

# Workers' Compensation

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The survey period from June 1, 2009 to May 31, 2010<sup>1</sup> was notable for several decisions of the Georgia Court of Appeals in areas ranging from temporary exacerbation of preexisting injury to choice of law. Minimal legislation was enacted in these areas.

## I. LEGISLATION

In relation to the Workers' Compensation Act,<sup>2</sup> the Georgia General Assembly was relatively quiet in 2010. Although section 34-9-12(b) of the Official Code of Georgia Annotated (O.C.G.A.)<sup>3</sup> was modified to facilitate the publishing of board awards on specific cases,<sup>4</sup> the Self-insurers Guaranty Trust Fund<sup>5</sup> was the essential focus of the General Assembly's remaining legislation for 2010.<sup>6</sup>

The only other legislation of significance, and perhaps the most controversial, was the General Assembly's modification of the Georgia

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1. For analysis of Georgia workers' compensation law during the prior survey period, see H. Michael Bagley & J. Benson Ward, *Workers' Compensation, Annual Survey of Georgia Law*, 61 MERCER L. REV. 399 (2009).

2. Ga. H.R. Bill 814, Reg. Sess., 1920 Ga. Laws 167 (codified at O.C.G.A. ch. 34-9 (2008 & Supp. 2010)).

3. O.C.G.A. § 34-9-12(b) (2008 & Supp. 2010).

4. Ga. H.R. Bill 1101, § 1, Reg. Sess., 2010 Ga. Laws 126 (codified at O.C.G.A. § 34-9-12(b) (Supp. 2010)).

5. O.C.G.A. §§ 34-9-380 to -389 (2008 & Supp. 2010).

6. See Ga. H.R. Bill 1101 at § 4, 2010 Ga. Laws at 128 (codified at O.C.G.A. §§ 34-9-380 to -389 (Supp. 2010)).

Insurer's Insolvency Pool Act,<sup>7</sup> which is likely to indirectly impact the state workers' compensation system.<sup>8</sup> Prior to this legislation, the Georgia Insurers Insolvency Pool was not liable for any workers' compensation claims incurred by captive insurance companies before January 1, 2008.<sup>9</sup> Likewise, the Insolvency Pool had the right to recover from any employer who was an insured of an insolvent workers' compensation insurer and whose net worth exceeded \$25 million with all amounts paid by the pool on behalf of the insured.<sup>10</sup> The 2010 legislation created a mechanism whereby these entities that were previously barred from coverage by the Insolvency Pool could elect in certain emergency circumstances to buy into the Insolvency Pool with the payment of \$10,000 for insureds with a net worth less than \$25 million, or \$50,000 if the electing insured's net worth exceeds \$25 million.<sup>11</sup>

## II. COURSE OF EMPLOYMENT

The court of appeals dealt with the subject of idiopathic injuries for a second year in a row during this survey period,<sup>12</sup> and this year the court held that an employee's injury did not arise in the course of her employment,<sup>13</sup> arguably limiting the reach of its prior decision in *Harris v. Peach County Board of Commissioners*<sup>14</sup> in the process. In *St. Joseph's Hospital v. Ward*,<sup>15</sup> the employee, a hospital nurse, asserted four different accident dates for injuries to her knees, dating from 2003 through 2005. After a hearing, the administrative law judge (ALJ) found that the June 2005 right-knee injury was compensable. The administrative record showed that the injury occurred on June 23, 2005, when the employee entered a patient's room to administer medication and twisted her right knee, experiencing a sudden pop, while turning around to get the patient some water. On July 7, 2005, the employee attempted to return to work after the injury but was unable to do so because of right-knee pain. She remained out of work through August 2005 when she was offered a sit-and-greet position. She continued to

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7. O.C.G.A. ch. 33-36 (2005).

8. See Ga. H.R. Bill 1364, Reg. Sess., 2010 Ga. Laws 1085 (codified at O.C.G.A. §§ 33-36-11, -36-14, -36-20, -41-20.1 (Supp. 2010)).

9. O.C.G.A. § 33-41-20.1(b) (Supp. 2009).

10. O.C.G.A. § 33-36-14(d)(1) (2005).

11. Ga. H.R. Bill 1364 at § 3, 2010 Ga. Laws at 1087 (codified at O.C.G.A. § 33-36-20(c) (Supp. 2010)).

12. For analysis of the subject of idiopathic injuries during the previous year, see *supra* note 1, at 404-05.

13. *St. Joseph's Hosp. v. Ward*, 300 Ga. App. 845, 848, 686 S.E.2d 443, 445 (2009).

14. 296 Ga. App. 225, 674 S.E.2d 36 (2009).

15. 300 Ga. App. 845, 686 S.E.2d 443 (2009).

work until September 2005 before leaving for a knee replacement. The employee's doctor continued to hold her out of work following the surgery.<sup>16</sup>

The ALJ also found sufficient evidence showing that in September 2005 the employee sustained a new, fictional accident when she was unable to work because of a gradual worsening of her physical condition, partially due to her continued work after her June 2005 injury.<sup>17</sup> On appeal, the Appellate Division of the Georgia State Board of Workers' Compensation (SBWC) cited *Chaparral Boats, Inc. v. Heath*<sup>18</sup> in concluding that the June 2005 "injury to her right knee was not compensable 'as the employee was not exposed to any risk unique to her employment by standing and turning, and that, in turning, she did not come into contact with any object or hazard of employment.'<sup>19</sup>

In turn, the Superior Court of Richmond County, Georgia, concluded that the court of appeals decision in the *Chaparral* case was misconstrued by the appellate division because the employee's injury was a direct result of the performance of her work duties (namely, assisting a patient by turning to get a cup of water for the patient).<sup>20</sup> The superior court held that "[i]njuring her knee while turning to get a cup of water for a patient is not a risk to which [the employee] would have been equally exposed to apart from her employment."<sup>21</sup> Thus, a causal connection existed between the employee's injury and her employment duties.<sup>22</sup>

The court of appeals noted that the crucial issue was whether the employee proved "that her accidental injury arose out of her employment."<sup>23</sup> Explaining that it was following the holding in *Chaparral*, the court concluded that employees who injure their knee while walking at work cannot receive workers' compensation benefits for that injury because they are engaged in an effort (that is, walking) that is a risk they are equally exposed to apart from their employment.<sup>24</sup> In other words, the employee's injury in *St. Joseph's Hospital* was idiopathic in

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16. *Id.* at 846, 686 S.E.2d at 444.

17. *Id.*

18. 269 Ga. App. 339, 606 S.E.2d 567 (2004).

19. *St. Joseph's Hosp.*, 300 Ga. App. at 847, 686 S.E.2d at 444.

20. *Id.* at 847, 686 S.E.2d at 445.

21. *Id.* (alteration in original).

22. *Id.*

23. *Id.* at 848, 686 S.E.2d at 445 (quoting *Chaparral Boats*, 269 Ga. App. at 340, 606 S.E.2d at 569) (internal quotation marks omitted).

24. *Id.* (quoting *Chaparral Boats*, 269 Ga. App. at 344, 606 S.E.2d at 572).

that it was personal to the claimant and not the result of any risk unique to her employment.<sup>25</sup>

The court noted that this result was harmonious with last year's decision in *Harris*<sup>26</sup> because in both decisions the court of appeals deferred to the appellate division's findings and the evidence that existed to support such findings.<sup>27</sup> According to the court, any statements in *Harris* that could be construed to conflict with *Chaparral* are nonbinding dicta.<sup>28</sup>

### III. CHANGE IN CONDITION VS. NEW ACCIDENT: INTERVENING EMPLOYMENT

In *Trucks, Inc. v. Trowell*,<sup>29</sup> the employee worked as a truck driver for Trucks, Inc., and her duties included the manual hooking and unhooking of trailers to tractor-trailer rigs as well as driving tractor-trailer rigs to and from Florida. To manually hook and unhook the trailers, the employee used a hand crank to roll down the trailers' landing gear. On April 18, 2006, while using the hand crank, the employee experienced a burning feeling in her right shoulder.<sup>30</sup> The employee "continued working at regular duty, but . . . sought medical treatment for pain in her neck and right shoulder."<sup>31</sup> She timely notified her employer of the incident, and the claim was accepted as a compensable "medical-only" claim.<sup>32</sup>

Within six months of the accident, the employee resigned due to a work slowdown and began working as a truck driver for a different employer, Trans Systems, Inc. (Trans Systems). Her new job duties included using a manual gear shift but did not include using a hand crank to raise and lower trailers. She worked for a little over a month before quitting in December when work slowed down. The following month, her treating doctor recommended surgery on her right shoulder and advised the employee not to work until surgery was performed. Because of her intervening employment with Trans Systems, Trucks,

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25. *See id.*

26. For the court of appeals decision and examination of the evidence in *Harris*, see 296 Ga. App. at 225-29, 231, 674 S.E.2d at 38-42.

27. *St. Joseph's Hosp.*, 300 Ga. App. at 848 n.1, 686 S.E.2d at 445 n.1.

28. *Id.*

29. 302 Ga. App. 488, 690 S.E.2d 880 (2010).

30. *Id.* at 488-89, 690 S.E.2d at 881.

31. *Id.* at 489, 690 S.E.2d at 881.

32. *Id.* (internal quotation marks omitted).

Inc. refused to pay for any further medical treatment or surgery. The employee responded by filing a claim against Trucks, Inc.<sup>33</sup>

The ALJ found that the employee's medical condition was the result of her April 18 injury and not due to a change in condition or new accident, and the appellate division affirmed.<sup>34</sup> The Superior Court of Cobb County, Georgia, affirmed as well but based its decision on the fact that the employee "had proven a change in condition entitling her to benefits."<sup>35</sup>

The court of appeals determined that the superior court erred in making its finding because the employee never previously received an award of workers' compensation benefits under O.C.G.A. § 34-9-104(a)(1)<sup>36</sup> for her job-related right-shoulder injury.<sup>37</sup> Nonetheless, the court of appeals affirmed the superior court's decision under the right for any reason principle, stating that the evidence supported a finding that the employee's disability was solely attributable to her initial work-related injury, not to a gradual worsening of the injury caused by her continued work.<sup>38</sup> The court referred to the employee's testimony that her problems persisted but did not increase during her period of subsequent employment as well as to the treating physician's testimony that the medical condition was caused by the initial incident.<sup>39</sup>

#### IV. STATUTE OF LIMITATIONS: CATASTROPHIC DESIGNATION

During the survey period, the court of appeals continued to clarify the interplay between the statute of limitations, requests for change in condition, and catastrophic designation. In *Georgia Institute of Technology v. Hunnicutt*,<sup>40</sup> the employee sustained a compensable injury in May 1996 and received indemnity benefits for the maximum 400-week period available under the statute until February 2004. She then filed a Request for Catastrophic Designation form, or WC-R1CAT-EE, in July 2005—within two years after last receiving benefits—but did not specifically request further indemnity benefits anywhere on the WC-R1CATEE form. The Managed Care and Rehabilitation Division of the State Board designated her injury as catastrophic. She later filed a WC-

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33. *Id.* at 489-90, 690 S.E.2d at 881-82.

34. *Id.* at 490, 690 S.E.2d at 882.

35. *Id.* at 491, 690 S.E.2d at 882.

36. O.C.G.A. § 34-9-104(a)(1) (2008).

37. *Trucks*, 302 Ga. App. at 492, 690 S.E.2d at 883.

38. *Id.* at 492-94, 690 S.E.2d at 883-84.

39. *Id.* at 493, 690 S.E.2d at 884.

40. 303 Ga. App. 536, 694 S.E.2d 190 (2010).

14 hearing request for indemnity benefits in December 2007, outside of the O.C.G.A. § 34-9-104(b)<sup>41</sup> two-year time requirement.<sup>42</sup>

The ALJ rejected the employer's argument that because the WC-R1CATEE did not specifically request indemnity benefits, the employee did not timely request benefits prior to the running of the two-year statute of limitations. The appellate division and the Superior Court of Fulton County, Georgia, affirmed. The only issue on appeal was whether the employee's timely filing of her catastrophic designation request constituted an application for additional indemnity benefits under O.C.G.A. § 34-9-104(b).<sup>43</sup>

The court of appeals agreed with the lower courts, determining that under the plain language of O.C.G.A. §§ 34-9-104(b) and 34-9-261,<sup>44</sup> the request to designate the injury as "catastrophic" constituted an application under § 34-9-104(b) for a decision based on a "change in condition" that would, pursuant to § 34-9-261, "increas[e] or authoriz[e] the recovery of . . . income benefits" greater than those she received following her original injury.<sup>45</sup> Thus, "because [the employee] filed her request for catastrophic designation within two years of the date of the last payment of her [temporary total disability (TTD)] income benefits, her request was timely under [O.C.G.A.] § 34-9-104(b)."<sup>46</sup> This decision clarifies that in order to properly request indemnity benefits, it is sufficient for an employee to file a WC-R1CATEE within two years of last receiving indemnity benefits.<sup>47</sup>

In *Kroger Co. v. Wilson*,<sup>48</sup> the employee sustained a compensable back injury in 1994. He received TTD benefits while out of work and temporary partial disability (TPD) benefits when performing light or sedentary work. The employer paid benefits until the employee exhausted the statutory maximum amount of weeks in September 2001. The employee filed a WC-14 hearing request in August 2003 and indicated that he was seeking temporary total and temporary partial disability benefits to continue past September 2001, but he later

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41. O.C.G.A. § 34-9-104(b) (2008).

42. *Ga. Inst. of Tech.*, 303 Ga. App. at 537-38, 694 S.E.2d at 191-92.

43. *Id.* at 538, 694 S.E.2d at 192.

44. O.C.G.A. § 34-9-261 (2008).

45. *Ga. Inst. of Tech.*, 303 Ga. App. at 539, 694 S.E.2d at 192 (alterations in original) (quoting *Williams v. Conagra Poultry, Inc.*, 295 Ga. App. 744, 745-46, 673 S.E.2d 105, 107 (2009)) (internal quotation marks omitted).

46. *Id.* at 539, 694 S.E.2d at 192-93.

47. *Id.* at 538-39, 694 S.E.2d at 192.

48. 301 Ga. App. 345, 687 S.E.2d 586 (2009), *cert. denied*, No. S10C0606, 2010 Ga. LEXIS 341, at \*1 (Ga. Apr. 19, 2010).

withdrew the request and took no action on his claim.<sup>49</sup> Upon the advice of his physicians, the employee stopped working in May 2004.<sup>50</sup>

In April 2006 the employee filed a WC-R1CATEE requesting the designation of his condition as catastrophic. Because the catastrophic designation request constituted a change in status or condition request, the ALJ determined that the employee's claim was time-barred under O.C.G.A. § 34-9-104(b)'s two-year statute of limitations.<sup>51</sup> The appellate division reversed, and the Superior Court of Clayton County, Georgia, affirmed the decision.

The court of appeals agreed that § 34-9-104(b) applied to the employee's request and that he therefore had two years from the date of his last income benefits payment to file a claim requesting catastrophic designation.<sup>52</sup> The operative inquiry centered on whether the employee's 2003 hearing request constituted a request within the limitations period.<sup>53</sup> The employee argued that his 2003 request should have tolled the statute of limitations because § 34-9-104(b) only requires a party to *apply* for a change of condition within a two-year period of the party's last benefits payment.<sup>54</sup> However, the court concluded that because the employee only indicated that he was seeking temporary disability benefits in the WC-14 form, the form did not put the employer on notice that he was seeking to designate his injury as catastrophic.<sup>55</sup> Additionally, the court reasoned that when the employee filed a WC-14 form instead of a WC-R1CATEE form specifically designed for catastrophic claims, this indicated that he was not seeking a catastrophic injury designation in 2003.<sup>56</sup> Thus, the court concluded the ALJ correctly determined that the employee's claim was time-barred.<sup>57</sup> This decision clarifies that when an employee who seeks a catastrophic injury designation files a WC-14 form requesting a hearing, the employee must make the request for a catastrophic injury designation explicit so as to put the employer on "notice of the specific issues [the employee] seeks to litigate."<sup>58</sup>

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49. *Id.* at 345-46, 687 S.E.2d at 587.

50. *Id.* at 345, 687 S.E.2d at 587.

51. *Id.* at 346-47, 687 S.E.2d at 587-88.

52. *Id.* at 347, 687 S.E.2d at 588.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

V. INJURY BY ACCIDENT: TEMPORARY EXACERBATION OF PREEXISTING CONDITIONS

In *Big Lots v. Kiker*,<sup>59</sup> the employee obtained a June 2004 award from the State Board after the Board found that she sustained a compensable accidental injury to her back in July 2002 that aggravated a preexisting back condition. Following a 2009 hearing, the ALJ determined that according to medical evidence, the July 2002 injury was no longer the reason for her back condition, and the present disability was caused by the preexisting back condition. Based on the evidence, the employee had experienced a change of condition for the better under O.C.G.A. § 34-9-1(4),<sup>60</sup> therefore, she was not entitled to medical treatment. The appellate division adopted the ALJ's award.<sup>61</sup>

The Superior Court of Carroll County, Georgia, reversed the appellate division, determining that a December 2005 consent order, which changed the authorized treating physician, had the effect of rendering res judicata that the injury continued to cause the back problems. Additionally, the superior court stated that only evidence showing a change in her condition after the consent order could be considered. Further, the superior court found no evidence after the consent order showing that the July 2002 injury had ceased and was no longer the cause of the back injury.<sup>62</sup>

The court of appeals noted that "[t]o establish that [the employee's] condition changed for the better because her July 2002 injury resolved [O.C.G.A. § 34-9-104(a)] required proof of change occurring after the date on which her physical condition as a result of the injury 'was last established by award or otherwise.'"<sup>63</sup> The consent order from December 2005, which related to the authorized treating physician, did not establish the employee's physical condition.<sup>64</sup> Thus, the court of appeals held that the superior court erred by concluding that only evidence after December 2005 could be considered.<sup>65</sup> Instead, the evidence showed that after the employee's condition from the July 2002 accident was established in the 2004 award, the injury was no longer the cause of the back-related disability.<sup>66</sup> Because the Board's findings

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59. 304 Ga. App. 190, 695 S.E.2d 710 (2010).

60. O.C.G.A. § 34-9-1(4) (2008).

61. *Big Lots*, 304 Ga. App. at 190, 695 S.E.2d at 710.

62. *Id.* at 191, 695 S.E.2d at 711.

63. *Id.*; see also O.C.G.A. § 34-9-104(a) (2008).

64. *Big Lots*, 304 Ga. App. at 191, 695 S.E.2d at 711.

65. *Id.*

66. *Id.*



were supported by competent evidence, they were binding on the superior court.<sup>67</sup>

#### VI. EXCLUSIVE REMEDY

In *Sabellona v. Albert Painting, Inc.*,<sup>68</sup> the court of appeals sought to harmonize two provisions of the Workers' Compensation Act (WCA) that appeared to have contradictory application. In *Sabellona*, an employee, who worked for Labor Ready, was killed after falling through a skylight at a Boral Bricks, Inc. plant. Boral had hired Albert Painting, Inc. (API) to paint a building at its plant and subsequently contracted with Labor Ready to supply temporary laborers for the job.<sup>69</sup> According to the agreements entered into by API and Labor Ready, Labor Ready charged its regular billing rate per employee, per hour, including "all wages, withholdings, FICA, Medicare, payroll taxes, unemployment insurance and workers' compensation insurance."<sup>70</sup> At the time of his death, the employee was a temporary employee supplied by Labor Ready to paint the roofs at API's plant.<sup>71</sup>

Following his death, the employee's minor son filed a workers' compensation claim against Labor Ready that settled for \$160,000. Subsequently, all three of the employee's children and his personal representative filed a wrongful death claim against a host of defendants, including Boral and API. The trial court granted API's motion for summary judgment on the ground that it was immune from suit pursuant to the exclusive remedy provision of the WCA.<sup>72</sup>

The court of appeals noted the 1995 changes to the exclusive remedy provision of O.C.G.A. § 34-9-11,<sup>73</sup> which extended tort immunity to businesses that make use of the services offered by temporary help contracting firms or employee leasing companies.<sup>74</sup> Businesses can receive this immunity "provided that workers' compensation benefits are furnished by either: (1) a temporary help contracting firm or an employee leasing company; or (2) a business using the services of either such firm or company."<sup>75</sup> Because Labor Ready qualified as a tempo-

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67. *Id.*

68. 303 Ga. App. 842, 695 S.E.2d 307 (2010).

69. *Id.* at 842-43, 695 S.E.2d at 308.

70. *Id.* at 843, 695 S.E.2d at 308-09.

71. *Id.* at 843, 695 S.E.2d at 309.

72. *Id.* at 842, 695 S.E.2d at 308.

73. Ga. H.R. Bill 272, Reg. Sess., 1995 Ga. Laws 352 (codified as amended at O.C.G.A. § 34-9-11 (2008)).

74. *Id.* at § 1, 1995 Ga. Laws at 353; *Sabellona*, 303 Ga. App. at 843, 695 S.E.2d at 309.

75. *Sabellona*, 303 Ga. App. at 843, 695 S.E.2d at 309.

rary help contracting firm, and API qualified as a business using Labor Ready's services, API was immune from suit under O.C.G.A. § 34-9-11(c).<sup>76</sup>

Applying the language of O.C.G.A. § 34-9-2(a)(2),<sup>77</sup> the appellants also contended that the WCA did not apply to API because API regularly had fewer than three employees in service. In response, API argued that by contracting with Labor Ready, it elected to be bound by the WCA voluntarily.<sup>78</sup> The court agreed, stating that even though API had fewer than three employees, API agreed to the terms of its contract and agreement with Labor Ready to pay a rate for temporary employees that included coverage for workers' compensation benefits.<sup>79</sup> Thus, API voluntarily agreed to be subject to the WCA.<sup>80</sup>

The case of *Clarke v. Freeman*<sup>81</sup> arose "from the events of March 11, 2005, when Brian Nichols escaped from Fulton County deputies while awaiting trial at the Fulton County Courthouse and killed several individuals . . . before surrendering" the next day.<sup>82</sup> The plaintiffs worked as case manager and assistant case manager to Judge Rowland Barnes, whom Nichols shot and killed during the incident.<sup>83</sup> The plaintiffs brought suit against Fulton County Sheriff Myron Freeman, among others, for damages arising out of assault, false imprisonment, and infliction of emotional distress.<sup>84</sup>

The trial court granted the defendants' motions to dismiss the complaints, which alleged that the plaintiffs failed to state a claim upon which relief could be granted.<sup>85</sup> The court of appeals reversed, stating that the appellants had in fact "alleged sufficient facts that, if proven, could sustain a finding that the foreseeable result of the defendants' negligence was Nichols's violence against [the] Judge . . . and his staff."<sup>86</sup>

One of the defendants argued that the dismissal was proper on the basis that the plaintiffs' exclusive remedy was via the WCA.<sup>87</sup> However, the court of appeals concluded that dismissal on the basis of the

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76. *Id.*

77. O.C.G.A. § 34-9-2(a)(2) (2008).

78. *Sabellona*, 303 Ga. App. at 843-44, 695 S.E.2d at 309.

79. *Id.*

80. *Id.* at 844, 695 S.E.2d at 309.

81. 302 Ga. App. 831, 692 S.E.2d 80 (2010).

82. *Id.* at 831-32, 692 S.E.2d at 82.

83. *Id.* at 832, 692 S.E.2d at 82.

84. *Id.* at 832, 835, 692 S.E.2d at 82, 84.

85. *Id.* at 835, 692 S.E.2d at 84.

86. *Id.* at 837, 692 S.E.2d at 85-86.

87. *Id.* at 837-38, 692 S.E.2d at 86.

exclusivity provision would be premature at that juncture in the proceedings.<sup>88</sup> The court of appeals noted the trial court's conclusion in its dismissal order that a special duty was owed by the defendants to the plaintiffs' decedent, but the court of appeals dismissed this argument because no one had provided it with a copy of the order.<sup>89</sup> The court also noted, moreover, that the plaintiffs did not allege physical injuries in their complaints, without which the plaintiffs could not bring the alleged psychological injury within the purview of the WCA.<sup>90</sup>

#### VII. SUBROGATION: CONFLICTS OF LAW

In *Performance Food Group, Inc. v. Williams*,<sup>91</sup> the employee, a Tennessee resident, was injured in a car wreck while driving a Performance Food tractor-trailer in Gwinnett County, Georgia. The employer paid benefits under Tennessee's workers' compensation law, and in an effort to recover for the medical and indemnity benefits that it paid, the employer subsequently brought an action in Georgia against the owner and driver of the vehicle responsible for the wreck. The trial court granted summary judgment for the defendants because the employer's subrogation rights under Tennessee law were precluded by Georgia law.<sup>92</sup>

The court of appeals explained that in Georgia, conflicts of law rules require courts to look to the state where the last act completing the tort occurred to determine the substantive law that applies.<sup>93</sup> Although the employee was a nonresident and was hired by a foreign corporation, because the employee was injured in Georgia, Georgia law applied regardless of whether Georgia workers' compensation law was invoked to pay benefits.<sup>94</sup> Therefore, because the injury occurred in Georgia and the employee was eligible for workers' compensation benefits in Georgia, Georgia law governed the employer's subrogation claim.<sup>95</sup>

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88. *Id.* at 838, 692 S.E.2d at 86.

89. *Id.*; see *Pardue v. Ruiz*, 263 Ga. 146, 148, 429 S.E.2d 912, 914 (1993).

90. *Clarke*, 302 Ga. App. at 837-38, 692 S.E.2d at 85-86; see *Betts v. Medcross Imaging Ctr., Inc.*, 246 Ga. App. 873, 874, 542 S.E.2d 611, 614 (2000) ("Psychological injury, not preceded by or accompanied by physical injury, is not compensable under the Workers' Compensation Act.").

91. 300 Ga. App. 831, 686 S.E.2d 437 (2009).

92. *Id.* at 832-33, 686 S.E.2d at 439-40.

93. *Id.* at 832, 686 S.E.2d at 440.

94. *Id.* at 832, 686 S.E.2d at 439 (quoting *Liberty Mut. Ins. Co. v. Roark*, 297 Ga. App. 612, 614, 677 S.E.2d 786, 788 (2009)).

95. *Id.* at 833, 686 S.E.2d at 439.

In Georgia O.C.G.A. § 34-9-11.1<sup>96</sup> governs subrogation for workers' compensation benefits.<sup>97</sup> The court explained that pursuant to O.C.G.A. § 34-9-11.1(b), the subrogation rights of an employer or insurer are limited to the benefits paid under the Georgia WCA.<sup>98</sup> Thus, the court held that the employer could not pursue a subrogation claim for benefits paid under foreign law.<sup>99</sup> While the application of *lex loci delicti* may appear harsh to employers, the court observed there is no inherent right to subrogation in Georgia, and *lex loci delicti* does not deprive employers of due process.<sup>100</sup>

### VIII. JUDICIAL REVIEW

During the survey period, the court of appeals dealt with a number of cases that concerned the proper standard or scope of appellate review. In *Home Depot v. Pettigrew*,<sup>101</sup> the employee twisted her ankle while working in 2003 and underwent medical treatment, including surgery.<sup>102</sup> She "also began experiencing back problems which . . . her treating physician attributed to the changes in her gait as a result of the ankle injury."<sup>103</sup> The employee ultimately filed a request to designate her injury as catastrophic, and a hearing was held on the issue.<sup>104</sup>

Following the hearing, the ALJ issued an order that designated the ankle injury as catastrophic under O.C.G.A. § 34-9-200.1(g)(6)<sup>105</sup> but found the employee's back problems to be degenerative and not a result of the ankle injury. The employee appealed, contending that the treating physician found the back pain resulted from the ankle injury and also that the employer never controverted that finding nor added the issue of compensability for the injury to its hearing request.<sup>106</sup>

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96. O.C.G.A. § 34-9-11.1 (2008).

97. *Performance Food Grp.*, 300 Ga. App. at 833, 686 S.E.2d at 439; *see* O.C.G.A. § 34-9-11.1.

98. *Performance Food Grp.*, 300 Ga. App. at 833, 686 S.E.2d at 439 (quoting *Johnson v. Comcar Indus., Inc.*, 252 Ga. App. 625, 626, 556 S.E.2d 148, 150 (2001)).

99. *Id.* at 833-34, 686 S.E.2d at 439-40.

100. *Id.* at 833-34, 686 S.E.2d at 440 (quoting *Dowis v. Mud Slingers*, 279 Ga. 808, 816, 621 S.E.2d 413, 419 (2005)) (citing *K-Mart Apparel Corp. v. Temples*, 260 Ga. 871, 872, 401 S.E.2d 5, 6 (1991) (finding that an employer or insurer does not have a constitutionally protected interest in money it receives from a third-party tortfeasor)).

101. 298 Ga. App. 501, 680 S.E.2d 450 (2009).

102. *Id.* at 502, 680 S.E.2d at 451.

103. *Id.*

104. *Id.*

105. O.C.G.A. § 34-9-200.1(g)(6) (2008).

106. *Home Depot*, 298 Ga. App. at 502, 680 S.E.2d at 451.

The appellate division concluded that the employee herself raised the issue regarding the compensability of her back problem when she requested the catastrophic designation, and it determined that both parties had an opportunity to present medical evidence regarding the causation of the back problems. The Superior Court of Houston County, Georgia, struck the factual finding that the employee's back problems were not a compensable injury; the issue was not properly before the ALJ because the employee received neither notice nor an opportunity to be heard on the issue.<sup>107</sup>

The court of appeals agreed that the superior court properly "determined that the issue of whether [the employee's] back injury was compensable was not properly before the ALJ or the [a]ppellate [d]ivision."<sup>108</sup> The employee marked nothing on the form for catastrophic designation that would suggest she thought the compensability of her back or ankle problems was at issue, and nothing in the hearing transcript suggested that either party believed compensability to be an issue.<sup>109</sup> Thus, as a matter of law, the ALJ erred in making factual findings on the compensability issue because no evidence supported that the employee had notice and an opportunity to be heard "or gave implied consent to trial of that issue."<sup>110</sup> However, the court of appeals also ruled that the superior court did not have the authority to strike the ALJ's finding.<sup>111</sup> Instead, the appropriate procedure for the superior court would have been to remand to the State Board for a hearing on the issue.<sup>112</sup> "Because the superior court did not do so, [the court of appeals] vacat[ed] its order and remand[ed] with instruction that the case be recommitted to the State Board . . . for a further evidentiary hearing" on the issue of whether the back injury was compensable.<sup>113</sup>

#### A. *Judicial Review: Appeals*

*Strickland v. Crossmark, Inc.*<sup>114</sup> arose from an August 15, 2008, incident in which the employee allegedly injured her back while stocking shelves. The employer voluntarily paid temporary total disability (TTD) benefits following the accident and then controverted the claim.<sup>115</sup>

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107. *Id.*

108. *Id.* at 503, 680 S.E.2d at 452.

109. *Id.* at 503-04, 680 S.E.2d at 452.

110. *Id.* at 504, 680 S.E.2d at 453.

111. *Id.*

112. *Id.* at 505, 680 S.E.2d at 453.

113. *Id.*

114. 298 Ga. App. 568, 680 S.E.2d 606 (2009).

115. *Id.* at 569-70, 680 S.E.2d at 607-08.

Following a hearing, the ALJ denied the claim after finding that the employee failed to show that she sustained a compensable injury.<sup>116</sup>

The employee appealed the ALJ's decision, and on appeal before the appellate division, she contended for the first time that the employer's notice to controvert was invalid. According to the employee, the employer violated O.C.G.A. § 34-9-221(h)<sup>117</sup> and Board Rule 221<sup>118</sup> when the employer voluntarily began paying benefits and failed to pay her all compensation due when its notice was given.<sup>119</sup> "[T]he Appellate Division vacated the decision of the ALJ and remanded for additional proceedings as to the validity of the notice to controvert."<sup>120</sup> The employer then appealed to the Superior Court of Lowndes County, Georgia, which reversed the appellate division and remanded with direction that it only review those issues that were raised before the ALJ at the hearing.<sup>121</sup>

The court of appeals determined that the appellate division's order, which vacated the ALJ's award and remanded to the ALJ for additional proceedings on the notice issue, was not a final award.<sup>122</sup> Consequently, the superior court heard an interlocutory appeal, but interlocutory appeals are not authorized under the WCA.<sup>123</sup> Thus, the superior court lacked jurisdiction to hear the appeal, and the court of appeals reversed the superior court.<sup>124</sup>

### B. *Judicial Review: Attorney Fees*

The court of appeals delved into the issue of attorney fees in *Flores v. Keener*.<sup>125</sup> In that case, the court examined a situation in which the employee switched attorneys immediately before settlement, resulting in the two attorneys for the employee fighting over apportionment of attorney fees from the settlement.<sup>126</sup> Ultimately, the question turned on the issue of the superior court's standard of review.<sup>127</sup>

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116. *Id.* at 568, 680 S.E.2d at 607.

117. O.C.G.A. § 34-9-221(h) (2008).

118. GEORGIA STATE BOARD OF WORKERS' COMPENSATION RULE 221.

119. *Strickland*, 298 Ga. App. at 568-69, 680 S.E.2d at 607.

120. *Id.* at 569, 680 S.E.2d at 607.

121. *Id.*

122. *Id.* at 571, 680 S.E.2d at 608.

123. *Id.* at 570-71, 680 S.E.2d at 608 (citing GAC, MFG/Processing v. Busbin, 233 Ga. App. 406, 406, 504 S.E.2d 270, 271 (1998)) ("[The] superior court lacked jurisdiction to review Board's order remanding case to ALJ.>").

124. *Id.*

125. 302 Ga. App. 275, 690 S.E.2d 903 (2010).

126. *See id.*

127. *Id.* at 275-76, 690 S.E.2d at 904.

In *Flores* the employee first hired Russell Keener on October 14, 2005, to represent him in a workers' compensation claim.<sup>128</sup>

In the contingent fee contract, [the employee] agreed to pay Keener 25 percent "of any recovery" or, in the event [he] dismissed Keener, a fee "based upon time devoted to [his] case at [a] reasonabl[e] hourly rate" or 25 percent "of any offers which have been made by any adversary or collateral party, whichever is greater."<sup>129</sup>

After litigating for twenty months, the employer offered \$650,000 to settle, which the employee rejected. The employee then dismissed Keener, who subsequently filed a lien for a \$162,500 legal fee (25% of the settlement offer) as well as accrued expenses.<sup>130</sup>

The same day he dismissed Keener, the employee hired Flores and signed a contingent fee contract, agreeing to pay Flores 25% of any monetary recovery payable to the employee under the WCA, whether previously accrued or accrued in the future. Eight days after Flores was hired, the employee accepted a settlement of \$657,500. The parties stipulated that the correct amount for attorney fees was \$162,875 and agreed that the fee should be held in escrow until Keener's lien was resolved.<sup>131</sup>

The ALJ concluded "that a reasonable apportionment of the total fee of \$162,875 was 98.8 percent for Keener and 1.2 percent for Flores," percentages which represented the respective lengths of representation by each attorney.<sup>132</sup> The appellate division determined the ALJ's calculation of the relative values of the attorneys' services was not shown in the record by a preponderance of credible evidence. Based on the record, including Keener's hourly rate and the amount of work he did on the case, the appellate division determined Keener was entitled to 70% of the apportioned attorney fees, leaving the remaining 30% for Flores. The Superior Court of Bartow County, Georgia, vacated the judgment on the ground that the appellate division failed to apply the correct legal standard and remanded with direction to apply the correct standard.<sup>133</sup>

The court of appeals held that the superior court erred in concluding that the appellate division committed an error in how it exercised discretion to allocate the fee between the two attorneys.<sup>134</sup> Because

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128. *Id.* at 276, 690 S.E.2d at 905.

129. *Id.* (fourth and fifth alteration in original).

130. *Id.* at 276-77, 690 S.E.2d at 905.

131. *Id.* at 277, 690 S.E.2d at 905.

132. *Id.*

133. *Id.* at 275, 277, 690 S.E.2d at 904, 906.

134. *Id.* at 279-80, 690 S.E.2d at 907.

Flores did not show any reason under O.C.G.A. § 34-9-105(c)<sup>135</sup> for vacating the appellate division's award while before the superior court, the court of appeals reinstated the award.<sup>136</sup>

#### IX. AUTHORIZED TREATMENT: ATTENDANT CARE SERVICES

In *Medical Office Management v. Hardee*,<sup>137</sup> the employee sustained significant memory loss and dizziness after she was struck in the head with a cash box during a robbery. Three of her medical providers recommended that she receive at-home attendant care services for eight hours per day, seven days per week, as workers' compensation benefits. Following her injury, the employee's husband provided the attendant care services that her medical providers recommended she receive. The employee requested a hearing to determine whether the employer was required to provide the services of a professional attendant care agency, whether her husband was entitled to reimbursement for the care he provided, and whether the employer was liable for attorney fees. The ALJ determined that the employee was entitled to attendant care but that the husband was not entitled to reimbursement, and the ALJ denied the request for attorney fees.<sup>138</sup>

The appellate division agreed that the employee was entitled to attendant care, but it also determined that the husband was entitled to reimbursement for the care he provided and awarded \$5,000 in attorney fees for the employee's attorney. The Superior Court of Glynn County, Georgia, affirmed but reversed as to the amount of attorney fees, increasing the amount to \$12,500. The employer appealed, arguing that under *Bituminous Casualty Corp. v. Wilbanks*,<sup>139</sup> the husband was barred from recovering for the services he provided.<sup>140</sup> In *Bituminous* the court of appeals determined that the ordinary services of a wife to her husband after his return from a hospital did not constitute compensable treatment under the then applicable workers' compensation law.<sup>141</sup>

The court noted that the WCA does not contain an express prohibition against an employee's recovering for the attendant care services provided

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135. O.C.G.A. § 34-9-105(c) (2008).

136. *Flores*, 302 Ga. App. at 280, 690 S.E.2d at 907.

137. 303 Ga. App. 60, 693 S.E.2d 103 (2010).

138. *Id.* at 61-62, 693 S.E.2d at 105.

139. 60 Ga. App. 620, 4 S.E.2d 916 (1939).

140. *Hardee*, 303 Ga. App. at 62-63, 693 S.E.2d at 105-06.

141. *Id.* at 63, 693 S.E.2d at 106 (quoting *Bituminous*, 60 Ga. App. at 622, 4 S.E.2d at 918).



by the employee's family, including care by a spouse.<sup>142</sup> The court also explained that the fee schedule contemplated home health care reimbursement for services given by family members.<sup>143</sup> Ultimately, the court held that its decision in *Bituminous* had been superceded by changes in both workers' compensation and domestic law.<sup>144</sup>

Specifically, the court discussed the changes to the WCA since 1939 when *Bituminous* was decided, including a requirement that employers furnish employees with those treatments and services that are prescribed by licensed physicians.<sup>145</sup> Based on that requirement, the court concluded that the change to the WCA expanded benefits to include at-home, nonmedical attendant care services.<sup>146</sup> While the court noted that the husband could be expected to care for his suffering wife, he was not legally required to provide the medically prescribed care.<sup>147</sup> Moreover, he provided medically prescribed services that the employer previously refused to give.<sup>148</sup> Therefore, the court concluded that he was entitled to reimbursement for the at-home attendant care services he provided.<sup>149</sup>

The court then addressed the employer's arguments against assessed attorney fees, upholding the award of fees but reversing the superior court on its increase of the amount.<sup>150</sup> Because there was uncontroverted medical evidence as to the need for attendant care, evidence existed to support the appellate division's determination of attorney fees.<sup>151</sup> However, the superior court erred in substituting itself as the fact-finding body and should have affirmed the appellate division's findings if any evidence existed to support them.<sup>152</sup> Therefore, the court of appeals reversed that portion of the judgment and assessed \$5000 in attorney fees against the employer.<sup>153</sup>

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142. *Id.*

143. *Id.*

144. *Id.* at 64, 693 S.E.2d at 107.

145. *Id.* at 63-64, 693 S.E.2d at 106-07; *see also* O.C.G.A. § 34-9-200(a) (2008).

146. *Hardee*, 303 Ga. App. at 64, 693 S.E.2d at 107.

147. *Id.*

148. *Id.*

149. *Id.* at 65, 693 S.E.2d at 108.

150. *Id.* at 65, 67-68, 693 S.E.2d at 108-09.

151. *Id.* at 66, 693 S.E.2d at 108.

152. *Id.* at 67-68, 693 S.E.2d at 109 (quoting *Korner v. Educ. Mgmt. Corp.*, 281 Ga. App. 322, 324, 635 S.E.2d 892, 894 (2006)).

153. *See id.*

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