



# WORKERS' COMPENSATION LAW

Section Newsletter

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Gregg M. Porter & Elizabeth Costner, editors

## McRae v. Arby's: Are We Done Now?

By K. Martine Cumbermack and J. David Garner

Who would have ever imagined that an employee's mistaking a cup of lye for Mountain Dew would lead to exacerbate the tension between an employee's right to privacy and an employer/insurer's right to obtain the employee's relevant medical information? The case of *Laura McRae v. Arby's* has spawned many discussions over the last two-and-a-half years on this issue. No doubt every practitioner of workers' compensation, either plaintiff or defense, is well versed on the details. Since this Newsletter last discussed the issue in the Fall of 2011, there have been additional Appellate decisions, some controversy, fervent debate among legal advocates, and, for some defense attorneys, a temporary shift in the way their claims were handled. Hopefully, the recent Supreme Court of Georgia decision handed down on Nov. 5, 2012, has put an end, for the most part, to the controversy over *ex parte* communications with treating physicians.

### The Controversy

At the crux of the debate is the interpretation of O.C.G.A. § 34-9-207. Specifically at issue is O.C.G.A. § 34-9-207(a), which provides that an injured worker waives any medical privilege or confidentiality related to any communications regarding the claim or history or treatment of injury arising from the incident by filing for and receiving workers' compensation benefits. The section goes on to provide that any physician who has examined, treated, or tested the employee, or consulted about the employee, shall provide within a reasonable time, and for a reasonable charge, *all information and records* related to the examination, treatment, testing or consultation concerning the employee.

### Court of Appeals Decision

At the Court of Appeals, the issue presented was essentially whether Arby's could require McRae to authorize an *ex parte* conversation or consultation between the defense attorneys and the authorized treating physician in exchange for receiving workers' compensation benefits. *McRae v. Arby's Restaurant*

*Group*, 313 Ga.App. 313, 721 SE 2d 602, (2011). In a 4-3 opinion, the Court of Appeals answered "no." The Court of Appeals ruled, "a claimant is not required by our Workers' Compensation Act to authorize her treating physician to talk to her employer's lawyer *ex parte* in exchange for receiving benefits for a compensable injury . . ." The Court of Appeals cited the case of *Baker v. WellStar Health Systems* in support of its ruling and provided a quite narrow interpretation O.C.G.A. § 34-9-207. Although the Court of Appeals acknowledged that the Code section directs an authorized treating physician to disclose to the employer "all information and records" related to the employee's treatment for the injury at issue, as well as any medical history, and also acknowledged that the Act required a claimant to provide an executed medical release form, the Court narrowly defined the word "information." The Court of Appeals' rationale was that in the Workers' Compensation Act, "information" was intended to refer only to tangible documents and that the legislature did not contemplate *ex parte* communications when it drafted the statute.

After the decision of the Court of Appeals was entered on Dec. 1, 2011, virtually every insurer and their defense counsel in Georgia caucused on what the ruling meant and how they would interpret it in handling their own claims. For many defense attorneys and insurers, the Court of Appeals' decision was interpreted as only applying to *ex parte* communications, or particularly in-person or telephonic conferences, with a claimant's authorized treating physician. Consequently, if defense counsel were unable to obtain permission from the claimant's attorney to consult with a treating physician, some pursued other avenues in an effort to obtain information and/or clarification of a claimant's medical treatment and diagnosis. One tactic was to forward communications to the treating physician, sometimes along with a medical questionnaire, with a copy to the claimant's attorney. The rationale being, by copying the claimant's attorney, said communication was not "*ex parte*" and, thus, not in violation of the Court of Appeals' decision. Another approach used by defense attorneys was to rely on the adjusters and/or nurse case manager's ability to

receive information directly from the authorized treating physicians. The rationale was that an adjuster is required to routinely make necessary inquiries and communicate with treating physicians in order to properly administer their claims and provide appropriate benefits to injured workers. Still, there were some who interpreted the Court of Appeals decision narrowly and treated *ex parte* communications as “business as usual.”

Of course, following the Court of Appeals’ decision, there were certainly many physicians who were apprehensive about communicating with any lawyers on a workers’ compensation claim, and others who outright declined to provide any information without specific prior written authorization from the claimant. The result had considerably broader implications despite the rather narrow issue presented and decided by the Court of Appeals.

## Supreme Court Decision

On Jan. 3, 2012, counsel for Arby’s Restaurant Group filed a petition for writ of certiorari to the Supreme Court of Georgia. On April 24, 2012, the Supreme Court of Georgia granted a writ of certiorari in a 4-3 vote. *Arby’s Restaurant Group, Inc., v. McRae*, 2012 Ga. LEXIS 375 Ga. Apr. 24, 2012. The Supreme Court was particularly concerned with whether the Court of Appeals properly interpreted O.C.G.A. § 34-9-207. Oral arguments were heard and the Supreme Court of Georgia received briefs from both parties, as well as amicus curiae briefs, filed on behalf of both parties by various groups and organizations throughout the state. In general, *McRae* and her proponents argued, among other things, that O.C.G.A. § 34-9-207 does not expressly require an employee to authorize a treating physician to engage in an *ex parte* conversation with the opposing parties’ lawyer. Additionally, *McRae* and her proponents argue that “information” properly refers to only tangible records that are already in existence and does not authorize prospective *ex parte* communication between the treating physician and opposing counsel. Further, *McRae* argued that *Baker v. WellStar Health Systems* controlled in this circumstance as binding precedent.



Conversely, among the arguments made by Arby’s and its proponents was that O.C.G.A. § 34-9-207 clearly and unambiguously provided that claimants waive any privilege of confidentiality concerning any communications. Furthermore, Arby’s proponents argued that no authority existed to define “information” as limited to only written documents or other tangible things.

In a unanimous decision entered on Nov. 5, 2012, the Supreme Court of Georgia held “that information as used in § 34-9-207(a) includes oral communications and the Court of Appeals erred by interpreting this section to prohibit oral communications between a treating physician and an employer.” In overturning the Court of Appeals decision, the Supreme Court held that “[u]nder the unambiguous language of § 34-9-207 (a), any privilege the employee may have had in protected medical records and information related to a workers’ compensation claim is waived once the employee submits a claim for workers’ compensation benefits or is receiving weekly income benefits or the employer has paid any medical expenses. The occurrence of any one of these triggering events waives the employee’s privilege in confidential health information and the information may be released by a treating physician.” In specifically addressing the Court of Appeals’ rationale, the Court reasoned that “[t]he Court of Appeals’ failure to distinguish between the terms ‘records’ and ‘information’ . . . is not supported by the language of OCGA § 34-9-207(a) or application of generally accepted rules of statutory interpretation.” *Id.* at 57. The Court concluded that “‘information’ as used in OCGA § 34-9-207(a) includes oral communications and the Court of Appeals erred by interpreting OCGA § 34-9-207(a) to prohibit oral communications between a treating physician and an employer.” *Id.*

Some would say you could actually hear the collective sigh of relief expressed by all employers, insurers, and defense counsel on the morning of Nov. 5, 2012.

The Court’s reasoning was concordant with the holding of the dissenters in the Court of Appeals decision, and ultimately, if somewhat reluctantly, embraced their rationale. The Court first rejected the narrow interpretation of “information” and “records” proposed by the Court of Appeals majority as noted above. However, the Supreme Court rested its holding on the premise that HIPAA’s privacy and confidentiality provisions do not apply to Georgia workers’ compensation cases because such privacy and confidentiality provisions have been waived pursuant to O.C.G.A. § 207(a), and HIPAA not only does not prohibit oral communications, but in fact expressly authorizes them under 45 C.F.R. § 160.103 and 45 C.F.R. § 164.512. *Id.* at 47 and FN1. The Court echoed Justice Miller’s concerns in her Court of Appeals dissent about prompt resolution of claims and inhibiting the employer’s ability to have easy access to the employee’s pertinent medical information. *Id.* at 58. However, the Court also said “we are aware that when a treating physician engages in *ex parte* communications with the employer there exists a risk that the communication may exceed the bounds of the privilege waived.” *Id.* at 57.

Noting its prior vigilance in protecting the privacy rights of Georgia citizens in confidential health information, and balancing that against the General Assembly's legislative creation of a Workers' Compensation Act that favors equal access to information and records relating to the employee's medical treatment, the Court proceeded to forge somewhat of a middle ground.

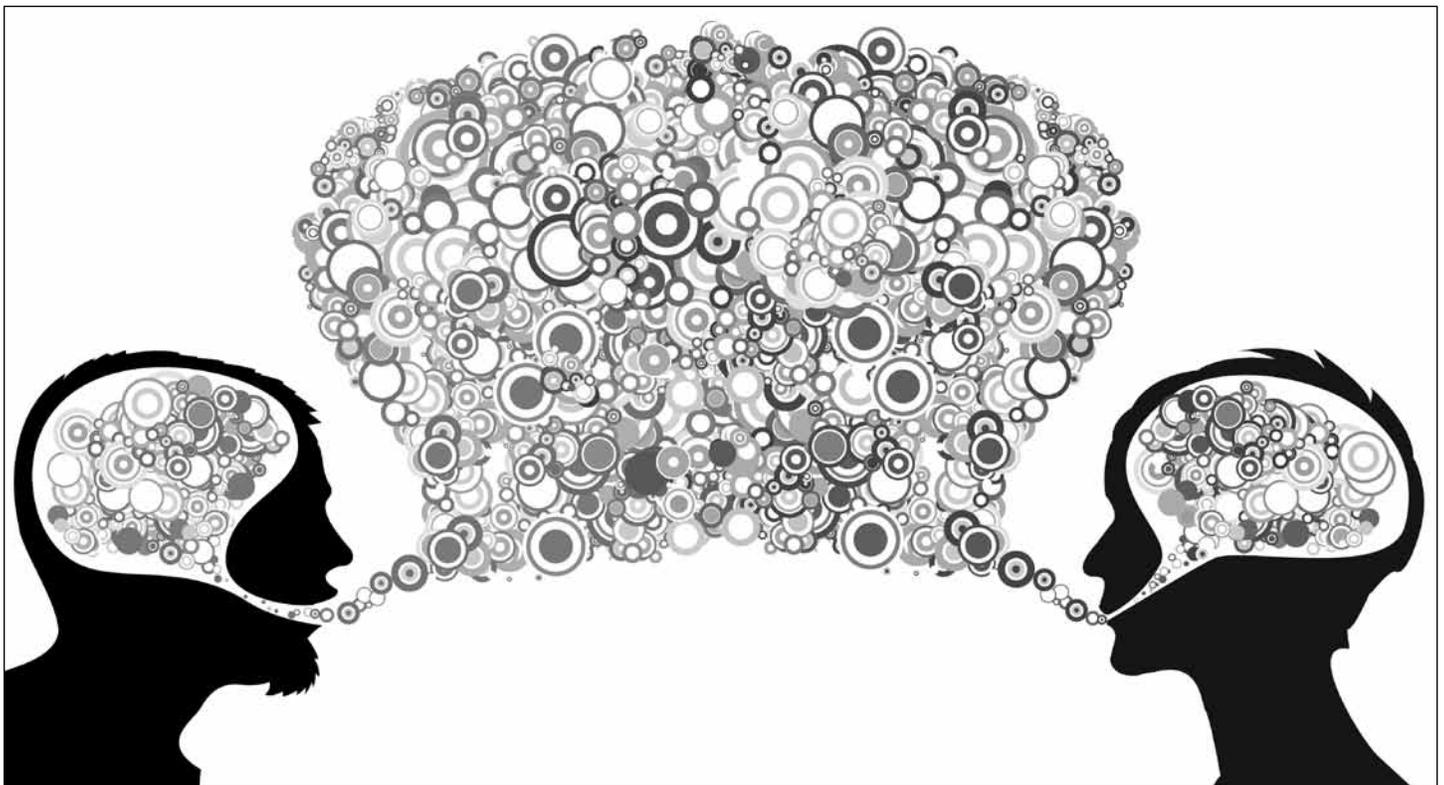
First, the Court reminded the State Board of Workers' Compensation that it retains the authority to issue protective orders to safeguard an employee's privacy interest in information for which a privilege has not been waived. *Id.* at 58. Then, the Court indicated that "while treating physicians are required under O.C.G.A. § 34-9-207(a) to provide the relevant information 'within a reasonable time and for a reasonable charge,' the statute does not demand that they agree to be interviewed *ex parte*. Under our statutory scheme, physicians may agree to be interviewed only on the condition that their own counsel, or the employee or her counsel, is present, may request that the interview be audio or video recorded, and may share the substance of the interview with the employee and her counsel." *Id.* Obviously, there are several practical issues raised by this language.

### Moving Forward

It would seem the Court has read O.C.G.A. § 34-9-207(a) to include a right of the employer and insurer to obtain information, including oral communications, but has subjected that right to the physician's right to refuse to engage in such oral communications *ex parte*, or to limit their scope or broaden the potential recipients of such communications. Practically speaking, that is not a real change from the pre-*McRae* practice, where a physician

could refuse to meet with anyone for any reason. Even post-*McRae*, there is not a functional mechanism in the Workers' Compensation Act to force physicians to meet with attorneys against their will. Another potential issue involves payment for meetings with physicians. While as a general matter it is not ideal professional practice to refuse to allow the employee or his attorney to sit in on a meeting with a treating physician or evaluating physician, as a practical matter someone has to pay the physician for the meeting. In the event an employer or insurer wishes to meet with the physician and the physician insists on the employee or her counsel being present, the Court does not specify whether there would be some remuneration to the employer and insurer from the employee. Perhaps it would be treated as are copying costs for medical records under Board Rule 200(f), where the employer and insurer are required to reimburse the employee, but the employee is entitled to copies of medical records and reports obtained via release at no expense to the employee. Of greater concern is that, despite the Court's statement that a physician may "refuse to be interviewed only on the condition that their own counsel, or the employee or her counsel, is present . . .," the Court nonetheless affirmed the State Board's Order compelling the claimant to sign a release allowing a meeting with the employer's counsel without the claimant or her attorney present. *McRae*, 134 S.E.2d at 58.

At least one of the examples given by the Court as a limitation on the right of *ex parte* contact with a physician is couched in somewhat ineffectual terms. Under the statutory scheme envisioned by the *McRae* Court, the physician "may request that the interview be audio or video recorded." *McRae*, 734 S.E.2d at 58 (*emphasis added*). It is



unclear what would happen if, for example, the employer and insurer refused to allow the interview to be audio or video recorded. Perhaps the Court recognizes that in the pragmatic light of actual law practice, parties and physicians will likely work around such issues to account for the comfort level of the parties and the physician.

Left unaddressed by the Supreme Court's pronouncement are several concerns raised by the parties and various amici leading up to the decision. Proponents of the Court of Appeals' approach rightly note the potential for undue influence when an adverse litigant is allowed to meet with a treating physician *ex parte*. Beyond noting the Court's prior concern for and protection of patient privacy, there was little in the Supreme Court's decision to assuage this concern. Those averse to the Court of Appeals' approach have long pointed out that employees already have access to the physician, and can easily (even under the Court of Appeals' proposed rule) have their counsel meet with physicians. Thus, employers and insurers tend to see the concern of undue influence as being a two-way street. Assuming that is the case, however, the Court does not address it in any pragmatic way. Allowing a physician to insist on other parties or their counsel being allowed to attend, or recording the interview, or sharing the substance of the interview with other parties or their counsel seems to make the proposed process for eliminating such undue influence voluntary, not to mention leaving it one-sided.

Similarly, while the Court notes the interest of the parties in having decision makers in the workers' compensation system actually make their decisions quickly, the Court seems to step back from this in allowing physicians to hinder that decision making process by refusing to meet with employers or their counsel altogether, or by placing conditions on how such a meeting is to be conducted. To be entirely fair, under the current schema of the Worker's Compensation Act, there is very little authority for the State Board to compel a physician to meet with any party, and it is certainly a fair argument that there should not be. Forcing physicians to meet with parties against their will would likely have a chilling effect on physicians accepting workers' compensation patients. Still, this is a valid concern for both sides, and it is left largely in flux by the present state of the law. Given the present position of the Supreme Court, it is likely that parties will either have to forge practical solutions to this problem or seek out further judicial, or perhaps even legislative, direction.

The *McRae* decision has settled a rather hotly disputed area of workers' compensation practice. It seems to have done so in a manner likely to satisfy neither side completely, but with an eye toward the concerns of all parties involved in the process. As noted above, there are still several practical issues raised by the Court's decision, and likely more to follow as parties work through the ramifications of the current state of the law.

## From the Chair

By Gary M. Kazin

I have been very honored to be serving as this year's chair of the Section. I congratulate and thank Gregg Porter and Elizabeth Costner for their fine work in putting together this newsletter. I also thank all of those who contributed the articles herein.

We have an excellent executive committee and there is significantly more time required to participate as a member of the executive committee than most members probably realize. I would like to thank the members of this year's Executive Committee for the fine work that they are doing: John Blackmon, Joe Stegal, Kevin Gaulke, John Christy, Kelly Benedict, Gregg Porter and Elizabeth Costner.

John Christy has been working hard to plan the Workers' Compensation for the General Practitioner seminar. This will be held on March 22, at the Bar Center.

The section recently held a cocktail party during the Midyear meeting of the State Bar of Georgia. It was very well attended by the members of our section and I believe all agreed it was definitely a success.

Of course, it should also be remembered that the Workers' Comp Law Institute Seminar which is usually held at St. Simons in October is probably the number one activity of this section. Under the guidance of co-chairs Hon. Andrea Mitchell, Rick Kissiah and Jim Long, the seminar was a huge success. Many thanks also go out to all of the speakers at the seminar.

The executive committee wishes to be responsive to our membership. If you have ideas for additional activities or would like to become more involved in assisting the executive committee please contact any member. We are also working on a survey of our membership which should be distributed in the near future by email to poll the membership on their likes, dislikes and suggestions for section activities. Please be on the lookout for this email.

Finally, at the time of this writing, it has recently been announced that Chairman Thompson will be leaving the State Board and that Frank McKay will be appointed by Gov. Deal to serve as the next chair of the State Board commencing March 1. On behalf of the executive committee and the section, I wish to express my sincere thanks for all of Chairman Thompson's support of the Workers' Compensation Section during his tenure at the State Board. We wish him the best of luck in his future endeavors. In addition, on behalf of the Section I wish to congratulate Judge McKay on his appointment and look forward to working with him as he assumes his new position.

# Chairman's Corner

By Richard S. Thompson

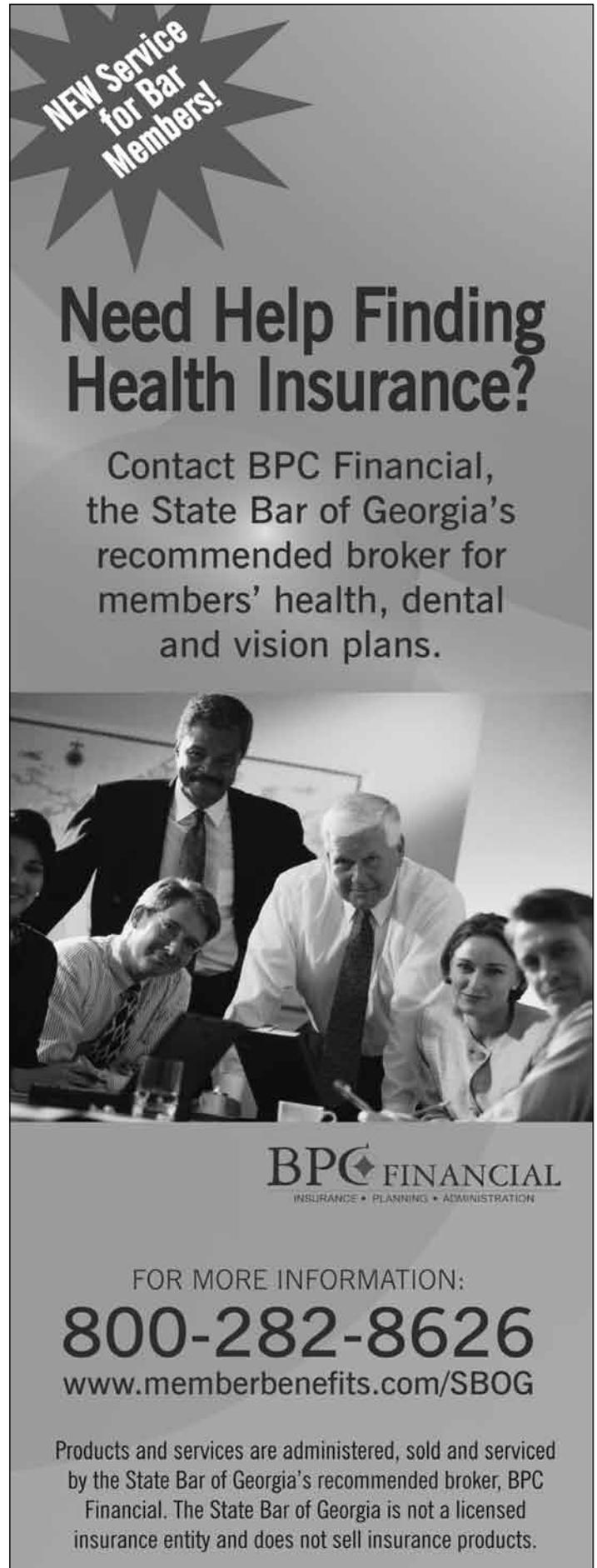
First, I would like to announce that after much consideration, I have informed Gov. Deal that I will not be seeking reappointment when my term expires May 1, 2013. I will be reentering private practice in a partnership with Nathan Levy, specializing in workers' compensation defense and offering mediation services in Georgia. I am truly indebted to former Gov. Sonny Purdue, who originally appointed me to this position as well as Deal, who allowed me to continue to serve in this position after he came into office in 2011. The progress we have made at the State Board of Workers' Compensation in our effort to continue to serve the workers' compensation community has produced a record of which we can all be proud. A shining example of that progress is the expedited approval of stipulations and agreements by David Kay and his staff in the Stipulation unit. In addition, awards are being generated at the trial level in a timely manner as well as at the Appellate Division level. All in all, the Board is in very good shape and will continue under new leadership.

Another new development at the board was the appointment of Hon. Elizabeth Gobeil as director effective Nov. 1, 2012. Gobeil has substantial regulatory and general counsel experience across a range of clients and disciplines, with a particular emphasis on life sciences and healthcare clients. She brings significant experience in policy and government affairs, having served as an aide to the late U.S. Sen. Paul Coverdell, and as finance director for the Federalist Society of Law and Public Policy. She received her B.A. in 1991 from Emory University and her J.D. in 1995 from the University of Georgia School of Law.

As to internal developments at SBWC, testing continues with regard to the "refresh" project designed to upgrade and improve ICMS, a project which should be completed in early spring, in order to allow a smooth rollout for all users early in 2013.

Finally, with regard to expedited approval of stipulations and agreements, the decision by CMS to change vendors and expedite the approval of MSA's has greatly improved and facilitated the approval of settlements throughout Georgia and other states. In fact, Work Comp Central reported in early January that the entire MSA backlog throughout the country has been resolved and the new vendor has contracted with CMS to improve MSA's in an expedited manner going forward.

Since this will be my last newsletter as chairman of the Georgia Board of Workers' Compensation, on a personal note, it has been a pleasure serving the people of the Georgia and an honor to become acquainted with so many members of the workers' compensation community throughout the state and country.



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# Traveling Employees and Continuous Employment: Where Are We Now?

By David W. Willis & Annette M. Freeman, Vernis & Bowling of Atlanta, LLC

The Workers' Compensation Act creates a special duty between employers and employees in providing coverage for injuries that arise "out of and in the course of" employment. *Gassaway v. Precon Corp.*, 280 Ga. App. 357 (2006). It is to be liberally construed to bring workers and employers within its coverage. § O.C.G.A. 34-9-23. The determination of whether an accident is "work-related" is given even broader scope in the case of "traveling" employees or those considered in "continuous employment." In the recently decided cases of *The Med. Ctr. Inc. v. Hernandez* and *Hernandez v. Atlanta Drywall*, Ga. App. (Cases No. A12A1292, A12A1315, decided Sept. 21 and Sept. 29, 2012), the Court restricted application of the continuous employment analysis in determining that traveling employees lose their continuous employment status once they cease work and return home. These cases, reviewed together and combined by the Court of Appeals, highlight the importance of a traveling employee's status at the time of accident in the determination of compensability.

As an initial matter, two independent criteria must be met for any injury to be compensable, regardless of whether the employee punches a clock, travels around the state or is considered on-call: the injury must arise "out of" and "in the course of" employment. *Mayor and Aldermen of the City of Savannah v. Stevens*, 278 Ga. 166 (2004). The injury arises "out of" employment when there is a causal connection between the employment circumstances and

the injury. *Id.* at 167. On the other hand, "in the course of" refers to the time, place, and circumstances in which the injury occurs. *Id.* at 166. It must have occurred within a period of employment and at a place where the employee may reasonably be in the performance of the job duties or activities incidental thereto. *Id.*

The interpretation of these two prongs is broader for "traveling employees." A traveling employee is defined as one who is "required by employment to lodge and work within an area geographically limited by the necessity of being available for work on the employer's job site." *Ray Bell Construction Co. et al. v. King*, 281 Ga. 853 (2007). This requirement is based on the geographical demands of employment. Whether the employer requires the employee to lodge away from home, reimburses or pays for lodging or pays the employee *per diem* are merely evidence to be considered in determining whether the employee falls within this category. *U.S. Fidelity & Guaranty Co. v. Navarre*, 147 Ga. App. 302, 305 (1978).

If this requirement is met, the employee is considered to be in continuous employment, day and night, under the Act. *See, Ray Bell*, 281 Ga. at 855. As a result, injuries which occur during this period are "in the course of" the employment. *Id.* Since the employee is required to lodge away from home, acts necessary to "health and comfort" are considered "incidents" of the employment and "acts of service." *Thornton v. Hartford Accident, etc., Co.*, 198 Ga. 786, 790 (1945) stated that injury is compensable when sustained while the employee crossed the road from the café to the hotel. Thus, if the cause of injury is related to the "dangers or perils arising from and incident to" the requirement to travel or lodge away from home, the injury is also considered to have arisen "out of" the employment and, thus, compensable. *See Ry. Express Agency v. Shuttleworth*, 61 Ga. App. 644 (1940)(death in hotel fire compensable).

Leisure activity will not necessarily break the continuity of the continuous employment period. In *McDonald v. State Hwy. Dept.*, 127 Ga. App. 171 (1972), the employee went to another hotel room where he ate, drank alcoholic beverages and played cards. On the way back to his room, he fell down the hotel steps and died. The Court held the claimant had not stepped outside the course of his employment simply by drinking alcohol and playing cards because there was no evidence that he had not conducted those activities in a normal and prudent manner or "wholly foreign" to employment. *McDonald*, 127 Ga. App. at 176. The Court also found "a clear causal connection between the steps... and his fall thereon." *Id.* at 177. As a result, the Court determined the injury was caused by the normal, usual and customary hazards of the hotel stay and awarded compensation. *Id.*



However, the employment period is broken, and the injury does not arise out of and in the course of employment where the traveling employee does not perform the activity in a reasonable and prudent manner. In *Williams v. Atlanta Family Restaurants*, 204 Ga. App. 343 (1992) it was determined that accepting a car ride from strangers is not reasonable and prudent, so the employee had left scope of employment and subsequent assault not compensable. The period of employment will also be broken when the employee embarks on a purely personal mission that is wholly foreign to the employment. When a traveling employee, who is already in continuous employment, embarks on such a mission, the employee is said to have said to have "deviated" from employment. *Ray Bell*, 281 Ga. at 856-857. An injury sustained during the period of deviation does not arise out of and in the course of employment. *Id.*

A commonly cited example of this is *U.S. Fed. & Guaranty Co. v. Skinner*, 188 Ga. 823 (1939), although the term "deviation" was not yet in use. In that case, the employee was staying in Savannah for business. He was injured while driving from Savannah to Tybee Island for dinner and to see the ocean. The employer furnished his vehicle and permitted reimbursement of his expenses, but did not require the trip and the employee was not conducting business in the area. *Skinner*, 188 Ga. at 823. The Court determined the excursion was outside of the employment area and purely personal in nature, notwithstanding the employer's permission and provision of transportation and expenses. As such, it denied compensability finding the injury did not arise "in the course of employment." *Id.*

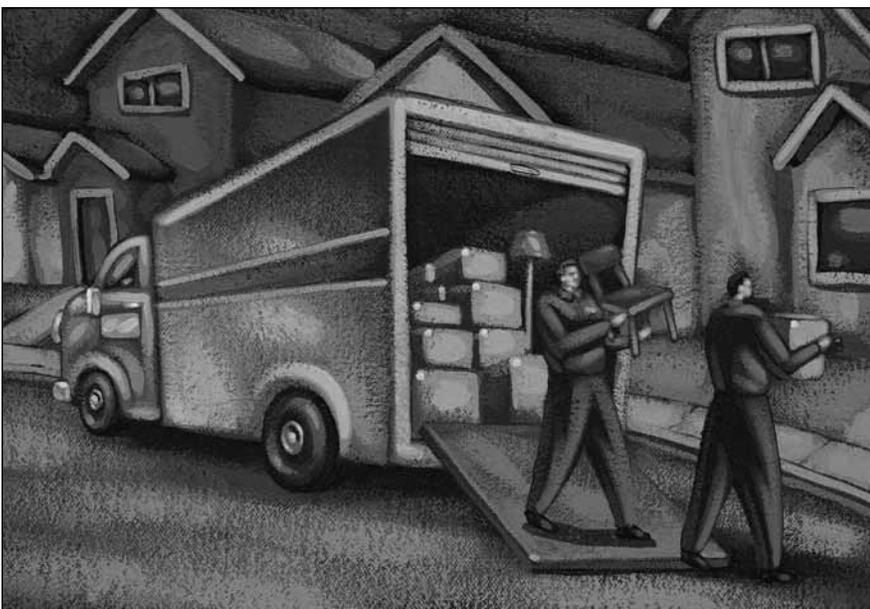
After the personal mission is completed and the employee turns back toward employment, continuous employment coverage is generally considered to resume. See *London Guarantee, etc., Co. v. Herndon*, 81 Ga. App. 178, 181 (1950). At times, departure from the employer's business may be so great that merely "concluding the personal errand and turning back" will not recommence

the period of continuous employment. Such is the case when the employee leaves the geographic area of employment. In that case, continuous employment resumes only when the employee is again in the general proximity of the place where he is employed to be and at a time where he is employed to be there. *Ray Bell Construction Co. et al. v. King*, 281 Ga. 853 (2007). Whether the "place" and "time" elements are met is largely a factual determination for the State Board. *Ray Bell Construction Co. et al. v. King*, 277 Ga. App. 144, 147-148 (2006).

In *Ray Bell*, an employee in continuous employment made a personal deviation when he left the area of employment (Fayetteville/Jackson) to take his mother's furniture to his storage facility in Alamo, Ga. He was fatally injured after he had delivered the furniture and was driving back toward the Fayetteville/Jackson area. *Ray Bell*, 277 Ga. App. at 145, 148. Since the Board had determined that the employee was back in the geographic place where he was employed to be, and at a time he was employed to be there, continuous employment had resumed and injury was found compensable. *Id.* at 148. On appeal, the Supreme Court reviewed whether both prongs of compensability were properly addressed and whether the employee's destination was determinative of compensability (either the jobsite or lodging). Since evidence showed the employee was injured while in the general proximity of the place where he was employed to be at a time when he was employed to be there, continuous employment had resumed. The injury was compensable regardless of whether he was heading toward his lodging or the worksite at the time of injury. *Ray Bell Construction Co. et al. v. King*, 281 Ga. 853 (2007).

In *Hernandez*, the Court of Appeals determined the employee's activity can be so unrelated to the employment that it ends the period of continuous employment. In that case, Calvin Hernandez and Juan Alvarez-Hilario were construction workers from Savannah whose employer undertook a contract on a project in Columbus. During the week, the men were required by their employment to lodge in the Columbus area. However, at the end of the week, they ceased all work duties, returned to their homes in Savannah and were not paid. They were injured while en route to begin work on a Monday morning when the co-worker's personal vehicle in which they were riding was involved in a collision only five minutes from the jobsite.

The Court determined that a period of continuous employment ends when the employee ceases work, is no longer being paid and leaves the employment area to return to his home. A new period begins when the employee is back in the general proximity of the employment and is being paid to be there or otherwise resumes performance of the employment duties. If the injury occurs *prior to* commencement of the new period, the injury is not compensable.



Applying this analysis, the Court determined the men's continuous employment ended at the end of each work week when they left Columbus to return to their homes in Savannah, ceased the performance of employment duties and were not paid by the employer. In effect, it found that the weekly Columbus employment constituted a series of discrete periods of continuous employment, as opposed to considering the Columbus construction project as one long period of continuous employment interrupted by personal deviations. As a result, the Court hearkened back to a "going to and from work" analysis and found the claimants' injuries did not arise out of and in the course of employment.

The "going to and from" rule states that injuries sustained while traveling to and from work do not arise out of or in the course of employment. *Id.* (citing *Stevenson v. Ray*, 282 Ga. App. 652, 654 (2006)). The *Hernandez* employees' injuries did not arise out of their employment because travel was not found to be part of their job duties. The Court determined they were not in the course of employment at the time of injury because they were only paid to perform construction work and had not yet arrived on the construction site. The *Hernandez* court points out that, in past cases analyzed under the continuous employment doctrine, compensability was found where the employees were "already in the midst of their employment duties" at the time of injury. It cites to *U.S. Fid. & Co. v. Navarre*, 147 Ga. App. 302 (1978); *McDonald v. State Hwy Dept.*, 127 Ga. App. 171 (1972); and *Ray Bell Construction Co. et al. v. King*, 281 Ga. 853 (2007). In those cases, at the time of injury: (1) the employees had already received payment for their work related to the employment that required their lodging in the geographical area of the worksite and (2) they had not returned home since the pay period began.

A comparison with *Ray Bell* may be instructive for determining why the *Hernandez* court declined to apply a deviation analysis and instead found a series of continuous employment periods broken by periods of no employment. In both cases the employees were construction workers; they made a personal trip that took them significantly outside the geographic area of employment; they were injured while returning to the area of employment; and they were found to be in the general proximity of employment at the time of injury. The key distinction is that, in *Ray Bell*, the employee's continuous employment status did not end. Despite being on "medical leave" there was no evidence that he did *not* continue to work in some



capacity or be paid and also no evidence that he was *not* required to lodge near the jobsite during that time. *Ray Bell*, 281 Ga. 853 (2007). The employees in *Hernandez*, by contrast, were only paid while at the job site. The evidence showed that when they left for the weekend, they ceased work, stopped being paid and returned home. Once they headed home, they ended their business in Columbus. Since they were not paid again until they returned to the Columbus jobsite, the Court was constrained to evaluate their injuries under the "going to and from" rule.

Quite possibly a few changes to the facts of the case may have changed the outcome in *Hernandez*. For example, although transportation was not furnished and there was no evidence it was reimbursed, their injuries might have been compensable if the employer had considered transportation to be a type of remuneration. *Than v. Maryland Cas. Co.*, 99 Ga. App. 758 (1959)(finding no compensability where transportation by co-employee in personal vehicle not

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considered remuneration or required by employer). The injuries might also have been compensable if the Board had found that men's work week began in Savannah, rather than Columbus, or if the men were paid on a daily basis instead of hourly. *Cooper v. Lumbermens Mut Cas. Co.*, 179 Ga. 256 (1934) (the injured employee routinely came to the employer's location to catch a ride with a third party to the worksite with the employer's knowledge, approval and expectation of same and workday found to begin at the employer's location). In addition, if the men had been charged with a special task or with performing some act beneficial to the employer during their commute, such as the safekeeping or transportation of tools to be used on the jobsite, this might have weighed in favor of compensability. See *Travelers Ins. Co. v. Moore*, 115 Ga. App. 295 (1967) (upholding compensability where employee killed while traveling to employer's office while carrying employer's money that he had been required to take home with him the previous night). Ultimately, none of these facts were present.

In conclusion, the rules for analyzing compensability remain the same for employees in "continuous employment" and for those who face a "standard" work day. Although certiorari has been applied for in *Hernandez* case, a ruling by the Supreme Court is unlikely to change the basic parameters of determining whether an employee is in a continuous employment situation. It is hoped, however, that if certiorari is granted the Court would articulate the rule more clearly. As it stands, equal effort must be made towards proving (or disproving) facts relevant to both an employee's "continuous employment" status and the "in the course of employment" prong of compensability.

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# Professionalism in the Workers' Compensation Bar

By G. Robert Ryan Jr.

This will not be an article about the Georgia Rules of Professional Conduct (the “rules of ethics”). Professionalism (and its corollary, civility) involves ethics, to be sure, but goes above and beyond the minimal standards set by the formal rules of ethics, and addresses what might be considered an “unwritten code” of how we treat each other in the practice of law. The subject touches on relationships with other attorneys, with the Board and ALJ’s, mediators, nurse case managers, insurance claims adjusters, claimants, parties, witnesses, medical providers – in short, all of the actors within the workers’ compensation system.

In Georgia, we have had an ongoing emphasis on professionalism, since the Georgia Supreme Court and the Bar made it a priority over 20 years ago. In fact, the Chief Justice’s Commission on Professionalism was established in 1989, as the very first body of its kind in the United States. Since that time, many organizations and individuals in Georgia have worked together toward the ideal, in the words of the Commission’s original charge: **Assuring that the practice of law remains a high calling, enlisted in the service of client and public good.** The Commission continues its work, as well as countless judges, individual lawyers, local bar associations, the law schools and individual professors, mentors, Young Lawyer’s Division, ICLE, bar sections (such as this article for the Workers’ Compensation section) and others. Georgia’s voluntary efforts toward improving and promoting professionalism have become a model for other states to follow.

One of the efforts of the Commission was to adopt the Lawyer’s Creed and Aspirational Statement on Professionalism. These, along with listings of General Aspirational Ideals and Specific Aspirational Ideals, may be found at Part IX – Professionalism, of the State Bar of Georgia Handbook.

A key word is “aspirational.” While the Rules of Professional Conduct are mandatory and enforceable, the ideals of professionalism are aspirational only. However, this is not to denigrate their function. Rather, in the words of the Commission: “The Creed and Aspirational Statement cannot be imposed by edict because moral integrity and unselfish dedication to the welfare of others cannot be legislated.”

The Commission recognized at its founding that “unfortunate trends of commercialization and loss of professional community” were causing “an undue emphasis on financial rewards of practice,” “lack of courtesy and civility,” a “lack of respect for the judiciary,” and a “lack of regard for others and for the common good.” (From the Aspirational Statement on Professionalism.)

If anything, the trends noted by the Commission appear to have intensified over the past 20 years. Technology has simultaneously brought our world closer together and farther apart. We can reconnect with old friends via Facebook, and emailing and texting offer instant, nearly free means of communication, to be sure, but have we lost the art of picking up the phone and talking to the other person, or of sending a handwritten note of congratulations or sympathy? When does advertising “go too far” and present a negative impression of the profession? The claimant and defense bars continue to intensify their competition for what seems, during these economic times, to be a shrinking number of clients. “Community” seems to hold less and less meaning, as we see trends that include increasing inequalities of wealth, privilege and power. How do we, as both claimant and defense bars, take a stand for professionalism and the common good in the face of ever increasing pressure from our clients to do “whatever it takes” to “win” without regard to the greater good? For those of us who are committed to attempting (however imperfectly) to uphold the ideals of the profession, how do we make that a reality in our everyday practices?

Some Good News – and then we will look at a few specific areas where professionalism can be put into practice.

The good news – here in the Workers’ Compensation section, the vast majority of our members exhibit a high degree of professionalism each and every day. It is the pleasure of practicing in the area of Workers’ Compensation. We are a relatively small band of practitioners and many of us know each other well, see each other over and over on cases, and have become close acquaintances and even friends. To the young lawyers practicing in Workers’ Compensation – our section’s deserved reputation for professionalism did not just happen – it was earned by the actions of those who came before us. Each new generation has a duty to uphold those ideals and to keep our section the best in the State Bar. Our goal here in the Workers’ Compensation section is not to discover how to be professionals – our job is much easier – all we have to do is to observe and learn from those mentors and respected members of our bar, who everyday show how to keep the level of professionalism in this section the highest of any section of the State Bar. The point is not to preach a sermon – but to emphasize the absolute importance of adhering to the standards that have been set. After all, over time, what makes it worthwhile to come to the office and practice law everyday are the relationships that have been built with clients, judges

and opposing counsel. No one case or one client is worth your reputation. Our goal as practitioners, claimant and defense, must be to build up and take care of the workers' compensation system that we all work within, and from which we all draw not only our employment, but much of our professional satisfaction.

## Specific Examples of Professionalism in Action

Aspirational articles on professionalism tend to be vague and flowery (and this article has its share of such language.) Specific examples can sometimes be lacking. Therefore, I have tried to include a number of specific examples of the principle in action, as it relates to workers' compensation cases. There are no written rules, and this list is by no means to be all encompassing. Any faults are the author's. An excellent additional resource, with further specific, concrete examples, is the "Specific Aspirational Ideals" contained within the Lawyers' Creed and Aspirational Statement on Professionalism. State Bar of Georgia Handbook, Part IX.

### 1. Setting Depositions

Professionalism dictates that an attorney does **not** unilaterally set a date and send out a notice for the deposition.

Claimant's deposition can be arranged by contacting opposing counsel and reaching a mutually agreeable date and time for the deposition. By custom, the deposition will be taken at the claimant attorney's office. If this is not possible, parties should confer on the location. Ninety-nine percent of the time, the deposition can be arranged in this manner.

Medical providers are essential actors in the worker's compensation system. Most doctors are very busy with demanding schedules. They are fellow professionals and should be treated as such. Do not simply subpoena the doctor to the deposition. Call the doctor's office and seek to coordinate scheduling of the deposition. Coordinate with opposing counsel as well. Make sure the doctor's fees for the deposition are clearly understood up front to avoid any later confusion. If you want the doctor to have his chart or films available, let the doctor know. If the deposition is to be videotaped, let the doctor know so that he will be able to dress appropriately. Surprises at the deposition help no one – work out as much in advance as possible.

It is possible to have a doctor served a subpoena to a deposition in the county where he lives and he will receive a \$25 witness fee check. Never do this (except perhaps in an extreme case where a provider is intransigent and refuses to cooperate in scheduling the deposition.) If you take this approach, expect to see a very angry doctor. Expect to get \$25 worth of testimony which will most definitely not help your case.

### 2. Extensions of Time

Reasonable requests for extension of time should be granted as a matter of course. This is a matter of basic professional courtesy. On the other hand, counsel should attempt to complete matters timely and should not abuse the privilege of seeking an extension of time. It is a two way street.

If there are unusual circumstances that prevent agreement on a reasonable request for extension of time,

take the professional courtesy to explain the situation to opposing counsel. If the issue is unavoidable, you may have to seek resolution from an ALJ. However, by explaining the extenuating circumstances to opposing counsel, you have prevented the issue from becoming personal and have saved your reputation in the situation.

### 3. Continuance of the Hearing

Agree to reasonable requests for continuance. We all know that a workers' compensation hearing will almost never be tried on

the first setting. Discovery is not usually complete by the time of the first setting. Don't make opposing counsel jump through unnecessary hoops – agree to reset the case.

Again, if there are unusual circumstances, and you are going to have to push to try the case at the first setting, let opposing counsel know early on in the process.

To my defense brethren – don't continue to ask for multiple continuances of a case that needs to be tried. If a case is on its fourth or fifth setting, and settlement is not likely, then the case needs to be tried. Candor to all sides is key. Sometimes a case must be reset multiple times – perhaps a key witness has not been found for deposition or a medical provider has delayed in getting key records out to the parties – the case may need to be reset. If the hospital where the claimant initially treated has not sent its chart to the parties, then the case will probably need to be reset. On the other hand, if you have not yet received a response

## Specific Examples of Professionalism in Action

1. Setting Depositions
2. Extensions of Time
3. Continuance of the Hearing
4. Mediation
5. Avoid Filing Unnecessary WC-14s
6. IMEs
7. Civility

to your RPD to the dermatologist the claimant (who has a back injury) saw one time in 1987 – this is probably not a good reason to seek to reset the hearing.

#### 4. Mediation

All sides must participate in mediation in good faith. What, exactly, does this mean? It is impossible to provide a precise meaning. However, ask yourself: “Is my client serious about trying to resolve the claim, or are we only going to mediation to delay, or to seek to obtain more information about the other side’s case?”

If the Employer/Insurer is only going to extend another \$500 in authority for the mediation, then, this is probably not a good faith attempt. On the other hand, if the claimant has made it clear that he is not going to drop below \$250,000 on a carpal tunnel case with successful surgery, and a full duty return to work, then there is probably not a good faith attempt to settle.

Sometimes, the parties think it is appropriate to come to the table to see what happens – i.e. to see if the claimant or the adjuster will listen to the mediator and soften their positions – even though there is a high chance the case will not settle. Be up-front with opposing counsel. To the extent possible without disclosing your client’s authority or settlement strategy, let opposing counsel know the purpose of the mediation. Avoid unpleasant surprises at mediation.

Above all, keep in mind the Board has limited resources for its mediation program. Do not waste those resources. If a private mediation, someone (perhaps your client) is paying the mediator’s fee, whether the case settles or not. Good faith is the key.

#### 5. Avoid Filing Unnecessary WC-14s.

It is easy to file a WC-14 these days. Anyone can file almost instantly via ICMS and obtain a hearing over virtually any issue. Sometimes, a hearing request is the only thing that will provide your client with relief. However, many times in workers’ compensation, the issues can and should be resolved without the necessity of filing a hearing request.

The possible issues in a workers’ compensation claim are endless: a mileage request is not paid on time; there is an issue regarding the ATP; claimant fails to attend a doctor’s appointment; average weekly wage is in dispute; there is a question regarding authorization of a medical procedure, and on and on. Many times the issues can be resolved with a few letters, emails or phone calls. Make a good faith effort to resolve issues before filing a hearing request. This will serve your clients and the system better in the long run.

#### 6. IMEs

Independent Medical Examinations for defense and claimant are part of the system. The claimant has a right to one IME, within certain parameters, paid for by the employer/insurer. The employer/insurer has the right,

within certain parameters, to set an IME of the claimant with a physician of its choosing.

The author sees no reason why this process should be contentious, and yet often issues arise.

Each side has certain rights in this area, as spelled out in the Act and Board Rules, and understood by all practitioners. Cooperate with the other side in this area. For the defense, provide claimant with as much advance notice as possible of the IME. Ensure travel arrangements are understood and that medical records are sent to the IME physician timely, so the appointment does not have to be rescheduled. Ensure claimant is kept informed of any changes to the IME schedule. For the claimant, don’t cancel the appointment at the last minute unless it is a true emergency. Arrive on time for the appointment. If there are special needs regarding travel, discuss it well in advance with opposing counsel. The adjuster probably cannot arrange transportation for your client at 5 p.m. the day before the IME, but could have if notified earlier.

Communication early and often should resolve most issues and allow the case to move forward.

#### 7. Civility

Be courteous and civil, not only to opposing counsel, but to everyone involved in the system. This is of utmost importance to the true professional.

The Commission’s Aspirational Statement includes: “Avoid rudeness and other acts of disrespect in all meetings including depositions and negotiations.” Also, “Be courteous and civil in all communications.”

Words, once spoken, can never be taken back. Perhaps more damage is done to the system, to reputations and to individuals by using carelessly spoken words than by anything else. Using abusive language toward your opponent, a party or a witness will not gain you anything. It will only result in a loss of respect and damage to your client’s cause.

Our administrative law judges are conscientious and hard working. They should and must be treated with the respect due at all times to the court.

For defense counsel – the claimant is not the enemy. They are a person. Your client has a conflict with them and your job is to seek to resolve that conflict, whether through settlement or a trial if necessary. When you depose the claimant, shake their hand and tell them “hello.” There is no need to yell or raise your voice during questioning – good, well thought out cross-examination questions will do their magic without raising of your voice.

The same things apply to claimant’s counsel – you can represent your client well while treating adjusters, employers and witnesses for the other side with respect and decency.

Litigation by its nature involves conflict. Human conflict, by its nature, can be ugly. It can be violent and result in demonizing the other side. Part of our role as

attorneys is to develop the professional skills to guide our clients through conflict, in a way that promotes dignity and civility. This starts and ends with us, the individual lawyer, and how we treat those involved in the litigation.

## Closing

Some years ago, I stumbled upon a delightful little book written in 1870 by Garnett Andrews, a superior court judge of the time. Reminiscences of an Old Georgia Lawyer (Cherokee Publishing Co., 1984).

I do not know if the book is still in print, but it contains many fascinating insights into what the practice of law was like in Georgia during the 19th century. Although the language used and methods of practice have changed dramatically, human nature being what it is has not changed, and many of the experiences with other lawyers, judges, and the like, related in the book are not too different from what an attorney practicing in Georgia in 2013 is likely to encounter.

In one interesting passage, the author describes the lawyers of a particular circuit and what today we would call "professionalism." The passage reads:

"[P]ractising at one time in one county of the Middle Circuit, I cannot let it pass without saying it was remarkable for the courtesy and high breeding of the leading members of its Bar, who always give tone to the rest of the profession and indeed, I may say, in some degree to the best citizens of the circuit in which they practice. The gentlemen bore themselves toward each other, in the court-house, with the same deference and urbanity they practiced in the drawing-room. Compared to the ill-nature and vulgarity - not to say brutality - I have noticed in some circuits . . . it was the difference between civilized and savage warfare."

As with those long ago rival lawyers of the Middle Circuit, the members of the Workers' Compensation section can be reflective of the best that the State Bar has to offer. The practice of law is difficult enough without resorting to "savage warfare." It is incumbent on each new generation of lawyers fortunate to practice in the workers' compensation system to carry forward our section's reputation for professionalism and civility.

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# Case Law Update

By H. Michael Bagley, J. Benson Ward and Taylor J. Stevens

The latter half of 2012 featured notable developments including the Georgia Supreme Court's *McRae* decision, a fact-intensive examination of the *Maloney* burden, and further treatment of the distinction between a change in condition and a fictional new accident.

## *Ex-Parte* Communications and *McRae v. Arby's*

In a unanimous decision, the Georgia Supreme Court reversed the Court of Appeals and ruled that the State Board acted within its discretion by ordering the claimant to sign a limited medical release or have her case removed from the hearing calendar. The Supreme Court held that an employer may seek relevant protected health information through informal oral communications with a treating physician.

The Supreme Court held that O.C.G.A. § 34-9-207(a) unambiguously provides that, once an employee initiates a workers' compensation claim, that employee waives any privilege with respect to medical records and information related to that claim. The Court of Appeals incorrectly limited this disclosure of medical records and information to tangible documents only; however, this position is not supported by the language of the statute according to the Supreme Court, which concluded that the scope of section 207(a) includes oral communications.

The Supreme Court also declined to apply decisions of Georgia courts involving medical malpractice cases, such as the *Baker v. Wellstar Health Systems* case cited by the Court of Appeals, to workers' compensation cases. The Court expressly observed that the legislature has designed Georgia's workers' compensation system to provide an efficient and streamlined process for obtaining medical care and income benefits within a no-fault system, and allowing equal access to all relevant medical information furthers this policy and intent. The opinion urges parties in a workers' compensation claim to act reasonably and within the parameters of privacy protections afforded to health information unrelated to the work injury, and emphasized the Board's role as gatekeeper in resolving disputes arising over this issue.

## The Continuous Employment Doctrine

*The Medical Center, Inc. v. Hernandez et al.* and *Hernandez et al v. Atlanta Drywall, LLC et al.*, 734 S.E.2d 557 (Ga. Ct. App. 2012), involved a motor vehicle accident which left one employee injured and another dead, where the employees were passengers in a vehicle driven by another coworker to the project to begin the work week. The employees lived in Savannah, commuted 4 hours every Monday morning to work on a church construction project in Columbus, stayed in lodging provided by the employer, and returned home on Saturdays; the employees were not

paid for the travel time and were not provided a vehicle by the employer. The ALJ found that because the employees were still traveling to the work site when the accident occurred, they had "not yet engaged in their employment at the time of the accident," and as such, the injuries did not arise out of or in the course of their employment.

Appellants argued that the continuous employment doctrine applied to broaden the workers' compensation coverage, as the employees traveled to the job site on Mondays and lodged for the week to work on the project in Columbus. While the Court agreed that the doctrine would likely have applied to the employees had the injury occurred after they had arrived at the job site, the fact that the employees left the job site after work on Saturday and had not yet begun their duties that Monday morning precluded the application of the doctrine. The Court compared the circumstances to those cases which applied the continuous employment doctrine, distinguishing the latter with evidence that those claimants were not only in proximity of their employment, but were also already in the midst of their job duties at the time of the injury. In contrast, the court here found that at the point the work week ended on Saturday, the employees were "off-duty and no longer continuously employed" and that the extended coverage for traveling employees resumed only at the time that they became engaged in construction work again. Although the employees were in the proximity of the job, because they had not yet begun performing their duties that morning and the accident was not "occasioned by their jobs as construction workers", the employees' injuries did not arise out of and in the course of their employment.

## The Maloney Burden

In *Brown Mech. Contrs., Inc. v. Maughon*, 317 Ga. App. 106, 728 S.E.2d 757 (2012), the Court of Appeals returned to the framework laid down in *Maloney v. Gordon County Farms*, 265 Ga. 825, 462 SE2d 606 (1995), to examine whether a claimant conducted a diligent job search sufficient to justify payment of indemnity benefits. The court affirmed the Board, which had reversed the ALJ Award, finding that a claimant who had contacted more than one hundred employers over the six month period leading up to his hearing date, after being laid off for reasons unrelated to his compensable shoulder injury, had not necessarily made a diligent search for work. The Board, in finding that the claimant's job search was not diligent, relied upon factors including that 110 searches over 144 "work days" was not sufficient, that searching an average of less than once per day is not diligent, that the claimant failed to follow up with 22 employers, that he went periods of 27 and 18 consecutive days without searching, that he lost two offered positions because of a purported need for surgery which had not been scheduled, and that despite

employment history in managerial/sales positions the claimant sought physical labor jobs and avoided retail jobs.

The Court of Appeals framed the issue for review as one involving whether the Board's findings of fact and conclusions were supported by the "any evidence" standard, and subsequently found that there was some evidence in the record to support the conclusion that the job search was not diligent. The court was not persuaded by evidence that claimant had three job offers retracted after his injury was disclosed.

## Change in Condition vs Fictional New Accident

The Court of Appeals and the Supreme Court of Georgia both had opportunities this year to clarify the ever evolving concept of change in condition versus a fictional new accident date. In *Scott v. Shaw Industries, Inc.*, 291 Ga. 313, 729 S.E.2d 327 (2012), the claimant injured her right foot in 1996 while working as a carpet inspector, resulting in a partial amputation and several months out of work during which she received TTD benefits. She returned to work at a desk job, but found that the foot prosthetic she wore as a result of the initial injury had altered her gait and caused knee pain. She underwent bilateral knee surgery in May 1997. She was able to return to work at the desk job which she performed over the next 12 years despite progressively worsening knee pain. On March 24, 2009, the claimant was taken out of work briefly because of the chondromalacia and osteoarthritis she developed as a result of knee problems caused by the amputation. The claimant made multiple attempts to return to work until September 2009, when her treating physician totally disabled her.

At trial, the claimant argued that she was entitled to TTD benefits as a result of a fictional new injury on March 24, 2009, the day she was taken out of work. The employer/insurer alleged that the claimant's inability to work was a result of a change in condition for the worse, barring her claim for TTD benefits on the basis that the statute of limitations had run. The ALJ awarded the claimant TTD benefits, the Board and Superior Court affirmed and the Court of Appeals' reversed. The Supreme Court reviewed the controlling case of *Central State Hospital v. James*, 147 Ga. App. 308, 248 S.E.2d 678 (1978), and its framework for distinguishing between a new injury and a change in condition. The Court applied the third scenario set out by the court in *James*, which provided that an employee undergoes a change in condition when he is awarded benefits and returns to his employment performing his normal duties or ordinary work, but as a result of wear and tear of ordinary life and the performance of his normal duties and not a specific work incident his condition, gradually worsens to the point he can no longer continue his ordinary work. The Court found that claimant had been awarded compensation as a result of her initial foot injury in 1996, returned to work in a new position that required no strenuous activity, and her knee and gait problems had

developed as a result of the wear and tear of ordinary life, a gradual worsening which the Court held constituted a change in condition for the worse, and not a new accident. As a result, the claim was barred by the statute of limitations, which the Court found began to run with the initial foot injury.

The Court of Appeals addressed the same issue in *Evergreen Packaging, Inc. v. Prather*, 734 S.E.2d 209 (2012), but reached a different conclusion. In that case, the claimant suffered a back injury in 2002 while working as a warehouseman responsible for operating a forklift to load trucks with milk and juice cartons, and received indemnity and medical benefits before returning to work for the employer. Nearly three years after returning to work for the employer, the claimant was transferred to a different position making and cleaning plates used in the employer's printing presses. This job required significant physical activity, including lifting up to 50 pounds and bending to the floor and was different and somewhat lighter than his prior work as a warehouseman.

The claimant continued to work, despite progressively worsening pain, and when the job duties changed in 2008 to require further bending, his problems increased. In 2010 his treating physician deemed the condition an exacerbation of his 2002 injury caused by work-related activity. The ALJ found that the claimant sustained a new injury on Feb. 26, 2010, as a result of having to bend further, and awarded TTD; the Board and superior court affirmed. The Court of Appeals determined that the facts fit the *James* scenario involving subsequent work which may aggravate a condition and result in a new injury even when there is no new accident. To distinguish a change in condition from a new accident, the Court considered the "intervention of new circumstances" and here, based on the claimant working a different job, having to bend over further and based on increased and worsened back problems.

## Exclusive Remedy

In *Carr v. Fedex Ground Package System, Inc.*, 317 Ga. App. 733, 733 S.E.2d 1 (2012) an employee of J. Wigg Trucking, Inc., a sole proprietorship with a contract to provide trucking services to FedEx, was injured in a fight with a FedEx employee on FedEx property. The employee's wife sought and received workers' compensation benefits on the employee's behalf from J. Wigg Trucking, Inc., and subsequently filed a personal injury action against FedEx, alleging multiple tort claims for negligence. Summary judgment was granted on the grounds that FedEx was a statutory employer immune to tort liability.

Appellant urged that the statutory employer doctrine did not apply because FedEx was not the employee's statutory employer, based on language in FedEx's contract with J. Wigg Trucking providing that it was an independent contractor and would keep its own workers' compensation coverage. The Court of Appeals rejected this argument, finding that J. Wigg Trucking's status as an independent contractor did not preclude a statutory employment relationship

between FedEx and the employee. Further, the Court found that parties cannot contract around the obligations of the Workers' Compensation Act, and specifically, no contract language would relieve FedEx from its obligation as a statutory employer.

The employee's guardian further argued against the application of the statutory employment doctrine on the grounds that FedEx was not a contractor under the definition of O.C.G.A. § 34-9-8(a) because FedEx had no contract to provide a good or service to another. The Court of Appeals disagreed, finding that the package delivery work the employee performed for J. Wigg Trucking was pursuant to shipping and delivery contracts FedEx had with FedEx's customers. Because J. Wigg Trucking contracted with FedEx to perform a portion of the work necessary to be done in order for FedEx to "fulfill subsequently-arising contracts" between FedEx and its customers, FedEx was a "contractor" for purposes of statutory employment. Accordingly, the exclusive remedy provision barred the action for personal injuries.

The Supreme Court of Georgia also recently addressed the application of the exclusive remedy provision in *Smith v. Ellis*, 291 Ga. 566, 731 S.E.2d 731 (2012), where the Court considered whether a prior opinion of *Ridley v. Monroe*, 256 Ga. App. 686, 569 S.E.2d 561 (2002), holding that the exclusive remedy provision of O.C.G.A. § 34-9-11(a) barred a claim against a co-employee in a tort action following a settlement under O.C.G.A. § 34-9-15(b), should be overruled. In *Smith*, the claimant and a coworker met on work property to practice shooting guns for personal enjoyment, and the claimant was injured when he was accidentally shot in the leg. Both employees were fired and the claimant filed a workers' compensation claim and settled on a no-liability basis. He then sued the coworker for negligence, and when summary judgment was granted on the basis of the exclusive remedy provision, he appealed on grounds that the coworker was a third-party tortfeasor and not a co-employee.

The Supreme Court first examined *Ridley*, then concluded that the claimant was barred from suing his co-worker in tort for the same injury for which he had already entered into a Board-approved settlement with his employer. While the exclusive remedy provision did not apply to an injury that was not compensable under the Act, the fact that the settlement was approved by the Board, albeit on a no-liability basis, represented an award of the Board. The Court reasoned that a no-liability settlement required an employer to compensate the employee for the alleged injury, triggering the protection against a subsequent tort suit, even though the injury may not actually have been deemed compensable under the Act. By settling the case under O.C.G.A. § 34-9-15 (a), an employee was prohibited from recovering again against the employer for the same injury; *Ridley* held that a settlement under O.C.G.A. § 34-9-15 (b) had the same effect. Ultimately, when a settlement has been approved by the Board, it constituted a complete and final disposition of all claims on account of the injury, whether the settlement was on a no-liability or not.

The Court then held that the exclusive remedy provision applied so long as the coworker qualified as an employee of the claimant's employer, as opposed to a third-party tortfeasor pursuant to O.C.G.A. § 34-9-11(a), a fact in dispute that should have been addressed at trial; the claimant alleged that the coworker was not functioning in his capacity as an employee at the time of the accident, and therefore, was acting as a third-party tortfeasor subject to tort liability.

## Unexplained Death and the Rebuttable Presumption

In *Wilkinson County Board of Education v. Johnson*, 317 Ga. App. 565, 732 S.E.2d 765 (2012), the Court of Appeals remanded a claim to the ALJ for further consideration to determine whether a claimant's death was the result of his employment aggravating a pre-existing medical condition. The employee, a high school principal, had significant health issues including hypertension and obesity. On his way back to the school after performing a work-related errand then purchasing a fast-food lunch, he began to sweat and drive erratically. Back at school, he was noticed to be sweating and in pain, his blood pressure was elevated and he reported that he had not taken his blood pressure medication. He was taken to the hospital by ambulance, where a CT scan revealed that he had suffered an acute aortic dissection. He underwent emergency surgery to repair the artery, but died five days later following abrupt respiratory arrest. The autopsy identified his cause of death as ischemic bowel complication of the aortic dissection.

His widow filed a claim, alleging that the death arose out of and in the course of his employment, and the ALJ denied the claim, finding that she failed to show that the employee's aortic dissection was attributed to his job performance and further, that the claimant was not entitled to the presumption that her husband's death arose out of and in the course of employment because he was not found dead at



a place where he reasonably could be expected to be in the performance of his job duties. The Board approved but the superior court reversed, finding error in the ALJ's conclusion that there was no presumption simply because the employee was not found dead at his place of employment; because the incident resulting in the employee's death occurred at a time and place when he was in performance of the job, the presumption applied and the ALJ should have considered whether the employee's death was an aggravation of his pre-existing condition.

The Court of Appeals stated that the presumption that a death arose out of employment, when an employee is found dead in a place where he might reasonably be expected to be in performance of his duties, applies only when the death is unexplained. Because modern medicine often provides at least an immediate cause of death, the Court noted that only the precipitating causative factor (and not the immediate causative factor) must be unexplained in order for the presumption to apply. Otherwise, probative evidence on the issue of causation must be submitted. The Court also clarified that this rule regarding the presumption also applies when the immediate cause of death arises from internal and physical factors, as opposed to external and non-physical factors.

Accordingly, the Court found that the ALJ and Board misinterpreted the law by concluding that the unexplained death presumption did not apply because the employee died at the hospital and not a place he reasonably could be expected to be performing his job, since the law has been expanded to include employees who become ill at the place of employment and subsequently die at a hospital. The Court also found that the superior court made an improper finding of fact when it substituted its finding that the employee's performance of his job caused his death, when neither the ALJ nor the Board had made that finding, and further misinterpreted the law by applying the presumption when there was no underlying finding at all as to whether the precipitating cause of the employee's death was unexplained. Accordingly, the Court of Appeals remanded the case to the ALJ to determine if the unexplained death presumption applied by determining first whether the incident causing the employee's death occurred in a time and place he might reasonably be expected to be performing his job, and second, whether the precipitating cause of his death was unexplained.

## Joint Employment and Apportionment of Liability

In *Aimwell, Inc. v. McLendon Enterprises, Inc.*, 734 S.E.2d 84 (Ga. Ct. App. 2012), the Court of Appeals addressed whether a trucking company and its workers' compensation carrier were liable for workers' compensation benefits owed to a truck foreman who was injured while driving a truck for the company's main customer. In this case, the claimant was employed as a truck foreman providing supervisory work for Aimwell, a truck and driver leasing company, which provided

hauling services, including trucks and drivers, to customers including McLendon, a road grading and utility contractor. Both Aimwell and McLendon were located in the same building and were owned by siblings, but McLendon required Aimwell to provide workers' compensation insurance for Aimwell's employees. Aimwell was solely responsible for paying the claimant.

The claimant was asked by a McLendon supervisor to assist on a job by driving a truck, and was injured while driving. For the day he was injured, the claimant had billed only one hour for supervisory work and more than ten hours worth of driving for McLendon. Aimwell billed McLendon for the 10 1/2 hours and then Aimwell paid the claimant for the entire 11 1/2 hours he worked the day of his injury. His workers' compensation claim was accepted and paid for by Aimwell's carrier. Aimwell and its carrier then sought judicial determination of whether McLendon was partially liable for the claim.

The ALJ awarded benefits against both Aimwell and McLendon in equal parts, finding that the claimant was a joint employee of both companies when he was injured because McLendon was controlling the claimant's work at the time of the injury and had the right to fire him, and because the claimant was not working for, nor under the control of, Aimwell during that time. As such, the ALJ found the claimant was a borrowed servant of McLendon. Furthermore, the ALJ found that the claimant was jointly employed by both companies since the claimant was still required to act as a truck supervisor for Aimwell. The Board affirmed the findings of fact that the claimant was a joint employee, but set aside the 50 percent apportionment of liability to each company, concluding that Aimwell was liable for 100 percent of the benefits.

The Superior Court affirmed the Board's finding that Aimwell was liable for 100 percent of the claim for compensation and the Court of Appeals agreed. The dispute on appeal concerned the reading of O.C.G.A. § 34-9-244 and the liability apportionment. The Court read



the statute to provide that in the case of joint employment of two or more employers subject to the Act, each employer must contribute to the compensation to an injured employee in proportion to its responsibility for paying the employee's wages, which the Court went on to define as payment by the employer to the employee for services rendered which result in an economic net gain to the employee. Applying its statutory application to this case, the Court found that even though McLendon paid Aimwell for the services the claimant provided, Aimwell was the sole payor of the claimant's wages. Aimwell paid the claimant at an hourly rate regardless of whether he performed the supervisory work as a foreman or operated a vehicle for a customer. Accordingly, because Aimwell had the sole obligation to pay the claimant, Aimwell and McLendon had never contracted around that, and Aimwell carried workers' compensation coverage for the claimant, the Court of Appeals found that Aimwell was liable for 100 percent of the compensation.

*If you have any questions about the foregoing decision, please do not hesitate to contact Benson Ward, Taylor Stevens or Mike Bagley at 404-885-1400.*

## Standard of Review

In *JMJ Plumbing v. Cudihy*, 735 S.E.2d 148 (2012), the Court of Appeals of Georgia reversed the superior court, which had reversed the Board's Order reversing the Award of the ALJ favor of the claimant. While working as a plumber on Sept. 2, 2008, the claimant alleged that he felt a pain in his back and leg while digging. He did not report the injury to his employer at the time, and after a short break, continued working normal duty. The claimant went to a medical clinic for treatment later that day, reporting that he had experienced back pain over the weekend and while digging at work earlier that day. He was treated with medication and four months later, after continuing to treat, was diagnosed with low back pain. He treated with a chiropractor in March 2009 and was diagnosed with muscle

spasms. After his pain persisted over the following few months, the claimant saw an orthopedist who diagnosed him with a possible disc herniation and placed him on light duty on June 3, 2009. The claimant first reported the incident to his employer on June 25, 2009, and was accommodated with light duty restrictions until he was terminated for cause in August 2009.

Following an all-issues hearing, the ALJ found that the claimant suffered a compensable injury on Sept. 2, 2008 and a new accident on June 25, 2009, based upon the theory of a new accident since the claimant was injured on the job, but continued to perform his duties until he was forced to cease work because of the gradual worsening of his condition attributed to his ongoing performance of the job. The Board reversed the ALJ's Award and substituted its finding that the claimant failed to show he sustained a compensable injury on Sept. 2, and that he had also not sustained a new accident on June 25, 2009, because he failed to report the initial work injury. Furthermore, the Board found that the claimant did not stop working on June 25, and therefore could not prove any disability manifested itself on that date. On appeal, the Superior Court reversed, finding that the Board's conclusions were supported by some evidence, but its legal analysis was erroneous for failing to consider whether a cumulative trauma legal theory applied. In awarding the claimant benefits, the Superior Court found that the claimant did not have to prove an initial injury on Sept. 2, 2008, and that he had sustained a compensable cumulative trauma injury on June 25, 2009, based upon the Court's own findings that the claimant had back pain as a result of his job, that his injury worsened as he continued to work until he was diagnosed with a herniated disk and that he became unable to work on June 25.

The primary basis for Court of Appeals' reversal of the Superior Court Order was the Superior Court having exceeded its authority in finding a cumulative trauma injury. According to the Court, the Board properly considered the legal theory of "new accident" which was raised by the employer on appeal to the Board. The Board addressed the theory, applied the law and supported its findings with evidence in the record that the claimant's injury had not worsened from his daily work activities. The Superior Court, on the other hand, inserted its own finding that the claimant's injuries had worsened as a result of his daily work duties, which the court found was an improper substitution of fact. In doing so, the Court of Appeals sent a clear message that the ALJ and the Board are the sole holders of the right to make findings of fact in workers' compensation cases, and if there is any evidence to support the Board's finding, the Superior Court may only reverse the Board's award if errors of law are committed.

In *Decostar Industries, Inc. v. Juarez*, 316 Ga. App. 642, 730 S.E.2d 120 (2012), the ALJ and the Board both found that the claimant had aggravated a pre-existing right shoulder injury by performing repetitive job tasks while working on Decostar's production line. However, the claimant's request for TTD was denied on the basis that the claimant's light duty job had remained available to her even though



she had voluntarily resigned. The claimant's request for a change of treating physicians was also denied, and the employer/insurer were found liable for only limited medical benefits. The claimant appealed to the Superior Court, which reversed and found for the claimant.

On appeal by the employer/insurer, the Court of Appeals found error in the Superior Court's decision to disagree with the Boards' conclusion that the claimant suffered an aggravation of previous injury, and instead designate the claim as a new injury. According to the Court



of Appeals, the Superior Court acted outside its powers when it reinterpreted the evidence and misapplied the standard of review. The Court found ample evidence in the record to support the ALJ and the Board's finding of an aggravation injury, and therefore, the Superior Court was not authorized to weigh the evidence and find otherwise.

The Court of Appeals also reversed the Superior Court on its decision to grant a change of physician to the claimant and award the claimant additional medical benefits. The Court clarified that the Superior Court must review a claimant's request for a change of physicians by considering whether the Board acted arbitrarily or in excess of its powers. In light of the fact that the Board denied the request for a change of physician to an IME physician Dr. Karsch, and instead, directed the claimant to continue treating with the long-standing physician, Dr. Colpini, she had previously been treating with, the Court of Appeals found no evidence that the Board acted arbitrarily or capriciously. The Court of Appeals also found no merit in the appellee's claim that Karsch became the authorized treating physician once the claim became compensable and that the Board thereafter lacked authority to change her treating physician from Karsch to Colpini. Because the issue of whether Karsch became the authorized treating physician had not been raised to the Board, the Court of Appeals refused to consider it on appeal.

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