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2007 Legislative Update

By Robert R. Potter

As of this printing, the Georgia General Assembly is still in session due primarily to budget disputes and discussions between the Senate and the House. Typically, a legislative session, which lasts 40 legislative days, concludes by the end of March. This one will extend to April 17 for Day 37 and it remains unclear when the last three days will be. As a result, much potential legislation, including bills affecting workers' compensation, remains in the process. It is likely that there will be some changes in the Workers' Compensation Act, but that is not a certainty in this very uncertain legislative year.

HB 424, sponsored by Representative Mike Coan, Chairman of the House Industrial Relations Committee, is the Board legislative package crafted by the Chairman's Advisory Committee. It would raise the maximum weekly TTD rate to $500 and the maximum weekly TPD rate to $334. It would also add language to insure that prescription benefits are subject to the Board's oversight authority in similar fashion to medical and hospital charges. It would also provide finality to the five-year rule for proceeding with a claim to a hearing. Finally, it would allow an employer 20 days (changed from 15) to designate a rehabilitation supplier after a catastrophic designation. This bill has passed the House and is in the Senate awaiting further action.

SB 131 is the SITF bill, sponsored by Sen. Ralph Hudgens, which provides a tweak to close a loophole. Those shifting from self-insured status to pure insurance status would remain responsible to the Fund for assessments which arose during self-insured status for the life of those claims. Previously, the self-insured was only so responsible for the calendar year in which the shift occurred. This bill has passed the Senate and awaits action in the House.

SB 239, sponsored by Sen. Greg Goggans, is the farm exemption bill which legislatively overrules *Gill v. Prehistoric Ponds*, 280 Ga. App. 629 (2006). That case dealt with an injury on an alligator farm and the ruling was that such an operation is under the Workers' Compensation Act and not part of the farm laborer exemption of OCGA 34-9-2. This bill would extend that exemption to employers involved in "the raising and feeding of and caring for wildlife" as defined in OCGA 27-1-2 (77). The referenced definition is considerably broader than alligators, but the intent of the bill is to exempt alligator farms from the Act. The bill has passed the Senate and resides in the House.

HB 597 is an effort by a certain hospital in Augusta, which primarily treats burn victims, to be exempted from the fee schedule ostensibly because of the uniqueness and singular expertise of its facility. The bill, sponsored by Rep. Ben Harbin, Chairman of the Appropriations Committee, has not moved but has been the subject of significant discussions at quite high political levels.

HB 661, sponsored by Speaker Pro-Tem Mark Burkhalter, is an effort by a private recovery group to require access to SBWC records in order to facilitate and seek reimbursement on behalf of certain group insurers in circumstances where payments have been made by a group insurer for a patient with a workers' compensation claim. The bill has not moved, but if passed it would be significantly problematic for the workers' compensation system.

The legislative committee of the Chairman's Advisory Committee has already met in 2007 to address some of these emerging issues and provide input to the appropriate legislative committees and members. Those bills which do not pass in 2007 will carry over to the 2008 session which likewise promises to be active in the world of workers' compensation.

For more information on this topic, contact Robert R. Potter at 404.888.6105, or robert.potter@swiftcurrie.com.

Suspension of Benefits in Georgia: The Form WC-2

By J. David Garner

In order to suspend weekly benefits based upon an employee's change in condition for the better, an employer/insurer must file a Board Form WC-2 providing notice to the claimant of the fact of and basis for the suspension. Failure to do so can subject the employer and insurer to a litany of consequences, none of which are very good. Obviously, a WC-2 should always be filed prior to suspending benefits for any reason, and all efforts should be made to ensure that the technical filing deadlines are met precisely. In fact, until recently, the failure to file a Form WC-2 and provide 10 days advance notice to the employee (in cases other than when the employee voluntarily returned to work) constituted failure of proper notice, and therefore, a defective suspension which could justify a reinstatement of benefits to the employee.

In *Atlanta Janitorial Service, Inc. v. Jackson*, 182 Ga. App. 155, 355 S.E.2d 93 (1987), the employer was ordered by the Board to pay benefits to the employee until "terminated or altered by law." Within 20 days of the Award, the employer and insurer tendered payment for all outstanding sums due under the Award. At the same time they filed a WC-2 with the Board purporting to suspend benefits, but without either attaching a medical report to the WC-2 or giving 10 days advance notice. The Court of Appeals held:

> OCGA § 34-9-221 (i) and the corresponding provisions of Board Rule 221 require an employer/insurer to give both a 10-day notice to the claimant before suspension of benefits as well as to file a medical report with the WC-2 form. The record discloses that appellants failed to comply with these provisions. Under these circumstances, appellants were not authorized to terminate benefits and did so at their peril.

Thus, the Court of Appeals affirmed the Board's Award ordering the employer and insurer to continue paying ongoing benefits until a proper suspension notice was given.

Even where a WC-2 is otherwise properly filed, it must provide not only notice of a basis for the suspension, but in fact the correct basis. In *Russell Morgan Landscape Management v. Velez-Ochoa*, 252 Ga. App. 549, 556 S.E.2d 827 (2001), the employer and insurer suspended benefits effective August 11, 1997, by filing a Form WC-2, mistakenly listing the reason for suspension as the employee's non-compliance with medical treatment. In actuality the suspension was based upon the employee's release to full-duty work status by his treating physician. However, at a hearing held on January 8, 1999, the State Board of Workers' Compensation determined that the suspension was improper because the employer and insurer (1) failed to state the accurate reason for suspension (i.e. the employee's change in condition for the better), (2) failed to provide supporting medical documentation, (3) failed to include information on the WC-2 advising the employee of the procedure for challenging the suspension, and (4) failed to give 10 days advance notice of the suspension as required by law. The Court of Appeals affirmed and held that these violations were not merely technical or procedural errors but violations of the employee's due process. The Court ordered the employer and insurer to reinstate temporary total disability benefits from the date of suspension through the date of the hearing. Previously, in *Sadie G. Mays Memorial Nursing Home v. Freeman*, 163 Ga. App. 557, 295 S.E.2d 340 (1982), the Court of Appeals held a technical filing violation would not invalidate a suspension of benefits such as would entitle the employee to continue receiving benefits to which he was not otherwise entitled. Yet they distinguished that case by noting the employer and insurer were suspended based upon a change in condition, and were mistaken only as far as indicating the employee had returned to work when in fact the employee had not returned to work, but had been released to do so. They found such a technical violation did not change the fact that the claimant had notice that his benefits were being suspended for a change in condition. The difference in *Velez-Ochoa*: no such due process was provided the employee.

Fortunately for employers and insurers, the recent case of *Reliance Electric Co. v. Brightwell*, A06A1665 (Ga. App. 2007) lessened the potential harm of failing to provide timely notice of a suspension of benefits. In *Brightwell*, the employer and insurer filed a WC-2 noting the proper reason for suspension and attaching supporting medical documentation.

However, although the employer and insurer filed the WC-2 with the Board, it failed to give the employee the full 10 days notice of benefits prior to the suspension. The Court of Appeals held, consistent with *Freeman*, that although the employer and insurer may be liable for assessed attorneys' fees and penalties for the violation of Board Rules, they would not be liable for indefinite and ongoing payment of income benefits. Instead, they would be responsible only for the balance of the 10 days of benefits.

As can be seen from these cases, proper notice to the employee of a suspension of benefits is one of the primary purposes of the WC-2. In cases where the impropriety lies in failing to timely provide a full 10 days notice, the Court of Appeals has now held the employer and insurer are only responsible for the full 10 days worth of benefits, but not ongoing benefits. However, keep in mind that where the impropriety constitutes a failure of notice itself, or a mistake in the reason for the suspension, the courts will be less forgiving and might still order payment of benefits until the employee is determined to have been given proper notice. Thus, the timing and content of the WC-2 should be carefully monitored to ensure proper compliance with the law.

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Georgia Case Law Update

By Chad Harris

In *Fallin v. Merritt Maintenance & Welding, Inc.*, A06A1664 (Ga. App. 2007), the Court of Appeals upheld an Administrative Law Judge's ruling that a claimant's benefits had been properly suspended following a change of condition for the better. Mr. Fallin sustained a compensable back injury on November 13, 1998. The employer/insurer commenced income benefits on December 17, 1998, but failed to pay the "late penalty" due the claimant. The employer/insurer continued paying income benefits until February 1, 1999, when they suspended payments and filed a notice to controvert, alleging a change of condition. On appeal, the claimant argued the employer/insurer's failure to file a valid notice of controvert prevented them from discontinuing his income benefits. The Court of Appeals disagreed.

The Administrative Law Judge found that the employer/insurer's failure to pay the statutory penalty made its controvert invalid under O.C.G.A. § 34-9-221(h) and barred the employer/insurer from contesting whether Mr. Fallin had sustained a compensable injury. This upheld a long string of prior decisions which stood for the premise that an employer's failure to pay all benefits currently due a claimant before filing a notice to controvert under O.C.G.A. § 34-9-221(h) renders that notice to controvert invalid. However, the judge also ruled that an insufficient controvert does **not** prevent the employer/insurer from raising a defense under O.C.G.A. § 34-9-221(i) that Fallin had experienced a change in condition for the better. On appeal, Fallin never disputed that he had undergone a change in condition for the better. Instead, he argued only that the invalid controvert prevented the suspension of benefits. In the end, the Court of Appeals upheld the judge's determination that Fallin had undergone a change in condition as of November 1, 1999, thereby finding the suspension of benefits to be valid.

In another important decision, the Court of Appeals held that when the sole defect in a WC-2 notice of suspension is a tardy filing date, an employer/insurer may not suspend benefits on the date it selected for suspension in the WC-2, but rather may suspend benefits 10 days after the date on which the WC-2 was actually filed with the State Board and served on the claimant. *Reliance Electric Company, v. Brightwell*, A06A1665 (Ga. App. 2007). The employer/insurer filed a WC-2 after the authorized treating physician deemed Brightwell capable of returning to work without restrictions as of July 25, 2003. However, the WC-2, reflecting a suspension of benefits of August 10, 2003, was not filed with the State Board until August 4, 2003, leaving the suspension four days short of the 10-day advance notice required by O.C.G.A. § 34-9-221(i) and Board Rule 221(i). This decision marks a return to substance over form, as the Court of Appeals determined that Brightwell should only be entitled to benefits for an additional four days to correct the notice deficiency on an otherwise valid WC-2.

The Court of Appeals once again considered who is "on the risk" in a case involving two insurance companies in *TIG Specialty Insurance Co. v. Dust-Away, Inc.*, A06A1710 (Ga. App. 2007). The decision actually revolved around an insurance company's due process right to a hearing on the issue of reimbursement. In the case, the claimant sustained an injury while working for Dust-Away in December 2000. At that time, workers' compensation insurance coverage was provided by TIG, who paid for the claimant's medical treatment. Zenith Insurance Company later assumed coverage in February 2002. In May 2002, the claimant was deemed unable to work for the first time since the work accident. Even though it no longer provided insurance coverage, TIG commenced income benefits. Then, in 2004, TIG requested a hearing seeking reimbursement of any income benefits that were paid after Zenith assumed coverage.

Both Zenith and the claimant filed motions to dismiss TIG's hearing request on the issue of reimbursement. The Administrative Law Judge denied those motions for dismissal, but the Appellate Division reversed and dismissed. The dismissal was then upheld by the Superior Court of Fulton County. Thereafter, the Court of Appeals held that TIG's request for a hearing should not have been dismissed, and that due process required a remand of the claim to the Administrative Law Judge for a full hearing on the issue of whether reimbursement was proper.

In *Reid v. Georgia Building Authority.*, A06A2008 (Ga. App. 2007), the Court of Appeals analyzed the standards utilized for determining whether an injury is "catastrophic" in a workers' compensation claim. The claimant sustained a compensable injury to two fingers on her dominant right hand which she sought to have designated catastrophic. The employer contested such a designation. The Administrative Law Judge and Appellate Division both deemed the claimant's injuries catastrophic but the superior court reversed. The Court of Appeals affirmed the finding of the superior court under the "any evidence" standard, duly noting its displeasure with the claimant's failure to properly cite to the record on appeal.

Under O.C.G.A. §34-9-200.1(g)(6), the claimant sought to prove her injury was catastrophic by demonstrating it was "of a nature and severity that prevents [her] from being able to perform…her prior work and any work available in substantial numbers in the national economy for which [she] is otherwise qualified." The Court of Appeals agreed that there was no question that the claimant was incapable of performing her prior work as a housekeeper. However, the State Board erred by reaching the conclusion that the injury was catastrophic, as the record was devoid of any reference to the claimant's training, skill level or education, and no testimony was presented by any vocational expert, thereby leaving no competent evidence in the record regarding the claimant's ability to perform work available in substantial numbers within the national economy. The Court of Appeals noted how the State Board determined the claimant's injury was catastrophic "based solely on its own experience." Because the record requires at least some competent evidence to support the Board's findings, no catastrophic designation was warranted in this case.

For more information on this topic, contact Chad Harris at 404.888.6108, or chad.harris@swiftcurrie.com.

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Friday, September 28, 2007, 9:30 AM to 3 PM – *Swift Currie Workers' Compensation Seminar*

Friday, November 2, 2007, 9 AM to 2:30 PM – *Swift Currie Property Seminar*

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