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The End of an Aggravation

By Benjamin O. Bengtson

We are all familiar with the provision in Georgia's Workers' Compensation Act that an "aggravation of a preexisting condition" is compensable. However, the corollary to this provision, that the aggravation is compensable "only for so long as the aggravation of the preexisting condition continues to be the cause of the disability" is easy to overlook. Careful analysis of the facts in your case may reveal a potential resolution, equivalent to a full-duty work release.

The typical scenario involves a claimant who suffered from arthritis before the work-related accident. Then a minor accident or lifting incident strains the claimant's lower back. He goes to a panel doctor and complains of low back pain. The doctor takes him out of work for a short time and then orders an MRI of the lumbar spine which reveals the degenerative changes, spondylosis and bone spurs. Based on these findings, the physician keeps the claimant either out of work or on restrictions.

The "aggravating" thing about this factual scenario is that the MRI findings are not objective evidence of an acute injury. If there was a herniated disc, we could understand how that particular finding may have been caused by the work accident. However, with findings which indicate a longstanding, chronic condition, the connection is not so clear. Doctors are typically not assertive in pointing out the objective evidence that indicates the difference between an acute versus chronic (i.e. preexisting) condition.

The key to dealing with these cases is to insert yourself into the medical dialogue as soon as possible. Review the MRI of the body part involved. Ask the doctor whether the findings are acute or chronic. Find out from the claimant whether he received any kind of medical treatment for the arthritis before the accident and relay that information to the doctor. By doing so, the doctor and the claimant will understand your concerns regarding the timeframe for resolving the aggravation.

The key question to ask in these communications is "when will the claimant return to his pre-injury baseline condition?" What you mean by that is not necessarily *when* will the claimant stop complaining of pain in the affected body part, but *when* will the objective medical evidence indicate that the claimant no longer has restrictions related to the aggravation. If possible, try to avoid the suggestion of an FCE as the evaluation will not differentiate between limitations related to the aggravation and those attributable to the preexisting condition, unless the claimant has an FCE which predates his accident.

The next question is, once you have an opinion from the doctor that the claimant has returned to his pre-injury baseline condition, what can you do with it? Here, there are differences of opinion among practitioners. More aggressive types will advise that income benefits can be unilaterally suspended and that further medical treatment can be controverted. File a WC-2 with the medical opinion attached as you would with a full-duty work release and file a WC-3 to controvert future medical treatment. More cautious practitioners may advise that the appropriate action is to file a request for hearing seeking a change in condition for the better.

As always, the best approach depends on the particular facts and actors involved. The important issue is that you draw the claimant's (and perhaps the claimant's attorney's) attention to the prospect of a cessation of benefits. Whether that leads to a return to work, cessation of benefits or settlement, the result will be more favorable than allowing the file to languish with no resolution at all.

For more information on this topic, contact Benjamin O. Bengtson at 404.888.6214, or benjamin.bengtson@swiftcurrie.com.

The 1st Report A Workers' Compensa

Case Law Update

By Elizabeth H. Lindsay

The case of *Ray Bell Construction Company v. King* decided March 26, 2007, by the Supreme Court, deals with the doctrine of continuous employment. The *King* decision explores how the continuous employment doctrine interacts with the two-prong test outlined in *Mayor and Aldermen of the City of Savannah v. Stevens*, 278 Ga. App. 166 (2004), which requires that an employee's injury arise out of his or her employment.

The evidence adduced at the hearing demonstrated that the claimant was a construction superintendent working for Ray Bell Construction Company at a construction site in Jackson, Georgia. Notably, the claimant was a resident of Florida. The employer provided the claimant with a company truck, an expense account for gas and maintenance of the truck and provided and paid for an apartment for the claimant in Fayetteville, Georgia. At the time of the vehicular accident, the claimant was returning to either the jobsite in Jackson, Georgia or to the company apartment in Fayetteville, Georgia. He was traveling north on I-75 on a direct route to both the jobsite and the company apartment. He was returning from dropping off personal belongings in a storage shed in South Georgia.

Although the Administrative Law Judge and the Appellate Division did not make a specific finding of the parameters of the claimant's scope of employment, they did make a specific finding that his deviation from employment for personal reasons was clearly at an end at the time of the ultimately fatal collision and that he had resumed the performance of his employment duties at that time. The Superior Court, the Court of Appeals and a majority of the Supreme Court affirmed. The Supreme Court reasoned that when an employee is required by his or her employer to lodge and work away from home or headquarters, and stay in an area defined by the need to be available to perform employment duties, the employee is said to be in continuous employment and has a much broader scope of employment than a person who is limited to one specific work location.

Nevertheless, even an employee who is in continuous employment can deviate from the performance of his or her work duties in order to engage in a purely personal mission. Injuries that occur while the employee is performing such a personal mission do not arise out of and in the course of employment. If, however, the personal mission is completed so that the deviation is over and the employee has resumed the performance of his or her work duties, an injury which occurs after the deviation ends does arise out of and in the course of employment. The Supreme Court majority viewed this case as a deviation and resumption case. The majority made only one passing reference to *Mayor and Aldermen of the City of Savannah v. Stevens*, *supra*. The majority apparently treated *Stevens* as a going to and coming from work case that had little relevance or significance in a deviation and resumption scenario outlined in *King*. Three dissenting justices believed the doctrine of continuous employment had been given an overly broad application by the majority.

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Idiopathic Injuries

By Kelly M. Clark

Idiopathic injuries pertain to conditions without a clear origin or a disease without a recognizable cause. If an idiopathic condition results in an injury, but the injury is no greater than it would have been had the employee suffered a similar accident at any place other than the employer's premises, then the claim is not compensable. *Wood v. Aetna Casualty and Surety Co.*, 116 Ga. App. 284 (1967). To be compensable, there must be a *causal connection* between the employment and the injury, and the injury must be the consequence of a hazard connected with the employment. *Borden Foods Co. v. Dorsey, 112 Ga. App. 838 (1965)*. In defending idiopathic injuries, an employer/insurer needs to establish that the "injury" was brought about by causes personal to the employee and not connected with the work environment. However, applying case law to concrete situations has been difficult for the courts for many years, resulting in confusing and often conflicting decisions.

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For some time, the Georgia Courts held that if the employee, during an idiopathic fall, suffers injury by reason of coming into contact with something indigenous to his work, such as a table, work bench, machinery or equipment, and not just the floor, the claim may be found compensable. *United States Casualty Co. v. Richardson*, 75 Ga. App. 496 (1947). In *Borden Foods v. Dorsey*, an employee was walking from one part of a plant to another part when she fell, yet there was nothing on the floor on which she could have fallen. The Court of Appeals held the injury was not compensable.

In *Johnson v. Publix Supermarkets*, 256 Ga. App. 540, 568 S.E.2d 827 (2002), the Court of Appeals decided to resolve conflicting case law with regard to whether the positional risk doctrine or peculiar risk doctrine was the correct doctrine to utilize. There, an employee was walking quickly and looking ahead for items left on the floor, when she fell. The Court of Appeals expressly overruled both *Borden* and *Prudential Bank*, reaffirming that it was the positional risk doctrine rather than the peculiar risk doctrine that was to be utilized in these types of cases. Thus, the Court deemed the claim compensable. The Court of Appeals noted that "if she had not been working, she would not have been hurrying through the aisles." As such, it was reaffirmed that the positional risk doctrine was to be utilized instead of the peculiar risk doctrine.

The theory espoused in *Johnson* was only temporary. In the most recent idiopathic case, *Chaparral Boats, Inc. v. Heath*, 269 Ga. App. 339, 606 S.E. 2d 567 (2004), the claimant hyper extended her left knee while she was walking across the employer's premises to clock in for work. The evidence showed that she was walking at a quicker than normal pace at the time because she was almost late for work when she suddenly felt popping and pain in her left knee, stopped briefly and then resumed walking with a limp. There was no evidence that the claimant slipped, tripped or fell at the time of the injury, nor was there any evidence that she came into contact with any object. Medical evidence showed that the hyperextension, which caused cartilage tears in the claimant's knee, could have occurred whether she was walking at a normal or quick pace.

The Court of Appeals in *Chaparral Boats* disapproved of the *Johnson* case in their opinion and held that *Johnson* misconstrued the positional risk doctrine. In essence, the Court held there must be something more than the location of the claimant when the accident occurs. In *Chaparral Boats*, the Court of Appeals found even where the risk which caused the injury to the employee is common to the public at large—and therefore not peculiar to the employment—the injury arises out of employment if a duty related to the employment placed the employee in a locale which exposed the employee to the common risk and the claimant was performing a job duty.

While the case law is confusing, the main issue in idiopathic injury cases is still whether the accident arises out of the course and scope of employment. As a result, the goal of the employer/insurer should be to show that the injury was brought about by idiopathic causes personal to the employee and not connected with the work or work environment.

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The Medicare Set-Aside: Why Do We Need Them and When Must We Use Them?

By S. Elizabeth Wilson

Why Do We Need Medicare Set-Aside?

Medicare is a Federally sponsored plan available to individuals who are sixty-five (65) years or older, and also to individuals who have received Social Security for more than two years. In order to slow down the rising cost of medical care, Congress passed the Medicare Secondary Payer Act in 1980 that made workers' compensation primarily responsible for future medical expenses related to the compensable injury. Medicare became secondarily responsible, covering the residual items left over once workers' compensation coverage was exhausted. In order to ensure that Medicare does not improperly pay for services expected to fall under workers' compensation, the Centers for Medicare and Medicaid Services (CMS), the federal agency that oversees Medicare, reviews certain workers' compensation settlements and ensures that Medicare's interests have been properly considered.

When Are Medicare Set-Aside Approvals Recommended?

While it would be prudent to at least consider Medicare's interest in any workers' compensation settlement, it is not necessary. Below are some general guidelines in which CMS approval for a Medicare Set-Aside is recommended.

(1) The claimant is already a Medicare beneficiary.

(2) The claimant is receiving Social Security benefits (and will be eligible for Medicare within two years of receiving social security from the date of onset).

(3) When the total settlement amount exceeds $250,000 and the claimant is reasonably expected to be Medicare eligible within thirty (30) months of the date the settlement is approved.

There is of course some question as to how to define "reasonable expectation." CMS has stated that a reasonable expectation can include, but is not limited to: (1) a claimant who has applied for Social Security Disability Benefits, (2) a claimant who has been denied SSDI who anticipates appealing and/or re-filing, and (3) an individual who is 62-years and 6-months-old. Also, due to workload limits, CMS has recently stated that total settlements of $25,000 or less need not be submitted for review, even if the claimant falls into one of the above categories, though such situations are somewhat rare in this new era of prescription drug inclusion.

Prescription Drugs

Effective January 1, 2006, Medicare Set-Asides must also account for prescription drug benefits. This resulted from the Medicare Prescription Drug Improvement and Modernization Act of 2003 (MMA), signed into legislation by President Bush in 2003. The legislation brought prescription medications under the umbrella of Medicare's coverage, thus requiring that any workers' compensation settlement after January 1, 2006, take into account prescription costs. In addition, when submitting a Medicare Set-Aside to CMS for approval, cover correspondence must now clearly indicate separate amounts for future medical treatment for future prescription costs. Clearly, given the rising cost of prescription drugs, employers face even greater financial responsibility for overall future medical costs, coupled with the potential of greatly increased Medicare Set-Aside costs compared to those of the recent past.

For more information on this topic, contact S. Elizabeth Wilson at 404.888.6211, or beth.wilson@swiftcurrie.com.

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Ramifications of Undocumented Workers on Insureds in Georgia
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