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## **WORKERS' COMPENSATION UPDATE**

Gardner, Willis, Sweat & Handelman, LLP hopes you find the information in this newsletter helpful. This information is intended to be general in nature and is not a substitute for competent legal advice. Because every issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

We publish various newsletters regarding other areas of law. Please contact us for more information or e-mail us at gwsh@gwsh-law.com if you prefer to receive our newsletters electronically.

This newsletter was prepared by Todd Handelman and Amanda Goff. Todd manages the firm's litigation team, which defends many public and private employers. He is well known for his statewide workers' compensation practice, which is successful in part due to his vigorous defense strategies and extensive experience. Todd has successfully defended many employers in significant cases.

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### **MCRAE V. ARBY'S RESTAURANT GROUP, INC. COURT OF APPEALS OF GEORGIA • DECIDED DECEMBER 1, 2011**

#### ***Ex parte communications with a claimant's treating physician***

In a close, 4-3 decision, the Georgia Court decided *McRae v. Arby's*. It is hoped that the Georgia Supreme Court will accept and reverse this decision. In the meantime, we need to act accordingly. This case centered on the issue of ex parte communications between a claimant's physician and the employer's attorney in workers' compensation matters and whether a WC-207 allows for these types of communications. The Court of Appeals ultimately reversed the lower courts' decisions, stating that a claimant is not required to authorize her treating physician to talk to her employer's attorney ex parte in exchange for her right to pursue workers' compensation benefits and that a claimant retains the right to medical privacy to matters unrelated to her claim.

From an adjuster's/employer's perspective, for most communications and correspondence, nothing has changed. We can continue to communicate with form letter to the treating physicians for the purpose of obtaining a medical status, a return to work date, a permanent impairment rating, an opinion regarding MMI, an opinion on light or regular duty capability, and the like without copying the attorney or an unrepresented claimant. Toward that end, we are actually under a legal obligation to request a permanent impairment rating after TTD benefits have been suspended. Also, if the treating physician contacts an adjuster/employer regarding a need for treatment or a referral, then I believe communications are permissible without the attorney or the claimant involved in the process.

On the other hand, this recent opinion seems to require that if we contact the claimant's physician to discuss or determine certain substantive matters, such as whether a claimant has a pre-existing condition, or regarding a medical opinion as to causation, or other matters concerning the theory of our case, we will have to copy the claimant's attorney, or the claimant if he is pro se, with this type of correspondence. In cases where we are trying to alter the opinion of the treating physician regarding an issue, we are going to need to copy the attorney or unrepresented claimant. Additionally, we will have to include them in any phone or in person conversations with the doctor.

An issue that will prove difficult is how to present surveillance evidence to a treating physician for his opinion when we have not yet provided same to the claimant. Strictly speaking, under the Arby's case, if we are seeking a full-duty release where a doctor has someone completely disabled, this is something of the type of substantive communication that the Arby's case seeks to address, and correspondence would need to include the attorney or unrepresented claimant. If surveillance demonstrates a claimant working, and it is reliable, we should continue to be aggressive and suspend benefits.

In cases where nurse case managers are being utilized, or where a field case manager is utilized, we need to recognize that they serve as our alter ego, and we want to be careful not to have them pursue ex parte discussions at our behest that we would not be able to under the Arby's decision.

**SHAW INDUSTRIES, INC. v. SCOTT**  
**COURT OF APPEALS OF GEORGIA • Decided July 12, 2011**

***Change in condition v. fictional new injury***

The employee, Scott, suffered a compensable right foot injury in 1996 while working as a carpet inspector for Shaw. She received TTD income benefits while out of work for approximately ten months and then returned to work in customer service with a prosthesis on her foot. As a result of her altered gait, Scott's knees were damaged and she required bilateral knee surgery in 1997. She continued to work in customer service for twelve more years before her bilateral knee pain returned. Scott's treating physician recommended that she cease working altogether by the end of 2009 after multiple attempts to continue working. Scott argued that she suffered a fictional new injury in 2009, while Shaw argued that it was a change in condition, for which the statute of limitations barred her from receiving additional income benefits.

The ALJ awarded benefits to Scott, agreeing that she suffered a fictional new injury in 2009, and the Appellate Division and the Superior Court affirmed. The Court of Appeals found, on the other hand, that the progressive aggravation of Scott's work-related injuries could only be characterized as a change in condition and it therefore reversed these decisions.

**Significance:** This case stands for the proposition that once income benefits have been paid a case can only be characterized as a change-in-condition if the same body part is involved and a specific new accident does not occur. We need to be aggressive in denying claims where no new specific injury occurs and income benefits were paid in the past.

**CROSSMARK, INC. et al. v. STRICKLAND**  
**COURT OF APPEALS OF GEORGIA • Decided June 27, 2011**

***Unilateral suspension of income benefits***

Strickland was initially paid income benefits after an alleged back injury but Crossmark filed a notice to controvert the claim within 60 days of its notice of the alleged injury and suspended benefits. Strickland argued that Crossmark was precluded from contesting compensability without newly discovered evidence or a subsequent change in condition under O.C.G.A. § 34-9-221 because it had not paid Strickland all benefits due before controverting, which is supported by 15-year-old case law. (Strickland alleged Crossmark had underpaid her approximately \$100 per week and failed to pay for the first seven days after her injury.) The ALJ and the Appellate Division agreed, finding that the controvert was invalid.

The Court of Appeals refused to overrule these holdings and affirmed the decision that Crossmark was unable to contest compensability because it had not paid Strickland all possible income benefits she was due, including penalties, before filing the controvert.

**Significance:** Because of Crossmark, it is far better for an adjuster or employer to simply controvert any claim than to start benefits and then attempt to controvert within 81 days from the accident date. If there is any defect whatsoever at the time of the controvert and suspension, the employer's controvert will be severely compromised. We would be in a better procedural posture if we controvert a claim after 21 days as long as we have not started benefits. It would be better to face penalties than to lose our right to dispute a claim.