

Albany Office
P. O. Drawer 71788
Albany, Georgia 31708
Telephone: (229) 883-2441
Facsimile: (229) 888-8148
www.gwsh-law.com

Atlanta Office
1201 Peachtree St., N.E.
400 Colony Square
Atlanta, Georgia 30361
Telephone: (404) 874-9588

GARDNER WILLIS
SWEAT & HANDELMAN, LLP
ATTORNEYS AT LAW

WORKERS' COMPENSATION UPDATE

August 4, 2010

CHANGE IN CONDITION

***TRUCKS, INC. et al. v. TROWELL, COURT OF APPEALS OF GEORGIA
302 Ga. App. 488, 690 S.E.2d 880, Decided February 8, 2010***

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 as well. Please call us for more information.

If you prefer to receive our newsletters electronically, please forward an email confirming your choice to gwsh-law@gwsh-law.com.

On April 18, 2006, employee, Trowell injured her right shoulder while exercising her duties as a truck driver. Her claim was accepted as medical only and she continued to work regular duty. She resigned because work was slow and went to work for another trucking company, Trans Systems, for approximately one month before resigning again. In January 2007, Trowell's physician recommended that she cease working and undergo surgery for the shoulder that had continued to cause her pain since the 2006 injury. Trucks refused to continue any medical payments in light of her intervening employment with Trans Systems.

The ALJ found, and the Appellate Division agreed, that Trowell's current condition was a result of her initial injury in 2006 and rejected Trucks' argument that her condition was aggravated while working for Trans Systems. The Superior Court affirmed the lower courts' finding that Trowell proved a change in condition.

The Court of Appeals found that the prerequisites for proving a change in condition were not met in this case. However, the Court of Appeals affirmed the decision under "the right for any reason rule".

The Court of Appeals found that the Superior Court's decision is error because there cannot be a change in condition without an initial receipt of income benefits. However, because Trowell's present condition was a result of her original injury from 2006, as evidenced by her medical records, an award of benefits against the original employer was affirmed.

Significance: In a case, like *Trucks*, where someone has not received income benefits from an initial claim, an employer or insurer should not voluntarily accept continued medical expenses and income benefits where there has been an intervening employment. A finding of a new accident is even more likely if the one-year statute of limitations has run on the initial claim. It will always be a factual determination as to whether an employee is found to have an initial claim, a change in condition, or a new accident, and an employer or insurer should not simply accept responsibility for a claim when a new accident is possible.



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. He is at the forefront of legal developments in the workers' compensation arena. Todd earned his Juris Doctorate degree from the University of Georgia in 1989. Admitted to the Georgia Bar in 1989, Todd is also admitted to the U. S. District Court for the Middle District of Georgia, the Georgia Court of Appeals and the Georgia Supreme Court. Contact Todd at (229) 883-2441 or e-mail him at todd.handelman@gwsh-law.com.

ATTENDANT CARE AND ATTORNEY FEES

***MEDICAL OFFICE MANAGEMENT et al. v. HARDEE, COURT OF APPEALS OF GEORGIA
2010 Ga. App. LEXIS 295, Decided March 23, 2010***

Employee, Hardee, sustained head injuries during an office robbery. Due to her injuries, she was forgetful, dizzy and often fell. Her physicians recommended attendant care between eight and sixteen hours per day, several days per week. The employer did not provide this attendant care and Hardee's retired husband cared for her. The ALJ found that Hardee was entitled to the attendant care eight hours per day, seven days per week, but that her husband was not entitled to reimbursement for his care, nor was her attorney entitled to assessed fees. The Appellate Division decided that Hardee's husband was entitled to reimbursement and awarded her attorney \$5,000.00 in fees. Both sides appealed and the Superior Court affirmed the finding for attendant care, but partially reversed on the attorney's fees issue and increased that award to \$12,500.00.

There is no express prohibition in the Workers' Compensation Act against recovery by an employee of attendant care services by a family member, including a spouse. In fact, O.C.G.A. §34-9-205 contemplates home health services provided by family members. Because Hardee's husband provided the prescribed service beyond the ordinary service of a spouse and because the employer did not furnish the needed care, which made her husband's care necessary, she is entitled to reimbursement for her husband's care.

The Court of Appeals found that there is enough evidence to support an award of attorney fees of \$5,000.00 but not \$12,500.00. An attorney may testify to the reasonableness of his own fee and the trier of fact may exercise its own judgment as to the reasonableness of the fees.

Significance: If an employee is found to be entitled to attendant care, he/she is entitled to reimbursement of said attendant care even if it is provided by a spouse, if that care is above and beyond his/her ordinary service as a spouse. Clearly this is going to be a medical question, and the opinion of the treating physicians will be critical. The amount and reasonableness of attorney fees for failure to provide this reimbursement will be determined by the court.

STATUTE OF LIMITATIONS FOR CATASTROPHIC DESIGNATION AND ADDITIONAL INCOME BENEFITS

***GEORGIA INSTITUTE OF TECHNOLOGY et al. v. JE-016 HUNNICUTT
COURT OF APPEALS OF GEORGIA, Decided April 7, 2010,***

Hunnicuttt suffered a compensable injury on May 6, 1996. She received temporary total disability (TTD) income benefits until February 2, 2004 when her entitlement to benefits ceased. This was a 400-week cap case. On July 27, 2005, Hunnicutt requested catastrophic designation but did not specifically request TTD benefits, and the Employer requested a hearing on the catastrophic designation.

The Managed Care and Rehabilitation Division of the Board designated Hunnicutt's injury as catastrophic on May 23, 2007. The Employer appealed this decision but later dismissed the appeal and agreed to pay rehabilitation benefits to Hunnicutt pursuant to the catastrophic designation.

Hunnicuttt thereafter filed a request for hearing, WC-14, on December 17, 2007, for TTD income benefits due to her designation as catastrophic, medical expenses, and penalties. The Employer argued that because Hunnicutt's request for catastrophic designation did not expressly request TTD benefits, her claim for income benefits was barred by the two-year statute of limitations provided under O.C.G.A. § 34-9-104(b). The ALJ did not agree and granted Hunnicutt's request for TTD benefits back to February 1, 2004, which is the date her benefits were previously ceased.

The Employer appealed to the Appellate Division of the Board, the Superior Court of Fulton County, who both affirmed the prior decisions. The Court of Appeals affirmed, and found that because the employee filed her request for catastrophic designation within two years of the date of last payment of TTD benefits, her request was timely and the Appellants are ordered to pay her income benefits until she undergoes a change of condition for the better.

Significance: This case is troubling. A claimant's attorney should have to file a hearing request within two years of the last receipt of income benefits when the claimant is alleging a change in condition, and seeking TTD benefits, pursuant to O.C.G.A. §34-9-104(b). In this case the courts have held that a claimant's mere claim for catastrophic designation with the Rehab Unit is sufficient to toll the Statute of Limitations. An actual WC-14 was not filed until after two years from the last receipt of the TTD benefits. This case circumvents the Statute of Limitations and is inconsistent with prior case law.

TSH/32-209-2010-05