The 1st Report
A Workers' Compensation Update

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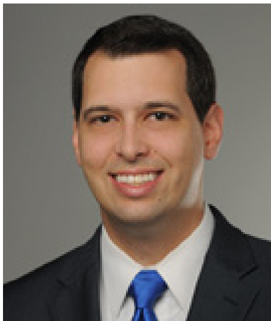

Recent Case Law Update

By: Damien C. Rees

Burdette v. Chandler Telecom, LLC, 779 S.E.2d 75 (Ga. Ct. App. 2015)

In *Burdette*, a cell tower technician fell while descending from a tower and sustained injuries. The employer's policy prohibited descending the tower by controlled descent, similar to rappelling. Despite this policy and the supervisor's advice that there was no safety rope available, the employee used controlled descent. After a hearing, the Administrative Law Judge (ALJ) barred the employee from recovery because he engaged in "willful misconduct" under O.C.G.A. § 34-9-17(a). Upon appeal, the Appellate Division affirmed the ALJ's findings. The Superior Court failed to consider the appeal within 60 days, and the Board's decision was affirmed by operation of law.

The Court of Appeals noted O.C.G.A. § 34-9-17(a) bars compensation if the injury is due to the employee's willful misconduct, "including intentionally self-inflicted injury, or growing out of his or her attempt to injure another, or for the willful failure or refusal to use a safety appliance or perform a duty required by statute." The Court of Appeals stated willful misconduct must rise to the level of a quasi-criminal act and go beyond a violation or disregard of a safety rule. *See Wilbro v. Mossman*, 207 Ga. App. 387, 427 S.E.2d 857 (1993). For conduct to rise to the level of a quasi-criminal act, an employee must know it will likely result in serious injury, or he must act with wanton and reckless disregard of the probable consequences. The Court of Appeals pointed out while the employee in *Burdett* engaged in a hazardous act in which the danger was obvious, the employer required training for controlled descents and employees performed them in emergencies. Thus, the employee did not know the *likely or probable* result of using controlled descent was going to be sustaining a serious injury.

The Court of Appeals concluded as a matter of law, the employer could not satisfy its burden of proof because the employee's misconduct did not rise to the level of a quasi-criminal act. The Court of Appeals also stated the mere violation of a work rule or instructions and engaging in a hazardous act was insufficient to constitute willful misconduct to bar recovery entirely.

Burdette forces courts to narrowly construe the meaning of "willfulness" under O.C.G.A. § 34-9-17(a). This can be a difficult defense and if you encounter a potential willful misconduct claim, we urge you to contact your Swift Currie attorneys for guidance.

Barnes v. Roseburg Forest Products Company, et al., 333 Ga. App. 273, 775 S.E.2d 748 (2015).

The Georgia Court of Appeals wrestled with statute of limitation issues in catastrophic claims. In *Barnes*, the employee required an immediate partial amputation of his left leg after an accident in August 1993, and his claim was accepted as catastrophic. The employee started receiving Temporary Total Disability (TTD) benefits, but they were suspended in January 1994 when the employee returned to light duty work. The employee's Permanent Partial Disability (PPD) benefits were paid in full by May 1998. In 2006, the employer sold the company to a new employer, and in 2008, the new employer eliminated the employee's supervisory position. The employee's new position was physically demanding, and he experienced swelling in his leg near the prosthesis. On September 10, 2009, while the *second* insurer provided coverage, the employee was terminated.

In August 2012, the employee filed a Notice of Claim against the first employer for recommencement of TTD benefits. On November 30, 2012, the employee filed a

Notice of Claim against the second employer/insurer for TTD benefits under a fictional accident date of September 11, 2009. At the hearing, the ALJ denied the employee's requests, holding O.C.G.A. § 34-9-104(b)'s two-year statute of limitations for a change in condition barred the employee's request for TTD benefits under the 1993 claim and O.C.G.A. § 34-9-82(a)'s one-year statute of limitation barred the 2009 claim.

The employee appealed the decision, but both the Board and the Superior Court affirmed the decision. On discretionary appeal, the Court of Appeals reversed and remanded the matter.

First, regarding the two-year statute of limitations for a change in condition, the Court of Appeals reasoned the Act did not contemplate a situation in which an employee with a catastrophic injury returns to work with limitations and requests TTD benefits after his job has been eliminated more than two years after the last benefit payment was issued. The Court of Appeals also stated the fact O.C.G.A. § 34-9-261 places a 400-week cap on TTD benefits for non-catastrophic injuries, but allows payment of weekly benefits "until such time as the employee undergoes a change in condition for the better" for catastrophic injuries, shows the Legislature intended to treat catastrophic claims differently. Finally, the Court of Appeals stated applying the humanitarian nature of the Workers' Compensation Act meant O.C.G.A. § 34-9-104(b)'s two-year statute of limitations did not apply to catastrophic claims.

Regarding the one-year statute of limitations under O.C.G.A. § 34-9-82(a), the Court of Appeals pointed out the last remedial treatment furnished by the employer was on December 2011, which was less than one year before the employee filed his Notice of Claim on November 30, 2012, for the September 11, 2009 fictional accident date. Although the remedial treatment was paid by the first insurer, not the second insurer, the Court of Appeals determined the first insurer was the alter-ego of the employer. As such, the employer provided remedial treatment in 2011, and the statute was tolled for one year following treatment. Therefore, the Court of Appeals concluded the employee timely filed his claim in 2012 against the employer, and the first insurer's actions were imputed to the second insurer.

Georgia's Supreme Court granted a writ of certiorari. Oral arguments took place on February 6, 2016, and Swift Currie partner, Michael Rosetti, presented compelling arguments for the employer. While the decision is pending, we recommend contacting your attorneys at Swift Currie for any questions about catastrophic claims where an employee is working.

For more information on this topic, contact Damien Rees at 404.888.6190 or at damien.rees@swiftcurrie.com. ■

The Art of Properly Suspending Benefits on a Form WC-2

By: Joanna S. Jang and Natalie E. Rogers

You have been paying an employee weekly income benefits every week for the past year. Now you find out you can finally suspend his benefits! Does this mean you can just stop issuing benefits today? The answer depends on which of the 11 boxes under Section C of Form WC-2 we can select. Regardless of whether we can suspend the benefits today or not, we *must* prepare a WC-2 and file it with the State Board, and send a copy to the employee. O.C.G.A. § 34-9-221(c).

Failing to properly file a WC-2 can lead to costly consequences. For example, an employer suspended an employee's Temporary Total Disability (TTD) benefits on August 11, 1997, and filed a WC-2, stating the benefits were being suspended due to the employee's non-compliance with medical treatment. *Russell Morgan Landscape Management v. Velez-Ochoa*, 252 Ga. App. 549, 556 S.E.2d 827 (2001). After a hearing, the ALJ concluded the suspension was actually based on the employee's ability to return to work without restrictions. *Id.* As a result, the ALJ held the employee was not given fair notice of the employer's ground for suspension and ordered the employer to pay an additional 10 days of TTD benefits, $1,100.00 in attorney's fees, and a civil penalty of $1,000.00. *Id.* On appeal, the Appellate Division ordered the employer to pay TTD benefits up to and through the date of the hearing (from August 11, 1997, to January 8, 1999!), and the Court of Appeals affirmed the decision. *Id.*

To avoid such a costly mistake, take care to properly file the WC-2 based upon the appropriate scenario. Section C of the WC-2 contains 11 different reasons for suspending benefits. This is where we have to pay particular attention.

Howdy Neighbor: How Your Georgia Injury Could Become an Alabama Claim

By Bob E. LeMoine

Did you know that Swift Currie is now fully operational in Alabama? Hopefully. Did you also know that your claimant's Georgia injury may be brought as a litigated matter in Alabama, even if you have settled the claim in Georgia? If not, read on. There are several circumstances under which a claimant injured out of state may establish jurisdiction in Alabama for a work-related injury.

Under Section 25-5-35(d) of the Alabama Workers' Compensation Act, an employee who is injured out of state can bring a claim in Alabama under the following circumstances: (1) the employment was "principally localized" in Alabama; (2) the employee was working under a contract of hire made in Alabama, and the employment was not localized in any one state; (3) the employee was working under a contract of hire made in Alabama and localized in another state, but that state's workers' compensation law is not applicable to the employer; or (4) the employee was working under a contract made in Alabama for employment outside of the United States.

The Act states that an individual's employment, as contemplated above, is "principally localized" in a particular state when his employer has a place of business in that state and the individual regularly works at or from that place of business or, if he "is domiciled and spends a substantial part of his working time in the service of his [or her] employer" in the state. Code of Ala. § 25-5-35(b). For example, assume a delivery driver lives in Columbus, Georgia, but makes daily runs out of a distribution center in Auburn, Alabama. This driver's employment would be said to be "principally localized" in Alabama. If the driver were injured while making a delivery in Georgia as part of his usual job duties, he may bring a claim in Georgia to recover for his injuries. He could also, however, pursue a claim in Alabama because his employment is "principally localized" in Auburn.

We also frequently see employees who live in Alabama, but are injured while working in Georgia attempt to bring claims in Alabama. To establish Alabama jurisdiction in this instance, the employee would need to show he was hired in Alabama and was not "principally localized" in any other state at the time of his injury. For example, imagine an individual living in Alabama who is recruited to work for a national trucking company based in Georgia. He agrees upon the terms and compensation over the phone with the employer, then travels from Alabama to Georgia to take the job. He completes employment screening and signs paperwork at the company's Georgia headquarters and then hits the road, but is injured while still in Georgia or on a later trip passing through.

Believe it or not, this individual may still be able to establish jurisdiction in Alabama, in addition to Georgia, under a theory that his "contract of hire" was made in Alabama. Alabama courts have held that a contract of hire can still be "made in Alabama" when an employee takes an affirmative action in accepting an offer of employment in Alabama, such as "a worker's responding to an offer of employment by embarking on a journey to the place of employment in a sister state and presenting himself there for work." *Ex Parte Robinson*, 598 So.2d 901, 904 (Ala. 1991). The employee would still have to establish his employment was not localized in any one state, however, to be successful in establishing Alabama jurisdiction under this theory.

Subsections 25-5-35(d)(3) (employer not subject to other state's workers' compensation laws) and (d)(4) (employment outside the United States) are less commonly encountered in jurisdictional analyses, particularly with regards to considerations between Alabama and Georgia.

When handling a claim that could be brought in either Georgia or Alabama, it is important to note that Georgia benefit payments or settlement will not automatically preclude a claim being brought in Alabama. However, both states allow a credit for benefits received in the other in cases of mutual jurisdiction. *See* Code of Ala. § 25-5-35(e), O.C.G.A. § 34-9-242. In order to prevent duplicate claims, it is important to ensure that any settlement agreement reached includes a release of claims in all applicable jurisdictions.

For more information on this topic, contact Bob LeMoine at 205.314.2405 or bob.lemoine@swiftcurrie.com. ■

Scenario 1: The Employee Returned to Work

If the employee actually returned to work, our options are box numbers 1 through 3. If the employee returned to full duty work, box 1 is the correct choice. If the employee returned to light duty work and is earning the same or higher wages as before the accident, box 2 is the correct choice. If the employee returned to light duty work, but is earning less wages than before the accident, box 3 is the correct choice. If we select box 3, we also need to fill out Section B, reflecting the commencement of Temporary Partial Disability (TPD) benefits. For box numbers 1 through 3, we can suspend from the date the employee returned to work. *See* Board Rule 221(i)(1). So, file the WC-2 and suspend now.

Scenario 2: The Employee Was Released, but Did Not Return to Work

If the employee was released to light duty or full duty work, but remains out of work, our options are box numbers 4 through 6. If the employee was released to full duty work, but did not return to work, box 4 is the correct choice. In this case, we must provide 10 days' notice of the suspension of benefits, and must attach the full duty release to the WC-2. *See* Board Rule 221(i)(4). To avoid any dispute sufficient notice was provided, we recommend providing 13 days' notice of the suspension of benefits. It is also important to remember the authorized treating physician (ATP) must have examined the employee within 60 days of the full duty work release. *See* Board Rule 221(i)(4). However, that deadline does not apply to the Board form itself – you may file the WC-2 more than 60 days from the date of the full duty release, so long as the release itself was issued within 60 days of an appointment with the ATP.

As a reminder, if the employee remains out of work, but is on light duty work restrictions for 52 consecutive or 78 aggregate weeks after a WC-104 is properly filed, we can unilaterally convert TTD benefits to TPD benefits. In this case, box 5 is the correct choice. If we select box 5, we also need to fill out Section B, reflecting commencement of TPD benefits.

In some cases, we can also suspend benefits if the employee refuses a light duty job approved by his ATP and offered on a Form WC-240. To do so on a WC-2, the employee must have attempted the job for less than 8 cumulative hours or one scheduled work day. In this case, box 6 is the correct choice. If we select box 6, we also need to attach a copy of the WC-240.

Scenario 3: The Weekly Cap on Benefits

A WC-2 should also be filed when the weekly cap on benefits has been reached. In this case, we use boxes 7 through 10. So long as a case has not been deemed catastrophic, an employee may receive TTD benefits for a maximum of 400 weeks. Once 400 weeks have passed, suspend using box 7. If the entire permanent partial disability (PPD) benefits have been paid, suspend using box 8. An employee may receive TPD benefits for a maximum of 350 weeks. Once 350 weeks have passed, suspend using box 9. No advance notice is needed to suspend once the cap is reached. So, file the WC-2 and suspend now.

Scenario 4: A Controverted Claim

The last scenario covered on the WC-2 is where a claim has been controverted within 60 days of the due date of the first payment. In this case, we use box 10. Remember, since the first payment of benefits is due on the 21st day after knowledge of the injury, we have 81 days after learning of the injury to suspend using box 10. In this case, a WC-3 should simultaneously be filed, and a copy should be sent to the employee and his attorney. Importantly, the employer/insurer must pay the employee all the benefits due before filing the WC-2 and WC-3. The Court of Appeals held a controvert was entirely invalid when the employer/insurer failed to pay all benefits due prior to controverting the claim and suspending on a WC-2. *Crossmark, Inc. v. Strickland*, 310 Ga. App. 303, 71 S.E.2d 430 (2011).

In short, do not forget about the WC-2! As always, if you need assistance with preparing or filing the WC-2, contact your Swift Currie attorney.

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

Events

WC WEBINAR:
The Law, The Job, The Deal – A Discussion of Recent Legislative Changes in Georgia, Utilizing the Light Duty Job Offer Process, and the Best Practices for Claim Settlement
May 4, 2016
1:00 - 2:00 pm EST

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