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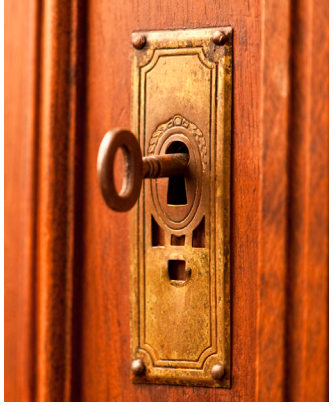

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Timeless Values. Progressive Solutions.

Workers' Compensation Liability and the Telecommuting Worker

By: K. Mark Webb

With improvements in remote access technology and employers' desire to cut down on overhead expenses, it is becoming increasingly common for businesses to offer formal telecommuting arrangements for its employees. Telecommuting arrangements can vary from several hours a week to employees that operate exclusively out of their home office (known as "teleworking"). Even if an employee does not participate in a formal telecommuting arrangement with his or her employer, 24 percent of employed Americans reported in recent surveys that they work at least some hours at home each week. *See American Time Use Survey—2010 Results*, USDL-11-0919 (U.S. Bureau of Labor Statistics, June 22, 2011). With more employees working from home, it follows it will become more common for employers to face workers' compensation claims from telecommuting employees who claim injuries while working from home. Naturally, employers face less control over work injuries in these work arrangements.

While telecommuting is not necessarily a recent phenomenon, there is no Georgia case law dealing with telecommuting employees injured while on the job. Under Georgia law, to be compensable, an injury must arise out of and occur within the course of employment. The words "arising out of" mean there must be some causal connection between the conditions under which the employee worked and the injury he sustained. *Thornton v. Hartford Accident & Indemnity & Company*, 198 Ga. 786, 32 S.E.2d 816 (1945). The words "in the course of employment" pertain to the time, place and circumstances of the accident. In Georgia, this means the injury occurred: (1) within the period of employment, (2) at a place where the employee reasonably may be in the performance of the employee's duties, and (3) while the employee was fulfilling the employee's duties or is engaged in something incidental thereto. *Barge et al v. City of College Park*, 148 Ga. App. 480, 251 S.E.2d 580 (1978).

This same general test applies in the context of the telecommuting employee injured at home. Since an employer has very little control over the employee's home office, employers expose themselves to unique risks by allowing employees to work from home. Specifically, employers are limited in their ability to supervise or monitor activities of employees working from home and have limited control over the safety of the-employees' home environment.

Employers allowing employees to work from home should take measures to mitigate their risk. One important measure is to set specific work hours and to establish when breaks will be taken by the employee. Employers will also want to specify what activities are allowed during work hours. In one of the few reported case law decisions in the country dealing with a telecommuter claiming an at-home injury, the Tennessee Supreme Court held that a telecommuter who was assaulted while preparing her lunch sustained injuries in the course of her employment because the employer did not prohibit personal breaks or restrict activities during work hours. *Wait v. Traveler's Indemnity Company of Illinois*, 240 S.W.3d 220 (Tenn. 2007). The claim was ultimately found non-compensable on the basis the claimant's injuries did not arise from her work duties. However, the court's finding that the claimant's injuries occurred during the course of her employment and their reasoning for same, shed light on some of the issues employers should consider when attempting to mitigate their risk with telecommuting employees.

Given the lack of supervision that can be exercised over employees working from home, extra consideration should be given by employers in selecting employees to telecommute. If possible, employers should select employees they consider to be responsible and have a longstanding history and commitment to the company. Moreover, an employer should also specify the exact nature of the employee's job duties by providing a detailed job description and having the employee sign-off on it in an effort to lessen the risk of having an employee foist onto the employer responsibility for an injury arising from a non-work-related activity. An employer will also specify within the job description the exact location in the home of the employee where work duties are to be

performed in an effort to limit the scope of the claimant's employment to a specific area, such as a home office. Moreover, as to the home office, an employer should perform at least one on-site visit to ensure there are no safety hazards that could lead to a work injury.

Monitoring the tasks of the telecommuting employee is another way employers can mitigate their risk against workers' compensation claims. Considering many formal telecommuting work arrangements involve the employer providing the employee a company-owned computer, employers should consider using task-monitoring software to reduce their exposure to injury claims. Such software permits the employee's supervisor to see the employee's computer activities. Having data regarding the employee's Internet usage and use of particular computer applications, such as word processing software, as well as times when the computer was idle can provide an employer valuable information when defending against a work injury claim. Moreover, when employees know their work and productivity are easily accessible to the employer, fraudulent claims are less likely.

As telecommuting increases, employers will undoubtedly face work injury claims occurring at the employee's home. Whether the employer is in the best position to fight these types of claims depends upon whether precautionary measures were implemented by the employer. As noted above, assessing the employee's home office, establishing a definite job description and establishing working hours and location will serve to contain workers' compensation claims made by the telecommuting employee.

For more information on this topic, contact Mark Webb at 404.888.6217 or mark.webb@swiftcurrie.com.

Recent Supreme Court of Georgia Case Addresses Change in Condition v. Fictional New Accident

By: M. Clay Sewell

***Shaw Industries, Inc. v. Scott*, 2012 Ga. LEXIS 638 (July 2, 2012).**

Our Summer 2012 issue briefly outlined the implications of a Court of Appeals decision which has now been reviewed by the Georgia Supreme Court and an opinion issued in July 2012. The Court of Appeals ruling was left largely undisturbed. However, the Supreme Court's opinion did add a twist which lends caution to employers who return a claimant back to work following a compensable injury.

The issue under review by the Supreme Court was whether a claimant who returns to light duty work for a prolonged period of time, and is thereafter taken completely out of work, has suffered a "fictional new accident" or a "change in condition." The difference, of course, can mean the initiation of income benefits, or the potential denial of income benefits altogether on a statute of limitations basis under O.C.G.A. § 34-9-104. In its analysis, the Court of Appeals and Supreme Court seemingly put forth the proposition that when an employee suffers a compensable injury for which he receives income benefits, returns to work performing less strenuous work but is later forced out of work due to a gradual worsening of his or her condition, there can be no fictional new

WC-205: To Fear or Not to Fear, That is the Question

By: M. Ann McElroy

There are not many workers' compensation forms that can strike fear in the hearts of employers and insurers like the WC-205. Typically, treatment provided to a claimant by an authorized treating physician is paid for by employers and insurers. In some circumstances though, authorized physicians may ask for pre-authorization for certain testing and/or procedures.

Board Rule 205 provides authorized treating physicians specific instructions on how to obtain pre-authorization for testing and/or procedures to be performed on claimants. In accordance with Board Rule 205(b)(3)(a), "[a]n authorized medical provider may request advance authorization for treatment or testing by completing Sections 1 and 2 of Board Form WC-205 and faxing or emailing same to the insurer/self-insurer, along with supporting medical documentation." The employer and insurer must then "respond by completing Section 3 of the WC-205 request within five business days of receipt of this form." Board Rule 205(b)(3). The employer and insurer is also required to fax or email the response back to the requesting authorized treating physician. *Id.*

However, Board Rule 205(b)(3)(a) can create a possible technical nightmare for employers and insurers with the specific provision that, "[i]f the insurer/self-insurer fail to respond to the WC-205 request within the five business day period, the treatment or testing stands pre-approved." This is the reason for fear and anguish on the part of all employers and insurers when faced with a WC-205.

Last year, the Supreme Court of Georgia, in *Mulligan v. Selective HR Solutions, Inc.*, 289 Ga. 753, 716 S.E.2d 150 (2011), clarified some of these issues. The court found that medical treatment or tests prescribed by an authorized treating phy-

accident. However, the Supreme Court intimates that if the claimant is brought back to light duty work which is more demanding than his or her prior job or work restrictions allow, the claimant may very well have a claim for a fictional new accident.

Valencia Michelle Scott worked for the employer for over 14 years, and suffered her original work injury on February 16, 1996. On that date, she was performing her work as a carpet inspector when her right foot became caught in a carpet roller and she suffered an injury which required partial amputation of her foot. This injury caused her to miss approximately ten months of work, during which time Temporary Total Disability (TTD) benefits were paid. She ultimately returned to work for the employer in early 1997, working a relatively sedentary position in the customer service department where she was allowed to alternate between sitting and standing as needed. Nevertheless, the claimant suffered superadded injuries. The partial amputation and the related prosthesis altered the claimant's gait, causing bilateral knee problems which resulted in bilateral knee surgery just one year later in May 1997.

The claimant continued working in the customer service department for the next 12 years but the knee problems and pain associated with those problems became progressively worse. Ultimately, in March 2009, as a result of the work-related chondromalacia and osteoarthritis in her knees, the claimant's treating physician recommended she cease working temporarily to relieve the knee pain. Following multiple attempts to return to work over the next several months, the claimant ultimately stopped working altogether in September 2009.

The claimant thereafter asserted she had suffered a fictional new accident effective the date she was held out of work by her treating doctor. Under the theory of fictional new accident, the claim would not be barred by the statute of limitations, as the claimant would have one year from her fictional "accident date" in which to file her claim for benefits. The employer, to the contrary, asserted the disability represented a change in condition and was thereby barred by the two-year statute of limitations under O.C.G.A. § 34-9-104(b).

The Administrative Law Judge (ALJ) found the claimant's knee problems were caused by her altered gait following her partial right foot amputation, and the subsequent work duties aggravated that injury, thereby warranting an award of benefits based on a fictional injury. The Appellate Division and Superior Court affirmed.

The Court of Appeals disagreed, stating that because the claimant had received benefits following the initial injury, returned to work and experienced a progressive aggravation of her condition as a result of her work duties, the claimant's disability could only be characterized as a change in condition pursuant. Accordingly, her claim for TTD benefits effective March 24, 2009, was denied. The Court of Appeals decision was clear and provided the lower courts with a straightforward method for addressing "change in condition" versus "fictional new accident" cases. While the Supreme Court did not erase the clarity provided by the Court of Appeals, it may have created slight ambiguity, adding that the type of light-duty work could play a role in distinguishing change in condition versus fictional new accident.

In its analysis, the Supreme Court distinguished the facts of *Shaw* from the facts in the case of *R.R. Donnelley v. Ogletreee*, 312 Ga. App. 475, 718 S.E.2d 825 (2011). In *Donnelley*, the claimant received benefits after suffering an injury, but thereafter returned to "several positions that were strenu-

sician are required to be paid for by an employer or insurer, as long as they are related to the claimant's on-the-job injury. *Id.* The court therefore found the employer and insurer's failure to timely respond to the pre-authorization request does not bind them to pay for medical care that is not related to a compensable injury. *Id.*

Part of the Georgia Supreme Court's reasoning came from a change made to Board Rule 205(b)(4). Previously, Board Rule 205(b)(4) read that "[w]here the employer fails to comply with Rule 205(b)(3), the employer shall pay, in accordance with the Chapter, for the treatment/test requested." However, this provision was amended, as of July 1, 2011, to read that when the employer does not comply with Board rule 205(b)(3), "the employer shall pay for the treatment/test requested **related** to the compensable injury in accordance with the Chapter." (Emphasis added). Thus, the Georgia Supreme Court reasoned that the failure of the employer and insurer to timely respond to the WC-205 does not mean that an employer or insurer will be required to pay for treatment unrelated to the workers' compensation injury. *Mulligan*, 289 Ga. 753, 716 S.E.2d 150 (2011).

There are a few other technical aspects to remember with the WC-205. If the employer or insurer wish to deny the testing or procedure requested by the authorized physician, the refusal is to be made in writing. Then, within 21 days of the initial receipt of the WC-205, the employer or insurer must either authorize the treatment or file a WC-3 controverting the requested treatment or testing, specifying the grounds for controverting the treatment or testing. Board Rule 205(b)(3)(b). If the employer or insurer deny the requested treatment or procedure on the basis that it is not reasonably necessary, the employer or insurer have the burden of proving the lack of reasonable necessity. Board Rule 205(b)(3)(c)(1). Pursuant to Board Rule 205(b)(3)(c)(2), disputes regarding whether services already performed are necessary or reasonable must be resolved by following the provisions of Board Rule 203(c).

It is important to note that when a WC-205 crosses your desk, it requires immediate attention.

For more information on this article, contact Ann McElroy at 404.888.6212 or at ann.mcelroy@swiftcurrie.com. ■

ous and exceeded his light duty work restrictions." Eventually, the claimant was forced to cease work due to his worsened condition. In *Donnelley*, the ALJ made a determination that the worker suffered a fictional new accident as a result of "inappropriately strenuous work." The Court of Appeals ruled the claimant in *Donnelley* had a fictional new accident as opposed to a change in condition.

The Supreme Court left the *Donnelley* opinion undisturbed, stating the facts in *Shaw* were in "sharp contrast" to those of *Donnelley*. In *Shaw*, the claimant's post-injury work activity was less strenuous than before her accident, and the knee problems developed as the result of her continued work and the "wear and tear of ordinary life." A critical fact cited by the Supreme Court was that the claimant in *Shaw* returned to a position that allowed her to be sedentary, which was not outside of her restrictions. The Supreme Court indicates if the claimant had returned to her regular duty position, or worked in a more physically demanding position upon her return to work, the claimant may very well have established a fictional new accident. Certainly, this is a very important consideration when returning a claimant to work following an injury.

Making an offer of suitable light duty employment will continue to be an effective way to reduce overall exposure for income benefits. However, one must be cognizant of potential risk for a future claim for benefits. Special care should be taken to ensure the light duty job offered a claimant is within the work restrictions issued by the authorized treating physician. In *Shaw*, if the claimant had been brought back to work at her regular duty position as a carpet inspector despite her light duty restrictions, the Supreme Court would have likely decided differently. We may presume that this would be especially true if the claimant suffered an acute injury to the same body part as opposed to a "gradual worsening."

Employers should insure claimants do not engage in activity that could be deemed outside his or her work restrictions, or more strenuous than their prior job. Of course, these considerations are particularly important where the claimant has received income benefits or a favorable award from the State Board.

For more information on this article, contact Clay Sewell at clay.sewell@swiftcurrie.com or 404.888.6204. ■

Swift Currie iPhone App . . . Do You Have it Yet?

Swift Currie now has a FREE iPhone app. The app provides access to useful resources and tools to assist you in investigating and evaluating workers' compensation claims, including:

- Centers for Disease Control Life Table;
- Georgia Life Expectancy Annuity Mortality Table;
- Date Calculator; and
- Present Value Calculator.

The app also has a link to our website and contact information for all Swift Currie attorneys. Finally, you will be able to access all of our helpful checklists and guides, including:

- The Red Flags of Workers' Compensation;
- "Dog" File Checklist;
- Georgia Venue Map;
- Georgia Workers' Compensation Forms;
- Nuts and Bolts of Georgia Litigation;
- Panel of Physicians Quick Tips;
- Reasons to Controvert; and
- Summary of Workers' Compensation Provisions.

To download the app, simply go to the App Store on your iPhone and search for "Swift Currie." Please take a moment to rate the app and let us know what you think.

Events

Annual WC Seminar
"2012 Swift Currie Classic:
Celebrating 10 Years of Edutainment"
Thursday, September 20, 2012
9:00 am - 3:00 pm
Cobb Energy Performing Arts Centre
Atlanta, GA
**Approved for 4 CE Hours (including 1 ethics hour and 3 property & casualty hours)*

Joint Litigation Luncheon with McAngus Goudelock and Courie
"Words with Claims: How to Decipher Medical Terminology and Win"
11:00 am - 2:00 pm
Embassy Suites Raleigh-Durham
**Approved for 2 CE hours by the GA and NC Insurance Departments*

Annual Property & Coverage Insurance Seminar
Friday, November 9, 2012
More Details to Come
Cobb Energy Performing Arts Centre
Atlanta, GA

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

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