the claimant refused any job offers and the reason for the refusal.

If the evidence shows the claimant did not put forth adequate effort to secure other employment, the claimant will not meet the burden of proving a change of condition authorizing a resumption of disability benefits. However, the claimant can continue to look for work and can revisit the issue of recommencing disability benefits when he feels the job search rises to the level of being diligent.

When an injured employee is terminated, it is possible the employee will file for unemployment benefits which will require certifying he is "ready, willing and able to work." Although this seems inconsistent with what the claimant will allege in the workers' compensation hearing, where he will take the position that he suffered an economic change of condition for the worse, the reality is the arguments are actually fairly consistent. The claimant will likely claim he is ready, willing and able to perform light duty work and should be entitled to the payment of weekly disability income benefits because he is unable to secure a light duty job based on his on-the-job injury and the related disability. Accordingly, an application for unemployment benefits will not bar an injured employee from seeking workers' compensation disability benefits during for the same period during which unemployment benefits were either sought or received.[8]

The standard test outlined in *Maloney* is also applicable in cases involving general layoffs and even retirement.[9] According to the Court of Appeals, after an injured employee voluntarily retires, the employee must still carry the burden of proving a change in condition within the parameters of *Maloney*.

Finally, the standard in *Maloney* also applies to temporary partial disability (TPD) benefits. As outlined above, when a claimant is working light duty and is terminated from that job for just cause, the injured employee will have the burden to conduct a diligent, but unsuccessful job search. If the employee is only able to locate a lower paying job as a result of his on-the-job injury and the associated disability, the employee will be entitled to payment of TPD benefits, so long as he meets his or her burden of proving an economic change of condition for the worse.[10]

WHETHER AN INJURY IS CONSIDERED COMPENSABLE IF IT OCCURS AFTER THE EMPLOYEE IS TERMINATED

When an employee quits, is terminated or is laid off before sustaining an injury on the former employer's premises, a question arises as to whether the former employee can still recover workers' compensation benefits from the former employer. Although there is not much case law on this issue, it has long been held that an employee must be allowed a reasonable period of time for ingress to, and egress from, their place of work. The case law is clear that the employee remains in the course of his employment during the period of egress, despite the fact he is no longer on the clock, and the employee is entitled to workers' compensation coverage for any injuries sustained while leaving the premises.[11] Therefore, any injury sustained on the employer's premises during the reasonable period of egress would be considered compensable unless other defenses to the claim are available. This would appear to include terminated employees. Accordingly, a terminated employee will have one last opportunity to sustain a work-related injury as he is walking out of the door. If the employer owns the parking lot, any injury sustained during egress in the parking lot will be covered by the Georgia Workers' Compensation Act.[12]

8 *James v. Gen. Motors Corp.,* 107 Ga. App. 588, 131 S.E.2d 58 (1963).
9 *City of Atlanta v. Arnold*, 246 Ga. App. 762, 542 S.E.2d 181 (2000).
10 *Roberts v. Jones Co.,* 277 Ga. App. 517, 627 S.E.2d 139 (2006).
11 *De Howitt v. Hartford Fire Ins. Co.,* 99 Ga. App. 147, 108 S.E.2d 280 (1959).
12 *Knight-Ridder Newspaper Sales, Inc. v. Desselle*, 176 Ga. App. 174, 335 S.E.2d 458 (1985).

HOW TERMINATING AN INJURED EMPLOYEE CAN TRIGGER AN AMERICANS WITH DISABILITIES ACT CLAIM

The Georgia Workers' Compensation Act aims to provide relief to workers who are injured on the job and return them to suitable employment. Enacted in 1990, the Americans with Disabilities Act (ADA) aims to ensure that people with disabilities have access to the same [employment] rights, benefits and opportunities as everyone else. The ADA defines "individuals with disabilities" to include any individual who "has a physical or mental impairment that substantially limits one or more of such person's major life activities; has a record of such an impairment; or is regarded as having such an impairment."[13] However, only a "qualified individual with a disability" is protected under the ADA.

The ADA defines a "qualified individual with a disability" as anyone who can perform the essential functions of the job "with or without reasonable accommodation."[14] Accordingly, most injured employees in a workers' compensation claim will be covered by the ADA. The term "disability" does not include sexual differences like homosexuality, bisexuality, transvestitism, pedophilia or voyeurism, and it does not include kleptomania, pyromania, compulsive gambling or psychological disorders resulting from current drug use.[15]

To be considered a qualified individual, the employee must meet essential physical and mental requirements.[16] Individuals who are unable to perform the essential functions of the job are not protected by the disability discrimination statutes.[17] Therefore, the ADA will not prevent an employer from terminating an injured employee who is not considered qualified. Similarly, if an employee seeks to extend his or her leave as an accommodation, but that leave has become an undue hardship for the employer (for example, the business requires a full-time employee in that particular position in order to operate properly), the ADA would not prevent termination of the employee.[18]

For those employees willing to return to work, the ADA requires employers grant a "reasonable accommodation" to qualified individuals who cannot perform the essential functions of their job absent that accommodation.[19] A reasonable accommodation is any change in the work environment or in the way things are usually done resulting in an equal employment opportunity.[20]

When an employer terminates an employee due to his injury, the firing can trigger a lawsuit under the ADA, in addition to creating problems in the underlying workers' compensation claim. Examples of terminating an employee for reasons related to their injury include, but are not limited to, the employee's inability to perform job tasks in a timely manner due to his injury, the employer's inability to accommodate light duty or the employer not wanting to hold the employee's job as required by FMLA.

THE DO'S AND DON'TS FOR TERMINATING AN EMPLOYEE

Terminating an employee is sometimes unavoidable. If an employer decides to terminate an employee who suffered a previous work-related injury, it is very important the employer follow the process outlined in their employee handbook. This will often include terminating an employee during a specific time and at a specified location, such as a manager's office. There should always be a witness present at the time of the employee's termination. If the employee who is being terminated was warned or written up for behavioral issues in the past, the employer should bring these documents to the meeting. The notice of termination should have a place for the employee to sign for receipt, as well as a place for employee comments or for an employer representative to note the employee's refusal to sign the form. The employer should get right to the point and avoid emotion and apologies.

The employer should avoid telling the employee he or she was terminated because "Georgia is a right to work state." A reason for terminating the employee should always be given, but do not go overboard and list too many reasons. Instead, stick to the reasons documented in the past or the most pressing reasons necessitating the employee's termination. It is a good idea to give the

13 *See* 42 U.S.C. § 12102.
14 *See* 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).
15 *Id.*
16 *See Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979).
17 *Id.*
18 *See* 42 U.S.C. § 121112(a)(5)(A).
19 *See* 42 U.S.C. § 12111(9).
20 *Id.*

employee an opportunity to disagree with the termination and to even document his disagreement on the notice of termination. Finally, the employer should avoid parading the employee out with security unless this is absolutely necessary.

CONCLUSION

It is usually better to avoid terminating an injured employee, but sometimes terminating the injured employee is necessary. When faced with a situation where terminating an injured employee is unavoidable, it is important to be mindful that a judge may ultimately be asked to decide whether the termination was for just cause or was for reasons related to the work injury. As outlined above, the answer to this question can have a significant impact on the overall exposure in the claim. Therefore, if you ever have questions about how to address possible termination of an injured employee in a workers' compensation claim, do not hesitate to contact a Swift Currie lawyer for guidance.

A Budding Star: Medical Marijuana in Workers' Compensation

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A Budding Star: Medical Marijuana in Workers' Compensation

Unless you have been living under a rock for the past few years, you have no doubt heard about the growing trend of marijuana legalization, and more specifically, the use of marijuana for medical purposes. There is a great deal of uncertainty around this area of public interest, especially in workers' compensation. The questions are endless – What is medical marijuana? Is it legal in Georgia? What should I do if it is prescribed? Although this issue is in its infant stages, perhaps we can walk through the basics as we know them now.

WHAT IS MEDICAL MARIJUANA?

Medical cannabis, often called medical marijuana, generally refers to the use of cannabis and its cannabinoids to treat medical conditions, diseases and related symptoms. The two primary cannabinoids in a marijuana plant of medical interest are THC and CBD. Some studies have shown that THC increases appetite and reduces nausea. CBD is a cannabinoid some believe may be useful in reducing pain and inflammation, controlling epileptic seizures and potentially treating addiction and mental illness. Medical cannabis can be administered in a variety of ways, including, but not limited to, oils, vaporizers, capsules, edibles, dermal patches, lozenges, oral/dermal sprays and dried buds that are smoked.[1] The U.S. Food and Drug Administration (FDA) has not recognized or approved the marijuana plant as medicine; however, the FDA has approved two medications that contain cannabinoid chemicals in pill form, both of which are used to treat nausea and boost appetite, which will likely lead to more research, and eventually, more medications to treat more conditions.[2] With so many potential uses, methods of delivery and opinions as to the drug's benefits, there is no single definition of medical marijuana which has achieved a consensus in the medical community. The amount of research on the use of cannabis in a medical setting is rather limited, due primarily to restrictions on production and government regulations but there has been a great deal of media coverage of patients who insist the medical benefits are real, often life changing, and the hurdles impeding medical marijuana research are slowly being reduced.[3]

In workers' compensation, the obvious question becomes – can medical marijuana be used for pain management? The answer is not crystal clear but some studies and publications (including *The Journal of the American Medical Association*) indicate cannabis can be effective in treating chronic pain, including pain caused by neuropathy.[4] That notwithstanding, the number of studies and the evidence therein is limited and there is concern as to whether the potential side effects outweigh the benefits of the drugs. Despite the limited studies and evidence at this point, there will no doubt be an increase in research and clinical testing as more states legalize medical cannabis and expand the umbrella of usage.

NATIONAL TRENDS, FEDERAL LAW AND GEORGIA LAW

To date, 25 states, the District of Columbia, Guam and Puerto Rico now allow or have created comprehensive public medical marijuana and cannabis programs. More states are expected to pass similar laws in 2017, and those who already have laws in place plan to expand existing legislation. However, while so many states are passing legislation legalizing the use of medical marijuana, the distribution and use of marijuana remains illegal under federal law. Marijuana is a Schedule I substance under the Controlled Substance Act of 1970, making distribution of marijuana a federal crime.[5] In October 2009, the Obama Administration sent a memorandum to federal prosecutors, along with a statement from Attorney General Eric Holder, essentially telling them not to

1 U.S. News and World Report (April 14, 2015). Medical Marijuana: the Myths and Realities. Retrieved July 19, 2016, from http://health.usnews.com/health-news/patient-advice/articles/2015/04/14/medical-marijuana-the-myths-and-realities.

2 National Institute on Drug Abuse (July 2015). Drug Facts: Is Marijuana Medicine? Retrieved July 20, 2016, from https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine.

3 Huffington Post (June 22, 2015). White House Takes Huge Step Forward In Fight Over Marijuana Research. Retrieved on July 23, 2016, from http://www.huffingtonpost.com/2015/06/22/public-health-service-review_n_7635760.html.

4 *The Journal of the American Medical Association* (June 30, 2015). Medical Marijuana for Treatment of Chronic Pain and Other Medical and Psychiatric Problems. JAMA. 2015;313(24):2474-2483. doi:10.1001/jama.2015.6199.

5 Drug Enforcement Administration. Retrieved July 27, 2016, from https://www.dea.gov/druginfo/ds.shtml.

prosecute individuals who distribute marijuana for medical purposes in accordance with state laws.[6] Furthermore, on August 29, 2013, the Department of Justice (DOJ) announced an update to the Marijuana Enforcement Policy which provides that while marijuana distribution and use remains illegal at the federal level, the DOJ expects states who have legalized marijuana in one form or another to create "strong, state-based enforcement efforts . . . and will defer the right to challenge their legalization laws at this time."[7] As you can see, this is a hazy area of law where the federal government says medical marijuana is technically *illegal*, but they are willing to turn a blind eye. Nevertheless, with a few exceptions, courts have generally sided with the federal government's position on medical marijuana, especially on insurance-related litigation where medical marijuana is concerned.[8]

In Georgia, House Bill 1, also called Haleigh's Hope Act, was signed into law by Governor Nathan Deal on April 16, 2015.[9] The law created a Georgia Commission on Medical Cannabis to prepare comprehensive recommendations regarding the potential regulation of medical cannabis in the state, and the state Department of Public Health will promulgate rules and regulations for the establishment and operation of the patient registration process and dispensing of registry cards to individuals and caregivers. The bill took effect immediately upon signature by Governor Deal and essentially made it legal for individuals with seizure disorders, Crohn's disease, mitochondrial disease, severe or end-stage ALS, multiple sclerosis, Parkinson's disease, sickle cell disease and cancer to possess up to 20 ounces of cannabis oil with a THC level of up to five percent if approved by their physician. However, there is one major caveat — the bill did not establish a system for cultivation, processing or distribution. In other words, it is still *illegal* to produce the drugs in Georgia, despite it being *legal* to possess them. This poses quite a conundrum for patients who can legally possess the drug, but simultaneously risk violating federal law and the laws of other states by legally purchasing the drug in a state such as Colorado, and then transporting it across states lines and home to Georgia. There have been efforts this year to relax the THC limit, authorize in-state cultivation and distribution of medical marijuana and expand the list of approved conditions to include PTSD, HIV/AIDS, Tourette's syndrome, autism and other diseases as well. However, these efforts have been met with stiff political opposition.[10] Looking forward, public opinion appears to be turning toward the expansion of medical marijuana. Also, states will likely take notice of the tax revenue potential of medical marijuana as the legal marijuana industry is expected to reach $7.1 billion in 2016.[11] All of this will no doubt drive continued debate and legislation here in Georgia and nationwide.

MEDICAL MARIJUANA IN THE WORKPLACE

As the regulatory stance on medical marijuana changes so rapidly, there is a sense of fear with regard to the potential impacts of medical marijuana in the workplace. The first question that likely comes into any HR professional's mind is — what does this mean for my drug-free workplace? Currently, there is very limited legislative or regulatory guidance as to how employers should handle medical marijuana issues. Fortunately, most employers have strict rules and internal regulations governing the use of prescription or doctor recommended drugs. For example, an employer would not assign an employee to operate heavy equipment or complex machinery if he or she is taking prescription narcotic pain medication. The same restraint would seemingly apply to medical marijuana.

In Colorado, for example, this gray area of the law recently saw some light. The Colorado Supreme Court held that an employer's zero-tolerance drug policy reigns supreme over the medical marijuana laws and employers may terminate employees for using medical marijuana, even if the drug was used on the employee's own time and authorized by a doctor.[12] The employee in Colorado's seminal employment/medical marijuana case used marijuana off-duty to control leg spasms following a car accident

6 *New York Times* (October 19, 2009). U.S. Won't Prosecute in States That Allow Medical Marijuana. Retrieved July 28, 2016, from http://www.nytimes.com/2009/10/20/us/20cannabis.html?_r=0.

7 The United States Department of Justice (August 29, 2013). Justice Department Announces Update to Marijuana Enforcement Policy. Retrieved July 28, 2016, from https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy.

8 National Conference of State Legislatures (July 20, 2016). State Medical Marijuana Laws. Retrieved July 27, 2016, from http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

9 *Atlanta Journal-Constitution* (April 16, 2015). Governor Signs Bill Making Medical Marijuana Legal in Georgia. Retrieved Jul 25, 2016, from http://www.ajc.com/news/news/state-regional-govt-politics/governor-signs-bill-making-medical-marijuana-legal/nkwXm/.

10 NBC News (April 24, 2016). Battle Over Georgia's "No-Buzz" Medical Marijuana Law Gets Personal. Retrieved July 28, 2016, from http://www.nbcnews.com/storyline/legal-pot/battle-over-georgia-s-no-buzz-medical-marijuana-law-gets-n560136.

11 *Forbes* (April 19, 2016). Legal U.S. Marijuana Market Will Grow to $7.1 Billion in 2016: Report. Retrieved July 22, 2016, from http://www.forbes.com/sites/katiesola/2016/04/19/legal-u-s-marijuana-market-will-grow-to-7-1-billion-in-2016-report/#6ae16777568d.

12 *Coats v. Dish Network*; 350 P.3d 849 (2015).

that left him as a quadriplegic. He was terminated after failing a random, employer-issued drug test. The court held that medical marijuana use is not protected under Colorado's "off-duty conduct" law because his state-licensed medical marijuana use is still prohibited by federal law.[13] Here we are again with federal law taking the day, which in this case is good news for employers. As a result, if this precedent holds here in Georgia, drug-free workplace programs will continue to be efficacious despite the legal use of medical marijuana. A majority of employers object to the use of medical marijuana at work, but a survey of employers recently demonstrated that one in five small businesses would allow marijuana at work.[14] There is little doubt this will continue to be an issue between employers and their employees. However, it is strongly recommended that the workplace continue to be drug-free to avoid the risk of injury or harm to employees and customers alike.

Medical marijuana may also cause issues with The Americans with Disabilities Act (ADA) because of the potential for discrimination claims. Employers will simply have to be diligent in ensuring that adverse employment decisions are made based on the individual's use of marijuana in violation of company policy rather than the underlying medical condition. Overall, a commonsense approach and clear guidelines in the workplace will be necessary, all while balancing federal and state law and considering the potential impact on insurance premiums (both liability and group health), as well as the impact on workers' compensation claims and other potential litigation.

MEDICAL MARIJUANA IN WORKERS' COMPENSATION

There is little doubt that medical marijuana will have an impact on workers' compensation here in Georgia, although it is unclear how noticeable the impact will be. The impact will likely be seen both at the beginning of a claim as a potential defense, as well as a treatment option later. For instance, suppose an employee legally uses medical marijuana and is injured on the job. As you may know, pursuant to the Georgia Workers' Compensation Act, an employee may not recover workers' compensation benefits where the employee's injury or death is a result of the employee's being under the influence of marijuana or other controlled substances.[15] Specifically, O.C.G.A. § 34-9-17 provides that where testing has been performed demonstrating an employee has any amount of marijuana or controlled substance in his blood within eight hours of the alleged accident, there will be a rebuttable presumption that the accident and injury or death were caused by the consumption of alcohol or by the ingestion of marijuana or the controlled substance. However, O.C.G.A. § 34-9-17(b) further provides, "no compensation shall be allowed for an injury or death due to intoxication by alcohol or being under the influence of marijuana or a controlled substance, except as may have been prescribed a by a physician for such employee and taken in accordance with such prescription."

Interestingly, the Drug Enforcement Administration classifies marijuana as a Schedule I drug under the Controlled Substances Act which places it in the same class of drugs as cocaine or heroin.[16] Therefore, marijuana cannot be *prescribed*.[17] The new Georgia law circumvents this by "splitting hairs" and refers to a physician "approving" the use of medical marijuana. One might suggest since medical marijuana cannot be "prescribed" under federal law, it is not necessarily protected under the language which reads, "except as may have been prescribed by a physician for such employee and taken in accordance with such prescription." There may be a viable argument that the intoxication defense would apply in a case where the employee was *legally* using marijuana, but the courts may also consider how much marijuana was in the employee's blood or urine and whether the employee was actually impaired.

Because of the nature of marijuana and its compounds' interaction with the human body, there is no widely-accepted, objective measure of marijuana intoxication. Certain tests, such as urine testing, only detect THC metabolites, leaving the tests able to detect the presence of the metabolite, but unable to indicate impairment. While blood and saliva testing can provide a more accurate reading on the employee's actual level of impairment, blood tests are more invasive and may violate the employee's privacy rights and the technology surrounding saliva tests is still new and fairly untested.[18] Courts may even consider whether the O.C.G.A.

13 C.R.S. 24-34-402.5.

14 National Underwriter Property & Casualty (October 14, 2015). Study: 1 in 5 small businesses would allow medical marijuana use at work. Retrieved July 22, 2016, from http://www.propertycasualty360.com/2015/10/14/study-1-in-5-small-businesses-would-allow-medical?slreturn=1469651583.

15 O.C.G.A. § 34-9-17.

16 Title 21 United States Code (USC) Controlled Substances Act (2012 Edition). Retrieved July 28, 2016, from http://www.deadiversion.usdoj.gov/21cfr/21usc/.

17 Drug Enforcement Administration Practitioner's Manual, Section II. Retrived July 26, 2016, from http://www.deadiversion.usdoj.gov/pubs/manuals/pract/section2.htm.

§ 34-9-17 statute addressing the drug defense is an unconstitutional denial of equal protection as has been done in other areas of the law.[19] If an employer suspects employee impairment at the time of a work accident, a urine toxicology test alone should not be relied upon. The employer should immediately seek other evidence to show impairment such as video footage or statements of other employees. In any case, we must remember that marijuana, both medical and recreational, remains illegal under federal law, which will no doubt influence the courts. We may simply have to wait until this issue is tested in the courts to see whether legal users of medical marijuana will be carved out of the intoxication defense.

Another scenario we may see is one in which medical marijuana comes into play as a treatment option in an accepted and compensable claim. The question naturally becomes, will medical marijuana be part of a standard, or approved, treatment plan in workers' compensation claims here in Georgia? In short, the answer is likely — not anytime soon. First, medical marijuana has not been endorsed or approved by the FDA and it remains a Schedule I drug.[20] Furthermore, there is no real consensus on the effectiveness and risks associated with medical marijuana as a form of pain management. As previously mentioned, there are complex issues with legal medical marijuana users' ability to obtain the drugs, and integration of the current medical marijuana framework into the workers' compensation system would be tedious. In the workers' compensation system, there may be few physicians willing to certify patients for the use of medical marijuana. Last but not least, there are very serious conditions still waiting to be legislatively approved and listed as authorized conditions under Haleigh's Hope Act. Therefore, it is unlikely general pain management will make the authorized list anytime soon, especially considering the political opposition to any expansion of the diseases and conditions covered under the act.[21]

It should be noted that other states are handling medical marijuana in a workers' compensation setting in various ways. Most states that have legalized medical marijuana have specific language in the statutes that absolves employers and insurers from being responsible for medical marijuana, providing clear direction on this issue. However, in New Mexico for example, the New Mexico Workers' Compensation Administration established rules to govern reimbursement for medical marijuana in workers' compensation claims, which was upheld in the appellate courts. Despite the New Mexico House passing a bill which would have amended state law to explicitly state that workers' compensation providers are not required to pay for medical marijuana, the bill was never heard in the New Mexico Senate, and therefore never made into law.[22]

There are proponents of medical marijuana that suggest medical marijuana may not be as bad as many think. For example, with the current narcotic pain medication addiction crisis in the United States, medical marijuana is seen by many as a suitable alternative in pain management as it may be less addictive and less expensive. Furthermore, because it is a Schedule I drug and not approved by the FDA, it would not be included in Medicare Set Asides. Although this may be beneficial in a vacuum, we do not yet know the implications from a medical perspective or how it will affect the return to work aspect of workers' compensation, such as the scenario where an employee is released to light duty work or returns to a light duty position while using legal medical marijuana. Therefore, we should remain cautious as this continues to develop.

MOVING FORWARD AND ETHICAL CONSIDERATIONS

Looking ahead, we may see changes in Georgia's legislation with expansion of THC levels and approved conditions and diseases, as well as cultivation and distribution legalization and guidelines. However, we also may see some significant developments on the federal level. The CARERS (Compassionate Access, Research Expansion and Respect States) Act is gaining strength in the United

[18] National Attorneys General Training & Research Institute (February 18, 2016). The Effects of Marijuana Legalization on Employment Law. Retrieved July 27, 2016, from http://www.naag.org/publications/nagtri-journal/volume-1-number-2/the-effects-of-marijuana-legalization-on-employment-law.php.

[19] *Love v. The State,* 271 Ga. 398, 517 S.E.2d 53 (1999) (DUI case where the Supreme Court of Georgia was unable to hold that the legislative/statutory distinction between users of legal and illegal marijuana was directly related to the public safety purpose of the legislation, and was therefore unconstitutional).

[20] U.S. Food and Drug Administration. FDA and Marijuana. Retrieved July 28, 2016, from http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm421163.htm; Title 21 United States Code (USC) Controlled Substances Act (2012 Edition). Retrieved July 28, 2016, from http://www.deadiversion.usdoj.gov/21cfr/21usc/.

[21] NBC News (April 24, 2016). Battle Over Georgia's "No-Buzz" Mecical Marijuana Law Gets Personal. Retrieved July 28, 2016, from http://www.nbcnews.com/storyline/legal-pot/battle-over-georgia-s-no-buzz-medical-marijuana-law-gets-n560136.

[22] New Mexico Association of Commerce and Industry. 2016 Focus. Retrieved July 25, 2016, from http://www.nmaci.rog/uploads/FileLinks/2ed44edf53447b390a1fba2e383bd7a/2016_FOCUS_Report.pdf.

States Senate with some notable senators in full support, although there are plenty of opponents on Capitol Hill.[23] If passed in its current form, it would amend the Controlled Substances Act (CSA) so that it would not apply to medical marijuana as defined by state law and it would downgrade the drug from Schedule I to Schedule II under the federal classification system. This could lead to a significant expansion of medical marijuana usage and research, and ultimately lead to a noticeable impact on workers' compensation.

There is no doubt legislation and policies at both the state and national level will evolve very quickly, so employers and insurers will need to stay abreast of changes in the law. A solid understanding of Georgia and federal law is the basic foundation needed to develop and maintain policies and procedures that effectively minimize exposure to medical marijuana-related risk. From a practical standpoint, employers should review all internal drug-related policies, assess the impact of medical marijuana and adapt to any concerns that may arise. Employers should determine the appropriate level of discipline if a staff member tests positive for marijuana, examine whether employees are using medical marijuana during work hours in addition to after hours and assess the company approach to accidents that happen at work while an employee is under the influence of medical marijuana. Employers who operate in more than one state where medical marijuana laws vary should carefully consider company drug policies.

An employer's medical marijuana policy should be made crystal clear to all employees and employers should understand the law and how it interacts with drug, disability, workers' compensation and other HR policies and safety regulations. This can be accomplished by contacting employment and workers' compensation attorneys to evaluate and assess compliance and potential hazards, and to evolve with the changing laws. From an ethical standpoint, employers have a duty under the Occupational Health and Safety Act of 1970 to maintain "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[24] Therefore, company policy should be thoroughly reviewed and scrutinized. From a claim's ethics perspective, claims administrators should be familiar with the employer's policies and current law, and be proactive in working with legal counsel to determine how these claims will be handled before they arrive so they can be nipped in the bud.

Although we do not believe medical marijuana will have a significant impact on Georgia workers' compensation in the immediate future, it is certainly worth following and will likely mature into a more compelling issue. As national trends evolve and Georgia law continues to develop, we will continue to monitor the legal and political climate and keep you informed.

[23] Senate Bill 683 - Compassionate Access, Research Expansion, and Respect States Act of 2015. Retrieved July 28, 2016, from https://www.congress.gov/bill/114th-congress/senate-bill/683.

[24] Occupational Health and Safety Act of 1970. 29 U.S. Code Chapter 15 - OCCUPATIONAL SAFETY AND HEALTH. Retrieved July 29, 2016, from, https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=OSHACT&p_id=2743.

Does Out of Sight Mean Out of Mind? The Effects a Claimant's Move Can Have on a Compensable Claim

By M. Ann McElroy

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Does Out of Sight Mean Out of Mind? The Effects a Claimant's Move Can Have on a Compensable Claim

While it might seem like a wonderful idea for a claimant to ride off into the sunset to a far and distant land (or state) away from Georgia, there are a number of headaches that come with a claimant's change of residence. First and foremost, an employer/insurer has no power to stop a claimant from moving out of Georgia. Keep in mind though, an employee is required to maintain a current address with the Board. In fact, the filing of a change of address may be the first notice the employer/insurer has of a move.

Questions arise about what the employer/insurer must and should do upon receiving the notice of the move. With regard to claim management, the employer/insurer's next moves may determine how, and if, they can maintain control of the claim in terms of the claimant's medical treatment and wage benefit entitlement.

EFFECT OF CLAIMANT'S CHANGE OF RESIDENCE ON MEDICAL TREATMENT

Handling workers' compensation claims in Georgia might make you think you would be dealing solely with physicians practicing in Georgia, but that is not the reality. The use of out-of-state physicians may be because a claimant has a residence near the Georgia state line. As such, there may be an appropriate and competent physician to treat the claimant's work injuries in the neighboring state. Sometimes, employers close to the Georgia state line have out-of-state providers on their panel. In other cases, out-of-state physicians may be used when a Georgia resident claimant decides to move to another state. This prompts the need, if the claim is open and the claimant still needs medical treatment, for the employer/insurer to find an out-of-state physician to appropriately treat the claimant.

As set forth by O.C.G.A. § 34-9-205, the State Board annually publishes a list by geographical location of "usual, customary, and reasonable charges for all medical services," known as the Georgia fee schedule. Although supposedly by geographical location, it is typically statewide. It should be noted that the fee schedule is considered a guideline rather than a law, thus, the State Board can use its discretion to actually approve higher charges above the fee scheduled amounts.[1] Generally, Georgia physicians tend to abide by the Georgia fee schedule, especially if they treat workers' compensation patients as a usual part of their practice.

As would be expected when a claimant moves away from Georgia and continues to be in need of work-related, medical treatment, he or she will need to find an out-of-state physician for continued treatment. This is when the employer/insurer needs to be proactive in finding a new physician to treat the claimant. For adjusters who handle more than one state or have network contacts in the state where the claimant is moving, utilize your or your colleagues' knowledge regarding good workers' compensation physicians in the new state of residence. Also, it would be appropriate to try and find a doctor willing to abide by the Georgia fee schedule. Yet, as stated above, the Georgia fee schedule will not be binding on the physician, and the Board can order payments higher than the fee scheduled amounts for services. If you cannot find a physician willing to follow the Georgia fee schedule, it would be wise to attempt to negotiate with the out-of-state provider at the outset regarding medical costs. It would be even better to get the result of that negotiation in writing, such as a fee contract agreement with the physician, if possible. This will limit delays in treatment and arguments regarding payments for medical bills if these matters are negotiated up front.

If a claimant or his attorney requests a specific physician, it would be wise to investigate and research that physician. This would include checking on the physician's reputation for being competent (medically and regarding workers' compensation) and any leanings toward particular parties in claims. If a claimant proposes a doctor or doctors, it is wise to also propose doctors on behalf of the employer/insurer. If an agreement cannot be met, these offers and their reasonableness can play into a decision by the administrative law judge (ALJ) regarding an order for the new authorized treating physician (ATP) in the new state, and it could possibly lean the ALJ towards one of the employer's choices.

While the employer/insurer may like the ATP in Georgia, it is not practical to attempt to make a claimant keep that physician if he moves out of Georgia. Generally, when finding panel physicians or independent medical examination physicians, the Board

[1] *See Chatham Cty Dep't of Family & Children Servs. v. Williams*, 221 Ga. App. 366, 471 S.E.2d 316 (1996).

places a caveat on the physician's need to be "reasonably accessible to the employee."[2] Making a claimant return to Georgia from his new residence in Montana, or the like, would not be reasonable or cost effective for the claimant or the employer/insurer. Under O.C.G.A. § 34-9-203, a claimant is entitled to reimbursement of travel expenses to and from physician appointments. If a claimant remained treating with a Georgia physician after moving out of Georgia, a situation could arise where the claimant is receiving a higher travel reimbursement than the employer/insurer would be paying for the doctor's visit. This could be a windfall to the claimant.

When a claimant with a compensable claim moves from Georgia, the employer/insurer must take it upon himself to actively seek a competent and reasonable treating physician in the new state of residence. Otherwise, the claimant may be able to take over control of the claim's medical treatment and increase the cost of the claim overall.

EFFECT OF CLAIMANT'S MOVE ON WAGE BENEFIT ENTITLEMENT

For a claimant to be entitled to wage benefits, he or she generally bears the burden of proving entitlement to temporary total disability (TTD) benefits. As such, he or she must prove he or she has suffered a loss of earning capacity due to the work injury rather than an unwillingness to work.[3] Therefore, the question arises with regard to an employer/insurer's ability to offer a light duty job in Georgia to an out-of-state claimant. This can definitely be frustrating for employers who are solely located in Georgia.

If an employer has an employee/claimant who was living in Georgia and working for the employer in Georgia at the time of the accident, there are obvious issues with the ability to offer a light duty job to the claimant if he later moves out of Georgia. The employer/insurer can argue for the ability to suspend wage benefits of a claimant if he does not return from his new state to accept a proffered, suitable light duty job with the employer in Georgia. The employer/insurer would argue that the claimant is not unable to perform the job due to the work injury. However, there are not any current cases from the Georgia Court of Appeals or Georgia Supreme Court specifically about the effect of a light duty job offer to an out-of-state claimant.

In *Dasher v. City of Valdosta*, the claimant aggravated his pre-existing back condition at work where he was a landfill operator. Despite the injury, he continued working for the employer until his position was eliminated. Rather than accept a similar job at another landfill location making less money, he retired. The court found he was not totally disabled, as his retirement was based partly on the lower salary of the comparable position and the effect it may have on Social Security benefits. The claimant was found not entitled to temporary total disability (TTD) benefits, as he could not show the loss of earning capacity was due to any disability from his injury. He had been offered another position and he chose not to accept it for economic reasons.[4] Using this rationale, an argument could be made that the claimant had unjustifiably refused since the reason was not due to any disability caused by the work injury.

In *City of Adel v. Wise*, the Georgia Supreme Court set out, with regard to the light duty job offer process, that the job offered must be "suitable to [the] capacity of the employee." If so, and the employee/claimant refuses to perform the position, then the Board must determine if the refusal was justified.[5] Factors as to whether a refusal is justified are "geographic relocation or travel conditions which would disrupt the employee's life."[6] So, after an employee has relocated out-of-state, a job offer in Georgia could arguably be viewed as disruptive to the employee's life if the offered job involves geographic relocation.

While we do not have a specific Georgia Court of Appeals or Georgia Supreme Court decision on this issue, we do have a published Award from the Hearing Division as to how an ALJ has handled this very situation. This Award issued in 2014 involved an injured claimant who moved from Georgia to South Carolina after a work injury. When the employer offered a light duty job to the claimant in Georgia, the claimant refused because he was unable to relocate to Georgia. Ultimately, the ALJ found the refusal to be justified. A factor addressed by the ALJ was that the employer knew the claimant lived in South Carolina by the claimant's address on record. The ALJ also noted the employer had a South Carolina office and could have offered a position there. The ALJ acknowledged the absence of any precedent on this issue. The ALJ opined that a claimant's move could make a light duty job offer process more difficult, or even impossible, but the ALJ found there are no restrictions on a claimant moving from Georgia during a compensable claim.

2 O.C.G.A. § 34-9-201(a)(1).

3 *Dasher v. City of Valdosta*, 217 Ga. App 351, 457 S.E.2d 259 (1995).

4 *Id.*

5 *City of Adel v. Wise*, 261 Ga. 53, 401 S.E.2d 522 (1991).

6 *Id.*

Given the current state of the law, there are a few options to help avoid litigation and its risks. If the employer has offices in the new state where the claimant is living, a good solution would be to find a suitable light duty job at the employer's location in the new state of residence. Another option would be to find a suitable position at a non-profit organization in the new state. This is an acceptable option for light duty job offers in Georgia and could be utilized in other states. As long as the position is within the claimant's physical capacity and is reasonable, the claimant should be unjustified in refusing to accept it.

OTHER PRACTICAL CONSIDERATIONS WHEN A CLAIMANT MOVES OUT-OF-STATE

There are many reasons a claimant may wish to relocate from Georgia such as a family member's job relocation, being closer to other family members or friends, a general desire to move, etc. However, be aware that one reason might be the claimant's accepting or looking for employment elsewhere. Therefore, placing surveillance on a claimant who is moving would not be a bad idea. Moreover, a big residential move is also an opportunity to assess the physical abilities of the claimant who may take a large part in the move by lifting, carrying and possibly performing activities outside of his or her assigned work restrictions and allegedly limited abilities.

Another good option for a claim in which a claimant is moving from Georgia is to evaluate the settlement potential of the claim. We can all agree the best claim is a closed one. There are hassles to potentially both sides of a claim with a claimant's move away from Georgia, and a claimant may want to close out the claim and move on with his or her life. This will avoid the headaches of finding new physicians and limitations of light duty job offers. As such, this would certainly be a good time, if not already discussed, to bring up the topic of settlement.

INCARCERATION OF CLAIMANT

Not all residential moves of a claimant are of their own choosing. If a claimant finds himself on the wrong side of the law in a criminal matter, that "move" can most assuredly impact his workers' compensation claim. A claimant's incarceration affects the claimant's availability for medical examinations and treatment, and it may have an effect on his or her wage benefits. However, there are some specific factors that determine if and when a jailed claimant's wage benefits can be suspended. It must be noted that incarceration alone does not definitively allow a suspension of wage benefits unless the delineated factors set forth in case law are met.

EFFECT OF INCARCERATION ON A CLAIMANT'S WAGE BENEFIT ENTITLEMENT

Incarceration can be a basis for suspending a claimant's wage benefits when he is otherwise entitled. The background for this is in the WC-240 light duty job offer process and examination of the justification for a claimant to accept or not accept a light duty job offered to him while on light duty work restrictions in jail.

In *Howard v. Scott Housing Services*, a claimant was entitled to, and was receiving, wage benefits when he was arrested. While in jail awaiting a hearing, he was offered a suitable job approved by a physician. Of course, his incarceration made him unable to accept the job. A hearing was requested by the employer to suspend the claimant's benefits for refusal to accept the suitable job. The claimant eventually pled guilty to the felony charges and was sentenced to life in prison on April 1, 1985. The employer/insurer then, retroactive to January 17, 1985 (the day after the hearing was held), suspended the claimant's benefits. Upon appeal, the Court of Appeals stated the suspension of benefits was correct, but the date of the suspension was not. The court opined the refusal to accept the light duty job was justified during the period of the claimant's incarceration up until the time of the claimant's guilty plea.[7]

The reason for suspending a claimant's wage benefits after a conviction is to take into account the possible injustice to a claimant who might be arrested and financially unable to post bail prior to a trial. This would deny the jailed claimant equal protection under the law since he might not be able to pay to get out of jail prior to any adjudication of guilt in order to accept a

[7] *Howard v. Scott Hous. Sys.*, 180 Ga. App. 690, 350 S.E.2d 27 (1986).

proffered light duty job.[8] As a side note, we also live in a reality where we are aware that not everyone arrested and incarcerated is actually guilty of the crime(s) for which he is charged. There are arrests which do not lead to convictions. As such, suspension of a claimant's wage benefits upon mere incarceration is not enough. There must be a conviction.

While *Howard* found the date of a claimant's guilty plea for suspension of benefits, later case law has further delineated the date of suspension as the date a judgment (or sentence) is pronounced. In *Mintz v. Norton Co.*, the claimant pled guilty to a violation of the Georgia Controlled Substances Act. In reviewing the claim, the Court of Appeals ruled the appropriate date for the suspension of wage benefits was the date of the pronouncement of the claimant's sentence, which was not the same day he entered his guilty plea. The reasoning put forth for waiting to suspend on the date the sentence is pronounced is that a claimant has an absolute right to withdraw a guilty plea prior to that date.[9] Of course, if a claimant's guilty plea or conviction occurs on the same date the sentence is pronounced, there would be no confusion.

There have been cases where a claimant has been entitled to wage benefits during the entire period of incarceration. In *Sargent v. Brown*, a claimant was arrested for a probation violation stemming from a previous conviction. Ultimately, no probation revocation hearing was held, and the charges against him were found to be false. Thus, the claimant was granted wage benefits the entire time he was in jail.[10]

Although the basis for suspending wage benefits stems from the WC-240 light duty job offer and the unjustified refusal of a convicted claimant to accept the job, the case law has now solidified the position that the employer/insurer does not have to actually make a formal, light duty job proffer to a convicted claimant. In *Mize v. Cleveland Express*, the claimant who was receiving benefits was found guilty of a felony and sentenced to 23 years in prison. The Board initially denied the request to suspend the claimant's wage benefits based upon the fact that the employer never made an actual offer of suitable employment to the employee. Upon review, the Court of Appeals found the claimant's right to receive wage benefits properly terminated upon the date guilt was adjudicated and noted that no offer of employment tendered to the claimant after that time could be "meaningfully" accepted by him.[11]

In review, remember that not every jailed claimant is subject to having his or her benefits suspended. When a claimant is incarcerated, the employer/insurer must continue to follow up regarding the status of any conviction and judgment. Only upon a judgment may the wage benefits be suspended. Please note, this is true unless there is an independent basis, apart from the incarceration, to justify suspension of the claimant's wage benefits. If there is an independent reason to suspend benefits, an employer/insurer does not need to worry with the status of any conviction and judgment of the claimant.

EFFECT OF INCARCERATION ON A CLAIMANT'S PPD ENTITLEMENT

Now that we know a claimant's temporary total disability (TTD) benefits may potentially be suspended upon a claimant's incarceration, a question arises regarding how a claimant's incarceration affects the entitlement to permanent partial disability (PPD) benefits. Luckily, *Wet Walls* deals with this very issue.

In *Wet Walls, Inc. v. Ledezma*, the employer/insurer suspended the claimant's wage benefits during his post-conviction incarceration. Since the claimant had been assigned a 65.5 percent PPD rating, the claimant argued the employer/insurer was required to commence PPD benefits at the time the TTD benefits were suspended. However, the Court of Appeals disagreed. O.C.G.A. § 34-9-263(b)(2) states that PPD benefits "shall not become payable so long as the [claimant] is entitled to" TTD or TPD benefits. Therefore, in *Wet Walls*, the question was whether the claimant was entitled to PPD benefits while the TTD benefits had been suspended due to his incarceration following conviction. The Court of Appeals found the trigger for payment of PPD benefits was not the receipt of benefits, but rather the entitlement. Therefore, although the claimant was not actually receiving the wage benefits while incarcerated, he was still "entitled" to them. The only reason he was not receiving the claimant's benefits was that he was incarcerated.[12]

8 *Howard*, 180 Ga. App. at 690, 350 S.E.2d 27; O.C.G.A. § 17-7-93(b).
9 *Mintz v. Norton Co.*, 209 Ga. App. 109, 432 S.E.2d 583 (1993).
10 *Sargent v. Brown*, 186 Ga. App. 890, 360 S.E.2d 826 (1988).
11 *Mize v. Cleveland Express*, 195 Ga. App. 56, 392 S.E.2d 275 (1988).
12 *Wet Walls, Inc. v. Ledezma*, 266 Ga. App. 685, 598 S.E.2d 60 (2004).

WHAT IF A CLAIMANT IS INCARCERATED WHILE COMPLETELY DISABLED?

As stated above, the origin of the ability to suspend a claimant's benefits came about with regard to the WC-240 light duty job offer process. However, what is the effect when a claimant is taken completely out of work prior to the incarceration? There does not appear to be any case directly on point with regard to this issue. However, given the case law regarding the origin of the ability to suspend wage benefits due to incarceration, it could be argued that a claimant would continue to be entitled to wage benefits while incarcerated if he were completely disabled by an authorized treating physician prior to being incarcerated. The basis for this argument would be that a claimant could not actually be offered any light duty job while he is completely disabled. A light duty job cannot be offered to a completely disabled claimant who is not in jail, so it likewise would arguably not be able to be done while a claimant is incarcerated.

It seems rather unjust for a claimant who is incarcerated following an adjudication of guilt to be allowed to receive wage benefits, even if he was completely disabled due to a work injury prior to the incarceration. For argument's sake, it could be possible for a catastrophically injured claimant to commit murder, and still be entitled to lifetime wage benefits. As such, if this murdering, catastrophically-injured claimant were found guilty and sentenced to life in prison, he would arguably continue to receive lifetime wage benefits, which does not seem fair to the employer/insurer or the workers' compensation system.

Although not directly discussing this point, *Wet Walls* seems to indicate there may be a basis for suspending any claimant's wage benefits during any period of incarceration following an adjudication of guilt. Among other things in *Wet Walls*, the claimant sought recommencement of wage benefits after being released from jail and deported, as well as PPD benefits for the period of time he was incarcerated. Based on his argument for being entitled to PPD benefits during the period of incarceration because his wage benefits were suspended during the incarceration, it would appear there was no argument made for the claimant's entitlement to TTD wage benefits during the time of incarceration. The case also mentioned he sought TTD benefits after he was released from jail, which tends to indicate these benefits were, again, not requested during the period of incarceration. Of note, the medical evidence in the claim revealed the claimant was partially paralyzed from the compensable work injury. There is also mention in the evidence that the claimant would need to undergo additional testing before being released to work. Therefore, the claimant was not released to light duty work as of the period of incarceration. Yet, the case does not make any mention regarding the claimant's right to receive TTD wage benefits during the incarceration. In fact, the case discusses the claimant's "entitlement" to TTD benefits during that time, but that he was not receiving them due to his incarceration.[13] As such, it appears to put forth the opinion that the employer's suspension of the wage benefits during the time of incarceration was appropriate. Over the years, the Board has allowed the suspension of TTD for incarcerated claimants who have been adjudicated guilty and incapable of performing any work.

THE CLAIMANT IS RELEASED FROM JAIL, WHAT NEXT?

Generally, a workers' compensation claimant would have the burden of proof to show why he or she is entitled to a recommencement of benefits following a proper suspension. Under *Maloney v. Gordon County Farms*, a workers' compensation claimant generally must show he or she: (1) suffered a loss of earning capacity from the compensable work injury; (2) continues to have physical limitations because of the work injury; and (3) has made a diligent, but unsuccessful search to find suitable employment.[14] The court in *Wet Walls* noted that *Maloney* only applies when an injured worker returns to work on restrictions and stops working as a result of the injury or is terminated. The court found the only reason the claimant's benefits were suspended was his incarceration, and he had not returned to work. Therefore, *Maloney* did not apply.[15] This line of thinking appears to indicate a claimant need only show he or she was released from his incarceration and is still laboring under a disability to have TTD benefits reinstated, if receiving them prior to conviction.

13 *Wet Walls,* 266 Ga. App. at 685, 598 S.E.2d at 60 (2004).

14 *Maloney v. Gordon Co. Farms*, 265 Ga. 825, 462 S.E.2d 606 (1995).

15 *Wet Walls,* 266 Ga. App. at 685, 598 S.E.2d at 60 (2004).

ABILITY TO SEEK A CREDIT FOR WAGE BENEFITS PAID DURING CLAIMANT'S INCARCERATION

There are times where payment for a claimant's pre-conviction incarceration can be credited back to the employer/insurer. As we now know, the suspension of wage benefits for incarceration is only allowed following a conviction, but there are times when a criminal is sentenced to time already served prior to the conviction. When that is the case, what is the employer/insurer's recourse for TTD payments made during the period of pre-conviction incarceration?

The employer/insurer may file for a credit for wage benefit payments made during the period of time a claimant was incarcerated if that time is later deemed as part of a "time served" sentence for the claimant. This pre-conviction time has been determined by an ALJ and the Appellate Division to be equivalent to post-conviction incarceration when it is later found to be part of the sentence. Since the claimant is not entitled to benefits during that time, the employer/insurer can seek credit for all wage benefits paid during that time. We have been successful in obtaining orders to reimburse wage benefits paid to claimants under those circumstances.

EFFECT OF INCARCERATION ON A CLAIMANT'S MEDICAL BENEFIT ENTITLEMENT

There does not appear to be a specific Georgia Court of Appeals or Georgia Supreme Court case on the issue of employer/insurer funded medical treatment for an incarcerated claimant. A claimant could be found to be in need of work-related, medical treatment while incarcerated. However, as a practical matter, the payment for medical benefits during incarceration is usually not an issue.

An incarcerated claimant does not typically receive workers' compensation medical treatment while in jail. Given an inmate's lack of freedom, it makes his ability to leave the prison to attend various medical appointments virtually nonexistent. While the suspension of wage benefits is limited during incarceration following a conviction, the lack of a claimant's ability to attend medical appointments would generally be the same at any point of incarceration, either before or after conviction, based on his lack of freedom. Therefore, payment for medical benefits at any point of a claimant's incarceration is not a typical concern.

CONCLUSION

While a claimant's change of residence may have little to no impact on a workers' compensation claim, the above scenarios indicate some serious effects a claimant's move can have. The important thing to do upon notice of a claimant's move, especially if out-of-state, is to arm yourself with information about the new residence in terms of ability to find a good physician and potential to be able to offer suitable light duty work. On a positive note, the move could be just the thing to move the claim towards settlement. On the other hand, if the claimant's new move involves an involuntary stent behind bars, it is best to assess the claimant's criminal status in light of any adjudication of guilt to be able to move to suspend benefits as soon as possible.

Claimant's Got Talent — The Recorded Statement and the Art of Storytelling

By W. Bradley Holcombe

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Claimant's Got Talent — The Recorded Statement and the Art of Storytelling

Taking the claimant's recorded statement is often a required portion of your claims investigation process, and for good reason. The statement may impact your decision to accept or deny a claim as it usually provides valuable information regarding the mechanism of injury, witnesses, medical providers, pre-existing conditions, any prior claims and the claimant's current activities. More often than not, we do not have the benefit of an eyewitness or video of an alleged accident and, unfortunately, are left with the claimant as our primary source of information. When a statement is obtained early in a claim, you can capitalize on the fact the claimant is less likely to be tainted by outside influences, such as secondary gain or legal counsel. Therefore, in this small window of time, you have an opportunity to develop legal defenses by locking down his or her position on the potential issues for litigation, including the date, time and place of the accident, as well as any witnesses and the specific body parts involved. As time elapses, memories fade, witnesses disappear and evidence can be lost. If the claimant's statement is not taken for several months or even years after the accident, he or she may be "excused" by an administrative law judge for having a less than clear recollection of the events. Thus, we want to provide a roadmap for taking a thorough and effective statement when the first opportunity presents itself.

STRATEGY

There are several stories in each claim: the employer's story, the doctor's story, the claimant's story and, of course, your story. Each story is usually different. Prior to any recording, and with this in mind, your first step should be to secure as much information as possible from the employer, any witnesses, medical providers and the claimant, as it will impact your approach to the statement once you are on the record. Think of possible defenses and what you could need in order to substantiate them. To that end, our preparation for any recorded statement should include a written "outline" of each topic you wish to discuss. While the basic premise and questions will typically be similar, you will want to have more tailored questions for a car accident versus a slip and fall injury, for example. However, even with a carefully constructed outline, approach the statement like a conversation and, like any conversation, we cannot always predict the direction it will take and need to anticipate unpredictability. Therefore, do not be afraid to "go off script" as follow-up questions can often lead to significant information. Patience is a virtue when taking statements, and typically a line of questioning that sounds more like a conversation rather than a series of rushed questions from a script will yield far superior results.

At this point in your relationship with the claimant, you should be attempting to build that relationship. It only makes sense and it is human nature that individuals want to be heard, appreciated and understood when telling their story. Attempt to empathize with the claimant and give positive feedback to keep the story going. For example, when the claimant is describing the injury, you will encourage a more detailed description and substantive dialogue if he or she feels validated by reactions such as, "I understand that injury must have hurt, please go on . . . ." and, "Now I realize why you feel frustrated. What happened next?" Again, show empathy and *listen, listen, listen* to what is being said and react accordingly, rather than merely reading from the outline and moving quickly to the next section. There is nothing wrong with silence and allowing the claimant some time to fully elaborate his or her story. If given the opportunity, the claimant's narrative can be as compelling and in-depth as a novelist. Your goal is to keep those creative juices flowing and help turn them into the Shakespeare of workers' compensation.

By the same token, know when you have enough information; too many questions can lead to suspicion, loss of rapport and termination of the conversation, and they could even push the claimant to retain legal counsel. Also, as a word of caution, do not forget what you say is also being recorded and conduct yourself accordingly. If exchanged in the discovery process or utilized at trial, a copy of the entire statement will be scrutinized closely by opposing counsel and the administrative law judge. Indeed, unless you are a witness at the trial, this may be your only opportunity to make an impression before the administrative law judge. Thus, you will want to be likeable, credible and avoid giving the appearance you are somehow bullying the claimant and do not commit to any legal position you are not prepared to defend down the road (i.e. do not make a promise you do not intend to keep).

O.C.G.A. § 16-11-62[1] AND O.C.G.A. § 16-11-66[2]

Often, a claimant may question whether taking a recorded statement is "legal." In Georgia, the legal authority governing recorded statements is found in O.C.G.A. §§ 16-11-62 and 16-11-66. While the statutes recognize and protect an individual's right to privacy and generally prohibit recording audio or video of an individual in private places where there is an expectation of privacy, the statutes do not prohibit an active party to the conversation from recording it, even in a private setting and without the other party's knowledge or consent. In addition to the statutes, there is ample and instructive case law on this issue.[3]

With that being said, from a commonsense perspective, it is not always good practice to covertly record your conversations with a claimant. Undisclosed recordings are disfavored by the Board, are looked upon very suspiciously and could backfire if the administrative law judge thinks you are not "playing fair" and attempting to take advantage of an unsophisticated or uninformed claimant. On the other hand, a fully-disclosed and voluntary statement will carry more weight and help prevent subsequent arguments from the claimant and his attorney that he was somehow coerced or inaccurate. As an example, think about statements in the context of a criminal proceeding. If an accused is read and acknowledges his Miranda rights and then "voluntarily, knowingly and intelligently" provides a confession, the confession is usually admissible and it is exceedingly difficult to later disavow the information provided.[4] In the same way, if you disclose your intent to record your conversation with the claimant and he voluntarily agrees to participate and provide his statement, the Board is more likely to allow you to use it against him down the road when you need it the most. Thus, while technically you may be able to obtain an undisclosed statement from the claimant under O.C.G.A. § 16-11-66(a), the best practice is to first obtain his or her consent on the record. At the outset of your conversation, ask the claimant to repeat his full name, date of birth, address and confirm his consent to provide a recorded statement. Moreover, as we discussed, your voice on the recording may be your only opportunity to make a personal impression with the administrative law judge and you want to put your best foot forward by appearing honest and fair.

UTILIZING STATEMENTS AT TRIAL

Assuming our recorded statement meets the requirements of O.C.G.A. §§ 16-11-62 and 16-11-66, it should be admissible at trial. However, we must first discuss "hearsay" and overcoming the potential obstacles presented by the "hearsay rule." Pursuant to the provisions of O.C.G.A. § 24-8-801(c), the definition of "hearsay" is "a statement, other than one made by the declarant [i.e. the individual who made the statement] while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[5] As a general consideration, hearsay is inadmissible and cannot be utilized as evidence at a hearing.[6] However, there are numerous exceptions to this general rule for exclusion, and recorded statements often fall within at least one of the exceptions. Typically, the recorded statement of a claimant will be deemed admissible under O.C.G.A. § 24-8-801(d)(1)(A) and/or O.C.G.A. § 24-8-801(d)(2)(A). It may also be admissible under the "catch all" provision of O.C.G.A. § 24-8-807.

Taking these in turn, O.C.G.A. § 24-8-801(d)(1)(A) ("Prior Statement by Witness"), states, "An out-of-court statement shall not be hearsay if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is admissible as a prior inconsistent statement or a prior consistent statement under Code Section 24-6-613[7] or is

1 O.C.G.A. § 16-11-62(1) "It shall be unlawful for: Any person in a clandestine manner intentionally to overhear, transmit, or record or attempt to overhear, transmit, or record the private conversation of another which shall originate in any private place."

2 O.C.G.A. § 16-11-66(a) "Nothing in Code Section 16-11-62 shall prohibit a person from intercepting a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."

3 *See Malone v. State*, 246 Ga. App. 882, 541 S.E.2d 431 (2000) (Although a statute prohibits the recording or taping of private telephone conversations, it does not prohibit a party to the conversation from recording it); *Fetty v. State*, 268 Ga. 365, 489 S.E.2d 813 (1997) (Statute prohibiting clandestine intentional recording of another's private phone conversations does not apply to one who is a party to such conversations); *Mitchell v. State*, 239 Ga. 3, 235 S.E.2d 509 (1977) (Statute providing that it shall be unlawful for any person to intentionally overhear, transmit or record the private conversation of another which shall originate in any private place does not apply to one who is a party to the conversation).

4 *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

5 *See Armstead v. State*, 255 Ga. App. 385, 565 S.E.2d 579 (2002) ("By definition, evidence is hearsay when a witness at trial offers evidence of what someone else said or wrote, outside of court, and the proponent's use of the evidence essentially asks the [Administrative Law Judge] to assume that the out-of-court declarant was not lying or mistaken when the statement was made.").

6 O.C.G.A. § 24-8-802.

7 O.C.G.A. § 24-6-613 ("Prior statement of witness"):
(a) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time; provided, however, upon request the same shall be shown or disclosed to opposing counsel.

otherwise admissible under this chapter." Of course, in the vast majority of hearings the claimant will be called as a witness by your Swift Currie attorney to testify under cross-examination and, if possible, our intention will be to utilize any recorded statement to impeach his credibility if it is inconsistent with his prior testimony on direct examination (i.e. your recorded statement will qualify for admission as a "prior inconsistent statement"). Depending on the extent of the claimant's inconsistencies, your recorded statement could provide very damning evidence and torpedo his credibility.[8]

Similarly, recorded statements may also be admissible under O.C.G.A. § 24-8-801(d)(2)(A) ("Admissions by party-opponent"). This statute states, "Admissions shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is: (A) The party's own statement, in either an individual or representative capacity." As a claimant is always a "party" to his own workers' compensation claim, his prior statement is typically admissible under this code section.

Finally, in addition to the code sections discussed above, we are able to argue for the admissibility of a recorded statement under the "catch all" provision of O.C.G.A. § 24-8-807. This statute states:

> A statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule, if the court determines that: (1) The statement is offered as evidence of a material fact; (2) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (3) The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this Code section unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Again, if we can obtain a recorded statement from the claimant that includes his self-identification via name, address, date of birth and acknowledgement of the recording, arguing for admissibility will be exceedingly easier. Additionally, the sound of the claimant's voice itself can often be unmistakable and act as a verbal "fingerprint" that will satisfy any concerns for "trustworthiness" of the source under O.C.G.A. § 24-8-807.[9]

As an aside, just as recorded statements may be utilized at trial to undermine a claimant's credibility, a claimant's statement may be forwarded to a treating physician for that same purpose if you believe he is providing inaccurate or incomplete information to

(b) Except as provided in Code Section 24-8-806, extrinsic evidence of a prior inconsistent statement by a witness shall not be admissible unless the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement or the interests of justice otherwise require. This subsection shall not apply to admissions of a party-opponent as set forth in paragraph (2) of subsection (d) of Code Section 24-8-801.
(c) A prior consistent statement shall be admissible to rehabilitate a witness if the prior consistent statement logically rebuts an attack made on the witness's credibility. A general attack on a witness's credibility with evidence offered under Code Section 24-6-608 or 24-6-609 shall not permit rehabilitation under this subsection. If a prior consistent statement is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive, the prior consistent statement shall have been made before the alleged recent fabrication or improper influence or motive arose.

8 Pursuant to the provisions of O.C.G.A. § 24-6-621, "A witness may be impeached by disproving the facts testified to by the witness." Furthermore, it has been held that "where a party offers himself as a witness in his own behalf, his testimony which is self-contradictory, vague or equivocal is construed most strongly against him." *Atlanta Life Ins. Co. v. Mason*, 89 Ga. App. 319, 321, 79 S.E.2d 352, 353 (1953); *Douglas v. Sumner*, 213 Ga. 82, 97 S.E.2d 122 (1957); *White v. Rainwater*, 205 Ga. 219, 52 S.E.2d 838 (1949). Finally, if it is shown that a party's testimony is indeed self-contradictory, vague, or equivocal, and unless there is some other evidence tending to establish his or her right to recover, the party is not entitled to a finding in his or her favor. *See Pike v. Greyhound Bus Line, Inc.*, 140 Ga. App. 863, 232 S.E.2d 143 (1977); *Martin v. Bohn*, 227 Ga. 660, 182 S.E.2d 428 (1971). Specifically, pursuant to the aforementioned legal authorities, Your Honor is entitled accept or to disregard in whole the testimony of a witness. O.C.G.A. § 9-11-52 ("Findings shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.").

9 For several illustrative cases on admissibility of prior recorded statements, *see Carter v. State*, 254 Ga. App. 187, 561 S.E.2d 856 (2002) (in a civil proceeding, an out-of-court confession is an admission against interest, and its introduction into evidence may make out a prima facie case for the plaintiff); *Howard v. State*, 227 Ga. App. 5, 488, S.E.2d 489 (1997) ("Burglary defendant's alleged admission that he broke into victim's house, even if hearsay, was admissible as an admission by defendant against his penal interest."); *Glover v. Grogan*, 162 Ga. App. 768, 292 S.E.2d 465 (1982) ("Prior admissions of a party to an action may be offered in evidence and, if believed by the jury, may be considered as substantive evidence of the fact sought to be proved."); and, *Crosby v. Cooper Tire & Rubber Co.*, 240 Ga. App. 857, 524 S.E.2d 313 (1999), opinion vacated in part on unrelated grounds, 249 Ga. App. 247, 548 S.E.2d 30 (2001) ("An admission against interest by a party is original evidence and is admissible as evidence as to the issue of liability.").

As some interesting examples of prior recordings that were excluded from trial, *see Middleton v. Middleton*, 259 Ga. 41, 376 S.E.2d 368 (1989) (tape recordings of telephone conversations in which wife discussed extramarital affair and her intention to marry paramour after divorce, which had been taped by husband in violation of anti-wiretapping statute, were inadmissible in parties' divorce action); and, *Ransom v. Ransom*, 253 Ga. 656, 324 S.E.2d 437 (1985) (tape recordings husband made of his wife's private conversations without the wife's knowledge or consent, which were made in violation of statute prohibiting any person from recording private conversations of another, could not be used at trial in divorce proceeding for impeachment purposes).

the physician. This scenario arises most often when a physician's understanding of the mechanism of injury or alleged body parts involved does not match the description you obtained in the claimant's initial statement. We do not like to feel manipulated or cheated, and physicians, in particular, tend to be upset when they feel their trust has been violated. Thus, akin to providing surveillance video to a physician, a good recorded statement could function in the same manner and result in a favorable medical report.

CONCLUSION

Taking an effective recorded statement presents unique challenges, but with the right mindset and preparation it can transform your claim. Not only may a recorded statement be utilized against a claimant at trial, it is your first and best opportunity to develop defenses, shape the direction of the litigation and showcase your experience and talents as an interviewer. This is the fun part of your claim and essentially our first chance to cross-examine the claimant.

Now You See Me, Now You Don't: Workers' Compensation Issues with Remote Employees

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Now You See Me, Now You Don't: Workers' Compensation Issues with Remote Employees

Telecommuting is becoming more common with the rise of virtual offices and employees having the ability to perform all functions of their job from home. A 2015 poll showed that 37 percent of American workers have worked remotely at some point, up 300 percent from 1995.[1] Eliminating the need for large office spaces to accommodate employees provides significant savings to employers, and employees have the benefit of avoiding traffic and other issues connected with going to and from an office. These benefits can lead to more productive and happier employees, translating into greater profitability and fewer personnel issues. However, the rise of telecommuting is creating unique challenges in the workers' compensation context as employers and insurers try to navigate work injuries that occur in their employees' homes. With inherent problems such as lack of witnesses, control over the work environment and difficulty in establishing what activity the employee was engaged in at the time of the accident, these claims can be difficult to investigate and compensability decisions are more complicated than ever. There are no reported Georgia decisions dealing with these specific issues, but we can gain insight into how the courts might decide by looking at other states and by applying established cases and defenses to the new norms of working life.

BURDEN OF PROOF AND CREDIBILITY ISSUES

First and foremost, when asserting a work-related injury, the burden of proof remains on the claimant.[2] The same issues confronted by the employer/insurer in investigating the claim will also transfer to the claimant in terms of proving that he or she sustained a work-related injury. Credibility issues will be key in these claims. Where there are no witnesses, surveillance cameras or well-known work environments, the employee's testimony as to the mechanism of injury will often be dispositive. If the administrative law judge believes the employee, there may be little the employer/insurer can do by the time the claim has reached a hearing. However, the converse is also true: if the employee's story does not ring true, that may be all it takes for the administrative law judge to deny the claim. It is well established that the testimony of a party who offers herself as a witness on her own behalf at trial is to be construed more strongly against her when the testimony is self-contradictory, vague or equivocal.[3] Thus, it will be very important for the employer/insurer to conduct a thorough investigation and determine if there is reason to believe the employee is being less than truthful.

ARISING OUT OF AND WITHIN THE COURSE OF EMPLOYMENT

In order for an injury to be compensable under Georgia law, the injury must arise out of and occur within the course of employment.[4] The term "arising out of" means there must be some causal connection between the conditions of the employment and the injury sustained by the employee.[5] Essentially, this element looks at what the employee was doing at the time of the injury. The employee must prove that he or she was performing an act beneficial to the employer, i.e., that he or she was performing some element of his or her job at the time of the injury. The "in the course of" element applies to when, where and how the injury occurred. In Georgia, the injury must occur: (1) within the period of employment; (2) at a place where the employee may reasonably be expected to be in the performance of his or her job duties; and (3) while the employee was fulfilling his or her job duties or was engaged in some activity incidental thereto.[6] This element is made more difficult when the employee never leaves the house in order to go to work. When does the employee stop being at home and start being at work?

The "arising out of" requirement can be tricky when applied to employees who work from home. The one reported Georgia case we have suggests this standard will be liberally applied to remote employees. In *Amedisys Home Health, Inc. v. Howard*, the claim-

1 August, 2015 Gallup poll. *See*, www.gallup.com/poll/184649/telecommuting-work-climbs.aspx.
2 *Copeland v. Continental Kewitt*, 218 Ga. App. 305, 461 S.E.2d 277 (1995).
3 *Douglas v. Sumner*, 213 Ga. 82, 97 S.E.2d 122 (1957); *White v. Rainwater*, 205 Ga. 219, 52 S.E.2d 838 (1949).
4 O.C.G.A. § 34-9-1(4).
5 *Thornton v. Hartford Accident & Indem. Co.*, 198 Ga. 786, 32 S.E.2d 816 (1945).
6 *Barge et. al. v. City of College Park*, 148 Ga. App. 480, 251 S.E.2d 580 (1978).

ant was a 24-hour, on-call field nurse.[7] She fell in the driveway of her home and injured her ankle while carrying patient reports to be completed for the following morning, as well as her cell phone, a newspaper and a pizza for her family.[8] The Court of Appeals found the claim was compensable because what she was doing at the time of the accident was "reasonably incident to her employment."[9] However, we must remember this case involved the continuous employment doctrine because the claimant was an on-call nurse, so the court might have treated the situation differently if she had simply been working from home.[10]

We can also look to a published Award from the Appellate Division for guidance as to when an injury at home arises out of the claimant's employment. From 2009-2014, the claimant worked from home and alleged she injured her neck after lifting a printer at home. She claimed she was packing up her printer as part of an agreement to relocate her to an office in another state. However, the claimant's supervisor sent her daily emails with instructions as to her duties for the day, and there were no instructions to pack her printer. The claimant did not report the accident on the day it allegedly occurred and her medical records did not corroborate the incident. The administrative law judge determined the claimant's activities on the alleged date of accident did not correlate with what she was supposed to be doing that day and packing up her printer was not part of her job responsibilities. The claim was denied on the basis that the claimant did not meet her burden of proving the injury arose out of her employment. It is clear from the decision that the claimant's lack of credibility resulted in the denial of the claim. Where there are no witnesses to the accident and rarely any other objective evidence one way or the other, this factor will be critical in every case.

REST AND LUNCH BREAKS

There are several traditional defenses that work just as well in the context of work-from-home employees. Generally, an employee who is injured while on a scheduled rest or lunch break during his or her own free time is not entitled to workers' compensation benefits.[11] In order to raise this defense, the employer must demonstrate: (1) the employee's break was a regularly scheduled break; and (2) the employee was free to do as he or she pleased while on the break, and therefore, was not under the control of the employer during the break.[12] In the case of *ATC Healthcare Services, Inc. v. Adams*, the court found the lunch break rule applied even though the time for the scheduled lunch could vary from day to day based on the worker's schedule.[13]

There are two specific exceptions for compensability regarding the lunch break or rest break rule. One exception is when the employee is performing some act incidental to his employment or in furtherance of the employment.[14] The other specific exception is the ingress/egress rule discussed in *Rockwell v. Lockheed Martin Corporation*.[15] In *Rockwell*, an employee was on her scheduled lunch break when she was injured in the parking lot on her way to her car.[16] The court found the claim compensable since the employee was in the act of egressing the employer's premises at the time of the injury, even though she was on a scheduled break.[17]

Rest and lunch breaks are particularly problematic when considering employee's working from home, when such breaks could occur at any time during the day without the employer's consent or knowledge. It is highly recommended that all telecommuting employees be assigned specific times each day for both regular and lunch breaks, with the start and stop time being set out in writing before the remote work arrangement begins and the employee being required to clock in and out. While this will not keep an employee from asserting that an injury occurred after returning from a break, when the injury may have occurred during the break, it will help the employer exert some control over the employee's day. Of course, Georgia does recognize the "personal comfort doctrine," meaning that acts of personal comfort (eating, drinking, using the restroom) do not remove the employee from the course and scope of employment and injuries in this context are usually compensable.

7 *Amedisys Home Health, Inc. v. Howard,* 269 Ga. App. 656, 605 S.E.2d 60 (2004).
8 *Id.* at 61.
9 *Id.* at 62.
10 *Id.* at 63.
11 *Wilkie v. Travelers Ins. Co.*, 124 Ga. App. 714, 185 S.E.2d 783 (1971).
12 *Rampley v. Travelers Ins. Co.*, 143 Ga. App. 612, 239 S.E.2d 183 (1977).
13 *ATC Healthcare Services, Inc. v. Adams,* 263 Ga. App. 792, 589 S.E.2d 346 (2003).
14 *Rampley v. Travelers Ins. Co.*, 143 Ga. App. 612, 239 S.E.2d 183 (1977).
15 *Rockwell v. Lockheed Martin Corp.*, 248 Ga. App. 73, 545 S.E.2d 121 (2001).
16 *Id.* at 73.
17 *Id.* at 73-4.

TRAVELING TO AND FROM WORK

The general rule is an employee's injuries sustained while traveling to and from work are not compensable;[18] however, there are several exceptions to this rule such as where: (1) the employer furnishes or reimburses transportation at the time of the injury; (2) injuries occurr while the employee is doing some act which is permitted or required by the employer and beneficial to the employer while en route to and from work; (3) injuries transpire while going to and from parking facilities provided by the employer; and (4) the injuries take place while the employee is on call and is furnished transportation or is reimbursed for transportation costs.[19] The courts have also recognized an employee should be allowed a reasonable amount of time to ingress and egress the employer's premises.[20] Once the employee is traversing on the employer's actual premises, the injury will likely be deemed to arise out of and in the course of the employment. An injury that occurs while the employee is traversing a parking area, which is either owned, maintained or controlled by the employer, is also compensable.[21]

One might think the "traveling defense" would not be applicable where employees are working from home; however, when the employee's home becomes his office, a new set of issues arises. First, can the employee's home be considered "employer premises" such that an injury occurring during ingress and egress to and from the home during work hours might be compensable? It is likely that the ingress/egress rule would be more strictly applied, and largely inapplicable, where the employer has no control over the premises. Another situation that could arise involves travel between the employee's home and the employer's office location. If an employee is injured while on his or her way to the office for a mandatory staff meeting, that injury might very well be compensable as the employee's home could be considered a satellite office location, such that the employee was traveling between employer locations at the time of the accident.

DEVIATION FROM EMPLOYMENT

Perhaps the most common defense in claims stemming from telecommuting workers is deviation from employment, given the lack of supervision for remote workers. Injuries occurring while the employee is on a personal mission unconnected with his or her employment are not compensable. In *South Georgia Timber Company v. Petty*, the employee worked as a contract logger for South Georgia Timber.[22] She was on her way to deliver a check to the contract hauler when she decided to stop by a shopping mall.[23] When she exited the mall, she was abducted by a man with a knife and sustained an injury.[24] The Court of Appeals affirmed the State Board of Workers' Compensation's finding that the trip to the shopping mall was purely personal and her deviation to the shopping mall clearly put her outside the scope and course of her employment.[25]

An injury will most likely be found compensable even though an employee deviates from the scope of his employment if the deviation is a slight deviation and he returns to the duties of his employment before the injury.[26] In *Lewis v. Chatham County Savannah Metropolitan Planning Commission*, the court found the employee's injury sustained in an automobile accident was in the course of her employment because her slight deviation to have lunch instead of going to the bank for her employer had ended before the accident.[27] After initially heading in a different direction than the bank, the employee turned her vehicle around and continued on her work errand to the bank.[28] In *Amedisys Home Health, Inc. v. Howard*, as discussed earlier, the court found the employee's injury was compensable because her personal deviation to pick up a pizza had concluded and she had resumed the business of Amedysis at the time of the fall.[29]

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18 *Wilcox v. Shephard Lumbar Corp.*, 80 Ga. App. 71, 55 S.E.2d 382 (1949).
19 *Corbin v. Liberty Mut. Ins. Co.*, 117 Ga. App. 823, 162 S.E.2d 226 (1968).
20 *DeHowitt v. Hartford Fire Ins. Co.*, 99 Ga. App. 147, 108 S.E.2d 280 (1959).
21 *Knight-Ridder Newspaper Sales, Inc. v. Desselle*, 176 Ga. App. 174, 335 S.E.2d 458 (1984).
22 *S. Ga. Timber Co. v. Petty*, 218 Ga. App. 497, 462 S.E.2d 176 (1995).
23 *Id.* at 497.
24 *Id.*
25 *Id.* at 499.
26 *Accident & Indem. Co. v. Souther*, 110 Ga. App. 84, 137 S.E.2d 705 (1964).
27 *Lewis v. Chatham Co. Savannah Metropolitan Planning Comm'n*, 217 Ga. App. 534, 458 S.E.2d 173 (1995).
28 *Id.* at 534-35.
29 *Id.* at 658.

When an employee works from home, a deviation may present itself at any moment. Because the employee is left to his or her own devices, there is really no way for the employer to control small deviations throughout the course of the day. An employee might go outside to get the mail, answer the door for a package delivery or go outside with the dog at any point during the day (and while on the clock). Should an accident occur, the central questions will be: (1) what was the employee doing at the time of the accident; (2) was it a deviation from employment; and (3) had the deviation concluded at the time of the injury? If the deviation ended and the employee resumed the business of the employer, the injury would be compensable. Again, the problem will be proving what happened and when it happened.

BEST PRACTICES

With all of the perils inherent in the work-from-home arrangement, what is a conscientious employer to do? There are several steps employers can take to minimize the likelihood of questionable claims and make it easier to quickly identify and handle compensable claims. First, the employer should provide all office equipment to the employee rather than having them use a personal computer. This will allow the employer to have full control over, and the ability to monitor the employee's work-related equipment. There are even software programs that can track all activities performed on a work computer to ensure personal activities are not being conducted on the employer's computer. After an injury has been reported, this would also allow the employer to determine exactly what the employee was doing in the time surrounding the occurrence of the alleged accident. Supplying job specific equipment also eliminates potential ethical issues associated with installing monitoring software on employee-owned equipment.

It is advisable to require employees to designate an area in their home (ideally a home office) to serve as their work space. Having a specific part of the home set aside for work activities can help to cut down on questions concerning accidents that occur in other parts of the house. For example, if the employee is injured in the back yard, but has a designated home office, you can be fairly certain that a deviation was in progress. If possible, schedule a site inspection before the employee starts working from home. Again, dictating to an employee the bounds and regulations of their personal space can create some potential ethical concerns, but the employer is entitled to take reasonable measures to ensure an employee is working in a relatively safe environment.

Make sure every employee has a written job description specifically listing their job duties. If an employee works from home, his or her job description should list the hours to be worked, the location of the work and consent to remotely monitor all computer activity. In addition, there should be specific times listed for all rest and lunch breaks. All remote employees should be required to log in and out so there is a clear demarcation between work time and personal time. While it is not possible to account for all of an employee's time during any given day, whether he or she works from home or in an office, these measures will help to create a boundary between an employee's home and home office.

CONCLUSION

Employers and insurers have many of the same investigative challenges when determining compensability regardless of whether the employee works in the office or from home, but those challenges can become more acute when all there is to go on is the employee's account of what happened. This should not discourage employers from permitting employees to work from home as telecommuting has been shown to have numerous advantages for both employers and employees. However, extra measures need to be put in place so when work accidents occur in an employee's home, they can be dealt with swiftly and appropriately.

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John F. Sacha handles general litigation matters, including workers' compensation and probate. He is a member of the Atlanta and State Bar Associations of Georgia as well as the Defense Research Institute.

A frequent lecturer, Mr. Sacha has spoken before the Southeastern Safety and Health Conference, the Workers' Compensation Claims Management Programs sponsored by the Georgia Tech Research Institute, the Employer's Liability Law Committee, the American Bar Association and other employer-oriented groups. In addition, Mr. Sacha has spoken at local and regional Chambers of Commerce. Mr. Sacha served as managing partner from 1996 through 2009.

Long active in civic affairs, Mr. Sacha has served as President and Director of the Center for Puppetry Arts, the Board of Directors for the Georgia Citizens for the Arts and the Board of Directors of Ansley Golf Club. He has also served on the Board of Directors for Peachtree Presbyterian Preschool. He currently chairs the Duke University Greek Alumni Advisory Council and is a member of the Duke University Alumni Admissions Advisory Committee in Atlanta. Since 2004, Mr. Sacha has been named a Georgia Super Lawyer by *Atlanta Magazine*. Additionally in 2008 and 2009, the "Power Book," published in the *Atlanta Business Chronicle's* 30th anniversary issue, named Mr. Sacha as a leader in the law industry. He has been selected as a *Best Lawyer in America* since 2011.

Mr. Sacha completed his undergraduate work at Duke University and earned his law degree from the University of Virginia School of Law. He is a member of Beta Omega Sigma and Omicron Delta Kappa Leadership Societies and Phi Alpha Delta.

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Robert R. Potter primarily handles workers' compensation and legislative and regulatory representation.

He is co-author of the *Georgia Workers' Compensation Law and Practice*, currently in its fifth edition and supplemented annually. He has authored and co-authored numerous Law Review articles and has appeared frequently as a speaker both on workers' compensation and legislative topics. Mr. Potter has served as chairman of the Workers' Compensation Section of the State Bar of Georgia and is a member of the Defense Research Institute. He has been named a Georgia Super Lawyer since 2004 by *Atlanta Magazine* and has also been listed in *The Best Lawyers in America* since 1999. In 2007 he was presented the inaugural Tom S. Howell Memorial Award of Excellence. In 2008, Mr. Potter was presented the Distinguished Service Award by the Workers' Compensation Section of the State Bar of Georgia. In 2012, he was inducted in as a fellow in The College of Workers' Compensation Lawyers.

A 1970 graduate of Mercer University, Mr. Potter served as an officer in the Navy before returning to Mercer to earn his J.D., *magna cum laude*, in 1977. While in law school, he was Editor-in-Chief of the *Mercer Law Review*.

Douglas A. Bennett
Partner

Douglas A. Bennett handles general civil litigation including workers' compensation, automobile litigation, products liability, premises liability and trucking litigation. Mr. Bennett is a member of the Atlanta and American Bar Associations, as well as the State Bar of Georgia. He also is a member of the Defense Research Institute and the Georgia Self Insurers Association. A frequent speaker in various practice areas, Mr. Bennett has lectured and chaired seminars for the Atlanta Bar Association and the Institute of Continuing Legal Education. He is a past member of the Executive Committee of the Workers' Compensation Section of the State Bar of Georgia and served as Chairman of the Section from June 2003 to June 2004. Mr. Bennett received a Bachelor of Business Administration from the University of Georgia in 1976. He also received his law degree from the University of Georgia, *cum laude*, in 1980, and served on the staff of the *Georgia Law Review*. In 2006, Mr. Bennett received a Bachelor of Arts from Georgia State University focusing on Literature. Additionally, Mr. Bennett was selected as a Best Lawyer in America since 1995.

Mark J. Goodman
Partner

Mark J. Goodman, since joining the firm in 1984, has specialized in both workers' compensation and liability defense matters. He also has experience in personal injury law, subrogation and other litigation areas.

Mr. Goodman is a member of the Workers' Compensation Section of the State Bar of Georgia, the Defense Research Institute, the Atlanta Bar Association and the Georgia Self Insurers Association. He has been a member of Public Education Committee of State Board of Workers' Compensation Chairman's Advisory Council from 2010-present. He is the co-author of a number of "Workers' Compensation Surveys," which are published annually in the *Mercer Law Review*, and has lectured at numerous workers' compensation seminars on a variety of topics.

Mr. Goodman has chaired several seminars sponsored by the Institute for Continuing Legal Education, the Georgia State Bar Association, the National Business Institute and other organizations, as well as participated in a statewide series of seminars for businesses sponsored by the Georgia Chamber of Commerce. He has also spoken at various seminars sponsored by the State Board of Workers' Compensation on numerous topics.

Mr. Goodman graduated with an A.B. degree, *cum laude*, from Georgetown University in 1981, where he was a member of Phi Beta Kappa. He earned his law degree from Duke University in 1984.

Joseph A. Munger
Partner

Joseph A. Munger has practiced workers' compensation law, employment law, personal injury law, insurance defense litigation and premises liability law since joining Swift, Currie, McGhee & Hiers in 1985. He has been a partner in the firm since 1992, and has served on the management committee. Mr. Munger is a member of the Atlanta, Colorado and American Bar Associations and the State Bar of Georgia. He is also a member of the Employment Law Section of the Defense Research Institute, belongs to the Workers' Compensation Sections of the State and Atlanta Bars, and is a member of the Georgia Self Insurers Association. He frequently lectures on employment topics that include discrimination and disability matters, drug-free workplace and workers' compensation. He has published articles on many employment-related topics including the American with Disabilities Act and its interplay with workers' compensation concerns. His practice covers the entire state of Georgia.

He graduated with honors from Michigan State University in 1980, and received his law degree in 1983, from the University of Colorado School of Law. He served as a law clerk in the U.S. Bankruptcy Court for the District of Colorado in 1984.

R. Briggs Peery
Partner

R. Briggs Peery practices both workers' compensation and general liability litigation defending insurance carriers and self-insureds. He is a member of the Atlanta and American Bar Associations and the State Bars of Georgia and Virginia. Mr. Peery has served as the Legal Committee Chairman for the Georgia State Board of Workers' Compensation Steering Committee. He has spoken on workers' compensation topics at multiple Claims and State Bar seminars as well as Georgia Chamber of Commerce, municipal, employer and self-insured functions. Mr. Peery is also a Georgia Representative for the Steering Committee of the Florida Workers' Compensation Institute and a member of the Legal Committee for the Georgia State Board of Workers' Compensation's annual seminar. Mr. Peery received his law degree from the Walter F. George School of Law at Mercer University in 1986. While at Mercer, he was a member of the Moot Court Board, National Moot Court Competition and the National ABA/LSD Moot Court Competition Team.

Mr. Peery graduated with a B.A. degree from Hampden-Sydney College in 1983. He also was a member of the Phi Alpha Theta, Phi Sigma Iota and Phi Delta Phi honor societies.

Richard H. Sapp, III

Partner

Richard H. Sapp, III, practices in the workers' compensation defense section of the firm. Mr. Sapp was admitted to practice in Georgia in 1987 and has concentrated his area of practice in workers' compensation defense and liability defense on behalf of employers and insurers. Mr. Sapp received his law degree, with honors, from the Walter F. George School of Law at Mercer University in Macon, Georgia, where he served for two years on the *Mercer Law Review*. Mr. Sapp is a member of the State Bar of Georgia. He is a former member of the Workers' Compensation Advisory Council, and was appointed to the council in 1992 by then Chairman, Honorable James Oxendine.

Mr. Sapp earned his A.A. degree from the Oxford College of Emory University in 1982, where he was a member of the Varsity Tennis Team. He earned his B.A. degree from Emory University in 1984.

Michael Ryder

Partner

Michael Ryder practices in the workers' compensation defense section of the firm. Mr. Ryder is admitted to practice in Georgia and Florida. Since 1988 he has concentrated his area of practice in workers' compensation defense and employment law issues on behalf of employers and insurers. Mr. Ryder was appointed and served on the Governor's Workers' Compensation Commission. He is a past member of the Board of Directors for the Atlanta Bar Association's Workers' Compensation Section and the Board of Governors for the Florida Bar Young Lawyers' Division. Mr. Ryder served as Editor of the State Bar of Georgia's Workers' Compensation Section Newsletter and has served on numerous State Bar of Georgia committees. Mr. Ryder is the founding director of the Atlanta Bar Association Workers' Compensation Section's annual "Kids' Chance Run," a charitable fundraiser that has been held annually since 1991. Mr. Ryder frequently lecturers on workers' compensation defense strategies to employers and insurers around the country and is a speaker on Georgia Workers' Compensation law at the annual Florida Workers' Compensation Law Institute Educational Conference.

Mr. Ryder earned his undergraduate degree and his law degree from the University of Florida, where he was a member of Florida Blue Key, Omicron Delta Kappa and Phi Delta Phi.

Debra D. Chambers

Partner

Debra D. Chambers practices in the workers' compensation and litigation sections. Prior to joining the firm, Ms. Chambers practiced in the area of insurance defense litigation, employment discrimination and workers' compensation with another Atlanta law firm for three years.

Ms. Chambers is a member of the Workers' Compensation Section of the State Bar of Georgia, as well as the Employment Law Section. She has been a speaker at the Annual Workers' Compensation Seminar hosted by the State Board of Workers Compensation, as well as through other venues. She is a member of DRI and the Georgia Defense Lawyers Association. Ms. Chambers has represented both self-insured employers, as well as insurance companies in the defense of workers' compensation cases, and has appeared before all the judges sitting at the State Board of Workers' Compensation. She has utilized defenses based upon the affirmative defenses found in O.C.G.A. § 34-9-17, as well as the standard defenses. She has successfully conducted numerous mediations, both at the State Board and with private mediators, for the benefit of her clients.

Prior to, and while attending law school, Ms. Chambers worked for nine years as a Sales Finance Administrator and a Contracts Representative for Hewlett Packard Company. With her business background she has an excellent understanding from the Employer's perspective on the need to keep costs/expenses down, while achieving a positive result.

Ms. Chambers graduated from California State University in 1983 with a B.S. in Finance, and received her J.D. degree from the Georgia State University College of Law, *cum laude*, in 1992. While in law school, Ms. Chambers served as the Assistant Managing Editor of the *Law Review*, was a student member of the Bleckley Chapter of the American Inns of Court and in the Outer Barrister's Guild. She received the American Jurisprudence Awards in Civil Procedure I and Torts.

Richard A. Watts

Partner

Richard "Rusty" A. Watts practices in the workers' compensation section of the firm. Mr. Watts was admitted to practice in Georgia in 1992 and has concentrated his area of practice in workers' compensation defense and liability defense. Mr. Watts received his law degree from the Walter F. George School of Law at Mercer University where he served as Chairman of the Moot Court Board and received the Most Outstanding Oralist Award at the 1991 Florida Workers' Compensation Moot Court Competition. Mr. Watts is a member of the State Bar of Georgia Workers' Compensation Section. He also serves as a part-time professor at the Georgia State University Law School and School of Risk Management and Insurance, as well as Mercer University's Stetson School of Business.

Mr. Watts earned his B.A. degree from the University of Florida in 1989, where he was inducted into the Florida Blue Key Leadership Honorary and served as President of the University's nationally ranked debate team.

Lisa A. Wade

Partner

Lisa A. Wade joined Swift, Currie, McGhee & Hiers, LLP, as a partner in 2000. She is responsible for a practice that consists of the defense of workers' compensation claims and general insurance defense litigation.

Ms. Wade has worked on cases involving premises liability, automobile accidents and uninsured motorist defense litigation, product liability, coverage issues, slips and falls and property damage cases. In the area of workers' compensation, Ms. Wade represents companies that are both self-insured and commercially insured and has defended claims of all types. In her capacity as approved counsel by the Atlanta Board of Education, she responded to various employment practice issues as well as defended several of the Board's workers' compensation claims. She is currently lead defense counsel for the City of Atlanta's workers' compensation matters. Ms. Wade is a member of the American, Gate City and Atlanta Bar Associations, the State Bar of Georgia, the Georgia Association of Black Women Attorneys, the Atlanta Claims Association and the Georgia Defense Lawyers Association. She is currently the state liaison for the Defense Research Institute's Workers' Compensation Committee and is also thechairman of the outreach subcommittee of the Diversity Committee. In the State Bar of Georgia, Ms. Wade is a member of the Workers' Compensation Section and the Litigation Section. She served as chairperson of the Board of Zoning Adjustment for the City of Atlanta from 1996-1998, and was a member of the Board since 1992. She is a past Chairperson of the Workers' Compensation Section of the State Bar of Georgia. She also served to five terms on the Fee Arbitration Committee of the State Bar of Georgia, and was a member of Leadership Atlanta's Class of 2002. Ms. Wade has served as the legal advisor to the Atlanta Board of Education's Civil Service Commission and has served as a hearing officer for cases involving the termination of certificated employees. In 2005 and 2006, Ms. Wade was named a Georgia Super Lawyer Rising Star by *Atlanta Magazine*. Additionally, she has been named in *Who's Who in Black Atlanta* since 2005.

Ms. Wade received her undergraduate degree in 1988, from Brown University in Providence, Rhode Island, and her law degree in 1991, from the University of Georgia School of Law.

Douglas W. Brown, Jr.

Partner

Douglas W. Brown, Jr., joined Swift, Currie, McGhee & Hiers, LLP, in 1996. He was admitted to practice in Georgia in 1992 and is also licensed in Tennessee. Mr. Brown has concentrated his practice in workers' compensation defense, liability defense and employment law. Mr. Brown received his B.A. degree from Vanderbilt University in 1988, and graduated from the Walter F. George School of Law at Mercer University in 1992. Currently, he is a member of the State Bars of Georgia and Tennessee, as well as a member of the State Bar of Georgia's Workers' Compensation Section.

Mr. Brown is a frequent speaker on a variety of topics, including defending workers' compensation claims, the overlap of workers' compensation with ADA, FMLA, and employment discrimination suits, drugs and alcohol in the work place and subrogation. Specifically, he has spoken at the annual seminar presented by the State Board of Workers' Compensation and the State Bar of Georgia's Workers' Compensation annual seminar.

Timothy C. Lemke

Partner

Timothy Clark Lemke practices in the workers' compensation and litigation sections of the firm. He became a partner at Swift, Currie, McGhee & Hiers on January 1, 2002. Mr. Lemke graduated from the University of North Carolina at Chapel Hill in 1990. In 1995, he graduated *cum laude* from the University of Georgia School of Law, where he was a member of the Intrastate Moot Court team, the Moot Court Board and the Managing Board of the *Journal of Intellectual Property*. Mr. Lemke was also selected as a member of the Joseph Lumpkin American Inn of Court.

Cristine K. Huffine
Partner

Cristine K. Huffine practices primarily in the workers' compensation section of the firm. Prior to joining the firm, Ms. Huffine practiced workers' compensation law (both in Georgia and Pennsylvania), employment law and general insurance defense. Ms. Huffine graduated, *cum laude*, from Pennsylvania State University with a B.S. in 1992, and the Dickinson School of Law with her J.D. in 1996. While at law school, Ms. Huffine participated on the Trial Moot Court Board for two years and received the Excellence for the Future Award based upon her academic credentials.

Ms. Huffine is a member of several professional organizations, including the Defense Research Institute, the State Bar of Georgia and the Pennsylvania State Bar. She is a Board Member with the Atlanta Claims Association, serving as the Chair of the Legislative Committee. Her community involvement includes service with the Family and Children Services of Cobb County.

While practicing in Pennsylvania, she participated in a precedent-setting products liability case. Her previous experience also included clerking with The Honorable Sheryl Ann Dorney for the Court of Common Pleas, 19th Judicial District in York, Pennsylvania, and interning at the Pennsylvania Attorney General's Office in the Tort Litigation Section.

In Georgia, Ms. Huffine has successfully defended numerous medically intensive workers' compensation claims, including occupational disease cases and catastrophic claims.

James D. Johnson
Partner

James D. Johnson joined Swift, Currie, McGhee & Hiers, LLP, in 1998 and became a partner in 2006. His practice has included a broad variety of litigation with focuses on automobile litigation, premises liability, business litigation, subrogation, workers' compensation and nursing home litigation. Mr. Johnson graduated from Georgia State University College of Law in 1998. He was a member of the Georgia State University Law Review which published his article on the Americans with Disabilities Act. Mr. Johnson received a B.A. from Auburn University in Auburn, Alabama, in 1990. He also received a Master of Science degree in Vocational Rehabilitation Services from Auburn University in 1992.

Mr. Johnson is admitted to practice in the Northern and Middle Federal District Courts as well as all State trial and appellate courts in Georgia. He is a member of the Workers' Compensation and Insurance Defense sections of the State Bar of Georgia and the Medical Liability and Health Care Law section of the Defense Research Institute and is a member of the Cobb County Chamber of Commerce Chairman's Club.

Prior to law school, Mr. Johnson worked for several years as a vocational rehabilitation consultant in Atlanta, Georgia. He worked with employers, attorneys and insurance carriers providing case management services and expert testimony on workers' compensation and Social Security disability files.

Cabell D. Townsend

Partner

Cabell D. Townsend practices in the workers' compensation section of the firm. He has obtained extensive experience handling workers' compensation defense and subrogation matters on behalf of employers, insurers and third-party administrators. Mr. Townsend obtained his J.D. degree from the Walter F. George School of Law at Mercer University in 1998. He was admitted to practice in Georgia in 1998. Mr. Townsend received a B.A. degree from the University of North Carolina at Chapel Hill in 1991. He is a member of the Atlanta Bar Association, the Lawyer's Club of Atlanta and the State Bar of Georgia. Mr. Townsend has presented numerous legal seminars to both employers and insurers throughout the Southeast.

Todd A. Brooks

Partner

Todd A. Brooks practices primarily in the areas of workers' compensation and insurance defense. Prior to private practice, Mr. Brooks was a prosecutor in Athens-Clarke County, Georgia.

Mr. Brooks has joined James B. Hiers, Jr., and Robert R. Potter in the writing and supplementing of *Georgia Workers' Compensation Law and Practice,* currently in its fifth edition and supplemented annually. He regularly speaks on various issues related to workers' compensation. He is a member of the State Bar of Georgia, Workers' Compensation Section, and is also licensed in Tennessee. He received a B.A. from the University of Tennessee and a J.D. from Syracuse University College of Law. While in law school, Mr. Brooks was a member of the ATLA National Trial Team.

Charles E. Harris, IV

Partner

Chad E. Harris concentrates his practice in the area of workers' compensation defense, representing employers and insurers throughout Georgia.

Mr. Harris has written and presented on a wide variety of topics, ranging from Medicare Set Asides, light duty return to work issues, statutory compliance and financial considerations for employers and insurers. Mr. Harris frequently presents to employers and insurers throughout the Southeast on workers' compensation defense strategies and has served as editor of the firm's quarterly publication, *The First Report*, which focuses on providing employers and insurers with updates and recommendations on workers' compensation issues. Mr. Harris received his J.D. from The University of Georgia School of Law. Mr. Harris served as a Notes Editor for the *Georgia Journal of International and Comparative Law*. Mr. Harris received his undergraduate degree from Furman University. As an undergraduate, he was a letterman on the Varsity Tennis Team.

Prior to joining Swift Currie, Mr. Harris practiced in the area of workers' compensation with another Atlanta law firm. He is admitted to practice in the State of Georgia. He is member of the State Bar of Georgia, Workers' Compensation Section and the Atlanta Bar Association.

Michael Rosetti

Partner

Michael Rosetti represents insurers and self-insured companies in workers' compensation related matters throughout Georgia. He also handles general liability, insurance coverage and Longshore matters.

Mr. Rosetti has held several leadership positions in the legal community. He serves on the Board of Directors of the Atlanta Bar Association — Workers' Compensation Section, is a member of the Legal Steering Committee of the Georgia State Board of Workers' Compensation, is a Fellow of the Lawyers Foundation of Georgia and chairs the committee organizing the Kids' Chance of Georgia Dinner and Silent Auction. Mr. Rosetti is a frequent speaker on workers' compensation law and related topics including Medicare set asides, workplace safety and ethics/professionalism. He has spoken at the request of the Institute for Continuing Legal Education, the National Business Institute, The American Society of Safety Engineers, the Professional Rehabilitation Specialists of Georgia, Lorman Educational Services, as well as local chambers of commerce, employer groups and at client meetings. He is a past co-chair of the Institute of Continuing Legal Education in Georgia — Workers' Compensation Law Institute and has authored numerous papers on workers' compensation-related topics.

In 2009 and 2010, Mr. Rosetti was honored on the Georgia Rising Stars list, and from 2011-2014 was selected as a Georgia Super Lawyer.

David L. Black

Partner

David L. Black practices in civil litigation and insurance defense with a focus on workers' compensation, general liability and subrogation. He has unique experience in the transportation and manufacturing industries.

Mr. Black graduated from Brigham Young University with a Bachelor of Arts in Political Science in 1989. He obtained a Masters in Education from the University of Georgia in 1993 and his Juris Doctor from the University of Oklahoma in 1996, where he was the recipient of the Walter F. Fagin merit scholarship. Mr. Black was admitted to the Oklahoma Bar to practice as a legal intern during his third year of law school at which time he successfully tried his first case under the supervision of his mentoring attorney. Mr. Black was admitted to the Georgia Bar in 1997 and is admitted to all state and federal courts in Georgia.

K. Martine Cumbermack

Partner

K. Martine Cumbermack practices primarily in the area of workers' compensation defense. Ms. Cumbermack has significant experience representing insurance companies, self-insureds and employers in workers' compensation cases in both Florida and Georgia, including representing insurers in fee schedule/medical bill disputes. Her experience includes serving as in-house counsel for a major national insurance company.

Ms. Cumbermack regularly writes and presents on a wide variety of topics, ranging from workers' compensation employer defense strategies, light duty return to work issues, and employer compliance with statutory rules. She served as an Adjunct Professor at the college and law school levels on subjects including workers' compensation and civil procedure. Ms. Cumbermack serves as co-chair of the firm's Diversity Committee, and has also served as co-editor of the firm's quarterly publicaiton, The First Report, and on the firm's Technology, Hiring and Community Relations Committees. Prior to joining the firm, Ms. Cumbermack practiced workers' compensation defense in Florida. She has also enjoyed working as an Assistant Public Defender and a court appointed Guardian Ad Litem.

Ms. Cumbermack received her undergraduate degree and law degree from the University of Florida where she was a member and Vice President of Sigma Gamma Rho Sorority, Inc., Chairperson of the Black Law Students Association Alumni Committee and was a Center for Governmental Responsibility Law Fellow. She was admitted to the Florida Bar in 1997 and the State Bar of Georgia in 2006.

Ann M. Joiner

Partner

Ann M. Joiner practices primarily in the area of workers' compensation defense. Ms. Joiner has significant experience representing employers, self-insureds and third party administrators in numerous workers' compensation claims throughout the state of Georgia. She frequently presents to employers and insurers on workers' compensation defense strategies, light duty return to work issues and employer compliance with statutory rules.

Prior to joining Swift Currie in 2009, her practice focused on workers' compensation defense at another Atlanta law firm.

R. Alex Ficker

Partner

Alex Ficker concentrates his practice in the area of workers' compensation defense. Mr. Ficker has significant experience representing employers, insurers, self-insureds and third party administrators before the State Board of Workers' Compensation and all of the appellate courts in Georgia. He frequently writes and presents on a variety of workers' compensation issues including defense strategies, light duty return to work issues and employer compliance with statutory rules. Mr. Ficker received his law degree from Georgia State University College of Law (J.D., 2004) and his undergraduate degree in philosophy (B.A., 1998) from the University of Pennsylvania.

Elizabeth L. Gates

Senior Attorney

Elizabeth L. Gates practices primarily in the workers' compensation section of the firm. Ms. Gates received her J.D., *cum laude,* from the University of Georgia School of Law in 2005. While in law school, Ms. Gates served on the Editorial Board and as a Notes Editor for the *Journal of Intellectual Property Law*. Ms. Gates graduated, *magna cum laude*, from the University of Georgia in 2002, with a B.A. in Political Science. As an undergraduate, Ms. Gates was inducted into both Phi Beta Kappa and Phi Kappa Phi Academic Honor Societies.

Ms. Gates is a member of the State Bar of Georgia. Ms. Gates was named a Georgia Super Lawyer Rising Star by *Atlanta Magazine* in 2013 and 2014.

Douglas E. Cobb
Senior Attorney

Douglas E. "Doug" Cobb represents employers and insurers in workers' compensation claims. Mr. Cobb is a former Administrative Law Judge with the State Board of Workers' Compensation and has more than 24 years of experience in workers' compensation.

Mr. Cobb graduated from the Georgia Institute of Technology in 1975 with a Bachelor of Science degree in Industrial Management. In 1978, he obtained his Juris Doctor from Cumberland School of Law at Samford University. Admitted to all state and federal courts in Georgia, Mr. Cobb remains accessible to his clients, and provides seasoned advice on workers' compensation matters.

Jon W. Spencer
Senior Attorney

Jon W. Spencer practices primarily in the firm's workers' compensation defense section. Before joining the firm, Mr. Spencer practiced insurance and workers' compensation defense in Missouri and Illinois. Mr. Spencer is licensed in the states of Georgia and Missouri as well as admitted to practice before the 8th Circuit Court of Appeal and the Eastern and Western Districts of the U.S. District Courts for the state of Missouri.

Mr. Spencer received his J.D. from the University of Missouri in 1994 and his B.S. in Accounting from the University of Missouri in 1991.

Jennifer L. LaFountaine
Senior Attorney

Jennifer L. LaFountaine practices primarily in the area of workers' compensation defense. Prior to returning to the firm, Ms. LaFountaine worked as a staff attorney in the Appellate Division with the State Board of Workers' Compensation and also served as a mediator. Previously, during her career in Georgia, Ms. LaFountaine also practiced workers' compensation defense at another Atlanta area law firm. Before that, she practiced workers' compensation defense in Florida as well as previously served as an Assistant State Attorney in Florida.

Ms. LaFountaine received her undergraduate degree in Psychology from the University of Georgia and J.D. from Loyola University School of Law in New Orleans. She was admitted to the Florida Bar in 2003, and the State Bar of Georgia in 2003.

Ms. LaFountaine is a member of the State Bar of Georgia Workers' Compensation Section and Young Lawyers' Division.

Ken M. Brock

Senior Attorney

Kenneth "Ken" M. Brock concentrates his practice in the area of workers' compensation defense, representing employers, insurers, self-insurers and third party administrators in numerous workers' compensation claims throughout the state of Georgia. Prior to joining the firm, Mr. Brock worked as Senior Staff Counsel with the CNA companies representing employers in workers' compensation matters.

Mr. Brock received his undergraduate degree in Economics from the University of Georgia in 1989, and a J.D. from the Walter F. George School of Law at Mercer University in 1992. While at Mercer, he served as a member of the *Law Review*. He is admitted to practice law in Georgia (1992) and Virginia (2015). Currently, he is a member of the State Bar of Georgia Workers' Compensation section.

Crystal Stevens McElrath

Associate

Crystal Stevens McElrath focuses her practice in the area of workers' compensation defense. Ms. McElrath represents employers, insurers, self-insureds and third party administrators in workers' compensation, subrogation and employment law matters across Georgia. She frequently enjoys writing and presenting on a variety of topics related to workers' compensation defense strategies.

Ms. McElrath received her law degree from Emory University School of Law (2010) and her Master of Theological Studies from Emory University (2010). While in law school, she served as a summer clerk for the Honorable Stanley Birch, Jr., on the Eleventh Circuit Court of Appeals as well as the Honorable William Duffey on the District Court for the Northern District of Georgia. Ms. McElrath received her B.A. from the University of Virginia (2006).

Ms. McElrath is a member of the Georgia Association of Black Women Attorneys. She previously served as the National Director of Community Service on the Board of Directors for the National Black Law Students Association from 2008-2009.

C. Blake Staten
Associate

Blake Staten practices primarily in the area of workers' compensation defense.

Mr. Staten earned his J.D., *cum laude*, from Georgia State University College of Law in 2010. While in law school, he competed nationally as a member of the Student Trial Lawyers Association and was awarded second place honors at the 2008 National Trial Advocacy Competition. Prior to law school, Mr. Staten attended the University of Georgia, where he graduated *magna cum laude* in 2006 with a B.A. in Political Science and a minor in Psychology. As an undergraduate, he was inducted into the National Society of Collegiate Scholars.

Mr. Staten has been a member of the State Bar of Georgia since 2010.

Katherine S. Jensen
Associate

Katherine S. Jensen represents insurers, self-insured employers and third-party administrators in defending workers' compensation matters throughout the State of Georgia. Ms. Jensen has defended numerous claims on behalf of staffing agencies, retailers, hotels, restaurants, manufacturers, nursing facilities, transportation companies and construction companies. She also handles subrogation litigation against third party tortfeasors in state and superior court. She has significant experience handling all aspects of litigated and non-litigated cases, including cases at the appellate level.

Ms. Jensen graduated *cum laude* from the University of Georgia School of Law. While attending law school, she served as a Judicial Clerk in DeKalb County Superior Court. In addition, Ms. Jensen served as a Notes Editor for the *Journal of Intellectual Property Law*. Prior to joining the firm in 2011, Ms. Jensen worked as an Assistant District Attorney under the Georgia Third-Year Practice Act in the DeKalb County Superior Court. She is admitted to practice before all Georgia State and Superior Courts, the Georgia Court of Appeals and the Georgia Supreme Court. Ms. Jensen is a member of the State Bar of Georgia and the Atlanta Bar Association.

Jeremy R. Davis
Associate

Mr. Davis has defended employers, insurers and third-party administrators in workers' compensation claims since 2003. He has also handled appeals at every level, from the Appellate Division of the State Board of Workers' Compensation to the Supreme Court of Georgia. He has given multiple presentations and written extensively on a variety of issues affecting workers' compensation claims, including fictional new injuries, the exclusive remedy provision and Medicare Set-Asides. In addition to defending workers' compensation claims, Mr. Davis also handles federal and state subrogation claims, as well as coverage disputes between insurers. He graduated *cum laude* from the Georgia State University College of Law in 2003, and he is a member of the Workers' Compensation Section of the State Bar of Georgia and the State Bar of Florida.

Emily J. Hyndman
Associate

Emily J. Hyndman practices primarily in the area of workers' compensation law. Ms. Hyndman represents insurance companies, self-insureds, employers and servicing agents in workers' compensation claims throughout Georgia. She has experience representing employers in a variety of industries including nursing home, manufacturing, construction, retail and hospitality, and staffing and professional employer organizations.

Ms. Hyndman received her J.D., *magna cum laude*, from Georgia State University in 2013. While at Georgia State College of Law, Ms. Hyndman served as an associate editor for the *Georgia State Law Review*. Ms. Hyndman also served as an Academic Enrichment Tutor for first-year property students.

Prior to law school, Ms. Hyndman graduated from Kennesaw State University, *magna cum laude*, with a B.S. in Political Science.

Joanna S. Jang
Associate

Joanna Jang practices primarily in the area of workers' compensation defense. Prior to joining Swift Currie, Ms. Jang practiced workers' compensation defense and federal and state subrogation with another Atlanta defense firm. Ms. Jang also has extended experience handling federal and state business and commercial litigation cases.

Ms. Jang received her B.A. at Emory University in 2004. She received her J.D. in 2009 from Emory University School of Law.

Natalie E. Rogers
Associate

Natalie Rogers practices primarily in the area of workers' compensation defense. Ms. Rogers has significant experience representing employers, insurers, self-insurers and third party administrators in workers' compensation claims throughout Georgia. She has written on a variety of topics related to employer claim management, the compensability of various types of injury, and light duty return to work issues. Ms. Rogers represents employers in a range of industries including big-box retailers, industrial manufacturers, staffing and professional employer organizations, freight and transportation companies, and liquor and food distributors, to name just a few.

Ms. Rogers, a dual Canadian-American citizen, graduated with distinction from Queen's University in Kingston, Ontario, with a Bachelor of Arts (Honors) in Psychology. She then returned to Georgia where she attended Georgia State University College of Law, graduating *magna cum laude*. While in law school, Ms. Rogers served as an Associate Student Writing Editor for the *Georgia State Law Review*.

Monica S. Goudy
Associate

Monica Goudy concentrates her practice in the area of workers' compensation defense. Ms. Goudy regularly represents employers, insurers, self-insurers and third party administrators in workers' compensation claims throughout Georgia. Prior to joining Swift Currie, she worked as a claimant's attorney in Atlanta and as an associate for another Atlanta law firm specializing in environmental litigation. Most recently spent the last four years living in Northern Italy.

Ms. Goudy received her J.D. from the University of Georgia School of Law. While in law school, she served as a law clerk for the Honorable Steve C. Jones, then a Georgia Superior Court Judge for the Western Judicial Circuit. Ms. Goudy received her B.A., *magna cum laude*, from Wake Forest University in 1995 in English and Speech Communications. Prior to attending law school, Ms. Goudy taught high school and college level English and literature in the Czech Republic.

Robert W. Smith

Associate

Robert Smith practices primarily in the area of workers' compensation defense. He provides his clients with an aggressive defense to their interests while also balancing the practical aspects of cost-effective representation and resolutions that are mindful of the bottom line. Prior to joining the firm in 2015, Mr. Smith worked for three years representing insurers, self-insureds, employers and third-party administrators for a defense firm in Atlanta.

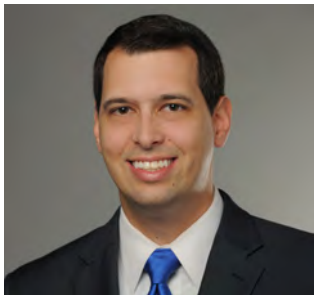
Mr. Smith received his B.S. in Political Science from Georgia College & State University in 2005 and his M.P.A. from Georgia College & State University in 2007. He earned his J.D., *cum laude*, from Mercer University Walter F. George School of Law in 2010. While in law school, he served on the *Mercer University Law Review*.

Andrew M. O'Connell

Associate

Andrew M. O'Connell concentrates his practice in the area of workers' compensation defense. Mr. O'Connell regularly represents employers, insurers, self-insureds and servicing agents in workers' compensation claims in Georgia. He represents employers in a variety of industries including construction, manufacturing, staffing, retail and hospitality, pest control, landscaping and plumbing. Prior to joining Swift Currie in 2015, he practiced workers' compensation insurance defense at another Atlanta law firm.

Mr. O'Connell received his B.A. in History and Political Science, *magna cum laude*, from the University of Georgia where he was a member of the Honors Program and Phi Beta Kappa honor society. Mr. O'Connell received his J.D., *cum laude*, from the University of Georgia School of Law. During law school he served as a Note Editor for the *Georgia Journal of International and Comparative Law*.



Damien C. Rees

Associate

Damien Rees focuses on efficiently and aggressively defending employers and insurers with strategies to bring about swift and favorable outcomes. Prior to joining Swift Currie, Mr. Rees honed his skills by exclusively practicing workers' compensation with another Atlanta area defense firm.

Mr. Rees earned his B.A., *cum laude*, in Political Science from Georgia College & State University where he was also a member of the Pi Sigma Alpha and Gamma Beta Phi honor societies. He earned his J.D., *cum laude with highest pro bono distinctions*, from Georgia State College of Law. In addition, while at Georgia State, Mr. Rees competed in the William Daniel Mock Trial Competition, received honors in Litigation, and was the recipient of the Ginny and Kelly Tax Clinic Fellowship and Paul D. Coverdell Services Award.

David E. Rhodes

Associate

Dave Rhodes practices in the workers' compensation section of the firm. He was admitted to practice in Georgia in 2012 and has concentrated his area of practice in workers' compensation defense and liability defense. Mr. Rhodes received his law degree from Georgia State University College of Law where he participated in the school's Health Law Partnership Clinic and was an active member of the Student Health Law Association's Moot Court team.

Mr. Rhodes earned his B.A. degree from the University of Georgia in 2001. Upon graduation, he was commissioned as an infantry officer in the United States Army, twice deploying in support of Operation Iraqi Freedom. Following law school, Mr. Rhodes received a direct commission from the Tennessee National Guard and currently serves part-time as trial counsel for the 230th Sustainment Brigade.

Dustin S. Thompson

Associate

Dustin S. Thompson practices almost exclusively in the area of insurance defense litigation. Mr. Thompson's practice is devoted to the representation of employers, insurers, self-insured companies, and servicing agents in workers' compensation claims throughout Georgia. He has experience representing employers in a variety of industries, including trucking, manufacturing, construction, retail and hospitality, and staffing and professional employer organizations.

Mr. Thompson received his J.D. from Georgia State University in 2014. While attending Georgia State University College of Law, Mr. Thompson was a member of the Student Trial Lawyers Association and competed in mock trials across the country. During law school, Mr. Thompson also gained valuable experience working as a law clerk for Georgia Court of Appeals Judge Michael P. Boggs and as an extern for the Judiciary Committees of the Georgia House of Representatives.

Prior to law school, Mr. Thompson graduated from Georgia Southern University, cum laude, with a B.A. in Political Science. Mr. Thompson joined Swift, Currie, McGhee & Hiers, LLP, in August 2016, after practicing in the area of workers' compensation for another defense firm in the Atlanta area for approximately two years.

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