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The 1st Report

A Workers' Compensation Update

Summer 2009

Statutes of Limitation: Section 82 Versus Section 104(b)

By Edwina M. Watkins

In some cases, a claimant may be barred entirely from bringing a claim for workers' compensation benefits. Essentially, a statute of limitations defense can completely bar an injured worker from obtaining benefits even when a claim might otherwise be compensable. Specifically, the Workers' Compensation Act includes two provisions which, when applicable, can bar liability on behalf of the employer/insurer.

Which Statue of Limitations Applies?

O.C.G.A. § 34-9-82(a) establishes the time period in which an injured worker can file an initial claim for workers' compensation benefits. This provision is sometimes referred to as the "all issues" statute of limitations. The general rule is that an injured worker must file a "claim" within one year after suffering an accident or injury. In the case of an injured workers' death, his dependents also have only one year from the employee's death in which to file a claim for death benefits. If the injured worker or the deceased worker's dependent fails to comply with these provisions, he is barred from recovering any workers' compensation benefits. Notably, a separate, specific statute of limitations exists for occupational injuries.

Section 82 also outlines specific exceptions to the general rule, which exceptions extend the time period in which an injured worker can bring an initial claim for benefits. If an employer and insurer pay "weekly benefits," then the statute of limitations is governed by O.C.G.A. § 34-9-104, which is outlined in more detail below. If the employer and insurer furnish "remedial treatment" for the work-related injury, then a claim must be filed within one year after the date the last remedial medical treatment was furnished by the employer.

Over the years, the Georgia Legislature and the courts have attributed very specific meanings to some of the terminology used in Section 82. Under this statutory provision, to "file" a claim refers to filing a WC-14 notice of claim or request for hearing with the State Board of Workers' Compensation and servicing copies of the WC-14 on all parties. O.C.G.A. § 34-9-82(c) and (d), Board Rule 82(b). Furthermore, the term "weekly benefits" includes the payment of any benefits under Sections 261, -262, or -263. *Mickens v. Western Prob. Det. Ctr.,* 224 Ga. App. 268, 534 S.E.2d 927 (2000). Under Section 82(a), "remedial treatment" does not include a mere evaluation/examination by a physician but does include more than just "medical" treatment, so as to encompass chiropractic care, physical therapy, psychological counseling, etc. The dispositive date for the purposes of the statute of limitations would be the date the claimant last received the remedial treatment (not the date the employer and insurer paid for the treatment). *Queen Carpet, Inc. v. Moynihan*, 221 Ga. App. 797, 472 S.E.2d 489 (1996).

O.C.G.A. § 34-9-104(b) establishes when an injured worker, who previously received income benefits and whose condition (i.e., wage-earning capacity, status as an employee or physical condition) was previously established by " award or otherwise," can file for additional income benefits. This provision is sometimes referred to as the "change in condition" statute of limitations. A successful defense under Section 104(b) can bar the injured worker from receiving additional compensation. However, a Section 104(b) defense does not bar a claim for additional medical benefits (at least for accidents occurring on or after July 1, 1978). Medical benefits are governed by O.C.G.A. § 34-9-200 and must be provided to an injured worker so long as the need for treatment is causally related to the original work injury. *General Ins. Co. of Am. v. Bradley*, 152 Ga. App. 600, 263 S.E.2d 446 (1979). Specifically, Section 104(b) does not apply to claims traditionally classified as "medical only," which would be governed by Section 82 and its statute of limitations.

The triggering factor under Section 104(b) is the "time of application" for a change in condition. An application for a change in condition must be made no more than two years from the date the employer and insurer last actually paid disability benefits under Section 261 (temporary total disability) or -262 (temporary partial disability). However, if an injured worker is filing only for benefits under Section 263 (permanent partial disability), an application must be made no more than four years from the date the last payment of income benefits under Sections 261 or -262 was actually made. As outlined in *United Grocery Outlet v. Bennett,* 292 Ga. App. 363, 665 S.E.2d 27 (2008), the date the last payment of benefits is "actually made" by the employer and insurer is controlling.

Practical Applications

In the case of either a Section 82 or Section 104(b) statute of limitations defense, a WC-3 notice of controvert should be filed asserting the defense. It is important to remember that a defense under either statutory provision is waived if it is not raised prior to or at least at the time of the first evidentiary hearing before the Administrative Law Judge. *St. Paul Mercury Indemnity Co. v. Oakley*, 73 Ga. App. 97,

35 S.E.2d 562 (1945) and Board Rule 82(a). Therefore, especially in the case of a Section 82 claim, it is important to make an early determination of whether a statute of limitations defense will be available. Then, the employer/insurer must have sufficient evidence to prove the various aspects required by the statute. Accordingly, it is important to properly document a file as to when income benefits are paid and when medical treatment is provided, as these records will serve as key evidence at an evidentiary hearing should a statute of limitations defense arise.

For more information on this topic, contact Edwina Watkins at 404.888.6175 or edwina.watkins@swiftcurrie.com.

Case Law Update

By Daniel A. Kiefer

Harris v. Peach County Board of Commissioners, 674 S.E.2d 36, A08A1846 Ga. Ct. App. (February 11, 2009)

The *Harris* case addresses the question of whether an injury with an unclear cause meets the statutory definition of "injury by accident arising out of and in the course of the employment" under O.C.G.A. § 34-9-1(4). In *Harris*, the claimant was employed as a custodian. While speaking with her supervisor, she noticed she had dropped a pill. When she bent down to pick up the pill, she heard something pop in her left knee and collapsed, suffering a dislocation of her left knee. Her physician opined this type of injury is typically a high-energy injury, but the claimant's body weight could potentially be enough force to cause the injury. The ALJ found the claimant's "peculiar" duties as a custodian included retrieving foreign objects off the floor, and therefore concluded her injury arose out of and in the course of her employment. The Appellate Division affirmed. The Superior Court reversed, finding the injury arose solely out of the claimant's obesity, a risk to which she was equally exposed on and off the job, citing *Chaparral Boats, Inc. v. Heath*, 269 Ga. App. 339 (2004) (knee injury while walking not compensable). The Court of Appeals reversed again, finding the Superior Court misapplied the applicable precedent in *Chaparral*. The Court noted the case turns on whether the claimant was performing a job duty at the time of the accident. This case may be viewed as an expansion of the standard for distinguishing compensable injuries from idiopathic or personal injuries as set forth in *Chaparral*.

Laurens County Board of Education v. Dewberry, A08A1503 Ga. Ct. App. (February 19, 2009)

The recent *Dewberry* decision once again addresses the often perplexing distinction between a "change in condition for the worse" and a "fictional new accident." In *Dewberry*, the claimant injured his right knee in 2000 and was diagnosed with a meniscal tear with underlying degenerative arthritis. After a few months of conservative treatment, he underwent right knee surgery on September 11, 2001, and was out of work for approximately six weeks following his surgery. The insurer on risk at that time paid all of the claimant's medical bills, but the claimant did not request and never received income benefits for his lost time, nor did he receive permanent partial disability benefits. In 2004, there was a change in carriers and after the change, the claimant returned for treatment of his progressive right knee discomfort. When the claimant's new authorized treating physician recommended a right knee replacement surgery and related it to the 2000 compensable accident, the first insurer controverted further treatment. The claimant ceased work because no suitable work was available and filed a claim for medical and indemnity benefits.

The ALJ found the claimant was forced to cease work due to the gradual worsening of his condition, which was at least partially attributable to his physical activities in continuing to work, under the precedent set by *Central State Hospital v. James*, 147 Ga. App. 308 (1978). The ALJ therefore found the claimant suffered a fictional new accident when he was forced to cease work in 2004, making the second insurer liable for benefits. The Appellate Division and Superior Court affirmed. The employer and second insurer argued to the Court of Appeals the claimant experienced a change in condition for the worse under O.C.G.A. § 34-9-104, which would make the first insurer liable for benefits. This argument was based on the fact the claimant had previously missed work as a result of his accident. The Court disagreed and affirmed the findings below, holding that without any prior workers' compensation award or voluntary payment of income benefits, the claimant's prior condition had not been "established by award or otherwise," and therefore the claimant could not have suffered a change in condition. The Court found the mere fact the claimant missed work following his initial accident did not preclude the establishment of a fictional new accident.

Tara Foods v. Johnson, A08A1628 Ga. Ct. App. (March 26, 2009)

The *Johnson* case addresses a request for catastrophic designation in light of the statute of limitations set forth in O.C.G.A. § 34-9-104(b). In *Johnson*, the claimant suffered a compensable injury in 1992. The last income benefit was paid August 28, 2001. The claimant filed a WC-14 Notice of Claim in November 2002, which included notice of a claim for a catastrophic designation, but no formal request for hearing. On August 22, 2005, the claimant filed a WC-14 Request for Hearing regarding payment of certain medical expenses, but the request again did not include the issue of a catastrophic designation. The medical issue was resolved between the parties by consent agreement, approved and signed by the ALJ on January 20, 2006, and included a statement that no additional issues remained before the court.

On September 15, 2006, the claimant filed a third WC-14, this time requesting a hearing on the issue of catastrophic designation and related income benefits. The ALJ found the claim time-barred, as more than two years had elapsed between the last payment of income benefits and the filing of the request for hearing. The Appellate Division affirmed. The Superior Court reversed, finding the application timely. The Court of Appeals reversed again, noting the filing of a notice of claim does not toll the statute of limitations in O.C.G.A. § 34-9-104(b), which requires a claimant's application for additional income benefits must

be made no more than two years from the date of the last actual payment of income benefits. Any application for additional income benefits, whether under a catastrophic theory or otherwise, is subject to this two-year statute. The Court found filing a notice of claim was insufficient to toll the statute and does not qualify as an "application for decision" under the statute.

City of Atlanta v. Roach, A09A0456 Ga. Ct. App. (April 8, 2009)

The *Roach* case addresses the scope of "superadded injuries" in a compensable worker's compensation claim. In *Roach*, the claimant suffered a traumatic brain injury, a fractured left hip and fractured pelvis in a motor vehicle accident in 2004. In 2005, the claimant's physician assigned a permanent partial disability rating and the claimant moved to New York. In 2006, the claimant drove to Atlanta to discuss with his supervisor a possible return to work. After making the return drive to New York in a single day, his hip felt sore. He placed a heating pad on his hip to relieve his discomfort and fell asleep. He awoke to find third degree burns on his leg, in an area he could not feel due to his injury. The claimant regularly slept with a heating pad on various parts of his body, including his back, arms and the part of his hip that retained sensation. The heating pad notably was not prescribed by a physician. The ALJ found the burn to be a superadded injury related to his work accident, and found use of the pad was reasonable and necessary. The Appellate Division reversed, finding the burn did not arise as a natural consequence of, or directly from, the original event, nor was it the result of reasonably required medical treatment prescribed for the treatment of the work-related injury. The Superior Court reversed these findings, but the Court of Appeals reversed yet again, finding the Appellate Division correctly analyzed the injury as neither a natural consequence of the compensable injury nor a result of reasonable and necessary medical treatment prescribed or authorized for the original injury. Therefore, the Court of Appeals found the claimant did not sustain a superadded injury. Had the authorized treating doctor prescribed the heating pad for the claimant, the Court's decision may have been different.

For more information on these cases, contact Dan Kiefer at 404.888.6217 or dan.kiefer@swiftcurrie.com.

Tips and Tools for Employers: Gaining Control Over a Claim from the Outset

By K. Martine Nelson

As defense attorneys, we are very often presented with claims where an employer's actions, taken long before a work injury occurs, make all the difference in the defense of a claim. Below, please find a synopsis of several tools or guidelines for employers to use when handling an on-the-job injury, which can help ensure an employer's control over a claim from the outset.

Post-Hire Medical Questionnaire

Having an employee complete a post-hire medical questionnaire is the first step in solidifying a *Rycroft* defense. When an employee is untruthful regarding their prior medical history and an employer can show they relied on the questionnaire in hiring the employee, there is a potential defense to the claim in its entirety. However, the questionnaire must be procured at the time of hire.

The Posted Panel of Physicians — Pre-Accident

Employers, along with the assistance of their insurers should make sure there is a valid panel posted at their location in accordance with O.C.G.A. § 34-9-201. Employers should ensure the panel is properly posted in a conspicuous location and make it available to all employees. It is important to ensure all employees understand the purpose and function of the posted panel of physicians. One method of ensuring employees understand the panel's purpose and function is for an employer to explain the purpose and function of the panel at the time of hire and have the new employee sign an acknowledgement at the time of hire that they were advised of and explained the purpose of the panel.

The Posted Panel of Physicians — Post-Accident

When an injury occurs, it is imperative employers again provide a copy of the panel to an injured worker for their selection of medical provider and again ensure the injured worker understands the purpose and function of the panel. It is also helpful to have an injured worker sign an acknowledgement that they were shown the panel at the time of their injury and were allowed to select a doctor from the panel.

Employer's Initial Investigation of the Claim

An initial "investigation" should include efforts to properly document how an injury occurred, determine any witnesses and obtain their statements and obtain a report of injury from the employee directly. Most effective, and assuming the circumstances allow, is to allow an employee to write out their own statement of how the injury occurred. For instance, many employers have their own form an injured employee can fill out and answer specific questions pertaining to when and how their accident occurred, what specific body parts were injured, whether they have ever before injured that body part and whether they have already seen a doctor for their injury. Some employers even include questions regarding whether the employee has any concurrent employment, and ask employees to list the names of current or recent treating physicians. Employee statements that are personally completed and signed by the employee, can serve as valuable pieces of evidence later in the life of a claim and also provide important information for a claims adjuster handling the claim at the outset.

Post-Accident Drug Testing

The Act includes an intoxication defense under O.C.G.A. § 34-9-17(b). Under this section, an employee's claim for compensation may be denied if the injury or death was due to intoxication by alcohol, or being under the influence of marijuana or other controlled substance. However, the controlled substance must be shown to be in "the employee's blood within eight hours of the time of the alleged accident." O.C.G.A. § 34-9-17(b)(1). With respect to alcohol, the substance must

be shown to be in "the employee's blood within three hours of the time of the alleged accident." O.C.G.A. § 34-9-17(a). For the results of laboratory testing to be legally admissible, the specimen must have been drawn by a medical examiner, licensed physician, registered nurse or medical or laboratory technician. Further, there must not only be proper identification of the sample tested, but a proper chain of custody, such as would render the report of the laboratory results admissible. Therefore, in order to ensure a legally admissible drug test result, which can be used to defend a claim based on the intoxication defense, the test should be done as soon as possible after the initial report of injury by a licensed medical professional and steps should be taken to ensure a proper chain of custody is in place, which will ensure admission into evidence at trial, if necessary. The testing must be done in accordance with O.C.G.A. § 34-9-415, the Drug Free Workplace portion of the Act.

For more information please contact Martine Nelson at 404.888.6224 or martine.nelson@swiftcurrie.com.

2009 Legislative Update

By Robert R. Potter

Legislative activity affecting the world of workers' compensation was limited in the 2009 Session of the General Assembly. H.B. 330, the Advisory Committee/Board recommended package, did pass. It was amended in the process to address a political issue involving contractors crossing state lines.

Sections 102 and 103 were amended regarding the term of art "notice of the award" to clarify that the twenty (20) days to appeal or to become final runs from the date of "issuance." With ICMS changes, the word "mailed" was changed to the word "sent." An addition was also made in these sections that notice to counsel of record of a party shall constitute service of notice to the party, if a copy of the decision was sent to the address of record of said party.

Section 207 was addressed to clarify an employer/insurer can acquire an employee's medical history before the date of an injury "with respect to any condition or complaint reasonably related to the condition for which such employee claims compensation." A decision in this past year created some controversy about the scope of a 207 form. This legislative remedy adopted the concept utilized successfully in Kentucky.

Section 223 was amended relative to a seldom used provision for appointments of a trustee by Superior Court to allow the trustee to deal with final settlements.

An effort late in the Session to change the standard for applicability of required coverage from 3 employees to 10 created considerable discussion as to whether that was actually a help for small business in this economy. The change was proposed to be in place for two years. Ultimately, that change did not pass.

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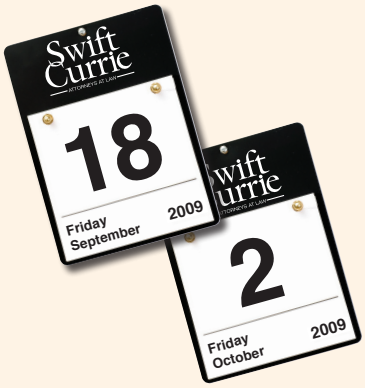
Save the Date

Multi-State WC Breakout Session at the Florida WC Conference
Wednesday, August 19, 2009
Orlando World Center Marriott

Swift Currie 2009 WC Seminar "Swift Currie Night Live"
Friday, September 18, 2009
More details coming soon
Cobb Energy Performing Arts Centre

Joint Litigation Seminar with McAngus, Goudelock & Courie, LLC
Friday, October 2, 2009
More details coming soon
Cobb Energy Performing Arts Centre



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