

Workers' Compensation Update

New Law Sets Time Limits for Acceptance of SITF Claims

As you know, due to the planned phase-out of the Subsequent Injury Trust Fund, employers/insurers will not be able to obtain reimbursement from the Fund for work injuries occurring after June 30, 2006. Recently passed legislation mandates that SITF claims will be automatically denied if not accepted by the Fund by June 30, 2009 (for notices of claim filed on or before July 1, 2006) or within three years of a properly filed notice of claim (for notices of claim filed after July 1, 2006). However, if compensability of the underlying workers' compensation claim is at issue, then employers/insurers will have three years from the date of final adjudication of compensability in which to obtain Fund acceptance. In addition, after June 30, 2006, employers/insurers will have only 20 days (rather than 90 days) from the date of the denial of the claim in which to request a hearing on the denial before the State Board of Workers' Compensation. This time limit will apply whether the claim is automatically denied or denied formally in writing.

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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 workers' compensation issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

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Court of Appeals Upholds Denial of Income Benefits to Illegal Alien

In Martines v. Worley & Sons Construction, 278 Ga. App. 26, 628 S.E.2d 113 (2006), the Georgia Court of Appeals affirmed the Superior Court's reversal of the State Board's award of income benefits in a case involving an illegal alien. The Court of Appeals agreed with the Superior Court that a light duty driving position offered pursuant to O.C.G.A. §34-9-240 was suitable and that the employee's refusal of that job, due to his inability to obtain a valid drivers license because of his undocumented worker status, was not justified.

The facts of the case were not in dispute. Mr. Martines suffered a compensable injury to his left foot. After medical treatment, he was released by his physician to return to work with restrictions. Worley & Sons offered him a light duty job as a delivery truck driver, a position clearly within the restrictions set by his physician. When he reported to work, Mr. Martines was unable to produce a Georgia drivers license, and he could not obtain one because he had entered the

United States illegally. The employer subsequently suspended income benefits due to the employee's unjustified "refusal" of the light duty position.

At the hearing before the Administrative Law Judge (ALJ), Mr. Martines did not present any evidence that he was unable to drive for any health-related reason. Also, he acknowledged that he drove in Mexico and he did not deny that he would drive if he could obtain a license. In addition to finding that Mr. Martines "did not undergo a physical change for the better" as of the date he was offered work, the administrative law judge also found that the job offered was not suitable because the employee did not possess the drivers license required for the job. The State Board's Appellate Division affirmed the judgment of the ALJ.

The Superior Court reversed the State Board, finding that the Board had applied the wrong legal standard to determine the suitability of the proffered job. The Superior Court concluded that Mr. Martines had not met his burden of demonstrating that his refusal of the work was justified, and accordingly, it reversed the award of temporary total disability benefits.

The Court of Appeals affirmed, addressing whether the employee's refusal of the delivery truck driver position was justified. For a refusal to be justified, it must be related to the physical capacity of the employee to perform the job, the employee's ability or skill to perform the job, or factors such as geographic relocation or travel conditions that would disrupt the employee's life. The Court noted that an employee is justified in refusing work that aggravates his injury, work that requires relocation, or work that he lacks the skills to perform, such as typing. The Court explained that there was no question that Mr. Martines could drive a car, but that he was unable to acquire a Georgia drivers license because of his illegal status. The Court determined that Mr. Martines' legal status was analogous to that of an individual whose drivers license has been suspended or revoked for a violation of the law or of a person incarcerated after an adjudication of guilt.

Illegal status alone does not bar an employee from receiving workers' compensation benefits. In this case, however, Mr. Martines'

inability to perform the suitable job stemmed from his legal inability to acquire the necessary drivers license, and thus, his refusal to accept the proposed light duty work was not justified as a matter of law.

Two Year Statute of Repose on Benefit Reimbursement

On February 2, 2006, the Court of Appeals decided Trax-Fax, Inc. v. Hobba, 277 Ga. App. 464, 627 S.E.2d 90 (2006), a significant case on the issue of reimbursement. Mr. Hobba (hereafter "Claimant"), the sole shareholder of Trax-Fax (hereafter "Employer"), suffered a work-related injury on July 28, 1998. Travelers (hereafter "Insurer") voluntarily commenced benefits, issuing maximum temporary total disability (TTD) benefits to the Claimant. However, on April 24, 2002, the Insurer suspended benefits, although the WC-2 was not actually filed until December 10, 2003. The suspension was based on the belief that the Claimant had previously returned to work but fraudulently continued to receive TTD benefits. On December 10, 2003, the Insurer also requested a hearing seeking, among other things, reimbursement of income benefits paid, pursuant to O.C.G.A. § 34-9-104 (d)(2).

The Administrative Law Judge (ALJ) issued an award in favor of the Insurer, finding that the Claimant was never totally economically disabled. The ALJ ruled that the Insurer was entitled to full reimbursement of all TTD benefits paid to the Claimant, pursuant to O.C.G.A. § 34-9-104(d)(2). The ALJ held that the statute of limitation defense raised by the Claimant in his brief was waived because the Claimant did not raise it as a defense at the hearing. It should be noted that the Claimant cited O.C.G.A. § 34-9-104 and O.C.G.A. § 34-9-245 in support of his statute of limitation defense. O.C.G.A. § 34-9-104(d)(2) states that the ALJ "may order the employee or beneficiary to repay to the employer or the insurer the sum of the overpayments." Similarly, O.C.G.A. § 34-9-245 states that "no claim for reimbursement shall be allowed where the application for reimbursement is filed more than two years from the date such overpayment was made."

The Appellate Division affirmed the ALJ. The Claimant subsequently appealed to the Superior Court, which made an important interpretation with respect to O.C.G.A. § 34-9-245. Essentially, the Claimant argued that O.C.G.A. § 34-9-245 was a "statute of repose" rather than a "statute of limitation." The Superior Court agreed and held that the Insurer was entitled to reimbursement of only those benefits paid in the two years prior to the hearing request. Thus, because the Insurer requested the hearing on December 10, 2003, it could seek reimbursement of benefits paid only since December 10, 2001.

The Insurer appealed to the Court of Appeals, which agreed with the Superior Court's interpretation of O.C.G.A. § 34-9-245. The Court explained: "A statute of limitation is a procedural rule limiting the time in which a party may bring an action for a right which has already accrued. A statute of ultimate repose delineates a time period in which a right may accrue. If the injury occurs outside that period, it is not actionable." Trax-Fax, 277 Ga. App. at 467. This interpretation is significant because, unlike a statute of limitation, a statute of repose cannot be waived.

Under the Trax-Fax opinion, a claim for reimbursement is actionable for only two years from the date of overpayment. Any payments made more than two years before the hearing request are not recoverable under O.C.G.A. § 34-9-245. Therefore, any claim for reimbursement should be made as soon as possible and within two years from the date of overpayment.

Inappropriate Burden Placed Upon Claimant Seeking TPD Benefits

In Roberts v. The Jones Co., 277 Ga. App. 517, 627 S.E.2d 139 (2006), the Court of Appeals held that the Administrative Law Judge (ALJ) placed an inappropriate burden on Ms. Roberts when she was denied temporary partial disability income benefits. Ms. Roberts was an employee of The Jones Company, d/b/a Flash Foods, when she sustained a work-related injury to

her wrist. When she returned to her job in a light duty capacity, Ms. Roberts was fired for reasons unrelated to her disability. In an effort to find another job, Ms. Roberts engaged in what was determined to be a diligent job search. Initially, however, she was unsuccessful in finding work. Eventually, she found a lower paying job as a waitress at Huddle House.

Thereafter, Ms. Roberts filed a claim against Flash Foods seeking temporary total disability (TTD) for the period of time that she was unemployed and also temporary partial disability (TPD) based upon her lower paying job at the Huddle House. The ALJ awarded Ms. Roberts TTD benefits during her period of unemployment, but he denied TPD based upon her failure to put forth any evidence that the lower earnings were related to the injury suffered while she worked for Flash Foods. The decision was upheld by the Appellate Division and was affirmed by the superior court. Ms. Roberts then appealed the denial of benefits to the Court of Appeals.

In deciding to reverse and remand the decision of the ALJ, the Court of Appeals looked to the decision of the Georgia Supreme Court in Maloney v. Gordon County Farms, 265 Ga. 825, 462 S.E.2d 606 (1995). In that decision, the Supreme Court held that workers' compensation benefits based upon a change in condition may be awarded if the claimant proves (1) that he or she suffered a loss of earning power as a result of a compensable work-related injury, (2) that he or she continues to suffer physical limitations attributable to that injury, and (3) that he or she has made a diligent, but unsuccessful, effort to secure suitable employment following termination. Once this evidence has been presented, an ALJ may reasonably infer that the inability to obtain suitable employment was proximately caused by the continuing disability. The Maloney decision specifically rejected the requirement that a claimant show that he was denied employment because of a continuing work-related disability. The Maloney decision indicated this was an "often impossible burden" for a claimant to meet because it would require evidence of the "motive and state of mind of the employer."

In Roberts, the Court of Appeals held that the ALJ correctly applied the principle set forth in Maloney with respect to the award of TTD but had incorrectly denied TPD on the grounds that the Claimant did not

present evidence that the reduced earnings were related to her wrist injury. The Court ruled that the Maloney inference was not limited to cases involving total disability. The Court stated that when a claimant diligently searches for a job before ultimately taking one that pays less, the "need for temporary partial disability benefits is no less compelling than the case for temporary total disability benefits under Maloney." To make a contrary decision would dissuade a motivated worker from seeking another job. Therefore, the Court reversed and remanded with directions that the ALJ reconsider the case under the correct standard.

CMS Announces New Low Dollar Threshold

On April 25, 2006, the Centers for Medicare and Medicaid Services (CMS) issued a new policy memo regarding the \$10,000 low dollar threshold that it had

previously announced on July 11, 2005. Effective with the issuance of the April 25, 2006 memorandum, CMS will review new workers' compensation Medicare set-aside proposals for Medicare beneficiaries only when the total settlement amount is greater than \$25,000. This new low-dollar threshold simply means that CMS no longer needs to review a settlement of \$25,000 or less. CMS stressed in its memo that the \$25,000 threshold was instituted to increase efficiency in its review process and that it was not a "safe harbor" threshold. That is, Medicare beneficiaries must still consider Medicare's interest in all workers' compensation cases and must insure that Medicare is secondary to workers' compensation in such cases. Please keep in mind that the computation of the total settlement amount includes, but is not limited to, wages, attorneys' fees, all future medical expenses (including prescription drugs) and repayment of any Medicare conditional payments. Also, any previously settled portion of the workers' compensation claim must be included in computing the total settlement amount.

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