



## **New Concerns When Suspending Income Benefits and Raising a Statute of Limitations Defense**

The Court of Appeals of Georgia recently addressed the definition of when the last payment of income benefits is "actually made" as it relates to the two-year statute of limitations defense in O.C.G.A. § 34-9-104(b), commonly known as the change of condition statute. Pursuant to O.C.G.A. § 34-9-104(b), a claimant must request a hearing seeking recommencement of income benefits not more than two years since the date the last payment of income benefits was "actually made." Otherwise, the claimant's request is barred by the statute of limitations. In *Lane v. Williams Plant Services*, 330 Ga. App. 416 (2014), the Court of Appeals previously concluded the last payment of income benefits is "actually made" when it is mailed to the recipient, which is commonly referenced as "the mailbox rule," opposed to when the employee received the check or the date through which the payment compensated the employee.

In *Sunbelt Plastic Extrusions, Inc. et al. v. Paguia*, the claimant's date of accident was March 31, 2009, and she was entitled to 400 weeks of income benefits, which expired on Nov. 29, 2016. The employer/insurer argued the last payment of income benefits, which included two weeks' worth of benefits paid together, was mailed on Nov. 15, 2016. The claimant filed a request for catastrophic designation on Nov. 20, 2018, seeking a recommencement of temporary total disability (TTD) benefits, which was beyond two years from when the employer/insurer contended the last payment of income benefits was mailed. Accordingly, the employer/insurer raised the statute of limitations defense.

The employer/insurer relied on the adjuster's testimony indicating she entered payment authorization for the last two weeks of TTD benefits to be paid on Nov. 14, 2016. The adjuster further testified her administrative assistant would then typically print the check, prepare it for mailing and the post office would usually pick up the check for mailing in the afternoon. The adjuster testified it was her opinion the last TTD check was likely mailed on Nov. 15, 2016. There was no testimony from the administrative assistant as to when she printed and prepared the check for mailing or when she placed the check in the area for it to be picked up by the postal service. Without such testimony, the State Board of Workers' Compensation concluded there was insufficient evidence to prove when the check was actually mailed or otherwise establish the routine practice for mailing checks by the insurer.

The Court of Appeals agreed with the Board regarding the need for additional evidence of the insurer's routine practice for mailing income benefits checks, and thus concluded the employer/insurer did not meet its burden of proof that the check was actually mailed on Nov. 15, 2016, to establish the statute of limitations defense. The injury was deemed catastrophic and income benefits were ordered to be recommenced with the 400-week cap removed.

The Court of Appeals' decision in *Sunbelt* recognized two significant issues when presenting evidence regarding a statute of limitations defense in this situation. First, when making any significant income benefits payment and especially the last income benefits payment at the time of the expiration of either the 350- or 400-week caps, employers, insurers and third-party adjusters (TPAs) should ensure there is documentation of when and how the payment was made. Certainly, being able to document when and how the payment was provided to the postal service will be necessary following this case. Perhaps, a payment with a tracking number could be considered. Moreover, it would behoove employers, insurers and TPAs to have and implement a written policy regarding the practice of issuing income benefits checks. Often, income benefits checks are not issued in the same office where authorization for payment is being made. With numerous parties and facilities handling the authorization and subsequent mailing of these checks, it makes it difficult to prove every step of the process several years later at a hearing. A written policy regarding the routine practice of issuing income benefits checks helps provide some evidence, although circumstantial, to help prove when a payment was mailed.

The second significant issue raised by the court in *Sunbelt* relates to the application of the mailbox rule generally in this situation. While it did not overturn the precedent in *Lane*, the court in *Sunbelt* suggested the rule in *Lane*, which establishes the mailing date as the commencement period for the statute of limitations, should possibly be reconsidered because the employee cannot easily determine the mailing date two years later. Additionally, the court believed the date should be more obvious considering income benefits would be forever barred. The court was also concerned that the current rule could mislead the employee. For example, in the *Sunbelt* scenario, the last check paid through Nov. 29, 2016, but the employee had less than two years to request recommencement if the last payment was mailed on Nov. 15, 2016. Ultimately, the Court of Appeals indicated it was able to affirm the Board's ruling without having to overturn *Lane*, and thus judicial restraint prevented the court from doing so. However, the Court of Appeals urged the Georgia Legislature to address the "substantial" statutory construction arguments raised by the employee regarding defining when a payment was "actually made" under O.C.G.A. § 34-9-104(b) as a matter of public policy. There is no guarantee the Georgia Legislature will address this issue when the session reconvenes in January 2022. However, the Court of Appeals appears to be primed to redefine the rule in *Lane* if offered a similar fact scenario.

If you wish to further discuss this case or have any questions, please contact a Swift, Currie, McGhee & Hiers attorney at 404.874.8800 or via our website, [swiftcurrie.com](http://swiftcurrie.com).

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