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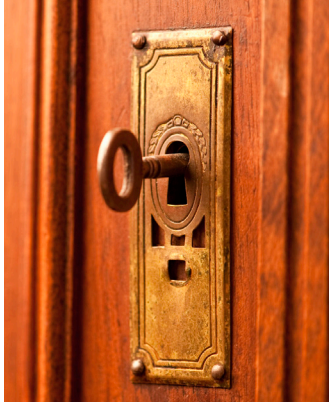

The 1st Report
A Workers' Compensation Update
Summer 2012
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Applying the Statute of Limitations in Workers' Compensation Cases

By: Benjamin I. Jordan

There are two separate and distinct statute of limitations provisions in Georgia workers' compensation law: 1) The "all issues" statute of limitations, O.C.G.A. § 34-9-82; and 2) The "change in condition" statute of limitations, O.C.G.A. § 34-9-104.

In considering which of the two statute of limitations may apply to a given case, first consider whether the case is an "all-issues" case or a "change in condition" case. If it is an all-issues case, the all-issues statute of limitations will apply. If it is a change in condition case, the change in condition statute of limitations applies.

What is a change in condition claim?
A claim will be treated as a change in condition action if (1) the employer/insurer have voluntarily paid TTD or TPD benefits as reported to the State Board on State Board-designated forms without subsequently, validly, controverting overall liability on the claim; or, (2) there has been a previous State Board award which ordered payment of disability benefits or medical benefits. If either of these conditions are met, the "change in condition" statute of limitations will apply.

The change in condition statute of limitations is as follows:

> Any party may apply under [O.C.G.A. § 34-9-104(b)] for another decision… ending, decreasing, increasing, or authorizing the recovery of income benefits awarded or ordered in the prior final decision, provided that the prior decision of the board was not based on a settlement; and provided, further, that at the time of application not more than two years have elapsed since the date the last payment of income benefits pursuant to Code Section § 34-9-261 or § 34-9-262 was actually made under this chapter; provided, however, any party may file for benefits solely under Code Section § 34-9-263 not more than four years from the date the last payment of income benefits was actually pursuant to Code Section § 34-9-261 or § 34-9-262 was actually made under this chapter. (emphasis added)

Under this provision, any party may apply for an order ending, decreasing, increasing, or authorizing the recovery of income benefits if, at the time of application, not more than two years have elapsed since the date the last payment of TTD or TPD benefits was made. Any party may apply for PPD benefits not more than four years from the date the last payment of TTD or TPD benefits was made.

Please note, only the voluntary payment of TTD or TPD benefits, or the award of TTD/TPD benefits by the Board, or the award of medical benefits by the Board, will make the claim a "change in condition." Thus, the voluntary payment of medical benefits alone, as in the typical "medical-only" claim, will not trigger the change in condition statute of limitations. *Georgia Pacific Corp. v. Sanders*, 171 Ga. App. 799, 320 S.E.2d 850 (1984). *Footstar, Inc. v. Liberty Mut. Ins. Co.*, 637 S.E.2d 692, 281 Ga. 448 (Ga. 2006). Similarly, the payment of mere PPD benefits does not make the claim a "change in condition." *Mechanical Maint., Inc. v. Yarbrough*, 264 Ga. App. 181, 590 S.E.2d 148 (2003).

It is also important to remember when the change in condition statute of limitations expires, it bars only the additional recovery of disability benefits. It does not, in any way, affect a claim for additional medical benefits. *General Ins. Co. of Am. v. Bradley*, 152 Ga. App. 600, 263 S.E.2d 446 (1979). Thus, once an employer accepts a claim through the payment of income benefits, as reported to the State Board on board-designated forms, without subsequently validly controverting its liability, the claimant is then entitled to medical treatment for as long as the claimant needs treatment for the work-related injury.

What is an all-issues claim?
An all-issues claim is one in which there has been no State Board award of income or medical benefits and one in which the employer/insurer has not voluntarily paid TTD, TPD, or PPD benefits as reported to the State Board on State Board-designated forms. If these conditions are met, the all-issues statute of limitations will apply. This provision is found at

O.C.G.A. §34-9-82 (a). It states as follows:

> 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. (emphasis added)

Take, for instance, the typical medical-only claim in which TTD, TPD or PPD benefits have not been paid, medical treatment has been provided without an award of the Board, and the claimant does not file a WC-14 Notice of Claim. In this case, the "all-issues" statute of limitations will run one year after the date of the last remedial treatment furnished by the employer/insurer. Remedial treatment has been held to include office visits and physical therapy but not a home exercise program without medical oversight. *Wier v. Skyline Messenger Serv.*, 203 Ga. App. 673, 417 S.E.2d 693 (1992).

Significantly, if an employer/insurer voluntarily pay TTD, TPD, or PPD benefits, but they do so without reporting the payments to the Board on Board-designated forms, the case will still be considered an all-issues case. *Harper v. L&M Granite Co.*, 197 Ga. App. 157, 397 S.E.2d 739 (1990). Similarly, if the employer/insurer voluntarily pay disability benefits but controvert the case validly – within 60 days of the due date of first payment of compensation – the all-issues statute of limitations applies. O.C.G.A. § 34-9-221(e). Of course, failure to file the appropriate WC-1 or WC-2 reporting payments of benefits, can have adverse consequences, such as civil penalties or loss of the ability to properly convert TTD benefits to TPD benefits pursuant to O.C.G.A. § 34-9-104. *See City of Atlanta v. Sumlin*, 258 Ga. App. 643, 574 S.E.2d 827 (2002); O.C.G.A. § 34-9-18.

Practical Considerations

When considering whether one of these two statutes of limitations apply, there are several practical matters to keep in mind:

1. When the all-issues statute of limitations applies, it serves as a bar to both income and medical benefits. On the other hand, when the change in condition statue of limitations applies, it bars only disability benefits.

2. A claimant may be able to circumvent either statute of limitations by alleging a "fictional new injury." A fictional new injury occurs when, after injuring himself at work, the claimant continues to work until he is forced to cease work because of the gradual worsening of his condition, which was at least partially attributable to his physical activity in continuing to work. *Central State Hosp. v. James*, 147 Ga. App. 308, 248 S.E.2d 678 (1978). In this situation, the limitations period begins to run the day the claimant stops working. *Id.* The purpose of this rule is to avoid penalizing a claimant who attempts to return to work after an injury.

3. The all-issues statute of limitations can be tolled in situations involving a claimant who is mentally incapacitated, a claimant who is a minor, or cases involving fraud on the part of the employer/insurer.

For more information on this topic, contact Ben Jordan at 404.888.6214 or ben.jordan@swiftcurrie.com.

Case Law Update

By: Charles E. Harris, IV and C. Blake Staten

***Mcrae v. Arby's Restaurant Group, Inc.*, A11A1021 Ga. Ct. App. (December 1, 2011).**

In this case, the Court of Appeals placed significant restrictions on ex parte communications by the employer/insurer and its counsel with the claimant's treating physician. The claimant sustained an on-the-job injury in February 2006, when she suffered third-degree burns to her esophagus after mistakenly drinking lye, which had been left in the break room in a cup similar to the one she had been using. The claim was accepted as compensable and income benefits were commenced in March 2006.

In September 2009, the claimant's treating gastroenterologist prepared a medical report in which the physician concluded that the claimant had reached maximum medical improvement, and a 65% impairment rating was issued. The claimant then requested a hearing seeking payment of Temporary Total and Permanent Partial Disability benefits.

Following their receipt of the above medical report, counsel for the employer/insurer attempted to schedule an ex parte consultation with the physician, but the physician declined to meet with them absent express permission from the claimant. Counsel for the employer/insurer filed a motion requesting the Administrative Law Judge (ALJ) remove the claimant's hearing from the calendar, or in the alternative, issue an order authorizing the treating physician to meet with defense counsel outside the presence of the claimant and her attorney. The ALJ ordered the claimant to expressly authorize her physician to communicate with counsel for the employer/insurer, and denied her request for immediate review of the issue by the Appellate Division. In denying the request, the ALJ held the claimant could informally communicate with the physician and inquire as to the substance of any communications between the physician and counsel for the employer/insurer.

The Appellate Division and Superior Court agreed the hearing could not go forward until the claimant consented to the physician communicating with counsel for the employer/insurer. The claimant then appealed the decision to the Court of Appeals.

The Court of Appeals first discussed the dangers associated with ex parte interviews of health care providers, and noted the Supreme Court of Georgia has held such communications between a litigant's treating physician and opposing counsel should be limited. *Baker v. Wellstar Health Sys.,* 288 Ga. 336, 338 (2), 703 S.E.2d 601 (2010). The Court also noted the privacy constraints of HIPAA are not "inapplicable" in workers' compensation proceedings. Rather, HIPAA permits the disclosure of "information" as authorized by and to the extent necessary to comply with the requirements of workers' compensation laws. Furthermore, the court broadly characterized "medical information," as consisting of both tangible documentation and communication. While a claimant's privilege of confidentiality regarding "communications" with the doctor, as depicted in medical records, is waived pursuant to the Workers' Compensation Act, the court held the "information" to which an employer is entitled does not include ex-parte communications with the treating physician.

The Court's opinion in this case is not specific as to the precise types of communication allowed between an employer/insurer and treating doctors. At a minimum, they are seemingly prohibited from speaking to the treating physician regarding a claimant's medical issues without the consent or participation of the claimant or his/her representative. Claimant's attorneys will argue an employer/insurer or its representatives are prohibited from engaging in any communication with a treating doctor, unless consent is first granted by the claimant. This may be an overly broad interpretation of the Court's decision, which likely will be clarified by the Supreme Court later this year, as the case has been accepted for review. At present, the most prudent approach for adjusters and representatives of the employer/insurer is to copy the claimant, or his attorney if represented, on any correspondence to a treating medical provider.

Veolia Environmental Services v. Vick, 309 Ga. App. 658, 711 S.E.2d 40 (2011).

The Court of Appeals in *Vick* analyzes the applicable burden of proof for a claimant asserting entitlement to income benefits. The claimant traditionally retains the initial burden of proof for demonstrating entitlement to all benefits. The claimant sustained a compensable injury and received Temporary Total Disability (TTD) benefits from May 8, 2007 to June 28, 2007, at which time he returned to light duty work with the employer. In early March 2008, the claimant received a prescription for morphine from his personal doctor, and a co-worker informed the employer the claimant was working under the influence of morphine. On or about March 10, 2008 the employer instructed the claimant to leave work and obtain a clearance letter from his physician regarding his ability to work safely while on this medication. When the claimant failed to provide such a clearance letter, the employer terminated the claimant's employment for a violation of company policy on our about May 2, 2008.

Following a hearing, the Administrative Law Judge (ALJ) denied the claimant's request for TTD benefits on the basis the claimant failed to meet his *Maloney* burden of conducting a diligent, good faith search for alternative employment. However, the ALJ awarded the claimant TPD benefits during his period of light duty employment and made that award of TPD continue beyond the date of the claimant's termination. The ALJ found the employer/insurer had not met its burden of demonstrating a change in condition for the better. The employer/insurer asserted this was an improper application of the law and shifting of the burden of proof, and accordingly appealed.

The Appellate Division vacated the portion of the ALJ's award which directed the employer to pay continuing TPD benefits. The claimant appealed to the Superior Court, which remanded the case back to the Appellate Division, with instructions to place the burden of proof on the employer/insurer to show the claimant was not entitled to TPD benefits following his last day of work. The Court of Appeals then granted the employer's application for discretionary appeal on the Order of remand.

The Court of Appeals reversed, finding the Appellate Division properly determined the claimant was not entitled to continuing TPD benefits following his termination. In analyzing the claim, the Court of Appeals reasoned the employer/insurer were not claiming a change of condition for the better since the last date worked, but rather the claimant was seeking an increased benefit in the form of a transition from TPD benefits to TTD benefits following his termination. As such, the claimant retained the burden of proof.

The outcome of this case, and the applicable burden of proof, would arguably differ if the employer/insurer were already paying ongoing TPD benefits following the claimant's return to light duty work. Under that scenario, the employer/insurer would retain the burden of demonstrating the claimant had undergone a change in condition for the better, even after the termination for cause, in order to suspend TPD benefits. Similarly, the claimant would retain the burden of proving an entitlement to an increased benefit of TTD following the termination, by and through satisfaction of his *Maloney* burden and completion of a diligent, good faith work search. Therefore, applying the factors reiterated in *Vick*, if a claimant was receiving ongoing TPD benefits while on light duty and failed to meet his *Maloney* burden, and the employer/insurer likewise failed to demonstrate a change in condition for the better, the claimant's TPD benefits would simply continue post-termination until otherwise terminable by law or award.

***Shaw Industries, Inc. v. Scott*, 310 Ga. App. 750, 713 S.E.2d 917 (2011).**

This recent decision represents a rare occurrence from a procedural perspective, insofar as the Court of Appeals overturned the earlier rulings of the Superior Court, Appellate Division, and Administrative Law Judge (ALJ), who all held the claimant suffered a fictional new injury. In their reversal, the Court of Appeals instead deemed the claimant's disability a change in condition, and thereby denied additional income benefits. The Supreme Court of Georgia granted certiorari in this case on March 19, 2012.

The claimant worked for the employer for over 14 years and suffered her original work injury on February 16, 1996. On that date, she was performing 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 10 months of work, during which time Temporary Total Disability benefits (TTD) were paid. She ultimately returned to work for the employer in early 1997, working in the customer service department, and thereby allowing her to alternate sitting and standing as needed. The partial amputation, and the related prosthesis, subsequently altered the claimant's gait, caused bilateral knee problems, and resulted in bilateral knee surgery 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 of 2009, as a result of the work-related chondromalacia and osteoarthritis in her knees, the 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 stopped working altogether in September 2009.

The claimant asserted she had suffered a fictional new injury effective March 24, 2009, the date she was first held out of work by her treating doctor. The employer asserted the disability represented a change in condition and was thereby barred by the statute of limitations under O.C.G.A. § 34-9-104(b).

In their analysis, the Court of Appeals relied on *Central State Hospital v. James*, 147 Ga. App. 308, 248 S.E.2d 678 (1978). The *James* Court held that, where a claimant sustains an injury and is awarded compensation, returns to his normal and ordinary job duties, but later goes back out of work due to the gradual deterioration of his or her condition, this constitutes a change in condition. On the other hand, if a claimant is injured at work and continues working without an award or voluntary payment of benefits, the same gradual worsening is effectively classified as a new accident. Accordingly, in order for a change in condition to have occurred, there must exist some earlier award, or its equivalent, relating to the injury which has gradually worsened and resulted in disability. Following the hearing, the ALJ determined the claimant's bilateral knee problems were caused by the altered gait which followed her partial right foot amputation, and the subsequent work duties aggravated that injury, thereby warranting an award of benefits on a new accident theory. 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. Her claim for TTD benefits effective March 24, 2009, was therefore denied.

In reaching their conclusion, the Court of Appeals seemingly analyzed this case through a different prism than prior decisions involving a change in condition or fictional new accident. The Court of Appeals in *Scott* specifically states the ALJ erred as a matter of law, despite acknowledging the State Board retains the discretion to make specific findings of fact. In so doing, they focus on the "legal" definitions of change in condition and fictional new injury, while prior Court of Appeals decisions have seemingly conceded the very fact specific nature of the analysis required in these types of cases. In light of the pending appeal before the Supreme Court of Georgia, it will be interesting to see whether this interpretation holds.

For more information on any of these cases, contact Chad Harris at 404.888.6108 or chad.harris@swiftcurrie.com, or Blake Staten at 404.888.6206 or blake.staten@swiftcurrie.com. ■

Events

"Managing Your Catastrophic Claims" Luncheon
June 27, 2012
11:00 am - 1:30 pm
Villa Christina

Annual Workers Compensation Seminar
September 20, 2012
Cobb Energy Performing Arts Centre
More details to follow.

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

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