



WORKERS' COMPENSATION LAW

Section Newsletter

Summer 2017

Julie Y. John, Co-Editor
C. Jason Perkins, Co-Editor

A View From Up On
The Bench From A
Rookie Judge

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From the Chair

By Kelly Benedict

It is hard to believe that as this issue of the newsletter is distributed, I will have ended my term as Chair of your Section. It has been an honor and pleasure to serve in this capacity for 2016-2017. The position is now being held by Gregg Porter, and I know he will do an excellent job leading the Section through the next year.

I would like to thank the members of the Executive Committee who made my job so easy. They were Gregg Porter, Elizabeth D. Costner, Kevin C. Gaulke, L. Lee Bennett, Julie Y. John, and Christopher Jason Perkins. Julie and Lee led a fantastic effort with the newsletter last issue. Many thanks to Julie and Jason for your time and labor on the current issue.

The Workers' Compensation Section has had an active and successful year thus far. We greatly appreciate the assistance provided by the staff of the State Bar. At the current time we have approximately 975 members.

As you may know, the Section holds two programs annually, one institute and one seminar, in conjunction with ICLE. The programs are chaired in part by officers of the Section.

Workers' Compensation Law Institute 2016. This program was held in October at Sea Palms Resort on St. Simons Island. This program is the responsibility of the Chair of the Section. The program for 2016 was chaired by one claimant's lawyer (now the Hon. Kimberly Stone Boehm), one defense lawyer (Todd Brooks, Esq.), and one Administrative Law Judge (Hon. David Imahara) as is our usual practice. There were 469 attendees at this year's program. The Distinguished Service Award was presented at the Institute to John A. Ferguson, Jr. The Workers' Compensation Section also made a donation to Kids' Chance of Georgia at their annual fundraiser held during the time of this seminar.

Workers' Compensation for the General Practitioner. This seminar took place on April 28, 2017. It was planned by one of the members of our Executive Committee (Elizabeth Costner, Esq.) and one of the Directors on the Appellate Division at the State Board of Workers' Compensation (Hon. Elizabeth Gobeil). The seminar gave a great overview of handling a workers' compensation claim for those who may not regularly do so.

The Executive Committee for the Section decided to fund a retirement celebration for the Hon. Harrill L. Dawkins, who retired as a Director at the State Board of Workers' Compensation at the end of 2016. As you may know, Judge Dawkins served as an Administrative Law Judge with the Board since 1999. Prior to that appointment he was Chairman of the Workers' Compensation Board from 1993 to August of 1999. He also served twelve (12) years as a Georgia State Senator representing the 45th District

and served as Appropriations Chairman, Floor Leader for Governor Zell Miller, and was Chairman of the Industry and Labor Committee. He came to the Board in May of 1993 from his 20 year law practice. He was an asset to the system and developed the Chairman's Advisory Council when he was the Chairman of the State Board. He will be dearly missed. The reception was held on Jan. 25, 2017 and approximately 120 members of the bar were in attendance.

The responsibilities of the members of the Executive Committee for the next term are as follows:

- Chair: Gregg Porter
- Vice Chair: Elizabeth Costner
- Worker's Compensation for the General Practitioner: Kevin Gaulke
- Secretary & Distinguished Service Award: Lee Bennett
- Treasurer: Julie John
- Co-Editor of the Workers' Compensation Newsletter: C. Jason Perkins
- Co- Editor of the Workers' Compensation Newsletter: Nathan C. Levy
- Immediate Past Chair: Kelly Benedict

Please welcome the newest member of the Executive Committee, Nate Levy. I believe he will be an exceptional addition to the Committee as I transfer off. I would like to thank the members of the Section for making my job so rewarding. I believe without question that we have the best Section in the State Bar. If you have any comments, suggestions, or wish to contribute your time, talents or newsletter articles, please feel free to contact any members of the Committee. I look forward to seeing all of you at the annual seminar.

The opinions expressed within the newsletter are those of the authors and do not necessarily reflect the opinions of the State Bar of Georgia, the Workers' Compensation Law Section or the Section's executive committee

State Board of Workers' Compensation Develops New Process to Reduce Medical Treatment Delays

By Frank R. McKay, Chairman and Chief Appellate Court Judge, SBWC

In the Georgia Workers' Compensation system, authorized medical providers are not required to obtain advance approval from insurers for medical treatment or testing recommended by an authorized provider in a compensable workers' compensation claim as a condition for payment of services rendered. However, many physicians will not proceed with treatment until they receive written confirmation from the insurer that the recommended treatment or testing is going to be paid by the insurer. There can be long delays in obtaining this approval resulting in an injured worker not receiving necessary treatment or testing for weeks or even months. Some of the data reveals that delays in an injured worker receiving necessary medical treatment can result in a worsening of the original injury and a poorer outcome and a decreased chance of a recovery and successful return to work, thus harming both the employee and the employer.

To address this problem, the State Board of Workers' Compensation will be implementing a new process that will allow an injured worker or an attorney representing an injured worker to petition the Board for an expedited telephonic conference with an administrative law judge during which the insurer will be asked to show cause why medical treatment or testing that has been recommended by an authorized medical provider has not been approved or controverted. The physician will not need to participate in the conference as the physician's prescription, office note or other record documenting the need for the treatment or testing will be attached to the show cause petition that is filed with the Board. The process contemplates that an order can be issued by a Board administrative law judge authorizing the treatment or testing within 10 to 15 days of the prescription by an authorized physician being provided to the insurer. If the judge authorizes the treatment, the order issued by the judge will also direct the employer/insurer to provide written approval of the treatment to the prescribing physician. In lieu of participating in the telephonic conference, the insurer can authorize the treatment and provide the physician with written approval of the treatment or testing or officially controvert the treatment or testing.

The Board expects this new process will reduce delay in two ways:

1. providing medical providers advance approval customary in their business models to allow them to proceed with recommended treatment or testing; and
2. requiring insurers to quickly approve or controvert medical treatment that has been recommended by an authorized medical provider resulting in more efficient claims processing.

Eliminating undue delays from the process of obtaining medical treatment necessary to recover from a work injury in compensable claims reduces overall costs in the system and is consistent with the Board's goal of a more expeditious return to work for the injured employee.

The projected date for the implementation of the new process is July 1, 2017.

The State Board of Workers' Compensation is pleased and excited to announce the hiring of three new judges to fill vacancies left by the retirement of several long time judges at the end of last year. All three new judges have over twenty years of private law practice experience handling workers' compensation cases and we are thrilled to obtain this legal talent at the SBWC. Judge Richard Sapp is now handling cases in the Dalton, Rome, and Northwest Georgia area. Judge Kimberly Stone Boehm is hearing cases in Atlanta and surrounding areas. Judge Sharon Reeves is in the Macon office and hearing cases in the nearby counties. We will be hiring a fourth new judge this year as Judge Gordon Zeese in our Albany office has announced his retirement effective July 1st.

For the first time the Board has a dental fee schedule. *The Georgia Workers' Compensation Dental Fee Schedule* went into effect on April 1, 2017 and was prepared to establish maximum fee amounts and uniform payment guidelines for reimbursing qualified physicians and dental providers for the treatment of injured employees. The dental fee schedule is designed to be an accurate and authoritative source of information about dental coding and reimbursement. Like all medical treatment, preauthorization or precertification for dental treatment or testing of an injured employee, other than required by a certified managed care organization, is not required as a condition for payment of services rendered.

The Workers' Compensation Law Section Newsletter is looking for authors of new content for publication.

If you would like to contribute an article or have an idea for content, please contact C. Jason Perkins at jason@perkins-studdard.com

Orthopedic Eponyms

By David A. Schiff, MD, Peachtree Orthopedics

A number of years ago, a Worker's Compensation attorney asked me to prepare a talk about many terms that he was reading in the medical record. It seemed that there were several eponyms that were popping up, terms like "Waddell signs" or "Laseque's sign", that were commonly used, but there was no intuitive explanation for them. Like a foreign language, I was tasked with interpreting the eponyms for attorneys, adjusters and case managers.

Medical eponyms are terms used in medicine that are named after people, and occasionally places or things (Remember Legionnaire's Disease?). Historically, the field of medicine has honored those who discovered a disease, or identified an anatomic structure, by naming that disease or structure after them. In 1975, the Canadian National Institutes of Health held a conference that discussed the naming of diseases and conditions. This was reported in *The Lancet* where the conclusion was summarized as: «The possessive use of an eponym should be discontinued, since the author neither had nor owned the disorder.» So even 40 years ago a rational group of physicians recognized that eponyms were inappropriate, but to this day they still reside in the medical record, challenging non-medical professionals daily.

As a physiatrist who provides non-operative spine care, I will try to interpret and simplify the many eponyms regarding the lower back. It is understood that there is a plethora of them when discussing examinations of the cervical spine, shoulders or knees. I personally try to use terms that are self-explanatory, so that anyone could look at my medical records and know what I am talking about. However, there are still some eponyms that I use, in part because that was how I was trained, and also because my peers utilize them as well. We do so with veneration for the medical pioneers before us.

Whenever any patient comes into my office with back pain, there is a standardized approach that I take when examining them. All spine exams require a thorough neurologic examination, checking strength, sensation and deep tendon reflexes. This can tell us if there's any concern about pinched nerves. Remember, whereas patients can subjectively feign weakness or numbness, they cannot fake reflexes. If these are abnormal, our concern is heightened! All spine exams should include range of motion testing, looking for pain patterns that may lead us to a specific diagnosis.

The **straight leg raise (SLR)** is a standard lower back exam, also referred to as a **dural tension sign**. The dura is the lining that surrounds the nerves that are coming out of the spine, and is covered with many pain fibers. When the dura is mechanically pressed on or chemically irritated by a herniated disc, it produces pain. (That is why we perform epi-dural injections, because we want to put medicine

around the dura.) If lifting one leg up produces back and leg pain, between 30 and 70 degrees, it is referred to as a "positive" straight leg raise. It can be positive at 20 degrees if someone has a large herniated disc, or sometimes at 90 degrees in someone who is very flexible, such as a woman who studies ballet in her youth. The key is to compare one side to the other. The eponym most commonly used for the straight leg raise is **Laseque's test**. There are variations on the SLR, which are more commonly seen in the chiropractic medical record, such as the Soto-Hall, Braggard's, Brudzinski-Kernig, and Bowstring tests.

A dural tension sign that should make you take notice is the **crossed straight leg raise**, also known as Lhermitte's test, or the "well leg raising sign of Fajersztajn". If an SLR is performed on one side, and it causes back and/or leg pain on the opposite side, there is a good chance that there is a large herniated disc present. Getting a lumbar MRI promptly is usually advised.

Most straight leg raises are performed when patients are lying down, but they can also be assessed when they are seated. A **seated straight leg raise** is the obvious term, with the Slump, Bechterew's and Flip tests the corresponding eponyms.

Whereas straight leg raises evaluate to lower lumbar nerves that comprise the sciatic nerve, L4, L5 and S1, the **femoral stretch test** evaluates the upper lumbar nerves, L1, L2 and L3. The patient lies on their stomach, and each knee is bent. The test is considered positive if there is recreation of pain down the front of their thigh.

The most common **sacro-iliac joint test** is Patrick's test, also called the FABER's test, which represents the position the hip is placed in to provoke SI joint pain, namely Flexion, Abduction, External Rotation. Other SI joint tests include the Gillet's and Standing Flexion tests. Of note is that the most accurate diagnostic test for confirming SI joint pain is pain relief immediately after an x-ray guided SI joint injection.

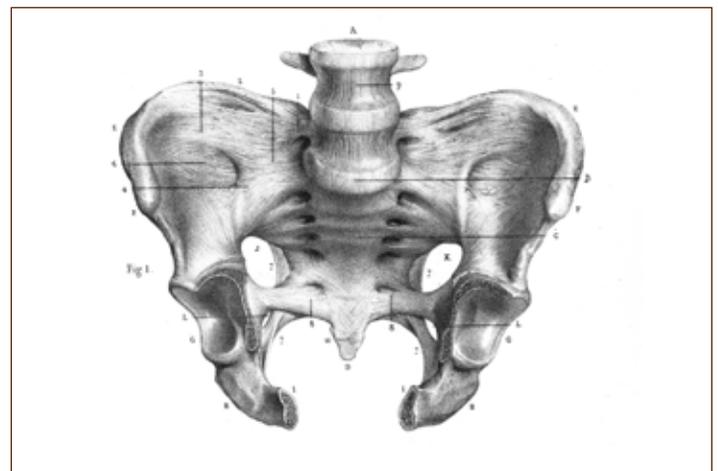


Photo by Getty Images @THEPALMER

Physical exam maneuvers for joint pain are called **facet loading**. Patients are rotated and lean back to one side, looking to see if it recreates their back pain. The terms Stork test and Kemp's test are their eponyms.

The **plantar response**, commonly called the **Babinski test**, is performed by running a sharp object, like a thumbnail or the handle of a reflex hammer, along the sole of someone's foot. It is a positive (abnormal) test when the big toe points up, and the remaining toes fan outward. This suggests an injury to the brain or spinal cord. An MRI should be performed promptly when this is seen.

The **Hoover test** is an exam maneuver that is intended to look for malingering. The patient lies on their back, while the examiner places their hands underneath both heels. The patient is then asked to raise one leg off the table. If they can't raise the leg, or don't push down with the other leg, then they aren't trying very hard.

Waddell signs were designed by a Canadian physician, Dr. Gordon Waddell, to look for a non-organic basis for pain complaints. These are a series of five exam maneuvers that, if present, would suggest that the patient's pain is not real. If at least three out of the five are abnormal, this raises questions. The five exam maneuvers are described below:

- **Tenderness:** When even very light touch induces severe pain, or if the pain covers a much larger territory that one would expect from their injury.

- **Simulation tests:** This is when certain movements that should not cause pain actually do. Examples include pseudoaxial rotation of the spine (rotating the patient at the hips instead of the spine itself), and pseudoaxial compression (pushing down on the top of the patient's head produces lower back pain, when it shouldn't).
- **Distraction tests:** This is when a physical finding is induced in one position, but not when the patient is distracted. An example would be when a supine straight leg raise produces pain at 30 degrees, but not at 90 degrees when the patient is seated.
- **Regional Disturbance:** This is when there is a divergence of pain from the accepted neuroanatomy. Examples include when there is diffuse numbness or weakness on the entire side of someone's body.
- **Overreaction:** This is when there is excessive groaning, facial grimacing, or the patient just collapses from a minor stimulation.

I am hopeful that understanding some of the eponyms above will help you when reading the medical records in your claims.

Dr. Schiff is a physiatrist who is board certified in Physical Medicine and Rehabilitation, as well as Pain Medicine. He has practiced in Atlanta since 1992, and has been with Peachtree Orthopedics since 1998.



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Is Alabama's Workers' Compensation Act Unconstitutional?

A Closer Look at Nora Clower vs. CVS Caremark Corp.

By James G. Smith

The recent decision of an Alabama circuit court judge which rendered the entire Alabama Workers' Compensation Act unconstitutional certainly gained the attention of neighboring jurisdictions. The initial Order, issued by Circuit Judge Pat Bullard on May 8, 2017, in the case *Nora Clower vs. CVS Caremark Corp.*, has since been walked back somewhat and is no longer under a 120-day stay, but it nonetheless sent shockwaves through Alabama and may ultimately prove to be the catalyst for change in the state's legislature. Similarly, it will be interesting to see how Judge Ballard's decision impacts other states, including Georgia. Of particular interest for Georgia is the Order's discussion and rationale for declaring the 15 percent cap on attorney's fees unconstitutional, which could lay the groundwork for a challenge to the 25 percent cap mandated by O.C.G.A. 34-9-108.

Overview of the decision

The headlines generated by Ballard's decision were somewhat misleading. Indeed, the practical effect of the Order was to render the entire Alabama Workers' Compensation Act unconstitutional, but it was actually only two specific provisions that formed the basis of the decision. Additionally, because the decision was issued in a circuit court, it did not necessarily have statewide application (and would not unless the case was appealed and the Court of Appeals issued an opinion).

Regarding the specifics of the Order, Ballard first held that the \$220 per week cap on permanent partial disability (PPD) benefits was unconstitutional under Article I, Section 13 of the Alabama Constitution and under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Second, and potentially most notable for Georgia, it was held that the 15 percent cap on attorney's fees was unconstitutional because it violated the separation of powers outlined in the Alabama Constitution and also the due process protections of the state and federal constitutions. Because these two provisions of the state Workers' Compensation Act were invalid, the entire Act was effectively unconstitutional.

As noted above, Ballard initially issued a 120-day stay on the decision to allow the legislature to possibly amend the subject provisions as necessary, but due to the timing of the decision, it was widely believed that the legislature would not have sufficient time to address the Order and its heavy implications. As such, on May 17, 2017, Judge Ballard amended the 120-day stay to become indefinite.

Rationale for the Order

Alabama Code 25-5-68, which caps permanent partial disability benefits at \$220. per week, was the first provision to be struck down. Somewhat different than Georgia, PPD benefits in Alabama are payable once an injured worker's condition is deemed to have stabilized. At that point, the injured worker can receive up to \$220 per week for life.

In deciding the "equal protection" issue under the Fourteenth Amendment of the US Constitution, Judge Ballard found that there was no "rational basis" for placing a \$220 cap on PPD benefits: "There is little credibility in telling two injured workers, both of whom are 99 percent disabled due to work injuries, that they both get \$220 per week in PPD – when one earns \$8.50 per hour for a 40-hour work week, and the other earns an annual salary of \$125,000. There cannot be anymore arbitrary, capricious, or attenuated idea that telling both workers that "equal protection of the laws" means they each get the identical amount under those circumstances."

In terms of the challenge of the \$220 cap under the Alabama Constitution, Ballard noted that 25-5-68 was enacted in 1985 and had not been amended to increase the PPD cap since that time. Ballard ultimately found that the statute was actually in violation of Article I, Section 13, of the state constitution upon its enactment in 1985 because it did not contain a provision which would allow the PPD cap to "keep up with prevailing wages and the cost of living." By comparison, the statute pertaining to temporary total disability benefits has continuously been adjusted upwards such that the *minimum* compensation rate for TTD benefits is currently \$229 per week. Ballard noted that this results in an inequity: "The State's very lowest wage earners now receive more per week during periods of temporary total disability than do the State's highest wage earners who are 99 percent disabled for the remainder of their lives." Further, he cited data submitted by the Plaintiff that the \$220 cap far exceeded the minimum wage for a 40-hour work week in 1985 but now equals only 76 percent of the minimum wage for a 40 hour week. Similarly, the \$220 cap initially exceeded the "poverty level" for a family of four in 1985, but now equals only 46.4 percent of the poverty level for a family of four.

Turning to the discussion on the 15 percent cap for attorney's fees (Alabama Code 25-5-90(a)), which is likely the most relevant in terms of its potential impact on Georgia, Ballard focused his decision on (1) the argument that a cap on attorney's fees denies due process of the law and (2) attorney's fees should be left to the judicial branch for determination.

Regarding the due process argument, Judge Ballard cited a decision on similar subject matter from the Supreme Court of Florida issued only last year (*Castellanos vs. Next Door Co.*, 192 So. 3d. 431 (Fla. 2016)). Florida had enacted a statute in 2009 which placed a mandatory “sliding scale” on the award of attorney’s fees depending upon the amount of the recovery, and which effectively eliminated a discussion of whether the fees were “reasonable.” The Florida court determined that such a law did not pass constitutional muster. Judge Ballard agreed and determined that the “mandatory” 15 percent cap on attorney’s fees was arbitrary: “The fee cap establishing that no more than 15 percent is enough, regardless of a myriad of potential attendant circumstances, fails to afford due process of the law.”

Lastly, Ballard turned to a number of other jurisdictions who, on the basis of a violation of the separation of powers, have stricken laws which placed a mandatory cap on attorney’s fees, including Utah, Minnesota, Pennsylvania, and New Jersey. Ballard pointed out that a significant number of workers’ compensation disputes in Alabama pertain only to medical issues, for which there is a “low recovery” potential in terms of paying the claimant’s attorney: “The Legislature provided no mechanism by which lawyers can be paid for that work – despite the fact that insurers have nearly unlimited resources with which to pay their lawyers to oppose claimants on the identical medical issues.” Judge Ballard held that “regulating attorney’s fees has historically been a function of the judicial branch of government,” and by not allowing the judiciary to determine a “reasonable” fee for the work performed on a particular case, the law overstepped the bounds of legislative powers. As such, he reasoned, the statutory cap on attorney’s fees in workers’ compensation cases “constitutes legislative trespass into a function reserved for the judicial branch of government.”

Future Implications

As noted above, the immediate impact of this circuit court ruling is limited, especially now that the initial 120-day stay has been modified to become indefinite. However, given the recent high court decisions cited by Judge Ballard in other jurisdictions on this topic, there is reason to believe that significant change could be coming to the Alabama Workers’ Compensation Act. In terms of what this may mean for Georgia, there is reason to take notice of Judge Ballard’s decision. While the ruling on the cap on PPD benefits may have little overlap in Georgia due to the difference in the respective states’ laws, the statutory cap on attorney’s fees is another matter. O.C.G.A. 34-9-108 limits a claimant’s attorney’s recovery to 25 percent of an award of weekly benefits or settlement. Whether this statutory cap will ever come under attack in Georgia remains to be seen, but the arguments for such a challenge will not be new.

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Third Party Actions “Over Against Employers” in Georgia & the Rest of the Eleventh Circuit:

Does the Exclusive Remedy Doctrine Bar a Third-Party Tortfeasor from Suing the Employer for Indemnity?

By John D. Blair – Levy, Sibley, Foreman & Speir

Introduction...

The question that serves as the premise for this article is whether an employer, who has paid workers’ compensation benefits to an injured employee for a work injury, may be sued by a third-party tortfeasor for indemnity and/or contribution concerning that same work injury? The gut reaction of many workers’ compensation practitioners may be to say “no” because of the “Exclusive Remedy Doctrine” or “employer immunity.” However, this is not always the case.

As it so often goes, the inspiration for this article was born out of an actual case. I will, out of respect for my clients and the other parties, omit any reference to their names or to the specific court in which that case is pending. The initial facts were as follows:

1. The employee of a subcontractor is injured on a construction site (“the Site”);
2. That same employee sought and (eventually) obtained WC benefits from the employer/subcontractor (*meaning there are no statutory employer issues*), which were paid by the employer/subcontractor’s WC carrier;
3. The employee/plaintiff sued the general contractor/defendant in tort alleging negligence (among other things);
4. The general contractor/defendant answered the suit denying any liability/negligence;
5. The WC carrier intervened in the tort case as a party-plaintiff in order to pursue subrogation/reimbursement of the WC benefits paid to the employee/plaintiff from any recovery realized against the defendant/general contractor; and
6. The general contractor/defendant then sued the employer/subcontractor (via third-party complaint in the same civil action) for indemnity, arguing that the employer/subcontractor negligently caused the plaintiff/employee’s injury and that the employer/subcontractor was, in any event, contractually obligated to indemnify it for any damages incurred concerning employer/subcontractor’s employees and subcontractors working at the Site.

This was certainly an interesting development, though it is not really that uncommon in factual scenarios with multiple contractors working at the same site/project. I’ve had it come up before, but in all such prior cases I had been involved with, the lawsuit settled globally before I actually had to research the answer. In this case, a quick settlement did not appear likely, and so I had to research the issue. First, the case in question was pending in Alabama; however, the general contractor/defendant in this case is a Georgia resident objecting to being sued in Alabama, and so I needed the answer for both jurisdictions. Also, as I frequently practice and advise clients on such matters in both states, I wanted the answer on both sides of the border. It then seemed logical to include Florida so as to finish answering this question throughout the entire 11th Circuit.

Before we move on to the answers, please note that the question we are discussing here is whether a third-party tortfeasor can successfully sue a direct employer for indemnity where the employer actually had workers’ compensation insurance coverage. Thus, the third-party tortfeasor in this scenario is not a “statutory employer.” The law is settled that the statutory employer enjoys immunity under the Exclusive Remedy Doctrine, and so a statutory employer would not incur tort damages for which to seek indemnification from the direct employer. Of course, statutory employers/insurers in Georgia have a statutory right of indemnity for benefits paid against the direct employer that failed to procure coverage for workers’ compensation (O.C.G.A. § 34-9-8(b)), but that form of indemnification is outside the scope of this article.

Third Party Action “Over Against the Employer”

In the course of my research, I came across a law review article precisely on point authored by none other than Professor Arthur Larson, who had clearly been pondering what I was pondering back in 1982:

“Perhaps the most evenly-balanced controversy in all of workers’ compensation law is the question whether a third party in an action by the employee can get contribution or indemnity from the employer, when the employer’s negligence has caused or contributed to the employee’s injury.”
Arthur Larson, *Third-Party Action over Against*

Workers' Compensation Employer, 1982 Duke L.J. 483, 484 (June 1982, No. 3).

This article provided a wonderful starting point for my research, and I believe credit should be given where and when due. Professor Larson used the phrase “**third-party action over against the employer**” to describe this scenario in which a third-party tortfeasor seeks redress, despite the Exclusive Remedy Doctrine, from an employer for damages it sustained concerning an injury to an employee. Professor Larson explained that the answer to this question depends on: (1) the applicable law; and (2) the legal grounds for the indemnity claim (e.g., contractual vs. non-contractual/ implied indemnity). However, the article is from 1982 and loosely addresses the national majority and minority trends. I wanted a current answer for the above-referenced case and also for my general knowledge throughout this circuit.

The Answer in Georgia...

According to Westlaw, Prof. Larson’s article had been cited on numerous occasions, and one of these citations was found in a Georgia treatise. It stated as follows:

“Professor Larson describes the issue of whether a third party can recover contribution or indemnity from an employer whose negligence also contributed to an accident as one of the most evenly balanced controversies in compensation law. **The rule in Georgia is that a third party is denied the right of contribution or indemnity from the employer unless there is a specific indemnity agreement in favor of the third party.** Negligence of an employer or others may be shown, however, to defeat or reduce liability on the part of a third party.

Ga. Workers’ Compensation Claims § 10:3 (Thomson Reuters 2016) (Third-party claims against negligent employer) (emphasis supplied).

This is a simple enough rule. Indemnity/contribution are no exception to the Exclusive Remedy Doctrine (O.C.G.A. § 34-9-11) **unless** specifically contracted for. The treatise cites to the 1983 case of *Seaboard Coast Line R. Co. v. Maverick Materials, Inc.* for this proposition (167 Ga. App. 160, 305 S.E.2d 810). It is worth noting that, while the Georgia Court of Appeals never used the term “third-party action over against” in the *Seaboard* opinion, the issue was the same as that considered by Professor Larson’s 1982 article. This case is still reported as current law. It is important to note, however, that an **implied** indemnity claim must fail. See *Georgia Dep’t of Human Res. v. Joseph Campbell Co.*, 261 Ga. 822, 411 S.E.2d 871 (1992) (expressly noting the *Seaboard* decision and affirming that an express contractual right to indemnity is enforceable)).

Granted, Georgia’s 2005 tort reforms eliminated the concept of joint and several liability for most negligence cases (requiring instead that juries apportion liability to each defendant separately) and thereby eliminated the need for common law (non-contractual) indemnity/contribution actions in most situations. However,

indemnity claims can and do still come up from time to time in the context of settlements and contractual clauses. Accordingly, the “third-party action over against an employer” is very much alive under Georgia law.

However, as one final parting shot, at least one case has held that a Georgia employer may not be impleaded for indemnity purposes in a third-party tort action. See *Lamb v. McDonnell-Douglas Corp.*, 712 F.2d 466, 467 (11th Cir. 1983)). However, neither the Eleventh Circuit nor the Supreme Court of Georgia (via certification) addressed whether an employer can be impleaded on a breach of (indemnity) contract theory. Based on the above-cited cases, however, I do believe that such impleader would be permitted under that theory (but not the employer’s carrier – consider that, while Georgia’s standard NCCI policy contains a Part II/ Part B for “employer’s liability insurance” covering work injuries not falling under workers’ compensation, such employer’s liability policies typically exclude coverage for “liability assumed under contract”).

Answers in the Rest of the Eleventh Circuit:

As this is a Georgia newsletter, I will spare its readers a lengthy recount of my research and analyses in other jurisdictions and simply summarize my findings concisely as follows:

	Contractual Indemnity	Non-Contractual/ Implied Indemnity
Alabama	Permitted but must be express/clear. ¹	Not Permitted. ^{2, 3, 4}
Florida*	Permitted. ⁵	Permitted. ⁶
Georgia	Permitted but must be express /clear. ⁷	Not Permitted. ⁷
Federal	Generally yes, but it depends. ⁸	Generally not, but it depends. ⁸

For those interested, the endnotes below contain citations and more detail on this subject for the above jurisdictions other than Georgia.

In Conclusion...

Throughout the Eleventh Circuit, and specifically including Georgia, “third-party actions over against the employer” for indemnity are very much alive when based upon an express and valid contract/contractual provision (though in Florida and some federal cases, it may also be possible to obtain indemnity “over against” the employer even without an express contract). It is, therefore, advisable for the workers’ compensation practitioners, when advising their clients, to remember that **a contractual indemnity clause/provision may circumvent**

or “relinquish” the employer’s immunity from suit under the Exclusive Remedy Doctrine. This is especially important for employers who routinely sign contracts with other companies that may contain such provisions/clauses concerning indemnity.

Consider that a contractual provision for indemnity may be construed as a liability “**assumed under contract.**” Accordingly, it would be excluded under most employers’ liability coverage, which is Part Two/B of the standards NCCI-form workers’ compensation policy used in Georgia (and many other states) covering work injuries that are not subject to workers’ compensation. Specifically, Part 2(C)(1) of the typical NCCI-form policy reads something like this: “This insurance does not cover: ... Liability assumed under a contract. This exclusion does not apply to a warranty that your work will be done in a workmanlike manner.” Accordingly, **it is quite possible that the workers’ compensation/employer’s liability carrier may deny coverage to the employer for an indemnity claim over against the employer.** It is worth noting that most general/commercial liability policies also exclude injuries to employees from coverage.

Further, any money owed to the workers’ compensation carrier in subrogation for workers’ compensation benefits paid to the employee is a statutory lien/right that, while certainly not unassailable, does not arise from or bear any relation to the indemnity agreement signed without its knowledge. Ordinarily, no premium is collected for the risk assumed by such an indemnity agreement/clause. Accordingly, even if the workers’ compensation carrier recovers all or part of the benefits paid to the employee in subrogation, the employer does not then have a right to receive those funds instead of the carrier simply because the employer agreed to indemnify the third-party tortfeasor. For this reason, it is critical for employers to be very wary of signing indemnity agreements/clauses with other contractors on a project. However, in many (if not most) cases, a general contractor is going to require such indemnity agreements/clauses. Otherwise the general may move on to a different subcontractor costing the wary employer valuable business. At first this may seem like a “catch-22” sort of problem for the employer: either lose the business entirely or take the work while being exposed to significant risk of (potentially) uninsured loss.

However, there is a relatively simple solution. In a recent case, I reviewed a policy where the employer had the forethought and presence of mind to obtain an endorsement/rider to the workers’ compensation/ employer’s liability policy specifically covering the contract in question, which included such an indemnity clause. This was sufficient to preempt/override the standard exclusion bringing the contract and indemnity clause within the employer’s policy. This endorsement/rider was specifically intended to bring within the coverage of the policy the entire project/contract. While this is rarely done, even by sophisticated employers, such an endorsement/ rider should be sufficient to secure coverage for the employer in the event that it is later sued for indemnity. In short: if an employer is working on a contract basis,

then he should present each contract to his insurer before signing and request that it specifically be covered under his workers’ compensation/employer’s liability policy. When a premium is paid for that specific contract/project, and the insurer is thereby given advance notice of the “liability to be assumed under the [indemnity] contract,” it will be quite difficult to justify a subsequent denial of coverage for an indemnity action.

**Please note that, while I did research to include Florida here, I am not licensed to practice law in the State of Florida and do not profess to be a Florida jurist. Florida citations herein are for informational purposes only.*

- 1 See *Goodyear Tire & Rubber Co. v. J.M. Tull Metals Co.*, 629 So. 2d 633, 638 (Ala. 1993) (overruling *Paul Krebs & Assocs. v. Matthews & Fritts Const. Co.*, 356 So. 2d 638, 638 (Ala. 1978), which previously denied all indemnity claims against an employer subject to the Act).
- 2 See generally 2 Alabama Workers’ Compensation § 19:46-51 (2d ed.) (West 2016) (cit. omitted) (noting that Alabama was previously, for a time, the last and sole jurisdiction in the country to not allow indemnity pursuant to an express contractual provision) concerning how this rule has changed back and forth over the years. The basis for only allowing express contractual indemnity is that a clear contractual clause amounts to a “*relinquishment*” of the employer’s exclusivity rights); see also *Hardy v. McMullan*, 612 So.2d 1146 (Ala. 1992) (except in medical malpractice cases, pretermitted exclusive remedy provisions, Alabama law does not generally allow for contribution or indemnity between joint active tortfeasors at all unless there is an express contractual indemnity agreement or where the contribution plaintiff is totally without fault but held liable due to non-delegable duty; in medical malpractice cases, one joint tortfeasor may seek indemnity against another if the other’s was the primary and/or most proximate cause of the plaintiff’s injuries).
- 3 As referenced above, Alabama has gone back and forth over whether to permit express contractual indemnity “over against” the employer. While indemnity for an *implied* contractual provision has previously been denied, it has not been expressly ruled upon since the Supreme Court reversed course to allow indemnity per *express* contractual clauses. 2 Alabama Workers’ Compensation § 19:49 (2d ed.) (West 2016) (cit. omitted). However, I believe the “relinquishment” theory recently relied upon to allow indemnity per express provisions (i.e., the idea that an employer relinquishes exclusivity in agreeing to an express indemnity clause) fails if the contractual provision is implied or otherwise vague. See 2 Alabama Workers’ Compensation § 19:48, FN. 26-28.
- 4 While not strictly an express indemnity agreement, third-party actions “over against” the employer’s immunity/exclusivity defense have been allowed where the employer breached an express contractual duty to procure insurance, which the courts have reasoned represents an independent contractual duty not subject to the Exclusive Remedy Doctrine. 2 Alabama Workers’ Compensation § 19:51 (citing *Goodyear Tire and Rubber Co. v. J.M. Tull Metals Co.*, 629 So. 2d 633 (Ala. 1993) and *Reliance Ins. Co. v. Gary C. Wyatt, Inc.*, 540 So. 2d 688 (Ala. 1988)).
- 5 “CDM appeals contending the trial court erred in determining that its claim for indemnification was barred by Florida’s Workers’ Compensation Act, section 440.11(1), Florida Statutes (1983), and by Florida’s statutory limitation on indemnification contracts, section 725.06, Florida Statutes (1983). We conclude that CDM’s claim for *contractual indemnity*

is not barred by either statute and therefore reverse the trial court's summary judgment order." *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 721 So. 2d 1254, 1255, 24 Fla. L. Weekly D41 (Fla. Dist. Ct. App. 1998) (citing *Sunspan Eng'g & Const. Co. v. Spring-Lock Scaffolding Co.*, 310 So. 2d 4 (Fla. 1975) (which held unconstitutional a provision of the Florida Workmen's Compensation Act that left third-party tortfeasors without a "reciprocal" claim for **common law indemnity** against a subcontractor/employer who were unfairly shielded from liability for indemnity by the exclusivity doctrine in violation of the third-party tortfeasors constitutional rights to equal protection and access to the Court)).

6 A third-party tortfeasor is not generally barred by the Exclusive Remedy Doctrine from bringing a third-party action against the employer, despite the language of the exclusive remedy statute (§440.11), because: "In *Sunspan*, the Florida Supreme Court held that section 440.11(1), Florida Statutes, the exclusive remedy provision of the Workers' Compensation Law, was **unconstitutional** as applied to bar a third-party plaintiff's common law action for indemnification against a negligent employer who paid its injured employee workers' compensation benefits." *Tsafatinos v. Family Dollar Stores of Florida, Inc.*, 116 So. 3d 576, 580, 38 Fla. L. Weekly D1383 (Fla. Dist. Ct. App. 2013) (citing *Sunspan*, supra). However, it is worth noting that, while the Exclusive Remedy Doctrine did not bar a common law indemnity claim, the claim failed in *Tsafatinos* because the third-party tortfeasor did not properly plead/state a valid claim for indemnity under Florida common law. Id.

7 See the in-text citations in the Georgia section of this article, supra.

8 While to answer that "it depends" often risks sounding like a "cop out" or lazy response, there are multiple federal workers' compensation laws/programs, and whether indemnity is allowed by a third-party tortfeasor "over against" an employer can be very situational. In many cases, for example, indemnity rights may be governed by state law when even where the workers' compensation claim arises under federal law. Consider that, in a claim under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§ 901, et seq.), for example, even an express contract allowing for indemnification by a "vessel" against the longshore employer are **void** by statute. See 33 U.S.C. § 905(b) ("In the event of injury to a [longshoreman] ... caused by the negligence of a vessel, then such [longshoreman] ... may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and **the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.**") It is also worth noting that a state law tort or indemnity claim against a longshore employer/stevedore may be pre-empted by this statute (see *Roustabout Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1984 A.M.C. 820 (5th Cir. 1983); *Kramer v. Bouchard Transp. Co. Inc.*, 741 F. Supp. 1023, 1991 A.M.C. 198, 1990 WL 96868 (E.D.N.Y. 1990)). Concerning the Outer Continental Shelf Lands Act of 1953 or "OCSLA" (43 U.S.C. §§ 1331, et seq.), the provisions of the Longshore Act apply to work injuries (33 U.S.C. § 1333(b)). (This is true with many federal workers' compensation programs that are administered as "extensions" of the Longshore Act.) However, in OCSLA cases, while the Exclusive Remedy Doctrine applies (33 U.S.C. § 905), subparagraph (c) of that statute allows for "reciprocal indemnity agreements" that permit indemnity by express contractual provision, in OCSLA cases only, even where prompted by the negligence of a vessel.

The Fifth Circuit has long held that 33 U.S.C. 905 bars direct suits in tort by an injured employee against his employer as well as third party suits for non-contractual indemnity or contribution from the employer. See *Johnston v. Atlantic Richfield Co.*, 620 F. Supp. 974, 975 (E.D. La. 1985) (citing *Ocean Drilling and Exploration Company v. Berry Brothers Oilfield Service, Inc.*, 377 F.2d 511, 514 (5 Cir. 1967), cert. den. 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118 (1967)). (Of course, Fifth Circuit cases from prior to October 1, 1981 are binding in the Eleventh Circuit unless later reversed/distinguished.) This is because the Exclusive Remedy Doctrine eliminates all an employer's tort liability, and so the employer can only be liable to a third-party for the claimant's injuries if he contractually obligates himself to be so liable. See *Olsen v. Shell Oil Co.*, 595 F.2d 1099, 1103-04, 1980 A.M.C. 1207 (5th Cir. 1979).

In that respect, the Fifth Circuit has ruled that, "...while **the employer may continue, even in spite of the exclusive liability provision of the Act, to remain liable for indemnity on the basis of an express or implied contractual obligation**, in the absence of such obligation, as here, there simply exists no underlying tort liability upon which to base a claim for indemnity against the employer." *Olsen v. Shell Oil Co.*, 595 F.2d 1099, 1103-04, 1980 A.M.C. 1207 (5th Cir. 1979) (citing *Cole v. Chevron Chemical Co. Oronite Division*, 477 F.2d 361, 367-368 (5th Cir. 1973) (emphasis supplied)).

Most federal workers' compensation laws, therefore, follow the general rule that compensation is allowed for express contractual indemnity, and in some cases implied contractual indemnity is permitted too, but most federal laws do not allow for common law or other implied/non-contractual forms of indemnity. There are exceptions, such as the prohibition of claims in indemnity by vessels against longshore employers under 33 U.S.C. § 905(b), and there is the exception to the exception: reciprocal indemnity agreements under OCSLA as per § 905(c).

One important distinction, however, arises in the context of claims under the Federal Employee's Workers' compensation Act or "FECA," which provides for WC claims against the United States as an employer. FECA has its own exclusive remedy provision, which requires injured federal employees and their families to accept FECA remedies as their exclusive remedy. However, the United States Supreme Court has held that this "exclusive" remedy does not apply to third-parties who do not enjoy FECA's "quid pro quo," and, therefore, FECA allows indemnity actions generally if otherwise valid through the Federal Tort Claims Act (which allows such suits against the U.S. as if brought by private individuals, typically under state law – see 28 U.S.C. § 1346(b)) or other laws limiting sovereign immunity. *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 198, 103 S. Ct. 1033, 1039, 74 L. Ed. 2d 911, 1983 A.M.C. 913 (1983). Accordingly, FECA allows all forms of indemnity, contractual or otherwise, provided the indemnity claims is otherwise valid under the applicable state or federal law. Id. Note that, while the Third Circuit Court of Appeals has issued a somewhat recent opinion limiting the construction of Lockheed (see *In re McAllister Towing & Transp. Co., Inc.*, 432 F.3d 216, 217, 2006 A.M.C. 45 (3d Cir. 2005)), this Supreme Court opinion remains valid law in the Eleventh Circuit (see *McRory v. Hobart Bros. Co.*, 732 F.2d 1533, 1535 (11th Cir. 1984)).

Understanding Burdette and the Affirmative Defense of Willful Misconduct

By Brian K. Cunha, Esq. and R. Scott Christopher, Slappey & Sadd, LLC

On Feb. 27, 2017, the Supreme Court of Georgia issued a ruling in *Chandler Telecom, LLC et al. v. Burdette*, a workers' compensation claim for an injury that the employer argues was the result of the employee's willful misconduct. This case shines a light on an important question in many claims made by injured workers in Georgia: is an employer responsible for injuries resulting from their employee's refusal to follow their rules?

In *Burdette*, the employee, Adrian Burdette, was hired by Chandler as a cell-tower technician. Chandler required all cell-tower technicians to be "ComTrain" certified. "ComTrain" is a training program that teaches safe tower climbing and rescue techniques. Burdette represented to Chandler that he was ComTrain certified, despite having no such certification.

On Nov. 5, 2012, Burdette was assigned to work on the top of a cell tower with Brian Prejean, the "lead tower hand" of the crew. Before the shift began Burdette's supervisor specifically instructed the entire crew not to use controlled descent but instead to climb down the towers. As Prejean and Burdette were finishing their work for the day, Prejean instructed Burdette to climb down the tower, but Burdette stated that he wanted to use controlled descent rather than simply climbing down. Prejean told Burdette several more times to climb down and not perform a controlled descent. Prejean also warned Burdette that he did not have a safety rope and their supervisor would be upset if Burdette attempted a controlled descent instead of climbing down as instructed.

Despite the warnings, Burdette used a controlled descent and ultimately fell a substantial distance and sustained serious injuries to his ankle, leg, and hip. Burdette has no memory of his fall or anything that happened immediately before or after it, including his conversation with Prejean. Prejean testified that Burdette's fall was the result of user error rather than any equipment malfunction.

Burdette filed a claim for workers' compensation benefits related to the injuries sustained from the fall from the cell tower. At the trial/hearing level the ALJ denied the claim on the grounds that the Employee was barred from recovery because he engaged in "willful misconduct" within the meaning of OCGA § 34-9-17(a) when he

defied his supervisor's instruction to climb down the tower instead of using controlled descent. This finding was upheld by the Appellate Division.

The Employee filed a notice of appeal in superior court, but the court never scheduled a hearing or issued a ruling on the matter. As a result, the Board's decision denying benefits was affirmed by operation of law. Thereafter, the Court of Appeals granted the Employee's application for discretionary appeal.

The Court of Appeals reversed the Board's decision. The Court of Appeals found that the Employee's injury did not result from his own willful misconduct under OCGA § 34-9-17(a). The Supreme Court of Georgia accepted the Employer's petition for writ of certiorari and ultimately reversed the Court of Appeals and remanded the case back to the Board to make additional factual findings. The Supreme Court found that the Court of Appeals improperly applied the standard for analyzing the affirmative willful misconduct defense. In order to address this standard, as explained by the Supreme Court, it is important to first understand how the Court of Appeals analyzed this case.

In reaching its decision, the Court of Appeals applied the long-accepted interpretation of willful misconduct promulgated in *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333 (1929). The Court of Appeals noted that mere violations of instructions, orders, rules, ordinances, and statutes, and the doing of hazardous acts where the danger is obvious, do not, without more, constitute willful misconduct. There must



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be something more than thoughtlessness, heedlessness, or inadvertence in violating a rule or order of the employer, to constitute willful misconduct. Willful misconduct “involves conduct of a quasi-criminal nature the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences.”

The Court of Appeals also noted that, although the Employee engaged in “a hazardous act in which the danger was obvious,” his conduct did not reach the level of “quasi criminal nature,” involving “the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences.” The Court of Appeals believed that the use of controlled descent was not likely to result in serious injury because controlled descent had previously been used as a means to descend towers, and because the Employer required its technicians to learn controlled descent for use in rescue situations. The Court of Appeals reasoned that the Employer would not require its technicians to train in and use controlled descent to rescue someone if serious injury would likely result from such conduct. The Court of Appeals found that the Employer had not met its burden of proof for its affirmative defense under OCGA § 34-9-17(a) that the Employee’s use of controlled descent was willful misconduct.

The Court of Appeals relied heavily on its prior decision in *Wilbro et al. v. Mossman*, 207 Ga. App. 387, 427 S.E.2d 857, (1993). In that case, the employee disobeyed her supervisor’s specific instruction not to climb on shelves in order to reach higher shelves, which resulted in her falling, bringing rise to her claim. The employee had been reminded by a co-worker of her employer’s specific rule immediately prior to her injury. The Board determined that the claim should be barred due to the willful misconduct of the employee. The Court of Appeals reversed the Board’s decision in *Wilbro* and instead found that the employee’s conduct “cannot constitute willful misconduct as a matter of law since the conduct was at most a violation of instructions and/or the doing of a hazardous act in which the danger was obvious, but was not conduct that was criminal or quasi-criminal in nature.”

The Supreme Court in *Burdette* explained that the Court of Appeals got *Wilbro* wrong, and failed to properly apply the standard explained in *Carroll*. The correct application of *Carroll* would instead be to allow the finder of fact to determine whether an intentional violation of an employer’s rule or instruction was done either with knowledge that it was likely to result in serious injury, or with the wanton and reckless disregard of its probable consequences.

The Supreme Court also addressed the statutory meaning of O.C.G.A. § 34-9-17(a) in a footnote. When *Carroll* was decided, the existing willful misconduct statute included “the willful breach of any rule or regulation adopted by the employer and approved by the Industrial Commission, and brought prior to the accident to the knowledge of the employee.” Ga. L. 1920, p. 167, 177, §14.

This language was removed from the willful misconduct statute in 1996. Ga. L. 1996, p. 1293-94, § 4. The Supreme Court in *Burdette* concluded that the removal of this language did not excise the act of violating an employer’s own rule from the definition of willful misconduct. As stated in *Carroll*, “the conduct enumerated in OCGA §34-9-17 is not exhaustive of the acts which may constitute willful misconduct.” Instead, the *Burdette* Court seemed to indicate that the removal of this language was only intended to strike the requirement of board approval of safety rules. If there is a rule violation, it simply must satisfy the *Carroll* definition of willful misconduct.

The employee’s intent requirement can perhaps be better explained in *Roy v. Norman*, 261 Ga. 303, 404 SE2d 117, (1991). In *Roy*, the employee started a fire with gasoline, which he had dispensed into a cup from an on-site pump. This resulted in burns for which the employee sought workers’ compensation benefits. The cup used was not a container approved by the State Fire Marshall, and therefore violated penal statute O.C.G.A. § 25-2-38. The employer defended the claim based on the affirmative willful misconduct defense, arguing that the employee’s actions were *per se* willful misconduct based on the intentional violation of a penal statute. However, the State Board found—and the Court of Appeals agreed—that even though the employee violated the statute, he did not willfully set himself on fire; the result was not conscious or intentional. *Roy* explained the general rule that the mere violation of a rule, instruction, ordinance, or statute, and the doing of hazardous acts where the danger is obvious does not constitute willful misconduct without the knowledge that it is likely to result in serious injury, or without wanton and reckless disregard for its probable consequences. But more importantly, the *Roy* decision correctly states that the determination of whether an employee is guilty of willful misconduct is one of fact to be determined by the State Board.

The *Burdette* Court ultimately found that the Court of Appeals erred by making its own findings of fact rather than remanding to the Board. Because the Board did not make any findings as to whether *Burdette* intentionally violated his employer’s instructions either with knowledge that it was likely to result in serious injury, or with wanton and reckless disregard of its probable consequences, the Board’s analysis was incomplete. Therefore, the Supreme Court reversed and remanded to the Superior Court, with instructions to remand to the Board to make appropriate factual findings.

The Supreme Court was careful to include in dicta that, while intentional violations of employer rules may constitute willful misconduct, a simple rule violation does not, in and of itself, bar compensation. While the *Carroll* standard has been a longstanding one, ultimately the decision by the Supreme Court in *Burdette* places a greater emphasis on the Board’s role in determining to what degree an employee has knowledge that his actions will result in their own serious injury.

A View From Up On The Bench From A Rookie Judge

By Richard Hampton Sapp III – Administrative Law Judge

Initial Impressions

For a relatively short fellow who must carefully choose sports tickets to have a decent view of the game, I can report that the view from up on the bench is especially good and unobstructed. However, unlike a sporting event where everyone else is looking out at the field, I was surprised to see that as a judge on the bench, every seat in the place is situated so that everyone is looking at me. At first, that was disconcerting and a bit uncomfortable, but I'm used to it now. The setup of the room correctly forces everyone to look to the judge to get things started and to insure that things run smoothly. In fact, that is one of the main duties of a judge as explained below under the "My In-Court Methodology" topic.

I'm often asked by my lawyer friends what it's like to be a judge. I was a practicing lawyer for almost 30 years and there are some surprising, somewhat disconcerting, differences. First, it can be a bit lonely. Like a lawyer, as a judge, I do review a file prior to a hearing, but otherwise it is an entirely different preparation process. There is really no client, no opposing attorney, nor young associate helping me prepare, nor is there a witness with whom to discuss the case, so I go into court with a plan but with no one to discuss my initial impressions. At the courthouse, I might get to say hello to the lawyers, but most times it is best to sit alone back in a sequestered area and only pop out into the courtroom right on time.

Even off the bench, the job can be a bit lonely. Though it should have been obvious, I was surprised that I essentially switched to a job where I get virtually no mail, no emails, and no phone calls. No one other than an occasional fellow judge stops by to say hello. I often send myself an email from my personal GMAIL account just to make sure my email is in fact operational. The State Board for whom I work has provided great advanced and impressive technology for me to use. And, it will surprise my old workmates that I've abandoned hand-written 'notesheets' and I'm fully utilizing the technology; I even was offered a Dictaphone and I have declined it. Things have really changed and I'm now in the 21st century with everyone else.

While it is nice to now have very few emails and phone calls, such that I can better concentrate on a work project without interruption, and while I've always been comfortable being alone, the lack of people-contact, the absence of an appreciative phone call from a happy client, and the lessened comradery with the friendly and fun workers compensation bar is something I miss. As a lawyer when an award was issued, was either happy or unhappy, and I would always have a workmate and client with whom to discuss the outcome. As a judge, it is entirely

different; you send it out into internet space feeling that you have made a fair and just decision, and one that is a correct application of the law to the facts, and you know that likely one side will be happy and one not happy. But once an award is sent out, there is a complete lack of follow up or feedback. It is as if you watched a walk-off homerun, you've seen the batter touch home plate, and then nothing. You miss the postgame celebration, postgame disappointment, award ceremony and post-game analysis.

The Football Analogy

A seasoned superior court judge once described the ease and challenge of the job as similar to a football referee. Much like refereeing a game with professional athletes, judging a hearing with good, well-prepared lawyers is the easiest. It is the little league referee that has the challenge – when the little league punter kicks the ball backwards over his head and through the end zone untouched. Is it a safety? One must make a quick decision on the spot regarding this unanticipated play. This is often the case with an unrepresented party, or unprepared or even overzealous lawyer. As a judge you are called on during the middle of a hearing to make an immediate 'call' or ruling on a completely unanticipated and unorthodox 'play'. There is no time, or at least very little time, to contemplate and research the issue. I just try to call on my 30 years of practice experience and make the best and fairest decision possible. These situations really happen much more often than I would have predicted, and now whenever it happens, I put myself at ease by telling myself (because there is of course no one with whom to discuss it) that attorney/party just punted the ball backwards over his head.

Motions? Motions!

Regarding my workload tasks outside the courtroom, the most surprising aspect has been the volume of motions that are filed. As a hearing division judge, the motions I see are typically in association with litigation that eventually will proceed to a hearing before me, if not otherwise resolved. So the motions I see are not the motions that are filed outside the litigation process, such as a physician-change motion in a case that is not otherwise in litigation. I find the volume of motions in litigated cases surprising only because in my several decades of practice, I rarely was involved with one. That is, I rarely filed one and I rarely was on the receiving end of one. I don't mention this topic to necessarily discourage motion filings, because I see many motions that are needed, and even if not, if the parties feel they need our help by way of a motion, it is our job to help in that manner.

I would encourage lawyers to follow the directive in Board Rule 102(D)(2) to consult with the opposing lawyer and discuss the issue and make a good faith effort to work out the issue before filing a motion. At least be transparent with one another and have a frank and open discussion about the issue and listen to the opposing lawyer's view. Possibly a compromise might be in order, or if not, at least after discussion of the issue and contemplation of the opposing view, the issue can be narrowed and more succinctly stated in a motion. I found this to be true during my practice and likely that avoided the need for a motion in many cases.

It is important for the parties to keep the judge informed about the status once a motion is filed. Typically a judge is assigned the motion soon after it is filed and most times well before the due date of a response. I will monitor that motion with an eye toward the due date of the response. I will also check the hearing date anticipating of course that a ruling is needed before the scheduled hearing. If the parties work out the issue during this process, which is of course is encouraged and sometimes does happen, it is important to inform the judge and withdraw the motion so that a ruling does not take place. As a practicing attorney, I always withdrew the motion I filed if the issue resolved, and if I was the recipient of a motion and the issue resolved, I would typically file a response stating the issue was resolved so that the judge was definitely informed and so that I did not let a response deadline pass without making a filing (this, assuming the lawyer filing the motion did not go ahead and clearly withdraw it).

Lastly regarding motions, sometimes lawyers will call on conference call and seek the guidance of a judge, sometimes by agreement, and sometimes one of the lawyers is reluctantly on the call. Usually to make a ruling on an issue

as a judge, I prefer that the parties file a written motion and reply giving me evidence and argument with legal citation; a judge can just make a better decision in that context. If I have a conference call and determine that there is time for that better process to occur, I inform the parties that I am happy to discuss the issues and I'll even give preliminary thoughts on the issue, in hopes that it will guide them and possibly help them resolve the issue, but I tell them in that call that I will not generate an order just based on the call. Conversely, there are issues that require a ruling based on a conference call if the motion process will not work because we are on the eve of a hearing. Some issues such as a motion to quash a subpoena just served for a hearing within a few days, of course require an immediate ruling and in that case I will make a ruling in the conference call after hearing the arguments of the parties.

My In-Court Methodology

With the guidance of some great seasoned judges that work with me, and now through some experience and learning after making mistakes, I've developed a methodology to fulfill my role as a hearing division judge. Everything a hearing judge does, in court, is meant to guide the process, protect and establish a good record, and most importantly to give the parties every opportunity to present their case and participate in a process where their due process right to be heard is protected.

As a hearing judge, I think that it is important to guide the process but not participate in either side's presentation of the case. I strongly tend toward letting a lawyer try his/her case as they see fit without interference from me. In other words, I really want to stay out of the way of a good lawyer trying their case.

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As stated, a judge's job is to guide the process and perfect the record. As discussed in my initial impressions above, when a judge walks into the courtroom, and even after all are seated, everyone is literally looking at the judge to get the process going. At the beginning of the case, I ask for each side to tell me what they are "seeking". The hearing request is a clue, but often, after the hearing request is filed, the issues are narrowed or expanded. Is the claimant seeking disability and if so what is the date range? Is the claimant seeking medical and if so, who is the provider? Is the claimant seeking a ruling that the employer lost medical control, and if so, what is the legal theory and what doctor do they want on the case if I rule that they are correct? Is the claimant seeking an assessed attorney fee, and is it due to unreasonable defense or a Board Rule violation, or both; and if I do not rule in the claimant's favor on that issue, does the claimant's attorney seek approval of his/her fee contract? Likewise, I ask the Employer if they 'seek' anything as part of the hearing process. I state on the record the relief sought by both parties and their general contentions as to the issues, I state any stipulations that they are able to enter, and I confirm that the parties agree to those things.

It is also important for the judge to make a finding at the beginning of the hearing as to burden of proof. In a multi-issue hearing, often each side will have a burden of proof as to an issue. Sometimes a judge needs to get information from the parties to make a finding as to who has the burden. The burden of proof should be established before evidence is presented. It can be tricky; for example it is the claimant's burden as to a medical expense if the denial is due to authorization or causation; however it is the employer's burden if the denial of medical is due to reasonableness and necessity. (Board Rule 205(c)(1)).

Similarly, a judge needs facts from the parties to determine which party has the change-in-condition burden.

Finally, during the hearing, it is the judge's job to perfect the record and keep order. I try to be assertive and make sure the hearing flows in an orderly manner; this includes such things and explaining the rule of sequestration to the witnesses, and instructing the witnesses where to stand for the oath and then where to sit. It includes such things and instructing a witness to pause in their testimony if there is an objection. A judge should insure that there is a ruling as to admissibility of each exhibit, and that the record is clear as to which exhibits are in evidence. I also make sure that if the record does not close at the conclusion of the hearing, then there is a specific date that the record will close, and I make sure that the record clearly shows the specific limited purpose for which the record is open. Also, regarding briefs, I get a date that the court reporter anticipates that the transcript will be available, and from that date I establish at the conclusion of the hearing a specific due date for briefs. I do this so there is no question as to the brief due date.

Conclusion

I hope that this article provides some insight to lawyers that practice workers compensation. Remember that the court system is here to provide a forum for parties to get quick and fair rulings, and we handle preliminary matters and court proceedings with that in mind. Finally, if you see a judge outside the courtroom, remember that we are a lonely bunch so say 'hello'; and, anytime a court case is becoming boring or mundane, feel free to give me a wink and then take the football and punt it backwards over your head. I'll be ready to make a quick ruling.



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McDuffie v. Ocmulgee

A View from the Employer/Insurer Perspective

By Ann Baird Bishop, Sponsler, Bishop, Koren & Hammer P.A.

Almost a year ago, the Court of Appeals issued its decision in *McDuffie v. Ocmulgee EMC*, Court of Appeals Case No.: A16A0093, completely ignoring the plain language of *O.C.G.A. § 34-9-1(4)*. The Supreme Court accepted the Application for Certiorari and the case was argued on June 19, 2017.

The facts show that the claimant was hired by Ocmulgee EMC in 2007. At the time of hiring, the claimant failed to disclose a prior knee injury and his permanent work restrictions as a result of that prior injury. In fact, on the application seeking a job at Ocmulgee EMC, the claimant failed to even mention the employer for which he was working at the time of his prior injury. The claimant was out of work for four years as a result of the prior knee injury and underwent three surgeries for that prior injury.

In 2009, while working for Ocmulgee EMC, the claimant reinjured his right knee. Ocmulgee EMC accepted the claim as compensable. The employer/insurer learned of the claimant's dishonesty regarding his prior injury and restrictions and fired the claimant, suspending his temporary total disability benefits. Although not discussed by the Court of Appeals, it is believed that no *Rycroft* defense was raised since, as a part of the hiring process, the claimant was sent for a pre-employment physical during which his prior knee surgery was disclosed. Accordingly, the employer/insurer could have investigated and learned of the permanent restrictions at the time of hire so the *Rycroft* defense was not available as newly discovered evidence pursuant to *O.C.G.A. §34-9-221(h)*.

When the claimant's treating physician took him out of work entirely for an additional right knee surgery, temporary total disability benefits were reinstated voluntarily in March 2011. After the surgery, in July 2011, the claimant's physician stated that the claimant had returned to his pre-2009 injury baseline and temporary total disability benefits, again, were suspended.

After a hearing in which the claimant sought reinstatement of temporary total benefits, the Administrative Law Judge found that, after the 2011 surgery, the claimant had improved to the point that he had no work restrictions beyond the restrictions he had (but failed to disclose) when hired by Ocmulgee EMC. Accordingly, the Administrative Law Judge found that the employer/insurer had carried their burden of proving that the claimant's condition had changed for the better and refused to order reinstatement of temporary total disability benefits. The State Board of Workers' Compensation and Superior Court confirmed the Administrative Law Judge's decision.

The Court of Appeals accepted the claimant's application for discretionary appeal. In its decision, the Court of Appeals acknowledged that, while there was conflicting evidence, there was some evidence to support the factual findings of the Administrative Law Judge and State Board of Workers' Compensation. As such, the Court of Appeals adopted the findings that the claimant had experienced a physical change for the better and that there were no longer any restrictions on the claimant's ability to work attributable to the 2009 accident while working for Ocmulgee EMC.

Nevertheless, the Court of Appeals reversed the lower tribunal's decisions holding that the employer/insurer were required to show not only that the claimant had recovered from the aggravation and returned to his pre-injury baseline, but also that suitable work was available and had been offered to the claimant. The Court of Appeals ordered the case remanded to the State Board of Workers' Compensation for the Administrative Law Judge to make a determination regarding whether suitable work was available and offered.

The employer/insurer, supported by the Georgia Workers' Compensation Association, Georgia Association of Manufacturers, Georgia Mining Associates, Georgia Agri-Business Council, Inc., Associated General Contractors of Georgia and Georgia Poultry Foundation, filed an application for writ of certiorari which was granted on Feb. 27, 2017. In granting the writ of certiorari, the Supreme Court asked that the parties pay particular attention to the following issue:

Must an employer show the availability of suitable employment to justify suspension of workers' compensation benefits after already establishing that an employee's work-related aggravation to a pre-existing condition has ceased to be the cause of the employee's disability?

In their brief to the Supreme Court in support of the appeal, the employer/insurer noted that the cases upon which the Court of Appeals relied in holding that the Employer/Insurer had the burden not only of showing that the claimant had recovered from the work related aggravation but also that suitable employment must be available were inapposite. In each of the cases cited by the claimant and the Court of Appeals, the evidence had not shown that the injured worker had recovered from the work injury but, rather, that the injured worker continued to suffer from restrictions on his ability to work which were the result of the work related accident. Here, as found by the Administrative Law Judge, the State Board of Workers' Compensation, the Superior Court, and the Court of Appeals, the claimant had no restrictions which were attributable to the work injury he sustained in 2009

while working for Ocmulgee EMC. The claimant no longer suffered any disability due to the 2009 aggravation of his pre-existing condition.

Despite the excellent and passionate efforts of Blake Smith on behalf of the claimant, the law is clear: *O.C.G.A. § 34-9-1(4)* states that an aggravation of a pre-existing condition meets the definition of injury by accident arising out of and in the course of employment only for so long as the aggravation continues to cause the disability. Here, the trier of fact found that, when benefits were suspended in July 2011, the aggravation no longer was causing any of the claimant's ongoing disability. In such circumstances, no further benefits are due.

It is submitted that the employer/insurer could have controverted the entire claim at that point and not only suspended temporary total but refused to provide further medical treatment since there was no longer any compensable injury by accident. The Court of Appeals noted that the employer/insurer had not challenged a separate holding of the Administrative Law Judge that Ocmulgee EMC remained responsible for providing and paying for reasonable and necessary medical treatment. However, it is submitted that if the claimant has recovered completely from the work injury then, under the plain language of *O.C.G.A. § 34-9-1(4)*, no further benefits of any kind should be payable. Moreover, it is suggested, that referring to the situation when an aggravation completely resolves as a "change in condition" may confuse the issue. Certainly, as a factual matter the condition has changed. However, "change in condition" is a term of art in workers' compensation cases which historically always has meant that a compensable injury still exists but that the claimant's condition may have changed to the point that he either has renewed entitlement to disability benefits or is no longer entitled to disability benefits. Historically, in change in condition cases, medical benefits continue to be payable and the accident/injury continues to meet the definition of injury by accident arising out and in the course of employment. That is not the situation in the instant case.

The oral argument before the Supreme Court presided over by Chief Judge Harris Hines and in which Judge Cynthia Adams of the Douglas County Superior Court substituted for Justice Peterson was heard on Monday, June 19, 2017. Fred Hubbs presented the argument on behalf of the employer/insurer, pointing out that after it was found that the claimant had recovered from the aggravation and no longer suffered any disability due to the aggravation, there is no longer a nexus between the accident while working for Ocmulgee EMC and any continuing unemployment. The claimant has returned to his baseline condition and nothing more need be proved.

On behalf of the claimant, Blake Smith attempted to suggest that the case at bar was not an aggravation case but a "new injury" case. Justice Nahmias pointed out that the State Board of Workers' Compensation and all but one judge on the Court of Appeals agreed that the claimant was back to baseline and pointed out that the petition for certiorari was denied on any factual issues but granted only on legal issues. Nevertheless, the attorney for the claimant/appellee continued to refer to the permanent restrictions placed on the claimant's ability to work before he was hired by Ocmulgee EMC as "paper restrictions". Mr. Smith seemed to be arguing that the Supreme Court should revisit the facts and find that the claimant had not recovered from the aggravation. Specifically, Mr. Smith asked for the Justices to engage in a de novo review. Justice Nahmias asked the parties to assume that the Supreme Court is not going to revisit the facts. Even setting aside any bias in favor of the employer/insurer, once the facts are determined to show that the claimant has recovered from any aggravation of a pre-existing condition so that he no longer suffers from any disability as a result of the aggravation, the law is clear that the claimant is entitled to no further benefits whatsoever. Workers' compensation is a creature of statute and it is hoped that the Supreme Court will correct the Court of Appeals' failure to abide by *O.C.G.A. § 34-9-1(4)*.

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Workers' Compensation: The Original Employment Law

By Daniel C. Kniffen. Drew, Eckl & Farnham, LLP

In the Legal Profession, the areas of Workers' Compensation Law and Employment Law are virtually always treated as separate and distinct disciplines, with their separate practitioners rarely venturing into the other's realm. This is ironic, since in many respects Workers' Compensation might be thought of as the original Employment Law.

When Workers' Compensation laws began to be passed in the United States in the early 1900s, the employment landscape was vastly different than today, with none of the benefits plans and legal remedies that are commonplace now. Georgia's Workers' Compensation statute, for example, was passed in 1920, many years before the National Labor Relations Act (1935), the Employment Security Act (1935), the Fair Labor Standards Act (1938), the Civil Rights Act (1964) and the Occupational Safety and Health Act (OSHA) (1970). When I began practicing law in the 1980s, the notion that any of these laws might be involved in the handling of a Workers' Compensation claim was a foreign concept, and extraordinarily rare. Indeed, for Employment lawyers, Workers' Compensation has traditionally been thought of as an entirely separate legal matter, more akin to an insurance claim than anything else.

The early 1990s, however, witnessed the dawn of a new era in the workplace, with passage of laws such as The Americans with Disabilities Act (1990), the Family and Medical Leave Act (1993) the Health Insurance Portability and Accountability Act (1996) and the Genetic Information Nondiscrimination Act (2008), as well as both court cases and statutory amendments that have steadily expanded the reach and application of virtually all workplace laws. In contrast to days past, lawyers practicing in Workers' Compensation must be familiar with potential issues that can significantly impact their clients, injured workers and employers alike. In today's workplace, every Workers' Compensation claim involves Employment Law issues as well.

A partial list of the issues where Workers' Compensation and Employment Laws intersect would include the following:

Hiring:

Anyone practicing Workers' Compensation in the early 1990s remembers the uproar created when the Americans with Disabilities Act was passed, with Title I devoted to prohibiting discrimination in the workplace against the disabled. Among those protections was a prohibition against employers asking any job applicant a question "phrased in terms of a disability." This was deemed to prohibit an employer from asking any questions

regarding an employee's prior health conditions, injuries, medical restrictions or prior Workers' Compensation claims – all routine, pre-employment questions for many employers at the time. The process that followed, between President George H.W. Bush's signing of the ADA in 1990, and the effective date of its employment provisions two years later, in response to an uproar from the business community was, perhaps, a "results oriented" interpretation by the Equal Employment Opportunity Commission of the ADA's language.

In providing guidance and policies for the ADA's implementation, the EEOC determined that while the ADA prohibits pre-employment inquires "phrased in terms of a disability," such questions, and indeed any health-related question, are permissible under the ADA when made (1) after a "conditional offer of employment" and (2) before the applicant actually begins working. It would have been hard to find many employers in the early 1990s who had ever heard of making a "conditional" offer of employment, but the EEOC's creation of this concept addressed the vexing problem of how Employers were to safely hire employees for work that could be potentially dangerous for the applicant, without discriminating in the process. For Workers' Compensation practitioners, this also meant that claims for reimbursement from the Subsequent Injury Trust Fund (still around at the time) might still be possible, as well as potential misrepresentation defenses under the case of *Ga. Power Co. v Rycroft*, 259 Ga. 155 (1989). While the EEOC's policies have now been in place for over 25 years, many employers remain unaware of their obligations in the hiring process. As a result, practitioners must be sure to carefully review the Employer's hiring practices and their handling of medical information, which has heightened protection under both the ADA and HIPAA.

Similarly, the passage of the Genetic Information Nondiscrimination Act in 2008 created new obligations for employers not only with regard to Genetic Testing, but also with any inquiries regarding an employee's family medical history, which GINA treats as genetic information. GINA includes an exception for Employers to comply with the FMLA, State or local laws (including Workers' Compensation) and certain Employer leave policies. Family medical history, for example, that is necessary to medical treatment for a compensable injury would be exempt from GINA coverage, but not a general question in the Hiring process regarding, for example, family history of heart disease. Damages available under GINA are similar to those available under Title VII of the Civil Rights Act, and include compensatory damages, back pay, punitive damages and attorney's fees. In one recent case in the Northern District of Georgia, a jury awarded \$2.2

million under GINA to two employees, from whom their employer obtained a DNA sample as part of a disciplinary investigation. *Lowe v. Atlas Logistics Group*, 102 F.Supp. 3d. 1360 (N.D.Ga. 2015)

OSHA and Drug Testing

For decades the Georgia Workers' Compensation Act, like many across the Country, has included an affirmative defense to claims caused by an Employee's willful misconduct, including intoxication. Since 1993, O.C.G.A. § 34-9-17 has included a rebuttable presumption that intoxication is the cause of an injury if the employee is found to have certain levels of alcohol or a controlled substance in their system within a prescribed period of time after the accident, or if the employee unreasonably refuses a "reliable and scientific" drug test required by the Employer, that meets the standards of the Drug Free Workplace provisions in O.C.G.A. § 34-9-415. Last year, the Occupation Health and Safety Administration passed a new regulation requiring employers to have reasonable procedures for reporting work related injuries and prohibiting employers from discriminating or retaliating against employees who report on-the-job injuries. In addition, OSHA now regards mandatory, automatic drug testing after any reported accident as potential evidence of improper deterrence in reporting injuries. *See 29 CFR 1904.35(b)(1)(iv)*. OSHA does provide that any drug testing done in compliance with State or Federal Drug Testing laws would not violate OSHA's prohibition against deterring accident reporting, but it should be noted that the Drug Free Workplace provisions in Georgia's Workers' Compensation Act do not impose a duty upon an employer to drug test (O.C.G.A. § 34-9-415(a)), and contemplates only testing after accidents for "reasonable suspicion" (O.C.G.A. § 34-9-415(b)(2)), and "if the employee has caused or contributed to an on the job injury which resulted in loss of worktime." (O.C.G.A. § 34-9-415 (b)(5)).

OSHA's new regulations are meant to address an Employer's motivation in the reporting of work related injuries, and it remains to be seen whether Courts will agree with their interpretation of blanket, mandatory testing after on-the-job accidents. Nevertheless, practitioners should be aware of this issue, and its potential impact on Employers in Intoxication defenses.



The WC-6 and Wage & Hour Laws

For many years, the Federal Department of Labor has estimated that 70 percent of all employers fail to comply with the Wage and Hour provisions of the Fair Labor Standards Act. Many employers, for example, still assume that employees are exempt from overtime payments if they are paid a salary, as opposed to hourly, or that employees do not need to be paid for time worked "off the clock." Over the last decade, Wage and Hour cases, including collective actions under the FLSA, have risen dramatically, and now constitute the most active area of litigation in the Employment Law sphere. For example, in 2015, there were 8,954 Wage and Hour cases filed in Federal Court alone, up from just over 8,000 in 2014. For an attorney representing either a claimant or an employer in a Workers' Compensation case, the WC-6 Wage Statement provides a window into the Employer's Wage and Hour practices, as do the wage and payroll records frequently produced in discovery. These records should be carefully reviewed to ensure that the employee has been paid correctly, and that the Employer addresses any wage and hour issues. Damages available under the FLSA include back pay, liquidated damages and attorneys' fees.

Return to Work

Georgia's Workers' Compensation Act has specific provisions relating to an employee's return to work, including the so-called "240 Rule," by which an employer may obtain approval of a light duty job from the Authorized Treating Physician, and suspend Disability benefits if the employee unreasonably refused the work offered. Nevertheless, returning an employee to work is aspirational under the Workers' Compensation Act, rather than mandatory; an Employer's legal obligation under the Act is to pay Workers' Compensation benefits, not necessarily to return the claimant to work.

The "reasonable accommodation" provisions of the Americans With Disabilities Act overlap with return to work issues, however and, unlike the Workers' Compensation Act, provide circumstances where an employee's return to work may be required. Under the ADA, an employer is required to engage in a "good faith dialogue" to provide a "reasonable accommodation" when requested by an employee with a covered disability, defined by the ADA as a physical or mental impairment that significantly limits a major life activity. Amendments to the ADA in 2008, and subsequent court decisions, sufficiently expanded the ADA's definition of "disability" that a significant number of Workers' Compensation injuries would qualify for ADA coverage.

Inquiries under the ADA as to what constitutes a "reasonable accommodation" are intentionally fact-specific, but the ADA, EEOC guidelines and court decisions do provide a few boundaries:

- At a minimum, "reasonable accommodation" under the ADA includes job restructuring, part-

time or modified work schedules, reassignment to a vacant position and acquisition of modification of equipment. 42 U.S.C. § 12111(9)(B).

- “Reasonable Accommodation” does *not* include creation of a new job, promotion or modification of a job’s “essential job functions.” *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*.
- An employee must request and identify a reasonable accommodation before the Employer must engage in the “good faith interactive process” to provide an accommodation. *Spears v. Creel*, 607 Fed. Appx. 943 (11th Cir. 2015).
- An employee is not entitled to the accommodation of their choosing; the accommodation must simply be reasonable under the terms of the ADA. *Stewart v. Happy Herman’s Cheshire Bridge, Inc.*, 117 F.3d 1278 (11th Cir. 1997).

Unlike many states, Georgia’s Workers’ Compensation Act does not include a specific “retaliation” statute, prohibiting adverse employment actions taken against an employee for pursuing Workers’ Compensation benefits. The only area where such conduct by an employer becomes relevant under our Workers’ Compensation laws is when an employee alleges a change in condition, the burden of proof for which can be met by evidence that the proximate cause of a termination of employment was his or her compensable injury. *Padgett v. Waffle House*, 269 Ga. 105 (1998). As a practical matter, however, the ADA operates as an “anti-retaliation” remedy in most workers’ compensation claims, as it prohibits adverse employment action taken as a result of a worker’s covered disability. See *Frazier-White v. Gee*, 818 F.3d 1249 (2016); *Lucas v W.W. Grainger, Inc.*, 257 F.3d 1249 (2001).

FMLA, Disability Leave and Termination of Employment

The Family and Medical Leave Act (FMLA) essentially provides for up to 12 weeks of unpaid leave for qualified employees who have a “serious health condition,” or who have a spouse, child or parent with such condition. Under the broad definition given under the FMLA for what constitutes a “serious health condition” most, if not all, workers’ compensation injuries would qualify, meaning that virtually all workers’ compensation claims implicate coverage under the FMLA. For the FMLA to apply, the employer must have 50 or more employees, and the employee must have at 1,250 hours worked for the employer in the preceding 12 months.

In addition to providing for up to 12 weeks of unpaid leave, the FMLA provides that the employee must be allowed to return from leave to the same or equivalent job, and that all health benefits must continue during the leave as if the employee were still at work. 29 U.S.C. § 2614 Many employers fail to designate leave from a work-related injury as FMLA leave, which can result in a qualified

employee being entitled to up to an additional 12 weeks of job-protected, unpaid leave under FMLA, even when he or she has been released to return to work.

Settlements

Inevitably, the settlement of any Workers’ Compensation case involves both parties agreeing to part company, and to terminate the Employer/Employee relationship. Apart from the natural preference of parties in litigation to be done with each other, little is resolved in a Workers’ Compensation case if issues regarding suitable employment, return to work and the potential for new claims based on a job-related aggravation of a pre-existing condition are not dealt with.

As a result, it has long been customary in settlement negotiations for a Workers’ Compensation case to include a cessation of employment, as well as a general release that documents there are not further, outstanding claims between the parties as to a variety of employment laws. While all Workers’ Compensation settlements must be submitted to and approved by the State Board of Workers’ Compensation pursuant to O.C.G.A. § 34-9-15, Board Rule 15(g) has long provided that the Board will not approve “Stipulations which contain waivers or releases of causes of action over which the Board has no jurisdiction.” Any release of claims outside the Workers’ Compensation Act, therefore, must be addressed in a separate, General Release.

Practitioners must be alert, however, to the varying rules and procedures regarding the release and waiver of different Employment Laws. Certain claims, including those for Unemployment Benefits and future discrimination claims, may not be waived. See O.C.G.A. § 34-8-250; *Alexander v Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1973) (*No prospective waiver of Discrimination claims under Title VII*); *Paylor v. Hartford Fire. Ins. Co.*, 748 F.3d 1117 (11th Cir 2014)(*waiver of prospective FMLA claims*). Releases for Age Discrimination claims must be “knowing and voluntary,” and include, among other things, written acknowledgment that the employee may consult an attorney, may have 21 days to consider the release and may revoke their agreement within seven days. See 29 CFR 1625.22.

Moreover, many insurers, providing only coverage for their insured’s Workers’ Compensation liability, refuse to authorize or pay for defense counsel beyond issues related directly to the Workers’ Compensation Act. While, as noted above, the resolution of the Employment relationship is fundamentally intertwined with the settlement of a Workers’ Compensation claim, Defense counsel is ethically obligated to represent the interests of the insured Employer and should, at a minimum, be able both recognize potential Employment Law issues, and either advise the Employer accordingly or suggest consultation with Employment Counsel. Similarly, counsel for the claimant should be cognizant of existing and potential claims for improper termination, retaliation, wage and hour claims and other potential causes of action.

Now You See Me; Now You Don't

Surveillance Footage Production: Can a Claimant Have It and, if so, When?

By Amy R. Harmon and Phillip B. Hairston, Bovis, Kyle, Burch & Medlin, LLC

The use of surveillance footage as evidence in Georgia courts in general (and in workers' compensation claims specifically) has been both murky and malleable for a variety of reasons (outlined below). The result leaves both claimants and employer/insurers unsure of their rights and obligations concerning this important litigation tool. A July 2016 decision by the Appellate Division of the State Board helped clarify some of the murk, providing more discernible contours of a policy on surveillance as evidence and the requirements of production, at least for the practice of workers' compensation. This decision, for now, helps guide the demand and production of surveillance footage throughout the course of a claim.

Georgia Workers' Compensation claim litigation is subject to the Georgia Civil Practice Act, which governs the scope of discovery.¹ The Georgia Civil Practice Act provides for "notice" discovery, the purpose of which is to provide all parties an opportunity to fully explore the facts and know the issues prior to the trial of the case,² in order to minimize "trial by ambush."³ Further, O.C.G.A. § 9-11-26 provides that discovery encompasses "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery . . . including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons

having knowledge of any discoverable matter."

Surveillance footage is a tangible thing under the Civil Practice Act that is arguably always relevant because it covers the activities of a claimant in a workers' compensation claim. The question is whether surveillance, especially that conducted by an employer/insurer after the commencement of a claim, is "any matter, not privileged" or whether a privilege exists that removes it from the scope of O.C.G.A. § 9-11-26. Most commonly, attorneys invoke the work-product doctrine as the means by which surveillance escapes discovery. This doctrine states that materials prepared in anticipation of litigation are discoverable only upon a showing of substantial need and an inability to obtain the materials by other means without undue hardship because of the importance of protecting against disclosure of the mental impressions, conclusions, opinions, or legal theories concerning the litigation.⁴

Georgia's State and Superior courts have not definitively stated whether surveillance footage is discoverable material in opinions outside of the affirmation of the Award from the Board discussed below. However, Federal District Courts in Georgia have addressed the issue on multiple occasions. The District Court for the Northern District of Georgia has stated that the possible use of surveillance evidence at trial creates the requisite substantial need to



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make surveillance evidence discoverable. However, if a party who has surveillance information is not going to use it at trial, then there is no need for the other party to be given access to that attorney work product. If the footage is barred from trial or is non-evidentiary surveillance material, it is protected by the attorney work product doctrine and not discoverable.⁵ Additionally, the District Court for the Southern District of Georgia held a defendant's act of preserving relevant surveillance footage beyond the time when the system normally deletes videos, though done for the purposes of litigation, is not sufficient to transform the video into work product.⁶ This same court also held surveillance footage is discoverable, but the party conducting the surveillance does not have to produce the footage until after the deposition of the surveilled party.⁷

Courts in other states have signaled that surveillance is protected by the work-product doctrine.⁸ Notably, a Maryland court found surveillance footage non-discoverable as protected under the work-product privilege. The judge rejected the argument that discovery of such information would be instrumental in effecting settlement, stating: "if the injuries are genuine, it is unlikely that plaintiffs would be concerned about pictures which confirm the claims presented. On the other hand, if the injuries are simulated or exaggerated, as demonstrated by the pictures, then plaintiffs are less than candid with the court and have no cause to complain of surprise if defendants elect to disprove the case on trial instead of in the conference room."⁹ The finding of the Maryland court highlights the tension between the intent of the Civil Practice Act to provide notice to parties of all relevant information and the protection of litigation preparation, especially as it relates to surveillance footage.

This tension is particularly high in workers' compensation, where surveillance can be a powerful tool in defense of a claim on multiple issues, including impeachment of a party. The Georgia State Board has tackled the issue of surveillance production, and generally found it discoverable. In particular, the Board has noted the timing of the disclosure to be important. In 2010, the Appellate Division reversed the administrative law judge's (ALJ) denial of a protective order for Employer/Insurer's surveillance. In this case, the Employee requested surveillance through discovery, and the Employer/Insurer properly noticed the claimant's deposition to occur prior to the production deadline.¹⁰ The Employee refused to sit for the deposition until the Employer/Insurer produced the surveillance footage. The ALJ denied a protective order to the Employer/Insurer to "negate unfair advantage" to Employer/Insurer in taking the deposition before the production deadline, but allowed the production of the footage to occur "immediately prior" to the deposition. The Appellate Division reversed, granting the order, finding no grounds for allowing the Employee to delay a deposition to which the Employer/Insurer was entitled under the Georgia Civil Practice Act, even if the tactic

resulted in an advantage to the Employer/Insurer. The Employer/Insurer had to produce the footage pursuant to the claimant's request, but not before the expiration of the deadline and not before the deposition duly noticed before the deadline.

More recently in 2013, the Appellate Division issued a more robust opinion on the discoverability of surveillance evidence and the required timing.¹¹ The claim concerned a discovery dispute in which the claimant requested surveillance footage through written discovery. The Employer/Self-Insurer objected on the grounds that surveillance was produced in anticipation of litigation, but agreed to produce the footage after the Employee's deposition. The deposition was postponed until the resolution of the dispute. The ALJ granted Employer/Self-Insurer's request for a protective order, finding that surveillance constitutes impeachment evidence falling outside the scope of discovery.¹² The ALJ also ordered the Employer/Self-Insurer to disclose the name of the investigator to the Employee so that she could depose the investigator prior to the hearing.

On the employee's appeal, the Appellate Division affirmed the protective order, but disagreed with the ALJ's legal reasoning. In its decision, Judge McKay, writing for the Appellate Division, found the surveillance footage was discoverable because of its potential use as both impeachment and substantive evidence. Further, the surveillance footage was prepared while litigation was pending, so its production was protected from discovery, unless the Employee could show a substantial need for the footage and an inability to obtain it without undue hardship. If the employee demonstrated a substantial need for the footage, then "the Board must 'protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories' of the Employer/Self-Insurer's attorney."¹³

Reconciling the competing interests of the parties, the Appellate Division granted the Employer/Self-Insurer's motion for a protective order for the footage until the Employee's deposition. It further directed the Employer/Self-Insurer to produce the surveillance footage after the deposition, as responsive to the Employee's Request for Production. The Appellate Division found that the Employee did have a substantial need for the footage, but not before her deposition. If the footage were produced prior to the deposition, it would cause "unnecessary harm to the Employer/Self-Insurer's hearing preparation" and "deprive them of the opportunity to obtain her sworn testimony based on her candid recollections unrefreshed by materials generated by the Employer/Self-Insurer for this purpose."¹⁴ The Employee's substantial need for the footage could be met by production of the surveillance footage "anytime in advance of the hearing that gives the Employee a reasonable opportunity to review them for authenticity and integrity and that allows her to prepare rebuttal evidence . . . as necessary and appropriate."¹⁵

The Appellate Division relied heavily on persuasive

authority from other Federal districts because of the paucity of decisions in on the matter in Georgia. This decision provides some practical guidelines for counsel on both sides to consider when requesting and producing surveillance footage:

- The crux of the matter appears to be timing. Having decided that surveillance footage is both discoverable and protected from discovery, the Appellate Division sought to satisfy a claimant's substantial need for the footage to avoid ambush at trial and protect an employer/insurer's privileged hearing preparation.
- An employer does not have to produce surveillance footage until after the deposition.
- A claimant can fully prepare to rebut any surveillance footage evidence when produced within ample time of the hearing.
- An employer does not have to produce the footage until after the deposition. However, the employer will have place the claimant on notice of a potential footage by denying the request for the footage. Placing the claimant on notice of potential surveillance gives him a chance to anticipate possible cross-examination questions prior to the deposition.

The above-referenced cases did not determine whether an employer must affirm or deny whether it has surveillance prior to the deposition. An employer that does not want to place the claimant on notice of surveillance prior to a deposition may refuse to answer whether it has surveillance. However, the refusal to acknowledge the existence of surveillance may lead a claimant to assume an employer has surveillance footage of him.

(Endnotes)

- 1 O.C.G.A. § 34-9-102(d)(1)
- 2 *Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284 (1972)
- 3 *Hanna Creative Enters., Inc. v. Alterman Foods, Inc.*, 156 Ga. App. 376 (1980).
- 4 O.C.G.A. § 9-11-26(b)(3).
- 5 *Turner v. Atlantic Southeast Airlines, Inc.*, N.D. GA 2008 WL 11320105.
- 6 *Pinkney v. Winn-Dixie Stores, Inc.*, S.D. Georgia, 2014 WL 12656735.
- 7 *Taylor v. Guardian Life Insurance Company of America*, 2007 WL 1068133 (S.D. Ga. 2007).
- 8 *Fletcher v. Union Pac. R.R.*, 194 F.R.D. 666, 670; *Ward v. CSX Transp., Inc.*, 161 F.R.D. 38, 40; *St. Louis Public Service Company v. McMillian*, 351 S.W. 2d 22.
- 9 *Hikel v. Abousy*, 41 F.R.D. 152 (D. Md. 1966).
- 10 State Bd. of Workers' Compensation, 2009005067 Appeal
- 11 State Bd. of Workers' Compensation, 2013024225 Appeal
- 12 State Bd. of Workers' Compensation, 2013024225 Trial
- 13 State Bd. of Workers' Compensation, 2013024225 Appeal
- 14 State Bd. of Workers' Compensation, 2013024225 Appeal
- 15 State Bd. of Workers' Compensation, 2013024225 Appeal

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For Better or Worse:

Third Party Medical Case Management in Non-Catastrophic Claims: Board Rule 200.2

By Julie Poirier, Poirier Law

The State Board of Workers' Compensation recently promulgated Board Rule 200.2, which took effect on Jan. 1, 2016. Board Rule 200.2 addresses medical case management by third party vendors in non-catastrophic claims.

Board Rule 200.2 Medical Case Management

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. 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). Case managers may be involved in cases where the employer/insurer has contracted with a certified workers' compensation managed care organization (WCMCO). 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.

1. What is Board Rule 200.2?

- A. Board Rule 200.2 sets forth specific guidelines for the both the qualifications of third party medical case managers and the manner in which they can assist with a claim. Board Rule 200.2 is inapplicable to catastrophic claims and does not apply to direct employees of the Employer, Insurer, or Servicing Agent.

1. What qualifications are required?

- a. Board Rule 200.2 provides that Employers may voluntarily utilize medical case managers who possess certification in compliance with Board Rule 200.1 (I)(A).
- b. Board Rule 200.1 (I) (A) lists one of eight separate certifications or licenses that the Case manager **must** hold:
 - (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);
 - (8) Certified Occupational Health Nurse Specialist (COHN-S).

B. When is consent required?

1. The rule specifies that consent from the employee or employee's attorney **shall be required** for any medical case manager to work with the injured worker.
2. **Written consent is always required** for the case manager to attend any medical appointment.
3. When consent is required, it may be withdrawn, and the employee **must be informed** in writing that consent may be refused by him/her.

C. When is Consent not required?

1. Consent **shall not be required** for all else, including, for the 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. ****Of note:** The Injured worker/attorney cannot prevent the case manager from conducting private meetings

(meetings with the treating doctor without the injured worker's attendance) **10 days' notice** is required for such private meeting to allow the attorney and injured worker to attend.

D. How to communicate in compliance with the Rules?

1. All communications by the case manager must comply with Board Rule 200.1(II)(D)
 - a. The case manager **must** provide copies of all correspondence, written communication and documentation of oral communications with the treating physician to all parties and their attorneys.
 - b. The case manager **must** provide professional identification and explain his/her role to any physician at the initial contact with the physician.
 - c. The case manager **must** obtain revocable written consent of the employee to attend private physical examination, after the employee has been advised of the right to a private examination. The case manager may meet with the physician and the employee after the private exam.
 - d. The case manager **must** not obtain medical information regarding an injured employee in a **private meeting** with any treating physician **unless** the manager has reserved with the physician sufficient appointment time for the conference and the injured employee and his or her attorney were given ten days advance notice of their option to attend the conference.

1. **Exceptions** to the 10 day notice requirement :

- a. In cases of medical necessity
- b. Consent of the injured employee or his or her attorney

2. What if the injured worker does not consent to a private meeting between the NCM and physician after proper notice is given?

- a. If the injured employee or the physician does not consent to a joint conference, or if, in the physician's opinion, it is **medically contraindicated** for the injured employee to participate in the conference, the NCM (shall note this in his or her report) may in those specific instances communicate directly with the physician.

What consequences are in place, under Board Rule 200.2, when the case manager violates this rule and

privately meets with the doctor and obtains information on the case without providing ten days' notice?

E. What happens if a case manager violates Board Rule 200.2, within Board Rule 200.2? *See Chart - Exhibit 1.

1. Violations of this rule may be referred to the Rehab Division for peer review 200.1 (IV). (See Chart for steps, *Exhibit 1)
2. Complaints against medical case managers for revocation or suspension of registration, excessive or fraudulent charges, provision of unnecessary services or unethical or unprofessional behavior shall be filed in writing on a Rehab Complaint with the Director of Managed Care and Rehabilitation with copies sent to all parties and affected suppliers and case managers. Registration may be revoked or suspended, and/or penalties assessed.
3. A written complaint must be filed with the Director. Upon receipt, the Director shall notify the case manager. *See Chart - Exhibit 1
 - a. How and WHERE to file on ICMS?
 1. Open Claimant's file in ICMS
 2. Click on Non Forms (vs. Forms when you file a 14)
 3. Form Title
 4. Rehab Related Complaints and
 5. Upload your "Complaint"/Letter detailing the violation and supporting documents
 6. SUBMIT
4. Within 15 days of notice, Director shall appoint a three-member panel to review the complaint. *See Chart - Exhibit 1
5. Medical case manager shall be provided 15 calendar days from the date of notice to provide a written response to the complaint. *See Chart - Exhibit 1
6. The complainant may reply to the response within 10 days by serving a copy on director and the review panel. *See Chart - Exhibit 1
7. Review panel may request addition information from any person or party having relevant knowledge. Such additional information shall be provided to the person who is subject of the complaint who will have 10 days to respond. *See Chart - Exhibit 1
8. The review panel shall report its findings and recommendations to the Director within 30 days of the final response. The Director shall

promptly notify the medical case manager.
***See Chart – Exhibit 1**

9. If the panel determines there is no inappropriate conduct, the Director shall send a copy of the findings to all parties to the case. If any party is dissatisfied, the party may challenge the finding by filing a WC-14 Request for Hearing within 20 days. ***See Chart – Exhibit 1**
10. If there is a violation, the Director will refer the findings and recommendations to the Enforcement Division which may include a referral to an ALJ for hearing. If a hearing is held, the ALJ shall issue a decision providing for any available remedy, including dismissal of the complaint, assessment of penalties, probation, and/or revocation of suspension

of registration. ***See Chart – Exhibit 1**

11. The Director shall also have authority to order a replacement of medical case manager if such action is necessary to effectuate the purpose of the Act. ***See Chart – Exhibit 1**
12. When appeals have been exhausted the Director shall report any violations to the appropriate certification or licensing Board. ***See Chart – Exhibit 1**

Lastly, the State Board of Workers’ Compensations’ website provides us further guidance on the New Rule in a section labeled “Best Practices In Light of Rule 200.2” It can be found on the State Board’s site at <https://sbwc.georgia.gov/medical-case-management>. Please see this section for a full listing. This list is presented in the form of questions (from the NCM) and answers/guidance to each of the NCM’s questions, as the “best practice” to follow in each situation.

