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Out Sick: Occupational Disease Claims In Georgia

By Sean M. Dunn

Without a doubt, the vast majority of workers' compensation claims involve on-the-job injuries. Most claim representatives get very experienced handling back injuries, neck injuries, shoulder injuries, and the like. Once in a while, a claim representative will be confronted with an occupational disease claim. Learning to distinguish occupational disease claims from those involving injuries is important, as the distinction may save an insurer money in the long run. The reasons for this are threefold.

First, a claimant's burden of proof for establishing a compensable occupational disease claim is much more difficult than that of an injury claim. Second, if an occupational disease is "aggravated" by a non-compensable "disease or infirmity," then the amount of compensation that is payable may be pro-rated to reflect the proportion of disability solely caused by the compensable occupational disease. Third, there are limitations on payment of permanent partial disability benefits in occupational disease claims that do not apply to injury claims.

So, what is an occupational disease? The answer is found in O.C.G.A. § 34-9-280(2), which defines an occupational disease as follows:

> "Occupational disease" means those diseases that arise out of and in the course of the particular trade, occupation, process, or employment in which the employee is exposed to such disease, provided the employee or the employee's dependant first proves to the satisfaction of the State Board of Workers' Compensation ***all of the following***: (A) A direct causal connection between the conditions under which the work is performed and the disease; (B) That the disease followed as a natural incident of exposure by reason of the employment; (C) That the disease is not of a character to which the employee may have had substantial exposure outside of the employment; (D) That the disease is not an ordinary disease of life to which the general public is exposed; and (E) That the disease must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence … [*Emphasis Added*].

Not only does a claimant have to prove his disability "arose out of" and was "in the course of employment," he also must prove

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Recovery Of Workers' Compensation Subrogation Liens – An Overview

By James D. Johnson

O.C.G.A. § 34-9-11.1 was enacted in 1992 and provides the employer and the insurer with a lien against the claimant's tort recovery from the defendant tortfeasor. The lien is limited to the amount of disability benefits, medical expenses, and death benefits paid to or on behalf of the claimant. This right of subrogation is tempered, however, by the statutory requirement that the lien is recoverable only "if the injured employee has been fully and completely compensated taking into consideration both the benefits received under the Worker's Compensation Act and the amount of the recovery in the third-party claim for all economic and non-economic loses incurred as a result of the injury." O.C.G.A. § 34-9-11.1(b).

The employer/insurer bears the burden of proving to the trial court or jury that the claimant has been fully and completely compensated. *City of Warner Robins v. Baker*, 255 Ga. App. 601 (2002). Such a showing requires a comparison of the amount of workers' compensation benefits paid plus the amount of the employee's recovery in the third-party action versus all economic and non-economic loses sustained by the injury. When workers' compensation benefits plus the employee's settlement or verdict are greater than the employee's economic and non-economic losses, the employer/insurer may recover on its lien, as the employee has obtained full and complete compensation. *GA. Elec. Membership Corp. v. Garnto,* 266 Ga. App. 452 (2004).

The employer and insurer are not entitled to recover any amounts paid to the claimant for non-economic damages. Therefore, the trial court or jury must determine what portion of a claimant's recovery is economic (lost wages, medical expenses) and what is non-economic (pain and suffering, loss of consortium). A general verdict form or a lump sum settlement do not allow for such an assessment. Accordingly, the employer/insurer should make certain a special verdict form is employed at trial. The employer/insurer has no such leverage in a settlement agreement between the claimant and the third-party defendant. However, that information might be obtainable through discovery.

The pursuit of subrogation liens has historically been under-utilized by employers and insurers. The law was written to require full and complete compensation, and the courts have interpreted that statute

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all five elements enumerated above. It is especially difficult to prove a disease "is not of a character to which the employee may have had substantial exposure outside of the employment" or that it is "not an ordinary disease of life to which the general public is exposed." In *Fulton–DeKalb Hospital Authority v. Bishop*, 185 Ga. App. 771 (1988) an emergency medical technician (EMT) contracted hepatitis B. Despite the fact an EMT is three to five times more likely to contract hepatitis B than the average person, his claim for benefits was still denied. The evidence showed hepatitis B is a "ordinary disease of life to which the general public is exposed" and that hepatitis B "is of a character to which [the Claimant] may have had unknowing and substantial exposure outside of his employment."

However, the occupational disease burden of proof is not insurmountable. *McCarty v. Delta Pride,* 247 Ga. App. 734, (2001) was an interesting case that involved malaria. The Claimant worked as a construction worker in Belize where he contracted malaria. The evidence adduced at the hearing showed that malaria had been more or less eradicated from the United States. The evidence also showed that malaria was still quite common in Central America, but that it was not "considered a disease of life to which the general public in Georgia would be exposed." The Court of Appeals held the requirement "that the disease is not an ordinary disease of life to which the general public is exposed" meant that the disease had to be one that was "not an ordinary disease of life to which the general public of Georgia, or the United States, is exposed." Because malaria is not an "ordinary disease of life" to which the general public of Georgia is exposed, the Claimant's occupational disease claim was deemed compensable.

Another advantage of occupational disease claims are the limitations on payment of permanent partial disability benefits. O.C.G.A. § 34-9-283 provides with respect to permanent partial disability benefits resulting from occupational disease claims that "there shall be no compensation due or payable for the partial loss of or partial loss of use of a member or for partial loss of vision of an eye."

O.C.G.A. § 34-9-285 also provides that where an occupational disease is "aggravated by a non-compensable "disease or infirmity," benefits awarded will be "limited only to such proportion of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as the causative factor, bears to all the causes of such disability or death." A case that illustrates how this provision works is *Price v. Lithonia Lighting Co.*, 256 Ga. 49 (1986). In *Price*, the Claimant had a pre-existing history of "pneumonia, frequent colds, and coughs" prior to her employment with Lithonia Lighting. The Claimant's "lung problems were aggravated as a result of breathing fumes, chemicals, or dust" at work. As a result, the Claimant was diagnosed with chronic bronchiectic lung disease. The ALJ found that the Claimant was totally disabled and awarded her the sum of $135 per week in temporary total disability benefits. It was also found that "only 10 percent of her disability [was] attributable to the aggravation of her condition as a result of her employment." The full Board adopted these findings and reduced her weekly benefit amount to $13.50 per week, as only 10 percent of her disability was due to the work-related aggravation.

On appeal, the Georgia Supreme Court rejected an Equal Protection Clause challenge to the "pro rata" provision found in O.C.G.A. § 34-9-285. It was also held the award of $13.50 per week was error. Although Lithonia Lighting could prorate benefits to reflect the percentage of work related disability, it was still responsible for paying at least the minimum benefit mandated in O.C.G.A. § 34-9-261, which at the time was $25 per week.

In sum, if an insurer can successfully argue that a claim for benefits is in the nature of an occupational disease claim, there are definite advantages to be gained.

Recovery of Works' Compensation…continued

strictly and in ways that further restrict the chances of recovery. However, in many cases, pursuit of the subrogation lien is a cost-effective way to recover some (but usually not all) of the amounts expended on the workers' compensation claim.

The following are practical tips for enforcing your workers' compensation subrogation lien:

1. Provide notice of the lien to all parties at the earliest possible time via certified letter, as this is required by statute.
2. Employ counsel early. Attorneys for plaintiffs and defendants in the third-party tort suit will likely ignore the subrogation lien unless another attorney is there to remind them and perhaps debate the recoverability of the lien.
3. If a third-party lawsuit has been filed, intervention in that lawsuit is necessary to protect the lien. Intervention occurs via motion and brief to the presiding judge. The employer and the insurer have a statutory right to intervene, and denial of intervention is abuse of discretion by the trial court. *Canal Ins. Co. v. Liberty Mutual Ins. Co.,* 256 Ga. App. 866 (2002).
4. Use the lien as leverage to negotiate settlement of the workers' compensation claim. An agreement to waive the lien frees up the parties in the third-party litigation to resolve their dispute and thus is valuable to those parties. In return, require a reduction in the claimant's settlement demand in his worker's compensation claim.
5. Manage your expectations. In approximately half of the cases no recovery is possible. This could be due to the poor quality of the plaintiff's tort case, the defendant's insolvency or lack of insurance, or several other factors. In the other half of the cases, you may be able to settle the lien, but the recovery is usually the result of considerable compromise by all parties. Depending on the size of the lien, this could still be well worth the effort of pursuing recovery.

Pursuit of your workers' compensation subrogation lien is generally not complicated or time consuming, and in the right circumstances, can provide the employer and insurer a return of at least some their workers' compensation expenses.

Recent Case Decisions

By Kristie L. Johnson

In *Caswell, Inc. v. Spencer, Inc.*, the Court of Appeals upheld the administrative law judge's ruling that a 62-year-old was not presumed to be incapable of learning new skills or adapting to light duty work. 2006 Ga. App. LEXIS 774. The claimant filed to have his compensable back injury designated catastrophic under O.C.G.A. § 34-9-200.1(g)(6), which provides that if an employee is unable to perform his prior work and work available in substantial numbers within the national economy because of the work injury, then the injury is catastrophic.

The administrative law judge (ALJ) found the testimony of the claimant's rehabilitation counselor to not be credible. His testimony that a 62-year-old could not learn new skills or adapt to the demands of a light duty job was not supported by any medical or psychological evidence. The judge rejected the notion that an employee's advanced age alone made him incapable of learning new skills. The judge relied on the testimony of the employer's vocational specialist, who pointed out that new research indicated many retirees were going back to work. In this instance, there were around four million suitable jobs the claimant could perform. The superior court concluded that the claimant's age was not properly considered in denying his request for catastrophic designation, but the Court of Appeals held that the superior court's conclusion was unfounded, since the ALJ did consider the claimant's age. The Court of Appeals did not rule on whether the ALJ's decision should be upheld or overturned, noting that the case would be sent back to superior court for that purpose.

The Court of Appeals also recently addressed an employee's requirement to submit himself to examination as long as he is receiving compensation, as provided in O.C.G.A. § 34-9-200(c). *Dallas v. Flying J, Inc.*, 2006 Ga. App. LEXIS 563. After the claimant refused to cooperate with medical treatment, he was ordered to call GIC clinic and schedule an appointment. After the claimant once again failed to submit himself to examination, the employer suspended his temporary total disability benefits.

The claimant requested his benefits be reinstated because he complied with the language of the order, which only required him to "call" GIC to schedule an appointment. GIC, however, was a walk-in clinic and would not schedule an appointment to examine the claimant. The evidence showed the claimant had prior knowledge that GIC clinic did not take appointments. Therefore, there was evidence to support the finding that the claimant had failed to cooperate with medical treatment. The claimant's request to have his benefits reinstated was therefore denied.

In *Gill v. Prehistoric Ponds, Inc.*, 2006 Ga. App. LEXIS 671, the Court of Appeals distinguished the difference between livestock and game animals in finding the employer was subject to the Workers' Compensation Act. The employer operated an alligator farm and the claimant was bitten by an alligator while cleaning out the cages. The employer argued he was a farm laborer because he raised, fed, and sold alligator hides. Thus, as farm laborers are not subject to the Act as provided in O.C.G.A. § 34-9-2(a), he argued he was not responsible for the claimant's injuries.

The Court held an alligator farm was not an agricultural "farm" and alligators were not livestock. The Court quoted the federal government's definition of livestock as all animals in the equine, bovine, or swine class; such as goats, sheep, horses, and cattle. Additionally, livestock is regulated by the Department of Agriculture, while alligators fall under the Department of Natural Resources. The Court also relied upon the Employment Security Law designation of alligators as "game animals." The Court held the claimant's job of cleaning out the alligator pens was caring for wildlife and not livestock. Therefore, the employer was subject to the Act and did not fall within the exemption provided by O.C.G.A. § 34-9-2(a).

Finally, in *Roberts v. The Jones Company*, 277 Ga. App. 317, 627, S.E. 2d 139 (2006) the Court looked at an employee's burden of proof to entitlement to temporary partial disability benefits. The claimant suffered a compensable wrist injury with Flash Foods and returned to work performing light duty. While still on light duty, the claimant was terminated for a non-injury related reason. After a diligent job search, the claimant was only able to procure a job working as a waitress for Flash Foods. The claimant requested temporary total disability benefits while she was out of work and temporary partial disability benefits upon her return because she earned less than her pre-injury wages at Huddle House. The administrative law judge found she was entitled to temporary total benefits because she proved a diligent job search. The judge, however, denied her request for temporary partial because she could not prove her lower earnings at Huddle House were proximately caused by the work injury.

The Court of Appeals reversed the ruling and held the requirement to prove the lower wages resulting from her injury was an additional burden inconsistent with prior case law. As long as the employee meets her *Maloney* burden of a diligent job search, she is entitled to both temporary total and temporary partial disability benefits. The Court reasoned to hold otherwise would act as a disincentive for injured employees to seek reemployment.

Mark Your Calendar!

Our next ROADSHOW is Thursday, October 26, 2006, from 10:45 a.m. - 1:00 p.m. at Maggiano's in Buckhead. We will be discussing Catastrophic Injuries.

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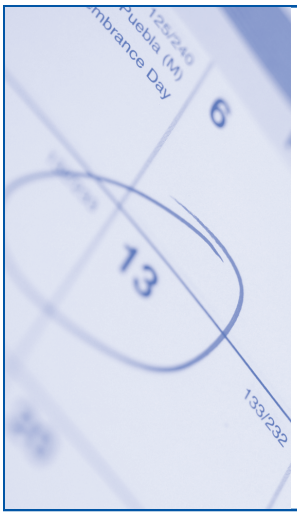

Save the Date!

You and your co-workers are invited to attend our Annual Swift, Currie, McGhee & Hiers Seminars. Both seminars will be held at Villa Christina, 4000 Summit Boulevard in Atlanta, GA. The seminars are free of charge and include a complimentary lunch.

Friday, September 15, 2006, 9:30 AM to 3:00 PM
Swift Currie Annual Workers' Compensation Seminar

Friday, November 3, 2006, 9:00 AM to 2:30 PM
Swift Currie Annual Property Seminar

You can register for this seminar online at our web site, *http://www.swiftcurrie.com/news/seminars.asp*

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