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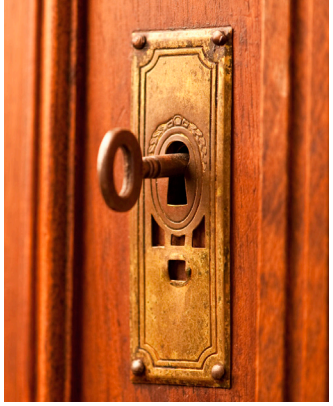

The 1st Report

A Workers' Compensation Update

Fall 2015

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The Idiosyncrasies of the Idiopathic Defense

By: Daniel M. McCarter

We often face an injured employee whose injury, while it occurred in the course of her employment, appears to be unrelated to her work activities. For example, a cashier walking across a room when her knee suddenly pops, or a dispatcher bending over to pick up a personal item she dropped and feeling a strain in her back. These incidents are commonly referred to as "idiopathic injuries." Under Georgia law, an idiopathic injury is generally not compensable.

Merriam Webster defines idiopathic as "arising spontaneously or from an obscure or unknown cause." While this definition is straightforward, the Georgia Court of Appeals has released several opinions regarding idiopathic injuries over the last decade, which lead to anything but a clear definition of an idiopathic injury.

The seminal case on idiopathic injury is *Chaparral Boats v. Heath*, 269 Ga. App. 339, 606 S.E.2d 567 (2004). In this case, the Court of Appeals established that:

> Where the injury would have occurred regardless of where the employee was required to be located, and results from a risk to which the employee would have been equally exposed apart from any condition of the employment, there is no basis for finding a causal connection between the employment and the injury. . . .

In *Chaparral Boats*, the claimant was walking at a "quicker than normal pace" across the employer's premises when she "felt popping and pain in her left knee." *Id*. at 339. The Court of Appeals ruled that she sustained a non-compensable, idiopathic injury, reasoning that the "knee injury was not the result of a slip, trip, fall, or contact with any object, and that there was no evidence [she] claimed any particular cause." *Id*. at 344. The court found the evidence revealed that the claimant was simply walking at a pace of her own choosing when the knee injury occurred. *Id*.

In another case, a nurse injured her knee when she turned to get a cup of water for a patient. The Board found that "the employee was not exposed to any risk unique to her employment by standing and turning, and that, in turning, she did not come into contact with any object or hazard of employment." *St. Joseph's Hospital v. Ward*, 300 Ga. App. 845, 686 S.E.2d 443 (2009). The Court of Appeals upheld the Board's decision.

Chaparral and *Ward* both examined whether the claimant was exposed to a risk unique to her employment and whether she made physical contact with an object or hazard of her employment. However, the Court of Appeals departed from this trend in deciding *Harris v. Peach County Board of Commissioners*, 296 Ga. App. 225, 674 S.E.2d 36 (2009). In *Harris*, a custodian dropped her pill on the floor and bent over to retrieve it, injuring her knee. *Id*. at 226. The Board concluded that bending over to pick up objects from the floor was part of the claimant's job duties as a custodian, and the injury was compensable. The Court of Appeals upheld the Board, saying:

> [T]he operative question is whether the claimant performed the activity in furtherance of her job duties, and this is a question of fact that is committed to the factfinder at the administrative level. In *Chaparral Boats*, the factfinder found that under the circumstances walking did *not* constitute an employment function, and we deferred to that finding. In this case, the factfinder found that under the circumstances bending over to

> pick up an object, even though it was the claimant's personal medication, *did* constitute an employment function, and, again, we defer to that finding. . . .

Id. at 228-29. The *Harris* ruling muddies the idiopathic waters by placing the focus on whether the claimant was acting in furtherance of her job duties, not whether she struck an object or was exposed to a peculiar hazard at work.

In 2014, the Court of Appeals decided *Chambers v. Monroe County Board of Commissioners*, 328 Ga. App. 403, 762 S.E.2d 133 (2014). In *Chambers*, an EMT was sitting at a desk watching television when her supervisor asked her to get up so he could use the desk. When the EMT stood up, she felt a pop in her left knee and ultimately needed a knee replacement. *Id*. at 404. The ALJ found the injury compensable because the claimant was required to be in the location where she was injured and was following her supervisor's orders. The Court of Appeals disagreed, reasoning that the claimant "offered no testimony to establish any causal connection between her employment and her injury." *Id*. at 405. The Court of Appeals then outlined several circumstances which, presumably, would provide the missing causal connection between employment and injury:

> [F]or example, . . . the chair or desk configuration caused her to lose her balance or strain to reach a standing position, . . . a work-related emergency such as a fire alarm caused her to jump out of the chair in a hurried manner, or . . . she came in contact with any object or hazard such as the desk, stairs, or a piece of equipment.

Id. Indeed, the *Chambers* Court ruled that the claimant sustained an idiopathic injury and returned some focus to the element of physical contact. But the ruling goes far afield by suggesting that furniture configuration or emergency circumstances could also defeat an idiopathic defense.

Although incongruous, the Appellate rulings above do provide guidance when investigating idiopathic claims. It must be noted that none of the cases examined herein have been explicitly overruled. Accordingly, the inquiry from each case remains relevant and must be examined: (1) Did the claimant strike any objects?; (2)Did the claimant's surroundings cause her to maneuver abnormally?; (3)Was there any emergency to which the claimant was reacting?; (4) What task was the claimant performing when injured and was the act in furtherance of her job duties?; and (5) Was the claimant exposed to a hazard unique to her employment when the injury occurred?

Ultimately, it will be up to the ALJ to determine what factors will be weighed in a given case.

For more information on this topic, contact Daniel McCarter at 404.888.6207 or at daniel.mccarter@swiftcurrie.com. ■

Cha-Cha-Cha-Changes...

By Richard A. Phillips

It is that time of year again. Yes, a new Sharknado movie just aired; however, it is also time to brush up on changes to Georgia Workers' Compensation statutes and Board Rules.

O.C.G.A § 34-9-261 was modified, increasing the maximum temporary total tisability (TTD) rate from $525.00 per week to $550.00 per week, effective July 1, 2015. If the accident date is between July 1, 2013, and June 30, 2015, the claimant's maximum TTD rate will still be $525.00 per week. If the accident date is July 1, 2015, or after, the maximum TTD rate will be $550.00 per week.

O.C.G.A § 34-9-262 was also modified, increasing the maximum temporary partial disability (TPD) rate from $350.00 per week to $367.00 per week. Again, the increased TPD rate only affects claims with a date of accident on or after July 1, 2015. This will have an impact on both the short- and long-term value of many claims. Despite the increase in the maximum TTD rate, Georgia still has the second lowest maximum TTD rate in the U.S., second only to Mississippi.

The Georgia Legislature also turned to the Panel of Physicians and addressed the Conformed Panel of Physicians from O.C.G.A § 34-9-262. The subsection addressing Conformed Panels was eliminated in its entirety, as was the subsection in Board Rule 201 addressing Conformed Panels. Although not the most popular choice for a Panel of Physicians, many employers are not aware of the recent change or the implications of not replacing their old Conformed Panel. Since certain medical providers, such as chiropractors, are presumably listed on the panel, it would be advisable to update the panels where applicable.

Several other changes were also made to the Board Rules. Although many of these changes will not affect your daily routine, there are a few that could potentially have a significant impact on claims. The most impactful changes were made to Board Rule 201, regarding the employer's Panel of Physicians. In the past, if you had the appropriate minimum amount of medical providers (six) on your panel, but two or more of the providers were "associated," your panel was invalidated on its face. For example, if you had one provider who was simply a subsidiary or sister company of another provider, despite being at a different location, your panel was invalidated. Board Rule 201(a)(1) was amended to remove the requirement that the Panel of Physicians consist of only "non-associated" physicians. This gives greater flexibility to employers and insurers, especially in less populated areas where finding multiple "non-associated" providers is more difficult. Not to mention, in today's "mergers and acquisitions" climate, we see so many medical practices merging.

Another significant change to the Board Rules also comes under Board Rule 201. Board Rule 201(a)(1)(i) now provides that, "should a physician on the panel of physicians refuse to provide treatment to an employee who previously has received treatment from another panel physician, [an employer or insurer,] as soon as practicable, shall increase the panel for that employee by one physician for each such refusal."

This is excellent news! In the past, for example, if a claimant elected to make her one-time change of physician on the panel to a physician who then refused to treat her, the claimant would inevitably argue that the panel was invalid; thus, giving her the right to choose any physician she so desired. Now, as a result of this Board Rule change, the employer and insurer have a period of time ("as soon as practicable") to find another physician to place on the panel for the employee to choose. Not only does this allow the employer and insurer to "save" their panel and keep control of the medical aspect of the claim, but they can now choose another physician to place on the panel, who may be a better fit for the employee's particular type of injury. It is important to note that adding this "new" physician to the panel does not affect all employees, but rather, only the employee who would not be seen by the physician being replaced on the panel. This effectively closes the door on a fairly common problem that arose with the Panel of Physicians, and the change should ultimately result in more claim control and cost savings.

Last, but not least, Rule 202(b) was amended to increase the base amount of a claimant's independent medical examination from $600.00 to $1,200.00. So, do not be alarmed if, and when, you see that higher amount on an invoice.

For more information on this topic, contact Richard Phillips at 404.888.6218 or richard.phillips@swiftcurrie.com. ■

Recent Case Law Update

By: Andrew M. O'Connell

***ABF Freight System, Inc. v. Presley*, 330 Ga. App. 885, 769 S.E.2d 611 (2015).**

In *Presley*, the Georgia Court of Appeals denied an employee's request for income benefits on the grounds the employee had sustained a change in condition for the worse and not a fictional new accident. A fictional new accident occurs when an employee sustains a specific accident, but he continues to work without ever having received or applied for workers' compensation benefits and eventually comes to the point where he can no longer work due to the gradual worsening of his condition, which is at least partially attributable to the continued work. A change in condition occurs when an employee is injured, misses time from work because of the injury, receives income benefits, returns to work, and, as the result of the wear and tear of ordinary life and the performance of his normal job duties, his condition worsens until he can no longer continue to perform his ordinary work.

The determining factor in distinguishing between a change of condition and a fictional new accident is the intervention of new circumstances, which requires the employee to show an increase in the demands of employment following his return to work. The distinction between a fictional new accident and a change in condition is important because O.C.G.A. § 34-9-104(b) places a two-year statute of limitations on any requests for additional income benefits on the basis of a change in condition. The two-year statute of limitations begins running when the last payment of income benefits is made.

In *Presley*, the employee sustained a compensable injury to his right knee on June 4, 2009. He subsequently underwent surgery on his right knee and was paid temporary total disability (TTD) benefits from June 4, 2009, until September 15, 2009. On September 16, 2009, the employee returned to work without restrictions and performed the same job duties he had performed prior to June 4, 2009. However, on December 4, 2009, he sustained a compensable injury to his left knee. Moreover, on March 17, 2010, he was diagnosed with arthritis in the right knee and was told he would eventually need a right knee replacement. He subsequently had left knee surgery and received TTD benefits for his left knee injury from June 24, 2010, to September 18, 2010. He returned to work without restrictions on his left knee on September 20, 2010, and continued to perform the same job duties he had performed prior to June 4, 2009.

On February 4, 2011, the employee was diagnosed with a tear in his left knee, and his right knee pain had worsened. On June 19, 2012, he underwent a total replacement of his right knee and was taken out of work until October 29, 2012. On March 21, 2013, the employee requested TTD benefits from June 2012 to October 2012 on the grounds he had sustained a fictional new accident in June 2012 when he stopped working. The employer contended the employee's initial June 4, 2009, right knee injury had undergone a change in condition for the worse, and any additional income benefits were barred by the two-year state of limitation, as no income benefits has been actually paid since September 2010.

The Administrative Law Judge and Appellate Division of the State Board denied payment of any additional income benefits, stating that the employee had sustained a change in condition for the worse in relation to his June 4, 2009, injury; therefore, he had not sustained a fictional new injury. The Court of Appeals agreed and found that the employee's post-June 4, 2009, job duties had not exposed him to any new or different circumstances, as he had returned to work performing the same job as he had performed prior to June 4, 2009. The Court of Appeals further held that the medical evidence showed the claimant's right knee was never the same after his first surgery and simply worsened over time.

The employee's attorney attempted to get around the statute of limitations by arguing the claimant's right knee worsened as a result of his altered gait, which was caused by his left knee injury. However, the Court of Appeals denied this theory as well, since the medical evidence showed the employee's right knee worsened over time and not as the result of his left knee injury or any new job duties.

Save-A-Lot Food Stores v. Amos, 331 Ga. App. 517, 771 S.E.2d 192 (2105).

In *Amos*, the Georgia Court of Appeals upheld a denial of workers' compensation benefits relating to an alleged stroke injury and affirmed that employees seeking workers' compensation benefits for an injury arising from a stroke must include medical evidence in support of their claim. O.C.G.A. 34-9-1(4) states that an "injury" does *not* include "heart disease, heart attack, the failure or occlusion of any of the coronary blood vessels, stroke, or thrombosis unless it is shown by a preponderance of competent and credible evidence, *which shall include medical evidence*, that any of such conditions were attributable to the performance of the usual work of employment." (emphasis added). In this case, the employee contended he had sustained a stroke after he had developed a headache and became dizzy, overheated, and weak while unloading pallets at work. His family physician opined he suffered a stroke and that job-related stress had helped to cause the stroke. However, two neurologists found no evidence the employee had sustained a stroke, and one of the neurologists questioned whether stress was a risk factor for a stroke, while also noting the claimant's personal comorbidities of diabetes and smoking were known risk factors for a stroke.

The Administrative Law Judge denied the claim on the grounds the employee had failed to prove by a preponderance of competent and credible evidence that he had sustained a stroke, and, even if he had sustained a stroke, he had failed to prove the stroke was caused by stress from work. The ALJ further noted the employee was required to "meet a higher standard of proof" to establish the compensability of his alleged stroke. The Appellate Division of the State Board affirmed the denial of the claim but struck the language from the ALJ's Award which stated the employee had to "meet a higher standard of proof" in proving he had sustained a stroke. After the Superior Court remanded the claim for a "new trial," the Court of Appeals clarified that there was no error in the ALJ's reference to the need for the employee to meet a higher standard of proof, as the ALJ was merely referencing the special requirement for a stroke claimant to include medical evidence in support of his claim.

For more information on this topic, contact Andrew O'Connell at 404.888.6213 or at andrew.oconnell@swiftcurrie.com.

Events

Swift Currie Golden Anniversary Firm-Wide Seminar and Cocktail Party
October 8, 2015
Cobb Galleria Centre
Seminar: 8:30 am - 5:00 pm
(Seminar will include breakout rooms for workers' compensation, liability, and property and coverage during the day as well as general sessions at the beginning and end of the day.)
Cocktail Party: 5:00 - 7:00 pm

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