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WINTER 2006

The 1st REPORT

A WORKERS' COMPENSATION UPDATE

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Change in Condition vs. New Accident

Footstar, Inc. v. Stephens, 275 Ga. App. 329, 620 S.E.2d 588, cert. denied
Georgia Court of Appeals, September 1, 2005

By Christina J. Bevill

Under *Footstar, Inc. v. Stephens*, the two-year "change in condition" statute of limitations under O.C.G.A. §34-9-104 may apply to "medical only" claims where a condition is determined compensable by award or otherwise. This means indemnity benefits are not a prerequisite to determine whether an employee has a change in condition or a fictional new accident.

Ms. Stevens had an injury while working as a manager in a K-mart department store that was operated by Footstar, Inc. on November 8, 1999. Travelers Insurance Company was the carrier at the time of this injury. Travelers accepted Stevens' claim as a medical only claim because she continued to work with Footstar. On January 1, 2001, Liberty Mutual Insurance Company replaced Travelers as Footstar's workers' compensation carrier. In August 2001, Travelers requested a hearing to determine which insurer was responsible for the cost of Stevens' continued medical care. In an award dated December 18, 2001, the Administrative Law Judge determined Stevens sustained a compensable injury on November 8, 1999; that she was not disabled because she continued to work for Footstar; and that Stevens had not sustained a new injury or new accident during Liberty Mutual's coverage. Therefore, Travelers was responsible for Stevens' continuing medical expenses.

Ms. Stevens eventually went out of work in January 2002. A new hearing was requested to determine whether Stevens was entitled to income benefits, and if so, which insurance carrier was responsible. The Judge found that the change in condition, two-year statute of limitations under O.C.G.A. §34-9-104(b) did not apply because Travelers never paid income benefits to Stevens. The judge concluded that if the claim was not a change in condition then a fictional new accident had to be established. Accordingly, the judge determined that January 5, 2002, the date Stevens left work, was a fictional new date of accident. Because Liberty Mutual was the insurance carrier on that date, it was responsible for any benefits due to the injured worker.

Liberty Mutual appealed the judge's decision and the appellate division adopted the judge's findings – except for the finding that a new injury had occurred on January 5, 2002. The appellate

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Moving Old Compensable Claims

By James S. Widener

Most claims adjusters have old, compensable claims, and unfortunately, these claims do not just go away on their own. We like to refer to these claims as "old dogs." They typically get worse with time, and some course of action must be taken to try to move these claims towards closure.

Usually, these types of claims involve a claimant who has some or all of the following attributes:

1. Receipt of income benefits for a long time;
2. Very little, if any, recent medical treatment;
3. A stable medical condition;
4. No interest in returning to work;
5. An employer with no light duty work; and/or
6. An authorized treating physician who has not provided a light duty release.

What can you do to move these claims towards closure? There are several courses of action to consider, but first, you should try to gain control of the medical treatment. As you know, you need a physician who understands workers' compensation, and who will be willing to work with you in releasing the claimant to work in at least some capacity. If the present authorized treating physician will not provide assistance to that end, you should consider

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UPDATE ON ICMS

The State Board is moving toward a paperless environment through the implementation of the ICMS document management system. The Board has the capability of electronically scanning all documents coming into the Board. However, at this time, due to the volume of paper coming in, the Board indicates that they are only scanning the following documents: WC-1, WC-2, WC-3, WC-4, WC-14 and WC-102B.

ICMS assigns a unique claim number to each claim. In addition, a separate "SBWC ID number" is assigned to each insurer, self-insurer, claim office and group fund. The "SBWC ID number" for organizations can be found at the State Board's web site at *www.sbwc.georgia.gov*.

Change in Condition vs. New Accident…continued

division determined the change in condition statute sometimes applies to "medical only" cases such as this, where a compensable injury had been established by award. The appellate division held Travelers was responsible for paying the disability and ongoing medical benefits to Stevens because it was the insurance carrier at the time of Stevens' original injury. Travelers then appealed to the Court of Appeals.

The Appellants argued the statute under O.C.G.A. §34-9-104(b) (the change in condition statute) should not apply because Ms. Stevens was awarded only medical benefits. The Court of Appeals disagreed, noting that the statutory definition of a change in condition makes no reference to what type of compensation must have been awarded. Instead, only the wage earning capacity, physical condition, or status of an Employee that was last established by an award or otherwise is mentioned under O.C.G.A. §34-9-104(a)(1). The Court of Appeals also found "an award of medical expenses is an award of compensation within the meaning of the Act." The Court found that the statute could apply because Stevens' condition was established as compensable by an award.

The significance of *Footstar* is twofold. First, it was generally accepted that in medical only cases the change in condition statute could not apply because no income benefits had been paid. Now, if you have a medical only claim, it is possible for a change in condition rather than a fictional new accident to occur. Second, it is possible for the two-year statute of limitations under O.C.G.A. §34-9-104(b) to apply. However, a significant question remains: what is the triggering mechanism for the statute of limitations? It could be that the triggering mechanism is the date of the award establishing compensability of an injury. Unfortunately, the Court failed to address this point. We can expect to hear more on *Footstar* and its impact on the Workers' Compensation system in the future. Stay tuned….

Moving Old Compensable Claims…continued

scheduling an independent medical examination (IME). Assuming you schedule an IME and obtain a treatment plan that includes a light duty release and help in trying to restore your claimant to suitable employment, then you should have reasonable grounds to file a motion with the State Board requesting a change of authorized treating physician, and you may want to choose that course of action. If you prevail, you may then be able to file a WC-104 Board form which will eventually allow you to lower the exposure (by reducing the claimant from Temporary Total Disability (TTD) to Temporary Partial Disability (TPD) benefits), and you will undoubtedly be moving the claim in the right direction, towards closure.

Another course of action to consider is scheduling an activities check or assigning surveillance. Often times, a claimant may have returned to work for another employer or have involvement in a subsequent claim or accident that may be an intervening cause ending your client's or company's liability. An investigation can be worthwhile, and there are many good vendors available.

Additionally, you may want to consider contacting claimant's counsel regarding a resolution of the claim. You should advise counsel you are interested in trying to resolve the claim and that you would be willing to consider a reasonable demand. If reasonable, you may wish to respond with an offer, or you may want to suggest mediation. Mediation can be a good way to demonstrate to opposing counsel why their valuation of the claim is unreasonable.

Assuming you have a catastrophic claim on your hands, which we sometimes refer to as "very old dogs," consideration of additional measures may be necessary. You should analyze exactly why the claim is catastrophic. If availability of work in the national economy is the issue, you should consider obtaining a vocational assessment, including labor market survey and transferable skills analysis. If catastrophic for some other reason, like a severe closed head injury, you may want to investigate the current medical status by scheduling an IME. Your investigation may reveal favorable evidence you could use to file a hearing request to contend the claimant has undergone a change in condition for the better. In other words, you would argue the claim should no longer be considered catastrophic and that there should be no lifetime entitlement to receipt of income benefits.

Likewise, in non-catastrophic compensable claims, you may want to consider filing a hearing request to contend the claimant has undergone a change in condition for the better, assuming you have obtained favorable medical opinions. Specifically, you would need the treating physician or an IME physician to say that the claimant's condition returned to the pre-injury baseline condition or the claimant is capable of working at a full duty work status without restrictions.

Moving these types of claims can be difficult, and we would be happy to provide assistance or to answer any questions you may have regarding these potential courses of action. The "bottom line" is that something must be done to move these claims towards closure.

Conversion from TTD to TPD: Complying with O.C.G.A. §34-9-104 and Board Rule 104

***MARTA v. Bridges*, 276 Ga. App. 220, 623 S.E.2d 1**
Georgia Court of Appeals, September 23, 2005

By Heidi M. Hosmer

The case of *Metropolitan Atlanta Rapid Transit Authority v. Bridges* helps to highlight the requirements of strictly following O.C.G.A. §34-9-104 and Board Rule 104 when seeking to convert (reduce) benefits from Temporary Total Disability (TTD) to Temporary Partial Disability (TPD), especially in a case where a change of physician has occurred. The employer in *Bridges* sought to unilaterally reduce the employee from TTD to TPD benefits, and later sought to unilaterally suspend benefits altogether. Both attempts were

denied by the Board, specifically because the Board found the employer failed to comply with the procedural requirements to prove a change in condition.

The employee injured his right knee and low back on October 24, 2001, aggravating pre-existing right knee and low back conditions. The claim was accepted as compensable and the employee treated with Dr. Stephen Dawkins. Dr. Dawkins released the employee to light duty work as of November 9, 2001, and a WC-104 was filed. Subsequently, the employee underwent additional treatment and surgery with Dr. Bernot. He was later released to full duty, and benefits were suspended with the filing of a WC-2.

A hearing was held at the request of the employee regarding the suspension of benefits. The Administrative Law Judge (ALJ) ordered a recommencement of TTD benefits and a change of physician to Dr. Kingloff.

The employer reinstated benefits back to April 2002. However the employer unilaterally reduced benefits from TTD to TPD on January 21, 2003, pursuant to a WC-104 based on a light duty work release which was issued before the November 1, 2002 award designating Dr. Kingloff as authorized treating physician. Subsequently, on July 21, 2003, the employer suspended all income benefits, alleging that the work aggravation of the employee's pre-existing conditions had ceased.

A hearing was held on the issues of benefit reduction and suspension. The ALJ found that the reduction and suspension were improper and that the employee was entitled to recommencement of TTD because the employer failed to prove compliance with O.C.G.A. §34-9-104(a) and the requirement of filing a WC-104. The ALJ found, and the Appellate Division and Superior Court affirmed, that the employee's condition was established by the ALJ Award of November 1, 2002, after the 2001 opinion from Dr. Dawkins. In order to avail itself of the unilateral conversion from TTD to TPD, the employer must have strictly complied with O.C.G.A. §34-9-104(a)(2), and the employer failed to do so. The employer should have secured an opinion after November 2002 that the employee could work with restrictions, and should have then filed an additional WC-104 reflecting same.

The burden is upon the employer to show that the requirements of O.C.G.A. §34-9-104 and Board Rule 104 are strictly complied with, including giving proper notice to the employee under O.C.G.A. §34-9-104 with proper filing of a WC-104. Absent strict compliance, the WC-104 may be defeated.

To successfully comply with the statutory requirements in seeking to reduce benefits from TTD to TPD under O.C.G.A. §34-9-104 and Board Rule 104, make sure to:

1) Complete a form WC-104 within 60 days of the employee's release to return to work with restrictions by the authorized treating physician. File the form with the State Board, as well as mail a copy to the employee, to give notice to the employee of the release, explain the restrictions, and provide the general terms of the Code section; and

2) Attach a copy of the authorized treating physician's report releasing the employee to return to work with restrictions, making sure that the release was given within 60 days or less; and

3) After 52-consecutive weeks of release to work with restrictions, or 78-aggregate weeks of release to work with restrictions, file a WC-2 indicating a reduction in benefits from TTD to TPD based on a change of condition for the better with no return to work, and again include a copy of the authorized treating physician's report establishing that the employee has been medically determined to be capable of performing work with restrictions for 52-consecutive or 78-aggregate weeks.

Continuous Employment Doctrine

***Ray Bell Construction Co. v. King*, 2006 Ga. App. LEXIS 13**
Georgia Court of Appeals, January 5, 2006

By Seth J. Sabbath

It has long been established that, as a general rule, if an employee's duties begin and end at his place of employment, an accident which occurs while the employee is going to, or coming from work is not compensable. However, this general rule is subject to a number of exceptions. One of these exceptions is discussed in a new Georgia Court of Appeals case, *Ray Bell Construction Company v. King*.

In *Ray Bell Construction*, the employer hired the employee as a construction superintendent on a job site in Jackson, Georgia. As part of this job, the employee lived in company housing in Fayetteville, Georgia. This housing was provided by the employer. The employer also provided a company truck to the employee for both personal and work purposes.

On a Sunday, prior to returning to work on Monday, the employee drove the company-owned truck from Fayetteville to Alamo, Georgia. He was driving this truck to deliver family furniture to a storage unit. On his return trip, he collided with another car and sustained injuries which eventually led to his death. Thereafter, his dependants brought a workers' compensation claim against the employer. The Administrative Law Judge found that the employee's accident did occur in the course and scope of his employment and awarded dependency benefits. This award was upheld by the Appellate Division, the Superior Court and the Georgia Court of Appeals, relying upon the "continuous employment doctrine."

The Court of Appeals recognized that the scope of the employment of a traveling employee is wider than that of an ordinary person. Therefore, if an employee "is required by his employment to lodge and work within an area geographically limited by the necessities of being available for work on the employer's job site," he is "in effect, in continuous employment."

The Court reasoned that this employee was in continuous employment with his employer because he was required to live in company

housing in Fayetteville. Based on this evidence, the Fayetteville area was part of his job site. Furthermore, although he was on a personal mission to deliver furniture, "such a personal mission comes to an end when the traveling employee turns back to return to his lodging or work site."

The Georgia Court of Appeals concluded, "in this case, the employee's accident did not arise on his way to Alamo. Rather, the employee was injured by accident on his way to either his job site or his employer-provided apartment. The accident occurred while the employee was driving an employer-provided vehicle, carrying both personal and company tools. Thus, we find that while the employee arguably engaged in a deviation [from employment] when he traveled to his storage shed in Alamo, given all the evidence presented, the deviation had ended at the time of the accident." Of course, the Court of Appeals noted that the State Board "is vested with a broad discretion in identifying which category in which to place the circumstances of a given claimant." Accordingly, the Court of Appeals found that the employee's accident did occur in the course and scope of his employment and upheld the award of dependency benefits.

Save the Date!

You and your co-workers are invited to attend our Annual Swift, Currie, McGhee & Hiers Workers' Compensation Seminar on Friday, September 15, 2006, from 9:30 AM to 3:00 PM. This year's seminar will be held at Villa Christina, 4000 Summit Boulevard in Atlanta, GA. The seminar is free of charge and includes a complimentary lunch.

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

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