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Lip Sync Battle

September 14, 2018

Cobb Energy Performing Arts Centre

Lip Sync Battle

Based on more than 50 years of representing clients in Georgia, Alabama and throughout the country, Swift, Currie, McGhee & Hiers, LLP, has evolved into a law firm capable of handling all areas of civil law and litigation. With approximately 140 attorneys, Swift Currie possesses the resources and abilities to tackle the most complex legal problems, while at the same time providing our clients with individualized, prompt and cost-effective service. Our law firm has a wealth of experience across numerous practice areas, and our depth of legal talent allows us to tailor such strengths to individual cases. Our firm's philosophy is to provide our clients with creative, aggressive and professional representation of their interests. We also strive to conduct ourselves in a manner consistent with the legacy of our four founding partners. No matter the issue in dispute, Swift Currie has attorneys ready to assist you. We believe we have a well-deserved reputation for high-quality legal services and dedicated attorneys. Finding creative solutions to complex problems — that is our commitment to our clients.

Seminar Agenda

Friday, September 14, 2018

9:30 a.m. – 9:40 a.m.	**Welcome and Introduction**
9:40 a.m. – 10:00 a.m.	**Workplace Violence: Taking "the Thrill" Out of "the Fight"** *Timothy C. Lemke*
10:00 a.m. – 10:20 a.m.	**Preventing an "Achy Breaky Heart" with Proper Denial of Medical Treatment** *James D. Johnson*
10:20 a.m. – 10:40 a.m.	**"Suspicious Minds" — How to Deal with Post-Hire Medical Questionnaires** *K. Martine Cumbermack*
10:40 a.m. – 10:55 a.m.	**Break**
10:55 a.m. – 11:15 a.m.	**"Don't Worry 'Bout Nothin'" — Managing Willful Misconduct Claims** *Douglas W. Brown, Jr., and Monica S. Goudy*
11:15 a.m. – 11:35 a.m.	**"Tell Me Why" — 2018 Case Law and Legislative Update** *Joanna S. Jang*
11:35 a.m. – 12:00 p.m.	**"Don't Drive No Car" — Transportation and Translation in the 21st Century** *Emily J. Truitt*
12:00 p.m. – 1:00 p.m.	**Complimentary Lunch**
1:00 p.m. – 2:15 p.m.	**Legal Triage**
2:15 p.m. – 2:30 p.m.	**Break**
2:30 p.m. – 2:55 p.m.	**Psych Claims Driving You "Crazy"? . . . Swift Currie Can Help** *Katherine S. Jensen*
2:55 p.m. – 3:20 p.m.	**"Stayin' Alive" in a Death Claim** *Kenneth M. Brock*
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Workplace Violence: Taking “the Thrill” Out of “the Fight”

By Timothy C. Lemke and John B. Weitnauer

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Timothy Clark Lemke joined Swift Currie in 1995. He practices in the workers' compensation and litigation sections of the firm. He became a partner at the firm on Jan. 1, 2002.

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Mr. Weitnauer received his law degree from Georgia State University College of Law in 2012. He is admitted to practice law in Georgia. Mr. Weitnauer received his undergraduate degree from Wake Forest University, where he graduated, *cum laude*, with honors.

Workplace Violence: Taking "the Thrill" Out of "the Fight"

Physical violence is, quite surprisingly, one of the leading causes of injury in the workplace. In 2016, 16,890 workers in the private industry experienced trauma from nonfatal workplace violence.[1] In the same year, another 500 workers were victims of homicide in the workplace.[2] Although one might reasonably view those injuries and deaths as noncompensable in light of the fact they result from a willful — and potentially criminal — act as opposed to a careless accident, such injuries and deaths can be considered an accident for the purpose of workers' compensation.

Consequently, just like an injury from a slip and fall or some other accident, an injury from a violent act in the workplace — including a fight between co-workers and even murder — can be compensable if it arises out of and in the course of the injured employee's employment. In exploring the topic of workplace violence in the context of the Georgia Workers' Compensation Act, this paper will discuss how to delineate between the different kinds of situations involving a violent act in order to analyze whether the resultant injury is compensable. It will address the increased-risk doctrine, the aggressor defense and the cooling-off period, concluding with recommendations for reducing workplace violence.

EMPLOYMENT RISK

In evaluating whether an injury caused by a violent act arose out of the employee's employment, a determination must be made regarding whether the risk giving rise to that violent act was employment related, neutral or purely personal.

Employment Related

As a general rule, if the injured employee was not the aggressor in the violent act causing his injury or death and the violent act was somehow related to the employment, the injury is compensable.

A couple of cases help illustrate an employment-related violent act in the workplace. In *Keen v. New Amsterdam Casualty Co.*, an employee was working as an automobile mechanic when a customer shot him after becoming upset the repair shop would not complete additional repairs without charge. The Court of Appeals, noting the injury occurred at a time and place where the employee was engaged in the work of his employment, held the injury was compensable because it arose out of his employment.[3] In a more recent case, *Handcrafted Furniture v. Black*, a businessman was murdered by his business partner, who had become angry over his belief the businessman would not sell his stake in the company to him. The Court of Appeals, agreeing with a lower court finding the deceased employee was murdered because the business partner desired to gain complete control of the business, held that the survivors of the deceased employee were entitled to benefits because his death arose out of his employment.[4] In these two cases, the courts found a clear causal link between the claimant's work — repairing a car and ownership of a business — and the resultant death.

Neutral

Even when the risk giving rise to a violent act is neutral with respect to the employee's employment, the Georgia courts have usually held the resultant injury to be compensable, as arising out of the employment. One example of a neutral situation is found in *Chadwick v. White Provision Co.*[5] In that case, the employee was shot and killed by a co-worker who suffered from a mental health condition. As a case of first impression, the court had to look to similar cases in other jurisdictions, one of which used the following correlation:

1 Bureau of Labor Statistics (2016).
2 *Id*.
3 *Keen v. New Amsterdam Cas. Co*., 34 Ga. App. 257, 129 S.E. 174 (1925).
4 *Handcrafted Furniture, Inc. v. Black*, 182 Ga. App. 115, 354 S.E.2d 696 (1987).
5 *Chadwick v. White Provision Co*., 82 Ga. App. 249, 60 S.E.2d 551 (1950).

> Should [an] employee be injured by a latently defective machine, unknown to the employer, such injury would nevertheless arise out of the employment and be compensable. Latently defective machinery can no more be anticipated and injuries thereby guarded against than latently defective minds of fellow employees.

The court also noted a person with a mental health condition "is incapable of committing a willful act, and the acts of such persons are in terms of law accidental to the person." Thus, the court found the claimant's death compensable.

In another case, *General Fire & Casualty Co. v. Bellflower*, the employee, an off-duty bus driver who was walking to his hotel room after dinner, was shot and killed by a stranger.[6] Significantly, the hotel room was paid for by the employer, as was done for all out-of-town bus drivers who were between trips. Even though the employee was not, for example, actually driving a bus at the time of the shooting, the court analogized the bus driver to a traveling salesman in continuous employment by virtue of the need to be "on the road," eating at restaurants and sleeping in hotels. It found the bus driver's trip assignment placed him in an area where he was particularly susceptible to crimes against the person. Thus, the court held there was a basis to conclude there was a sufficient causal connection between the conditions of employment and the injury.

A subcategory of neutral risk cases concerns cases that can be classified under the increased-risk doctrine. These cases include injuries sustained by employees who, by virtue of the nature and setting of their particular position, are at an increased risk for said injuries. The position of police officer readily comes to mind as an example of one placing the employee at an increased risk of injury and/or death.

Indeed, the case of *Barge v. College Park* addressed the compensability of a police officer's death after an apparent ambush-style murder, for which no perpetrators had been arrested.[7] Noting the evidence demonstrated College Park police officers were always on call, the court viewed the deceased police officer as a continuous employee. The court also noted the police officer was in uniform, armed and on his way to his duty shift at the time he was murdered. Perhaps most importantly, the court considered circumstantial evidence, which suggested the police officer may have been murdered by a criminal defendant against whom he had testified during a grand jury. This latter detail seemed to push the court toward finding the police officer's death arose out of and in the course of his employment.

Purely Personal

Whereas an injury or death with its origin in a violent act tied to an employment-related or neutral risk can be found compensable, the opposite is true with regard to purely personal risks. In Georgia, an injury or death resulting from the willful act of a third party against an employee for reasons purely personal to that employee are simply not compensable. The Workers' Compensation Act, O.C.G.A. § 34-9-1(4), clearly states that the definition of "injury" "shall not include injury caused by the willful act of a third person directed against an employee for reasons personal to such employee." Of course, this clear language has not prevented claimants' attorneys from attempting to prove such injuries are compensable.

The facts presented by the case of *Walsh Construction Co. v. Hamilton* help illustrate a clearly personal dispute and why the resultant injury was properly held as noncompensable.[8] In that case, the claimant asked another employee for some of his breakfast, which prompted a third employee to admonish the claimant for "coming in here begging every morning." The claimant took offense to that comment, telling the third employee it was none of his business. When the claimant turned his back, the third employee grabbed the claimant, shoved him against a wall and fell on top of him, breaking one of the claimant's legs. In reviewing the facts, the court determined the claimant was not performing any tasks required by or incidental to his employment at the time of the injury, labeling the act of eating breakfast before work as a "purely personal undertaking."

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6 *Gen. Fire & Cas. Co. v. Belflower*, 123 Ga. App. 864, 182 S.E.2d 678 (1971).

7 *Barge v. College Park*, 148 Ga. App. 480, 251 S.E.2d 580 (1978).

8 *Walsh Constr. Co. v. Hamilton*, 185 Ga. App. 105, 363 S.E.2d 301 (1987).

THE AGGRESSOR DEFENSE

It has long been held in Georgia that an employee is not entitled to compensation where the injury is the result of a fight in which the employee is the aggressor.[9] In that situation, the injury is not considered to be an accident arising out of and in the course of employment, as is required by O.C.G.A. § 34-9-1. This is a common-sense rule, as an employer should not be held liable for the injuries sustained by an employee who "started the fight."

In *Hartford Accident & Indemnity Co. v. Zachery*, the court considered a petty quarrel between a cook and a dishwasher that ended quite violently.[10] The dishwasher arrived late to work and began perversely taunting the cook by saying, "I guess you will tell the boss." The boss happened to overhear this conversation and instructed the dishwasher to stop arguing and begin working. However, moments later, the dishwasher resumed his taunts, calling the cook a tattletale. The cook, in response, struck the dishwasher in the head with a cleaver. The court found the dishwasher's injuries were noncompensable because he had provoked the attack with his repeated accusations against the cook. This case highlights the fact an employee can be an aggressor with "fighting words" alone, even if he did not "throw the first punch."

THE COOLING-OFF PERIOD

Another potential defense to compensability in cases involving an altercation is called the cooling-off period defense. A cooling-off period is a gap in time between the initial argument between two employees and the resulting physical altercation. In these situations, some courts have held the resultant injuries sustained by an employee are not compensable, essentially finding the gap in time pulls the altercation out of the employment context and instead places it in the realm of a personal conflict. For example, in *Hightower v. United States Casualty Co.*, a superintendent argued with a customer about the repair of a car wheel, with the evidence showing the superintendent either slapped the customer or threw a stick at him.[11] The customer left the place of business, but several hours later, returned and shot the superintendent to death. The court simply concluded the superintendent's death was "the result of the willful act of a third person, directed against an employee for reasons personal to the employee."

This holding seems a bit at odds with the facts, as they suggest the conflict between the two individuals stemmed from an argument regarding a business issue — the repair of a wheel. It is not as though the customer disliked the superintendent for reasons unrelated to business. Consequently, it should come as no surprise more recent cases have rejected the cooling-off period as a defense.[12]

RECOMMENDATIONS FOR REDUCING WORKPLACE VIOLENCE

Any reasonable employer wants its employees to be safe in the workplace, which includes being safe from physical fights and sexual assault. How can an employer reduce workplace violence?

First, the employer should establish a zero-tolerance policy toward workplace violence, periodically reviewing the policy with employees just as the employer would for safety training. Employees should receive a copy of the policy and be encouraged to report any incident of workplace violence, including sexual assault.

Second, in order to properly address any reported incident, the employer must have established a confidential reporting process, by which an employee's allegation of workplace violence is documented and fully investigated.

As with investigations regarding any workplace accident, the employer investigating workplace violence should endeavor to document its findings by collecting signed and dated witness statements, photographs, security video and — in the case of sexual assault — emails and other communications between the victim

9 *Liberty Mut. Ins. Co. v. Reid*, 56 Ga. App. 68, 192 S.E.2d 325 (1937).
10 *Hartford Accident & Indem. Co. v. Zachery*, 69 Ga. App. 250, 23 S.E.2d 135 (1943).
11 *Hightower v. U.S. Cas. Co.*, 30 Ga. App. 123, 117 S.E. 98 (1923).
12 *See Commercial Constr. Co. v. Caldwell*, 111 Ga. App. 1, 140 S.E.2d 298 (1965).

and alleged assailant that might provide additional details regarding the exact relationship between the two parties. Ultimately, if the facts merit disciplinary action, such action must be taken just as it would for any other workplace infraction. Should the victim-employee report the assault to law enforcement, the employer must be careful to not interfere in whatever investigation the police conduct and instead cooperate with the investigation.

Just as employees can be careless and cause accidents, employees can also sometimes be violent and injure each other. Just as an employer can take steps to reduce the nature, number and frequency of accidents, so too can it take steps to reduce workplace violence by establishing clear zero-tolerance prohibitions against fighting and sexual assault, and immediately and appropriately responding to same. Of course, despite our best efforts, accidents and assaults will continue to occur, but we can be prepared to address them at the very least.

Preventing an "Achy Breaky Heart" with Proper Denial of Medical Treatment

By James D. Johnson and Karen G. Lowell

James D. Johnson

Partner

James D. Johnson's practice has included a broad variety of litigation matters, including workers' compensation, automobile litigation, premises liability, business litigation, subrogation and nursing home litigation. Prior to law school, Mr. Johnson worked for several years as a vocational rehabilitation consultant in Atlanta. He worked with employers, attorneys and insurance carriers, providing case management services and expert testimony on workers' compensation and Social Security disability files. This experience makes him uniquely qualified to aggressively contest workers' compensation claims for catastrophic designation and defend catastrophic injury liability claims.

Mr. Johnson joined Swift Currie in 1998 and became a partner in 2006. He is a member of the Workers' Compensation and Insurance Defense sections of the State Bar of Georgia, the Medical Liability and Health Care Law Committee of the Defense Research Institute and the Cobb County Chamber of Commerce.

In 1998, Mr. Johnson graduated from Georgia State University College of Law. There, he was a member of the *Georgia State University Law Review*, which published his article on the Americans with Disabilities Act. Previously, he earned a Bachelor of Arts degree from Auburn University in 1990. He also received a Master of Science in vocational rehabilitation services from Auburn University in 1992.

Mr. Johnson is admitted to practice in the U.S. District Court for the Northern and Middle Districts of Georgia, as well as all state trial and appellate courts in Georgia.

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Karen G. Lowell is an associate in the firm's workers' compensation section.

Ms. Lowell graduated from the University of Georgia in 2012 with her B.A. in international affairs and a minor in anthropology. She received her J.D. from the Georgia State University College of Law where she graduated, *magna cum laude*.

During her time in law school, Ms. Lowell was a published member of the *Georgia State University Law Review*, served as an article research editor and was hired as a graduate research assistant for two professors. She was also a summer associate with Swift Currie and a legal intern at the U.S. Attorney's Office for the Northern District of Georgia.

Preventing an "Achy Breaky Heart" with Proper Denial of Medical Treatment

At the outset of every claim, the employer must make a critical determination as to whether it will accept a claim as compensable or controvert the claimant's injury for any number of reasons. Either decision has lasting implications on the life of a workers' compensation claim, particularly in regard to the medical benefits an authorized treating physician (ATP) may recommend. If an employer disagrees with an ATP's recommendation, it must be prepared to defend its position as it goes head to head with the claimant in the battle over whether certain medical treatment or testing is reasonably required pursuant to Georgia's Workers' Compensation Act.

PICKING A TRACK: TO ACCEPT OR TO DENY MEDICAL TREATMENT

By accepting an injury as compensable, the employer faces exposure for both the claimant's medical and indemnity benefits associated with the claimant's injury. However, accepting a claim as compensable comes with the advantage of controlling the claimant's medical treatment through the use of a panel of physicians, if valid. Alternatively, if the claim is controverted, the employer risks the possibility the claim will later be found compensable, in addition to the resulting past and future exposure for medical treatment prescribed by the claimant's physician of choice. Fortunately, even in this situation, there are certain tools delineated within Georgia's Workers' Compensation Act that allow an employer to advantageously navigate unreasonable or inappropriate medical treatment recommended by the claimant's ATP.

Under Georgia's Workers' Compensation Act, the employer and/or insurance provider is required to provide medical benefits, including "medical, surgical, and hospital care and other treatment, items, and services which are prescribed by a licensed physician, including surgical supplies, artificial members, and prosthetic devices and aids damaged or destroyed in a compensable accident, which . . . shall be reasonably required and appear likely to effect a cure, give relief, or restore the employee to suitable employment."[1] Prior to 2013, the claimant was entitled to a lifetime of medical benefits. However, this was amended in 2013 to limit medical care to 400 weeks from the date of injury for noncatastrophic injuries occurring on or after July 1, 2013.[2] If the claim is initially accepted as compensable and medical treatment is offered, the employer is able to maintain control of the claimant's future treatment through the posted panel of physicians.[3] The claimant may select her ATP from this panel of physicians or choose her own physician if the claim is controverted or there is not a valid panel.[4]

Once the ATP recommends or prescribes certain treatment in a compensable claim, the employer is required to cover all medical treatment reasonably required and appearing likely to effect a cure, give relief or restore the employee to suitable employment.[5] However, often the employer and insurer will question the necessity of certain recommended treatment for a variety of reasons, such as evidence of a pre-existing condition, failure to exhaust conservative treatment, it is duplicative of prior testing or procedures or there is suspicion such medical treatment is not, in fact, warranted based on objective evidence, e.g., surveillance. At this juncture, the claimant and the employer each have several options in furtherance of their position.

1 O.C.G.A. § 34-9-200.
2 O.C.G.A. § 34-9-200(a)(2); Ga. Laws 2013, Act 203, § 1.
3 O.C.G.A. § 34-9-201.
4 O.C.G.A. § 34-9-201(f).
5 O.C.G.A. § 34-9-200.

THE CLAIMANT'S SONG AND DANCE

In considering whether to deny a specific treatment or testing the ATP has recommended, the employer should act promptly in making its determination. Otherwise, the employer may receive either a WC-205 from the medical provider or, more recently, a WC-PMT (a petition for medical treatment) from the claimant's attorney seeking either pre-authorization or a response as to the ATP's recommendation.[6] Until recently, a claimant and medical provider's only route to ensure payment of a recommended course of treatment through workers' compensation was through the WC-205, which requires the employer to either approve or deny the recommended testing or treatment within five business days. If the employer initially denied the treatment, it then had 21 days to approve the treatment in writing or file a WC-3/Notice of Controvert with the Board along with its supporting evidence.[7] It is then the employer's burden to show the treatment is not reasonably necessary or, alternatively, the claimant's burden to show the treatment was authorized and/or related to the compensable injury.[8] If the employer fails to respond to the WC-205 within five business days of being filed, the specific treatment or testing sought is deemed pre-approved. However, the Supreme Court of Georgia ruled an employer's failure to timely respond within five days under Rule 205 only amounts to an obligation to pay if the treatment is for a compensable injury under the Act.[9]

Board Rule 205 was recently amended as of July 1, 2017, to allow an employee to file a WC-PMT if the employer fails to authorize the recommended medical treatment after five days of its receipt of the recommendation. The petition then requires an employer to "show cause" why the recommended treatment or testing has not been authorized.[10] Once the petition is filed by the claimant's attorney, a conference call is scheduled with an administrative law judge (ALJ) within five business days, unless the employer either authorizes or controverts the treatment. If the conference call takes place, the judge will then issue an interlocutory order and, if in favor of the claimant, the employer has 20 days to file a WC-14/Request for Hearing, which operates as a temporary stay of the order.[11] The employer must then prepare to defend its controvert of a recommended medical treatment or testing at a hearing.

THE EMPLOYER'S REBUTTAL

When an employer questions the medical necessity of a prescribed treatment or testing, many states allow — or even require — the recommended treatment be submitted for a "utilization review" by an independent physician or medical peer review group.[12] A medical peer review consists of a team of independent medical providers who review a claimant's medical treatment to determine whether she is receiving appropriate care based on her current diagnosis. After assessing the medical records, the physician reviewer(s) will provide a report discussing the claimant's condition along with their opinion as to whether the prescribed treatment is within the recommended guidelines for the claimant's diagnosis. If the treating physician prescribes any treatment inconsistent with her diagnosis, the reviewers may approach the ATP regarding the inappropriate treatment and encourage suitable modifications. If the ATP disagrees with the recommended course of action, the employer can then use the report as a basis for a controvert.

In Georgia, however, the State Board of Workers' Compensation does not recognize the role of medical peer reviews, except for disputing unreasonable medical charges.[13] Instead, the Board relies primarily on the recommendations of the ATP or another qualified physician who has personally examined the claimant.[14] Therefore, to effectively deny a certain recommended medical procedure or course of treatment, the employer should focus its resources on more persuasive alternatives, such as consultations with the ATP, independent medical examinations and medical questionnaires.[15]

6 Board Rule 205.

7 Board Rule 205(b)(3)(b).

8 Board Rule 205(d)(1).

9 *Mulligan v. Selective HR Solutions, Inc.*, 289 Ga. 753, 757 (2011).

10 Board Rule 205(c).

11 Board Rule 205(c)(5).

12 *See, e.g.*, Cal. Lab Code § 4610 (2017); Tenn. Comp. R. & Regs. 0800-02-06-.02 (2017); Fla. Stat. Ann. § 440.13 (2017).

13 *See Best Practices: Role of the Employer*, State Board of Workers' Compensation, https://sbwc.georgia.gov/sites/sbwc.georgia.gov/files/related_files/site_page/BestPractices_RoleOfEmployer.pdf (July 2013); *see also* Board Rule 203(c)(2).

14 O.C.G.A. § 34-9-200; O.C.G.A. § 34-9-202.

15 *Arby's Rest. Grp., Inc. v. McRae*, 292 Ga. 243, 734 S.E.2d 55 (2012) (holding an employer or an employer representative is authorized to conduct ex parte communications with the treating physician regarding the claimant's treatment under O.C.G.A. § 34-9-207 in exchange for the claimant receiving benefits for a compensable injury).

CONSULTATION WITH THE ATP

Often, the most effective and cost-efficient strategy to challenge a recommended treatment or service is to start with a consultation with the ATP. This is because a judge will often defer to the recommendations of the ATP over a conflicting report from an independent physician. A consultation with the ATP allows the employer to provide additional background information to supplement the claimant's subjective complaints through evidence of a pre-existing condition, video footage of the injury itself or even recent surveillance conducted by the employer. It can be an effective tool to inquire into a certain course of treatment and see if the ATP is receptive to alternative, more conservative treatment options prior to more drastic and costly measures.

If the ATP is amenable to the employer's recommendations based on the information provided, the employer can request the ATP amend her prior recommendations or complete a medical questionnaire memorializing her opinions expressed during the consultation. Otherwise, if the ATP maintains her position, which the employer believes is not appropriate or reasonable, the employer should then rely on an alternative strategy, such as an independent medical examination (IME).

INDEPENDENT MEDICAL EXAMINATIONS

Although many states will utilize medical peer reviews for an objective assessment of a recommended treatment, the Georgia State Board of Workers' Compensation prefers the opinion of a physician who has physically treated the claimant.[16] Therefore, in Georgia, if an employee is claiming compensation for an injury, the employer has the right to schedule an IME with a duly qualified physician at a reasonable time and place.[17] As such, an IME is routinely used to obtain a second opinion regarding an ATP's recommended treatment. If compelling, it can be used to persuade either the ATP or an ALJ that a different course of treatment would be more likely to effect a cure, give relief or restore the employee to suitable employment.

To secure the most effective IME, there are several criteria an employer must consider. First, it is important to remember your audience. At the end of the day, the employer is seeking a credible and convincing medical report to either persuade the ATP to recommend an alternative course of treatment or to be used as evidence in a hearing before an ALJ. It is in the employer's best interest to schedule an IME with a reputable and persuasive physician who will provide a compelling medical report the Board will give due weight. Otherwise, even if you find a physician who will provide the medical opinion and report you want, the Board may choose to simply disregard the physician's opinion based on her reputation or if she authors a weak report, resulting in both wasted time and resources.

Once a qualified physician is selected, the employer should ensure the physician is given all pertinent information needed to provide a well-supported IME report. For example, it is routine practice to provide the physician with the claimant's medical records, including diagnostic films, deposition testimony or job descriptions, followed by a letter summarizing the claimant's medical treatment to date. Once the physician has reviewed the relevant records, the employer can pursue one of two strategies. The first is to request a consultation with the doctor after her review of the medical records, but prior to a physical examination. This strategy is recommended when an employer is uncertain of the physician's position because it does not want an unfavorable medical report that must then be produced to opposing counsel.[18] Alternatively, if confident the physician will provide a favorable report, the employer can request a reasonable date and time for the claimant to present for an examination with the physician.[19] Under either strategy, the employer will often provide the physician with a medical questionnaire for her review and completion following the examination.

If a favorable report or questionnaire is provided by the independent physician, the employer can then schedule a consultation with the ATP or simply provide the ATP with the report in an effort to alter the ATP's course of treatment. If ineffective, this report will then become one of the employer's most significant pieces of evidence at a hearing or to defend its position the ATP's recommended course of treatment is not reasonable or appropriate.

16 *See* O.C.G.A. § 34-9-200 and 202.

17 O.C.G.A. § 34-9-202(a). The claimant also has the right to an IME paid for by the employer after an accepted compensable injury and within 120 days of receiving any income benefits. O.C.G.A. § 34-9-202(e).

18 Board Rule 200(e).

19 Board Rule 202. The employer must provide 10 days' written notice of both the time and place of the requested examination. The employer must also simultaneously provide payment for travel expenses to and from the examination. Board Rule 200(c).

A favorable IME report also provides additional advantages. If the claimant's attorney has filed a WC-14/Request for Hearing due to the employer's failure to authorize certain medical treatment, he often simultaneously requests attorney's fees and/or litigation expenses for an unreasonable defense of the claim.[20] But, if an IME report supports the employer's contention the ATP's recommended course of treatment for a claimant's injury is not reasonable or appropriate, a judge will be less likely to assess attorney's fees or litigation expenses for an unreasonable defense.

THE FINALE

Monitoring and controlling the claimant's medical treatment throughout the course of a claim is essential to ensuring the claimant is receiving reasonable and appropriate treatment that is intended to restore the claimant to suitable employment. While a judge may give deference to the recommendations of an ATP, the employer has several strategies to ensure effective and suitable treatment, such as requesting consultations with the ATP, scheduling IMEs and utilizing medical questionnaires. Each has its unique advantages and can be effective in securing a "win" for the employer in the battle over medical treatment.

[20] O.C.G.A. § 34-9-200(b)(1), (2) and (4); O.C.G.A. § 34-9-221.

“Suspicious Minds” — How to Deal with Post-Hire Medical Questionnaires

By K. Martine Cumbermack and Seth J. Butler

K. Martine Cumbermack

Partner

K. Martine Cumbermack's practice focuses primarily in the area of workers' compensation defense. Ms. Cumbermack has significant experience representing insurance companies, self-insureds, third-party administrators and employers in workers' compensation cases in both Florida and Georgia, including insurers in fee schedule/medical bill disputes.

Ms. Cumbermack regularly writes and presents locally and nationally on a wide variety of workers' compensation topics, ranging from employer affirmative defenses, light duty return to work issues, post-hire medical questionnaires, the role of aging workers in workers' compensation and employer compliance with statutory and Board rules. Ms. Cumbermack serves as co-chair of the firm's Diversity Committee and represents the firm as a member of the Steering Committee of the State Bar of Georgia Diversity Program. She has also served as co-editor of the firm's quarterly publication, *The First Report*, and on the firm's Technology, Hiring and Community Relations committees.

Prior to joining the firm, Ms. Cumbermack practiced workers' compensation defense in Florida as in-house counsel for a major national insurance company and outside panel counsel. She has taught as an adjunct professor at the college and law school levels on subjects, including estates and trusts, workers' compensation and civil procedure. She has also previously served as an assistant public defender and a court-appointed guardian ad litem.

Ms. Cumbermack received her undergraduate degree and law degree from the University of Florida, where she was a member and vice president of Sigma Gamma Rho Sorority, Inc., chairperson of the Black Law Students Association Alumni Committee and a law fellow for the Center for Governmental Responsibility.

She was admitted to the Florida Bar in 1997 and the State Bar of Georgia in 2006.

Seth J. Butler

Associate

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"Suspicious Minds" — How to Deal with Post-Hire Medical Questionnaires

We see it all too often. An employee alleges an injury shortly after being hired and upon receiving their medical records we learn they have extensive pre-existing conditions. We quickly look to their personnel file to see if the claimant filled out a post-hire medical questionnaire and if they failed to mention their pre-existing condition. We encourage that same strategy for employers, as well as insurers, as the clock begins ticking once you have notice of an injury. A post-hire medical questionnaire is one of the easiest ways to present solid evidence in conjunction with a potential *Rycroft* defense, but it must be done quickly. In most cases, the employer becomes procedurally barred from asserting a *Rycroft* defense when the employer initially accepts liability on the claim and when more than 60 days from the due date for payment of income benefits have elapsed.[1]

While the law only requires the employer to provide reasonable and necessary medical care in order to return a workers' compensation claimant back to their baseline, pre-injury condition, it often takes a considerable amount of treatment, time and money to reach this threshold. Thus, a post-hire medical questionnaire is a powerful tool to defend claims without breaking the bank on medical care. Once an employer is notified of an injury, the employer should immediately notify the insurer whether there was a post-hire medical questionnaire obtained from the employee prior to the injury. Furthermore, if a post-hire medical questionnaire was completed by the employee prior to the injury, it should be provided to the adjuster as soon as notice of an injury is given by the employee.

UNDERSTANDING THE PROCESS: ADA IMPLICATIONS

The Americans with Disabilities Act of 1990 (ADA), which applies to employers with 15 or more employees, sets forth specific guidelines regarding the use of medical examinations and questionnaires in the hiring process.[2] The ADA outlines three distinct stages to the hiring process — pre-offer, post-offer and during employment — each with particular restrictions on the ability of a potential employer to obtain information regarding an applicant's medical history.[3]

Pre-Offer Stage

At the pre-offer stage, which is the timeframe before an offer of employment has been made, an employer can only make inquiries into the ability of an applicant to perform job-related functions.[4] At this point, any inquiries into an applicant's medical history or any request or requirement regarding a medical examination is prohibited.[5]

Questions during this stage of the hiring process should be standard for all applicants. We encourage employers to put these questions on their employment applications in order to ensure they are uniformly asked of every applicant. Consider asking questions about the applicant's attendance at their former place of employment. Limit these questions to how many days they were absent from their last job, but do not ask why they missed work as you do not want to elicit information about their medical history at this stage of the hiring process. Based on this information, an employer can infer the prospective employee's commitment to work simply by virtue of the days they missed at their last place of employment.

Other questions employers may consider incorporating into job applications are inquiries into specific abilities to complete day-to-day work functions. For example, ask questions about the prospective employee's ability to lift a certain amount of weight or be on their feet for an extended period of time. The goal is to make sure an applicant will be able to perform the specific job functions without any limitations, but without directly asking about specific limitations. With that being said, these questions should be limited to "check the box" yes or no answers to avoid applicants writing narratives that may run afoul of ADA guidelines.

1 *Floyd S. Pike Elec. Contractors v. Williams,* 207 Ga. App. 86, 427 S.E.2d 393 (1993).
2 42 U.S.C.A. § 12111(5)(A).
3 42 U.S.C.A. § 12112(d).
4 42 U.S.C.A. §12112(d)(d)(2).
5 *Id.*

Post-Offer Stage

Once an offer of employment has been extended, but prior to the applicant starting to perform their work duties, an employer may require a medical examination and can even condition the offer of employment based on the results of the examination.[6] It is essential, however, if an employer requires medical examinations, *all* entering employees must be subjected to an examination.[7] Additionally, any information obtained through the examination regarding the applicant's medical condition or history must be maintained on separate forms and in separate medical files.[8] This information must be treated in the same manner as a medical record. Granted, this information can be made available to certain entities, such as supervisors and first aid or safety personnel, if it is necessary for potential emergency treatment or accommodate any necessary work restrictions or modifications.[9]

Employee Starts Working for the Employer

Once an applicant has started working, an employer is allowed to conduct voluntary medical examinations, including inquiries regarding medical history, as long as the examination is conducted as part of an employee health program available at the worksite.[10] Additionally, an employer may make inquiries about the ability of an employee to perform job-related functions.[11] Bear in mind, medical information will always need to be protected and any information received at this point must also be kept confidential and in a file separate from the employee's personnel file.

Additionally, the Health Information Portability and Accountability Act (HIPAA) defines restrictions on the dissemination of private health information. However, there are certain provisions allowing for a covered entity to release health information without the consent of the individual once an employee has been injured on the job. 45 C.F.R. § 164.512, states, in pertinent part:

> A covered entity may use or disclose protected health information without the written authorization of the individual (as described in 164.508), or the opportunity for the individual to agree or object (as described in 164.510), in the situations covered by this section, subject to applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.
>
> (b)(1) A covered entity may use or disclose protected health information for the public health activities and purposes described in this paragraph to:
>
> (v) An employer, about an individual who is a member of the workforce of the employer, if:
>
> (A) The covered entity is a covered health care provider who provides health care to the individual at the request of the employer:
>
> (2) To evaluate whether the individual has a work-related illness or injury
>
> (B) The protected health information that is disclosed consists of findings concerning a work-related illness or injury . . . ;
>
> (C) The employer needs such findings in order to comply with its obligations . . . to record such illness or injury . . . ;
>
> (l) A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.

6 42 U.S.C.A. §12112(d)(3).
7 42 U.S.C.A. § 12112(d)(3)(A) (emphasis added).
8 42 U.S.C.A. § 12112(d)(3)(B).
9 42 U.S.C.A. § 12112(d)(3)(B)(i), (ii).
10 42 U.S.C.A. § 12112(d)(4)(B).
11 *Id.*

POST-HIRE MEDICAL QUESTIONNAIRES: WHAT ARE THEY AND HOW DO THEY WORK?

Post-hire medical questionnaires are documents used to gather information pertaining to a new employees medical history. A good practice is to focus these questionnaires on specific and particular injuries that commonly arise in the employer's line of work. For instance, any job that requires heavy lifting will want a post-hire medical questionnaire to inquire into prior back injuries, but clerical jobs may want to focus more on repetitive-use injuries, such as carpal tunnel syndrome. While it is permissible to ask about prior workers' compensation claims, it is better to focus on prior injuries or conditions that may preclude the employee from performing essential job functions. If the employee misrepresents their medical history or physical condition within the submitted post-hire medical questionnaire, the employer may have a defense to an otherwise compensable claim.

THE *RYCROFT* DEFENSE

An employer's ability to deny an otherwise compensable claim on the grounds the employee misrepresented a prior condition is a defense arising out of case law. The seminal case in Georgia regarding the availability of workers' compensation benefits after a misrepresentation by a prospective employee as to medical background information is *Georgia Electric Co. v. Rycroft*.[12] In *Rycroft*, the Georgia Supreme Court adopted a three factor test to determine whether such a misrepresentation would bar benefits under workers' compensation: 1) the employee must have knowingly and willfully made a false representation as to their physical condition; 2) the employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring; and 3) there must have been a causal connection between the false representation and the injury.[13]

Knowing and Willful

One essential element of the *Rycroft* defense is the employee both *knowingly* and *willfully* made a misrepresentation about their physical condition. As such, a misstatement is not the same as a misrepresentation. For instance, in *Saunders v. Bailey,* an employee responded her health would "not be a problem" when her new employer asked if she had "any health problems that would keep her from doing the type of work described for her."[14] Despite the employee having a prior surgery for two ruptured discs in her back, the court found her statement to be "good faith" response, which did not amount to a knowing misrepresentation, even when the employee reinjured her back six weeks after starting her new job. It seems clear that questions about prior conditions or injuries must be asked with an amount of specificity to avoid the same kind of "good faith response."

Reliance by the Employer

The second essential element of the *Rycroft* defense is the employer must have relied on the employee's misrepresentation and the reliance was a substantial factor in the hiring. The reliance factor may be satisfied through testimony from the employer representative indicating the employee would not have been hired for the particular position if they had answered the questions truthfully.[15] Additionally, reliance can be proven under circumstances showing the employer refrained from a further investigation based on the employee's answers. In *Fort Howard Corp. v. Devoe*, the court reasoned that reliance was established when the employee made a misrepresentation about his time missed from work due to a past injury and claimed he never had any prior issue with his back or spine.[16] Based on his misrepresentation, the employer refrained from conducting further investigations, which would have included a medical examination.[17]

12 *Ga. Elec. Co. v. Rycroft,* 259 Ga. 155, 378 S.E.2d 111 (1989).
13 *Id.* at 158.
14 *Saunders v. Bailey,* 205 Ga. App. 808, 123 S.E.2d 688 (1992).
15 *Ga. Elec. Co. v. Rycroft,* 259 Ga. 155 (1989).
16 *Fort Howard Corp. v. Devoe*, 212 Ga. App. 603, 442 S.E.2d 474 (1994).
17 *Fort Howard Corp.,* 212 Ga. App. at 604.

Substantial Factor in the Hiring Decision

To prove reliance on the employee's misrepresentation was a substantial factor in the hiring decision, the employer does not have to prove a truthful response would have led to an immediate termination. Rather, it may only show the misrepresentation could have led to the discovery of additional medical evidence revealing the employee's pre-existing condition would have have affected their ability to undertake essential job functions.[18]

In *Shepherd Center v. Williams,* the employer testified if the employee had been truthful, it would have requested the employee undergo an additional medical evaluation, tried to make reasonable accommodations in his restrictions by attempting to find him another position or withdrawn the employment offer if it was unable to do so.[19] The court found the testimony demonstrated the employer "relied" on the false representation and this reliance was a "substantial factor" in the claimant's hiring. It is important to note the employer does not have to prove the employee would not have been hired after admitting to a prior injury. Rather, the employer must only show there would have been further medical inquiries and/or evaluations if the employee was truthful.

Causal Connection

The last essential element in a successful *Rycroft* defense is there must be a "causal connection between the false representation and the injury." It is important to realize an employer does not have to show the employee's pre-existing condition caused the subsequent on-the-job injury. However, if the on-the-job injury was made worse due to the pre-existing condition, the causal connection is made. In *Gordon County Farm v. Cope*, the Court of Appeals found the employee's pre-existing back condition did not cause her subsequent fall.[20] However, the medical evidence showed the injury resulting from the on-the-job accident was considerably worse than it would have been had the pre-existing condition not been present.[21]

It is important to note the employer/insurer will carry the burden of proof to establish all of the above elements for a successful *Rycroft* defense. The court in *Rycroft* held the employee's statement on a pre-employment application in which he denied ever having back trouble or injury — despite receiving workers' compensation benefits for a herniated-disc back injury at a previous employer — was sufficient to bar recovery under the three-part test.

TIPS FOR EMPLOYERS

- Be cognizant of the ADA implications regarding the stages of the hiring process.
- Pre-employment stage: Cannot make inquiries into an applicant's medical history and no medical examinations.
- Ask yes/no questions in job application about specific job functions.
- Post-offer stage: Can condition employment on the results of a physical examination as long as it is standard for everyone.
- Post-offer stage is the time to request that the employee fill out a post-hire medical questionnaire.
- Employee begins working for employer: Can conduct voluntary medical examination, including inquiries into their medical history, as long as it is conducted as part of an employee health program available at that worksite.
- Focus questions on specific job functions: This will reduce claims for discrimination based on condition and will also help establish "causal relationship" if a workers' compensation claim were to arise.
- As soon as you receive notice of an employee's work-related injury, the post-hire medical questionnaire should be one of the first documents provided to an insurance adjuster.
- Always maintain employee's medical information in a separate confidential file.

[18] *Id.* (The court reasoning this element was met when the personnel director indicated that she would have investigated the matter further, sent the employee for a medical examination and may have "sent them home" if the investigation revealed a history of back problems).

[19] *Shepherd Ctr. v. Williams,* 251 Ga. App. 560, 553, S.E.2d 872 (2001).

[20] *Gordon Cnty. Farm v. Cope,* 212 Ga. App. 812, 442 S.E.2d 896 (1994).

[21] *Id.*

TIPS FOR INSURERS/ADJUSTERS

- Be mindful the post-hire medical questionnaire is one of the first documents you should request from the employer when a claim is reported.
- Begin looking at prior medical records (if available) or prior claims searches to determine if there is a potential causal connection between an injury alleged and a misrepresentation by the employee.
- If counsel is obtained, the post-hire medical questionnaire should be one of the first documents sent to counsel.
- The clock starts ticking once notice of a work-related injury is given by the employee to the employer; make sure enough evidence is procured to make an informed decision within the first 60 days from when benefits are due.
- Determine whether the misrepresentation is causally connected with the alleged work injury.

CONCLUSION

The provisions of the ADA make clear that after an employment relationship has begun, inquiries regarding medical histories or examinations are allowed under a few specific circumstances. First, inquiries are permissible if they are voluntary and part of an employee health program available at the worksite. Second, an employer can inquire about an employee's ability to perform job-related functions. Third, an employer can make inquiries regarding whether an employee has a disability and, if so, the severity of the disability only if it is job related and consistent with business necessity.

With all cases, medical information must be kept in a confidential file separate from the employee's personnel file. Additionally, Georgia case law clearly supports the notion an employee must be truthful in their representations to an employer, especially throughout the application and hiring process.

The ideal time for an employer to gain information regarding any pre-existing medical conditions of a potential employee is during the post-offer stage, where an offer has been extended or even accepted but before the employee begins to perform work duties. Courts have consistently held any information withheld by the employee at that point in time will likely bar recovery of any future workers' compensation benefits under the *Rycroft* defense. After the employee begins work, inquiries into an employee's medical condition or history are severely restricted and may open the employer up to an accusation of an ADA violation.

“Don’t Worry ‘Bout Nothin’” — Managing Willful Misconduct Claims

By Douglas W. Brown, Jr., and Monica S. Goudy

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"Don't Worry 'Bout Nothin'" — Managing Willful Misconduct Claims

DEFINITION OF WILLFUL MISCONDUCT

In Georgia, O.C.G.A. § 34-9-17 sets the standard by which we can raise a defense for willful misconduct. According to this code section, "an employee may not recover workers' compensation benefits where the employee's injury or death is a result of the employee's own willful misconduct, intentionally self-inflicted injury, attempt to injure another, willful failure to utilize a safety appliance, or intoxication by alcohol or by being under the influence of marijuana or other controlled substances."

We know from case law that negligence is not enough. Willfulness has been defined as the idea of premeditation, intentional wrongdoing and deliberate disobedience, more than performance of a thoughtless act.[1] Specifically, the Georgia Supreme Court recently held O.C.G.A. § 34-9-17(a) may bar recovery of workers' compensation when the employee, in deliberate disobedience of the employer's explicit prohibition, acted in a knowingly dangerous fashion with disregard for the probable consequences of that act and the finder of fact must determine whether such an intentional act was done.[2]

Willful misconduct is an affirmative defense, meaning the burden of proof is on the party claiming an exemption under this code section.[3] The employer and insurer must show by a preponderance of the evidence the employee at the time of his injury was engaged in willful misconduct and such misconduct was the proximate cause of his injury.[4] Naturally, just because we raise the defense and show proximate cause does not mean the claimant will automatically lose his right to benefits. An employee may be able to rebut the defense and maintain his right to benefits, despite evidence of some act of "willful misconduct."

HORSEPLAY/FIGHTING

Georgia law follows the well-settled rule where a worker steps aside from his employment and engages in horseplay or practical joking, or so engages while continuing his work, and accidental injuries result, the injury does not arise out of the employment.[5] Generally, injuries resulting from "horseplay" do not "arise out of" the employment, because such acts could not have been reasonably contemplated by the employer as a risk naturally incident to the nature of the employment.[6]

The law considers horseplay "not such an act as could have been reasonably contemplated by [an] employer as a risk naturally incident to the nature of [the] employment."[7] The burden of proof in a horseplay defense is on the employer.[8] Under the provisions of the Workers' Compensation Act, a claimant is not entitled to compensation if the injury is the result of a fight between the claimant and a fellow employee in which the claimant is the aggressor.[9] In such a case, the injury is not an accident arising out of the employment, within the meaning of the Act.[10] Injuries sustained by the victim of an assault while at work may be deemed compensable if the fight stems from the employee's work duties.[11] If the fight stems purely from personal reasons, however, the claim is not compensable.[12]

1 *Armour and Co. v. Little*, 83 Ga. App 762, 64 S.E.2d 707 (1951).
2 *Chandler Telecom, LLC v. Burdette*, 300 Ga. 626, 297 S.E.2d 93 (2017).
3 *Hartford Accident & Indem. Co. v. Cox*, 101 Ga. App. 789, 115 S.E.2d 452 (1960).
4 *The Borden Co. v. Dollar*, 96 Ga. App. 489, 100 S.E.2d 607 (1957).
5 *Bibb Mfg. Co. v. Cowan*, 85 Ga. App. 816, 70 S.E.2d 386 (1952); *Givens v. Travelers Ins. Co.*, 71 Ga. App. 50, 30 S.E.2d 115 (1944).
6 *Maddox v. Travelers Ins. Co.*, 39 Ga. App. 690, 148 S.E. 307 (1929).
7 *Ga. Cas. Co. v. Martin*, 157 Ga. App. 909, 122 S.E. 881 (1924), citing *Maddox v. Travelers Ins. Co*., 39 Ga. App. 690,148 S.E. 307 (1929).
8 *Am. Fire & Cas. Co. v. Gay*, 104 Ga. App. 840, 123 S.E.2d 287 (1961); *Hartford Accident & Indem. Co. v. Cox*, 101 Ga. App. 789, 115 S.E.2d 452 (1960).
9 *Liberty Mut. Ins. Co. v. Reed*, 56 Ga. App. 68, 192 S.E. 325 (1937); *Fulton Bag & Cotton Mills v. Hayne, 43 Ga. App*. 579, 159 S.E. 781 (1931).
10 *Reed* at 72 and *Hayne* at 579.
11 *State v. Purmort*, 143 Ga. App. 269, 238 S.E.2d 268 (1977) (employee sustained an accidental injury arising out of and in the course of his employment when he was attacked and struck in the head by one of his subordinate employees as a result of a reprimand because of the quality of his work).
12 *City of Atlanta v. Shaw*, 179 Ga. App. 148, 345 S.E.2d 148 (1986) (employee who was injured in a fight between two employees for purely personal reasons was barred from recovering workers' compensation benefits because the employee was not performing tasks required by or incidental to her employment at the time she sustained her injuries; therefore, her injuries did not arise out of or in the course of her employment).

The defense of willful misconduct applies to injuries resulting from "horseplay," in which the employee was the instigator or a participant, as such injuries do not "arise out of" the employment, within the legislative purpose of the Act.[13] As indicated by some of the terms used in *Maddox v. Travelers Ins. Co.*, to be considered horseplay, the conduct in question must be "good-natured," "teasing," "playful" or "in the spirit of levity." In a recent Board decision, the State Board determined there was no horseplay where a paraprofessional, "all excited," was telling the claimant about working in a classroom with older children and "how bad those kids are." To demonstrate how one of the "bad" students had pushed her, she approached the claimant and shoved the claimant using both hands, causing her to fall backward, land on her bottom and back and hit a cabinet behind her. The administrative law judge (ALJ) found no indication in the record the women involved in this incident were playing or teasing. Therefore, because there was no employee deviation from employment to engage in horseplay or practical joking from which the accidental injury occurred, the ALJ ruled there was insufficient evidence of a willful misconduct defense. Furthermore, even if the accident had resulted from "horseplay," the ALJ determined there was no evidence the claimant herself initiated the horseplay or that she actively participated in any horseplay or misconduct of any kind.

By contrast, in another recent Board decision, horseplay was upheld as a valid defense where the claimant was playing around with a co-worker and performing "Kung Fu" kicks when the claimant fell and injured himself. Both the claimant and his co-worker were terminated upon review of a warehouse surveillance videotape of the incident showing horseplay. The initial medical records also documented the claimant and another employee were "horseplaying" when the claimant fell from a standing position and sustained multiple injuries. The ALJ found, on the ground of willful misconduct, the employee's injuries did not arise out of his employment and, therefore, his claim for benefits was denied.

FAILURE TO USE A SAFETY DEVICE

To meet the burden of showing an injury was due to the willful failure of the employee to use a safety appliance, the employer must show: (1) the failure was willful; (2) the safety device was available and accessible; (3) the employee was aware of the necessity to utilize the safety appliance; (4) the employee recognized the danger of not using the appliance; (5) the willful failure to use a safety appliance was intentional and not mere inadvertence or the result of an emergency situation; and (6) such failure proximately caused the injuries.[14]

The claimant in *Armour & Co. v. Little* worked at a meat-cutting company on a production line. On his first day of work, he was given a tour of the machines and instructed on the use of a rake to remove meat from the cutters. However, the employer did not show the rake had been identified as a safety appliance (as opposed to a simple utility appliance). As a result of his failure to use the rake, the employee was injured. The Board denied the claim, holding the employee's failure to ascertain the cutter was stopped and failure to use the rake constituted willful misconduct. The trial court reversed the award and the Court of Appeals affirmed the trial court.

The *Armour & Co. v. Little* decision held the employee's failure to confirm the cutter had stopped constituted mere negligence, not a willful act. In addressing the employee's failure to use the safety appliance, the court distinguished the facts from those in *Liberty Mutual Insurance Co. v. Perry*, another case involving the use of a safety device. In *Perry,* it was undisputed the employee was thoroughly familiar with the machine and paddle the employer provided for removing metal from a machine.[15] However, the employee attempted to remove the metal with his hand, and his finger was cut off by the descending die. The employee's claim was barred because the employee's failure to use the paddle provided by the employer constituted a willful failure to use a safety appliance. By contrast, the claimant in *Little* was almost wholly unfamiliar with the machine and any instructions he might have received occured a month previously, in connection with instructions on six other machines, and the instructions as to the rake in question did not indicate it was a safety appliance, but were merely a definition of its purpose.[16] As the employer could not prove the meat rake was identified to the employee as a safety device and the employee did not have extensive experience with the tool, the employer did not carry its burden of proof.

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13 *Universal Underwriters Ins. Co. v. Ga. Automobile Dealers' Ass'n Group Self-Insurers' Fund,* 182 Ga. App. 595, 356 S.E.2d 686 (1987).

14 *Herman v. Aetna Cas. & Surety Co.,* 71 Ga. App. 464, 31 S.E.2nd 100 (1944).

15 *Liberty Mut. Ins. Co. v. Perry,* 53 Ga. App. 527, 186 S.E. 576 (1936).

16 *Armour & Co. v. Little, supra* at 768.

Another illustration of the fact-specific nature of these decisions is *Pullman Co. v. Carter*. The employee was checking the air-conditioning equipment in a rail car while the standby electrical cable was attached to the car's socket providing it power, but he did not hang a "do not apply cable" sign over the socket.[17] The employee lost his hand when he allegedly slipped beneath the car and his hand was caught by a fan belt or blade. The safety policy in place stated that before a workman could go under the car, he must hang up the sign and stop running the machinery. Notably, the Georgia Court of Appeals held the employee was not barred from recovery because under some circumstances, the best method of performing his duties would have been to start the machinery and listen, even though it might be necessary for him to lean under the car in order to hear the knocks.[18] In other words, where the safety appliance is not used because its use would be "reasonably impractical" at that stage in the employee's duties, recovery is not barred.

INTOXICATION

Under O.C.G.A. § 34-9-17(b), "no compensation shall be allowed for an injury or death due to intoxication by alcohol or being under the influence of marijuana or a controlled substance, except as may have been prescribed by a physician for such employee and taking in accordance with such prescription." While O.C.G.A. § 34-9-17 generally places the burden upon the employer, there is an exception when the employee tests positive for the presence of alcohol or drugs as shown by chemical analysis of the employee's blood, urine, breath or of his bodily substance. Specifically, O.C.G.A. § 34-9-17 provides where testing has been performed demonstrating an employee has 0.08 grams of alcohol or greater in his blood within three hours of the time of the alleged accident or an employee has any amount of marijuana or controlled substance in his blood within eight hours of the alleged accident, there will be a rebuttable presumption the accident and injury or death were caused by the consumption of alcohol or the ingestion of marijuana or the controlled substance. The injured employee will likely attempt to present evidence to rebut the presumption that the presence of alcohol, marijuana or a controlled substance caused the work injury. If the employee unjustifiably refuses to take a drug or alcohol test, the same presumption applies per O.C.G.A. § 34-9-17(b)(3).

In the event a test is not performed within the prescribed timelines, the employer may still raise the intoxication defense. However, in that instance, the employer has the burden to prove the employee was intoxicated and the employee's accident and injury were caused by the intoxication. From a practical standpoint, it is important for the employer to interview the injured employee's co-workers and investigate whether he appeared intoxicated or was otherwise acting out of the ordinary while on the jobsite. The Georgia Court of Appeals has defined intoxication as a condition where one is under the influence of intoxicants "to the extent that he is not entirely himself, or his judgment is impaired, and his acts, words, or conduct are physically and noticeable affected."[19] Therefore, testimony from co-workers regarding the employee's behavior prior to the accident can be helpful.

Furthermore, the employer must prove chain of custody for the urine or blood sample. O.C.G.A. § 34-9-17(b)(2) provides if any amount of a controlled substance is in the employee's system within eight hours of the accident, there is a rebuttable presumption that the injury was caused by the ingestion of a controlled substance. Therefore, the employer must first demonstrate the medical facility took the employee's sample within eight hours of the accident. Although not expressly addressed by O.C.G.A. § 34-9-17, the State Board of Workers' Compensation applies the sample collection and testing requirements of O.C.G.A. § 34-9-415, regarding drug-free workplace programs, to drug defense cases.[20] Under that section, in order for a drug test to be admissible in court, the specimen taken at the hospital must have been collected by a physician, a physician's assistant, a nurse or a certified paramedic. It is necessary to request complete hospital records and the laboratory's "litigation package," which documents the chain of custody and other requirements under O.C.G.A. § 34-9-415.

17 *Pullman Co. v. Carter*, 61 Ga. App. 543 (1939).

18 *Id.*

19 *Parks v. Md. Cas. Co.*, 69 Ga. App. 720, 26 S.E.2d 562 (1943).

20 Interestingly, O.C.G.A. § 34-9-17 only expressly applies the testing requirements of O.C.G.A. § 34-9-415 to instances where the employee refuses to submit to the test. O.C.G.A. § 34-9-17(b)(3). It does not impose those testing requirements to cases where the employee submits to an alcohol (subsection (b)(1)) or controlled substance (subsection (b)(2)) analysis. Nor does O.C.G.A. § 34-9-415 make it clear whether such tests are required merely to meet the provisions of the Drug Free Workplace Program or are required globally. However, the State Board has in the past imposed the requirements of O.C.G.A. § 34-9-415 upon cases involving submission as well as refusal. It is therefore most prudent to ensure that where the employee submits to analysis of his urine or blood for the purpose of detecting alcohol or controlled substances, the test procedures are done in accordance with the provisions of O.C.G.A. § 34-9-415.

An initial positive test result is usually confirmed with a confirmation test. The laboratories performing these tests must be approved by the National Institute on Drug Abuse of the College of American Pathologists. The gas chromatography/mass spectrometry method or an equivalent method approved by the National Institute on Drug Abuse is required. As for the chain of custody, the law requires there be safeguards in the taking, transfer and storage of the sample before the testing. "An employer who performs drug testing or specimen collection shall use chain of custody procedures to ensure proper record keeping, handling, labeling, and identification of all specimens to be tested."[21] The specific procedures are stated in portions of O.C.G.A. § 34-9-415(d), but chain of custody need only be proven within a reasonable degree of certainty to make a drug test admissible.[22] In other words, it does not have to be perfect. Also, the testimony of the test giver is not needed to prove the chain of custody.[23] In fact, in *Smith*, the records were admitted as business records. Also, in that case, there was expert evidence indicating the test results showed drug use. At any rate, the law says any doubt about the identity or purity of the sample taken goes to the weight it is given, not its admissibility.[24]

Where an employee tests positive for drugs or alcohol or refuses to submit to a drug or alcohol test, a rebuttable presumption arises and the employee has the burden to prove the injury or accident was not caused by the consumption of alcohol or the ingestion or marijuana or a controlled substance. While this is a rebuttable presumption, it is difficult to rebut as the claimant then has the burden of showing by "clear, positive, and uncontradicted evidence" the use of alcohol or controlled substances was not the cause of the injury.[25] Whether the presumption is rebuttable is typically fact specific. Where the situation is such that an employee would have been injured whether intoxicated or not (such as where something falls on top of the employee that he could not have avoided even if he was not intoxicated), the presumption may be rebutted. Where the situation is such that the employee's injury could have been caused by the presence of drugs or alcohol, but might have happened even in the absence of drugs or alcohol, the presumption is more difficult to rebut. As with proving an intoxication defense in the absence of a valid positive test, it is important to interview witnesses and know the facts as early as possible in order to maintain the presumption.

For example, in a recent Board decision, the employer/insurer prevailed with an intoxication defense where the claimant, a driver, took unlawful amounts of prescription medications (hydrocodone and clonazepam) before his work injury.[26] From the testimony of the state trooper on the scene and the EMT who gathered the sample, proper chain of custody was established. Notably, no one asked for judicial notice of the controlled substances statutes. The presumption code section says the drug(s) in question must be on the controlled substance list: " . . . that the accident and injury or death were caused by the ingestion of . . . the controlled substance."[27] Unlike heroin, morphine or cocaine, it is not commonly known in the community that clonazepam and hydrocodone are controlled substances. Therefore, judicial notice was not taken of the controlled substances statutes and the employer/insurer was not entitled to the presumption of intoxication found under O.C.G.A. § 34-9-17(b)(2). Nevertheless, the ALJ was very much persuaded by the testimony of a toxicology expert, who credibly stated there was no way the employee last took clonazepam the night before or hydrocodone two nights before as the employee had suggested. With the testimony of the toxicology expert, the employer carried the burden of proving not only impairment, but also that the accident was caused by the drowsiness from clonazepam plus hydrocodone.

In another recent decision, the Board was not persuaded by the employer/insurer's intoxication defense where the claimant, a professional tree surgeon/climber, fell approximately 35 to 40 feet from a tree while allegedly under the influence of drugs.[28] The intoxication presumption did not apply because there was not a proper drug test within eight hours of the accident. The drug test performed the following day was positive for use of cocaine, marijuana and opiates. Therefore, there was some evidence of use of an intoxicant that would account for the accident, but no persuasive evidence the claimant was impaired at the time of injury. Some cell phone pictures were introduced into evidence as allegedly showing the drug paraphenalia in the claimant's bag on the day of the accident, but the photos were blurry and, even if these things were drug-related items, there was no proof of impairment/intoxication or proximate cause on the accident date.

21 O.C.G.A. §34-9-415(d)(9).
22 *Smith v. City of E. Point*, 189 Ga. App. 454, 376 S.E.2d 215 (1988).
23 *Id.*
24 *Mutcherson v. State*, 179 Ga. App. 114, 345 S.E.2d 661 (1986).
25 *Lastinger v. Mill & Machinery, Inc.*, 236 Ga. App. 430 (1999).
26 2014010911 Trial.
27 O.C.G.A. § 34-9-17(b)(2).
28 2017013136 Trial.

PRACTICAL APPLICATION FOR EMPLOYERS/INSURERS

As demonstrated by the aforementioned cases, willful misconduct is inherently fact specific and the particular outcome of each case will be decided on the individual and unique facts of the case. It is important to investigate these claims at the outset. If an employee violates safety rules, negligence — even gross negligence — on the part of an employee is not enough to show willful misconduct.

As a precaution, we recommend employers conduct regular safety meetings about the rules and regulations related to safety and the consequences of not adhering to them. That way, if presented with a situation involving failure to use a safety device, the employer will be able to establish it did provide safety equipment and instructions on how to use it. Likewise, continued diligence in pursuing witnesses, proving chain of custody in intoxication claims and documenting other potentially advantageous evidence is imperative because the outcome of such cases turns, in large part, upon small variations in the facts from claim to claim.

“Tell Me Why” — 2018 Case Law and Legislative Update

By Joanna S. Jang

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Associate

Joanna S. Jang practices primarily in the area of workers' compensation defense. Ms. Jang represents employers, insurers, self-insureds and third-party administrators before the State Board of Workers' Compensation and all of the appellate courts in Georgia. She frequently writes and presents on a variety of workers' compensation issues, including light duty return to work issues and defense strategies, among others. Prior to joining Swift Currie, Ms. Jang practiced workers' compensation defense and federal and state subrogation with another Atlanta defense firm. She also has extended experience handling federal and state business and commercial litigation cases.

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"Tell Me Why" — 2018 Case Law and Legislative Update

The following are the most recent workers' compensation cases that have been decided in the Georgia Court of Appeals and the Supreme Court of Georgia in the past year.

CLARIFYING EMPLOYER/INSURER'S BURDEN OF PROOF IN CHANGE OF CONDITION CASES

In *Ocmulgee EMC v. McDuffie*, the claimant injured his right knee in 2002 at work and subsequently had three knee surgeries.[1] He was placed on permanent sedentary work restrictions. In March 2007, he applied for a job with Ocmulgee EMC (EMC) and was hired as a meter reader, but did not disclose his prior right knee injury nor permanent work restrictions.

The claimant reinjured his right knee in September 2009. EMC initially accepted the claimant's accident as compensable, but later suspended benefits after discovering the claimant's prior injury. However, the authorized treating physician (ATP) recommended surgery in February 2011 and EMC authorized the surgery and reinstated income benefits. In July 2011, the ATP determined the claimant had returned to his pre-injury baseline and EMC suspended the claimant's income benefits.

The claimant filed a hearing request, seeking income benefits. The administrative law judge (ALJ) denied the claimant's request and found EMC proved the claimant's current restrictions were the same as his restrictions prior to the 2009 accident. The ALJ also found the claimant had no restrictions other than those present at the time he was hired by EMC.

The claimant appealed that decision and the State Board's Appellate Division affirmed the ALJ's decision. The Appellate Division further explained the employer/insurer did not need to show the availability of suitable employment to justify the suspension of income benefits, provided the employer/insurer can show, by a preponderance of the competent and credible evidence, the employee no longer suffers any disability due to his work-related injury. The claimant appealed to the Superior Court, which affirmed the Appellate Division's decision.

The claimant then appealed to the Court of Appeals. While the Court of Appeals affirmed the ALJ's finding EMC proved the claimant had improved to the extent he had no work restrictions other than the permanent sedentary work restrictions he had before his hire, the Court of Appeals concluded the ALJ erred by failing to make factual findings regarding whether EMC met its burden of proving the availability of suitable work. The Court of Appeals vacated the judgment in part and remanded the case for additional findings. This decision was potentially troubling as it appeared to create an additional requirement in proving a change of condition for the better.

Both the claimant and EMC filed a petition for certiorari and the Supreme Court of Georgia granted EMC's petition. The Supreme Court explained when an employee is still suffering from the effects of a work-related injury limiting his work capacity, the employer must show the availability of suitable employment before terminating benefits. However, the Supreme Court clarified when an employee had a pre-existing condition that limited his work capacity before a work-related accident, then as soon as the effects of the work-related accident cease, the employer's responsibility also ceases.

[1] *Ocmulgee EMC v. McDuffee*, 302 Ga. 640, 806 S.E.2d 546 (2017).

In making this decision, the Supreme Court stressed the definition of the term "injury" as used in the Workers' Compensation Act:

> Except as otherwise provided in this chapter, "injury" and "personal injury" shall include the aggravation of a preexisting condition by accident arising out of and in the course of employment, but only for so long as the aggravation of the preexisting condition continues to be the cause of the disability; the preexisting condition shall no longer meet this criteria when the aggravation ceases to be the cause of the disability.[2]

Therefore, the Supreme Court concluded no further fact-finding was required and reversed the Court of Appeals' judgment. This means we are not responsible for showing the availability of suitable work when we can establish an aggravation to a pre-existing condition ceased to be the cause of the employee's disability.

DEPENDENCY BENEFITS: ACTUAL DEPENDENCY SUFFICIENT OR IS MARRIAGE REQUIRED?

In *Sanchez v. Carter*, the employee suffered a head injury at work on Oct. 22, 2015.[3] The employer/insurer accepted the employee's accident as compensable and paid benefits until his death. Reynalda Sanchez filed a hearing request, seeking dependency benefits. Sanchez lived with the decedent from 2002 until his death. They were not married. Sanchez became disabled to work in 2011 due to diabetes affecting her feet. The decedent had paid all of her living expenses, including the rent and utilities for the home.

The ALJ found Sanchez was wholly dependent on the decedent for her support and there was no other person who was wholly dependent on the decedent at the time of his death. However, the ALJ cited prior cases in which dependency benefits were denied in a meretricious relationship and held Ms. Sanchez was not entitled to dependency benefits even though she was actually dependent on the decedent.

The ALJ specifically cited two cases in making the decision. In the first case, *Insurance Co. of North America v. Jewel*, the claimant had a living husband when she married the employee.[4] After living with the employee for a month, the claimant discovered that the employee had a living wife. However, the claimant continued living with the employee. After the employee died in a work-related accident, the claimant filed a claim for dependency benefits. The Court of Appeals denied the claimant's request as the dependency grew out of an immoral act. In the second case, *Williams v. Corbett*, the claimant had lived with the deceased employee for 11 years, but they were not married.[5] The Supreme Court of Georgia held one cannot recover dependency benefits arising from a living arrangement not including ceremonial or common-law marriage.

Sanchez appealed the ALJ's decision, but the State Board's Appellate Division affirmed the ALJ's decision. The Superior Court of Colquitt County affirmed the Appellate Division's decision.

Sanchez argued that her relationship with the deceased employee would have fallen within the definition of common law marriage before it was abolished in 1997. The Court of Appeals stated Sanchez could not be deemed married to the decedent by common law because they started living together in 2002, after the common law marriage was abolished. The Court of Appeals refused to modify the holding in *Williams* and stressed that notwithstanding the actual dependency, no dependency benefits can be awarded absent ceremonial or common-law marriage.

Interestingly, the Court of Appeals added that the Supreme Court "might choose to revisit" the issue as to whether the sole requirement for an award of dependency benefits should be dependency in fact. The Court of Appeals may be suggesting the Supreme Court should overturn its prior decision in the *Williams* case and the standard for awarding dependency benefits should be dependency in fact, rather than the existence of a marriage.

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2 O.C.G.A. § 34-9-1(4).

3 *Sanchez v. Carter*, 343 Ga. App. 187, 806 S.E.2d 638 (2017).

4 *Ins. Co. of N. Am. v. Jewel*, 118 Ga. App. 599, 164 S.E.2d 846 (1968).

5 *Williams v. Corbett*, 260 Ga. 668, 398 S.E.2d 1 (1990).

ANOTHER CRACK AT THE IDIOPATHIC INJURY

In *Cartersville City Schools v. Johnson*, the claimant was teaching fifth grade at an elementary school when she walked back to her desk to put an image up on the smartboard.[6] She turned from her computer and desk to walk back to the front of the classroom and fell, injuring her knee. The ALJ found the claimant's injury was compensable as her swift movements, which were necessary for her teaching job, and the configuration of the classroom caused her to "place acute stress on her knee." The ALJ stated these factors created a risk and caused a danger peculiar to her work environment.

The school appealed the decision and the Appellate Division reversed the ALJ's decision. The Appellate Division concluded the claimant's knee injury was idiopathic because the act of turning and walking was not a risk unique to her work. The Appellate Division also stated the act of turning and walking was a risk to which the claimant would have been equally exposed apart from her employment.

The claimant appealed the decision. The Superior Court of Bartow County reversed the Appellate Division, stating the Appellate Division's standard would label any injury that could be incurred off-site as "idiopathic." The Superior Court explained that simply because an injury could occur elsewhere does not make it automatically idiopathic. The Superior Court concluded the claimant's fall was not idiopathic as it arose out of her performing her duties as a teacher.

The school appealed the decision. The Court of Appeals stated that in considering whether an injury arose out of employment, the focus should be on the causal link between the injury and the employee's work-related conditions or activity. Just because an employee could have engaged in the activity giving rise to the injury outside of work does not mean the activity is not compensable. Rather, an injury must either be caused by activity the employee engaged in as part of his job or it must result from some special danger of the employment.

In this analysis, the Court of Appeals cited *Chaparral Boats*, in which the employee's knee injury occured when she hyperextended her left knee as she was walking across the company property to clock in was held to be idiopathic.[7] In *Chaparral Boats,* it was determined the employee's injury did not arise from her engagement in activity specifically required for her work and the injury did not result from a slip, trip, fall or contact with any hazard of her workplace.

After reviewing the ruling in *Chaparral Boats*, the Court of Appeals clarified an idiopathic injury is "peculiar to the individual or arise[s] spontaneously or from an obscure or unknown cause" and has no causal connection to the workplace activity or condition. The Court of Appeals pointed out that both the ALJ and the Appellate Division found the claimant was actively engaged in the movements and behaviors required of her as a classroom teacher when she was injured. Therefore, the Court of Appeals held the claimant's knee injury was not idiopathic.

The analysis of whether an injury is idiopathic is fact specific. This recent decision by the Court of Appeals should not change the analysis we have been applying to cases. An idiopathic injury still remains as a potential defense to claims involving the absence of any causal connection between the condition of the employment and the injury.

6 *Cartersville City Schools v. Johnson*, 2018 Ga. App. LEXIS 203 (Mar. 16, 2018).

7 *Chaparral Boats, Inc. v. Heath*, 269 Ga. App. 339, 606 S.E.2d 567 (2004).

“Don’t Drive No Car” — Transportation and Translation in the 21st Century

By Emily J. Truitt

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Ms. Truitt received her J.D., *magna cum laude*, from Georgia State University. While at Georgia State College of Law, Ms. Truitt served as an associate editor for the *Georgia State Law Review*, as well as an academic enrichment tutor for law school students. Prior to law school, Ms. Truitt graduated from Kennesaw State University, *magna cum laude*, with a B.S. in political science.

"Don't Drive No Car" — Transportation and Translation in the 21st Century

When analyzing workers' compensation claims, we often talk about whether an injury arose out of and in the course of employment. We talk about notice, the lunch break defense and whether an injury might be characterized as idiopathic. These are all important discussions and an impactful analysis could change the posture of the claim. However, like in life, it is often the smaller moves that contribute to moving cases.

We can generally predict when a translator or transporter may be needed. Most frequently, we schedule translators to accompany a court reporter at a deposition. Similarly, claimants' attorneys will often hire a translator should a non-English-speaking claimant plan on testifying at a hearing. Though sometimes less thought of, interpreters regularly attend doctor's appointments. We have all read the report from an orthopedic surgeon stating he had difficulty communicating with a claimant who was merely pointing to the place that allegedly hurt. Even still, we have all read the report stating it was the patient's young daughter who served as an ad hoc interpreter. The issue of transportation typically comes up in the medical appointment scenario — whether it is to travel to the imaging center, physical therapy or a follow-up examination with an authorized treating physician (ATP). The reality is that while transportation and translation seem like side issues, if these two small details are overlooked, a case can fall into disarray fairly quickly.

DO YOU UNDERSTAND THE WORDS COMING OUT OF MY MOUTH?

Providing an interpreter is vital. With as many depositions as we take in workers' compensation claims, any attorney can tell you of a scenario where a non-English-speaking claimant rebuts a doctor's note on the basis the doctor did not understand her. She will claim there was a language barrier, the doctor ignored her or any number of other excuses. She does this to provide some wiggle room, such that she is not attached to the statement in the doctor's narrative. Should she maintain this conviction at a hearing, she will have left the choice with the judge. Does the judge believe it is plausible the doctor misunderstood his patient? Certainly, there are plenty of circumstances where it will be apparent to the judge the claimant is simply attempting to rewrite history. However, there are also circumstances she may be truly right. Imagine relying on high school Spanish classes to tell a doctor in Central America of your flu symptoms. The reality is that while some injured workers communicate in broken English, it is likely insufficient to communicate medical terminology. Therefore, the best rule of practice when it comes to whether an interpreter is needed is to err on the side of caution and simply provide one.

In an effort to cut costs, a common-sense suggestion might be to permit a family member to translate on the claimant's behalf. This is a risky proposition. The family member may be incentivized to exaggerate or expand the claimant's symptoms. Similarly, the family member may make suggestions on the claimant's behalf. The safest option is to avoid another interested party by bringing in a neutral interpreter.

The bill is the last consideration in thinking about a translator. In practice, we recommend paying for an interpreter if the claimant requires one at a doctor's appointment. Again, this reduces the possibility of an inaccurate translation provided by a non-certified friend or family member. Similarly, if we asked to take the claimant's deposition, we pay for the interpreter just as we pay for the court reporter. If the claimant wishes to testify at a hearing, it is her burden to provide an interpreter. Therefore, the claimant's attorney should hire the certified translator (a family member is not appropriate) and should add that to his expenses in the case.

PLANES, TRAINS AND AUTOMOBILES

Pursuant to O.C.G.A. § 34-9-200, an employer shall furnish an injured employee with medical care. From there, Board Rule 203(e) explains medical expenses include "the reasonable cost of travel between the employee's home and the place of examination or treatment or physical therapy, or the pharmacy." The rule further states when the travel is by private vehicle, the reimbursement rate is 40 cents a mile. The board requires the mileage incurred by the employee be paid within 15 days from the date the employer or insurer receives an itemized written request. Thus, the statute and Board rule make clear, in the case of a compensable claim, the employer/insurer is required to pay for mileage as part and parcel of the medical expense.

Ordinarily, a claimant will keep a mileage reimbursement log of some sort and document the mileage from her home to her doctor's appointment, then to the pharmacy and so forth. At some point, this is submitted to the adjuster and payment is made. In instances where a claimant is physically able to drive, has a license and access to a car, there is typically no problem. While this process is fairly buttoned up, the problem becomes murkier when the claimant is requesting transportation in lieu of mileage.

If the claimant is physically unable to drive, such that a mileage reimbursement is insufficient, transportation is probably warranted. Examples of these situations include instances where the claimant is on heavy medication and the physician provided a driving restriction or the claimant had radiating pain causing foot numbness. In these scenarios, nearly every judge will order an employer/insurer to provide transportation, knowing the claimant is unable to transport herself.

The harder issue arises when the claimant is physically capable of driving, but does not drive for another reason. The explanations vary, but common situations are the claimant has never driven or does not have a car, license or the money to pay for car registration or insurance. Reasonable people differ on how to handle this. A claimants' attorney will argue the employer/insurer is required to pay for reasonable medical, which includes transportation. If the claimant is not able to transport herself, this will include transportation. An employer/insurer could argue Board Rule 203 contemplates mileage, not transportation. Accordingly, the employer/insurer should not be required to pay above the contemplated 40 cents a mile.

Often, the issue of transportation can come down to an ethical decision. If the claimant truly cannot get herself to a doctor's appointment, the ethical move may be to simply provide transportation. Take the claimant with an ankle injury. Though her injury does not preclude her from driving, she is nevertheless without a car. Even still, her only form of transportation is taking the bus, but the bus stop is a mile from her house. If the employer/insurer takes a hard stance on denying transportation, the judge might not look favorably upon such a decision. Different facts yield different suggestions.

While the ethical move may be to provide transportation, there are other implications. For instance, what happens if the claimant is involved in a motor vehicle accident on the way to physical therapy? The Court of Appeals has explained the issue of whether an employee's injuries sustained en route to a medical appointment are compensable depends on whether the trip is considered "voluntary."[1] In the 2012 case, the court detailed an employer merely providing transportation should not, by itself, render an accident work related.[2] In *Flores v. Dependable Tire Co.*, the evidence showed: (1) the claimant was not on his way to or from work when the accident occurred; (2) the appointment was not required by the employer; and (3) the employer had no control over the claimant's appointments.[3] Accordingly, the court seems to suggest that while providing transportation could be viewed as a factor, this fact alone should not deem a car accident a compensable event. Accordingly, for purposes of making a decision on whether to provide transportation, it seems prudent to assess whether the appointment is otherwise voluntary.

In an effort to limit liability in a cost-effective way, the new trend is to consider ride-hailing applications, such as Uber and Lyft. A judge may view the employer reimbursing a Lyft or Uber ride as sufficient transportation. It eliminates the problem incurred by claimants not having a car or license, but is considerably less expensive than providing standard transportation. Of course, ride-hailing applications will not work in every scenario, as not all claimants have smart phones or credit cards to utilize in the application. Moreover, there are claimants so destitute that they assert an inability to front the money, such that a reimbursement policy will prove insufficient.

BALANCING CONSIDERATIONS

In addition to the considerations outlined above, it is always useful to rely on social media investigations and physical surveillance. Certainly, if the claimant is visualized driving a car and later contends she lacks transportation, there is reason to deny this request. Ultimately, the decision as to whether we should offer claimants an interpreter or transportation will be made on a case-by-case basis. A safe approach considers the current statutory scheme by ensuring ongoing compliance with medical treatment, while balancing the various ethical considerations presented by an individual claimant.

1 *Flores v. Dependable Tire Co.*, 315 Ga. App. 311, 726, S.E.2d 776 (2012).
2 *Id*. at 314.
3 *Id*.

Psych Claims Driving You "Crazy"? . . . Swift Currie Can Help

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Ms. Jensen graduated, *cum laude*, from the University of Georgia School of Law. While attending law school, she served as a judicial clerk in DeKalb County Superior Court. In addition, Ms. Jensen served as a notes editor for the *Journal of Intellectual Property Law*. Prior to joining the firm in 2011, she worked as an assistant district attorney under the Georgia Third-Year Practice Act in the DeKalb County Superior Court. She is admitted to practice before all Georgia state and superior courts, the Georgia Court of Appeals and the Georgia Supreme Court. Ms. Jensen is a member of the State Bar of Georgia and the Atlanta Bar Association.

Psych Claims Driving You "Crazy"? . . . Swift Currie Can Help

WHAT CONSTITUTES A COMPENSABLE PSYCHOLOGICAL CLAIM?

In order for an injury to be compensable under the Georgia Workers' Compensation Act, the claimant must show his injury arose out of and in the course of his employment.[1] O.C.G.A. § 34-9-1(4) defines a compensable injury under the Act and, unless the claimant suffers an "injury" as thus defined, he is not entitled to a recovery of benefits.[2] The courts have construed a compensable "injury" under O.C.G.A. § 34-9-1(4) as "a discernible physical injury."[3] In accordance with this definition of a compensable injury, the long-standing rule in Georgia is a psychological injury is compensable only if it arises "naturally and unavoidably" from some discernible physical occurrence.[4] A claimant is entitled to benefits under the Act for mental disability and psychological treatment which, while not necessarily caused by a physical injury, arose out of an accident in which a compensable physical injury was sustained, and that physical injury contributed to the continuation of the psychological trauma. The general rule in Georgia is a psychological injury not accompanied by any physical injury is not compensable.

In 1998, the Georgia Supreme Court granted certiorari to address the question of whether an employee is entitled to benefits under the Georgia Workers' Compensation Act for psychological trauma and disability not preceded or accompanied by any physical injury.[5] Abernathy was employed as a park maintenance supervisor for the City of Albany since the mid-1980s. He experienced psychological trauma after a cemetery flooded and he had to retrieve numerous bodies in July 1994. He and three other employees helped recover some 400 caskets and 18 corpses, 12 of which the claimant personally retrieved. The process of retrieving the decayed bodies from the flood waters was particularly gruesome and akin to a horror film. The evidence at the hearing was undisputed — Abernathy did not sustain any physical injury as a result of his work activities. However, in January 1995, the city asked him to prepare a detailed written account of his experiences. Shortly thereafter, he started having nightmares about dead and decaying bodies emerging from the water to attack him. The nightmares were so vivid he woke up clutching a pistol and realized he had shot his bedroom drawers in his sleep.

Abernathy received counseling from the city's Employee Assistance Program and was referred to a psychiatrist. The psychiatrist diagnosed him with post-traumatic stress disorder (PTSD) and prescribed medications. Abernathy was not able to operate the machinery needed to perform his job and stopped working in August 1995. At that point, he filed for workers' compensation benefits. The city denied his claim. Despite enduring gruesome physical contact with cadavers and suffering psychological trauma, the court found that the Act did not authorize any recovery for a purely psychological injury. The court narrowly construed O.C.G.A. § 34-9-1(4) and denied Abernathy's claim for workers' compensation benefits because he did not sustain any physical injury. Justices Benham, Hunstein and Sears disagreed with the majority opinion and stated Abernathy's claim should have been compensable. The dissenting opinion provided Abernathy should have received income benefits and psychological treatment under workers' compensation because he sustained a mental injury that arose out of in the course of his employment.

In 2008, the Court of Appeals found there was sufficient evidence to affirm the State Board's finding that a psychological injury was compensable after an asthma attack due to exposure to fire extinguisher residue and cleaning products on a school bus.[6] The claimant was a school bus driver with a family history of asthma. She had been diagnosed with asthma four years before the work injury. Additionally, one of her sisters had died during a severe asthma attack and another sister was on disability benefits due to her asthma. The claimant had sought treatment for asthma attacks at the hospital four times before the work accident in 2005.

1 O.C.G.A. § 34-9-1(4).
2 *Covington v. Berkeley Granite Corp.*, 182 Ga. 235, 184 S.E. 871 (Ga. 1936).
3 *Southwire Co. v. George*, 266 Ga. 739, 470 S.E.2d 865 (Ga. 1996).
4 *Southwire Co. v. George*, *supra* at 741.
5 *Abernathy v. City of Albany*, 269 Ga. 88; 495 S.E.2d 13 (Ga. 1998).
6 *DeKalb Cnty. Bd. of Educ. v. Singleton*, 294 Ga. App. 96, 668 S.E.2d 767 (Ga. Ct. App. 2008).

The claimant's physical accident occurred on the first day back to school. She arrived at the parking lot to pick up her bus and found the interior covered in white powder, which she believed was fire extinguisher residue and mold. She cleaned the bus with paper towels and hand sanitizer. She drove the bus for 40 minutes and parked in her designated spot. She began feeling weak and drowsy and called her husband, who drove her home. She began coughing and called her supervisor to report she was ill. Shortly thereafter, she experienced difficulty breathing and her son took her to the hospital. She was treated for an asthma attack.

Later, she was evaluated by a pulmonologist who found she could return to work, but any exposure to cold air, strong odors or fumes could cause another asthma attack. If she experienced an asthma attack while operating the school bus, the pulmonologist felt her ability to drive the bus would be impaired. The claimant felt unsafe driving the school bus and was concerned another attack could result in harm to the children. She was examined by a clinical psychologist. The psychologist diagnosed her with adjustment disorder with depression and recommended short-term treatment. The psychologist felt she was unfit to drive the bus because she had too much anxiety.

The court found that in order for a psychological injury to be compensable, it must satisfy two conditions precedent: (1) it must arise out of an accident in which a compensable physical injury was sustained; and (2) while the physical injury need not be the precipitating cause of the psychological condition or problems, at a minimum, the physical injury must contribute to the continuation of the psychological trauma.[7] The court found the claimant's physical injury contributed to the continuation of her psychological problems. The court concluded her psychological problems were not "mild," but constituted a real fear of her own death from further asthma attacks and concerns about the safety of the children she would have been transporting. The court affirmed the administrative law judge (ALJ) and Superior Court's awards of income benefits, medical payments and ongoing medical care for the claimant's psychological problems.[8]

PRACTICAL TIPS FOR HANDLING PSYCHOLOGICAL CLAIMS

As outlined above, some work accidents are traumatic, which may lead the claimant to develop psychological issues. For example, an employee involved in serious motor vehicle accident may experience anxiety or a fear of driving following the event. Likewise, an employee involved in a fatal motor vehicle accident may suffer from post-traumatic stress disorder, depression or survivor's guilt. Similarly, a claimant who is the victim of an armed robbery or active shooter situation may experience anxiety or feel apprehensive about returning to work. Additionally, it is important to consider that even if a compensable work accident does not involve a traumatic event, some employees may experience psychological illness due to physical pain, financial stress and the inability to work and provide for their family following the work accident.

It is important to note that in an armed robbery situation, the courts have held the claimant's psychological injury is only compensable if he sustained a discernible physical injury during the robbery.[9] For example, in 1989, the Court of Appeals denied a store clerk's request for psychological treatment after a gun was placed against her head during a robbery. The court held "a mere touching of the claimant's head without injury" was not sufficient to support an award for benefits under Georgia law as a discernible physical occurrence.

If a psychological claim seems questionable, the best course of action is to consult your Swift Currie attorney. They can assist you in navigating the WC-3 process, which will include filing a WC-3 Form to controvert the request for psychological treatment. Once the request for psychological treatment has been denied, the claimant will likely request a hearing seeking authorization of psychological treatment. After denying the treatment, the employer and insurer should begin investigating whether the need for psychological treatment is related to the work accident. A thorough investigation should include written discovery regarding the claimant's prior psychological treatment, including any of use of anti-depressant, anti-anxiety or anti-psychotic medications. If the claimant discloses any prior psychological history, the records from his psychologist should be obtained to compare them to the claimant's present complaints. If the claimant refuses to disclose his prior psychological treatment or records, your Swift Currie attorney will file a motion to compel the records. Additionally, the pre-hearing investigation should include the deposition of the claimant to assess his prior

7 *Columbus Fire Dep't v. Ledford,* 240 Ga. App. 195, 196-197(1), 523 S.E.2d 58 (Ga. Ct. App. 1999).

8 *DeKalb Cnty. Bd. of Educ. v. Singleton*, 294 Ga. App. 96, 668 S.E.2d 767 (Ga. Ct. App. 2008).

9 *W.W. Fowler Oil Co. v. Hamby*, 192 Ga. App. 422, 385 S.E.2d 106 (1989).

medical history and current condition. You may also want to consider placing surveillance on the claimant to assess his activity level and determine if his activities are consistent with the alleged psychological issues.

Following the claimant's deposition, schedule an independent medical evaluation (IME) with a psychologist and/or psychiatrist to determine whether the claimant requires psychological treatment. If so, determine whether the need for treatment is related to the work accident. Additionally, the IME physician should be asked to address the recommended duration of psychological treatment and/or medications. After receiving the IME report, the employer/insurer should decide whether to authorize the requested treatment or proceed to an evidentiary hearing.

With regard to ethical considerations, it is important to address any psychological issues as soon as possible. If the claimant's concerns are not addressed, he will likely hire an attorney who will push for psychological treatment and seek assessed attorney's fees if there is an unreasonable delay in authorizing medical treatment. While we have a right to investigate whether psychological treatment is medically necessary and reasonably required to effect a cure, we must be able to show the State Board any delay in authorizing treatment was due to our investigation in order to avoid the imposition of attorney's fees.

“Stayin’ Alive” in a Death Claim

By Kenneth M. Brock and C. Pari Fakhrzadeh

Kenneth M. Brock

Partner

Kenneth "Ken" M. Brock concentrates his practice in the area of workers' compensation defense, representing employers, insurers, self-insurers and third-party administrators in numerous workers' compensation claims throughout the state of Georgia. Prior to joining the firm, Mr. Brock worked as senior staff counsel with the CNA companies representing employers in workers' compensation matters.

Mr. Brock received his undergraduate degree in economics from the University of Georgia in 1989 and his J.D. from the Walter F. George School of Law at Mercer University in 1992. While at Mercer, he served as a member of the *Mercer Law Review*. He was admitted to practice law in Georgia in 1992 and Virginia in 2015. Currently, he is a member of the State Bar of Georgia Workers' Compensation Section.

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Ms. Fakhrzadeh received her J.D. from Georgia State College of Law in 2014. During law school, Ms. Fakhrzadeh worked as an extern for the Honorable Judge Alford Dempsey Jr.

She also served as the president of the Phi Alpha Delta professional law fraternity and was a member of The Business & Law Society, as well as the Association of Women Law Students.

Ms. Fakhrzadeh graduated, *cum laude*, from University of South Carolina with a Bachelor of Science in business administration and a minor in political science in 2011. While there, she was inducted into the National Society of Collegiate Scholars, a columnist for the university newspaper and a member of the Alpha Delta Pi sorority.

"Stayin' Alive" in a Death Claim

GENERAL OVERVIEW

One of the most dreaded workers' compensation scenarios an employer can face is the death of an employee. Fortunately, the majority of claims do not result in death, but it is important employers and insurers understand the workers' compensation implications in the event a death occurs.

The purpose of the Workers' Compensation Act in Georgia, "with respect to the payment of death benefits, is to provide a measure of compensation to persons suffering a direct loss of support because of the death of an employee as a result of his employment."[1] Therefore, if an employee's death instantly results from an accident arising out of and in the course of employment, or even later results therefrom, the individuals who suffered a financial loss as a consequence of the employee's death — the employee's dependents — may be entitled to benefits.[2]

Compensability of death claims is usually treated like any other accidental injuries. To be compensable, the death must arise out of and in the course of employment. Similar to an aggravation of a pre-existing injury claim, there is no requirement the work injury be the sole cause of death. The death is compensable if a compensable injury triggered, activated or aggravated a dormant condition or disease that ultimately contributed to the employees death.[3] In those cases, the burden of proof is on the claimant to show the death resulted from an accident arising out of and in the course of employment.[4]

Because a claimant is not available to testify about his accident, proving the death arose out of the employment can be difficult. This difficulty was recognized immediately after the Workers' Compensation Act was passed and addressed by the courts. The legislature created a natural inference, or presumption, in dealing with deaths where the precipitating cause was unexplained. When an employee dies from unknown causes in a place and at a time where he might reasonably be expected to be performing his job, there is a presumption the death arose out of and in the course of the employment. Once the presumption is applied, the burden of proof shifts from the claimant to the employer. The employer must show the decedent's death *did not* arise out of the employment, and this burden cannot be met by simply suggesting *possible* causes of death.[5] The rationale behind the presumption — and the burden placed on the employer — is the death itself removes the witness best able to show causation.[6] Thus, the presumption does not apply when a claimant sustains a compensable, nonfatal accident for which he received disability benefits, before later dying.[7]

If it is determined a death is compensable, the potential exposure of the employer falls into three categories. First, the employer must cover any reasonable medical expenses within the fee schedule incurred by the employee as a result of the ultimately fatal on-the-job injury.[8] Second, the employer must pay for the employee's "reasonable burial expenses" up to $7,500 ($5,000 if the accident occurred prior to July 1, 1999).[9] Lastly, the employer is responsible for paying benefits to the surviving dependents of the employee.[10]

WHO IS CONSIDERED A DEPENDENT?

The Georgia Court of Appeals defined the term "dependent" in *Insurance Co. of North America v. Cooley* as "one who looks to another for support."[11] While a claimant dependent is usually a member of the deceased employee's immediate family (a child, a surviving spouse or a parent), an individual need not necessarily be a member of the decedent's immediate family or a relative of the decedent, in order to be eligible for dependency benefits.[12]

1 *St. Paul-Mercury etc., Co. v. Robinson*, 88 Ga. App. 217, 219, 76 S.E.2d 512 (1953).
2 *Johnson v. Fireman's Fund Indem. Co.*, 79 Ga. App. 187, 53 S.E.2d 204 (1949).
3 *B.P.O. Elks Lodge No. 230 v. Foster*, 91 Ga. App. 696, 86 S.E.2d 725 (1955).
4 *Hardware Mut. Cas. Co. v. King*, 104 Ga. App. 252, 121 S.E.2d 336 (1961).
5 *S. Bell Tel. Co. v Hodges,* 164 Ga. App. 757, 298 S.E.2d 570 (1982).
6 *Gen. Accident Fire & Life Ins. Co. v. Sturgis*, 136 Ga. App. 260, 221 S.E.2d 51 (1975).
7 *Fowler v City of Atlanta,* 116 Ga. App. 352, 157 S.E.2d 306 (1967).
8 O.C.G.A. § 34-9-265(b)(1).
9 O.C.G.A. §34-9-265(b)(1).
10 O.C.G.A. §34-9-265(b)(2).
11 *Ins. Co. of N. Am. v. Cooley*, 118 Ga. App. 46, 162 S.E.2d 821 (1968).
12 *St. Paul-Mercury Indem. Co. v. Robinson*, 88 Ga. App. 217, 76 S.E.2d 512 (1953).

Dependency, for the purposes of death claims, then can be defined as one who looks to another for support or is dependent on another for the ordinary necessities of life to which he has become accustomed.[13] Therefore, a dependent is one who relied upon the deceased employee in order to maintain the dependent's "standard of living."[14] Georgia's Court of Appeals has made it clear — the question of dependency is one of fact that is to be determined according to the facts and circumstances of each particular case.[15] The individual claiming dependency has the burden of proof and substantial discovery is often required.

CLASSES AND PRIORITY OF DEPENDENTS

It is important to understand there is a priority among who will draw dependency benefits if there are multiple dependents. There are three types of dependents or beneficiaries: primary, totally dependent secondary and partially dependent secondary.[16] Only the spouse and children of the injured worker can be primary beneficiaries.[17] Everyone else is a potential secondary beneficiary.[18] If there are any primary beneficiaries, then the entire dependency benefit will be split between the primary beneficiaries, unless the primary beneficiaries waive the right to receive benefits.[19] For example, where a primary dependent surviving spouse is entitled to death benefits, a partially dependent parent of the decedent is not entitled to any benefits.[20] If, however, the spouse dies or is no longer entitled to benefits, the payments are then made to any remaining totally dependent secondary beneficiaries, then to partial dependents.

Regardless of the number of primary beneficiaries, the total amount of weekly dependency benefits to be paid by the employer does not change.[21] In cases of multiple persons totally dependent upon the decedent employee, the death benefit must be divided among them equally and any partial dependents will receive no portion thereof.[22] If there are no total dependents but multiple partial dependents, the death benefits will be divided among them, proportionate to their relative dependency.

PRIMARY BENEFICIARIES

Dependency of Children

For purposes of dependency, the term "child" includes dependent stepchildren, legally adopted children, posthumous children and acknowledged children born out of wedlock, but does not include married children.[23]

Children of the deceased employee are presumed totally dependent if the "child" is: (1) under age 18; (2) a full-time high school student; (3) under age 22 and a "full-time student or equivalent in good standing enrolled in a postsecondary institution of higher learning"; or (4) physically or mentally incapable of earning a livelihood.[24] Legitimate natural children of the deceased who fall into these categories can recover death benefits even if they were not actually dependent upon the deceased.[25] In practice, paternity tests, birth certificates and witness testimony may all be entered in to evidence to establish a child's status.[26]

When a child dies, marries or no longer falls into one of the foregoing four provisions, the child's right to dependency benefits ends and the employer may suspend payment of weekly dependency benefits by filing a Form WC-2a/Notice of Suspension of Benefits with the State Board in conjunction with sending a copy to the claimant or the claimant's legal representative.[27] It should be noted this WC-2a is different than the standard WC-2 and is specifically tailored to death benefits.

13 *Glens Falls Indem. Co. v. Jordan*, 56 Ga. App. 449, 193 S.E. 96 (1937).
14 *Ins. Co. of N. Am. v. Cooley*, 118 Ga. App. 46, 162 S.E.2d 821 (1968).
15 *Md. Cas. Co. v. Campbell,* 34 Ga. App. 311, 129 S.E.2d 447 (1925).
16 O.C.G.A. § 34-9-13.
17 *O'Steen v. Fla. Ins. Exch.,* 118 Ga. App. 562, 164 S.E.2d 334 (1968).
18 *Id*.
19 O.C.G.A. § 34-9-13(c); *O'Steen v. Fla. Ins. Exch.*, 118 Ga. App. 562, 164 S.E.2d 334 (1968).
20 O.C.G.A. § 34-9-13(c); *Mays v. Glens Falls Indem. Co.*, 77 Ga. App. 332, 48 S.E.2d 550 (1948).
21 *Ga. Forestry Comm'n v. Harrell*, 98 Ga. App. 238, 105 S.E.2d 461 (1958).
22 O.C.G.A. § 34-9-13(d).
23 O.C.G.A. § 34-9-13(a).
24 O.C.G.A. § 34-9-13(b)(2).
25 *Menard v. Fairchild, 254 Ga. 275*, 328 S.E.2d 721 (1985).
26 *See Stevedoring Services of Am. et. al. v. Collins,* 247 Ga. App. 149, 542 S.E.2d 134 (2000).
27 *Turner v. U.S. Fid. & Guar. Co.*, 125 Ga. App. 371, 187 S.E.2d 905 (1972).

Dependency of Spouse

A surviving spouse shall be conclusively presumed to be totally dependent if she can prove: (1) a valid marriage to the decedent; and (2) that the surviving spouse and the decedent were *not* "living separately for a period of 90 days immediately prior to the accident resulting in the death of the deceased employee."[28] Prior to Jan. 1, 1997, common-law marriage was recognized in Georgia and considered a valid marriage for the purpose of workers' compensation benefits.[29] No common-law marriage may be entered into in Georgia on or after Jan. 1, 1997, but any such marriage entered into prior to that date shall continue to be recognized in Georgia.[30] Thus, if an individual claims to be a spouse without a marriage ceremony, they must have qualified as a common-law spouse before 1997.

A spouse's dependency benefits terminate at age 65 or 400 weeks, whichever provides the greater benefit, not to exceed $230,000 for accidents occurring after July 1, 2016.[31] It should be noted the $230,000 cap only applies when the surviving spouse is the sole dependent at the time of death. In other words a surviving spouse with a minor child is not limited by the $230,000 cap and may be entitled to benefits to age 65. When benefits have been paid to the injured employee before their death, then any such benefits "shall be subtracted from the maximum 400-week period of dependency of a spouse.[32] This credit does not apply when the spouse is entitled to benefits based on her age rather than the 400-week period. Benefits for a spouse may also be terminated upon remarriage or cohabitation in a meretricious relationship. A meretricious relationship is defined as "a relationship in which persons of the opposite sex live together continuously and openly in a relationship similar or akin to marriage, which relationship includes either sexual intercourse or the sharing of living expenses."[33] This can lead to some interesting discovery.

SECONDARY BENEFICIARIES

Secondary beneficiaries may be entitled to dependency benefits if there are no primary beneficiaries or primary beneficiaries have waived their rights. There is no presumption of dependency for secondary beneficiaries and they must prove actual dependency in order to be eligible for dependency benefits. According to the Act, in order for any nonspouse or nonchild dependent to receive benefits, the dependency must have existed for at least three months prior to the accident.[34] Although this is the claimant's burden of proof, it typically requires both parties to engage in a substantial amount of discovery. Secondary beneficiaries may be either totally dependent or partially dependent. In analyzing the facts of each case, the court looks to the following factors: (1) "the amounts, frequency, and continuity of actual contributions of cash and supplies"; (2) "the need of the claimant"; and (3) "the legal or moral obligations of the employee."[35]

Some states list the "parents" of a deceased employee as being individuals conclusively presumed to be entitled to death benefits. Georgia does not, treating them just like any other secondary dependent. Consequently, in order for parents to recover death benefits, there must be no primary dependents and the secondary dependent parent of a deceased employee must prove he was actually dependent in fact upon that employee for his support. A parent will not be entitled to recover any death benefits at all if there is any individual who is a primary beneficiary (such as a child of the decedent or a surviving spouse of the decedent) entitled to recover benefits.[36]

O.C.G.A. § 34-9-13(b) makes it clear that an unmarried significant other is not entitled to the presumption of total dependency. Georgia case law goes a step further by denying any claim for dependency by an unmarried significant other, even where the significant others cohabitate and are financially dependent upon each other. In *Insurance Co. of North America v. Jewel,* the claimant and deceased employee both had living spouses when they entered into a ceremonial marriage and began living together.[37] When the employee died and the

28 O.C.G.A. § 34-9-13(b)(1).
29 *Steed v. State*, 80 Ga. App. 360, 56 S.E.2d 171 (1949).
30 O.C.G.A. § 19-3-1.1.
31 O.C.G.A. §34-9-265 (d).
32 O.C.G.A. § 34-9-265(b)(4).
33 O.C.G.A. § 34-9-13(e).
34 O.C.G.A. § 34-9-13(d).
35 *Ins. Co. of N. Am. v. Cooley*, 118 Ga. App. 46, 48, 162 S.E.2d 821, 823 (1968).
36 *Zachery v. Royal Indem. Co.*, 80 Ga. App. 659, 56 S.E.2d 812 (1949).
37 *Ins. Co. of N. Am. v. Jewel,* 118 Ga. App. 599 (1968).

claimant sought workers' compensation benefits, the court found their relationship meretricious and denied the claim.[38] The Court of Appeals arrived at the same conclusion even where adultery was not involved, in the 1990 case of *Williams v. Corbett*.[39] In *Williams v. Corbett,* the claimant and deceased employee lived together but had no ceremonial or common law marriage.

SUMMARY OF ORDER OF DISTRIBUTION

In summary, the following rules apply:

1. If there is a dependent spouse, as well as children, the spouse receives "full compensation" for both of their use. However, the Board can apportion the compensation at its discretion.
2. If there is a dependent spouse and no children, the spouse receives full compensation but no more than $230,000.
3. If there is no dependent spouse and at least one dependent child, the child/children receive full compensation, to be shared equally.
4. If there is neither a dependent spouse nor dependent children, total dependents who can prove dependency receive full compensation, to be shared equally.
5. If there is no dependent spouse, dependent children or total dependents, partial dependents receive compensation divided in accordance with the relative extent of their dependence.
6. If there are no dependents, the employer pays the State Board of Workers' Compensation one-half of the benefits or $10,000 — whichever is less.

If the employer doesn't know who to pay as a dependent, it may request a hearing to resolve the dispute. In other words, it acknowledges the debt but not the person to whom it is due.

ETHICAL CONSIDERATIONS

In the event the decedent leaves behind a surviving dependent who is a minor or a legally incompetent adult, the Board may, in its discretion, appoint a conservator for the dependent to pursue the case and protect their interests.[40] Board appointment of a conservator for a minor or legally incompetent adult is necessary to both pursue the claim and receive benefits or enter into agreements with the employer/insurer. In situations where the dependent spouse is not the parent of the dependent child, it is important to take extra care to make sure the interests of minors and incompetent adults are protected by having a conservator appointed.

Settlement of the claim by the Board appointed conservator can be performed in cases where the value of the net settlement is less than $100,000. However, if the net settlement is $100,000 or more, probate court approval is required. O.C.G.A. § 34-9-226 (b)(2) provides:

> The Board may, in its discretion, authorize and appoint a conservator of a minor or legally incompetent person to compromise and terminate any claim and receive any sum paid in settlement for the benefits and use of said minor or legally incompetent person *where the net settlement amount approved by the Board is less than $100,000.00; however, where the natural parent is the guardian of a minor and the settlement amount is less than $15,000.00, no board appointed conservator shall be necessary.*

Although always important, fair and ethical handing of death claims is especially important given the sensitive nature of the situation. In order to ensure these claims are handled properly, you must pay special attention to the Workers Compensation Act, as well as the Civil Practice Act.

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38 *See also Ga. Cas. & Sur. Co. v Bloodworth*, 120 Ga. App. 313 (1969), 170 S.E.2d 433.

39 *Williams v. Corbett.* 260 Ga. 668 (1990).

40 O.C.G.A. § 34-9-226(a).

Attorney Bios

John F. Sacha
Partner

John F. Sacha handles general litigation matters, including workers' compensation and probate. From 1996 through 2009, Mr. Sacha served as managing partner of the firm.

Mr. Sacha is a member of the Atlanta Bar Association and the State Bar of Georgia, as well as the Defense Research Institute. A frequent lecturer, he has spoken before the Southeastern Safety and Health Conference, the Workers' Compensation Claims Management Programs sponsored by the Georgia Tech Research Institute, the Employer's Liability Law Committee, the American Bar Association and other employer-oriented groups. In addition, Mr. Sacha has spoken at local and regional Chambers of Commerce.

Long active in civic affairs, Mr. Sacha has served as president and director of the Center for Puppetry Arts and on the board of directors for the Georgia Citizens for the Arts , Ansley Golf Club and Peachtree Presbyterian Preschool. He currently chairs the Duke University Greek Alumni Advisory Council and is a member of the Duke University Alumni Admissions Advisory Committee in Atlanta. Since 2004, Mr. Sacha has been named a Georgia Super Lawyer by *Atlanta Magazine*. Additionally in 2008 and 2009, the "Power Book," published in the *Atlanta Business Chronicle*'s 30th anniversary issue, named Mr. Sacha as a leader in the law industry. He has also been selected as a *Best Lawyer in America* since 2011.

Mr. Sacha completed his undergraduate work at Duke University and earned his law degree from the University of Virginia School of Law. He is a member of Beta Omega Sigma and Omicron Delta Kappa Leadership Societies and Phi Alpha Delta.

Robert R. Potter
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Robert R. Potter primarily handles workers' compensation and legislative and regulatory representation.

He is co-author of the *Georgia Workers' Compensation Law and Practice*, currently in its fifth edition and supplemented annually. He has authored and co-authored numerous law review articles and appeared frequently as a speaker both on workers' compensation and legislative topics. Mr. Potter has served as chairman of the Workers' Compensation Section of the State Bar of Georgia and is a member of the Defense Research Institute. He has been named a Georgia Super Lawyer since 2004 by *Atlanta Magazine* and listed in *The Best Lawyers in America* since 1999. In 2007 he was presented the inaugural Tom S. Howell Memorial Award of Excellence. In 2008, Mr. Potter was presented the Distinguished Service Award by the Workers' Compensation Section of the State Bar of Georgia. In 2012, he was inducted in as a fellow in The College of Workers' Compensation Lawyers.

A 1970 graduate of Mercer University, Mr. Potter served as an officer in the Navy before returning to Mercer to earn his J.D., *magna cum laude*, in 1977. While in law school, he was editor-in-chief of the *Mercer Law Review.*

Douglas A. Bennett
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Douglas A. Bennett handles general civil litigation, including workers' compensation, automobile litigation, products liability, premises liability and trucking litigation. Mr. Bennett is a member of the Atlanta and American Bar Associations, as well as the State Bar of Georgia. He also is a member of the Defense Research Institute and the Georgia Self Insurers Association.

A frequent speaker in various practice areas, Mr. Bennett has lectured and chaired seminars for the Atlanta Bar Association and the Institute of Continuing Legal Education. He is a past member of the Executive Committee of the Workers' Compensation Section of the State Bar of Georgia and served as chairman of the from June 2003 to June 2004.

Mr. Bennett received a Bachelor of Business Administration from the University of Georgia in 1976. He also received his law degree from the University of Georgia, *cum laude*, in 1980, and served on the staff of the *Georgia Law Review*. In 2006, Mr. Bennett received a Bachelor of Arts from Georgia State University focusing on literature. Additionally, Mr. Bennett has been named in *The Best Lawyers in America*© since 1995.

Mark J. Goodman
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Mark J. Goodman, since joining the firm in 1984, has specialized in both workers' compensation and liability defense matters. He also has experience in personal injury law, subrogation and other litigation areas.

Mr. Goodman is a member of the Workers' Compensation Section of the State Bar of Georgia, the Defense Research Institute, the Atlanta Bar Association and the Georgia Self Insurers Association. He has been a member of Public Education Committee of State Board of Workers' Compensation Chairman's Advisory Council from 2010 to present. He is the co-author of a number of "Workers' Compensation Surveys," which are published annually in the *Mercer Law Review*, and has lectured at numerous workers' compensation seminars on a variety of topics.

Mr. Goodman has chaired several seminars sponsored by the Institute for Continuing Legal Education, the State Bar of Georgia, the National Business Institute and other organizations, as well as participated in a statewide series of seminars for businesses sponsored by the Georgia Chamber of Commerce. He has also spoken at various seminars sponsored by the State Board of Workers' Compensation on numerous topics.

Mr. Goodman graduated with an A.B. degree, *cum laude*, from Georgetown University in 1981, where he was a member of Phi Beta Kappa. He earned his law degree from Duke University in 1984.

Joseph A. Munger

Partner

Joseph A. Munger has practiced workers' compensation law, employment law, personal injury law, insurance defense litigation and premises liability law since joining Swift Currie in 1985. He has been a partner at the firm since 1992 and has served on the management committee. His practice covers the entire state of Georgia.

He frequently lectures on employment topics, including discrimination and disability matters, drug-free workplace and workers' compensation. He has published articles on many employment-related topics, such as the American with Disabilities Act and its interplay with workers' compensation concerns.

Mr. Munger belongs to the Atlanta, Colorado and American Bar Associations and the State Bar of Georgia. He is also a member of the Employment and Labor Law Committee of the Defense Research Institute, Georgia Self Insurers Association and Workers' Compensation sections of the State Bar of Georgia and Atlanta Bar Association.

R. Briggs Peery

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R. Briggs Peery practices both workers' compensation and general liability litigation, defending insurance carriers and self-insureds.

He is a member of the Atlanta Bar Association, American Bar Association, State Bar of Georgia and Virginia State Bar. Mr. Peery has served as the Legal Committee chairman for the Georgia State Board of Workers' Compensation Steering Committee. He is also a Georgia representative for the Steering Committee of the Florida Workers' Compensation Institute and a member of the Legal Committee for the Georgia State Board of Workers' Compensation's annual seminar.

He has spoken on workers' compensation topics at multiple claims and State Bar seminars, as well as Georgia Chamber of Commerce, municipal, employer and self-insured functions.

Mr. Peery received his law degree from the Walter F. George School of Law at Mercer University in 1986. While at Mercer, he was a member of the Moot Court Board, National Moot Court Competition and the National ABA/LSD Moot Court Competition Team.

In 1983, Mr. Peery graduated with a B.A. from Hampden-Sydney College. He also was a member of the Phi Alpha Theta, Phi Sigma Iota and Phi Delta Phi honor societies.

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Michael Ryder practices in the workers' compensation defense section of the firm. Mr. Ryder is admitted to practice in Georgia and Florida. Since 1988, he has concentrated his area of practice in workers' compensation defense and employment law issues on behalf of employers and insurers.

Mr. Ryder frequently lectures and trains employers and workers' compensation professionals around the country on issues of Georgia workers' compensation. Mr. Ryder also serves as an instructor of the multistate portion of the annual Florida Workers' Compensation Institute.

Previously, Mr. Ryder served on the Governor's Workers' Compensation Commission and is a past member of the board of directors for the Atlanta Bar Association's Workers' Compensation Section and the board of governors for the Florida Bar Young Lawyers' Division. Mr. Ryder has also served as editor of the State Bar of Georgia's Workers' Compensation Section newsletter and on numerous State Bar of Georgia committees. He founded the Atlanta Bar Association Workers' Compensation Section's annual Kids' Chance Run, a charitable fundraiser held since 1991.

Mr. Ryder earned both his undergraduate degree and law degree from the University of Florida, where he was a member of Florida Blue Key, Omicron Delta Kappa and Phi Delta Phi.

Debra D. Chambers
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Debra D. Chambers practices in the workers' compensation and litigation sections. Prior to joining the firm, Ms. Chambers practiced in the area of insurance defense litigation, employment discrimination and workers' compensation with another Atlanta law firm for three years.

Ms. Chambers is a member of the Workers' Compensation Section and Employment Law Section of the State Bar of Georgia. She has been a speaker at the Annual Workers' Compensation Seminar hosted by the State Board of Workers Compensation, as well as through other venues. She is a member of DRI and the Georgia Defense Lawyers Association.

Ms. Chambers has represented both self-insured employers, as well as insurance companies in the defense of workers' compensation cases and has appeared before all the judges sitting at the State Board of Workers' Compensation. She has utilized defenses based upon the affirmative defenses found in O.C.G.A. § 34-9-17, as well as the standard defenses. She has successfully conducted numerous mediations, both at the State Board and with private mediators, for the benefit of her clients.

Prior to, and while attending law school, Ms. Chambers worked for nine years as a sales finance administrator and a contracts representative for Hewlett-Packard Co. With her business background, she has an excellent understanding from the employer's perspective on the need to keep costs/expenses down, while achieving a positive result.

Ms. Chambers graduated from California State University in 1983 with a B.S. in finance. She received her J.D. degree from the Georgia State University College of Law, *cum laude*, in 1992. While in law school, Ms. Chambers served as the assistant managing editor of the *Georgia State University Law Review*, was a student member of the Bleckley Chapter of the American Inns of Court and in the Outer Barrister's Guild. She received the American Jurisprudence Awards in Civil Procedure I and Torts.

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Richard "Rusty" A. Watts practices in the workers' compensation section of the firm. Mr. Watts was admitted to practice in Georgia in 1992 and has concentrated his area of practice in workers' compensation defense and liability defense.

Mr. Watts is a member of the State Bar of Georgia Workers' Compensation Section. He also serves as a part-time professor at the Georgia State University Law School and School of Risk Management and Insurance, as well as Mercer University's Stetson School of Business.

Mr. Watts received his law degree from the Walter F. George School of Law at Mercer University where he served as chairman of the Moot Court Board and received the Most Outstanding Oralist Award at the 1991 Florida Workers' Compensation Moot Court Competition.

Mr. Watts earned his B.A. degree from the University of Florida in 1989 where he was inducted into the Florida Blue Key Leadership Honorary and served as president of the university's nationally ranked debate team.

Lisa A. Wade
Partner

Lisa A. Wade joined Swift Currie as a partner in 2000. She is responsible for a practice that consists of the defense of workers' compensation claims and general insurance defense litigation.

Ms. Wade has worked on cases involving premises liability, automobile accidents and uninsured motorist defense litigation, product liability, slips and falls, coverage issues and property damage cases. In the area of workers' compensation, Ms. Wade represents companies that are both self-insured and commercially insured and has defended claims of all types. In her capacity as approved counsel by the Atlanta Board of Education, she responded to various employment practice issues and defended several of the Board's workers' compensation claims. She is currently lead defense counsel for the City of Atlanta's workers' compensation matters.

Ms. Wade is a member of the American and Atlanta Bar associations, the State Bar of Georgia and the Atlanta Claims Association. She was formerly the state liaison for the Defense Research Institute's Workers' Compensation Committee and the chairman of the Outreach Subcommittee of the Diversity Committee. In the State Bar of Georgia, Ms. Wade is a member of the Workers' Compensation Section and the Litigation Section.

She is a past chairperson of the Board of Zoning Adjustment for the City of Atlanta and the Workers' Compensation Section of the State Bar of Georgia. She also served five terms on the Fee Arbitration Committee of the State Bar of Georgia and was a member of Leadership Atlanta's Class of 2002. Ms. Wade has served as the legal adviser to the Atlanta Board of Education's Civil Service Commission and a hearing officer for cases involving the termination of certificated employees.

In 2005 and 2006, Ms. Wade was named a Georgia Super Lawyers Rising Star by Atlanta Magazine. Additionally, she has been named in *Who's Who in Black Atlanta* since 2005.

Ms. Wade received her undergraduate degree in 1988 from Brown University in Providence, Rhode Island, and her law degree in 1991 from the University of Georgia School of Law.

Cristine K. Huffine

Partner

Cristine K. Huffine practices primarily in the workers' compensation section of the firm. Prior to joining the firm, Ms. Huffine practiced workers' compensation law both in Georgia and Pennsylvania, employment law and general insurance defense.

Ms. Huffine graduated, *cum laude*, from Pennsylvania State University with a B.S. in 1992, and the Dickinson School of Law with her J.D. in 1996. While at law school, Ms. Huffine participated on the Trial Moot Court Board for two years and received the Excellence for the Future Award based upon her academic credentials.

Ms. Huffine is a member of several professional organizations, including the Defense Research Institute, State Bar of Georgia and the Pennsylvania State Bar. She is a board member with the Atlanta Claims Association, serving as the chair of the Legislative Committee. Her community involvement includes service with the Family and Children Services of Cobb County.

While practicing in Pennsylvania, she participated in a precedent-setting products liability case. Her previous experience also included clerking with The Honorable Sheryl Ann Dorney for the Court of Common Pleas, 19th Judicial District in York, Pennsylvania, and interning at the Pennsylvania Attorney General's Office in the Tort Litigation Section.

In Georgia, Ms. Huffine has successfully defended numerous medically intensive workers' compensation claims, including occupational disease cases and catastrophic claims.

Cabell D. Townsend

Partner

Cabell D. Townsend practices in the workers' compensation section of the firm. He has obtained extensive experience handling workers' compensation defense and subrogation matters on behalf of employers, insurers and third-party administrators.

Mr. Townsend was admitted to practice in Georgia in 1998. He is a member of the Atlanta Bar Association, the Lawyer's Club of Atlanta and the State Bar of Georgia. Mr. Townsend has presented numerous legal seminars to both employers and insurers throughout the Southeast.

Mr. Townsend obtained his J.D. degree from the Walter F. George School of Law at Mercer University in 1998. In 1991, he received a B.A. degree from the University of North Carolina at Chapel Hill.

Todd A. Brooks
Partner

Todd A. Brooks practices primarily in the areas of workers' compensation and insurance defense. Prior to private practice, Mr. Brooks was a prosecutor in Athens-Clarke County, Georgia.

Mr. Brooks has joined James B. Hiers, Jr., and Robert R. Potter in the writing and supplementing of Georgia Workers' Compensation Law and Practice, currently in its fifth edition and supplemented annually. He regularly speaks on various issues related to workers' compensation. He is a member of the Workers' Compensation Section of the State Bar of Georgia and is also licensed in Tennessee.

He received a B.A. from the University of Tennessee and a J.D. from Syracuse University College of Law. While in law school, Mr. Brooks was a member of the ATLA National Trial Team.

Charles E. Harris, IV
Partner

Chad E. Harris concentrates his practice in the area of workers' compensation defense, representing employers and insurers throughout Georgia.

Mr. Harris has written and presented on a wide variety of topics, ranging from Medicare Set Asides, light duty return to work issues, statutory compliance and financial considerations for employers and insurers. Mr. Harris frequently presents to employers and insurers throughout the Southeast on workers' compensation defense strategies and has served as editor of the firm's quarterly publication, *The First Report,* which focuses on providing employers and insurers with updates and recommendations on workers' compensation issues. Mr. Harris received his J.D. from The University of Georgia School of Law., where he served as a notes editor for the *Georgia Journal of International and Comparative Law*. Mr. Harris received his undergraduate degree from Furman University. As an undergraduate, he was a letterman on the Varsity Tennis Team.

Prior to joining Swift Currie, Mr. Harris practiced in the area of workers' compensation with another Atlanta law firm. He is admitted to practice in the State of Georgia. He is member of the Workers' Compensation Section of the State Bar of Georgia and the Atlanta Bar Association.

Michael Rosetti
Partner

Michael Rosetti represents insurers and self-insured companies in workers' compensation-related matters throughout Georgia. He also handles general liability, insurance coverage and Longshore matters.

Mr. Rosetti has held several leadership positions in the legal community. He serves on the board of directors of the Atlanta Bar Association Workers' Compensation Section, is a member of the Legal Steering Committee of the Georgia State Board of Workers' Compensation, fellow of the Lawyers Foundation of Georgia and chairs the committee organizing the Kids' Chance of Georgia dinner and silent auction.

Mr. Rosetti is a frequent speaker on topics related to workers' compensation law, including Medicare Set Asides, workplace safety and ethics/professionalism. He has spoken at the request of the Institute for Continuing Legal Education, the National Business Institute, the American Society of Safety Engineers, the Professional Rehabilitation Specialists of Georgia, Lorman Educational Services, as well as local chambers of commerce, employer groups and at client meetings. He is a past co-chair of the Institute of Continuing Legal Education in Georgia – Workers' Compensation Law Institute and has authored numerous papers on workers' compensation-related topics.

In 2009 and 2010, Mr. Rosetti was honored on the Georgia Rising Stars list. Every year since 2011, he has been selected as a Georgia Super Lawyer.

Mr. Rosetti earned his J.D. at the St. John's University School of Law in 1998. Prior, he received a B.A. from the State University of New York at Albany in 1992.

David L. Black
Partner

David L. Black practices in civil litigation and insurance defense with a focus on workers' compensation, general liability and subrogation. He has unique experience in the transportation and manufacturing processing industries as well as defending self-insured employers.

Mr. Black graduated from Brigham Young University with a Bachelor of Arts in political science in 1989. He obtained a Masters in Education from the University of Georgia in 1993 and his Juris Doctor from the University of Oklahoma College of Law in 1996, where he was the recipient of the Walter F. Fagin merit scholarship. Mr. Black was admitted to the Oklahoma Bar to practice as a legal intern during his third year of law school at which time he successfully tried his first case under the supervision of his mentoring attorney.

Mr. Black was admitted to the State Bar of Georgia in 1997 and is admitted to all state and federal courts in Georgia.

S. Elizabeth Wilson
Partner

S. Elizabeth "Beth" Wilson practices primarily in the area of workers' compensation defense. Prior to joining the firm, Ms. Wilson practiced workers' compensation defense with another Atlanta firm and served as staff counsel for an insurance company.

Ms. Wilson has written numerous papers and presented at various seminars on a wide array of topics, ranging from common defenses to Medicare Set Asides. Ms. Wilson frequently presents to employer and insurers throughout the Southeast on workers' compensation defense strategies. Ms. Wilson received her B.A. in history from the University of Kentucky and her J.D. from Cumberland School of Law at Samford University.

Ms. Wilson is a member of the State Bar of Georgia and the Workers' Compensation Section of the State Bar and is active with Kids' Chance. Kids' Chance is a nonprofit corporation that provides scholarships for children of permanently or catastrophically injured or deceased workers. She is a current member on the committee that organizes an annual fundraiser for Kids' Chance. Ms. Wilson was named a Georgia Super Lawyer Rising Star by *Atlanta Magazine* from 2010-2013.

Ann M. Joiner
Partner

Ann M. Joiner practices primarily in the area of workers' compensation defense. Ms. Joiner has significant experience representing employers, self-insureds and third-party administrators in numerous workers' compensation claims throughout the state of Georgia. She frequently presents to employers and insurers on workers' compensation defense strategies, light duty return to work issues and employer compliance with statutory rules.

Prior to joining Swift Currie in 2009, her practice focused on workers' compensation defense at another Atlanta law firm.

R. Alex Ficker
Partner

R. Alex Ficker concentrates his practice in the area of workers' compensation defense. Mr. Ficker has significant experience representing employers, insurers, self-insureds and third-party administrators before the State Board of Workers' Compensation and all of the appellate courts in Georgia. He frequently writes and presents on a variety of workers' compensation issues, including defense strategies, light duty return to work issues and employer compliance with statutory rules.

Mr. Ficker received his law degree from Georgia State University College of Law in 2004 and his undergraduate degree in philosophy from the University of Pennsylvania in 1998.

K. Mark Webb
Partner

K. Mark Webb's practice is focused in the area of workers' compensation defense. He has represented numerous insurance companies, self-insured employers and third-party administrators in defense of workers' compensation claims, as well as subrogation litigation against third-party tortfeasors. Prior to joining the firm, Mr. Webb practiced workers' compensation defense with another Atlanta area law firm.

Mr. Webb received his B.A. in History from the University of Georgia and his J.D. from Cumberland School of Law. While attending law school, Mr. Webb was the recipient of the James L. Hughes Memorial Law Scholarship and Scholar of Merit Awards in Constitutional Law II and Juvenile Justice. Mr. Webb was named a Georgia Super Lawyer Rising Star by *Atlanta Magazine* in 2013.

Preston D. Holloway
Partner

Preston Holloway concentrates his practice in the area of workers' compensation defense, representing employers, insurers, self-insurers and third-party administrators in numerous workers' compensation claims throughout Georgia. Mr. Holloway frequently presents to employers and insurers on workers' compensation defense strategies and he has spoken nationally on issues regarding Medicare Set Asides.

Mr. Holloway takes great pride in working directly with his clients on successfully resolving what are often times complicated and difficult claims. Mr. Holloway is proficient in all phases of litigation and has deposed countless witnesses, including numerous doctors' depositions. Although Mr. Holloway has defended many workers' compensation claims at the hearing level, he also realizes the importance of alternative dispute resolution and his number one priority is to provide his clients with aggressive, yet efficient, representation.

Born and raised in Marietta, Georgia, Mr. Holloway attended the University of Georgia where he earned degrees in broadcast journalism and political science. Mr. Holloway received his J.D. from Mercer University's Walter F. George School of Law in 2007. Mr. Holloway joined Swift Currie in January 2014 after practicing in the area of workers' compensation for another defense firm in the Atlanta area for approximately seven years.

Richard A. Phillips
Partner

Richard A. Phillips practices primarily in the area of workers' compensation law. He also practices in the areas of catastrophic injury and wrongful death and subrogation. His workers' compensation experience includes representing employers, insurers and third-party administrators regarding Medicare Set Aside issues, catastrophic injury, employer claim management and prevention/safety and air ambulance Georgia Fee-Schedule litigation. He represents both small and large employers in a variety of industries, including construction, hospitality (restaurants/food service and lodging), nursing home, manufacturing and staffing and professional employer organizations. Mr. Phillips always seeks to provide his clients with efficient, cost-effective and favorable litigation results, including by way of alternative dispute resolution. He believes client communication is essential to effective representation and strives to make this a focus of his practice.

Born and raised in Hart County, Georgia, Mr. Phillips received his B.A. in political science from the University of Georgia and his J.D. from the Walter F. George School of Law at Mercer University, also earning an advanced degree certificate in legal writing, research and drafting. Prior to attending law school, Mr. Phillips worked for a subsidiary of Intuit, Inc., as an account manager, managing the introduction of new and modified internet banking solutions for small to mid-size financial institutions.

Amanda M. Conley
Partner

Amanda M. Conley practices primarily in the area of workers' compensation defense. Prior to joining Swift Currie, her practice focused on workers' compensation litigation at another Atlanta law firm.

Ms. Conley received her B.A. in history from Boston College in 2004. She received her J.D., *magna cum laude*, in 2007 from the University of Alabama. While in law school, Ms. Conley served on the managing board of the *Journal of Legal Profession*. Ms. Conley was named a Georgia Super Lawyers Rising Star by *Atlanta Magazine* in 2013, 2014 and 2016 to date.

W. Bradley Holcombe
Partner

W. Bradley "Brad" Holcombe is a partner in the firm's workers' compensation practice group. He regularly advises his clients, including retailers, health care providers and staffing and hospitality companies, on the defense and prosecution of workers' compensation claims and potential subrogation recovery. Mr. Holcombe frequently presents to employers and insurers throughout the Southeast on workers' compensation defense strategies and has spoken at numerous continuing legal education seminars for attorneys. In 2015, Mr. Holcombe was elected to serve on the board of directors of the Georgia Staffing Association, currently serving as the board's legislative chair.

Mr. Holcombe earned his B.A., *magna cum laude*, in history from the University of Georgia in 2004. He earned his J.D., *cum laude*, from the University of Florida Fredric G. Levin College of Law in 2008.

Jeff K. Stinson

Partner

Jeff K. Stinson exclusively represents employers and insurers in workers' compensation claims in Georgia. He has served as a client advocate in this area of law since joining the State Bar of Georgia in 2003. He has represented Fortune 100 companies, retail establishments, specialized insurance carriers and self-insured employers. He aims to work as a team with the insured and insurance carrier to prevent injuries from occurring, minimize the risk when they do happen and defend claims brought frivolously. He prides himself on fighting hard for his clients when needed, but also working with the other side to try to resolve issues when doing so is in the best interest of all parties.

Mr. Stinson regularly speaks at local and national workers' compensation events. He is a member of the Atlanta Bar Association and the National Retail and Restaurant Defense Association. He was honored as a Georgia Super Lawyers Rising Star in 2010.

Born in Kansas City, Missouri, Mr. Stinson moved to the Atlanta area with his family while in elementary school. Mr. Stinson attended the University of Georgia and received degrees in public relations, criminal justice and sociology. Mr. Stinson earned his law degree in 2003 from Georgia State University.

Marion H. Martin

Partner

Marion Handley Martin focuses exclusively on the representation of employers, insurers and self-insureds from across Georgia, at all levels of workers' compensation litigation. Ms. Martin has spearheaded and participated in the defense of thousands of workers' compensation claims and worked with employers in a wide range of industries, as well as with a variety of well-known insurers and servicing agents. She has experience in the pursuit of subrogation interests and reimbursement from the Subsequent Injury Trust Fund, as well as successful appellate experience before the Georgia Court of Appeals and Georgia Supreme Court. She has also been a frequent writer and speaker on a variety of workers' compensation topics over the years and counsels employers on various aspects of workers' compensation claims management, best practices and prevention.

Ms. Martin earned her Juris Doctor degree from the University of Georgia School of Law in 1993, where she served as a notes editor for the *Georgia Journal of International and Comparative Law*. She received her Bachelor of Arts degree in French, *cum laude*, from Davidson College and spent her junior year enrolled at a French university.

Mark E. Irby
Partner

Mark E. Irby advises adjusters, managers and employers on the process and administration of workers' compensation law. He has developed a strong understanding of how to effectively counsel companies and has particular experience with construction companies, manufacturers, retailers, health care professionals and the trucking and transportation industry.

Mr. Irby is proficient in taking depositions of claimants, employer witnesses and expert witnesses, including numerous doctors' depositions. He serves clients by efficiently preparing them for hearings or mediations and the quick resolution of files.

Prior to joining the firm, Mr. Irby practiced at another Atlanta defense firm where his primary focus was defending employers and insurers in workers' compensation claims. Mr. Irby is licensed in both Georgia and Alabama. Prior to moving to Atlanta in 2007, he practiced at a Montgomery, Alabama, firm for two years where he focused on insurance defense litigation, general liability, premises liability, contract issues and employment law. During law school, he gained valuable experience while clerking at several large firms in Birmingham, Alabama.

Jon W. Spencer
Senior Attorney

Jon W. Spencer practices primarily in the firm's workers' compensation defense section. Before joining the firm, Mr. Spencer practiced insurance and workers' compensation defense in Missouri and Illinois. Mr. Spencer is licensed in the states of Georgia and Missouri, as well as admitted to practice before the 8th Circuit Court of Appeals and the U.S. District Court for the Eastern and Western Districts of Missouri.

Mr. Spencer received his J.D. from the University of Missouri School of Law in 1994 and his B.S. in accounting from the University of Missouri in 1991.

Jennifer L. LaFountaine
Senior Attorney

Jennifer L. LaFountaine practices primarily in the area of workers' compensation defense. Prior to returning to the firm, Ms. LaFountaine worked as a staff attorney in the Appellate Division with the State Board of Workers' Compensation and also served as a mediator. Previously, Ms. LaFountaine also practiced workers' compensation defense at another Atlanta law firm and served as an assistant state attorney in Florida.

Ms. LaFountaine received her undergraduate degree in psychology from the University of Georgia and J.D. from Loyola University New Orleans College of Law. She was admitted to the Florida Bar and the State Bar of Georgia in 2003.

Ms. LaFountaine is a member of the State Bar of Georgia Workers' Compensation Section and Young Lawyers' Division.

Jeremy R. Davis

Senior Attorney

Jeremy Davis has defended employers, insurers and third-party administrators in workers' compensation claims since 2003. He has also handled appeals at every level, from the Appellate Division of the State Board of Workers' Compensation to the Supreme Court of Georgia. He has given multiple presentations and written extensively on a variety of issues affecting workers' compensation claims, including fictional new injuries, the exclusive remedy provision and Medicare Set Asides. In addition to defending workers' compensation claims, Mr. Davis also handles federal and state subrogation claims, as well as coverage disputes between insurers. He graduated, *cum laude,* from the Georgia State University College of Law in 2003. Mr. Davis is also a member of the Workers' Compensation Section of the State Bar of Georgia and the Florida Bar.

Carl "Trey" K. Dowdey

Senior Attorney

Carl "Trey" K. Dowdey, III, is a senior attorney in Swift Currie's Birmingham, Alabama office. While Mr. Dowdey's practice concentrates primarily on workers' compensation matters, he also defends employers against retaliatory discharge and co-employee liability claims and handles automobile and premises liability defense litigation. He has experience trying both civil jury and bench trials and presenting oral argument to the Eleventh Circuit Court of Appeals. In addition, he has tried numerous panel and judge alone courts-martial, worked on a wide array of military separation boards and focuses on military law in his capacity as a U.S. Army Reserve JAG officer.

Mr. Dowdey earned his undergraduate degree from the University of Virginia and his J.D. from Cumberland School of Law at Samford University in Alabama.

As a lieutenant colonel in the United States Army Reserve JAG Corps, Mr. Dowdey was selected to serve as staff judge advocate for the 412th Theater Engineer Command, a two-star command with more than 12,000 soldiers located in Vicksburg, Mississippi. Prior to this assignment, he was staff judge advocate at the 87th U.S. Army Reserve Support Command (East). He also served as staff judge advocate with the Deployment Support Command, which provides transportation and logistical support for deployed soldiers overseas. Mr. Dowdey was on active duty from 1998 through 2002, and was mobilized on active duty from 2007 through 2008. He is active on the Military Law Committee within the Alabama State Bar and graduated from the U.S. Army War College, earning his Masters in Strategic Studies as a Distinguished Graduate.

Ronni M. Bright
Senior Attorney

Ronni M. Bright practices almost exclusively in the area of insurance defense litigation. She is devoted to the representation of employers, insurers, self-insured companies and servicing agents in workers' compensation claims. She has experience representing employers in a variety of industries, including manufacturing, construction, retail, nursing, hospitality and staffing and professional employer organizations.

Prior to joining Swift Currie, Ms. Bright practiced workers' compensation defense litigation at a major law firm in the New Jersey/Pennsylvania region for several years. Additionally, her prior litigation experience includes practice in the areas of medical malpractice and nursing home negligence. She received her law degree from Dickinson School of Law at Pennsylvania State University in 2009, and immediately thereafter held a judicial clerkship for the Honorable Craig L. Wellerson, Presiding Judge in the Civil Law Division of Superior Court of New Jersey, Ocean County.

Crystal Stevens McElrath
Senior Attorney

Crystal Stevens McElrath practices in the areas of employment law and workers' compensation defense. Ms. McElrath frequently publishes papers and presents to employers, insurers and third-party administrators on the practical aspects of dealing with injured or disabled workers, leave laws and discrimination claims.

In 2010, Ms. McElrath received both her law degree from Emory University School of Law and Master of Theological Studies from Emory University. While in law school, she served as a summer clerk for the Honorable Stanley Birch, Jr., the Honorable William Duffey on the District Court for the Northern District of Georgia and the Eleventh Circuit Court of Appeals. Ms. McElrath received her B.A. from the University of Virginia in 2006.

Ms. McElrath is a member of the Georgia Association of Black Women Attorneys. She previously served as the national director of community service on the board of directors for the National Black Law Students Association from 2008 to 2009.

M. Ann McElroy
Senior Attorney

M. Ann McElroy practices primarily in the workers' compensation section of the firm. Prior to joining Swift Currie, Ms. McElroy practiced in the areas of general litigation and workers' compensation at a law firm in Lawrenceville, Georgia. Ms. McElroy has been a member of the State Bar of Georgia since 2002 and was admitted to the Tennessee Bar Association in 2008.

Ms. McElroy graduated, *cum laude*, from the University of Georgia in 1999 with a B.A. in history and a minor in German. In 2002, Ms. McElroy received her J.D. from Georgia State University College of Law. While in law school, Ms. McElroy participated in numerous competitions as a member of both the Moot Court Board and the Student Trial Lawyers Association. Ms. McElroy was the treasurer of the Student Bar Association and a member of the Bleckley Inn of Court.

Christopher K. Gifford
Senior Attorney

Christopher K. Gifford practices primarily in the area of workers' compensation defense. Mr. Gifford represents employers, insurers, self-insureds and third-party administrators before the State Board of Workers' Compensation and the appellate courts of Georgia. He has written and presented on topics pertaining to Georgia workers' compensation law and is an active member of the State Bar of Georgia' Workers' Compensation Section.

Prior to joining Swift Currie, Mr. Gifford represented injured workers before the State Board of Workers' Compensation, which provides him a unique perspective on how to defend workers' compensation claims In 2010, Mr. Gifford earned his J.D. from Cumberland School of Law at Samford University. He received his Bachelors of Arts degree from the University of Georgia in 2002.

C. Blake Staten
Associate

Blake Staten practices primarily in the area of workers' compensation defense.

Mr. Staten earned his J.D., *cum laude*, from Georgia State University College of Law in 2010. While in law school, he competed nationally as a member of the Student Trial Lawyers Association and was awarded second place honors at the 2008 National Trial Advocacy Competition. Prior to law school, Mr. Staten attended the University of Georgia, where he graduated, *magna cum laude*, in 2006 with a B.A. in political science and a minor in psychology. As an undergraduate, he was inducted into the National Society of Collegiate Scholars.

Mr. Staten has been a member of the State Bar of Georgia since 2010.

Marc E. Sirotkin
Associate

Marc E. Sirotkin concentrates his practice in the area of workers' compensation defense, representing employers, insurers, self-insurers, servicing agents and direct/statutory employers. He regularly advises his clients, including manufacturers, retailers, health care providers, nursing homes and companies in the utility, hospitality and construction industries, on the nuances of workers' compensation insurance defense, potential subrogation issues, catastrophic claims, multiple employer/insurer cases and handling issues with protection of Medicare's interest in claims. He has also developed an ancillary practice from workers' compensation claims and handles recovery of client judgments through the garnishment process and protecting judgments in bankruptcy court. Prior to joining Swift Currie, Mr. Sirotkin handled domestic relations and general civil litigation matters.

Born and raised in Atlanta, Georgia, Mr. Sirotkin attended Wake Forest University where he earned a Bachelor of Arts degree with a double major of history and politics. He then attended the University of Georgia, where he received a Masters of Historic Preservation degree from the School of Environmental Design. Mr. Sirotkin earned his law degree from Georgia State University and joined Swift Currie in 2012.

Jonathan G. Wilson
Associate

Jonathan G. Wilson concentrates his practice in the area of workers' compensation defense. Mr. Wilson represents employers, insurers, self-insureds and third-party administrators in workers' compensation claims throughout Georgia. In addition, Mr. Wilson represents employers as garnishees in garnishment proceedings. Prior to attending law school, Mr. Wilson worked as a paralegal in Savannah, Georgia.

Mr. Wilson received his B.A. in public relations from Berry College. He received his J.D., *cum laude*, from Walter F. George School of Law at Mercer University, where he was the administrative editor of the *Mercer Law Review* and recipient of two CALI awards in summary judgment practice and labor arbitration.

Robert W. Smith
Associate

Robert W. Smith practices primarily in the area of workers' compensation defense. He provides his clients with an aggressive defense of their interests, while also balancing the practical aspects of cost-effective representation and resolutions that are mindful of the bottom line. Prior to joining the firm in 2015, Mr. Smith represented insurers, self-insureds, employers and third-party administrators for another defense firm in Atlanta for three years.

Mr. Smith received his B.S. in political science in 2005 and M.P.A. in 2007 from Georgia College & State University. He earned his J.D., *cum laude*, from Walter F. George School of Law at Mercer University in 2010. While in law school, he served on the *Mercer University Law Review*.

Dustin S. Thompson
Associate

Dustin S. Thompson practices almost exclusively in the area of insurance defense litigation. Mr. Thompson's practice is devoted to the representation of employers, insurers, self-insured companies and servicing agents in workers' compensation claims throughout Georgia. He has experience representing employers in a variety of industries, including retail and hospitality, staffing and professional employer organizations, trucking, manufacturing and construction.

Mr. Thompson received his J.D. from Georgia State University College of Law. While attending law school, he was a member of the Student Trial Lawyers Association and competed in mock trials across the country. Mr. Thompson also gained valuable experience working as a law clerk for then Georgia Court of Appeals Judge Michael P. Boggs and an extern for the Judiciary Committees of the Georgia House of Representatives.

Prior to law school, Mr. Thompson graduated from Georgia Southern University, *cum laude*, with a B.A. in political science. He joined Swift Currie in August 2016 after practicing in the area of workers' compensation for another defense firm in the Atlanta area.

Meghan E. Olson
Associate

Meghan "Meg" E. Olson concentrates her practice in the area of workers' compensation defense. Ms. Olson has significant experience representing employers, insurers, self-insurers and third-party administrators in workers' compensation claims throughout Georgia. She also has experience handling workers' compensation coverage disputes and subrogation claims. Ms. Olson has spoken at various seminars on topics related to cost containment in claims handling for adjusters, ethical considerations in workers' compensation matters and employer claim management and coverage concerns.

Ms. Olson graduated, *magna cum laude*, from Palm Beach Atlantic University with a Bachelor of Arts in journalism and a minor in dance. She later earned her J.D. from Emory School of Law, where she was a member of the Emory Moot Court Society. While in law school, Ms. Olson was named Outstanding Oral Advocate in her 1L class and placed third in the nation at the Gibbons Criminal Procedure Moot Court Competition. She currently lives in Dunwoody with her husband, their four children and four rescue dogs.

Joanna L. Hair
Associate

Joanna Hair concentrates her practice primarily in the area of workers' compensation defense. Prior to joining the firm, she worked as the staff attorney to the Honorable Chief Judge Albert B. Collier.

Ms. Hair received her Juris Doctor from Cumberland School of Law at Samford University in 2013. During law school, she was a senior associate editor for *The American Journal of Trial Advocacy* and published a student note in that publication. She was named to the Dean's List every semester and the Scholar of Merit for Employment Law and Securities Regulations, earning the top grade in each course. While in law school, she interned with the Honorable Judge Eugene Verin, the HealthSouth Corporation and the Georgia Department of Education.

Ms. Hair graduated, *magna cum laude*, from Agnes Scott College in 2010 with a Bachelor of Arts in political science and English literature and a minor in piano performance music. She was a recipient of the Robert C. Byrd Scholarship and the Tower Scholarship. While at Agnes Scott, she worked as a writing tutor for the Center for Writing and Speaking and was an associate editor of the quarterly writing center publication, *Southern Discourse*. During her junior year, Ms. Hair spent a semester in Helsinki, Finland, studying international relations from a Scandinavian perspective. She was also a member of Sigma Alpha Iota and Sigma Tau Delta.

She is a member of Phi Alpha Delta professional law fraternity, the Atlanta Bar Association, the Atlanta Stonewall Bar Association and State Bar of Georgia.

Benjamin D. McClure

Associate

Benjamin D. McClure concentrates his practice in the area of workers' compensation defense. Mr. McClure is a former prosecutor and criminal defense attorney. While working as a prosecutor, he participated in the prosecution of major felony crimes, including jury trials, where he expanded his trial advocacy skills. As a criminal defense attorney, Mr. McClure put his advocacy skills to use by representing individuals, ranging from day laborers to executives, who had been charged with crimes. He also spent a large amount of time defending indigent persons who could not afford to hire an attorney. Prior to attending law school, Mr. McClure worked as a deputy sheriff with a Metro-Atlanta Sheriff's Office, as both a uniform patrol officer and as a major crimes detective.

Mr. McClure received his J.D. from Emory University School of Law in 2016. While in law school, he interned with the Honorable Judge Amy Totenberg in the United States District Court for the Northern District of Georgia and worked as a teaching assistant at Emory University's Goizueta Business School, teaching business ethics. Mr. McClure earned his B.S. in political science, *cum laude*, from Kennesaw State University, with a minor in sociology.

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