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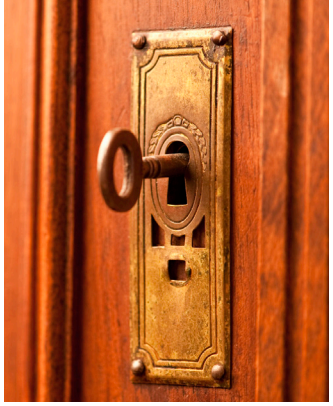

The 1st Report
A Workers' Compensation Update
Spring 2015

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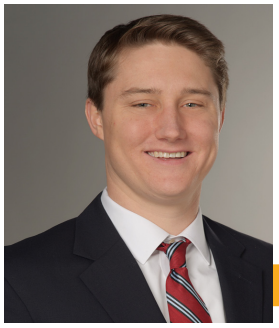

Termination for Cause and Its Effects on Exposure for Indemnity Benefits

By: Robert W. Smith

We understand employers have a multitude of considerations and interests in the day-to-day operations of their businesses that may not always align perfectly with workers' compensation concerns. A frequent context within which these competing interests arise is the decision as to whether or not to terminate an injured employee for cause when he is performing light duty work. In that situation, it is best, from a workers' compensation standpoint, not to terminate the injured employee. As long as the light duty restrictions are being accommodated, we can limit our exposure for indemnity benefits. However, if termination becomes necessary, it may not in and of itself entitle the employee to indemnity benefits.

An injured employee who has returned to light duty work and is no longer receiving indemnity benefits is not entitled to an automatic resumption of indemnity benefits following a termination for cause unless the employee can demonstrate that, as a result of the previous work-related injury, he is unable to secure suitable employment elsewhere. *Ga. Power Co. v. Brown*, 169 Ga. App. 45, 311 S.E.2d 236 (1983). To do this, the employee must prove "he or she suffered a loss of earning power as a result of a compensable work-related injury; continues to suffer physical limitations attributable to that injury; and has made a diligent, but unsuccessful, effort to secure suitable employment following termination." *Maloney v. Gordon County Farms*, 265 Ga. 825, 462 S.E.2d 606 (1995). The Board then has discretion to draw reasonable inferences from the evidence that the employee's inability to obtain suitable employment was proximately caused by the continuing disability. However, the claimant does not have to show diligent job search efforts if he can demonstrate he was terminated as a result of the light duty work restrictions. *Padgett v. Waffle House, Inc.*, 269 Ga. 105, 498 S.E.2d 499 (1998). By proving the work injury was the cause of the termination, the employee has established a causal link between the injury and the worsened economic condition.

If an employer ultimately makes the decision to terminate an injured employee, a hearing request seeking indemnity benefits will usually follow. If represented, the employee's attorney will likely instruct the employee on the requirements of the *Maloney* job search and have the employee perform a well-documented job search. The employee would need to testify and produce documentary evidence at a hearing in support of the job search. However, through effective use of discovery, your Swift Currie attorneys can investigate any inconsistencies in the actual job search. If those inconsistencies exist, we will attack the validity of the alleged job search by producing evidence that contradicts the employee's testimony. Furthermore, we will point out any other inadequacies of the job search that may exist. Among other things, these inadequacies can include the employee's failure to inform the potential employer about the light duty job restrictions, applications to positions for which the employee was not qualified, or rejecting an actual job offer.

It is also not uncommon for claimants to make allegations they were terminated as a result of their restrictions. As referenced above, if the employee can prove this, he will be entitled to indemnity benefits without having to prove a *Maloney* job search. Accordingly, it is critically important to document the justifications for the termination and to have a credible employer witness available to testify at a hearing.

In conclusion, if cause arises to potentially terminate an employee who is working on light duty restrictions, the employer must ultimately make the decision whether the reason for termination outweighs the potential increase in exposure. If termination becomes necessary, we will work to aggressively defend against the employee's entitlement to indemnity benefits by verifying every aspect of alleged job search and using the documented justification(s) for the termination.

For more information on this topic, contact Robert Smith at 404.888.6204 or at robert.smith@swiftcurrie.com.

Should Employees Be Held Accountable for Failing to Look Out for Their Own Safety?

By: Emily J. Hyndman

To successfully establish a compensable workers' compensation claim, an employee must show he sustained an injury which arose out of and in the course of his employment. O.C.G.A. § 34-9-1(4). It is the claimant's burden to prove all essential elements of his claim. *Riley v. Taylor Orchards*, 226 Ga. App. 394, 486 S.E.2d 617 (1997). While this is the general rule in Georgia, there are a few exceptions. Some exceptions can be found in O.C.G.A. § 34-9-17(a), which reads:

> No compensation shall be allowed for an injury or death 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.

After a claimant has met his burden of proof, the employer/insurer is able to assert an affirmative defense. Because it is the employer/insurer who asserts this defense, the employer/insurer then carries the burden of proof. O.C.G.A. § 34-9-17(c); *Borden Co. v. Dollar*, 96 Ga. App. 489, 100 S.E.2d 607 (1957).

Generally, "willful misconduct" includes the conscious or intentional violation of definite law or rules of conduct, as opposed to inadvertent, unconscious or involuntary violations. *Beck v. Brower*, 101 Ga. App. 227, 113 S.E.2d 220 (1960); *Shiplett v. Moran*, 58 Ga. App. 854, 200 S.E. 449 (1938). There are several scenarios in which willful misconduct could be shown: (1) a self-inflicted injury; (2) an intentional injury inflicted upon another; (3) an injury arising from the willful failure to utilize a safety device; and (4) an injury which occurred from an employee's failure to perform a duty required by statute.

Our focus in this article will be on the third scenario, which is the failure to utilize a safety device. To successfully assert the willful failure to use a safety device defense, an employer must show: (1) the failure to use the safety device was willful; (2) the device was available and accessible; (3) the employee was aware of the necessity to utilize the appliance; (4) the employee recognized the danger of not using the appliance; (5) the willful failure to use the appliance was intentional and not mere inadvertence; and (6) the failure to utilize the device served as the proximate cause of the employee's injury. *Liberty Mut. Ins. Co. v. Peery*, 53 Ga. App. 527, 186 S.E. 576 (1936); *Herman v. Aetna Cas. & Sur. Co.*, 71 Ga. App. 464, 31 S.E.2d 100 (1944).

The "safety device" defense is illustrated in two cases in the Georgia Court of Appeals. In *Peery*, an employer provided a paddle for employees to extract metal from machines. *Liberty Mut. Ins. Co. v. Peery*, 53 Ga. App. 527, 186 S.E. 576 (1936). This safety device was "within easy reach" of the machine, and the employee knew the paddle was there. Therefore, the Court found it was the employee's "willful failure or refusal" to use the device which caused his finger to be cut off and found his claim was not compensable. Similarly, in *Herman*, the deceased employee was a superintendent in a sand-mining plant. *Herman v. Aetna Cas. & Sur. Co.*, 71 Ga. App. 464, 31 S.E.2d 100 (1944). He informed his subordinates about the importance of using rubber gloves and boots and required their use when starting, operating or working with electric motors. When he failed to do so, even though the gloves and boots were within an accessible distance, he was electrocuted. The employer contended his death resulted from willful misconduct and a "willful failure or refusal to use a safety appliance," and the Court of Appeals agreed.

In conclusion, when assessing an injury resulting from an employee's failure to utilize a safety device, keep in mind the accident may not actually be compensable. We would recommend you ask some important questions. Was the device physically near the employee? Was the device accessible? Did the employee know the device existed? Was the employee's failure to utilize the device willful or intentional? And finally, did the employer explain that the employee was required to use this device? If all the answers received a resounding "yes," you may have a successful willful misconduct defense for failure to use a safety device.

For more information on this topic, contact Emily Hyndman at 404.888.6220 or emily.hyndman@swiftcurrie.com. ■

Recent Case Law Update

By: Jonathan G. Wilson

Bonner-Hill v. Southland Waste Systems, Inc., 330 Ga. App. 151, 767 S.E.2d 803 (2014)

The Court of Appeals in *Bonner-Hill* addressed the "ingress/egress" rule as it pertains to workers' compensation claims. The deceased employee's widow sought death benefits after the employee was struck and killed by a train as he drove across railroad tracks on his way to work. The employer's premises was located in an area running parallel to a railroad track. The employer "leased" its building and the surrounding two acres. The only access to the employer's parking lot was an entrance road crossing over the tracks. The decedent was traveling on the entrance road when a train struck his vehicle.

The ALJ found the claim compensable because the entrance road was the only route by which the decedent could access his workplace. Therefore, it was "part of the business premises." Since the decedent was arriving during a reasonable time before his shift, and the employer had control over the entrance road pursuant to its commercial lease, the ALJ found for the employee's widow.

Upon appeal by the employer, the Board concluded the ingress/egress rule did not apply because the employer did not exclusively own, maintain or control the entrance road. However, the Court of Appeals found the "[a]pplication of the ingress/egress exception requires a factual inquiry into whether the location at which the injury occurred constituted a portion of the [employer]'s premises." As such, the Court of Appeals found the employer's lease "specifically states that the premises 'shall include access to the property over the entrance road' on which [the decedent] was driving when he was killed." The Court of Appeals ruled the decedent had arrived at the employer's premises when the accident occurred, "triggering application of the ingress/egress rule." The fact the railroad track intersected "what was essentially a driveway to the business" did not bar application of the rule.

Emory University v. Duval, 2015 WL 522640 (February 10, 2015)

In *Duval*, the Court of Appeals once again dealt with application of the correct standard of review to be used by

So You Think You Have a Statute of Limitations Defense, But On Second Glance, Do You?

By Marc E. Sirotkin

When an injured worker does not timely file a workers' compensation claim, the statute of limitations defense could bar the claim. The statute of limitations defense is codified in the Act at O.C.G.A. § 34-9-82(a), which states:

> The right to compensation shall be barred unless a claim therefor is filed within one year after injury, except that if payment of weekly benefits has been made or remedial treatment has been furnished by the employer on account of the injury the claim may be filed within one year after the date of the last remedial treatment furnished by the employer or within two years after the date of the last payment of weekly benefits.

This means an injured worker has one year to file a claim for workers' compensation benefits with the State Board, though this period of limitations can be extended until two years from the last date the employer paid income benefits (including salary-in-lieu of comp) or one year from the last date the employer furnished remedial medical treatment. *Harper v. L & M Granite Co., Inc.*, 197 Ga. App. 157, 397 S.E.2d 739 (1990).

There is an exception to this general rule if the injured worker can prove the employer had an invalid panel of physicians at the time of the accident. In *Georgia Institute of Technology v. Gore*, 167 Ga. App. 359, 306 S.E.2d 338 (1983), the Court of Appeals determined unauthorized medical treatment received by an employee, when the employer did not have a valid panel in place at the time of the accident, constitutes "remedial medical treatment" within the meaning of O.C.G.A. § 34-9-82(a). The Court of Appeals reached this conclusion by reading O.C.G.A. § 34-9-82(a) and O.C.G.A. § 34-9-201(e) (the statute governing panels) together. As a result, in *Gore,* the statute of limitations for filing the claim was tolled for one year from the last date the claimant furnished his own medical treatment, as Georgia Tech did not have a valid panel.[1] The *Gore* decision adds more incentive for employers to assure their panels remain valid, as to not only avoid losing control of medical, but to also not enable the claimant to toll the statute of limitations for his claim. "Tolling" means halting the running of the period of time set forth by the statute of limitations.

In the end, an employer can avoid opening the door for the claimant to toll the statute of limitations by making certain a valid panel is properly posted and their employees understand the location, purpose and function of the panel. Furthermore, the employer must allow an injured worker to review the panel following a reported accident and select a panel provider. We would recommend the employer have the injured worker circle, initial and date his selection on a copy of the panel to show he was given the opportunity to choose a panel provider. We would also recommend checking the panel regularly to ensure the listed providers' contact information is correct and that they still accept workers' compensation patients, as these are the most common issues raised by a claimant to attack the validity of an employer's panel.

Let's be proactive and not give the claimants, or their attorneys, a way to build up the value of their claims. These simple steps for maintaining a valid panel will help an employer to have the upper hand in prospective workers' compensation claims.

For more information on this topic, contact Marc Sirotkin at 404.888.6129 or marc.sirotkin@swiftcurrie.com. ■

[1] However, the period of limitations is not tolled forever by an invalid panel of physicians. *Poissonnier v. Better Business Bureau of West Georgia-East Alabama, Inc.*, 180 Ga. App. 588, 349 S.E.2d 813 (1986).

a superior court in reviewing an award of the Board. The claimant in *Duval* was employed as a nurse when she suffered a compensable right shoulder injury on December 3, 2010. She received treatment with an orthopedic surgeon through workers' compensation. In February 2011, the claimant returned to the surgeon due to pain in her *left* shoulder and received an injection. When she returned again in March 2011, the surgeon ordered a left shoulder MRI. The MRI revealed a rotator-cuff tear and she ultimately underwent left shoulder surgery in November 2011. She did not return to work following the surgery.

The claimant later complained of pain in her right shoulder due to overcompensating from the left shoulder injury. She then received injections into her right shoulder. When symptoms did not improve, she had an MRI on her right shoulder which revealed a torn rotator-cuff. Surgery was recommended to repair the right shoulder.

The claimant requested a hearing seeking additional medical benefits for both shoulders; indemnity benefits from the date of her left shoulder surgery; and assessed attorney's fees . The employer argued the claimant's initial right shoulder injury in 2010 "was temporary and had resolved after appropriate medical treatment, and that her left-shoulder injury was unrelated to her employment."

The ALJ concluded the claimant's left shoulder injury was not compensable, but the current injury to her right shoulder was an aggravation of her compensable 2010 injury. On appeal, the Board concluded the claimant's 2010 right shoulder injury and her current right shoulder injury were unrelated and reversed the ALJ's award.

When the claimant appealed, the Superior Court reversed and remanded. The Superior Court gave the Board two options: either accept the ALJ's finding of fact that the claimant's current injury was an aggravation of her compensable 2010 injury or provide the rationale for why the surgeon's undisputed opinion was rejected.

The Court of Appeals stated that when the Board reviews an ALJ's award or denial of benefits, it is authorized "to vacate the ALJ's findings of fact and conclusions of law as unsupported by a preponderance of the competent and credible evidence, and to substitute its own alternative findings."[1] The Board may assess the credibility of witnesses, weigh conflicting evidence, and reach conclusions differing from those of the ALJ. As a corollary, the Board may disregard the ALJ's factual inferences and substitute its own. Finally, "if after assessing the evidence of record, the Board concludes that the award does not meet O.C.G.A. § 34–9–103(a)'s evidentiary standards, the Board may substitute its alternative findings for those of the ALJ, and enter an award accordingly."

Nevertheless, the Court of Appeals noted both the Superior Court and the Court of Appeals may not substitute themselves as fact finders. Rather, the role of a reviewing court is "to review the *Board's* award for the sole purpose of determining if *its findings* are supported by any record evidence." If so, the Board's findings are binding, regardless of whether the reviewing court would have reached a different conclusion in place of the Board.

Therefore, the Court ruled the Superior Court erred in reversing the Board's ruling in light of the record evidence to support it. While the ALJ found the orthopedic surgeon's records more credible, the Board favored the conclusions of the employer's expert along with medical records showing the claimant's pre-accident history of right shoulder pain. Since there was evidence to support the Board's substitute findings, the Superior Court should have affirmed the Board's ruling.

For more information on this topic, contact Jonathan Wilson at 404.888.6227 or jonathan.wilson@swiftcurrie.com.

[1] *Citing Master Craft Flooring v. Dunham*, 308 Ga.App. 430, 708 S.E.2d 36(2011); *Owens–Brockway Packaging v. Hathorn*, 227 Ga. App. 110, 488 S.E.2d 495(1997); O.C.G.A. § 34–9–103(a) (2014); *Bankhead Enterprises v. Beavers*, 267 Ga. 506, 480 S.E.2d 840 (1997).

Events

Liability Webinar: Defending Damages
April 21 — 1:00 - 2:00 pm EST

Joint WC Luncheon Presented with McAngus Goudelock & Courie
"Stop the Bleeding: Controlling Your Medical Costs"
April 30 — Atlanta, GA
May 5 — Charlotte, NC

Joint Liability Luncheon Presented with McAngus Goudelock & Courie
May 6 — Charlotte, NC
May 13 — Atlanta, GA

WC Webinar: Legislative Update and Common Defenses
May 20 — 1:00 - 2:00 pm EST

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