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A WORKERS' COMPENSATION UPDATE

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Legislative Update 2006

Legislative Report

By Robert R. Potter

The 2006 Session of the Georgia General Assembly adjourned on March 30th, having passed two bills dealing with workers' compensation. The first of these, House Bill 1240, was the product of the Chairman's Advisory Committee and was sponsored by Representative Mike Coan, Chairman of the House Industrial Relations Committee. This bill makes four relatively modest changes. (1) The death benefit for a surviving spouse as a sole dependent has been raised from $125,000 to $150,000. (2) Physicians treating workers' compensation claimants will be subject to the Patient Self-Referral Act, which has been in existence since 1993. There had been an exemption for physicians listed on a valid panel of physicians that was included in that bill years ago for political reasons and served no practical purpose. The exemption has now been removed. (3) The bill clarifies that mileage expenses must be submitted within one year of the date of incurring those expenses or else they are deemed waived. That had been the law, but the language was made a little more clear. (4) The fourth item in this bill is truly a grammatical change relative to a Section 104 notice to the employee. The previously existing language, which has now been deleted, required that an employee receive notice, and that language has now been replaced with a more common sense phrase that the employer shall provide such notice.

House Bill 1405, also sponsored by Representative Coan, was requested by the Board of the Subsequent Injury Trust Fund. It puts in place some time frames to perfect a Fund claim. Up until now, the only real time deadline for a Fund claim was the 78-week notification provision. Once met, claims could simply languish for years with no further action by anyone. The Fund had no effective means to dismiss such claims or otherwise determine what was and what was not valid and this incapacity has led to an inaccurate view of the actuarial exposure to the Fund. With the passage of this bill, for those claims already filed before July 1, 2006, the employer and insurer have until June 30, 2009 to obtain a reimbursement agreement, or such claim is deemed denied. For those claims filed on or after July 1, 2006, the employer and insurer have three years from the date the notice was received by the Fund to obtain a reimbursement agreement, or the claim is deemed denied.

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Show Me the Money: Recouping Overpayment of Disability Benefits

By John P. Farrell

The Court of Appeals recently decided a case that bears directly on an insurer's efforts to seek reimbursement of disability benefits. In *Trax-Fax, Inc. v. Hobba*, A06A0397, slip op. (Ga. App. February 2, 2006), the Court of Appeals looked at O.C.G.A. § 34-9-245, which is the statute governing reimbursement of overpayments made to a claimant. Indeed, O.C.G.A. § 34-9-245 is both a sword and a shield. It allows an insurer to assert a claim for overpayments, but also allows a claimant to escape liability for a claim seeking reimbursement of overpayments if the claim is not asserted timely.

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Update on Return to Work Issue for Undocumented Workers

Martines v. Worley & Sons Construction, **A05A1985 February 14, 2006.**

By Todd A. Brooks

The *Martines* case involves the issue of whether an employee's refusal to accept a suitable job was justified within the meaning of O.C.G.A. § 34-9-240. The undisputed facts of the case are that the employee suffered a work-related injury to his left foot. Subsequently, he was released to return to work with restrictions. Therefore, the employer offered him a position as a delivery truck driver that complied with the restrictions from his doctor. Upon his return to work, the employer asked him to produce a Georgia driver's license and documentation that he was in the country legally before he could drive a company truck. At that time, he could not produce the Georgia drivers' license, and told the employer that he could not obtain one because he entered the country illegally. The employee presented no evidence at the hearing that he was unable to drive for any physical or health-related reason. He also conceded that while he could not drive very well, he had, in fact, driven a vehicle in Mexico. Two days after he reported to work for the truck driver position, the employee's doctor took him totally out of work.

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There is an exception for those cases in which compensability is at issue. In those cases, the three years begins to run from the date of final adjudication of compensability by the State Board or by any Appellate Court. In any of the cases referenced above in which there has been automatic statutory denial after the expiration of three years, the employer and insurer have the right to file for a hearing within 20 days of such statutory denial. If they do that, they have all of the rights and privileges associated with pursuing a claim through the hearing process. If there is no such request for a hearing filed within those 20 days, then the claim is thereafter and forever barred.

Show Me the Money…continued

On July 28, 1998, Hobba was seriously injured in a work-related accident. He was awarded Temporary Total Disability benefits. Travelers suspended his benefits on April 24, 2002, but did not file a Notice of Suspension of Benefits until December 10, 2003. Travelers alleged Hobba had improperly continued to receive benefits despite returning to work less than a year after his accident. In conjunction with the Notice of Suspension, Travelers requested a hearing to determine whether it was entitled to reimbursement of all benefits paid to Hobba.

Hobba argued a statute of limitation defense in that Travelers had failed to assert a claim for overpayments within two years of the overpayment. The Administrative Law Judge (ALJ) ruled that Hobba had waived the statute of limitations defense when he did not raise it at the hearing. Ultimately, the issue was appealed to the Court of Appeals.

Travelers argued to the Court of Appeals that O.C.G.A. § 34-9-245 was a statute of limitation which was waived by Hobba when he failed to assert it as a defense prior to the hearing before the ALJ. The Court of Appeals went into a lengthy discussion about a very technical issue of the law – whether a statute is a statute of limitation or a statute of ultimate repose. Briefly, 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 of that period, it is not actionable. The Court of Appeals determined O.C.G.A. § 34-9-245 was a statute of repose and not a statute of limitation. In other words, Hobba did not have to affirmatively raise O.C.G.A. § 34-9-245 as a defense.

The Court noted that Travelers had, at the very least, nearly one year to seek reimbursement of even its initial payment to Hobba made shortly after Hobba's injury. Therefore, the Court reasoned Travelers had adequate time to seek reimbursement prior to having its cause of action extinguished. As such, the Court of Appeals precluded Travelers from seeking reimbursement for any overpayments made more than two years prior to December 10, 2003, the date of filing of their request for hearing seeking the overpayment.

Interestingly, the Court of Appeals did not apply O.C.G.A. § 34-9-245 two years from the suspension of benefits, nor two years from the dates of the actual payments, but, instead, two years from the filing date of the request for hearing. According to this case, had Travelers filed the Notice of Suspension *and* requested the hearing for overpayment on the day benefits were actually suspended, they would have been able to assert a claim on overpayments paid two years prior to April 24, 2002, instead of December 10, 2003, resulting in a claim for an additional 85 weeks of benefits.

Obviously, *Hobba* highlights the importance of timely filing documents with the State Board. It is now clear that an employer/insurer is only entitled to recoup overpayment of benefits two years back from the date of filing the notice of claim or hearing request.

Update on Return to Work Issue…continued

The Administrative Law Judge and Appellate Division of the State Board of Workers' Compensation found that the job offered to the employee was not suitable because he did not possess the driver's license required for the job. The Superior Court reversed the State Board and found that it applied the wrong legal standard to determine the suitability of the proffered job, and that the employee failed to meet his burden of demonstrating that his refusal to work was justified. Additionally, the Superior Court found that the medical opinion from the employee's doctor, which took him out of work two days after he reported for light duty work, was based on facts that had not yet occurred and could not be utilized in analyzing whether the employee had refused suitable employment on the day he returned. Therefore, the Superior Court reversed the State Board's award of Temporary Total Disability (TTD) benefits.

In affirming the Superior Court's decision, the Court of Appeals recognized that there is a two-prong test regarding light duty job offers pursuant to O.C.G.A. § 34-9-240. The State Board must first determine whether the employment refused by the employee is suitable to the capacity of the employee. If the State Board concludes that the job is suitable, it must next determine whether the employee's refusal to work was justified. The Court of Appeals relied on the holding of the Georgia Supreme Court in *City of Adel v. Wise*, 261 Ga. 53 (1991), asserting that the phrase "suitable to his capacity," contained in O.C.G.A. § 34-9-240, referred to the employee's capacity or ability to perform work within his physical limitations or restrictions. The Supreme Court in *Wise* also found that the reason for the refusal must relate 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 which disrupt the employee's life.

The Court of Appeals agreed that *Martines* failed to demonstrate that his refusal to perform the truck driver delivery job was justified since his inability to produce a driver's license and documentation that he was in the country legally was not related to the justified reasons described in the Supreme Court's decision in *Wise*. As such, the Court acknowledged that since the employee could drive a car, it was his inability to acquire a Georgia drivers' license because

of his illegal status that caused his refusal. In making this point, the Court compared the employee to a person whose license has been suspended for a violation of law, and is, therefore, unrelated to his physical capacity or ability to perform the job.

As for Martines' illegal presence in the United States, the Court analogized his legal status to a person who has been incarcerated after an adjudication of guilt and, therefore, is not entitled to TTD benefits. Specifically, the Court found that the employee could not meaningfully accept any offer of employment, just like an incarcerated person.

The employee argued that the employer's failure to require the employee to complete an Employment Eligibility Verification Form (commonly known as the "I-9 Form") at the commencement of the employment relationship should bar the employer from asserting the employee's illegal status as a defense to income benefits. However, significantly, the Court found that the employee failed to cite to any legal authority for the proposition that the employer's failure to require an employment form some time before his injury has any legal effect on whether his refusal of proffered light duty work after the injury was justified.

Finally, the Court failed to accept the employee's argument that he was not required to accept the proffered job because two days after his attempt to return to work, he was taken totally out of work. The Court found that it was not appropriate to consider facts which had not yet occurred as of the date the employee was supposed to return to work for the light duty job when determining whether a refusal of light duty work was justified.

Change in Condition: The Any Evidence Standard

John W. Rooker & Assoc. v. Patterson
A05A1050, Court of Appeals of Georgia, November 17, 2005

By J. David Garner

The employer, John W. Rooker & Associates, appealed the denial of its request for reduction in benefits from Temporary Total Disability (TTD) to Temporary Partial Disability (TPD) by the Administrative Law Judge (ALJ), the Appellate Division and the Superior Court. Rooker's request was based upon the Claimant, Patterson's 1) alleged return to work as a maintenance worker for an apartment complex, and 2) his change in lifting restrictions, and the alleged availability of jobs within those restrictions. Patterson had previously received a workers' compensation award designating his injuries as catastrophic and ordering payment of TTD benefits. Rooker argued that the Appellate Division applied the wrong legal standard for a change in condition. The Court of Appeals affirmed.

The Court first noted the well-settled "any evidence" standard. Citing *Olde South Custom Landscaping v. Mathis*, 229 Ga. App. 316 (1997), the Court held that "[i]t is axiomatic that the findings of the [Board], when supported by any evidence, are conclusive and binding, and that neither the Superior Court nor this Court has any authority to substitute itself as a fact finding body in lieu of the Board."

Applying this standard to the instant case, the Court first noted that a change in condition for the better can be shown in two different ways. The first is where an employee's condition has improved to the point that no disability remains. In that instance, the employer does not need to show that work is available to the employee, because having recovered from his injury the employee is in the same position as every other member of the general work force. The second is where the employee's disability has lessened, and he can do some work, but not the work he was doing pre-injury. In that instance, the employer must show: 1) a physical change for the better; 2) an ability to return to work as a result of the physical change; and 3) the availability of work to terminate or decrease the loss of income resulting from work-related disability. The Court then noted that in the case at bar, Rooker had only asserted a change in condition based upon the latter test. Rooker complained that the lower courts had applied an improper legal analysis by analyzing the case under the former test. However, the Court of Appeals noted that since the lower courts had analyzed the facts under both tests, and had applied the latter test to the issue before it, there was no harm to Rooker as a result of the additional, unnecessary analysis under the former test.

Rooker also argued that the lower courts misinterpreted the law regarding a change in condition based on a return to work. Specifically, Rooker cited two cases – *WAGA-TV, Inc. v. Yang*, 256 Ga. App. 224 (2002) and *ABB Risk Management & Co. v. Lord*, 254 Ga. App. 88 (2002) – in which the Court of Appeals had previously held under similar facts that the employee had returned to work, compelling a reduction in benefits. Rooker argued that because the facts in *Yang* and *Lord* were similar to the facts in this case, those opinions compelled the conclusion that Patterson had returned to work. The Court of Appeals disagreed, noting that this case, like *Yang* and *Lord*, is grounded on the "any evidence" standard of review, and that both *Yang* and *Lord* gave deference to the Board's decision. The Court specifically noted that the *Lord* Court stated that the facts of that case could have supported a different result, but upheld the ALJ and Appellate Division awards despite this. The Court stated that the correct test is whether, when viewed in the light most favorable to the employee (the party prevailing before the Appellate Division), there is any evidence to support the finding that Patterson had not returned to work. The Court found that there was and affirmed.

Finally, Rooker argued that it was entitled to a remand because the ALJ misstated significant testimony adduced at the hearing regarding whether any of the ten jobs identified in a "Labor Market Survey" were suitable for Patterson. The Court, citing *Sadie G. Mays Memorial Nursing Home v. Freeman*, 163 Ga. App. 557 (1982) and *Peterson/Puritan, Inc. v. Day*, 157 Ga. App. 827 (1981), rejected this argument. The Court held that even if the jobs had been suitable, there was no evidence in the record to suggest that any of the ten jobs were actually available to Patterson or that he had actually been informed of the jobs as is required under *Freeman* and *Day*.

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