Swift Currie
ATTORNEYS AT LAW

Timeless Values.
Progressive Solutions.

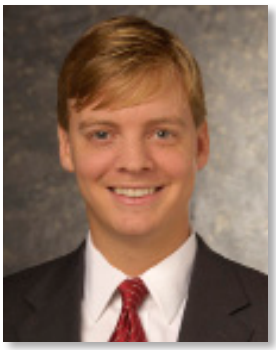
www.swiftcurrie.com

The 1st Report

A Workers' Compensation Update

Spring 2010

Recent Developments at the State Board of Workers' Compensation



By Jonathan M. Johnston

The past year has brought many changes to the Georgia State Board of Workers' Compensation. Two of the three members of the Appellate Division have changed. Judge Carolyn Hall has retired and Judge Viola S. Drew is now hearing cases as an Administrative Law Judge. They were replaced by Judge Richard. S. Thompson, now Chairman, and Judge Stephen Farrow. Judge Warren Massey remains the third judge on the Appellate Division. Judge Melodie Belcher has been appointed as the new Chief Administrative Law Judge. An important administrative change recently occurred as Kathy Oliver, deputy Chief Operating Officer and liaison to insurance issues, retired at the end of February, 2010. Given the current budget crisis, her duties will be temporarily absorbed by others at the State Board.

As the new Chairman, Judge Thompson has implemented several changes which will affect the way workers' compensation law is administered in Georgia. One such change is the rotation of Administrative Law Judges in the northern half of the state, which began on January 1, 2010. At the present time, the rotation of Administrative Law Judges is on a six-month trial basis. If the experiment goes well, this change will likely continue and may include the rotation of Administrative Law Judges in the southern half of the state as well. With input from Judge Massey, Judge Farrow, and others at the State Board, Judge Thompson will decide in June 2010 whether the rotation will continue and possibly expand.

While Employers and Insurers might have some concerns regarding this change and whether it will negatively impact their cases, worry should be kept to a minimum. One concern is if Administrative Law Judges rotate every six months and a workers' compensation case lasts for years, problems will inevitably develop because different issues in the case may be heard by multiple Administrative Law Judges before the case is finally resolved. Some would argue this lack of continuity could lead to inconsistent decision-making in the same case. However, the State Board has indicated that it is actually common for different Administrative Law Judges to hear different parts of the same case for a variety of reasons (i.e., judicial retirement, moving offices, illnesses, etc.).

Another issue raised by Employers and Insurers is that this rotation might create "judge-waiting" by Claimants. In theory, a Claimant could continue a case several times and/or take it off the calendar if he or she does not want to try the case before the particular Administrative Law Judge assigned. The Claimant could then place it back on the calendar when a preferred Administrative Law Judge is assigned to the case. This issue has already been addressed by the Board with the indication that Administrative Law Judges will be randomly assigned should the rotation continue. Thus, if a Claimant decides to continue a case and/or take it off the calendar and wait for another Administrative Law Judge to be assigned, he or she could potentially be assigned a judge with lesser sympathy to his or her case.

Another change implemented by the Board is more stringent enforcement of the already written policy that Administrative Law Judges have 60 days to issue Awards from the date of the hearing. This has been a rule at the State Board, but a stronger effort is now being made to require strict adherence to that rule. It has already shown results. At the time the new policy was implemented, 61 Awards were late. However, as of the end of February 2010, no Awards were considered late.

The significant budget issues in Georgia have affected the State Board of Workers' Compensation. In addressing the budget shortfall, the Rome and Gainesville offices have recently closed and the Augusta office is closing. Cases are still being heard in these cities, but there are no longer permanent offices there. Also in response to the budget crisis, mandatory furloughs have been put in place for every State Board employee. This is the second round of furloughs for Administrative Law Judges and all State Board employees will be furloughed one day in the months of February, March, and April. It is uncertain whether furloughs will continue beyond April 2010.

Finally, the State Board is in the process of determining the feasibility of video conferencing of appellate arguments. Currently, attorneys in the southern half of the state must drive several hours to Atlanta to present a five minute argument before the Board. To remedy this issue, the Board is considering establishing video conferencing in Tifton and Savannah so attorneys could "appear" at oral arguments before the appellate division in Atlanta remotely. However, this potential remedy has not yet been solidified because of the cost associated with video conferencing.

In summation, Judge Thompson has brought with him a new perspective on the Georgia's workers' compensation system and has implemented a number of changes which will hopefully make the system more efficient and fair for all parties.

For more information on this topic contact Jonathan Johnston at 404.888.6229 or jonathan.johnston@swiftcurrie.com.

Get the Picture: Separating Shoulder and Neck Injuries

By Bobby D. Johnson

Legendary University of Georgia radio play-by-play man, Larry Munson, started every football game broadcast with the immortal statement "[g]et the picture." Munson would then describe the opposing team's uniforms and the Bulldog's uniforms so that no listener or viewer would have any trouble discerning the Bulldogs from their opponent. Munson's ornate descriptions of helmets and uniforms enabled the listener to form a clear picture of each team's distinct appearance. In the realm of workers' compensation, we depend on medical providers to help us "get the picture" by describing the claimant's symptoms and providing a specific diagnosis for the cause of those symptoms. Frequently, neck and shoulder injuries are difficult to distinguish as the overlapping symptomology and proximal relation between the two distinct body parts makes it difficult for us to "get the picture" regarding which body part was injured in the work related accident. Claimants and their attorneys capitalize on the confusion of symptoms to extend the life of the claim and drive up the value of settlement.

A classic example would be a slip and fall injury causing a rotator cuff tear in the shoulder. The initial symptoms include pain in the shoulder, pain raising the arm, pain lowering the arm, weakness in the arm and pain radiating down the arm. Early on in the claim, the shoulder is the focal point of treatment, but as the shoulder injury begins to resolve, new complaints of neck pain emerge. Employers and Insurers then face the additional costs of independent medical examinations and further treatment due to the onset of the new neck symptoms. Diagnosing the problem and determining the injured body part takes several important steps. Diagnostic imaging and testing is an important, but costly step. X-rays will not provide evidence of a rotator cuff tear, but will show fractures, arthritic changes and abnormalities. MRIs of the shoulder and neck can help clear up the picture as to which body part is injured. EMG/nerve conduction studies are beneficial in determining which nerves are affected by the injury. Diagnostic injections are also beneficial for providing temporary relief and revealing whether the pain is caused by a cervical injury or shoulder injury. However, diagnostic imaging and studies are costly and are only one piece of the picture that a treating physician utilizes to make a diagnosis. Thorough physical examination and close attention to the claimant's symptoms and subjective complaints help to clarify the picture. The treating physician's physical examination will look for tenderness in the shoulder, deformity, instability in the shoulder joint, measure range of motion in the shoulder from several locations and measure the strength of the arm. Accordingly, the physical exam is another piece of the picture that enables the physician to determine whether the injury is in the shoulder or cervical spine.

Pain symptoms for shoulder and neck injuries often overlap. For example, the dermatome for C5-C6 covers the shoulder. Thus, a claimant reporting shoulder pain may actually be experiencing a pinched nerve at C5-C6. However, physical examination and testing for a Spurling's Sign can distinguish whether the pain is due to a shoulder injury or to an injury at C5-C6. Shoulder injuries and neck injuries may both cause symptoms of pain radiating down the arm. However, pain from a rotator cuff injury will not radiate past the elbow. Pain radiating to the wrist or fingertips indicates a cervical injury, not a shoulder injury. An important piece of the shoulder diagnostic picture is the status of the cervical spine. Even where symptoms are limited to the shoulder, the treating physician will examine the cervical spine, specifically C1, C5, C6, C7 and C8. No shoulder diagnosis is complete without considering the cervical spine as a source of the patient's shoulder pain.

Separating shoulder injuries from neck injuries is no simple task. "Getting the picture" includes thorough physical examination, close attention to the claimant's subjective complaints of pain, use of diagnostic imaging, studies and injections to improve the picture, and examination of other possible sources to clarify the picture. Once the picture is clear, the treating physician can provide the appropriate conservative care and treatment. The life of the claim can be shortened by effective treatment rather than extended by manipulation of overlapping symptoms. Thus, in order to prevent the prolonging of a claim with mixed shoulder and neck symptoms, it is important to have the treating physician clarify the diagnoses and resultant treatment plan.

For more information on these cases contact Bobby Johnson at 404.888.6207 or bobby.johnson@swiftcurrie.com.

Recent Case Law Update

By Ann M. Joiner

St. Joseph's Hospital et al. v. Ward, A09A1398 Ga Ct. App. (November 9, 2009)

In *Ward*, the Court of Appeals addressed the issue of the appropriate standard of review for both the appellate and superior courts in reviewing awards in workers' compensation cases and more importantly brings some clarification

to the line of case law addressing idiopathic injuries. The claimant worked as a nurse for St. Joseph's hospital. She alleged four injury dates for multiple bilateral knee injuries. The Administrative Law Judge (ALJ) acknowledged all four accident dates and found that the employee sustained a compensable accident to her right knee when she turned while administering medication to a patient and felt a pop in her knee. The claimant returned to work for one month, but her duties changed to a "sit and greet" position. She continued to work that position until she went out of work for knee replacement surgery. The ALJ found sufficient evidence to show a fictional new accident date on the claimant's last day of light duty work.

The Appellate Division concluded that based on the Court's decision in *Chaparral Boats v. Heath*, 269 Ga. App. 339, 606 S.E.2d 567 (2004), the initial right knee injury sustained while administering pain medication was not compensable because she was not exposed to any risk unique to her employment in standing and turning. Additionally, the Appellate Division stated that the claimant worked for one month in the sit and greet position and therefore did not show any additional trauma to her idiopathic right knee injury as a result of her job duties. Subsequently, the superior court concluded that the Appellate Division misconstrued the holding in *Chaparral* because the claimant's injury directly resulted from the performance of her work duties of assisting a patient. The Court of Appeals found the superior court exceeded its authority when it rejected the Appellate Division's application of *Chaparral*. The *Ward* Court stated that both the Court of Appeals and the superior court must defer to the Appellate Division's finding that the claimant was not exposed to any risk unique to her employment. Citing the recent *Harris v. Peach County Board of Commissioners*, 296 Ga. App. 225, 229, 674 S.E.2d 36 (2009), the Court of Appeals reversed the superior court because it substituted its own judgment for that of the Appellate Division on the issue of whether the claimant's disability arose out of and in the course of her employment. Of note, this case does not necessarily expand an Employer/Insurer idiopathic defense, but simply reiterates the prior holding of *Chaparral*.

Trucks, Inc. et al. v. Trowell, A09A1624 Ga. Ct. App. (February 8, 2010)

In *Trowell*, the Court of Appeals addressed the issue of change in condition versus new accident. The claimant worked full time as a truck driver for Trucks, Inc. where she drove a tractor-trailer to and from Florida, manually hooking and unhooking trailers using a hand crank. She sustained an injury to her shoulder while using the hand crank to roll down landing gear. The claimant reported the injury, it was accepted as a medical-only claim, and the claimant received medical treatment while continuing to work regular duty for Trucks, Inc. In the months following the incident, the claimant came to treat with an orthopedic surgeon who diagnosed positive impingement of her shoulder. She continued working her regular duty job until she resigned due to a work slowdown. The claimant began working as a truck driver for a different employer in the same month she resigned from Trucks, Inc. At her new job, the claimant did not use a hand crank, but did use a manual gear shift. She resigned from her second employer after only two months when work again got slow. The orthopedic surgeon then recommended shoulder surgery, but Trucks, Inc. refused to pay because of the issue of intervening employment. The claimant filed a hearing request seeking temporary total disability benefits commencing the first day that the orthopedic surgeon recommended she stop working to undergo shoulder surgery. She also sought payment of continuing medical treatment for her shoulder injury.

The ALJ found in favor of the claimant, declaring that the claimant's medical condition was the result of her initial injury rather than a change in condition or new accident. The State Board adopted the factual findings and conclusions of law of the ALJ as its own and affirmed the decision. The superior court affirmed, but on the ground that the claimant had proven a change in condition. The Court of Appeals found that the superior court erred in finding that the claimant's present disability resulted from a change in condition rather than a new accident because the prerequisites for establishing a change in condition were not met. The Court of Appeals stated that a disability cannot be the result of a change in condition unless there has been a prior award of benefits by the State Board for the initial injury. Importantly, while an employer/insurer's prior voluntary payment of income benefits is equivalent to a formal award, prior voluntary payment of medical benefits is not. Therefore, according to the *Trowell* Court, the facts did not support a finding of change in condition. The Court instead affirmed the superior court's ruling under the principle of right for any reason, as there was evidence to support the finding that the claimant's disability resulted from her initial shoulder injury rather than a change in condition or new accident. Notably, this case presents possible issues for Employers and Insurers who are the first party on the risk, even when a claimant returns to work for a subsequent employer. Of note in the *Trowell* case is that the claimant admitted her job duties at her second job were lighter. Further, the second employer was never brought into the claim, which may have played a significant role in placing responsibility upon the first employer.

For more information on these cases contact Ann Joiner at 404.888.6210 or ann.joiner@swiftcurrie.com.

Settlements Involving the Subsequent Injury Trust Fund

By Jon W. Spencer

Recently, the Subsequent Injury Trust Fund has introduced some new requirements and policies to be adhered to when settling a claim which has been accepted for reimbursement. Medicare Set Asides have increased the costs of settlement significantly, and the Fund is now working to limit and quantify those costs. Additionally, the Fund is working from a limited budget, and the timing of reimbursement has been affected.

The Fund has implemented several new policies for settlements involving Medicare Set Asides (MSAs). The costs involved with MSAs have sky-rocketed since the statutory changes regarding medications

went into effect last year. Furthermore, Centers for Medicare and Medicaid Services (CMS) have often been increasing the MSA costs by multiples of what was submitted to them by the MSA provider. At this point, the Fund has implemented new policies which require CMS approval of MSAs before finalization of any settlement. The Fund is also requiring language in settlement stipulations effectively requiring the reduction of the payment to the employee, or even the return of money by the employee to the employer/insurer, if CMS actually reduces a MSA. Contrary to popular belief, this does happen on occasion.

Next, in cases where there is a MSA and a physician has recommended a spinal cord stimulator, but the stimulator has not actually been installed, the Subsequent Injury Trust Fund will not settle a case for a two-year period after the date of the recommendation by the doctor. This is to avoid having CMS revise the MSA to include the cost of multiple spinal cord stimulator replacements. CMS only requires the last two years of medical records. Thus, this new policy will theoretically remove the costs of spinal cord stimulation from the MSA because the medical records will most likely not include references to a recommendation for a spinal cord stimulator.

Furthermore, the Fund has been repaying large settlements on an installment basis. Accordingly, any settlements from $75,000 to $150,000 will be reimbursed under an installment basis of $75,000 on the first payment and the remainder will be reimbursed on the anniversary of that first payment. For any settlement between $150,000 and $225,000, the first reimbursement will be $75,000, the second reimbursement will be another $75,000 on the first anniversary of the original payment and the remainder will be paid on the next anniversary date of the payment. Any settlements above $225,000 will be reimbursed in three equal installments. When being reimbursed on a large settlement, calendaring the dates to insure the payments are reimbursed in a timely manner is recommended. However, an additional request for reimbursement is not necessary to ensure reimbursement of the remaining installments.

Finally, as an aside, David Taylor has retired from the Subsequent Injury Trust Fund. Mr. Taylor was always a pleasure to work with and we certainly wish him the best in his future endeavors. Jim Beck, Sr. has now taken over as Deputy Administrator of the Subsequent Injury Trust Fund and will be responsible for signing future stipulations and reimbursement agreements.

For more information on this topic contact Jon Spencer at 404.888.6240 or jon.spencer@swiftcurrie.com.

1355 Peachtree Street, NE • Suite 300 • Atlanta, Georgia 30309
404.874.8800 • www.swiftcurrie.com

E-mail List

If you would like to sign up for the E-Newsletter version of The 1st Report, please send an e-mail to info@swiftcurrie.com with "First Report" in the subject line. In the e-mail, please include your name, title, company name, mailing address, phone and fax.

Save the Date

Atlanta Claims Association Reception
Thursday, April 15, 2010
5:00 - 7:00 pm
Gwinnett Center - Duluth, GA

"From Flames to Claims: The Anatomy of Arson in the SE"
Joint Property Seminar with McAngus Goudelock & Courie, LLC
Friday, April 30, 2010
8:00 am - 3:00 pm
The Ballantyne Hotel - Charlotte, NC

"The Good, The Bad, The Ugly"
Joint WC Seminar with McAngus Goudelock & Courie, LLC
Thursday, May 13, 2010
11:00 am - 1:30 pm
Villa Christina - Atlanta, GA

The First Report is edited by Charles E. Harris, IV, and Elizabeth L. Gates. If you have any comments or suggestions for our next newsletter, please contact Chad at chad.harris@swiftcurrie.com or 404.888.6108. or Elizabeth at elizabeth.gates@swiftcurrie.com or 404.888.6208.