The Overruling of Lemon: A Sour Note For Original Injury Compensation Insurers

Sixty years ago, Edna Louise James may not have had a leg to stand on.[1] Her only avenue of recovery against employer Central State Hospital for a work related leg injury would have been a common law action for damages, which required proof of tortious behavior on the part of the usually defense-clad employer.[2] Today, however, the no fault scheme of Workers' Compensation[3] eliminates these common law hurdles to recovery. Thus, claimants like Ms. James are assured of statutorily formulated compensation upon suffering a work related injury. Currently, concern has focused on the issue of compensability where the original injury, once compensated, becomes (1) aggravated by a second injury; (2) aggravated by continued employment; or (3) gradually worsened as a result of the wear and tear of ordinary life and work.

In the first two instances, a claimant under the Georgia statute will be deemed to have suffered a new compensable accident arising on the date the second injury occurs or the disability manifests itself. In the third instance, the current, albeit wavering, judicial attitude has been that the claimant has undergone a change in condition. This latter classification relegates the claimant to recovery under the original injury award, with compensation coming from the original employer-insurer's pocket, even when the claimant is working for another employer at the time of the worsening of his condition. This comment will explore the development of this issue in Georgia, in light of recent authority construing, and in one instance overruling, former decisions.

I. Aggravation Of Condition By Second Job-Related Accident

There is no question that the work related aggravation of a pre-existing infirmity, whether congenital or otherwise, is compensable under the Georgia Workers' Compensation Act.[4] The most easily identified classification

1. Ms. James was the claimant in Central State Hospital v. James, 147 Ga. App. 308, 248 S.E.2d 678 (1978), discussed *infra*.

2. *See* W. Prosser, Handbook of the Law of Torts 525 (4th ed. 1971).

3. Ga. Code Ann. tit. 114 (1973 & Supp. 1979).

4. *See* Thomas v. Ford Motor Co., 123 Ga. App. 512, 181 S.E.2d 874 (1971); Aetna Casualty & Surety Co. v. Cagle, 106 Ga. App. 440, 126 S.E.2d 907 (1962); Manufacturers Casualty Ins. Co. v. Peacock, 97 Ga. App. 26, 101 S.E.2d 898 (1958); Massachusetts Bonding & Ins. Co. v. Turk, 84 Ga. App. 547, 66 S.E.2d 364 (1951); United States Casualty Co. v. Kelly, 78 Ga. App. 112, 50 S.E.2d 238 (1948); Davis v. Bibb Mfg. Co., 75 Ga. App. 515, 43 S.E.2d 780 (1947); American Mutual Liability Ins. Co. v. Gunter, 74 Ga. App. 500, 40 S.E.2d 394 (1946); Employers Liability Assurance Corp. v. Johnson, 62 Ga. App. 416, 8 S.E.2d 542 (1940); Pruitt v. Ocean Accident & Guar. Corp., 48 Ga. App. 730, 173 S.E. 238 (1933).

of such aggravation is by a second, specific, job related injury. That was the case in *Aetna Casualty & Surety Co. v. Cagle.*[5] There the court held that where the claimant suffered a back injury in July, 1958, and was later incapacitated by aggravation attributable to a separate incident on the job in July, 1959, his claim filed in December, 1959, was not barred by the one year limitation period.[6] The court's rationale was that the second accident at least partially precipitated the claimant's disability by aggravating his pre-existing back injury. Consequently, the second accident was deemed a new accident so that the limitation period began on the date of the disabling second injury. "To hold otherwise," Judge Eberhardt reasoned, "would penalize the claimant for attempting to continue working even though hurt to some extent."[7] The court of appeals upheld the superior court's reversal of the board's denial of compensation.

The court in *Pacific Employers Insurance Co. v. Ivey*[8] extended the reach of *Cagle* beyond cases where claimant is immediately disabled to situations where claimant continues to work after the second accident and his condition gradually worsens to incapacity. In the latter event, the statute of limitations is considered to run from the date the disability manifests itself. In *Ivey,* the claimant was a maintenance foreman who sustained a back injury on the job in September, 1963, incurring no lost time from work. In April, 1965 he aggravated that injury while at work but continued to work until he was hospitalized in October, 1965. In light of those facts the court of appeals concluded:

> [T]he aggravating injury of April 1965, was in itself a *new accident* and . . . the hospitalization of September or October 1965, which was the first time loss due to disability, provides the time at which the disability manifests itself and is a beginning point for the running of the one-year limitation on filing a claim . . . .[9]

II. Aggravation Of Condition By Continued Employment

In cases where claimant cannot point to a specific second injury as precipitating his disability, his right to compensation is not necessarily curtailed.[10] Rather, the rule in Georgia is that "if the employment contributes to the aggravation of the pre-existing injury, it is an accident under our compensation law and is compensable, and it is not necessary that there be 'a specific job-connected incident' which aggravates the previous injury."[11] Thus, in the situation where the fact of continued employment

5. 106 Ga. App. 440, 126 S.E.2d 907 (1962).
6. Ga. Code Ann. § 114-305 (1973).
7. 106 Ga. App. at 440, 126 S.E.2d at 908.
8. 118 Ga. App. 299, 163 S.E.2d 435 (1968).
9. *Id.* at 301, 163 S.E.2d at 437 (emphasis in original).
10. *See, e.g.,* Skinner Poultry Co. v. Mapp, 98 Ga. App. 772, 106 S.E.2d 825 (1958).
11. Northern Assurance Co. of America v. Thompson, 121 Ga. App. 666, 667, 175 S.E.2d

aggravates a previous injury and the employee is forced to quit working, such aggravation becomes a "new accident" within the meaning of the Workers' Compensation Act. As the court of appeals succinctly stated in *Mallory v. American Casualty Co.*,[12] the statute of limitations begins to run from the date claimant was forced to leave work if the aggravation was attributable to claimant's continued employment.[13] This rule is no doubt undergirded by the policy consideration of encouraging a claimant to return to work after sustaining an injury.[14]

The Georgia Supreme Court followed this reasoning in *Blackwell v. Liberty Mutual Insurance Co.*[15] In *Blackwell,* the claimant aggravated an earlier on-the-job knee injury by continuing to work cleaning parts at a dip vat. This aggravation resulted in claimant's having to quit work and undergo an operation. The court held that aggravation of a previous injury by continued work is a new accident, and compensation was awarded.

Another decision expanding the applicability of the "new accident" theory was *House v. Echota Cotton Mills, Inc.*[16] This case was one of first impression for the court of appeals insofar as the employee-claimant voluntarily left the employment where his original injury occurred, worked at other jobs for other employers, and ultimately claimed disability to work for a later employer due to aggravation of the original injury. In finding the claimant not entitled to compensation from the original injury employer, the court construed the definitional language of section 114-102 of the Code which provides compensation for "injury by accident arising out of and in the course of employment."[17] The court concluded that this provision relates to "employment with the party from whom compensation is sought"[18] and necessarily precludes injury occurring at a different type of work for a different employer.

As a result, claimant was denied relief. His "new accident" had not occurred while working for appellee ex-employer Echota Mills, and any claim that may have arisen from the original injury was barred by section 114-305 because none had been filed within a year of the injury.

When the "new accident" logic is applied to the continued employment aggravation of a pre-existing condition, it follows that carrier liability is

67, 68 (1970). *See also* Noles v. Aragon Mills, 114 Ga. App. 130, 150 S.E.2d 305 (1966).

12. 114 Ga. App. 641, 152 S.E.2d 592 (1966).

13. *See also* National Union Fire Ins. Co. v. Johnson, 121 Ga. App. 332, 333, 177 S.E.2d 125, 127 (1970), wherein the court stated: "[I]t is now settled that the aggravation by continued work of a previous injury is a 'new accident.' We think it logically follows that the claimant is entitled to compensation based on the law in effect at the time of the 'new accident.'"

14. *See* text accompanying note 7 *supra.*

15. 230 Ga. 174, 196 S.E.2d 129 (1973).

16. 129 Ga. App. 350, 199 S.E.2d 585 (1973).

17. GA. CODE ANN. § 114-102 (1973).

18. 129 Ga. App. at 352, 199 S.E.2d at 587.

determined as of the date of the "new accident" which resulted in disability, and not the date of the original injury. In *Liberty Mutual Insurance Co. v. White,*[19] the deputy director found that the employee-claimant had injured her knee on May 1, 1972, when Hartford Insurance Company carried the liability coverage. Subsequently, after she had changed to a job requiring her to be on her feet more often, her knee condition gradually worsened. She was forced to cease work because of this disability on April 20, 1973, when Liberty Mutual Insurance had the liability coverage. Liberty Mutual was held liable for the employee's benefits.

III. Worsening Of Condition By Ordinary Wear And Tear

A judicially imposed exception to the new injury premise was set forth in *St. Paul Fire & Marine Insurance Co. v. Hughes.*[20] In *Hughes,* no evidence was shown of a specific second injury to aggravate the claimant's original work-related back injury, but there was testimony that connected claimant's subsequent work related injury with his original injury. In finding that a change in condition had occurred, the court announced a holding that was to spawn confusion in judicial circles, notwithstanding the "any evidence" limitation on appellate court review of compensation claims.[21] The court stated its exception to the new accident theory as follows:

> [E]ven if the wear and tear of ordinary life or ordinary work to some extent aggravates a pre-existing infirmity, when that infirmity itself, stemming from the original trauma, continues to worsen, the point where the employee is no longer able to continue his work is not a *new* accident but is a change of physical and economic condition entitling the claimant to compensation under the original award.[22]

Thus, it would appear that continued employment aggravation of a pre-existing infirmity may on occasion escape classification as a new accident. Instead it would constitute a change in condition in cases where the infirmity itself continued to worsen.

In a cautious limitation of its holding in *Hughes,* the court observed that the case did not involve a situation where the claimant is denied compensation from either employer because both may have adversely affected his health. Nor did the facts show a specific subsequent accident as precipitating the disability.[23]

19. 139 Ga. App. 85, 227 S.E.2d 886 (1976).

20. 125 Ga. App. 328, 187 S.E.2d 551 (1972).

21. The "any evidence" rule states that findings of fact in an award, supported by any evidence, are, in absence of fraud, conclusive on the reviewing court. *See generally* Ga. Code Ann. § 114-710 (1973).

22. 125 Ga. App. at 330, 187 S.E.2d at 553 (emphasis in original).

23. *Id.*

Judge Quillian, in *Garner v. Atlantic Building Systems, Inc.*,[24] attempted to delineate the situations where wear and tear of ordinary life or work aggravate a pre-existing infirmity and where sufficient aggravation of itself results in a new disability. The former was held to be the case in *Garner;* thus, claimant was deemed to have suffered a change in condition, not a new injury. Again, however, the court, inching its way along the thin ice of precedent, carefully limited its holding. "What has been stated . . . is not to be confused with that line of cases which hold that, where an employee sustains an injury and continues to work, the statute of limitation does not begin to run until the date the employee was forced to cease work."[25]

The *Garner* opinion also attempted to clarify the confusion surrounding the courts' indiscriminate use of the word "aggravation" to refer both to those situations involving a new injury, and to those involving a change of condition. For future reference, the court admonished:

> It is clear that this court and the State Board of Workmen's Compensation should, when referring to a new accident, use the word "aggravation," and when referring to a condition which is not a new accident, use the terminology, gradual worsening or deterioration, or recurrence, as appropriate to the circumstances.[26]

In 1977 the short-lived authority set forth in *Southern Bell Telephone & Telegraph Co. v. Lemon*[27] squeezed in a strained construction to the language in *Hughes,* in an apparent attempt by the court to reinstate the new accident theory in cases of deterioration by wear and tear of ordinary life and work. The court in *Lemon* decided that the term "ordinary work"[28] (which the court in *Hughes* said did not cause a new accident where the infirmity itself worsened) encompassed "work *other than that in [claimant's] usual employment,* such as yard work."[29] The court concluded that claimant's employment duties could have constituted a new accident, although they were acts that could have as easily been done off the job, for example in driving an automobile.

Under the holding in *Lemon,* a court could find a change of condition only in cases where there was gradual deterioration caused by the wear and tear of ordinary nonemployment work. Where ordinary employment work could have aggravated the claimant's condition, the new accident theory would support an award of compensation.

Lemon was cited in *United States Fidelity & Guaranty Co. v. Reynolds.*[30]

24. 142 Ga. App. 517, 236 S.E.2d 183 (1977).
25. *Id.* at 518, 236 S.E.2d at 184.
26. *Id.*
27. 142 Ga. App. 141, 235 S.E.2d 588 (1977).
28. *See* text accompanying note 22 *supra.*
29. 142 Ga. App. at 142, 235 S.E.2d at 589 (emphasis in original).
30. 146 Ga. App. 615, 247 S.E.2d 199 (1978).

The court however, under the "any evidence" rule, upheld the administrative law judge's finding that "the claimant did not suffer a 'new injury at any time' and therefore a physical as well as an economic change of condition resulted."[31]

Shortly after the *Reynolds* decision, *Lemon* was overruled and the *Hughes* language was realigned in *Central State Hospital v. James.*[32] Once again, if the infirmity itself worsened, additional aggravation by "ordinary work" resulted only in a change of condition (to the probable chagrin of insurers under original injury awards everywhere in Georgia.)

In *James,* claimant Edna Louise James suffered a work related injury on August 9, 1971, and later returned to perform work which required her to stand all day. She was hospitalized because of a swollen leg on January 5, 1977. The administrative law judge, relying on *Lemon,* found that claimant's standing on her feet all day aggravated her condition to the extent that it constituted a new injury. Instead of taking the approach of the court in *Reynolds*[33] and adhering to the "any evidence" rule, the court of appeals in *James* overruled *Lemon,* and found a change in condition, and reversed with direction that the Board enter a conforming award.[34]

The trend appears set. Recently, a case close on its facts to *James* was similarly decided. In *Zurich American Insurance Co. v. Sargent,*[35] the claimant fractured his ankle on the job; he later returned to work, but pain and discomfort caused him to quit. The Board had determined that the fracture had healed in such a way as to make the joint practically useless. The result was a wearing away of cartilage which was precipitated by standing and walking. The standing and walking also aggravated traumatic arthritis which claimant had suffered due to the original fracture. The Board concluded that claimant suffered a new injury as a result of aggravation of his pre-existing condition. On appeal the court stood by its decision in *James* (once again sidestepping the "any evidence" rule) and reversed the Board on the ground that there was no specific, job related new incident.[36]

The most current judicial attempt to reconcile the conflict is *Hartford Insurance Group v. Stewart.*[37] In this case, two insurers had coverage, one at the time of claimant's original injury, and the other at the time of his subsequent disability by aggravation. No claim had been filed at the time of claimant's original injury. Therefore, if a change in condition were found, claimant would be without a remedy because there would be no

31. *Id.*

32. 147 Ga. App. 308, 248 S.E.2d 678 (1978).

33. *See* text accompanying note 31 *supra.*

34. The court's reasoning seems to be that unless *Lemon* were overruled, a change in condition would almost never be found. 147 Ga. App. at 311, 248 S.E.2d at 680.

35. 147 Ga. App. 672, 250 S.E.2d 11 (1978).

36. *Id.* at 672, 250 S.E.2d at 12.

37. 147 Ga. App. 733, 250 S.E.2d 184 (1978).

original award to which the change could relate. Faced with this situation, the court held that a new injury had occurred. Its holding was based on an heretofore unemphasized fact:

> [T]he "new accident theory cases" only apply in those instances where the claimant is injured and goes back to work subsequent thereto without any agreement or award as to that injury having been approved or issued by the State Board of Workers' Compensation.
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> . . . .
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> A different theory is applied in a case where the claimant is injured and draws compensation under an agreement or award and subseqently returns to his employment, and that as the result of performing his normal duties his condition gradually grows worse to the point he is no longer able to continue in his employment. Under these circumstances the claimant has had a change in condition and not a "new accident."[38]

This holding does alleviate somewhat the harshness of *Hughes* and *James* as first applied. Emphasis has apparently shifted away from the issue of causation of disability by ordinary wear and tear or by aggravation. Rather, now the determinant appears to be simply whether or not claimant has an original injury award to fall back on for purposes of finding a change in condition. If not, the injury becomes a new accident. The rule seems simple enough in theory. However, it still misses the mark. It is not the nature of the original infirmity that should be determinative, but the fact of the job connected aggravation of such infirmity.

IV. CONCLUSION

Judge Eberhardt's advice in *Cagle* should be heeded in construing and formulating authority in compensation cases, so that ultimately a claimant will not be penalized for returning to work.[39] The holding in *Hughes* and its progeny appears to be the antithesis of that advice, and has resulted in harsh law which subsequent decisions have vainly attempted to mollify. *Lemon* was a well intentioned attempt to ameliorate the situation. Unfortunately, the vehicle chosen by the court in *Lemon* was an artificial construction of the *Hughes* holding, a construction that did not bear up under judicial scrutiny in *James*.

Further, the foregoing disarray of cases bears adequate witness to the

38. *Id.* at 734, 250 S.E.2d at 185-86 (citations omitted).

39. *See* text accompanying note 7 *supra*. One legislative step in this direction is the recent passage of the Subsequent Injury Trust Fund Act, the parameters of which are beyond the scope of this comment. Its intent in pertinent part is "to encourage the employment of the handicapped by protecting employers from excess liability for compensation when an injury to a handicapped worker merges with a pre-existing permanent impairment to cause a greater disability than would have resulted from the subsequent injury alone." GA. CODE ANN. § 114-911 (Supp. 1979).

truth of Judge McMurray's dissents in *James* and *Sargent*,[40] that the determination of new accident or change in condition should be left to the Board as the finder of fact. Such was the intent of the General Assembly in promulgating the duties of the Workers' Compensation Board, so that the courts would not try "to enter the any evidence field and determine these cases on their facts for the board."[41] Otherwise, because "the line of difference may be so infinitesimal as to be almost impossible of determination,"[42] appellate disposition of Workers' Compensation subsequent disability claims will be as disparate as the factual situations comprising them.[43]

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40. 147 Ga. App. 315, 248 S.E.2d at 682; 147 Ga. App. at 674, 250 S.E.2d at 12. *See also* Crown America, Inc. v. West, 143 Ga. App. 525, 239 S.E.2d 208 (1977).

41. 147 Ga. App. at 674, 250 S.E.2d at 12.

42. *Id.*

43. Recent legislation limiting appellate court review of compensation cases to certiorari should effectively place matters for factual determination such as change in condition back in the province of the Board. *See* GA. CODE ANN. § 6-701.1(a)(1)(Supp. 1979).