

Workers' Compensation Update

2007 Legislative Changes

The Georgia General Assembly passed several changes to the Workers' Compensation Act this year. For injuries occurring on or after July 1, 2007, the maximum temporary total disability (TTD) rate will be **\$500**, and the maximum temporary partial disability (TPD) rate will be **\$334**. The Legislature also amended O.C.G.A. §34-9-202 to clarify that independent medical examinations may include psychiatric and psychological examinations. The Legislature amended O.C.G.A. §34-9-200.1(a), as well, to increase the number of days (from 15 to 20) within which an employer/insurer may select a rehabilitation supplier. In response to recent case law, O.C.G.A. §34-9-2 was amended to include persons employed in the raising, feeding of, and caring for wildlife in the definition of a "farm laborer," meaning that such persons are not covered under the Workers' Compensation Act. Finally, O.C.G.A. §34-9-205 now provides that charges for prescription drugs shall be subject to the approval of the State Board.

The foregoing is only a summary of some of the more significant changes. For a complete set of the changes, or if you have any questions about the changes, please do not hesitate to contact us.

Recent Case Law

In *Reliance Electric Co. v. Brightwell*, 284 Ga. App. 235, 643 S.E.2d 742 (2007), the Georgia Court of Appeals issued an important ruling regarding an employer's failure to give a full ten days' notice before unilaterally suspending a claimant's income benefits based on the claimant's ability to return to unrestricted duty. The facts of the *Brightwell* case are as follows: On or about February 28, 2002, the Claimant suffered a carpal tunnel injury. The employer/insurer accepted the claim as compensable under workers' compensation, paying medical benefits and benefits for temporary total disability. The Claimant underwent surgery on April 21, 2003. Her treating physician released her to return to unrestricted duty as of July 25, 2003. On July 29, 2003, the insurer issued a Form WC-2, stating that, based upon the regular duty release, the Claimant's income benefits would be suspended on August 10, 2003. The insurer attached a copy of the release to the WC-2. However, the insurer did not actually file the WC-2 with the State Board until August 4, 2003. The insurer subsequently suspended income benefits on August 10, 2003, as stated on the WC-2. In May 2004, the Claimant requested a hearing seeking a recommencement of income benefits.

At the hearing on January 12, 2005, the Administrative Law Judge took judicial notice of the WC-2, which notified the Claimant of the August 10, 2003 suspension of benefits based on the full-duty release of July 25, 2003. The ALJ found that the Claimant's carpal tunnel syndrome had resolved as of July 25, 2003 and that, therefore, she was capable of returning to full duty work, without restrictions, on that day, as her doctor had instructed. The ALJ also found, however, that because the insurer did not file the WC-2 at least ten days prior to suspending benefits, the insurer had to pay disability income benefits to the Claimant commencing August 11, 2003 and continuing until the award, which was dated March 15, 2005. The ALJ did not assess attorney fees.

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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.

We publish various newsletters regarding other areas of law as well, including employment law and banking law. Please call Rhonda Paul at (229)883-2441 for information about other newsletters.

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The Appellate Division adopted and amended the award. The Appellate Division agreed that the insurer had improperly suspended the Claimant's income benefits because it had not provided ten days' notice. The Appellate Division concluded that the insurer should be allowed to suspend benefits not on the date of the ALJ's award, however, but on the date of the hearing. Thus, the Appellate Division ordered the insurer to pay income benefits from August 11, 2003 through January 12, 2005. The employer/insurer appealed the Appellate Division's decision to the superior court, which affirmed.

The Court of Appeals reversed the judgment of the superior court. The Court agreed that, based on the filing date of August 4, 2003, it appeared that the insurer had suspended benefits four days sooner than authorized under O.C.G.A. §34-9-221. Nonetheless, the Court reached a different result than the lower courts, explaining: "It follows that [the Claimant] is entitled to an additional four days of benefits. It also follows that [the insurer] may be penalized by an assessment of attorney fees for its failure to give a full ten days' notice before unilaterally suspending benefits....It does not follow, however, that the notice is void, as the appellate division implicitly held....[the] Claimant... is entitled to an additional four days of benefits, not an additional seventeen months of benefits." The Court therefore reversed the judgment of the superior court, remanding it with direction that the case be remanded to the Board for consideration of the issue of attorney fees and for issuance of an award consistent with the Court's opinion.

The *Brightwell* case is favorable to employers and insurers, since it holds that an employer/insurer's penalty for the late filing of a WC-2 under these circumstances is not liability for all payments due until the date of a hearing. Rather, it is the amount of the prematurely suspended benefits, plus the possibility of assessed attorney fees. Nonetheless, a slightly different set of facts could have resulted in a different outcome. It is therefore important that employers and insurers use care in the preparation and filing of Board forms. ❖

In *Fallin v. Merritt Maintenance and Welding, Inc.*, 283 Ga. App. 485, 642 S.E.2d 122 (2007), the Georgia Court of Appeals dealt with the issue of the filing of a valid notice to controvert based on a change in condition. In *Fallin*, the Claimant suffered a work-related injury to his back on November 13, 1998. The employer/insurer commenced TTD benefits to the Claimant on December 17, 1998, paying the past due benefits in a lump sum but failing to pay the statutory late payment penalty. The employer/insurer continued to pay benefits to the Claimant until February 1, 1999. It then suspended benefits and filed a notice to controvert, asserting a change in condition.

The ALJ found that the employer/insurer's failure to pay the statutory penalty rendered its notice to controvert invalid and barred the employer/insurer from contesting the issue of whether the Claimant had suffered a compensable injury. The ALJ also found, however, that the invalid notice to controvert did not prevent the employer/insurer from raising the defense that the Claimant had experienced a change in condition. The ALJ then found that the Claimant's condition had changed as of November 1, 1999 and that any remaining disability was not the result of the compensable injury. The ALJ's award was affirmed by the Appellate Division and the superior court.

On appeal to the Court of Appeals, the Claimant argued that because the employer/insurer's notice to controvert was invalid for purposes of disputing whether he had sustained a compensable injury, it should also be considered invalid for purposes of determining whether he had experienced a change in condition. (In fact, the Claimant did not deny that he had experienced a change in condition or that he had held various jobs since November 1, 1999.) The Court held, however, that the lower courts had correctly applied the law and had awarded the Claimant all of the compensation that he was entitled to receive. The Court noted that an employer who disputes the compensability of a claim without paying benefits must file a notice to controvert within 21 days of learning of the injury. In the alternative, an employer who elects to pay benefits while investigating the claim further has an additional 60 days to controvert the claim under O.C.G.A. §34-9-221(h). An employer's failure to pay all benefits currently due, including late payment penalties, before filing a notice to controvert under O.C.G.A. §34-9-221(h) renders that notice to controvert invalid. The employer is therefore barred from contesting the claim on the grounds that the injury was not compensable. In this case, the Court said, the lower courts had correctly found that the employer/insurer's failure to pay the statutory penalty owed to the Claimant prevented them from disputing the compensable nature of his injury, which had rendered the Claimant temporarily totally disabled until November 1, 1999. The lower courts also correctly found, however, that the employer/insurer's failure to pay the statutory penalty did not prevent them from controverting the claim under O.C.G.A. §34-9-221(i) based on a change in condition. (This provision provides that an employer may controvert on the grounds of a change in condition at any time, and simultaneously suspend the payment of benefits, provided that the notice to controvert is filed with the Board and provided to the employee no later than ten days prior to the first omitted payment.) In other words, although a failure to pay all compensation due before controverting a claim under O.C.G.A. §34-9-221(h) precludes the employer/insurer from disputing the compensable nature of the injury, it does not bar an employer/insurer from disputing related issues, such as a change in condition. ❖

In *TIG Specialty Insurance Co. v. Brown*, 283 Ga. 283 App. 445, 641 S.E.2d 684 (2007), the Court of Appeals again dealt with the issue of a notice to controvert. The Claimant in this case suffered an on-the-job accident on December 28, 2000. TIG Specialty Insurance Company provided the workers' compensation coverage on that day. In February 2002, Zenith Insurance Company began coverage for the employer. The Claimant's authorized treating physician disabled him for the first time on May 8, 2002. Even though it no longer insured the employer, TIG commenced payment of temporary total disability benefits to the Claimant. TIG requested a hearing in February 2004, seeking reimbursement from Zenith for payments made following the effective date of Zenith's policy. Both Zenith and the Claimant filed motions to dismiss TIG's hearing request. The ALJ denied the motions, but the Board's Appellate Division dismissed the hearing request, finding that the request was barred by O.C.G.A. §34-9-221(h). The superior court affirmed.

On appeal, the Court of Appeals reversed, finding that the ALJ should conduct a hearing. The Court said that the 60-day statute of limitations contained in O.C.G.A. §34-9-221(h) was not applicable to the current situation. As previously discussed in the *Fallin* case, above, that Code section provides that when compensation is being paid without an award, the right to compensation shall not be controverted except upon the grounds of a change in condition or newly discovered evidence, unless the notice to controvert is filed with the Board within 60 days of the due date of the first payment of compensation. Since there was no issue in this case as to whether one of the insurers owed benefits to the Claimant, the time limit in O.C.G.A. §34-9-221(h) did not apply. The Court quoted *Columbus Immediate Care Home v. Johnston*, 196 Ga. App. 516, 396 S.E.2d 268 (1990), in explaining that the 60-day time limitation "should not reach a controversy between two insurance companies wherein the compensability of the Claimant's injury goes unchallenged." Since TIG was not disputing the Claimant's "right to compensation," but rather, whether it was the responsible insurer, TIG was entitled to a hearing on this issue. The Court thus reversed the dismissal of the hearing request, finding that the ALJ should conduct a hearing to determine whether TIG or Zenith was responsible for payment of temporary total disability to the Claimant.

Even though TIG prevailed on appeal, if the case goes to a hearing before an ALJ there is a question as to whether the ALJ would ultimately find a "new accident" in May 2002, as TIG wanted. If the ALJ were to find a new accident, Zenith could argue that it still did not owe benefits, because the Claimant never filed a claim for a May 2002 date of accident. Thus, the ALJ might be reluctant to find a new accident, because such a finding could put the Claimant's benefits at risk, due to no fault on the part of the Claimant. The best practice for insurers, of course, is to promptly investigate coverage issues and to file a hearing request as soon as possible after the discovery of a dispute. ❖

Earlier this month, the Georgia Court of Appeals issued its decision in *Renu Thrift Store, Inc. v. Vigueroa*, A07A1116 (decided June 20, 2007). This case covers three issues: one, the mandate of O.C.G.A. §34-9-245 that no claims for reimbursement of an overpayment shall be allowed where the application for reimbursement is filed more than two years from the date of the overpayment; two, the requirement of O.C.G.A. §34-9-221(b) that income benefits shall be due and payable in weekly installments; and three, the assessment of attorney fees based on a unilateral suspension of benefits.

The Claimant in this case suffered an on-the-job injury for the employer in September 2000. Due to its own error, the employer began paying the Claimant temporary total disability benefits based on an average weekly wage that was significantly more than the Claimant's correct average weekly wage. The employer paid income benefits to the Claimant based on the incorrect average weekly wage from September 2000 to March 2005. These benefits were paid on either a weekly basis or on a bi-weekly basis. The employer eventually discovered its error, and on January 26, 2005 it filed a Notice of Suspension of Benefits stating that it had overpaid the Claimant \$9,280.49 in income benefits, which would be credited toward future permanent partial disability benefits. The employer filed a second Notice on February 11, 2005 stating that it would suspend benefits as of February 21, 2005. Following the suspension of benefits, the Claimant filed a motion requesting recommencement of benefits. The employer objected, and a hearing was held before an Administrative Law Judge. At the hearing, the employer requested reimbursement of \$23,754.

The Administrative Law Judge found that the employer was entitled to a credit for the overpayment, but, pursuant to O.C.G.A. §34-9-245, the judge limited the credit to payments made within the two years prior to the employer's request for reimbursement. The ALJ denied the Claimant's request for recommencement of benefits and for assessed attorney's fees and granted the employer repayment in the amount of \$2,981.39.

Both the Claimant and the employer appealed to the Appellate Division. The Appellate Division affirmed the ALJ's ruling regarding reimbursement of certain benefits to the employer, but it also assessed a 15% penalty against the employer for making certain payments on a bi-weekly, as opposed to weekly, basis. The Appellate Division also assessed \$2,000 in attorney fees against the employer based on the employer's unilateral suspension of benefits. The employer appealed to the superior court, which affirmed the Appellate Division.

The Court of Appeals likewise affirmed. The Court agreed that the employer was barred by O.C.G.A. §34-9-245 from obtaining credit for overpayments that were made more than two years prior to its application for reimbursement. The employer argued that O.C.G.A. §34-9-243(a) applied, not O.C.G.A. §34-9-245. O.C.G.A. §34-9-243(a) provides

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that the payment by the employer or insurer to the employee of any benefit when not due shall be credited against any payments of weekly benefits due, as long as the credit does not exceed the aggregate amount of weekly benefits due to the employee. The employer contended that it was thus entitled to a credit against future payments for all of the overpayments it had made, because these overpayments were made "when not due." The Court stated, however, that to allow the employer credit for the overpayments that it had made more than two years prior to its request for reimbursement would entirely frustrate the purpose of O.C.G.A §34-9-245, which is to provide certainty of knowing when past benefit payments are no longer subject to reimbursement claims. The Court also agreed that the Appellate Division had correctly assessed a 15% penalty against the employer due to the employer's failure to pay benefits on a weekly basis as required by O.C.G.A §34-9-221(b). Most of the time, the employer paid benefits on a

weekly basis, but during certain periods in 2002 and 2003, the employer paid on a bi-weekly basis, and the record revealed no explanation for this change. The Court pointed out that, under O.C.G.A §34-9-221(b), the employer should have obtained Board approval prior to paying benefits on anything other than a weekly basis, and the employer did not do so. "[I]n light of the clear statutory language requiring weekly payments, we cannot say that the Board erred in concluding that [the employer] failed to comply with the weekly payment requirement," the Court concluded. Thus, the Board was authorized to assess a 15% penalty for those weeks that the employer failed to pay the Claimant's benefits on a weekly basis.

Finally, the Court affirmed the award of assessed attorney fees based on the employer's unilateral suspension of benefits. The Court said that the record supported the Board's finding that the unilateral suspension of benefits was unreasonable, because the employer's overpayments were made due to its own error. ❖

Exclusive Remedy Re-visited

In *Burns International Security Services Corp. v. Johnson*, 284 Ga. App. 289, 643 S.E.2d 800 (2007), the Georgia Court of Appeals reversed the denial of summary judgment to the employer, Burns International Security Services, in a wrongful death suit filed by the parents of the employee, Tamica Johnson, who was killed while working as a security guard for the employer. The employer had hired the employee in January 2000. She was 21 years old and had no prior security experience, and after hiring, her training consisted of a one-day orientation program. Because the employer did not arm its guards, its policy was to not accept jobs that it considered to be a high risk to the safety of its employees. For high-risk jobs that it did accept, its policy was to use guards with at least two years of experience, and for medium-risk jobs, its policy was to use guards with at least one year of experience.

Nonetheless, in April 2000, the employer assigned the employee to guard certain property that was considered to pose a high risk to the guards. She guarded this property alone during the 3:00 p.m. to 11:00 p.m. shift, without a weapon or other means to protect herself and without a radio or other form of mobile communication. The evening of April 19, 2000, the employee could not be located when a second guard arrived to relieve her. About three weeks later, law enforcement found the employee's decomposed body in a secluded room on the property. The medical examiner determined the employee's cause of death to be strangulation and blunt head injuries, ruling her death a homicide.

The employee's parents subsequently filed a tort suit against the employer for the wrongful death of their daughter. The employer moved for summary judgment, asserting that the plaintiffs' exclusive remedy was an action under the Workers' Compensation Act. The trial court denied the motion.

On appeal, the Court of Appeals held that the Workers' Compensation Act provided the exclusive remedy for the plaintiffs' claim, since a felonious assault by a third party upon an employee is treated as an accident covered by the Act, as long as the willful act is not directed against the employee for reasons personal to the employee. To determine if the assault occurred for reasons personal to the employee, the Court explained, one must consider whether the employee's injuries arose out of and in the course of the employee's employment. In this case, the Court concluded that the uncontroverted evidence showed that the employee's death "arose out of" her employment, because she was young and inexperienced, and yet had been assigned to guard property in a high-risk area; she worked alone and at night, with no form of protection or mobile communication; and her body was found on the property that she was assigned to guard. Under these circumstances, the conditions of the employee's employment increased the risk to her and subjected her to a danger peculiar to her employment.

The Court also concluded that the evidence showed that the employee's death occurred "in the course of employment" because on the last evening that she was seen, she noted in a log that she was going on security patrol at approximately 7:00 p.m. When a second guard arrived to relieve the employee at 11:00 p.m., she was nowhere to be found, although her personal items were at the security desk. The employee's body was then discovered in a room on the property approximately three weeks later, and the medical examiner stated that she had been deceased for at least two weeks, possibly longer. This evidence demonstrated, concluded the Court, that the employee's death occurred within the period of her employment with the employer, at a place where she was performing her security duties, and while she was fulfilling those duties, meaning that her death occurred "in the course of employment" under the Workers' Compensation Act.

Based on the foregoing, the Court reversed the trial court and granted summary judgment in favor of the employer. The plaintiffs' remedy in this case, if any, was exclusively under the provisions of the Workers' Compensation Act.

SITF Reminder

Due to the planned phase out of the Subsequent Injury Trust Fund, 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). If compensability of the underlying workers' compensation claim is at issue, however, then employers/insurers will have three years from the date of final adjudication of compensability in which to obtain Fund acceptance.

In *Wal-Mart Stores, Inc. v. Parker*, 283 Ga. App. 708, 642 S.E.2d 387 (2007), the Georgia Court of Appeals addressed O.C.G.A. §34-9-105, which governs workers' compensation appeals to a superior court. This Code section provides that an Appellate Division's decision shall be considered affirmed by operation of law under certain circumstances: (1) if the superior court does not hear the case within 60 days of the date of docketing, unless the hearing originally scheduled to be held within the 60 days has been continued to a date certain by court order; (2) if a hearing is held later than 60 days of the date of docketing because same has been continued to a date certain by court order, but no order of the court disposing of the issues on appeal has been entered within 20 days after the date of the continued hearing; or (3) if the case is heard within 60 days from the date of docketing, but no order of the court dispositive of the issues on appeal has been entered within 20 days of the date of the hearing.

In this case, the Claimant was awarded income benefits by an administrative law judge. The employer and its insurer appealed to the State Board's Appellate Division, which adopted in part and amended in part the ALJ's award. The Claimant appealed that decision to the superior court, where the case was docketed on August 5, 2005. Oral argument was held on September 6, 2005, after which the superior court reinstated the ALJ's award by order dated and filed September 26, 2005. Thus, all of the deadlines of O.C.G.A. §34-9-105 were met.

Georgia law requires a superior court judge to file his or her decision with the clerk of the court and to notify the attorney of the losing party of his or her decision. The Georgia Supreme Court has held that if this notice is not provided to the losing party, then a motion to set aside the judgment may be granted and the judgment re-entered. The 30-day period within which the losing party must appeal will begin to run from the date of the re-entry.

Initially, neither the Claimant nor the employer received a copy of the superior court judge's order. The Claimant's attorney contacted the superior court and obtained a copy of the order, however. After the time to apply for discretionary appeal to the Court of Appeals had expired, the Claimant's attorney contacted the employer's attorney to inform him of the judgment. The employer's attorney then filed a motion to vacate and re-enter the judgment so that he could pursue an appeal in a timely manner.

The superior court denied the employer's motion, however, even though it acknowledged that the employer had not received the required notice. The superior court reasoned that if it vacated the order, it would lose jurisdiction of the case by operation of law under O.C.G.A. §34-9-105 and that, therefore, any subsequently entered order would be a nullity. The superior court also said that all parties knew that O.C.G.A. §34-9-105 required it to enter an order within 20 days of the hearing and that the employer did nothing to determine whether the court had entered judgment for more than 30 days after the expiration of the 20-day period. The superior court said that setting aside the order would reward the employer, which had not been diligent.

The Court of Appeals held that the superior court erred in denying the employer's motion. The Court stated that O.C.G.A. §34-9-105 must be strictly construed and that this case fell outside of the circumstances contemplated by that Code provision, since the superior court had met the time requirements set forth in that Code section. The Court noted that the policy underlying the Code section (speedy resolution of workers' compensation appeals) would not be violated by vacating and then re-entering the judgment to allow the employer the opportunity to seek review by the Court of Appeals. The Court also said that it was improper for the superior court to decide the employer's motion based on a determination that the employer knew or should have known that a judgment had been entered. The Court pointed out that the issue was not whether the losing party had knowledge that judgment was entered, but whether the superior court had carried out its duty to provide notice to the losing party. The Court therefore directed the superior court to grant the employer's motion and to vacate and re-enter the September 26, 2005 judgment. The 30-day period for appeal would then begin to run from the date of the re-entry of the judgment. ❖

MSA Legislation

In late May, Rep. John Tanner (D-TN) and Rep. Phil English (R-PA) introduced the Medicare Secondary Payer and Workers' Compensation Settlement Agreements Act of 2007. This proposed legislation seeks to amend the Social Security Act by, among other things, exempting certain workers' compensation settlement agreements (such as agreements with a present value of less than \$250,000) from the secondary payer provisions. The proposed bill is now in Committee, and we will keep you up to date on its progress.

The Georgia Court of Appeals case **Caremore, Inc. v. Hollis**, 283 Ga. App. 681, 642 S.E. 2d 375 (2007), deals with two common and yet important issues - one, the Claimant's entitlement to a higher average weekly wage based on the value of subsidized meals provided to her by the employer, and two, the employer's responsibility for fees and penalties due to certain procedural violations. In *Caremore*, the Claimant suffered a compensable on-the-job accident for which the employer commenced disability income benefits. On March 4, 2004, the authorized treating physician sent the employer a Form WC-205, requesting pre-approval of an evaluation with another doctor. Under Board Rule 205, the employer was required to respond within five days. The employer did not respond until March 15, 2004, however, when it denied the request. On August 21, 2004, the employer authorized the evaluation. In the meantime, on May 4, 2004, the Claimant had requested a hearing. As a part of her hearing request, the Claimant requested an increase in her temporary total disability benefits by contending that subsidized meals should be considered in the calculation of her average weekly wage.

The parties agreed to submit the case to the ALJ by a stipulation of facts in lieu of an evidentiary hearing. In January 2005, the ALJ concluded that the employer had willfully violated Board rules by failing to timely file certain Board forms, including its response to the authorized treating physician's request for advance authorization of an evaluation. The ALJ thus assessed civil penalties. The ALJ also increased the Claimant's average weekly wage by \$15 per week to include the economic benefit of a meal subsidy. The Appellate Division and the superior court affirmed.

The Court of Appeals also affirmed. Although the employer challenged Board Rule 205 as an invalid

extension of statutory power not granted to the Board by the legislature, the Court refused to rule on that issue. The Court said that, since the employer had actually approved the evaluation (in August 2004) before the ALJ ruled on the issue, then the validity of that part of the rule precluding an employer from contesting the compensability of treatment was not before the Court. The Court concluded that the Board had properly assessed civil penalties based upon the employer's willful violation of certain Board rules, including its failure to timely file certain Board forms, as well as its failure to timely respond to the request for advance authorization. "A[n] employer or insurer's conscious indifference to its duty to file required forms constitutes willfulness," the Court explained.

Regarding the increase in the Claimant's average weekly wage, which thus increased her temporary total disability benefits, the Court concluded that the superior court did not err in affirming the Board's inclusion of a partial meal subsidy in the calculation of the average weekly wage. The parties stipulated that the Employer subsidized on-premises meals (the Claimant paid only \$1 per meal, although the actual value exceeded that amount and resulted in an economic benefit of \$3 per day, or \$15 per week). The employer contended that this meal subsidy was not a benefit "furnished without charge" to be included in the wage computation pursuant to Board Rule 260(a). In other words, according to the employer, only a fully subsidized meal should be included in the calculation of the average weekly wage, not a partially subsidized meal. The Court disagreed, stating that such a "technical reading" of Board Rule 260(a) does not "serve to effectuate the Act's purpose of providing relief to injured workers." Thus, the value of partially subsidized meals should be included in the calculation of an average weekly wage. ❖

Fee Schedule Update

Effective July 1, 2007, the State Board has promulgated its first Fee Schedule for Non-Emergency Transportation. Please contact us for a copy of same, or log onto the Board's website at www.sbcc.georgia.gov.

Reid v. Georgia Building Authority, 283 Ga. App. 413, 641 S.E.2d 642 (2007), involves the issue of a catastrophic designation. The Claimant in this case injured two fingers on her right dominant hand on February 15, 2000 in an accident arising out of and in the course of her employment as a housekeeper for the employer. The Claimant underwent surgery and physical therapy. Her treating physician released her to restricted duties in November 2002, and although the Claimant returned to work, she eventually stopped working altogether. In October 2003, the Claimant's authorized treating physician concluded that she was permanently and totally disabled from her regular duties as a housekeeper. The Claimant later sought to prove that her injury was catastrophic. Following a hearing, the ALJ ruled that the claim was indeed catastrophic, and the Appellate Division affirmed. The superior court reversed, finding that there was insufficient evidence to support a catastrophic designation.

The Court of Appeals affirmed the judgment of the superior court. Based on the date of the Claimant's accident, the Claimant needed to prove that her injury was catastrophic by showing that it was "of a nature and

severity that prevents [her] from being able to perform ... her prior work and any work available in substantial numbers within the national economy for which [she] is otherwise qualified." The Court said that there was no dispute that the Claimant was unable to perform her previous job; therefore, the only issue was whether there was "any work available in substantial numbers within the national economy" for which the Claimant was otherwise qualified. Since the Claimant had the burden of proof, the Court explained, she must present some competent evidence that she was unable to perform any work available in substantial numbers within the national economy. At a minimum, this requires some evidence that the Claimant had unsuccessfully attempted to obtain employment within her limitations, which supports an inference that such jobs are not available. The only evidence in the record regarding the Claimant's job search, however, was her statement at the hearing that she had "looked for work." The Court said that this statement was not enough, since it provided no details regarding the job search. Under these circumstances, the Court concluded, the superior court correctly found that there was insufficient competent evidence that the Claimant's injury was catastrophic. ❖

Supreme Court Affirms *Ray Bell*

In **Ray Bell Construction Company v. King**, 281 Ga. 853, 642 S.E.2d 841 (2007), the Georgia Supreme Court affirmed the decision of the Georgia Court of Appeals finding that the death of a traveling employee was compensable under the Workers' Compensation Act. The employee in *Ray Bell* was a superintendent working for a construction company at a construction site in Jackson, Georgia. The employer provided the decedent an apartment in Fayetteville, Georgia (the decedent was a resident of Florida) and a company truck. On the day of the accident at issue, a Sunday, the decedent had moved some personal belongings from Fayetteville to a storage unit in Alamo, Georgia (in south Georgia). The collision occurred as the decedent was returning to either the job site or to his employer-provided apartment - in other words, within the general proximity of the Fayetteville/Jackson area. The Administrative Law Judge, the superior court, and the Court of Appeals all found that the accident arose out of and in the course of the decedent's employment.

The Supreme Court affirmed in a 4-3 decision. The Supreme Court discussed Georgia's doctrine of continuous employment (or the traveling employee doctrine), noting that there is broader workers' compensation coverage for an employee who is required by his employment to lodge and work within an area geographically limited by the necessity of being available for work on the employer's job site. Such an employee is in "continuous employment," and acts necessary to the health and comfort of the employee are incidents of his employment and acts of service therein within the meaning of the Workers' Compensation Act. Nonetheless, injuries that occur while the traveling employee is performing a purely personal mission do not arise out of and in the course of employment. Once the personal mission is complete and the employee resumes the performance of his work duties, however, any accident that occurs after the resumption of work duties does arise out of and in the course of employment. Here, the Supreme Court said that it was undisputed that the decedent had engaged in a personal mission unrelated to employment when he delivered furniture to Alamo. However, the Appellate Division found that, at the time of the accident, the decedent's deviation from his employment had ended, and he had again resumed his employer's business. Since the accident occurred in the general proximity of the Fayetteville/Jackson area, the Supreme Court concluded, the decedent's continuous employment coverage resumed whether he was traveling to the employer's job site or was returning to his employer-provided housing. The Supreme Court thus affirmed the Court of Appeals' judgment affirming the superior court's affirmance of the Appellate Division.

Royal Indemnity Company v. Georgia Insurers Insolvency Pool, 284 Ga. App. 787, 644 S.E.2d 279(2007), involves a declaratory judgment action filed by the Pool against Royal Indemnity Company and the employer, AIT-Atlanta. The Georgia Court of Appeals found that the superior court lacked subject matter jurisdiction, and it therefore vacated the superior court's order and remanded the case to the superior court with direction to dismiss the Pool's petition for declaratory judgment.

By way of background, the Claimant in this case was injured on November 30, 1990 while working as a temporary employee at Hitachi, AIT's predecessor in interest. Royal provided workers' compensation coverage to Hitachi. The Claimant's direct employer was Synesys Temporaries, which was covered for workers' compensation by Home Insurance Company. On December 26, 1990, the Claimant filed a formal claim with the Board, listing both Synesys and Hitachi as his employers. Synesys began making voluntary weekly payments to the Claimant, and Hitachi filed a notice to controvert. A hearing was never held. In June 2003, the carrier for Synesys, Home Insurance Company, became insolvent and the Pool began making payments to the Claimant. Two years later, the Pool filed the declaratory judgment action at issue, asking the superior court to declare that the Pool was statutorily barred from making further payments to the Claimant until the Claimant's rights under the Royal policy were exhausted; that the policy issued by Royal was primary; and that the Pool was entitled to reimbursement from Royal for all amounts it had paid to the Claimant. The superior court issued a declaration finding that the workers' compensation policy issued by Royal to Hitachi provided coverage to the Claimant, that the Pool was relieved from making

further workers' compensation payments to the Claimant until such time as the Claimant's rights under the Royal policy had been exhausted, and that Royal must reimburse the Pool the monies paid by the Pool to the Claimant since Home's insolvency.

Royal and AIT appealed to the Court of Appeals, asserting that Royal was not obligated to pay workers' compensation benefits to the Claimant because any workers' compensation claim by the Claimant against Hitachi was now untimely, and it was also too late for the Pool to controvert its liability to pay workers' compensation benefits.

The Court of Appeals did not address the parties' arguments, stating that the superior court did not have subject matter jurisdiction to order the payment of workers' compensation benefits. In other words, the parties were in the wrong forum. The Court stated that resolution of the issues raised in the Pool's petition was dependent upon a determination by the Board of the amount, if any, the Claimant would have been entitled to recover from Royal in the pending, unresolved claim that he had filed against Hitachi for workers' compensation benefits. In its Motion for Reconsideration, the Pool contended that the superior court had subject matter jurisdiction because Hitachi had successfully asserted a statutory employer defense in a tort action brought by the Claimant in federal court. The Pool argued that it had therefore already been established that Hitachi and Royal were liable to the Claimant for workers' compensation benefits. The Court denied the Motion for Reconsideration, explaining that statutory employers are immune from suit for tort claims based on their potential liability for workers' compensation benefits and that thus, Hitachi's actual liability for such benefits had not been established in the federal lawsuit. ❖

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