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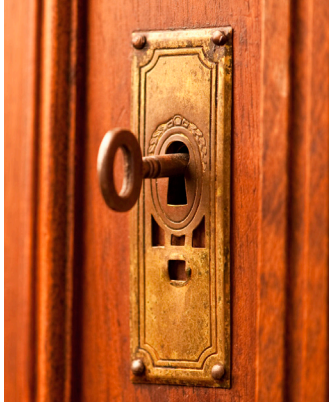


The 1st Report

A Workers' Compensation Update

Fall 2013

Timeless Values. Progressive Solutions.

Charge of the "Light Duty" Brigade — Limiting Exposure Through Return to Work Offers Under O.C.G.A. §34-9-240

By: R. Alex Ficker

Many are familiar with Alfred Lord Tennyson's immortal poem about the courageous charge of the "Noble Six Hundred" British light cavalry soldiers on Russian forces during the Crimean War in 1854. The Light Brigade charged into what Tennyson described as the "Valley of Death," despite the threat of grave danger. Many employers and insurers dealing with claims of injured workers may view light duty programs with similar trepidation, considering the risk of a new injury or aggravation of an existing injury, and the tedious and time consuming light duty job offer process, which can still require employers and insurers recommence of income benefits due to technical missteps and despite brief, half-hearted efforts to perform the suitable light duty work.

However, in light of recent changes to the language of O.C.G.A. § 34-9-240, specifically the addition of a minimum time period employees must work upon returning to light duty work, even if ultimately unsuccessful, before employers, insurers and/or servicing agents are required to recommence income benefits, employers should be encouraged and inspired to lead their own charge of the "Light Duty" Brigade to implement and maintain light duty programs. Indeed, light duty job offers are one of the more effective arrows available to employers and insurers in the somewhat limited arsenal available to limit exposure for income benefits. O.C.G.A. § 34-9-240(a) states: "If an injured employee refuses employment procured for him or her and suitable to his or her capacity, such employee shall not be entitled to any compensation at any time during the continuance of such refusal unless in the opinion of the Board such refusal was justified." Therefore, if an employee unjustifiably refuses a suitable job offer, the employer and insurer can deny entitlement to income benefits in situations where income benefits have not been paid, or, in those cases involving employees receiving income benefits, the opportunity to unilaterally suspend those benefits based on the employees actual return to work or unjustified refusal to do so. As studies show the longer an injured employee stays out of work, the more likely he or she will not return to work, the importance of effective light duty programs in limiting a claim's exposure is readily apparent and can result in dramatic decreases not only in the amount of benefits paid to injured workers, but also the number of claims involving the payment of income benefits.

The Georgia Worker's Compensation Act and the State Board of Workers' Compensation Rules have several provisions controlling the method and manner of light duty job offers. In order to properly implement and adhere to these provisions, however, it is important to understand the critical role of communication in the process. Ineffective communication can stymie or even negate the effect of returning employees to light duty work, as even slight deviations or oversights can invalidate the job offer.

First, the employer and insurer must communicate with the authorized treating physician to ensure the physician is aware light duty work is available and restrictions can be accommodated. In considering the light duty position to submit to the authorized treating physician for approval, it is important to remember the employee must not only be physically capable of performing the job offered, but must also have the ability and skill to perform the job, and the location of and travel to and from the position must be reasonable so as not to disrupt the employee's life. See *City of Adel v. Wise*, 261 Ga. 53 (1991). Thus, communication between the individual preparing the job description and the individual submitting the job description to the physician, be it an adjuster or attorney, will ensure these foundational requirements are satisfied. In addition to effective communication with the authorized treating physician and the parties preparing and submitting the job description, Board Rule 240(b)(1) also requires the employer and insurer notify the employee and, if applicable, the employee's attorney, of the submission of the light duty job offer to the authorized treating physician at the time of submission. Failure to provide this notice can negate the entire process.

Once the light duty position is approved by the authorized treating physician, who must have examined the employee within the sixty days before the approval, the job and job offer

must then be formally communicated the employee. When an employee is not receiving income benefits, the employer can simply offer the available and suitable position to the employee and his or her attorney. However, when an employee is receiving income benefits, a Board Form WC-240 must be used to document the offer of light duty work. Along with this form, the job offer must include either the medical note approving the submitted job description or the job description signed by the authorized treating physician. This offer must also be communicated at least ten days prior to the date the employee is scheduled to begin the light duty position. Again, failure to adhere to this notice requirement can serve as justification to refuse the light duty job offer.

If the employer and insurer strictly adhere to these procedures, the employee is under a legal obligation to attempt that job pursuant to O.C.G.A. § 34-9-240 (a) and (b). If the employee unjustifiably refuses to even attempt the offered light duty job, the employer and insurer may unilaterally suspend income benefits. However, in situations where the employee attempts a light duty job, but is "unable" to perform the job for more than fifteen working days, income benefits must be immediately reinstated, and the burden is on the employer to prove the employee is not entitled to continuing benefits. (See O.C.G.A. § 34-9-240(b)(1) and Board Rule 240(c) (i)).

Until only recently, there was no minimum threshold for the length of the employee's attempt to return to light duty work. This often led to situations involving "attempts" to work for only a few hours or even minutes, before the employee declared an inability to perform the available light duty work, and the employer and insurer were forced to recommence income benefits. However, effective July 1, 2013, O.C.G.A. §34-9-240 was amended to require an employee to attempt the proffered light duty job for eight (8) hours or one scheduled work day, whichever is greater, before the employer is required to recommence income benefits. This change applies to all dates of accident for job offers made pursuant to O.C.G.A. §34-9-240 after July 1, 2013. This certainly represents a positive step towards limiting employee's ability to make the often tedious implementation of the light duty job offer process an exercise in futility.

Therefore, through effective communication, employers and insurers can capitalize on the recent changes to the provisions of O.C.G.A. §34-9-240 to more effectively limit income benefit exposure through light duty job offers, such that all employers should, to paraphrase Tennyson,

> Honor the charge they made
> Honor the Light Duty Brigade,
> Noble two forty.

For more information on this topic, contact Alex Ficker alex.ficker@swiftcurrie.com or 404.888.6215.

Reid v. Metropolitan Atlanta Rapid Transit Authority

By: Charles E. Harris, IV

In *Reid v. MARTA*, the Court of Appeals addressed the two-year statute of limitations for income benefits under O.C.G.A. § 34-9-104, as well as the meaning of a "change of condition." Of note, the parties stipulated to the facts of the claim at the hearing, allowing the Court of Appeals to apply a de novo standard of review.

The employee was injured at work in October of 1999 and received TTD benefits between October 1999 and June 2002, after which he returned to work and benefits were suspended. Many years later, in May 2010, the employee sought payment of late payment penalties on 12 weeks of those TTD benefits. The employer declined, asserting the two-year statute of limitations outlined in O.C.G.A. § 34-9-104 barred entitlement to those penalties. At the hearing, the employer stipulated that 12 of the TTD payments were late, and penalties in fact due, but never paid by the employer. In denying the

400-Week Cap on Medical Benefits: Litigation and Settlement Considerations

By: Katherine E. Soublis

The 2013 legislative session of the Georgia General Assembly passed House Bill 154, which revised portions of the Georgia Workers' Compensation Act. A key provision of HB 154 added a cap on medical benefits for all injuries occurring on or after July 1, 2013. Pursuant to the newly revised O.C.G.A. § 34-9-200(a)(2), medical exposure for all non-catastrophic injuries occurring on or after July 1, 2013 shall be capped at 400 weeks. For those injuries occurring on or before June 30, 2013, an employer is still required to provide "lifetime" medical benefits, so long as the employee can demonstrate his or her condition is related to the original work accident.

In practicality, the vast majority of cases never reach the 400-week cap, and are instead either settled or designated catastrophic before 400 weeks elapse. The greatest immediate benefit of this new legislation relates to claim exposure and settlement considerations, as an employer/insurer will now only need to project medical costs through a 400-week cap. Arguably, Medicare Set-Aside (MSA) projections for all accidents occurring on or after July 1, 2013, will no longer be based on a claimant's full life expectancy, but instead only account for medical through the new 400-week cap. It remains to be seen how the Centers for Medicare and

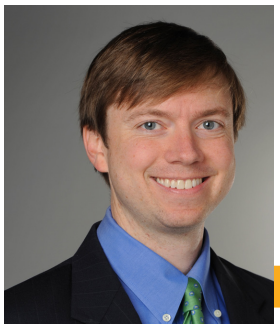
employee's claim at the lower levels, the State Board and Superior Court ruled the claim for penalties constituted a "change in condition," now barred by the two-year statute of limitations. More specifically, they found the payment of workers' compensation benefits by an employer constituted a "condition," and that when an employee seeks to recover benefits that were owed but never paid, the employee is seeking "additional" benefits as a result of a change in condition. Therefore, the two-year statute of limitations applies, and the claim for penalties was barred.

In contrast to a long history of both statutory and case law, the Court of Appeals found the two-year statute of limitations outlined in O.C.G.A. § 34-9-104 inapplicable, as the employer/insurer failed to pay the late payment penalties due the employee nearly ten years earlier. The Court rationalized that the employee was not seeking to recover the statutory late-payment penalties because his physical or economic condition had changed, but rather because the penalties constituted benefits due him as a matter of law under O.C.G.A. § 34-9-221. Of noted importance to the Court of Appeals: the employee was not seeking modification of a prior calculation of amounts owed or modification of a prior ruling, this represented his "initial" claim for benefits, and there had been no earlier establishment of his condition by State Board award or otherwise. This reasoning would seem to reopen a line of analysis by the Court of Appeals that the legislature specifically intended to avoid when they revised the statute 23 years ago.

Taken in context, it could be argued this decision implies the two-year statute of limitations does not apply for any case in which an employer/insurer has not paid all benefits "due" an employee. This could foreseeably encompass late payment penalties, missed TTD checks and correct calculation of the Average Weekly Wage or Temporary Total Disability rate, even if a substantial amount of time has passed since last payment. The *Reid* decision would arguably allow for the resurrection of any "unsettled" claim, if an employee was never provided all the benefits and penalties to which he or she was due. While in *Reid*, the claimant was only awarded late payment penalties, it could be argued the payment of those penalties would then resurrect the two-year statute of limitations for an additional "change in condition" claim. Clearly, the fallout from this opinion could be extensive and far-reaching, and may initiate a wave of litigation on cases which were previously viewed as barred by the two-year statute of limitations. While *Reid* has been presented to the Supreme Court of Georgia for review, it is unknown at this juncture whether they will agree to hear the case on appeal.

If you should be faced with a request for payment of old penalties or benefits, given the complexities of this case, we would recommend you refrain from any voluntary issuance of those benefits until consulting an attorney regarding the specific facts of your claim.

For more information on this case, contact Chad Harris at chad. harris@swiftcurrie.com or 404.888.6108. ■



Breaking the Chain: When is it Appropriate to Suspend or Deny Benefits with an Intervening Accident?

By: Mark E. Irby

Over the course of handling compensable claims, claimants will often paint the picture to the employer/insurer that there is not much going on in their lives as they continue to collect their TTD benefits and pursue ongoing medical treatment. Despite what appearances they may try to convey, life does actually go on for many of these claimants. Occasionally, "life" may lead to subsequent accidents for a claimant that are completely unrelated to his or her original work injury. When another accident occurs, it is certainly worth exploring whether that accident could have broken the "chain of causation" of a claimant's disability, and whether there could be an opportunity to suspend or deny the claimant's benefits.

Medicaid Services (CMS) will treat these cases under the new law, and whether they will accept cost projections accounting for only 400 weeks.From an employer/insurer's standpoint, the new law clearly reduces the number of cases that carry on for years, for those claimants receiving solely medical benefits. The legislation could also have a significant impact on medical-only claims where the claimant has not missed any time from work, but has pursued ongoing medical treatment.

As the 400-week cap on medical benefits applies only to cases that are not designated catastrophic, this new provision may encourage claimants to file for catastrophic designation to extend entitlement. Consequently, there may be a rise in litigation over whether a claim should be designated as catastrophic pursuant to O.C.G.A. § 34-9-200.1(g). This could also lead to an increase in the number of claimants who apply for Social Security Disability benefits in an effort to bolster a claim for catastrophic designation pursuant.

While there will certainly be advantages and disadvantages for both parties under the new cap on medical benefits, the long-term effects of the legislation are difficult to predict. From the employer/insurer's standpoint, the cost of insurance premiums should seemingly decrease with the limitation on medical benefits. On the other hand, we would anticipate an increase in filings for catastrophic designation in order to circumvent the cap and obtain lifetime medical benefits. This could accordingly result in increased litigation and attorney involvement in the coming years as a result of the new legislation.

For more information on this article, contact Katherine Soublis at katherine.soublis@swiftcurrie.com or 404.888.6216. ■

Under O.C.G.A. § 34-9-204(a), "No compensation shall be payable for the death or disability of an employee if his or her death is caused by or, insofar as his or her disability, may be aggravated, caused, or continued by a subsequent non-work related injury which breaks the chain of causation between the compensable injury and the employee's disability." To contend the intervening accident broke the chain of causation, the employer/insurer bears the burden of proof under Board Rule 204. Moreover, the employer/insurer may not unilaterally suspend benefits on that basis, but must first obtain an order from the State Board authorizing them to do so. *Id.*

Generally, a subsequent intervening accident will not keep the claimant from receiving benefits if the claimant is already disabled due to a work related accident. In *Royal Indem. Co. v. Manley*, 115 Ga. App. 259 (1967), the Court of Appeals held the employer/insurer's change of condition action seeking a suspension of TTD benefits should be denied. The claimant in *Royal Indem.*, was out of work on TTD benefits when he was involved in an off-the-job automobile accident, which resulted in injuries. Ultimately, the court held the employer/insurer could not demonstrate the unrelated injuries were the true cause of disability and did not constitute a change in condition with respect to his compensable work injuries.

However, the Court of Appeals has found a change of condition where the claimant fully recovered from an on the job injury and no longer suffered disability, then subsequently became disabled due to injuries suffered in an automobile accident. *See Williams Bros. Lumber Co. v. Magee*, 162 Ga. App. 865. The Court in *Williams Bros.* noted, "This is true even though the claimant is disabled *if such disability is due to causes unrelated to the on the job injury*. If this were not true, a claimant could sustain an on the job injury and while recovering from the on the job injury sustain another injury which permanently disabled him and even though he recovered from the first injury the employer would never be able to prove a change in condition." *Id.* (emphasis added).

A question has also been raised as to whether a claimant can be barred compensation if the claimant negligently aggravates his injury outside of the workplace. *Hallisey v. Fort Howard Paper Co.*, 268 Ga. 57 (Ga. 1997). In *Hallisey*, the claimant suffered a back injury at work. Medical records then showed that the claimant further aggravated his back injury while playing golf. The Court of Appeals found the claimant's negligence in playing golf "broke the chain of causation between his initial injury and resulting disability." *Id.* However, the Supreme Court reversed that ruling because "the ALJ determined that Hallisey's disability was an acceleration and aggravation of an injury which arose out of and in the course of his employment, and there is evidence to support that determination." *Hallisey* at 60.

I previously handled a claim in which a claimant suffered a compensable injury to his left forearm. Approximately 12 weeks later, he suffered a subsequent intervening accident at his home when he attempted to pick up a burning grease pan, and the grease ultimately burned him as he fell backward wile attempting to get the burning pan out of his house and he fell backward. The claimant testified that the burn injuries kept him completely out of work. Meanwhile, we presented medical evidence that showed his forearm fracture had healed. The ALJ in that case ruled that the O.C.G.A. § 34-9-204 standard of intervening accident had been met, and the Employer/Insurer should not have to bear the open-ended responsibility for a disability that was clearly not caused by the original work injury.

Of course, each claim involving a subsequent accident has unique and distinct circumstances. One should always look for evidence of improvement in the claimant's medical condition prior to the intervening accident. Review medical records and physical therapy notes closely, looking for any reference to activities at home or outside the workplace which could impact your case, such as falls or motor vehicle accidents. Periodically pull updated ISO claim search reports on stale claims. If there is reference or evidence to an unrelated event in these records, it is worth pursuing a medical opinion from authorized treating physician that the claimant would be able to return to work, but for the intervening accident. If you can obtain an updated work release or statement from the doctor as to the root cause of disability in these scenarios, you may have sufficient evidence to petition the State Board for a change in condition.

For more information on this topic, contact Mark Irby at mark.irby@swiftcurrie.com or 404.888.6118.

Events

Joint Litigation Luncheons Presented with McAngus Goudelock & Courie
October 1, 2013 — Charlotte, NC
October 3, 2013 — Raleigh, NC
October 17, 2013 — Orlando, FL
Details to come

Swift Currie Annual Property and Coverage Insurance Seminar
November 8, 2013 — Atlanta, GA
Cobb Energy Performing Arts Centre
Details to come

For more information on these programs or to RSVP, visit www.swiftcurrie.com/events.

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The First Report is edited by Chad Harris, Doug Cobb and Amanda Conley. If you have any comments or suggestions for our next newsletter, please email chad.harris@swiftcurrie.com, doug.cobb@swiftcurrie.com or amanda.conley@swiftcurrie.com.