

GARDNER, WILLIS, SWEAT & HANDELMAN, LLP

Workers' Compensation Update

MARCH 2006

Keep up with State Board Changes

As most of you have heard, the State Board of Workers' Compensation is transitioning to a paperless system. As part of Phase I of this process and effective October 1, 2005, the State Board implemented a new requirement that all filings contain the employer's I.D. number. Each employer already has or will be assigned a unique number. To find out your unique number, contact your local State Board or call WC Claims Assistance at 404-656-3818. Additionally, the State Board will begin assigning claim numbers for all claims filed with the State Board. This will be an automated process, and employers will be notified of the claim numbers via e-mail. Once you receive your claim number, you must include it on all future correspondence with the State Board. Please note, the State Board now requires that a valid e-mail address be included on all forms filed with the State Board.

In a change reflected in Rule 104 and on the WC-104 itself, the WC-104 (Notice to Employee of Medical Release to Return to Work with Restrictions or Limitations) must now be served upon the employee AND his/her attorney within 60 days of a release to light duty. The previous rule required service on only the employee, whether represented or not.

In 2005, the State Board also implemented four new Board forms, which are as follows:

WC-14a, Request to Amend Information on a Form WC-14. Parties should utilize the new WC-14a form to amend or alter the issues to be tried, as well as to correct any clerical errors made on the WC-14.

WC-262, Wage Documentation of Temporary Partial Disability Payments. Employers and adjusters must utilize the WC-262 when temporary partial disability benefits are being paid at an amount less than the statutory maximum amount. This form should be updated every 13 weeks or when benefits are suspended.

WC-R5, Request for Rehab Conference. Employers and adjusters should utilize the WC-R5 when a rehabilitation conference is desired. The issues to be discussed should be set forth clearly and completely in Section B of the WC-R5.

Change of Address Form. The parties should utilize the change of address form any time the address of a party changes in any way. This information is useful to the State Board and other parties.

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If you prefer to receive this newsletter electronically, please forward an email confirming your choice in that regard to rhonda.paul@gwsh-law.com.

Gardner, Willis, Sweat & Handelman, LLP hopes you find the information in this newsletter helpful. If you have questions on these or other workers' compensation issues, please give us a call at (229) 883-2441.

Gardner, Willis, Sweat & Handelman, LLP, P. O. Drawer 71788, Albany, GA 31708
Phone: (229) 883-2441
Fax: (229) 888-8148
gwsh@gwsh-law.com

Change in Condition or New Accident

In Oconee Area Home Services, Inc. v. Burton, 2005 Ga. App. Lexis 1113 (2005), the Georgia Court of Appeals revisited the issue of change in condition versus new accident. The facts involved a claimant who sustained a compensable back injury on July 16, 2003. The claimant remained out of work under his doctor's restrictions until August 4, 2003. During this time, the claimant received appropriate temporary total disability benefits and medical care. However, on August 26, 2003, the claimant ceased working due to increased back pain. Consequently, the claimant sought a reinstatement of his indemnity benefits. On August 1, 2003, however, the employer had changed insurance carriers from Carrier A to Carrier B. Which provider was responsible for paying the workers' compensation benefits hinged on whether August 26, 2003 constituted a new accident or whether it was a change in condition from the original accident.

The administrative law judge held that the claimant experienced a change in condition because the claimant left work due to a gradual worsening of his condition brought on by ordinary wear and tear of his job and normal life. Thus, the court did not find that a second accident occurred that aggravated his pre-existing condition, which would have constituted a new accident. Carrier A was therefore held responsible for paying the claimant's benefits. On appeal, the Appellate Division affirmed the ALJ's decision and adopted the opinion as its own. The Superior Court reversed the Board's decision because it interpreted the facts to find a new accident. After granting discretionary appeal, the Court of Appeals then reversed the Superior Court on the grounds that the Superior Court had failed to follow the "any evidence" rule. Essentially, the Court held that

because the factual findings of the Appellate Division were supported by the evidence, the Superior Court was not justified in substituting itself as a fact-finding body. This decision reaffirmed existing case law regarding the differences between a change in condition and a new accident.

Board Continues to Require Strict Compliance with Section 104 and Its Rules

In Metropolitan Atlanta Rapid Transit Authority v. Bridges, Ga. App. LEXIS 1035 (September 23, 2005), the Georgia Court of Appeals affirmed the Board's ruling that Metropolitan Atlanta Rapid Transit Authority (MARTA) had improperly reduced and then suspended income benefits to its employee.

On October 24, 2001, the employee suffered compensable injuries to his right knee and back. On November 9, 2001, his authorized treating physician at the time, Dr. Dawkins, released him to light duty and a WC-104 to this effect was filed and served. In January 2002, Dr. Bernot performed surgery on the employee's right knee. In February 2002, Dr. Bernot indicated in his records that the employee was able to perform light duty work. However, evidently, no new WC-104 to this effect was issued. In April 2002, based upon a regular duty release by Dr. Bernot, MARTA suspended income benefits.

After a hearing, the administrative law judge issued an award on November 1, 2002 concluding that the employee's condition had not changed for the better and that he was entitled to past and continuing TTD benefits. The award also found that the employee was capable of only sedentary work since the date of accident and that only his knee,

and not his back, had been treated. It also ordered a requested change in authorized treating physicians to Dr. Kingloff.

Perhaps emboldened by the ALJ's finding that the employee was capable of sedentary work since the date of accident, MARTA unilaterally reduced the employee's income benefits to temporary partial disability payments on January 21, 2003. The reduction was premised upon MARTA's understanding of Dr. Bernot's conclusions about the employee's condition immediately following the right knee surgery. Six months later, MARTA suspended all income benefits to the employee based upon its claim that aggravation of his condition by work had ceased.

After another hearing, the administrative law judge ruled that MARTA had improperly reduced and then suspended the employee's income benefits. The decision awarded past and continuing TTD payments. MARTA's appeal centered around its January 2003 reduction of income benefits. The Court of Appeals agreed with the Board that there was no record of a WC-104 filed concerning Dr. Bernot's light duty release in February 2002. In any event, Dr. Bernot had also released the employee to regular duty a few months later and this release had been rejected by the ALJ in his November 2002 award. The Court rejected MARTA's argument that it could rely on the November 2001 WC-104 based upon Dr. Dawkins' light duty release. The Court noted that, subsequent to that earlier WC-104, the employee underwent knee surgery, which was clearly a change in his physical condition rendering him temporarily totally disabled. Following his return to light duty status, no new WC-104 was filed by MARTA notifying the employee he was able to return to light duty. MARTA was not able to rely upon the earlier ALJ award finding the employee capable of at least sedentary work because it was required to again notify the employee on another WC-104. Thus, the Board's ruling to this effect was affirmed.

Court of Appeals Upholds Board Award Finding Change in Condition Rather Than "Fictional" New Accident

In Footstar, Inc. v. Stevens, 275 Ga. App. 329, 620 S.E.2d 588 (2005), involving a dispute between two workers' compensation carriers, the Georgia Court of Appeals upheld the State Board of Workers' Compensation's finding that an employee's condition was caused by a change in condition for the worse rather than a new accident.

In November 1999, the employee sustained work-related injuries to her head, neck and shoulder while putting merchandise into an overhead bin. The claim was accepted as a "medical only" claim by Traveler's Insurance Company, the insurance carrier at that time. Subsequently, in January 2001, Traveler's was replaced by Liberty Mutual Insurance Company as the workers' compensation carrier. Traveler's then requested a hearing, which resulted in a December 2001 award finding that the employee had sustained a compensable work-related injury in November 1999 and that Traveler's would be responsible for the continued medical payments because it was the carrier at the time of injury.

The employee's condition continued to worsen until January 2002, at which point she ceased working. Traveler's denied responsibility for paying income benefits based upon the theory that the employee had sustained a fictional new accident. Liberty Mutual denied responsibility for the claim based upon the theory that the employee had sustained a change in condition for the worse. After a hearing on the issue, the administrative law judge found that a fictional new injury had occurred on

January 5, 2002, and he held Liberty Mutual responsible for the new accident. The Board's Appellate Division reversed the ALJ and held that the employee's departure from work in January 2002 did *not* constitute a fictional new injury. Rather, her departure reflected a change in condition for the worse.

The superior court and the Court of Appeals affirmed the award issued by the Appellate Division. The Court of Appeals cited the ALJ's December 2001 ruling in which the November 1999 injury was found compensable under the Act. The Court then distinguished and explained the difference between "change in condition" claims and "new accident" claims. Specifically, the Court stated, quoting from a previous case, stated "when a claimant sustains an injury, is awarded compensation, returns to his normal and ordinary job duties, but then as a result of the wear and tear of ordinary life and the activity connected with performing his normal duties, his condition gradually deteriorates to where he cannot continue to perform his ordinary work, such facts constitute a change in condition and not a new accident. On the other hand, when a claimant is injured on the job but continues, without an agreement or award, to perform the duties of his employment until forced to cease work because of a gradual worsening of his condition that is at least partly attributable to his physical activity in continuing to work, such facts constitute a new accident."

Thus, the Court of Appeals agreed with the Appellate Division's decision that the initial insurance carrier, Traveler's, was responsible for providing the benefits because a new injury did not occur, rather a change in condition for the worse occurred. The Court held that the application of the change in condition two-year statute of limitations under O.C.G.A. §34-9-104 is not limited to cases where income benefits have been awarded from the outset. Rather, it *can* apply in cases where only medical benefits are awarded, as long as the

employee's status had been "established by award or otherwise." In this case, the ALJ's December 2001 ruling established the employee's status.

The ultimate reach of this case is unclear, because the facts were unusual. There is no question, however, that for years parties in workers' compensation cases had assumed that there could be no change in condition without the previous payment of income benefits. This case certainly changes that proposition. It also warns employers/insurers to be cautious about litigating "medical only" issues, as Traveler's initially did, because it could open the door to future change in condition cases.

Superior Court Exceeds Jurisdiction by Deciding Factual Issue

In Sears v. Macon Water Authority, 276 Ga. App. 194, 622 S.E. 2d 867 (2005), the Georgia Court of Appeals held that the superior court exceeded its jurisdiction by deciding a factual issue that was never raised at the administrative level.

In November 2002, Stanley Sears sustained a work-related injury when he fell from a ladder while employed as a painter by the Macon Water Authority. Mr. Sears ultimately underwent surgery to treat his injuries. Two days after being released from the hospital, he also suffered a heart attack. The Macon Water Authority admitted that the accident was work-related but argued that it should not be responsible for paying for medical treatment rendered for the heart attack because Mr. Sears suffered from a pre-existing heart condition.

At the State Board Hearing, the parties agreed that if the heart attack was found compensable, the Water Authority would pay for the treatment listed in

Exhibit C-7. The administrative law judge subsequently found that the fall aggravated Mr. Sears' pre-existing condition, which resulted in the heart attack, and that therefore the heart attack was work-related. The Appellate Division affirmed the decision. On appeal, the superior court affirmed the decision but further held that the Water Authority would not be responsible for future medical expenses related to the heart condition. On appeal, Mr. Sears argued that the superior court exceeded its authority by addressing future medical expenses, because same were never an issue at the administrative level.

The Georgia Court of Appeals agreed with Mr. Sears and reversed the superior court's decision with regard to future medical expenses, reasoning that a superior court may not engage in fact-finding and can set aside a workers' compensation decision only in limited circumstances. Here, the superior court exceeded its authority by considering an issue not addressed by the Board.

Workers' Compensation Decision Affirmed Under the "Any Evidence" Standard of Review

In Georgia Pacific Corp. v. Cross, 275 Ga. App. 664 (2005), the Georgia Court of Appeals affirmed a decision awarding compensation to an injured employee. In doing so, the Court reasserted two areas of settled workers' compensation law: (1) A decision rendered by the Appellate Division will be affirmed if it is supported by any evidence, and (2) when an injured employee is forced to stop working due to a worsening of his condition which is linked in some way to his physical activity in continuing to work, the statute of limitations does not begin to run until the day he ceases to work.

In 1995, Mr. Cross was exposed to a fine mist of sulfuric acid while working at a paper mill and he sought treatment when he developed problems breathing and swallowing. A few weeks later, he began experiencing ankle pain. In 2000 and 2001 he missed several months of work due to elbow, leg, and ankle symptoms. He was diagnosed with an autoimmune disease in November 2001. Mr. Cross's physician indicated that this condition was caused by his exposure to the sulfuric acid in 1995. On January 4, 2002, Mr. Cross quit working, and filed a workers' compensation claim 24 days later.

Mr. Cross's claim was initially denied after a hearing on the grounds that he did not prove that he had an "occupational disease" and that any claim for an "occupational injury" resulting from the 1995 incident was barred by the one-year statute of limitations. The Appellate Division reversed, finding instead that his claim for an occupational injury was timely filed because he stopped working due to a "work-related aggravation" on January 4, 2002. This decision was affirmed by the superior court.

Georgia Pacific appealed, contending that there was no evidence to support the Appellate Division's decision. In affirming the decision, the Georgia Court of Appeals indicated that a finding by the State Board of Workers' Compensation will not be reversed if there is any evidence to support the decision. Here, there was evidence presented that Mr. Cross's injury sustained in 1995 was aggravated by his continuing to work.

In addition, the Court rejected the contention that the claim was not timely filed. The statute of limitations does not begin to run until the date the employee ceases to work if the cessation is caused in any way by a worsening of his condition due to his continuing to work. This, in effect, is considered a "new" date of injury. Here, Mr. Cross stopped working in January 2002 due to a worsening of his condition and he timely filed a claim 24 days later.

Gardner, Willis, Sweat & Goldsmith, LLP
2408 Westgate Drive
P. O. Drawer 71788
Albany, GA 31708-1788 32-245.501

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