



WORKERS' COMPENSATION LAW

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SECTION NEWSLETTER

Workers' Compensation Case Law Update

By G. Robert Ryan Jr.

Moore, Clarke, DuVall & Rodgers, P.C.

Following are some interesting recent workers' compensation decisions from the Georgia Court of Appeals.

***Footstar, Inc. d/b/a Meldisco Shoe-Mart v. Stevens*, 275 Ga.App. 329; 2005 Ga. App. Lexis 969, (decided Sept. 1, 2005)**

This new decision from the Court of Appeals addresses the often litigated issue of change in condition versus new accident or fictional new accident.

Claimant was injured on Nov. 8, 1999 while putting merchandise into an overhead bin. The workers' compensation carrier was Travelers. The claim was accepted as medical only and medical benefits were paid. Claimant continued to work through 2001, although she testified that she had difficulty performing her work because of her injuries and occasionally used vacation and sick leave to alleviate the aggravation she experienced in her arm neck and shoulder. However, at no point did she seek income benefits.

On Jan. 1, 2001 Liberty Mutual replaced Travelers as the workers' compensation carrier for the Employer.

In August 2001, Travelers requested a hearing to determine which insurer was responsible for the cost of claimant's medical treatment. The hearing was held and the ALJ issued an award on Dec. 18, 2001 finding that the claimant suffered a compensable

injury on Nov. 8, 1999, that she was not disabled because she continued to work, that she had not sustained a new injury or new accident during Liberty Mutual's coverage and that Travelers was therefore responsible for continuing medical expenses.

Thereafter, the claimant was placed on light duty by her treating physician. Her condition continued to deteriorate until she ceased working on Jan. 5, 2002. Despite the ALJ's earlier award, Travelers refused to pay income benefits, arguing that there was a fictional new accident. The employer actually commenced benefits out of its own pocket for a period of time.

A second hearing was held before the ALJ on Oct. 31, 2003 to determine which insurer would be responsible for income benefits. The ALJ held that there was not a change in condition because Travelers never paid income benefits. Accordingly, he found a fictional new accident date of Jan. 5, 2002 and found that Liberty Mutual would be responsible for TTD benefits.

Liberty Mutual appealed and the Appellate Division adopted the ALJ's findings of fact but reversed him on the law. Specifically, the Appellate Division held that the change in condition statute (rather than fictional new accident) applied, since the Claimant's condition had in fact been previously established by the ALJ's Nov. 8, 1999 award finding that the claim was compensable.

The Appellate Division's determina-

tion was upheld by the Superior Court and by the Court of Appeals.

The Court of Appeals distinguished this case from other cases where income benefits have not been paid, since the claimant's condition was in fact established by the Nov. 8, 1999 award. Travelers attempted to argue that since the Nov. 8, 1999 award only awarded medical benefits that the claimant's condition had not been established and that therefore the fictional new accident theory would apply, and there would be a fictional new accident date of Jan. 5, 2002 for which Liberty Mutual would be responsible.

The Court of Appeals agreed with Liberty Mutual's position that since the compensability of the claim was established by a previous award, it did not matter whether that award was for medical only or for income benefits. O.C.G.A. §34-9-104(a)(1) allows for a change in condition when the change occurs after the date on which the condition was "last established by award or otherwise".

The "or otherwise" clause has been interpreted to apply in situations where the Employer/Insurer have voluntarily accepted a claim as compensable by paying income benefits. It is clear based on existing precedent that payment of medical only benefits by the employer/insurer does not constitute acceptance of a claim. However, the *Footstar* decision stands for the

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State of the Section – From the Chair

By Luanne Clarke, Chair
Moore, Clarke, DuVall & Rodgers

A great many events have transpired since I took office the summer of 2005 and we have many more scheduled for the remainder of my tenure as Chair. However, first, I would be remiss if I did not thank our former Chair, Emily George, for all of her hard work and commitment to the section. Only a very few of us truly know how very hard she worked – thank you, Emily!

Congratulations to our system and the State as a whole on the reappointment of the Honorable Carolyn C. Hall as Chairman and Viola Drew as a Director of the State Board of Workers' Compensation. Their leadership strengths have long been recognized by our section and will be particularly important as we make the transition to ICMS and go paperless.

Congratulations to Mrs. Lavinia George on being honored with the section's Distinguished Service Award. Ms. George's legal career began when she studied for the bar more than 50 years ago. Our workers' compensation system is the beneficiary of her countless hours of dedication.

Thank you to our co-chairs of the Workers' Compensation Institute, the Honorable David Imahara, Julie John and Drew Tanner. It was their efforts in choosing fine speakers that led to many raving comments on the institute's success. Thank you to the speakers as well- we all know that with speaking comes the commitment to write that dreaded paper. We greatly appreciate your dedication of time and energy to make the program such a success.

Congratulations to former Chair Mark Gannon because his vision of a coffee table book on the history of Workers' Compensation is now a reality. It is a superb history of our system and a lasting tribute to the attorneys and judges who have worked tirelessly to make our system the model that

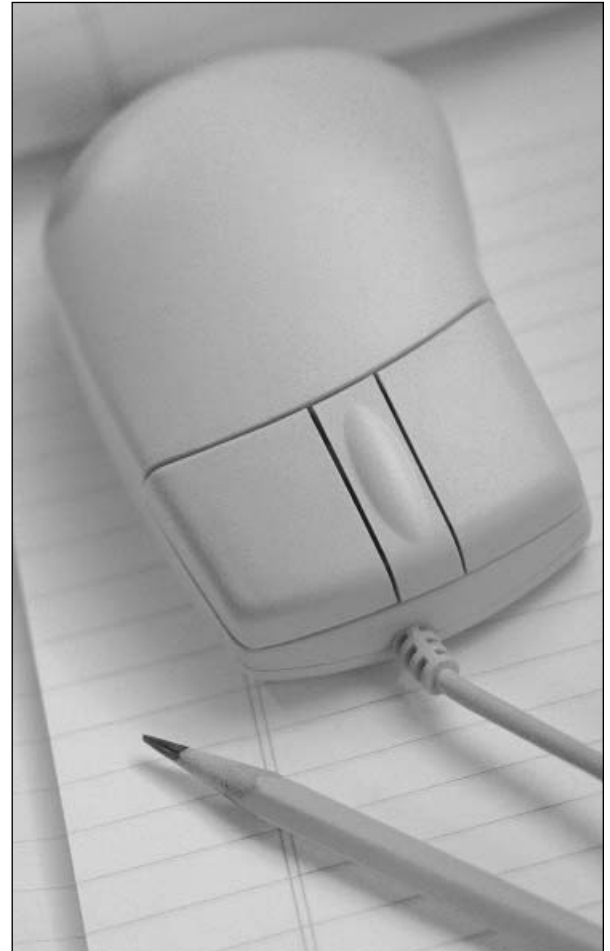
it is today. Georgia's system is one of only seven states to obtain an A rating from Workloss Data Institute and those individuals and the countless others not noted in the written history are to be credited. The proceeds of the book are donated to Kids' Chance so please support the book project!

Speaking of Kids' Chance, I offer my sincere appreciation to all of our section's volunteers and those who are a part of our system for your generous donation of time, talents and money for this wonderful cause. Kids' Chance is a lifeline to so many of our kids here in Georgia and throughout the nation. Please continue to support the many fund-raising events. Every moment and penny make a difference in our kids' lives.

January will bring the mid-year meeting of the State Bar and our section's reception is Friday, January 6, 2006. Please register with the State Bar and join us for a short meeting and a great deal of camaraderie.

The Georgia Defense Lawyers' Association is sponsoring a Workers' Compensation Academy in February 2006 which is specifically geared to educate those young defense lawyers of our section. Please contact GDLA if you are interested in participating as an instructor or a student.

Finally, IT IS HERE! The SBWC has gone paperless. Unique claims numbers, auto-generated notifications, attorney passwords, and electronic filings are all a part of our future. This ICMS process has been in the development stage for years and it is now a part of our claim process. I encourage



all of you to visit www.sbcw.georgia.gov and Georgia1st.com publications and review the articles of Jan Dillard, Ph.D., ICMS Project Manager, for detailed information on how the system works. Jan's articles provide a great overview that even old dogs like me can understand. Thanks to Jan, her entire team, and especially the personnel at the Board for their hard work and tenacity. We will all be the beneficiaries when the system is completely implemented.

Thank you again for the honor to serve as your 2005-2006 chair. I serve with a dedicated executive committee and we will continue to work to ensure that our section provides you with meaningful assistance in our area of practice. I wish you all a warm and wonderful holiday season. **WC**

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proposition that the distinction between payment of income/medical benefits for purposes of application of the change in condition statute is not relevant when the condition has been established by an award of an administrative law judge rather than simply a voluntary acceptance of the claim by the employer/insurer.

***Theesfeld v. Image Electrolysis and Skin Care, Inc.*, 274 Ga. App. 38 (2005)**

The above decision from the Court of Appeals involves application of the exclusive remedy doctrine in a negligence suit.

Theesfeld filed a negligence suit against Image Electrolysis after she fell from a stool while performing a pedicure. Theesfeld alleged that she was an independent contractor of Image Electrolysis. Prior to filing the negligence suit, Theesfeld had pursued a workers' compensation claim against Image Electrolysis and had settled the claim through a no liability stipulation, which was approved by the State Board.

Image Electrolysis argued that it was entitled to summary judgment on the negligence claim for two reasons: First, that the payment of compensation to Theesfeld pursuant to the no liability stipulation invoked the exclusive remedy doctrine and precluded her negligence suit; second, that in any event, Theesfeld had equal or greater knowledge of the alleged dangerous condition of the stool and she was therefore not entitled to recovery.

The Court of Appeals ultimately found that Image Electrolysis was entitled to summary judgment for the second reason. However, the Court of Appeals rejected Image Electrolysis' allegation that the exclusive remedy doctrine applied. In so doing, the court acknowledged that the exclusive remedy doctrine bars a subsequent tort suit by the injured party despite a no liability stipulation when compensation is paid pursuant to the settlement, *Ridley v. Monroe*, 256 Ga. App.

686 (2002). However, Image Electrolysis apparently failed to produce evidence on its summary judgment motion to show that compensation was in fact paid to Theesfeld pursuant to the no liability stipulation. Therefore, since there was a lack of evidence in the record showing that Theesfeld received compensation pursuant to the terms of the settlement, the exclusive remedy doctrine did not apply.

The primary importance of this case is a reminder that allegations and arguments of counsel are not evidence in and of themselves and that it is necessary to actually produce evidence of record to demonstrate and prove that benefits were paid and that the exclusive remedy doctrine would therefore apply.

***Georgia Pacific Corp. v. Cross*, 2005 Ga. App. Lexis 1063 (decided Sept. 28, 2005)**

This case involves the one year statute of limitation for filing a claim pursuant to O.C.G.A. §34-9-82 and the application of the fictional new accident theory.

The claimant suffered an injury on Aug. 22, 1995, when he was exposed to sulfuric acid while working in a paper mill. On the date of the accident, he had difficulties swallowing and breathing, was treated at the emergency room and returned to work a few days later.

The claimant missed work a few weeks later due to pain and swelling in his left ankle. Then, the claimant missed work from November 2000 to February 2001 due to pain and swelling in the right elbow.

The claimant missed work again from August 2001 to November 2001 due to pain in the left leg and ankle.

In November 2001, a physician diagnosed the claimant with an autoimmune disease as a result of the 1995 exposure to sulfuric acid. Although it is not entirely clear from the Court of Appeals decision, apparently there was some connection between this auto-immune disease and the extremity pain suffered by the claimant from

time to time after 1995.

The claimant stopped work on Jan. 4, 2002 and filed a workers' compensation claim on Jan. 28, 2002 (Note: it is not clear from the Court of Appeals opinion whether a physician took the claimant out of work on Jan. 4, 2002 or whether he stopped work on his own and it is also not clear exactly what action the claimant took to "file a workers' compensation claim" on Jan. 28, 2002. Apparently, he filed a WC-14 on that date.)

A hearing was held and the ALJ denied the claim on two (2) grounds: First, that the claimant had failed to prove that he was suffering from an occupational disease and second, that his claim for an occupational injury arising from the 1995 exposure to sulfuric acid was barred by the one (1) year statute of limitations (presumably referring to the statute of limitation located at O.C.G.A. §34-9-82, although the Court of Appeals never specifies in its opinion).

The Appellate Division reversed the ALJ's decision on the statute of limitations ground, finding that the claimant had been forced to stop work due to a work related aggravation of his work related arthritic condition on Jan. 4, 2002 and that the claim was therefore timely filed, i.e., the Appellate Division found a fictional new date of accident on Jan. 4, 2002.

The Court of Appeals upheld the Appellate Division's determination that the Claimant was entitled to benefits.

The Court did not address the underlying issues or factual scenario in any great detail whatsoever. Instead, the Court simply upheld the Appellate Division's determination based on the "any evidence" standard. The only specific evidence discussed by the Court was that the claimant and others (it not being clear whether the others were medical providers or coworkers or what) testified that his continuing to work aggravated the arthritic condition resulting from his

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1995 exposure to sulfuric acid (which makes little sense because earlier in the opinion the Court cites to a medical doctor who diagnosed an autoimmune disease related to the 1995 exposure, but there is no discussion of any diagnosis of an arthritic condition related to the 1995 exposure).

The Court went on to restate the principle that an employee who is injured and continues to work and is later forced to stop working because of gradual worsening of his condition which was partially attributable to his continuing to work, is entitled to a fic-

tional date of accident which begins to run on the date he stops working.

Finally, the Court issued a statement in the final paragraph of the opinion which was, apparently, an incorrect statement of the law. The Court stated that O.C.G.A. §34-9-80 provides that a claim must be filed within thirty (30) days of the accident and since Cross filed his claim twenty-four (24) days after he stopped working, it was timely filed. However, as we all know, O.C.G.A. §34-9-80 has nothing whatsoever to do with filing claims. Filing claims is governed by the one (1) year statute of limitation at O.C.G.A. §34-9-82. O.C.G.A. §34-9-80 deals only with the thirty (30) day limit for providing

notice of a claim to the employer.

Finally, the Court of Appeals opinion never addresses what appears to be the real issue in this case, which is whether the Claimant's arthritic condition which caused him to stop working was in any way related to the work injury that occurred on Aug. 22, 1995.

This decision does emphasize the fact that the best opportunity to prevail is at the ALJ or Appellate Division level. Once the case reaches the Court of Appeals, the Court may very well simply confirm whatever decision the Appellate Division made under the "any evidence" standard. **WC**

ICMS Goes Live

By Jan Dillard, Ph.D.

ICMS Project Manager

It's ALIVE! The State Board of Workers' Compensation inaugurated their new ICMA document management system on Oct. 1, 2005.

Phase 1 of the ICMS implementation focuses on building the network infrastructure, including an Oracle database that stores claim information and passes the data through the Board processes. The Board now has the capability to electronically scan all documents coming to the Board. However, because of the large volume of paper and the limited workflow procedures during Phase 1, the Board has decided to limit scanning to the following forms: only WC-1s, WC-14s, WC-2s, WC-3s, WC-4s, and WC-102Bs will be scanned for now.

The ICMS system will generate a unique number for each new claim. This "Board Claim Number" appears on every form. It is a 10-digit number with the first four digits identifying the year the claim is created at the Board (not the year of the injury).

The new Board claim number has been assigned to existing claims and these numbers have been sent out to insurance carriers and self-insurers.

A critical feature of the ICMS system is the ability to auto-generate notifications and alerts. To send these alerts, the system must have accurate and up-to-date information. The system has established a unique organization number, called the "SBWC ID number" for all insurers, self-insurers, claim offices, and group funds. Please ensure that the organization's SBWC ID number is included where requested. Do not confuse this number with the "Board Claim Number" which identifies a single claim. SBWC ID numbers can be found on the State Board's web-

site at www.sbwc.georgia.gov.

We have created a mailbox specifically to receive updates on your organization's contact information: ICMSprep@sbwc.ga.gov. Please send your organization's name, the U. S. Postal address (must include city/state/zip code), a primary e-mail address, and as many as three alternate e-mail addresses to this electronic mailbox. Please note that this mailbox is strictly to receive contact information. It is not a monitored information source.

To communicate more effectively with Attorneys who represent parties to a claim, the new system requires accurate contact information. The Board requires the Attorney's contact name, U. S. Postal address, e-mail address, an alternate e-mail address, phone number, and Georgia Bar number. We are asking attorneys to send this information to ICMSprep@sbwc.ga.gov.

When a document is scanned into the system, all parties of the claim will be notified that a document has been received. This is an automated response by the system and will use the information that has been entered. These e-mail notifications began on Oct. 27. Please note, however, that not all documents are being scanned. Only electronic documents will generate an automated notification. Please refer to our website for information regarding the new ICMA system, www.sbwc.georgia.gov. **WC**

Jan Dillard, Ph.D., PMP, is president and founder of Glenridge Consulting Group, LLC, which specializes in Project Management for Information Technology projects. to augment existing technology systems.

Daubert and Georgia's New Expert Witness Rule

By Greg Presmanes
Bovis, Kyle & Burch, LLC

The tort reform package passed by the Georgia Legislature in 2005 included a new expert witness rule loosely based on the federal *Daubert* rule.¹ The *Daubert* rule is actually a compilation of rulings from four U.S. Supreme Court decisions: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,² *General Electric Co. v. Joiner*,³ *Kumho Tire Company v. Carmichael*⁴ and *Weisgram v. Marley Company*.⁵ The *Daubert* rule, created by these four U.S. Supreme Court decisions, is the basis for admitting expert testimony in the Federal Courts.

Let us take a look at how those cases developed the *Daubert* rule. The *Daubert* case involved the question of whether Benedectin, an anti-nausea drug, ingested during pregnancy, caused birth defects. The trial court and the Ninth Circuit United State Court of Appeals excluded the plaintiff's expert causation evidence on the grounds that it was not "sufficiently established to have general acceptance."⁶ In federal trials, the rule for novel scientific evidence was controlled in many federal courts by the decision in the case of *Frye v. United States*.⁷ The famous *Frye* test was simple. It created what came to be known as the "general acceptance" test as the standard for determining the admissibility of scientific opinion evidence. That test stated that, if the scientific community which studied the scientific evidence in question had accepted the principles or methods involved, the evidence could be admitted. The rule was based on the premise that the pertinent scientific community was in a far better position than a trial court to evaluate whether a novel theory or technique was valid and reliable. If the pertinent scientific community was still testing or arguing over the new theory or technique, it was not yet ready for the law courts.

Georgia, like many other jurisdictions, found the *Frye* rule too restrictive, because it was totally dependent upon scientific orthodoxy which made it inflexible when it came to novel theories and techniques that might have a following in the scientific community, but had not yet achieved the "general acceptance" that *Frye* required. Furthermore, there were disputes as to which "scientific community" should have the right to say whether the principles or methods involved were "generally accepted." Therefore, like many other jurisdictions, Georgia modified the *Frye* test to give the trial judge a larger role in evaluating the validity and reliability of novel scientific evidence. In the case *Harper v. State*,⁸ the Georgia Supreme Court stated that:

"... The *Frye* rule of "counting heads" in the scientific community is not an appropriate way to determine the admissibility of a scientific procedure in evidence... We hold that it is proper for the trial judge to decide whether the procedure or technique in question has reached a scientific stage or verifiable certainty, or ... whether the procedure rests upon the laws of nature... The significant point is that the trial court makes this determination based upon the evidence available to him rather than by simply calculating the consensus in the scientific community."

The United States Supreme Court granted certiorari in the *Daubert* case, in order to resolve a split in the circuits as to what standard to use to determine the admissibility of scientific opinion evidence. The United States Supreme Court held that, because the Federal Rules of Evidence had been adopted, the standard for determining the admissibility of scientific opinion evidence could no longer be the "general acceptance" test that originated in

the *Frye* case, because Federal Rule of Evidence 702 replaced the "general acceptance" test with a more flexible approach. The more flexible approach has often been called the "scientific reliability" test. The *Daubert* decision assigns a "gatekeeping" role to the trial judge that involves more than simply "counting heads" in the scientific community to determine whether a scientific opinion or methodology has gained "general acceptance." The *Daubert* decision requires that the trial judge be satisfied that the offered evidence is scientifically reliable before admitting it and allows the judge to use any sources that help in making that determination. The United States Supreme Court's holding in the *Daubert* case was codified in 2000 by an amendment to Rule 702 of the Federal Rules of Evidence.

Daubert requires the trial court to act as a gatekeeper and to ensure that speculative and unreliable expert opinions do not reach the jury.⁹ Even though a jury is not involved in workers' compensation cases, the *Daubert* rule nonetheless applies. As the gatekeeper, the Court must do a preliminary assessment as to whether the reasoning or methodology underlying the testimony is "scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."¹⁰ The Court must consider the testimony with the understanding that "the burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion."¹¹

Under the *Daubert* rule, the trial judges act as "gatekeepers" of scientific and other expert evidence. They are required to examine the data and methodology on which each expert's opinion is based, and they have the authority to exclude unreliable expert

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opinions.¹² In conducting this assessment, the trial court should give the parties an adequate opportunity to present their factual and legal contentions and should state the reasons for its ruling on the record.¹³ The proponent of the expert opinion has the burden of producing evidence from which the Court can determine that the proffered testimony is admissible.¹⁴

Under *Daubert*, the trial court has considerable latitude both in deciding how to test an expert's reliability and in deciding whether that expert's testimony is reliable. This latitude allows the Court to decide what proceedings, if any, are needed to investigate reliability.¹⁵ Courts generally have not required that a *Daubert* hearing take any specific form. Moreover, the trial judge may make a decision on admissibility without a hearing if the parties have presented a sufficient basis for the decision.¹⁶ The trial court's latitude also extends to its decision about which factors should be considered in assessing the reliability of particular offered expert testimony.¹⁷

Under *Daubert*, the trial court has two separate and distinct functions, the first of which is to determine the testimony given by the expert is reliable, and the second is to determine whether the expert's reasoning or methodology can properly be applied to the individual facts of the case.¹⁸ As to the first function, determining whether the testimony given by the expert is reliable, the assessment of the reliability of the expert's testimony turns on whether the individual is qualified to express an opinion in that particular field, inasmuch as a witness may be qualified as an expert by virtue of "knowledge, skill, experience, training, or education."¹⁹ Failure to possess the requisite experience or education to testify can result in the exclusion of the expert from the case.²⁰ Similarly, Georgia courts have issued decisions concerning the analysis required to determine the reliability of expert testimony. The Georgia

Supreme Court has held that, where an expert lacks expertise in a particular area in which he is being asked to testify, he is not properly qualified to render an opinion.²¹

The second gatekeeping function is to determine whether the expert's reasoning or methodology can properly be applied to the individual facts of the case. Rule 702 requires the trial judge to exclude offered expert testimony if it is not relevant and reliable.²² However, the Court should not exclude evidence that is more weak than unreliable.²³

Besides the relevancy requirement of Rule 702 of the Federal Rules of Evidence, Rule 402 provides generally that irrelevant evidence is not admissible. The U.S. Supreme Court describes relevance in the context of scientific expert evidence as requiring a "valid scientific connection to the pertinent inquiry."²⁴

Thus, the first prong of the *Daubert* rule is establishing relevance, and the second prong is establishing reliability. In *Daubert*, the U.S. Supreme Court offered the following factors as suggestions that may be considered in determining evidentiary reliability, but cautioned that the list is not definitive:²⁵ (1) whether the theory or technique has been and can be reliably tested; (2) whether it has been or can be subjected to peer review; (3) the known or potential rate of error of the technique; and, (4) the "general acceptance" of the technique, i.e., the old *Frye* test.

On remand of the *Daubert* case to the 9th Circuit, the 9th Circuit added another factor: "whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for the purpose of testifying."²⁶ In other words, is there a litigation taint in the research?

These factors do not function as a "definitive check list or test." Instead, they form the basis for a flexible inquiry into the overall reliability of a proffered expert's methodology.²⁷ The

trial court has "considerable leeway" in deciding in each case "how to go about determining whether particular expert testimony is reliable." The court "should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability" of the proffered expert testimony.²⁸

The reliability requirement, which is the second prong of the *Daubert* rule, is designed to exclude so called "junk science." At the very least, scientific opinions offered under Rule 702 must be based on sound scientific methods and valid procedures.²⁹

The primary focus must be on the principles and methods used, not on the conclusions generated.³⁰ But conclusions and methodology are "not entirely distinct from one another." A court may conclude that there is simply too great an analytical gap between the data and the opinion offered.³¹

The U.S. Supreme Court has issued three more opinions, fleshing out the *Daubert* decision. In *Kumho Tire*, the Court broadened the *Daubert* rule to apply to all expert testimony, and not merely to the "scientific" evidence that was at issue in the *Daubert* case.³² In *Weisgram*, the U.S. Supreme Court ruled that federal appellate courts that reverse a trial court's admission of expert evidence can reverse and render judgment if, without the rejected evidence, the remaining evidence in the record is not sufficient to sustain the verdict, which means that, basically, the litigants get only one bite at the apple.³³ In the *Joiner* case, the U.S. Supreme Court ruled that review of a trial judge's rulings on expert evidence is limited to an abuse of discretion standard.³⁴

Before the 2005 tort reform legislation, Georgia had declined to adopt the *Daubert* rule on several occasions on the ground that it was based on the Federal Rules of Evidence, which had not been adopted by the Georgia Legislature.³⁵ The Georgia Supreme Court granted certiorari twice to consider whether to adopt the *Daubert* rule, but ruled that certiorari was improvidently granted.³⁶

Before the 2005 legislation, Georgia law provided much broader rules for expert testimony and did not require the trial court to be a “gatekeeper.” The basis for Georgia’s historic rule on expert testimony was contained in O.C.G.A. §24-9-67, which provided in pertinent part, “The opinions of experts on any question of science, skill, trade or like questions shall always be admissible.” Furthermore, questions going to whether there was a sufficient basis upon which to base an expert opinion went to the weight and credibility of the testimony, not its admissibility.³⁷ However, the Georgia Supreme Court adopted an exception to the general rule in a criminal case, *Harper v. State*.³⁸ In *Harper*, the Court evaluated the standard for determining whether the results of an interview, conducted while the defendant was under the influence of truth serum, were admissible. The Court rejected the *Frye* rule of “counting heads,” and instead held that it was proper for the trial judge to decide whether the procedure or technique in question had reached a scientific state of “verifiable certainty.” This verifiable certainty test, however, did not address the admissibility of the opinions of expert witnesses generally; instead, it addressed only the admissibility of the results of novel “procedures and techniques.”³⁹

The Georgia Court of Appeals ruled that the *Harper* rule was not the same as the *Daubert* rule in the case of *Orkin Exterminating Co. v. McIntosh*.⁴⁰ In that case, the Court of Appeals held that the credibility of the conclusions drawn by the experts was for the jury to determine, and hence, they denied Orkin’s motions for summary judgment and directed verdict. However, federal trial judges have used the *Daubert* rule to evaluate not only the methodology, but the conclusions and opinions of the experts, as well, notwithstanding Justice Blackmun’s opinion that the *Daubert* rule was to be applied only to the methodology and not to the conclusions and opinions of experts.⁴¹

The new law passed by the Georgia Legislature in 2005 is O.C.G.A. §24-9-67.1, which governs the admissibility

of expert opinions in civil actions. It attempts to adopt Rules 702 and 703 of the Federal Rules of Evidence, with Rule 702, as amended in 2000, being the codification of the *Daubert* rule. Subsection (a) of the new Georgia statute is exactly the same as Rule 703. Subsection (b) of the statute is almost the same as Rule 702. Subsection (a) addresses the basis of opinion testimony by experts. It is contrary to Georgia’s historic rule, which prevented an expert from relying on hearsay evidence and which required the basis of expert opinion to be admitted in evidence independently. Federal Rule 703, however, allows the expert to base his opinion on hearsay, if the facts or data upon which the opinion is based, are of a type “reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,” and “the facts or data need not be admissible in evidence for the opinion or inference to be admitted.”

There is an internal inconsistency in the new statute between subsection (a) and subsection (b)(1) of O.C.G.A. §24-9-67.1. Subsection (a) allows an expert to rely on “facts or data [that] need not be admissible in evidence” if of a type reasonably relied upon by experts in the field in forming opinions, but subsection (b), contrary to Federal Rule 702, and contrary to subsection (a), requires expert opinions to be based on facts and data “which are or will be admitted into evidence at the hearing or trial.” This contradictory language is likely to cause confusion.

Georgia has not adopted all of the Federal Rules of Civil Procedure or the Federal Rules of Evidence. Federal Rule 26(a)(2) of the Federal Rules of Civil Procedure contains the requirement for what must be included in the disclosure of expert testimony and directs the timing of such disclosures. To the contrary, however, Georgia has no similar provision. Instead, discovery of experts is governed by O.C.G.A. §9-11-26(b)(4) of the Civil Practice Act. Essentially, that statute states that, in response to an interrogatory, a party must disclose experts. There are no specific details

or requirements, and typically, neither side will give much information on their experts outside of depositions.

In determining whether the proposed expert testimony is relevant, the Georgia definition of relevancy is somewhat different than the Federal Rules of Evidence. The Georgia rule provides, “Evidence must relate to the questions being tried by the jury and bear upon them either directly or indirectly.”⁴² On the other hand, Rule 401 of the Federal Rules of Evidence provides, “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” It remains to be seen as to whether or not these two differing definitions of relevancy will be interpreted differently.

The new statute provides for pre-trial hearings to determine the admissibility of proposed expert testimony. Subsection (d) of O.C.G.A. §24-9-67.1 provides that, upon motion of a party, the Court may hold a pre-trial hearing to determine whether a witness qualifies as an expert and whether the expert testimony satisfies the requirements of the rule. There is no comparable provision in Rule 702 of the Federal Rules of Evidence. However, if a hearing is held in federal court, it is typically held pursuant to Rule 104 of the Federal Rules of Evidence, a provision in the federal rules that has no parallel in Georgia. To the contrary, in *Kumho Tire Company*, the United States Supreme Court held that it was not necessary to have a hearing on a *Daubert* motion, but that the trial court has the discretion to decide how to consider the motion.⁴³ However, the trial court cannot simply disavow its ability to handle the *Daubert* issues. In the case of *McClain v. Metabolife International, Inc.*, the Court stated that, “Although the trial court conducted a *Daubert* hearing, and both witnesses were subject to a thorough and extensive examination, the Court ultimately disavowed its

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ability to handle the *Daubert* issues. This abdication was in itself an abuse of discretion."⁴⁴ Thus, merely holding a hearing is not sufficient, and the court must apply the factors recommended by the United States Supreme Court in the *Daubert* case.

There is a unique provision of the new statute contained at O.C.G.A. §24-9-67.1(f). That provision is as follows:

"It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states."

It is unclear how this will be interpreted. Perhaps it will be necessary for Georgia courts to stay current with decisions in other states in order to determine whether an expert can testify in Georgia. Moreover, what interpretation will arise if decisions of other states reach inconsistent results? Also, if expert testimony is handled differently in another state, with different statutes, should that be relevant in Georgia? This is a very unusual provision, which to this writer's knowledge, does not exist in any other jurisdiction. The remainder of subsection (f) gives Georgia courts the right to draw upon opinions of the United States Supreme Court in the cases of *Daubert*, *Kumho Tire*, and *General Electric v. Joiner*, in considering expert witness testimony. However, the new statute in Georgia is not entirely consistent with either the *Daubert* or *Kumho Tire* cases. Therefore, problems may arise from drawing upon those decisions to interpret the Georgia statute insofar as it is not entirely consistent with those cases.

Even though much of the *Daubert* rule and O.C.G.A. §24-9-67.1 are geared toward jury trials, they still apply in workers' compensation cases. Insofar as workers' compensation cases are concerned, the provisions of O.C.G.A. §24-9-67.1 specifically apply

to "all civil actions," which includes workers' compensation cases.⁴⁵ Expert witnesses are allowed to give their opinions based upon facts as proved by other witnesses.⁴⁶ The expert witness may be allowed to base his or her opinion on facts or data made known either at the hearing or before the hearing.⁴⁷ An expert witness may be allowed to base his or her opinion on facts or data that are not admissible in evidence if they are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.⁴⁸

An expert witness can be allowed to testify if expert testimony will assist the trier of fact to understand the evidence or determine a fact in issue.⁴⁹ An expert witness may be qualified as an expert by virtue of knowledge, skill, experience, training, or education.⁵⁰ An expert witness may be allowed to give opinion testimony if the testimony is based on sufficient facts or data which are or will be admitted into evidence; the testimony is the product of reliable principles and methods; and the witness has applied the principles and methods reliably to the facts of the case.⁵¹

Any party may request a pre-trial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of O.C.G.A. §24-9-67.1(a) and (b).⁵² Upon the filing of a motion by any party for a pre-trial hearing on such issues, the hearing and ruling must be completed no later than the final pre-trial conference.⁵³ However, this provision seems more geared toward jury trials. Therefore, in a workers' compensation case, the Board would probably rule on the motion before the trial, because there is no "final pre-trial conference" in workers' compensation claims.

The State Board of Workers' Compensation will use the same four factors recommended by the United States Supreme Court in determining the reliability of proposed scientific opinion testimony as follows: (1) whether the theory can and has been tested; (2) whether it has been subjected to peer review; (3) the known

or expected rate of error; and (4) whether the theory and methodology employed is generally accepted in the relevant scientific community.⁵⁴ The factors will be applied by the Board in accordance with the guidelines given by *Daubert*, and thus will be flexible and used to insure the overall reliability of a proffered expert's methodology and conclusions, with the primary focus being on the principles and methods used, not on the conclusions generated.⁵⁵

Conclusion

It will take years and many decisions from Georgia courts before we know the full impact of the *Daubert* decision, its progeny, and O.C.G.A. §24-9-67.1. Constitutional challenges to the statute are a distinct possibility. In workers' compensation cases, however, the main reasons for requiring the trial judge to be the "gatekeeper" of expert testimony do not really apply, because there is no jury. Nonetheless, the State Board of Workers' Compensation is required to make the analysis and findings in accordance with the *Daubert* decision and O.C.G.A. §24-9-67.1, either at the trial or beforehand, if a party makes such a motion. **WC**

This writer would like to acknowledge and thank Robert E. Shields and Leslie J. Bryan for their excellent article in the October 2005 issue of the *Georgia Bar Journal* titled "Georgia's New Expert Witness Rule: *Daubert* and More."

Endnotes

1. Senate Bill 3, Section 7 (striking O.C.G.A. §24-9-67 and enacting a new O.C.G.A. §24-9-67, and enacting O.C.G.A. §24-9-67.1).
2. 509 U.S. 579 (1993).
3. 522 U.S. 136 (1997).
4. 526 U.S. 137 (1999).
5. 528 U.S. 440 (2000).
6. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 727 F. Supp. 570, 572 (S.D. Cal. 1989), affirmed, 951 F.2d 1128 (Ninth Circuit 1991), vacated and remanded, 509 U.S.

- 579 (1993).
7. 293 F.1013 (D.C. Cir. 1923).
 8. 249 Ga. 519, 525-26, 292 S.E.2d 389, 395-96 (1982).
 9. *McLean v. Metabolife International, Inc.*, 401 F.3d 1233 (11th Circuit 2005), citing *Daubert* 509 U.S. at 593.
 10. *Id.* at 1237.
 11. *Id.* at 1238; *U.S. v. Frazier*, 387 F.3d 1244, 1260 (11th Circuit 2004).
 12. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).
 13. *In re: Paoli RR Yard PCB litigation*, 916 F.2d 829, 835-836 (3rd Circuit 1990), cert. denied, 499 U.S. 961 (1991).
 14. *Maryland Casualty Co. v. Thermo-disc, Inc.*, 137 F.3d 780, 783 (4th Circuit 1998), cert. denied, 119 S.Ct. 74 (1998).
 15. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999).
 16. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999).
 17. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999).
 18. *Daubert*, 509 U.S. at 591-593.
 19. *Quiet Technology DC- 8, Inc. v. Hurel-Dubois UK Limited*, 326 F.3d 1333, 1342 (11th Circuit 2003).
 20. *Montgomery v. Noga*, 168 F.3d 1282 (11th Circuit 1999).
 21. *Cromer v. Mulkey Enterprises, Inc.*, 254 Ga.App. 388, 392, 562 S.E.2d 783, 787 (Ga.App. 2002) citing *Johnson v. Knebel*, 267 Ga. 853, 485 S.E.2d 451 (1997).
 22. *Kumho Tire Company Ltd. v. Carmichael*, 526 U.S. 137 (1999).
 23. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588-589, 595-596 (1993).
 24. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591-592 (1993).
 25. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-594 (1993).
 26. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317-1319 (9th Circuit), cert. denied, 516 U.S. 869 (1995).
 27. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993).
 28. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999).
 29. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (remanding case for a finding on whether plaintiff's theories linking drug to birth defects were reliable).
 30. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993).
 31. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (District Court acted within its discretion in concluding that animal studies and epidemiological studies, individually or in combination, were insufficient to support witness's opinion about causation of plaintiff's lung cancer.)
 32. *Kumho Tire*, 526 U.S. 137 (1999).
 33. *Weisgram*, 528 U.S. 440 (2000).
 34. *Joiner*, 522 U.S. 136 (1997).
 35. See, e.g., *Orkin Exterminating Co. v. McIntosh*, 215 Ga.App. 587, 592-93, 452 S.E.2d 159, 165 (1994).
 36. *Orkin Exterminating Co. v. Carder*, 258 Ga.App. 796, 575 S.E.2d 664 (2002), cert. granted on whether to adopt the *Daubert* rule (April 29, 2003), cert. vacated (September 8, 2003).
 37. *Chandler Exterminators, Inc. v. Morris*, 262 Ga. 257, 259, 416 S.E.2d 277, 278 (1992).
 38. *Harper v. State*, 249 Ga. 519, 292 S.E.2d 389 (1982).
 39. *Harper v. State*, 249 Ga. 519, at 525-26 (1982).
 40. *Orkin Exterminating Co. v. McIntosh*, 215 Ga.App. 587, 593, 452 S.E.2d 159, 165 (1994).
 41. *General Electric Co. v. Joiner*, 522 U.S.136, 146 (1997).
 42. O.C.G.A. §24-2-1 (2005).
 43. *Kumho Tire Co.*, 526 U.S. 137 (1999).
 44. *McClain v. Metabolife International, Inc.*, 401 F. 3rd, 1233, 1238 (11th Circuit 2005).
 45. O.C.G.A. §24-9-67.1(a).
 46. O.C.G.A. §24-9-67.1(a).
 47. O.C.G.A. §24-9-67.1(a).
 48. O.C.G.A. §24-9-67.1(a).
 49. O.C.G.A. §24-9-67.1(b).
 50. O.C.G.A. §24-9-67.1(b).
 51. O.C.G.A. §24-9-67.1(b) (1-3).
 52. O.C.G.A. §24-9-67.1(d).
 53. O.C.G.A. §24-9-67.1(d).
 54. *McLain v. Metabolife International, Inc.*, 401 F.3rd 1233 (1251), 11th Circuit 2005, citing *Daubert*, 509 U.S. at 593.
 55. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993); see also, *Liriano v. Hobart Corp.*, 949 F.Supp. 171, 177 (S.D.N.Y. 1996). (In considering relevance and reliability factors under *Daubert*, the focus must be solely on principles and methodology, not on conclusions they generate.)

Section Midyear Reception

As has long been our custom, the Workers' Compensation Section will have a reception for our members at the State Bar of Georgia's Midyear Meeting.

We will meet at 5 p.m. at the Renaissance Waverly Hotel at the Cobb Galleria. There will be a brief meeting followed by a reception.

The cost is \$33 and you may register online at www.gabar.org.

Footstar, Inc. v. Stevens: A “Unified Theory” of Change in Condition Remains Elusive

by Neil C. Thom

A.B. Bishop & Associates, LLC

One of the most frequently analyzed, litigated, and confounding subjects in Georgia workers’ compensation is the change in condition, particularly as it relates to its distinction from a new accident. Over time, employers, insurers, job duties, medical status, and work ability can all change, often making it difficult to determine who is responsible for what and when. Litigators attempt with valor to apply what can appear to be simple, settled law to some of the most convoluted fact patterns imaginable. As we advise our clients, understanding that settled law is of utmost importance.

The recent case of *Footstar, Inc., et al. v. Stevens*, No. A05A0883, 620 S.E.2d 588 (Ga. Ct. App. Sept. 1, 2005, cert. applied for), appears to call into question one of the “rules” with which many workers’ compensation practitioners had grown comfortable: no change in condition can be had unless the employee was previously paid weekly benefits. This recent decision appears to be somewhat revolutionary, but upon examination, it may not be so dramatic. It does, however, expose some potentially troubling questions when trying to forecast the management and litigation of claims with some semblance of predictability.

Case after case has moved through the channels of litigation into the appellate courts with previous payment of weekly benefits mentioned as a seemingly necessary component to a change in condition: *Wier v. Skyline Messenger Serv.*, 203 Ga.App. 673, 417 S.E.2d 693 (1992) (§ 34-9-104 inapplicable to “medical only” claims); *Clarke v. Samson Mfg. Co.*, 177 Ga.App. 149, 338 S.E.2d 738 (1985) (§ 34-9-104 applies because weekly benefits had been paid); *Hartford Acc. & Indem. Co.*

v. Mauldin, 147 Ga.App. 230, 248 S.E.2d 528 (1978) (no change in condition without prior award granting compensation); *Williamson v. Morrison Assur. Co.*, 138 Ga.App. 191, 225 S.E.2d 778 (1976) (application of two-year statute of limitation for change in condition is erroneous in a “medical only” claim); *Hartford Ins. Group v. Stewart*, 147 Ga.App. 733, 250 S.E.2d 184 (1978) (claim is change in condition and not new accident where claimant is injured and “draws compensation”).

Flying virtually under the radar for nearly 50 years was the notion that a change in condition case could be brought without weekly benefits ever having been paid. The Court of Appeals, in *General Motors Corp., Chevrolet Div. v. Dempsey*, 93 Ga.App. 423, 91 S.E.2d 850, aff’d, 212 Ga. 560, 93 S.E.2d 703 (1956), held that a change in condition for the worse could be sought by a claimant who had never received income benefits, but whose injury had been established as compensable by a previous award of medical benefits. In issuing its previous award, according to the Court of Appeals, the State Board of Worker’s Compensation asserted and reserved jurisdiction over the claim for future changes, including a potential claim for income benefits based on a change in condition.

In so doing, the court distinguished an earlier case, *New Amsterdam Cas. Co. v. McFarley*, 191 Ga. 334, 12 S.E.2d 355 (1940), where the Supreme Court held that a change in condition could not be had where an earlier award found the elements of compensability to be present, but denied income benefits because the claimant had been disabled only for a few days, insufficient to meet the waiting period

requirement and dismissed the claim. One might imagine that if the previous award in the *McFarley* case had been identical, but for the claim’s dismissal, a different result would have been reached on the subsequent change in condition attempt. The first award, containing the claim’s dismissal, had become final, concluding the Board’s jurisdiction over the claim. This distinction made by the *Dempsey* court, however, begs the question of whether the claim’s dismissal alone could have been reversed on appeal if there was no relief (medical or income benefits) available on the facts as they were at the time.

On careful review of the case law over the last several years, one can easily see that they are consistent with the proposition that payment of income benefits voluntarily or by award give rise to the possibility of a change in condition. As asserted in *Footstar*, they are not, however, necessarily conclusive of the converse: a change in condition implies the prior payment of income benefits. Indeed, the statute itself, O.C.G.A. § 34-9-104(a), defines “change in condition” as “a change in the wage-earning capacity, physical condition, or status of an employee or other beneficiary covered by this chapter, which change must have occurred after the date on which the wage-earning capacity, physical condition, or status of the employee or other beneficiary was last established by award or otherwise.” Where no income benefits have been paid voluntarily, can a claimant’s condition be established by an award that does not contemplate the payment of income benefits? *Footstar* and *Dempsey* hold that it can. In fact, the administrative law judge in *Footstar* had expressly established the claimant’s condition as compensable at the pre-

vious hearing, albeit finding that condition was “not disabled”. *Footstar*, 620 S.E.2d at 589 (2005)

Left unaddressed in the *Footstar* decision, however, is the language in O.C.G.A. § 34-9-104(b), which legislatively confers on the State Board of Workers’ Compensation the right to issue another decision “because of a change in condition ending, decreasing, increasing, or authorizing the recovery of income benefits awarded or ordered in the prior final decision”. If there were no income benefits awarded or ordered in the prior final decision, does the State Board have jurisdiction to modify it?

In *Dempsey*, the relevant code section, Ga. Code. Ann. § 114-709, provided that the State Board could, based on a change in condition, “make an award ending, diminishing or increasing the compensation previously awarded or agreed upon.” An award of medical benefits only may be an award of compensation within the meaning of the Workers’ Compensation Act, as asserted in *Dempsey*, but it is certainly not an award of income benefits, arguably necessary for jurisdiction over the issue under our present O.C.G.A. § 34-9-104(b).

We have, perhaps, yet another example of how the act, amended in bits and pieces over its long history and reinterpreted by the appellate courts in volumes of decisions, contains gaps and disconnects that defy its logical contemplation as a single work. This particular chapter is not, of course, closed, as the *Footstar* case is presently pending an application for certiorari in the Georgia Supreme Court.

In the meantime, *Footstar* instructs us to be careful about litigating “medical only” issues, since doing so and losing could open the door to future claims for income benefits based on a change in condition for the rest of the claimant’s life, since the two-year limitation period in O.C.G.A. §34-9-104(b), by its own language, does not apply where no income benefits have been paid. **WC**

Stipulated Settlement Minefields

By Cliff Perkins

Your partner walks in as you hang up the phone and asks: “What’s with the big smile on your face?” You explain: “You know the Hightower case I’ve been fighting for the last three years? We just settled it!” “Congratulations!” he replies. “Now give that file to the new associate to review the stip and let’s go celebrate all your hard work.”

It is tempting to think of the case as over when you agree on a settlement amount, but it can also be dangerous. Serious issues with serious consequences can lurk in the fine print of the settlement documents. Below are just a few examples of common problems and some suggestions on how to deal with them.

Board’s Website

A great deal of excellent information about settlement procedures and forms can be found at the board’s website <http://sbwc.georgia.gov>. This article will therefore limit itself to issues not addressed in detail on the website.

Releases and Resignations

The simple solution: Don’t sign them. The employer/insurers contend that these documents are needed because if the claimant remains an employee, he/she can easily make a new claim by claiming aggravation of the old injury. It is true that most employers will not settle and also allow an employee to continue to work for them, but employer/insurers can (and often do) terminate the employment without a resignation.

Usually the employee is no longer working and the real reason for resignation is to avoid possible claims for employment discrimination based on age, race, disability, gender, etc. As claimant’s attorneys we are tempted to say it is safe to sign because there are no viable discrimination claims. But do you really know? If there are no viable claims then the employer/insurer has no need for a resignation or release in the first place. If there are viable claims other than workers’ compensation, then the claimant has made a mistake in signing the release and the claimant’s attorney may have just committed malpractice. Many of these resignations and releases have a place for the claimant’s attorney to sign witnessing or approving the document. Even if you as the attorney are not required to sign, just by handling these documents you probably have assumed responsibility for properly advising the claimant about these other claims he is releasing.

If you are not representing the claimant on these other claims, you need to make clear to the claimant that: (1) You represent the claimant only on the workers’ compensation claim; (2) You do not represent the claimant on any other claims which the employer/insurer is asking to release; (3) The claimant does not have to sign any of these documents as part of the workers’ compensation settlement; (4) the claimant may be losing valuable rights by signing these documents; and (5) The only legal advice you are giving is that the claimant should consult with an attorney who is competent in these areas before signing these documents. If claimants insist on signing a release or resignation without legal advice, have them sign a memorandum showing all of the above.

See Settlements on page 12

Settlements

Continued from page 11

Medicare

The myriad issues relating to Medicare would require an entire article, if not an entire book. Many of these issues are covered by employer/insurers in the settlement documents. Good Medicare Set Aside evaluators often offer sample documents as part of their services. This article will limit itself to issues that may not be fully addressed by these sources.

Always have the employer/insurer agree to fund the set aside account with any additional amount that Medicare requires in order to approve the set aside account. Language similar to the following is suggested:

“The employer/insurer shall submit the Medicare Set Aside agreement to the Center for Medicare and Medicaid Services for approval. Should CMS require additional funding of said Medicare Set Aside, such additional funding shall be the responsibility of the Employer/Insurer.”

You may be able to squeeze a few more dollars out of the insurer by making the claimant responsible for any additional amount required by CMS, but the insurer is much better prepared to fund such a future contingency. If you make the claimant responsible, the necessary funds may not be available when the time comes to provide additional funds. If the funds are not available you have created problems for your client and perhaps yourself as well.

If the Medicare Set Aside Account will be self-administered, then the stipulation or some other settlement document should require the claimant to sign acknowledging his understanding of his duties and responsibilities with regard to administration of the Set Aside Account. This acknowledgement serves two purposes. First, it protects you by documenting that you have not left the client trying to administer an account that he/she has no understanding of how to administer. More importantly, it advises the

claimant of the details he/she must know in order to properly administer the account.

Even if a claimant is found disabled by Social Security, he is not normally eligible for Medicare until the 30th month after he became disabled. This period of non coverage can create problems with settlement of the workers' compensation claim. Take the following example: A claimant's Medicare coverage will begin on Nov. 1, 2006. The claim is settled and approved by the board on Dec. 15, 2005. There is a period of six months open medical. From June 15, 2006 until Nov. 1, 2006, the claimant is left with no way to pay medical expenses except out of the settlement proceeds. These medical expenses cannot even be paid out of the Medicare Set Aside, since it only covers expenses for which Medicare would otherwise be responsible. To avoid this problem, you should require that medical will remain open until the date the claimant becomes eligible for Medicare. If the claimant insists on closing medical before that date in order to receive more money, then be sure you have the claimant acknowledge their understanding that this means they will have to pay their own medical expenses during the period of no coverage.

Open Medical

If medical remains open after settlement, then there is the danger that the right to treatment can be defeated simply by the insurer's delay in approving the treatment until the period of open medical closes. This problem can be avoided by including the following paragraph in the stipulation:

“If:

- (1) a medical provider requests the employer/insurer to confirm that related and authorized services will be paid, and
- (2) the employer/insurer/insurer fails or refuses to confirm or delays in confirming that the services will be paid, and
- (3) because of this failure, refusal

or delay, these medical services or other medical services do not occur within the period of open medical, then the running of the period of open medical shall be stayed and suspended during the continuance of such failure, refusal or delay. This stay and suspension shall be only as to medical treatment or services which, because of this failure, refusal or delay, did not occur within the period of open medical.”

Standard Provisions

The Board should consider approving a set of standard paragraphs for stipulations and requiring their use. These standard provisions could be drawn by a committee appointed by the board, similar to the fashion in which standard jury charges were created. Such paragraphs would have many advantages. First, they would improve the quality of stipulations since the best language from different firms and stipulations could be chosen and consolidated into one document. Second, the need for claimants' attorneys to review the document would be greatly reduced since most of the document would be standard paragraphs. Third, there would be much less need for claimants' attorneys to suggest variations in language.

This would reduce the delays that occur while proposed changes in the language are being negotiated. This would also reduce the errors that occur when the stipulation is amended such as pagination errors or omitting language. Finally, the stipulations would be much easier for the Board to review since most of the paragraphs would be standard ones.

Medical Bills

Include a list of all known outstanding medical bills or providers that are accepted as authorized treatment. Also include a list of any medical bills or providers that are not authorized and therefore will not be paid by the employer/insurer. The list of authorized bills and providers avoids any later argument with the insurer. The list of unauthorized medical is even

more important since it avoids any later argument with your client about whether he/she was aware that certain medicals would have to be paid out of the settlement proceeds.

Bankruptcy

If the claimant is in bankruptcy, then the trustee may in some circumstances claim a right to recover part of any settlement on behalf of the creditors of the bankrupt's estate. In other cases, the trustee may choose to abandon or not pursue the workers' compensation claim. Whether the trustee will make a claim against the settlement usually depends on whether the claim can be fully exempted by the debtor/claimant.

If the trustee claims any interest in the workers' compensation case, then the claimant's attorney must obtain permission from the trustee and/or the bankruptcy court to represent the court's interest in the workers' compensation claim. This may require a special order from the bankruptcy court appointing claimant's attorney as counsel to represent the estate. It may also require a bankruptcy order agreeing on what portion of the settlement will be paid to creditors. Upon learning that the claimant is in bankruptcy, claimant's attorney should immediately consult with the claimant's bankruptcy attorney to determine which if any of the above actions will be required. Bankruptcy attorneys usually handle the necessary pleadings and proceedings in bankruptcy court without the need of appearance by claimant's counsel.

If settlement has already been approved when claimant's counsel learns of the bankruptcy, then the settlement funds should be held until it is determined if any funds must be paid to creditors. Failure to do so could result in claimant's counsel being required to pay creditors out of his own funds.

Structured Settlements

A detailed consideration of structured settlements is far beyond the scope of this paper. An excellent article by Jennifer Cho on this issue can be found in the September 1999 issue

of the California Workers' Compensation Enquirer. One problem that is discussed in that article is also worth mentioning here. That problem is the conflict between the rules for obtaining favorable tax treatment of a structure and the rules for obtaining a favorable social security offset.

In order for the damages that are received for a personal injury or wrongful death to be excludable from gross income under section 104(a)(2) of The Internal Revenue Code of 1954, the negotiations and settlement agreement should not offer the plaintiff a lump-sum as an alternative to the periodic payment settlement. However, in order to use the "Hartman language" lifetime proration to reduce the Social Security offset, the claimant must have the option of receiving the structure as a lump sum. In other words, if you design the structure so that you receive the tax benefit, then you lose the Social Security offset benefit and vice versa. There are possible ways to preserve both these benefits and they are well explained in Ms. Cho's article which can also be found at <http://www.susanwasserman.com>, the website of the Law Offices of Susan R. Wasserman.

Benefits Received From Others

Others entities may have paid disability or medical benefits that should have been paid by the employer/insurer. If so, they may have a right to recover these benefits from the claimant after settlement. For example, ERISA plans almost always provide that they are entitled to reimbursement and may sue the claimant for benefits which should have been paid by the employer/insurer. To avoid this danger, the stipulation should include the following language in cases where other entities have paid any benefits:

"It is not the intent of this settlement document to shift any liability for this Workers' Compensation claim from the employer and insurer to any non-party, including Medicare or Medicaid. Therefore, this settlement shall not compromise or release the right of any non-party to be reim-

bursed for any benefit or expense that would have been compensable under this Workers' Compensation claim. If a non-party has a right to recover any such benefit or expense directly from the claimant or the claimant's attorney, then the employer and insurer agree to indemnify and hold the claimant and claimant's attorney harmless from any such liability and from any fees or expenses incidental thereto. If a non-party is entitled to and does reimburse itself by withholding from claimant or claimant's attorney a benefit otherwise due from the non-party to the claimant or the claimant's attorney, then the employer and insurer agree to pay the benefit withheld."

It is also beyond the scope of this paper to address all the interplay between Social Security Disability, short term disability or long term disability policies, and workers' compensation. If the claimant has received either short or long term disability, then you should carefully consider how settlement of the workers' compensation claim will affect these benefits. An excellent article on this issue by Andrew Reinhardt can be found in the October 2005 issue of the Workers First Watch magazine.

Conclusion

So don't celebrate your settlement too soon. Many important and valuable issues remain to be addressed after the settlement amount has been agreed upon. The final effort involved in a detailed and well-drafted stipulation can assure that a client who was happy at the mediation remains happy a year later when someone asks who is a good attorney to handle a workers' compensation claim. **WC**

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He is chair of WIN-PAC and a member of the executive committees of the Georgia Workers' Compensation Claimants Lawyers and the Workers' Compensation Law Section.

The CAT (designation) is Out of the Bag: Two New Presumptions to Help Put it Back

By Robert D. Ingram and Ryan G. Prescott
Moore, Ingram, Johnson and Steele

This article discusses the limited application of the two new presumptions against a catastrophic designation, argues that the presumption will apply retroactively and discusses the practical effect the new presumptions will have on Georgia's Workers' Compensation system.

Introduction

Among the numerous bills passed by the Georgia legislature during the 2005 session was House Bill 327. With its unanimous passage, House Bill 327 created two new presumptions against designating a workers' compensation injury as catastrophic. The goal, of course, is too prevent an abuse of the catastrophic designation and limit its application to truly severe cases.

A "Catastrophic injury" is defined as: (1) Spinal cord injury involving severe paralysis of an arm, a leg, or the trunk; (2) Amputation of an arm, a hand, a foot, or a leg involving the effective loss of use of that appendage; (3) Severe brain or closed head injury (with listed factors); (4) Second or third degree burns over 25 percent of the body as a whole or third degree burns to 5 percent or more of the face or hands; (5) Total or industrial blindness; or (6) Any other injury of a nature and severity that prevents the employee from being able to perform his or her prior work and any work available in substantial numbers within the national economy for which such employee is otherwise qualified (added in 1995).

There is little debate over whether categories one thru five are appropriate, objective considerations for designating an injury as catastrophic. However, there is concern over whether the catch-all category 6 and partial reliance on Social Security disability standards will lead to abuses of the true goals of the catastrophic designation. According to the 2003

Report of the Governor's Workers' Compensation Review Commission prepared by Georgia Law Professor Thomas A. Eaton and Georgia Business School Professor David B. Mustard, 1,269 claims were designated as catastrophic from 1997 thru 2002 and nearly half (627) of those claims were filed under the catch-all category 6.1 As such, the new presumptions focus on controlling claims filed under category 6.

The new presumptions only apply to claims filed under category 6

The two presumptions are contained in subsections (A) and (B) within category 6. That suggests that courts will only enforce the presumptions in claims filed under the catch-all definition. Within the same sentence as the catch-all definition the first presumption reads, "if the injury has not already been accepted as a catastrophic injury by the employer and the authorized treating physician has released the employee to return to work with restrictions, there shall be a rebuttable presumption, during a period not to exceed 130 weeks from the date of injury, that the injury is not a catastrophic injury." O.C.G.A. § 34-9-200.1(g)(6)(A). Therefore, claimants released to work with restriction will have a more difficult time obtaining a catastrophic designation.

Some claimants' attorneys will inevitably advise their clients to wait until 131 weeks after their injury to file for a catastrophic designation and then argue that the presumption does not apply. The question is whether courts will interpret the 130 week time period to modify the time for obtaining a release to work or the time for when the presumption would apply. In either case, the 130 week period appears arbitrary. It makes no sense that a claimant released to work in week 130 is considered different

from a Claimant released to work in week 131. Unfortunately, however, the statute only guides the Board to consider "all relevant factors including, but not limited to, the number of hours for which an employee has been released." Id.

In addition to the returned-to-work presumption, once an employee who is designated as having a catastrophic injury under the catch-all definition has reached the age of eligibility for retirement benefits as defined in 42 U.S.C. Section 416(l), as amended March 2, 2004, there shall arise a rebuttable presumption that the injury is no longer a catastrophic injury; provided, however, that this presumption shall not arise upon reaching early retirement age as defined in 42 U.S.C. Section 416(1), as amended March 2, 2004. O.C.G.A. § 34-9-200.1(g)(6)(B). The most difficult task with regards to this presumption is figuring out the claimant's age of retirement by looking at the Federal Code.

After reading and re-reading the relevant statute, we think the Federal Code rescheduled the age of retirement based on an "age factor increase" that is established when the employee reaches the age of early retirement, which is determined by other factors that partially rely on other determinations. 42 U.S.C. § 416(l). Clear as mud. In most cases, the age of early retirement is 62 and therefore, employees who turned 62 prior to June 2002 have now reached the age of retirement. 42 U.S.C. § 416(l)(2). The other method is to ask whether the claimant is receiving retirement benefits, since that should be a good indicator.

Once again, this presumption will likely only apply to claimants that are currently designated catastrophic under category 6 since the presumption is contained in a subsection to category 6.

Both presumptions should apply retroactively

Absent from the new statute is any indication on whether the presumption will apply retroactively. There is, of course, a prohibition against retroactive laws contained in Article I, Section I, Paragraph X of the Georgia Constitution of 1983. However, that prohibition only applies to those laws which affect or impair substantive rights under prior law which have vested at the time the subsequent law takes effect. Where an amendment to a statute changes procedure it does not impair vested substantive rights, and it is to be given retroactive effect. Therefore, the issue is whether the new presumptions affect substantive rights.

Claimants will argue that the new presumptions do affect substantive rights since the returned-to-work presumption potentially prevents a catastrophic designation if the authorized treating physician released the claimant to light-duty within 130 weeks and the retirement presumption potentially eliminates a catastrophic designation, and continuing benefits, once an employee reaches the age of retirement. However, there is no direct affect on a substantive right. Moreover, the legislative history suggests that the statute is procedural.

The preamble to House Bill 327 reads that its purpose is "to change a provision relating to the designation process for a catastrophic injury by creating a rebuttable presumption." (emphasis added) Thus, courts should view the new presumptions as procedural, relating to the designation process, and apply them retroactively to all claim regardless of the date of injury, date of catastrophic designation or date of filing for a catastrophic designation. However, even if courts find that the new presumptions partially affect a substantive right, the presumptions should still apply retroactively.

Interestingly, there is case law dicta supporting the position that in the workers' compensation forum, a new statute applies retroactively even when it arguably effects substantive

rights. In *Chatham County Dept. of Family and Children Seros. v. Williams*, 221 Ga. App. 366 (1996), the Court of Appeals addressed whether to retroactively apply a changed rule regarding the maximum time a family member could provide attendant care. In that case, the court stated that:

Administrative rules and regulations, like statutes, will generally not be applied retroactively unless they are purely procedural or clearly intended to be applied retroactively. An ongoing workers' compensation case provides a unique context for retroactive analysis, however, since once an employer's obligation to pay for a work-related injury is established, the case may continue for decades. During this time the Board will be promulgating and changing rules which define and redefine the scope of the employer's obligations and the worker's rights with respect to medical care; and it would not make sense to freeze those obligations and rights as they were at the time of the injury, when the need for medical care continues. Accordingly, workers' compensation statutes and rule which do not render compensable an injury which would not otherwise be compensable, but merely affect the scope of treatment required, will be applied to ongoing cases where the injury preceded the effective date of the law. .in determining the applicability of a new rule affecting the scope of treatment, courts will look to the dates of treatment rather than the date of the original injury.

Therefore, the peculiar nature of workers' compensation supports the argument to apply the new presumptions retroactively, rather than freeze the rules regarding the catastrophic designation process to the time of the injury or time of request for a catastrophic designation.

The Effect the New Presumptions will have on the Workers Compensation System

In theory, the new presumptions will help to guard against the abuse of the catastrophic designation. It makes sense that employees who were released to return to work will have to

overcome a presumption to obtain a catastrophic designation under category 6 since the basis for the category 6 catastrophic designation is that the employee cannot work at any job available in substantial numbers. Moreover, it makes sense that an employee designated as catastrophic under category 6 must overcome a presumption to keep that designation once they reach the age of retirement since that employee would have likely discontinued working regardless of the injury.

Many employers believe the CAT has been out of the bag since the category 6, or catch-all definition, was enacted by the legislature in 1995. Whether the new presumptions will be interpreted consistent with their intent to help herd the CATs back into the bag is yet to be determined. **WC**

Endnote

1. However, as the report concedes, the true amount of catastrophic designation for accidents occurring in any given year cannot be known until as many as seven years later.

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