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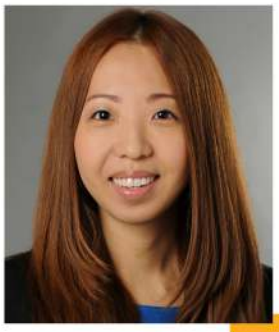

Psychological Claims and Super-Added Injuries: Learning One Concept to Better Understand the Other

By: Joanna S. Jang and Natalie E. Rogers

What do psychological injuries and super-added injuries have in common? For an adjuster handling Georgia claims, the most tempting answer may be: "neither concept makes sense to me." While these issues may seldom arise in our cases, each time they do, they are sure to make us groan and reach for our statute books. Understanding the definition of a psychological injury is a good first step towards mastering the concept of the super-added injury. With this goal in mind, let's address our first question:

WHAT MAKES A PSYCHOLOGICAL INJURY COMPENSABLE?

Under the Georgia Workers' Compensation Act (the Act), unless an employee suffers an "injury," she is not entitled to a recovery of benefits.[1] The Act defines an "injury" as something that arises out of and in the course of the employment and results "naturally and unavoidably" from an accident.[2] In accordance with this definition of an "injury," the general rule is that a psychological injury that does not arise "naturally and unavoidably" from some discernable physical occurrence is not compensable.[3] To put it more simply, a psychological injury not accompanied by a discernible physical injury is not compensable.

The physical injury requirement:

The general rule that a psychological injury must be accompanied by a physical injury is demonstrated by a memorable 1998 Georgia Supreme Court case. This case involved a park maintenance supervisor who, after a flood, helped recover some 400 caskets and 18 corpses.[4] During the recovery efforts, the head of a corpse broke away and landed in the employee's lap. The employee's hands even sank into the decayed flesh of one of the corpses. The employee subsequently received counseling and was diagnosed with post-traumatic stress disorder. He was unable to work for approximately six months. The Supreme Court acknowledged the employee suffered a "revolting employment related experience which caused an ensuing psychological injury." Nonetheless, the Supreme Court noted the employee suffered no physical injury at all. Because the employee's injury was purely psychological, it was not compensable.

The discernable occurrence requirement:

Not only must the psychological injury be accompanied by a physical injury, but the physical injury must also be a "discernible occurrence." For example, an employee was involved in a robbery at gunpoint, but never suffered any physical problem or physical injury as a result of the robbery.[5] She argued her resulting emotional and psychological problems stemmed from the act of the robber touching the side of her head with his gun, not from the fright of the robbery as a whole. The Superior Court of Georgia held there was a discernible physical occurrence, based upon the employee's testimony that when the gun hit her head, "[her] nerves went all to pieces." However, the Court of Appeals reversed, holding a mere touching is not a discernible physical injury.

[1] *Covington v. Berkeley Granite Corp.*, 182 Ga. 235, 184 S.E. 871 (Ga. 1936).
[2] O.C.G.A. § 34-9-1(4).
[3] *Southwire Co. v. George*, 266 Ga. 739, 470 S.E.2d 865 (1996).
[4] *Abernathy v. City of Albany*, 269 Ga. 88, 495 S.E.2d 13 (Ga. 1998).
[5] *W.W. Fowler Oil Co. v. Hamby*, 192 Ga. App. 422, 385 S.E.2d 106 (1989).

While the Act does not require the psychological injury to directly result from physical trauma, the physical injury must "contribute" to the continuation of the psychological trauma.[6] For example, an employee was awarded continued workers' compensation benefits because the emotional trauma associated with her injury was disabling, despite testimony from her doctors that she was no longer physically disabled because of her accident.[7] In a more recent case, a school bus driver had an asthma attack after exposure to fire-extinguisher residue and cleaning products on her bus.[8] She subsequently developed adjustment disorder and depression from anxiety about driving the bus and suffering another asthma attack. Even though the employee had a family history of asthma and was diagnosed with asthma before, the Georgia Court of Appeals found her psychic condition originated with the accident (a discernable occurrence), and her physical injury contributed to continuation of her condition. Her injury was therefore compensable.

[6] *Columbus Fire Dept./Columbus Consol. Gov't v. Ledford*, 240 Ga. App. 195, 523 S.E.2d 58 (1999).
[7] *Employers Ins. Co. of Ala. v. Wright*, 114 Ga. App. 10, 150 S.E.2d 254 (1966).
[8] *DeKalb Cnty Bd. of Educ v. Singleton*, 294 Ga. App. 96, 668 S.E.2d 767 (2008).

ONE STEP FURTHER: UNDERSTANDING SUPER-ADDED INJURIES

With an understanding of psychological injuries, we move next to the concept of the super-added injury. In fact, these concepts may often intersect as a super-added injury may involve a psychological injury. In general, an employee satisfies the definition of "super-added injury" where, as a result of a work injury to one portion of the body, she suffers injury to *other* portions of her body.[9] It generally arises as a natural consequence of the original event, and is not the result of a new event or accident.

Super-added injury involving a psychological injury:

An example of a super-added injury involving a psychological injury concerned an employee who contended she suffered schizophrenia as a result of her compensable, physical work injury.[10] Despite conflicting expert testimony regarding whether the physical injury directly caused the schizophrenia, the employee was awarded workers' compensation benefits for schizophrenia, and it was deemed a super-added injury.

[9] *J.M. Huber Corp. v. Holliday*, 228 Ga. App. 4, 491 S.E. 2d 74 (1997).
[10] *West Point Pepperell, Inc. v. Baggett*, 139 Ga. App. 813, 229 S.E.2d 666 (1976).

We note, however, that not all psychological symptoms resulting from a physical injury meet the threshold for super-added injuries. Instead, those symptoms must arise to the level of a mental or nervous disorder.[11] For example, as a result of a compensable work injury, an employee's index, middle and ring fingers were severed.[12] The administrative law judge awarded her disability benefits for a super-added injury, holding symptoms of mild depression and anxiety resulted from her work injury. The Georgia Court of Appeals reversed. The court characterized her symptoms of depression and anxiety as "natural, albeit unfortunate, responses to any type of severe physical injury." However, because there was no evidence to show these symptoms amounted to a further mental or physical disorder related to her injury, the court determined she did not suffer a super-added injury.

Other examples of super-added injuries:

Of course, claims for super-added injuries also arise outside of the context of psychological injuries. For such claims, the same standard applies: an employee satisfies the definition of "super-added injury" where, as a result of a work injury to one portion of the body, she suffers injury to *other* portions of her body.[13] Once again, it generally arises as a natural consequence of the original event, and is not the result of a new event or accident.

For example, an employee fell in a textile mill, sustaining lacerations, abrasions and contusions to her right foot.[14] The parties entered into an agreement that the employee was entitled to compensation for the right foot injury. Subsequently, she filed a claim related to her back based upon a change in condition. Her treating physician testified her work injury to the right

[11] *ITT Cont'l Baking Co. v. Comes*, 165 Ga. App. 598, 302 S.E.2d 137 (1983).
[12] *Id.*
[13] *J.M. Huber Corp. v. Holliday*, 228 Ga. App. 4, 491 S.E.2d 74 (1997).
[14] *Fieldcrest Mills, Inc. v. Richard*, 141 Ga. App. 702, 234 S.E.2d 345 (1977).

The Reality of Subrogation Liens in Georgia

By M. Ann McElroy

If an employee is injured in an accident arising out of and in the course of his employment through the negligence of a third party, an employer/insurer has a subrogation lien against the recovery that the employee can obtain from the third party.[1] This subrogation lien is in the amount of disability benefits, death benefits and medical expenses paid to or on behalf of the employee. However, the lien is recoverable only "if the injured employee has been fully and completely compensated, taking into consideration both the benefits received under [the Workers' Compensation Act] and the amount of the recovery in the third-party claim for all economic and noneconomic losses incurred as a result of the injury."[2] Economic losses are lost wages and medical expenses, while the noneconomic losses are damages such as pain and suffering and loss of consortium.

[1] O.C.G.A. § 34-9-11.1.
[2] *Id.*

An injured employee has a 2-year statute of limitations within which to file suit against the third party. Once the action is filed by the employee, an employer/insurer who has paid workers' compensation benefits retains a statutory right to intervene in the liability action pursuant to O.C.G.A. § 34-9-11.1. It should be noted that the employer/insurer's right to intervene does not expire with the 2- year statute of limitations, so long as the employee has filed a timely claim within the statute of limitations.[3] However, if no action is brought by the employee against the third party in the first year after the loss, the employer/insurer may file suit, either in its own name or in the name of the employee, to enforce its lien.[4]

The biggest hurdle an employer/insurer faces with regard to recovery of a subrogation lien is the determination of whether "the injured employee has been fully and completely compensated" for all economic and noneconomic losses with the judgment or settlement. If not, the employer/insurer cannot recover the subrogation lien. The Court of Appeals has clarified that the employer/insurer has the burden of proving the employee has been fully and completely compensated.[5] Basically, an injured employee has been fully and completely compensated when the trial court determines he has. Truthfully, full and complete compensation is almost impossible to show, especially given that most liability actions settle prior to a full trial. Liability releases in settlements do not contain breakdowns of the amounts being paid for each individual category of damages. Therefore, there often is no evidence of exactly how the funds are to be allocated in the settlement, so the employer/insurer cannot carry the burden of proving full and complete compensation.

[3] *Kroger v. Taylor*, 320 Ga. App. 298 (2013).
[4] O.C.G.A. § 34-9-11.1(c).
[5] *Ga. Elec. Membership v. Garnto*, 266 Ga. App. 452 (2004).

Given the difficulty in showing full and complete compensation, an employer/insurer must look for any way to obtain value from a subrogation lien in Georgia. Generally, plaintiffs and third party defendants consider subrogation liens a nuisance. A subrogation lien gives an employer/insurer leverage in a workers' compensation claim. The most often use for a subrogation lien is to reduce a workers' compensation settlement in exchange for waiving the lien and dismissing their intervention action. However, it must be noted the offset will not be dollar for dollar. Along the same lines, a subrogation lien can be used in a settlement with a ladder agreement. The employer/insurer can settle the workers' compensation claim and agree to dismiss the intervention in the liability claim in exchange for a set and agreed upon percentage of the employee's recovery in the third party claim. While the subrogation lien may not reduce the workers' compensation amount in that instance, there is hope for a subsequent partial recovery from the liability claim.

While employers/insurers who have paid workers' compensation benefits have the right to pursue subrogation liens against third parties who may be liable for the injuries to their employees in Georgia, there is a cost-benefit analysis that should be performed. Given that recovery on a subrogation lien is generally for pennies on a dollar, the lien amount should be substantial enough to warrant the costs associated with pursuing the lien. If only a couple thousand dollars have been spent on medical treatment and/or wage benefits for an injured employee, the potential litigation costs that may be spent in intervening and participating in or monitoring the liability claim will likely far exceed any amount of recovery or settlement offset. Accordingly, while an employer/insurer may have a subrogation lien and a technical right to intervene, it may not always be the best business decision.

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foot caused additional pressure on her spinal cord. The Georgia Court of Appeals upheld the Board order, which found a compensable super-added injury to the low back.

A useful example of an injury deemed not compensable involves an employee who sustained a left knee injury at work.[15] While on a walk in the woods unrelated to his employment, he tripped on a vine and fractured the same knee. The claim was denied. In their decision, the Georgia Court of Appeals relied upon the fact the employee had a new accident and fractured the same knee which had previously been injured on the job. In other words, the employee failed to satisfy two requirements of the super-added principle: (1) he failed to show an injury to "other" portions of his body; and, (2) he failed to show his injury was not the result of a new accident.

It is also important to note there must be a direct causal relationship between the original injury and the ultimate condition to prove a super-added injury. In *City of Atlanta v. Roach*, a City of Atlanta police officer suffered a compensable traumatic brain injury, as well as a fractured left hip, and a fractured pelvis in a motor vehicle accident.[16] This accident occurred in 2004. In 2005, the employee relocated to New York. In 2006, the employee drove to Atlanta to discuss with his supervisor the possibility of returning to work. He then drove back to New York. After the long drive, the employee's left hip felt sore and he thus placed a heating pad on his hip. The employee fell asleep with the heating pad on and sustained third degree burns to his left hip, an area where he could not feel due to the nerve damage from the original accident. The administrative law judge found the burn to be a super-added injury, but the Appellate Division reversed, finding the burn did not arise as a natural consequence of, or directly from, the original injuries. The Appellate Division also found the burn did not occur as a result of the reasonably required medical treatment because the heating pad was not prescribed by a physician. The Court of Appeals ultimately upheld the Appellate Division's findings and denied the occurrence of a super-added injury.

CONCLUSION

To recap, to be compensable, a psychological injury must satisfy two requirements: (1) it must arise from a physical occurrence; and, (2) the physical occurrence must be discernable. An understanding of this rule is a useful step towards mastering the concept of the super-added injury, as psychological injuries may in fact qualify as super-added injuries. To be compensable, a super-added injury must: (1) relate to an injury to a portion of the body other than that originally injured at work; and, (2) arise as a natural consequence of the original event, rather than a new accident. We can master these concepts by breaking them down into components, and building them upon one another.

For more information on this article, contact Joanna Jang at 404.888.6228 or joanna.jang@swiftcurrie.com; or Natalie Rogers at 404.888.6122 or natalie.rogers@swiftcurrie.com. ■

[15] *J.M. Huber Corp. v. Holliday*, 228 Ga. App. 4, 491 S.E.2d 74 (1997).
[16] *City of Atlanta v. Roach*, 297 Ga. App. 408, 677 S.E.2d 426 (2009).

Events

Workers' Compensation Seminar: "Swift Currie Today"
September 18, 2014
9:00 am - 3:30 pm
Offers 3 general and 2 ethics CE hours for GA adjusters.

Webinar: Apportionment in Georgia Law
September 25, 2014
1:00 pm - 2:00 pm EST
Offers 1 general hour of CE for GA adjusters pending approval by the GA DOI.

Joint Litigation Luncheon Presented with McAngus Goudelock & Courie
October 29, 2014 — Richmond, VA
December 3, 2014 — Raleigh, NC
Offers 3 ethics hours for insurance adjusters.

Property and Coverage Insurance Seminar: "Back to School with Swift Currie"
November 7, 2014
8:45 am - 3:00 pm

Most Swift Currie programs offer continuing education hours for insurance adjusters. To confirm the number of hours offered, for more information on these programs or to RSVP, visit www.swiftcurrie.com/events.

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