Worker's Compensation

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This survey of the Georgia law of worker's compensation covers the two-year period ending June 1, 1978. These two years are significant, for a major statutory revision of the Worker's Compensation Act and a plethora of judicial interpretations of the Act have broadened and liberalized Georgia's worker's compensation scheme to continue to provide a reasonable balance between the interests of the employer and the interests of the employee. During the survey period, approximately 150 cases were reviewed by the Georgia Court of Appeals and the Supreme Court of Georgia. In House Bill No. 1360,[1] the General Assembly extensively revised Title 114 of the Georgia Code with amendments which became effective on July 1, 1978. This survey will, by necessity, focus on a limited number of selected revisions and interpretations for the reader who is basically familiar with Title 114; however, all the amendments and all of the court decisions for the whole survey period require careful analysis for the practitioner or the student.

I. LEGISLATION

Title 114 of the Georgia Code has been amended to change the designation of "Workmen's Compensation" to the designation of "Worker's Compensation." The term "Worker's" will now be used wherever it should be properly substituted. Consequently, Georgia's Title 114 is now known as the law of worker's compensation and the Board is now known as the State Board of Worker's Compensation.

A. Statute of Limitation

Ga. Code Ann. §114-305 has been amended to provide, in some instances, for an extended period in which to make a timely claim for compensation.[2] the basic one-year limitation which commences on the date of the accident has been retained, but has been qualified to allow a claim to be made within one year after the date of any last remedial treatment fur-

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1. GA. CODE ANN., tit. 114 (Supp. 1978).
2. GA. CODE ANN. §114-305(a) (Supp. 1978).

nished by the employer or within two years after the date of the last payment of any weekly benefits paid to the employee.[3]

B. Income Disability Benefits

Some of the most significant changes in the Act are in the revisions to Ga. Code Ann. §§114-404, -405 and -406. The most important of these amendments is the addition of a provision for compensation for disability to the body as a whole to the schedule listed in §114-406 for specific member losses.[4] The amendment provides that for the purpose of defining disability to the body as a whole, "disability" means either physical impairment or actual wage loss (as provided by Ga. Code Ann. § 114-405), whichever is greater.[5] For example, an employee with a permanent partial back injury can now receive payments of up to two-thirds of his average weekly wage for a maximum of 350 weeks. As with specific member losses, the loss of use of the body as a whole is compensable without regard to whether the employee suffered any economic loss as a result of the injury. This amendment for compensation for disability to the body as a whole fills a gap in Georgia law and has long been needed by the employee.

The revised language of §§114-404, -405, and -406 makes it clear that total permanent disability will be covered by §114-404 as in the past, while temporary partial disability will be covered by §114-405, and permanent partial disability will be covered by §114-406. Section 114-405 defines a temporary partial disability as one "partial in character but temporary in quality."[6] Section 114-406 defines a permanent partial disability as one "partial in character but permanent in quality."[7]

The maximum income benefits allowable for total disability under §114-404 have been increased from $95.00 per week to $110.00 per week and the unlimited duration feature of the section has been retained.[8] The maximum income benefits allowable for temporary partial disability compensable under §114-405 were increased from $70.00 per week to $80.00 per week, with the same maximum duration period of 350 weeks being retained.[9] In the bodily loss schedule of §114-406(c), the maximum amount and duration of the allowable benefits remain the same, with the exception of the increase from 200 weeks to 225 weeks for the loss of an arm.[10] Adjustments are made for lower percentage disability ratings by reducing the number of maximum weeks rather than the weekly amounts paid. Of additional significance is the elimination of the maximum improvement determina-

3. *Id.*
4. GA. CODE ANN. §114-406(c) (Supp. 1978).
5. GA. CODE ANN. §114-406(f) (Supp. 1978).
6. GA. CODE ANN. §114-405 (Supp. 1978).
7. GA. CODE ANN. §114-406(a) (Supp. 1978).
8. GA. CODE ANN. §114-404 (Supp. 1978).
9. GA. CODE ANN. §114-405 (Supp. 1978).
10. GA. CODE ANN. §114-406(c)(1) (Supp. 1978).

tion and the alternative 52 week recovery period. Finally, double payments have been prevented by the language of §114-406(b)(2): "[i]ncome benefits due under this section shall not become payable so long as the employee is entitled to benefits under the provisions of Code sections 114-404 or 114-405."

C. *Subsequent Injury*

One of the most extensive revisions to Title 114 is the consolidation of former §§114-408 (Second Injury), 114-409 (Two Injuries), and 114-410 (Two Permanent Injuries) into a new single section,[11] entitled "Subsequent Injury." The content, however, of the three former sections remains essentially intact in the new §114-408 (a) and (b). This apparently indicates that prior judicial clarifications as to which type of successive injury or what method of payments are contemplated by the three sections are still applicable to the language of the new §114-408 (a) and (b).[12] Sub-section (c) of §114-408 carries forward language of prior §114-410 and clearly coordinates the total disability provisions with §114-404 (Income benefits for total disability), with §114-406 (Income benefits for permanent partial disability) and with the following sections of Chapter 9: §114-911 (Limitation on Employer's Liability for subsequent injury through the Subsequent Injury Trust Fund), §114-912 (Payment for subsequent injury from the Subsequent Injury Trust Fund), §114-913 (Apportionment or denial of reimbursement for expenses paid by employer or insurer), and §114-914 (Notice to the employer of employee's pre-existing permanent impairment as condition precedent to employer's right to reimbursement).

Sub-section (c)(1) of new §114-408 provides in part as follows: "[a]n employee who has a prior disability as described in Chapter 114-9 who sustains a subsequent injury which combines with the prior injury to produce total disability shall be entitled to income benefits as provided in Code Section 114-404 . . . ."[13] One resulting clarification of this amendment is that there is no limitation on the benefits payable for the total disability produced by the merger of a subsequent injury with a pre-existing permanent injury. However, when a disability or death meets the definition of §114-911 (b) and (c), the employer can be reimbursed from the Subsequent Injury Trust Fund for all weekly income benefits payable after 104 weeks of payment, for half of all medical expenses paid which exceed $5,000 but which do not exceed $10,000, and for all medical expenses paid which exceed $10,000.[14] Reimbursement from the fund is conditioned upon the employer's following the prescribed procedure in §114-914.

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11. GA. CODE ANN. §114-408 (Supp. 1978).

12. *See* Barry v. Aetna Life and Cas. Co., 133 Ga. App. 527, 211 S.E.2d 595 (1974), for a judicial distinction between the two former sections.

13. GA. CODE ANN. §114-408(c)(1) (Supp. 1978).

14. GA. CODE ANN. §114-912 (Supp. 1978).

D. Selection of Physician

Both the employer and the employee are given a new responsibility under a §114-504. The employer must now post a list of at least three physicians (or persons licensed to practice a healing art and remedial treatment) who are accessible to the employee.[15] The employee must select one physician from the list, except in emergencies where selection is not possible. The Board may order a change of physician for the employee on the request of either the employer or employee. If the employer fails to maintain a list of physicians for the employee, then the employee may select any physician he chooses for treatment of his work-related injury or disease. On the other hand, if a list is provided by the employer and the employee disregards the list without justifiable reason, the employer is not responsible for the charges by the unauthorized physician.

E. Method of Payment; Filing of Claims

Section 114-705, with much specificity, provides new instructions to the employer on the proper and timely method of making income benefit payments to the employee. The prior provisions for Board approval of an agreement for compensation have been eliminated. Section 114-705 unequivocally requires benefits to be paid periodically, promptly, and directly to the employee according to the deadlines provided, without an award.[16] Corresponding procedures with specific deadlines are provided for the employer if it chooses to controvert liability.[17] If benefits are not paid according to the prescribed schedule, the accrued benefits payable without an award shall be increased by 15 percent and accrued benefits payable under an award shall be increased by 20 percent.[18]

Section 114-706 has been amended to eliminate the language of the former section which provided that, in the event the employee and employer fail to reach an agreement, the Board would order a hearing at the request of either the employer or employee. In place of such language, §114-706 (apparently complementing §114-705) now simply states that the Board and its administrative law judges shall have full authority to investigate, hear, and determine all questions with respect to a claim.[19] Upon its own motion or application of any interested party, the Board can order a hearing.[20]

F. Hearing Before Administrative Law Judge

The revisions to §114-707 are helpful to the practitioner because perti-

15. GA. CODE ANN. §114-504(a) (Supp. 1978).
16. GA. CODE ANN. §114-705(a) (Supp. 1978).
17. GA. CODE ANN. §114-705(d) (Supp. 1978).
18. GA. CODE ANN. §114-705(e), (f) (Supp. 1978).
19. GA. CODE ANN. §114-706(a) (Supp. 1978).
20. GA. CODE ANN. §114-706(c) (Supp. 1978).

nent information for preparation for the hearing is gathered and organized in a logical manner. The section sets forth the venue provisions, the specific powers of the administrative law judge at the hearing, the applicability of the Civil Practice Act to discovery procedures, the applicability of the rules of evidence which prevail in the civil non-jury cases in the superior courts, the special evidentiary rule making medical reports admissible, the deadline and form for the decision of the administrative law judge, the provisions for recording and transcribing the hearing, the appointment of an agent for service of notice to a party who becomes a non-resident, and the enforcement and penalty now given to the administrative law judge.[21]

G. Modification of Award

In view of the prolific litigation generated by disputes arising out of modifications to awards made by the Board due to a change of condition, the revisions of §114-709 must be expected to clarify the extent to which the Board can modify a prior "final" decision. A "change of condition" under the former §114-709 was emphatically defined as follows: "Notwithstanding any court decision previously rendered construing this section, 'change of condition' . . . shall mean solely an economic change in condition occasioned by the employee's return or ability to return to work for the same or any other employer; or inability to work or continue to work . . . ."[22] A change in condition is now defined as a change in "wage earning capacity, physical condition, or status of an employee or other beneficiary under this Title," which occurred after the date of the prior award.[23] The language does not make it clear whether the amendment is intended merely to restate the interpretations of the above prior definition or to expand the definition. More important, however, is the elimination of the former language which stated that the Board may review and modify any award or any settlement. Sub-section (b)(1) of revised §114-709 now provides that the Board can modify a prior final decision, provided the prior decision of the Board was not based on a settlement.

H. Effective Dates of House Bill No. 1360

All amendments to Title 114 which create substantive rights are applicable to any accident occurring on or after July 1, 1978. All amendments which are procedural in nature apply to any action taken on or after July 1, 1978, without regard to the date of the accident.

II. COURT DECISIONS

The decisions during the survey period selected here for review were chosen with the idea that the extensive amendments reviewed above be-

21. GA. CODE ANN. §114-707 (Supp. 1978).
22. 1968 Ga. Laws 3, 7.
23. GA. CODE ANN. §114-709 (Supp. 1978).

came effective at the very end of the survey period and, consequently, rendered some decisions less important than they might have been without the revisions of the Act. Therefore, the cases selected below are considered to be unaffected by the statutory changes.

A. *Frivolous Appeal*

Attorneys predictably continue to accuse the other side of prosecuting a frivolous appeal. Two cases from the survey period succinctly illustrate the successful and unsuccessful route for getting a penalty against the opposite party for bringing a frivolous appeal.

In *Roper Corp. v. Reynolds,*[24] the claimant's motion for assessment of reasonable attorney's fees against the defendant under Ga. Code Ann. § 114-712 was denied, even though the court found the defendant's enumerations of error to be unequivocally without merit. The court of appeals held once again that this statute does not confer on the court the authority to assess penalties in an appeal of a worker's compensation case from a superior court.[25] The penalty provision of the Act is applicable only on appeal to the superior court from the Board of Worker's Compensation. In *Hartford Insurance Co. v. White,*[26] the claimant-appellee was successful when he relied on Ga. Code Ann. §6-1801 and was granted damages in the amount of ten percent of the amount of the award that was definitely ascertainable at the date of the appellate decision. In assessing the damages, the court of appeals held that there was evidence to support the Board's finding that the claimant was totally disabled. The court further found that the appellant had argued an irrelevant principle of law in arguing aggravation of a pre-existing infirmity. In face of the "any evidence" rule, the court held that it is too well settled for argument that a superior court or the court of appeals will not disturb such an award. This application of §6-1801 to worker's compensation appeals causes serious concern to the advocate who must advise his client as to the merits of an appeal and who is conditioned in the belief that even reasonable minds can differ.

B. *Heart Attacks*

Claimants in heart attack cases are becoming more restricted in attempting to meet the stern burden of proof imposed by Ga. Code Ann. §114-102. That section, in defining an injury, states that the term does not include "heart disease, heart attack, the failure or occlusion of any of the coronary blood vessels, or thrombosis, unless it is shown by the preponderance of competent and creditable evidence that it was attributable to the performance of the usual work of employment."[27] On its face, this require-

24. 142 Ga. App. 402, 236 S.E.2d 103 (1977).
25. *Id.* at 406, 236 S.E.2d at 106.
26. 142 Ga. App. 307, 235 S.E.2d 740 (1977).
27. GA. CODE ANN. §114-102 (1973).

ment seem superfluous because a causal connection (sometimes still referred to as the proximate cause) must be found in each claim to satisfy the requirement that an injury or disease arises out of the employment. However, attempts to establish a compensable heart attack are, in fact, more difficult.[28]

Carter v. Kansas City Fire & Marine Insurance Co.[29] offers a good discussion for future guidance. The employee was a carpenter who experienced pain for a period of several weeks while performing strenuous activity on the job. He had no knowledge of a prior heart attack, although he had a history of high blood pressure, but with medication he was able to work. An electrocardiogram showed that the claimant had suffered damage to his heart at some time. A physician testified that the exertion *could* have precipitated the heart attack. The administrative law judge found that the exertion had aggravated a pre-existing condition and was a contributing cause of his incapacity to work. The Board, however, found that the pain was merely a symptom of a prior coronary disease and not an aggravation. The Board, in denying compensation, held that the claimant had not suffered an accident which arose out of, and in the course of, his employment. The court of appeals affirmed the denial, on the ground that there was some evidence to support the finding of no causal connection. The court conceded that it was a matter of semantics whether the disability was described as a symptom of the disease, whether it was a disability to which the exertion was a precipitating factor, or whether it was both. The majority stressed that there are different forms of evidence in such cases to establish the required causal connection: medical opinions, lay observations and natural inferences from human experiences. The semantic message here for the claimant and his attorney is that the weight of "preponderance" in heart attack cases may well be heavier than in other cases. The Georgia Bar should have had the benefit of a full report of the facts in *Georgia Building Authority v. Stroup*,[30] in which compensation was granted, in order to know how the heart attack victim prevailed in that case while the claimant did not prevail in *Carter*.

C. *Paranoid Schizophrenia*

Sawyer v. Pacific Indemnity Co.[31] is a significant development in Georgia's law of worker's compensation for several reasons. In *Sawyer*, the

28. The difficulty is clear in the following five cases appealed during the survey period: Carter v. Kansas City Fire & Marine Ins. Co., 138 Ga. App. 601, 226 S.E.2d 755 (1976) (compensation denied); Gardner v. Employers Mut. Liab. Ins. Co., 139 Ga. App. 107, 228 S.E.2d 27 (1976) (compensation denied); Home Indem. Co. v. Guye, 143 Ga. App. 494, 238 S.E.2d 549 (1977) (compensation denied); Zitzman v. Seaboard Fire & Marine Ins. Co., 143 Ga. App. 298, 238 S.E.2d 282 (1977) (compensation denied); Georgia Bldg. Auth. v. Stroup, 144 Ga. App. 522, 241 S.E.2d 630 (1978) (compensation granted).

29. 138 Ga. App. 601, 226 S.E.2d 755 (1976).

30. 144 Ga. App. 522, 241 S.E.2d 630 (1978).

31. 141 Ga. App. 298, 233 S.E.2d 227 (1977).

claimant was a counselor in an institution for boys with behavorial problems. He was charged with overseeing their behavior and meeting their emotional needs. After two years, he himself developed emotional problems and was diagnosed a paranoid schizophrenic. The illness resulted in occupational disability. The administrative law judge denied compensation and this decision was affirmed by the full Board and the superior court. On appeal, the court of appeals reversed with direction that the case be referred to the medical board. *Sawyer* is important because it is the only reported case which has arisen from sub-section (5) of §114-803. In 1971, this general catch-all category for occupational disease was tacked onto an otherwise specific list of occupational diseases. In essence, this sub-section allows compensation for *any disease* which the employee can prove meets five specific criteria to establish a strong causal connection between the disease and the employment activity. *Sawyer* is also significant because it holds that the question of causal connection between the mental illness involved and the employment activity is a medical question which must be referred to the medical board under the provisions of §114-819. Finally, the case is important because it is a progressive step in Georgia on questions of the coverage of Georgia's worker's compensation scheme for certain mental illnesses. *Sawyer* emphasizes that Georgia has recognized that certain mental illnesses which result from an "accident" are compensable. In other words, mental illnesses resulting from a single physical trauma are compensable. In addition, Georgia has recognized that mental illnesses which result from slight repetitive events that individually would not be recognized as an "accident" can be viewed in such a way that the cumulative effect of the events constitutes the "accident." Therefore, while no problem results from a mental illness caused by a discernible accident, there is a problem when the mental illness results from an emotional trauma. *Sawyer* clearly paves the way for a finding that paranoid schizophrenia resulting from an emotional trauma can be an occupational disease as contemplated by §114-803(5). The disease, however, does raise an issue of causality which must be resolved by the medical board.

D. Aggravation of a Pre-existing Condition

Judging from the number of cases appealed during the survey period which struggle with the question of whether an injury is an aggravation of a pre-existing condition or whether it is a new injury, *Garner v. Atlantic Building Systems, Inc.*[32] is a long-awaited and welcome clarification of the issue. On appeal the appellant contended that the award was inconsistent because it stated that the claimant did not sustain a new injury and also stated that the claimant aggravated a prior injury. In response, the court first reaffirmed the principle that an aggravation of a pre-existing condition constitutes a new injury. The court, however, conceded that it had

32. 142 Ga. App. 517, 236 S.E.2d 183 (1977).

compounded the confusion by using the word "aggravation" to convey two different meanings. In the past, the court of appeals had held that "aggravation" was a new injury when the "aggravation" of a pre-existing condition alone was sufficient to constitute the cause of the claimant's inability to work. The Court of Appeals has also used the word "aggravation" in holding that the claimant has not sustained a new injury—but rather a change of economic condition—in a situation where the claimant's condition, as a consequence of performing his usual duties, continues to worsen to the point that he can no longer perform the duties of his employment. The court in *Garner* clarified this ambiguity with the declaration that the court and the Board should use the word "aggravation," when referring to a new accident, and should use the terminology "gradual worsening," deterioration, or recurrence, when referring to a condition which is not a new accident.

E. Apportionment Among Insurance Companies

Garner was decided by the court of appeals in the same term as *Leatherby Insurance Co. v. Hubbard.*[33] The clarification of the term "aggravation" in *Garner* makes the insurance question raised in *Leatherby* particularly interesting, in which a second injury gave rise to a change of condition and a new injury at the same time.

Hubbard suffered a serious work-related injury to his left leg and right hip in a fall in October, 1974. He returned to work in January, 1975, after a period of total disability. In May, 1975, Hubbard suffered another fall injuring his back and left leg again. The doctor testified at the hearing that the second fall resulted in a "temporary aggravation" of the original injury (a change of condition) and caused a temporary lumbosacral strain (a new injury). Hubbard testified that the latter disabling symptoms appeared only after the second fall. Argonaut Insurance Company, the appellee, was the worker's compensation carrier for the employer at the time of the first injury. That coverage expired in January, 1975. Coverage by Leatherby Insurance Company, the appellant, was substituted in January, 1975, and was in effect on the date of Hubbard's second fall. Leatherby wanted Argonaut to share in the liability to Hubbard; Argonaut wanted to be completely discharged from liability; Hubbard wanted Leatherby to pay because his compensation rate was higher in May, 1975.

The court of appeals reversed the superior court and upheld the Board's apportionment of liability between the two insurance companies. The Board assessed Leatherby Insurance Company for temporary total disability from May 14, 1975, to August 5, 1975, for the new injury to the back. The Board assessed Argonaut Insurace Company for benefits beginning August 6, 1975, for temporary disability due to a change of condition of the original injury.

33. 142 Ga. App. 476, 236 S.E.2d 168 (1977).

F. Lunch Break

Two cases in the survey period illustrate the vacillation that the Georgia worker's compensation law can take. *Walker v. Continental Insurance Co.*[34] shows a harsh, employer-oriented approach to the "lunch break" rule. In contrast, *Rampley v. Travelers Insurance Co.*[35] shows a lenient, employee-oriented approach to the same rule.

In *Walker*, the employee was a sanitation worker for the city of Hapeville. His duties consisted of driving a three-wheeled vehicle to collect trash and garbage from areas inaccessible by truck. He was required to bring the vehicle to the shop at noon each day before his lunch break from 12:00 to 12:30. The city provided a lunchroom in the shop, but employees were free to go wherever they wished for lunch. On September 3, 1976, Walker went into a quick-food establishment shortly before 12:00 to purchase food to take back to the shop. While waiting for his order, a train stopped between him and his vehicle. When the train had not moved by 12:20, Walker attempted to climb betweeen two cars. As he was doing so, the train started and crushed his foot in the coupling between the cars.

The court denied compensation, holding that Walker had departed from his employment when he began preparation for his lunch and did not, and could not, resume the master's business until the moment he began driving the vehicle toward the shop. The court viewed these facts as coming under the classic "lunch break" rule which denies compensation for injuries sustained on scheduled lunch breaks at a time when the employer has no right of control over the employee's activities.

The harshness to the employee seen in *Walker* is in sharp contrast to the attitude of the court in *Rampley*. In *Rampley*, the employee was also on her lunch break when she was injured. She slipped in the restroom on the employer's premises.

The administrative law judge found that the employee was on her own time during her lunch break, and denied compensation. The court of appeals reversed. Although the claimant had the burden of proof to show that the injury arose out of, and occurred in the course of, the employment, the claimant presented no evidence that the break was not scheduled or that she was subject to her employer's control. The court focused on this void in the proof and enunciated an exception to the claimant's normal burden of proof. The court said that once a claimant has introduced evidence to show the injury occurred on the employer's premises during the work day, the burden should shift to the employer to show that the break was scheduled, and that the employer had no right of control. The court said that such a shift is justified when the employer is seeking to avoid liability through an exception to a general rule such as the "lunch break" rule. Strangely, the court analogized this proof situation to the principle in

34. 142 Ga. App. 115, 235 S.E.2d 389 (1977).
35. 143 Ga. App. 612, 239 S.E.2d 183 (1977).

worker's compensation law, which raises the presumption that a death arose out of, and in the course of, employment when the employer is found dead in a place where he would reasonably be expected to perform his duties.