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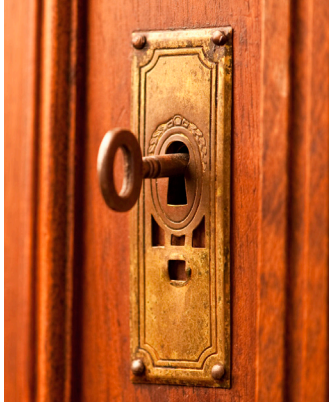

The 1st Report

A Workers' Compensation Update

Spring 2011

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Recent Case Law Update

By: Teesha T. McCrae

***Lowndes County Board of Commissioners et al. v. Connell et al.*, A10A1213 Ga. Ct. App. (September 8, 2010).**

In *Connell*, the Court of Appeals provided insight into what evidence can support a finding that a claimant did not sustain a compensable injury. In *Connell*, the claimant, an investigator with the Lowndes County Sheriff's Office, injured his right knee in accidents at work on March 17, 2005 and August 31, 2006. The claimant lost no time from work and received only minor medical treatment for the March 2005 incident related to bursitis. He continued to work through May 2007.

On May 12, 2007, the claimant injured his right knee while riding a four-wheeler at home. The claimant reported he felt a "sharp pain" and a "pop" in his right knee. An orthopedic surgeon diagnosed a torn anterior cruciate ligament (ACL) and torn knee cartilage. The claimant underwent surgery and missed approximately seven weeks of work.

The claimant subsequently filed a workers' compensation claim seeking payment of his medical expenses associated with the treatment for the torn ACL and cartilage, as well as temporary total disability benefits for the time he spent out of work after the four-wheeler incident.

The parties agreed the claimant sustained injuries to his right knee arising out of and in the course of his employment on March 17, 2005 and August 31, 2006. At issue, however, was whether the torn ACL and cartilage were causally connected to the prior work-related accidents or were new injuries caused solely by the four-wheeler incident. The claimant made several arguments in favor of compensability. He argued that the torn ACL was compensable as an original accident claim related to the March 2005 and August 2006 incidents because his ACL was torn at that time; he claimed the torn ACL was compensable as a "new accident" because his knee was in a weakened state on May 12, 2007; and he claimed the ACL tear in May 12, 2007, was a "superadded injury." The employer and insurer took the position that the knee problems were caused solely by the four-wheeler incident and were unrelated to the claimant's employment.

The Administrative Law Judge (ALJ) found that the torn ACL was causally connected to the claimant's August 2006 job accident and awarded him medical expenses for treatment of that condition. However, the ALJ denied the claimant's request for medical expenses associated with the torn cartilage and for temporary total disability benefits for his time out of work after the four-wheeler incident. On appeal, the State Board overruled the ALJ and denied all benefits to the claimant.

The claimant appealed, and the Superior Court upheld the State Board's finding the claimant was not entitled to medical expenses for the torn cartilage or temporary total disability benefits. However, the Superior Court also held there was no evidence to support the State Board's reversal of the ALJ's award of medical expenses for the torn ACL.

The Court of Appeals held that there was some evidence to support the State Board's finding that the claimant's torn ACL was a new injury resulting solely from the four-wheeler incident. Specifically, before the four-wheeler incident, Connell was diagnosed with bursitis, not an ACL tear. In addition, following the August 2006 job accident, Connell returned to work immediately, performed all of his duties, and did not seek any further medical treatment. Finally, Connell testified he felt a "pop" and experienced excruciating pain during the four-wheeler incident, which was different than the pain he felt before the four-wheeler incident. Therefore, the State Board was authorized to conclude the torn ACL was not compensable as an original accident or a new accident claim.

***Imerys Kaolin v. J. W. Blackshear*, A10A1216 Ga. Ct. App. (September 15, 2010).**

Blackshear highlights the importance of strict compliance with the notice requirements under O.C.G.A. § 34-9-104(a)(2) before reducing an employee's benefits from temporary total disability (TTD) benefits to temporary partial disability (TPD) benefits. However, *Blackshear* also stands for the proposition that an employer is not barred from filing a subsequent WC-104 in the event it failed to follow those notice requirements previously.

Under O.C.G.A. § 34-9-104(a)(2) and Board Rule 104 an employer/insurer can unilaterally reduce an employee's TTD benefits to TPD benefits 52 consecutive or 78 aggregate weeks after the treating physician releases the employee to return to work with restrictions. However, Board Rule 104 requires that the employer/insurer serve the employee and the employee's attorney with a Form WC-104 no later than 60 days from the date the employee was released to work with restrictions by the authorized treating physician, and the employer/insurer must attach to the Form WC-104 the medical report demonstrating the employee is capable of performing work with restrictions.

In *Blackshear*, the claimant injured both of his hands in the course of his employment on May 24, 2001, and the employer commenced TTD benefits from the date of injury. On June 11, 2001, the claimant was released to return to work with restrictions. In January 2002, the employer/insurer notified the claimant that his TTD benefits would be reduced to TPD benefits effective June 4, 2002, pursuant to the light-duty work release issued by the authorized treating physician.

However, the employer/insurer did not actually reduce the claimant's benefits in 2002. Instead, the employer/insurer obtained new documentation from the orthopedist releasing the claimant to return to work with restrictions. This light-duty work release was dated December 31, 2002, and was based on an evaluation conducted in August 2002. Citing the December 2002 light-duty work release, the employer/insurer notified the claimant on January 14, 2003, that his benefits would be reduced from TTD benefits to TPD benefits on December 31, 2003. The claimant's benefits were actually reduced in January 2004 and on February 8, 2008, the employer/insurer suspended the claimant's TPD benefits on the ground that the claimant had been paid the maximum amount of TPD benefits to which he was entitled.

In October 2008, the claimant requested that his TTD benefits be recommenced arguing that he had never been timely notified of the unilateral reduction pursuant to O.C.G.A. § 34-9-104(a)(2) and the reduction was, therefore, improper. The ALJ agreed, finding that the June 11, 2001 work release and the December 2003 release were substantively the same, and concluded that the employer/insurer were required to notify the claimant of the reduction within 60 days of June 11, 2001 (the date of the first light-duty work release). Because it failed to do so, the claimant was entitled to TTD benefits retroactive to the date of the unilateral reduction in January 2004.

The employer/insurer appealed and the Appellate Division adopted the conclusions of the ALJ, except stated, "should a release be issued based upon a subsequent examination and determination of limitations, then ostensibly a new 60-day period would commence from the date of the examination and determination, during which another Form WC-104 may be filed, but those circumstances are not presented here." The Superior Court disagreed and reinstated all of the conclusions and findings of fact reached by the ALJ, reasoning that because the employer/insurer failed to file the appropriate notice forms within 60 days of the ini-

Legislative Update

By: Robert R. Potter

The General Assembly arrived in Atlanta on the second Monday in January to snow and ice. They will meet for forty legislative days with the only actual constitutional mandate being to pass a balanced budget. The clear signal from the Governor's office to State Agencies is to submit only mission critical and budget-related legislation. All else is to be deferred. This deferral includes the State Board of Workers' Compensation legislative package so, unless there is a strategic shift, there will be no housekeeping bill this year and no change to the workers' compensation laws. Senate Bill 7 has been introduced by Senator Bill Heath to prohibit undocumented workers from receiving wage loss and medical benefits under the Workers' Compensation Act. Of course, the Exclusive Remedy Doctrine would thereby be in jeopardy. It appears at this writing that it is unlikely this bill will advance through the legislative process. Two other immigration bills, House Bill 87 and Senate Bill 40, have been introduced and are receiving considerable attention, but neither deal with the receipt of workers' compensation benefits. The State budget remains problematic and it appears that the primary focus of the Legislature and the Governor will be on that subject and core services. ■

tial June 11, 2001 release, the employer/insurer was barred from filing a subsequent Form WC-104 unless and until there was a change in the claimant's status.

The Court of Appeals disagreed with the Superior Court's holding. Specifically, the Court of Appeals stated that nothing in O.C.G.A. § 34-9-104 or Board Rule 104 supports the Superior Court's "changed status" requirement and neither the statute nor the rule places a limit on the number of times an employer may seek to reduce benefits based on substantially similar work releases. The Court of Appeals, instead, adopted the reasoning of the Appellate Division in holding that the notice is invalid, not because it is similar to a previous notice, but because it was issued more than 60 days from the time the restrictions were determined. On the other hand, the Court of Appeals found that the Superior Court was correct in determining that the second notice, generated over five months from the last medical evaluation and four months from the FCE, was untimely.

Although the Court of Appeals ruling confirms that the employer must strictly comply with the 60 day notice requirements under O.C.G.A. § 34-9-104(a)(2) and Board Rule 104, it did also maintain that an employer's failure to comply in one instance, did not bar compliance later should there be another light duty release issued by the treating physician. Admittedly, most employer/insurers have reasonably assumed it was proper to serve a WC-104 upon a claimant within 60 days of any light duty release issued by the treating physician, whether or not it was the first. This case simply provides support for this, in addition to clarifying that an improperly served WC-104 does not bar an employer from serving a subsequent one that meets the requirements of O.C.G.A. § 34-9-104(a)(2) and Board Rule 104.

***Hughston Orthopedic Hospital et al. v. Wilson*, A10A1098 Ga. Ct. App. (October 19, 2010).**

In *Wilson*, the Court of Appeals addressed the question of whether the employee sustained a compensable injury where she exhibited rather bizarre symptoms, which she related to exposure to wallpaper glue and primer. In *Wilson*, the employee worked as a clinical technician for Hughston Orthopedic Hospital. In May 2006, the claimant was assigned to a hospital floor where new wallpaper was being installed. On two occasions, the claimant felt sick from the fumes from the wallpaper glue and primer, but she was able to keep working. On May 25, 2006, however, the fumes left the claimant unable to breathe and again feeling sick. She was taken to the emergency room, where she fainted and was admitted to the hospital for further observation. According to the claimant, she then exhibited signs of brain injury, including inability to talk, inability to walk, and headaches. Nonetheless, the claimant had a battery of tests, all of which revealed normal brain functioning. The claimant never returned to work.

The claimant filed a workers' compensation claim against her employer. The employer/insurer took the position that the claimant's condition was not the result of her exposure to the fumes but rather was psychogenic in nature. The Administrative Law Judge denied the claimant's request for benefits. The Administrative Law Judge had the opportunity to observe the claimant's demeanor and conduct while testifying and noted that the claimant "stuttered in a bizarre, sporadic pattern which appeared to be feigned," "would lapse into talking like a baby," "would speak in a very shrill high-pitched tone at times," and "on several occasions sounded as though she were speaking in tongues." The Administrative Law Judge found that the claimant appeared "psychiatrically disturbed" on the witness stand and concluded that her testimony seemed "feigned, contrived and grossly exaggerated." Ultimately, the Administrative Law Judge concluded that while the claimant may have had a temporary adverse reaction to the wallpaper chemicals, she failed to prove by a preponderance of the evidence that her symptoms were caused by work-related chemical exposure.

The claimant appealed to the State Board, but the State Board adopted the Administrative Law Judge's findings and conclusions. Nonetheless, the Superior Court reversed the Award of the State Board, finding that the State Board had misconstrued the evidence and improperly substituted its lay opinion for that of the medical experts.

The Court of Appeals held that the Superior Court was in error in reversing the State Board's decision, given the "any evidence" standard of review that the Superior Court was obligated to apply. The Court of Appeals reasoned that there was some evidence to support the State Board's determination that the claimant's condition was not caused by a work-related chemical exposure. Specifically, the State Board found that the claimant lacked credibility and was not convinced by the testimony of Dr. Larry Empting, who was the only physician who linked the claimant's symptoms to chemical exposure at work.

The *Home Depot et al. v. McCreary*, A10A1408 Ga. Ct. App. (November 16, 2010).

In *McCreary*, the claimant sustained a cut on her left eyebrow at work in July 2001 when a 76-pound sheet of plywood struck her. The claimant treated outside the workers' compensation system, returned to work the next day, and made no workers' compensation claim. The claimant stated she then began experiencing cognitive difficulties that made her job difficult, and medical doctors concluded that the claimant's problems resulted from the 2001 head injury. In the meantime, the claimant injured her neck at work in January 2002 and filed a workers' compensation claim based on that injury. The claimant went out of work in June 2003 for reasons that were

in dispute. The 2002 neck injury was determined to be compensable and the claimant began receiving temporary total disability benefits for that injury in July 2003.

The claimant sought workers' compensation benefits for the 2001 head injury arguing she sustained a fictional new injury when her symptoms became so bad that she had to stop working in June 2003. The claimant conceded that the statute of limitations had run on the 2001 injury, arguing instead that June 2003 was the date of her alleged compensable fictional new injury.

The Administrative Law Judge noted the issue was whether the claimant was entitled to income benefits from June to July 2003, and to medical benefits for the head injury. The Administrative Law Judge also noted that the parties agreed that the statute of limitations had run on the 2001 injury. Nonetheless, the Administrative Law Judge still awarded psychological and psychiatric treatment for the 2001 head injury and over $8,500.00 in medical expenses incurred since 2001. The Administrative Law Judge made no findings regarding whether the claimant suffered a fictional new injury when she left work in June 2003, nor with respect to her claim for income benefits from June to July 2003.

The employer/insurer appealed to the Appellate Division, which reversed the Administrative Law Judge's award because the statute had run on the 2001 injury and "no evidence" supported the claimant's contention that her work aggravated the head injury, but instead showed she had preexisting unrelated cognitive issues.

The Superior Court set aside the Appellate Division's conclusion that no evidence supported the claimant's claim that her cognitive function deteriorated as a result of her continued employment. The Superior Court also remanded the claim back to the Appellate Division to weigh the conflicting evidence contained in the record and for clarification as to whether the doctrine of aggravation of a preexisting condition was considered.

The Court of Appeals held that the Superior Court correctly remanded the claim back to the Appellate Division to weigh the conflicting evidence contained in the record. Specifically, the Court of Appeals stated that the Appellate Division was incorrect in holding that no evidence showed the claimant's job made her worse, because the record did contain some evidence that the stress of the claimant's job made her cognitive dysfunction worse. The Court of Appeals also held that the Superior Court properly remanded the case to the Appellate Division to consider whether the claimant had a preexisting cognitive dysfunction that was worsened by her employment until it became disabling because the Appellate Division's failure to do so was an error of law. In fact, the Court of Appeals found that the Appellate Division affirmatively misstated the applicable burden of proof.

This case presents an interesting example of how employers and insurers can encounter unexpected outcomes at hearings before the State Board. Here, the Administrative Law Judge awarded medical benefits based on a date of accident that the parties agreed was barred by the statute of limitations and failed to address the only theory under which such an award could be based. Then when the employer appealed to the Appellate Division, it obtained a favorable ruling, but the Superior Court and the Court of Appeals both found that the Appellate Division incorrectly applied the law, including an affirmative misstatement of the applicable burden of proof. ■

Events

Atlanta Claims Association Reception
Thursday, April 14, 2011
5:00 - 7:00 pm
Gwinnett Center - Duluth, GA

Joint Litigation Luncheon with McAngus Goudelock and Courie
Wednesday, April 27, 2011
11:30 am - 2:00 pm
Maggiano's Buckhead - Atlanta, GA

"Settling Your CAT Claim"
Wednesday, May 4, 2011
11:00 am - 1:30 pm
Villa Christina - Atlanta, GA

For more information on these programs or to RSVP, visit www.swiftcurrie.com/events.

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