Workers' Compensation

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The 2014-2015 survey period included decisions of the appellate courts on a wide variety of issues impacting the workers' compensation system, ranging from the average weekly wage to the statutes of limitation.[1]

I. LEGISLATIVE UPDATE

The bill drafted by Chairman Frank McKay's State Board of Workers' Compensation's Advisory Council passed through four committees and both chambers of the Legislature without a dissenting vote and was signed into law by Governor Nathan Deal.[2] The primary feature of the legislation was to address *Estate of Mack Pitts v. City of Atlanta*[3] and the concerns regarding the impact of the decision.[4] In *Estate of Mack Pitts,* the Georgia Court of Appeals held that the "exclusive remedy" provision of the Georgia Workers Compensation Act, section 34-9-11 of the Official Code of Georgia Annotated (O.C.G.A.),[5] did not bar the plaintiffs from seeking damages for "breach of the contract" against the defendants who otherwise would have been considered "statutory" employers immune from suit for damages for a workplace accident and

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1. For an analysis of Workers' Compensation law during the prior survey period, see H. Michael Bagley & J. Benson Ward, *Workers' Compensation, Annual Survey of Georgia Law*, 66 MERCER L. REV. 247 (2014).

2. Ga. H.R. Bill 412, Reg. Sess. (2015).

3. 312 Ga. App. 599, 719 S.E.2d 7 (2011), *cert. granted*, 292 Ga. 219, 735 S.E.2d 772 (2012), *remanded to* 323 Ga. App. 70, 746 S.E.2d 698 (2013) (reaffirmed).

4. *See generally* Ga. H.R. Bill 412 § 1.

5. O.C.G.A. § 34-9-11(a) (2008 & Supp. 2015).

a resulting injury (in this case death).[6] To reach this decision, the court concluded the injury for which the plaintiffs sought damages "is not a physical injury but instead is the loss of access to insurance coverage occasioned by the defendants' alleged breach of contract."[7] The plaintiffs already had recovered the specified relief under the Workers' Compensation Act[8] for this worksite injury and, in a separate action, sought and obtained a judgment against the third party that caused the accident for damages based on the death resulting from the physical injuries sustained in a job site accident.[9] However, the court of appeals reasoned that because the plaintiffs' claim purportedly sought "damages for breach of contract, not personal injury, . . . the Workers' Compensation Act provide[d] no specific remedy for the damages sought."[10] Accordingly, the court concluded that the Act is not applicable to a "breach of contract" action, thus the claim was not barred by the Act's exclusive remedy provision.[11]

Attempting to address concerns regarding the perceived erosion of the exclusive remedy doctrine in the aftermath of this decision, O.C.G.A. § 34-9-11[12] was amended to emphasize that the Workers' Compensation Act (the Act) granted rights and remedies to employees who shall "be in place of all other rights and remedies . . . at common law or otherwise, on account of [the] injury, loss of service, or death," unless the employer expressly agrees, "in writing, to specific additional rights and remedies."[13] The amendment further clarified that "the use of contractual provisions generally relating to workplace safety . . . compliance with laws or regulations, or . . . relating to liability insurance requirements shall not be construed to create rights and remedies beyond those provided" in the Workers' Compensation Act.[14] The maximum weekly benefit payable for temporary total disability was increased from $525 to $550,[15] and the maximum weekly benefit payable for temporary partial disability was increased from $350 to $367.[16]

The legislation also amends the maximum benefit payable to a surviving spouse as a sole dependent at the time of death from $150,000

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6. *Estate of Pitts*, 312 Ga. App. at 605-06, 719 S.E.2d at 16-17.
7. *Id.*
8. O.C.G.A. §§ 34-9-1 to -421 (2008 & Supp. 2015).
9. *Estate of Mack Pitts*, 312 Ga. App. at 606-07, 719 S.E.2d at 16-17.
10. *Id.* at 607, 719 S.E.2d at 17.
11. *Id.* at 607, 719 S.E.2d at 17-18.
12. O.C.G.A. § 34-9-11 (2008 & Supp. 2015).
13. Ga. H.R. Bill 412 § 1 (codified as amended at O.C.G.A. § 34-9-11).
14. *Id.* (codified as amended at O.C.G.A. § 34-9-11).
15. *Id.* § 3 (codified as amended at O.C.G.A. § 34-9-261 (2008 & Supp. 2015)).
16. *Id.* § 4 (codified as amended at O.C.G.A. § 34-9-262 (2008 & Supp. 2015)).

to an indexed amount not to exceed 400 weeks at the maximum prevailing rate for temporary total disability.[17] In addition, the bill moves the sunset date for the Subsequent Injury Trust Fund from 2020 to 2023 and transfers oversight at that time from the State Board of Workers' Compensation to the Department of Insurance.[18]

II. REFUSAL OF LIGHT DUTY WORK

The claimant in *Brasher v. U.S. Xpress Enterprises, Inc.*,[19] a long-haul truck driver, was injured while on the road and treated in a local emergency room. He reported the injury to his employer but allegedly was not provided with medical treatment or a list of a panel of treating physicians, so he continued to seek treatment occasionally with urgent care facilities on his own, receiving work restrictions. Less than a month after the accident, the employer offered suitable light duty work at another location and provided the claimant with a bus ticket to that location. The claimant remained at this job for five hours and then left, signing a form that he was declining the job for financial reasons. Following a hearing, the administrative law judge (ALJ) awarded income benefits from the date of the accident through the date the claimant presented to the light duty job. However, the ALJ declined further income benefits after that date due to the claimant's unjustified refusal to perform this work and assigned the claimant's former surgeon as his authorized treating physician (ATP). The Appellate Division of the State Board of Workers' Compensation (Appellate Division) adopted this decision, and the superior court affirmed the decision by operation of law.[20]

The court of appeals reversed the ATP appointment because there was no evidence that the employer posted or presented a panel of physicians to the claimant or otherwise facilitated his medical treatment.[21] The court only affirmed the ALJ's awarding of income benefits up until the commencement of the light duty job, holding that the light duty work was appropriate and the claimant's refusal was not justified.[22] In response to the claimant's argument that the long bus ride to the light duty job disrupted his life, the court noted that as a long-haul truck driver who traveled across the country, the claimant was accustomed to

17. *Id.* § 5 (codified as amended at O.C.G.A. § 34-9-265 (2008 & Supp. 2015)).
18. *Id.* § 7 (codified as amended at O.C.G.A. § 34-9-358 (2008 & Supp. 2015)).
19. 328 Ga. App. 20, 761 S.E.2d 448 (2014).
20. *Id.* at 21, 22, 23, 761 S.E.2d at 450-51, 452.
21. *Id.*
22. *Id.* at 25, 761 S.E.2d at 452-53.

long periods away from home.[23] The claimant's reliance on an urgent care work status note that ambiguously stated "no activity" did not compel a finding that he was entitled to ongoing income benefits.[24] Finally, the court rejected the claimant's contention that his due process or equal protection rights were violated.[25]

III. INJURIES ARISING OUT OF THE EMPLOYMENT

In *Chambers v. Monroe County Board of Commissioners*,[26] the court of appeals revisited the concept of idiopathic injuries. The claimant, a firefighter and emergency medical technician, returned to the fire station from a call and sat at a desk, completing paperwork and watching television. When her supervisor asked her to get up from the desk so that he could use it, she rose from her chair and heard a "pop" in her left knee.[27] "The ALJ found the [knee] injury compensable on the basis that [the claimant] was required to be in the location where she was injured and was following her supervisor's orders;" however, the Appellate Division vacated and reversed the award because there was "no evidence that the [claimant] slipped, tripped, or fell or came in contact with any object or hazard that increased her risk of injury . . . she simply rose from a seated position."[28] The superior court affirmed.[29]

The court of appeals noted that the claimant presented no testimony or evidence that established any causal connection between the employment and the injury (such as a unique desk configuration, a fire alarm causing her to hurriedly exit the chair, or any contact with another object).[30] The court noted prior decisions addressing this issue, including the two 2009 decisions, *St. Joseph's Hospital v. Ward*[31] and *Harris v. Peach County Board of Commissioners*,[32] and the court stated that the issue may be reconciled through the common strand of the appellate courts giving great deference to the ALJ's and Appellate Division's fact-finding role.[33] Because some evidence existed to support the Appellate Division's determination that the injury was not causally

23. *Id.* at 25-26, 761 S.E.2d at 453.
24. *Id.* at 26, 761 S.E.2d at 453.
25. *Id.* at 27, 761 S.E.2d at 454.
26. 328 Ga. App. 403, 762 S.E.2d 133 (2014).
27. *Id.* at 404, 762 S.E.2d at 133.
28. *Id.* at 404, 762 S.E.2d at 134.
29. *Id.*
30. *Id.* at 405, 762 S.E.2d at 134.
31. 300 Ga. App. 845, 686 S.E.2d 443 (2009).
32. 296 Ga. App. 225, 674 S.E.2d 36 (2009).
33. *Chambers*, 328 Ga. App. at 405-06, 762 S.E.2d at 134.

connected to the employment, the court upheld the Appellate Division's award that denied the claim.[34]

IV. CHANGE IN CONDITION/FICTIONAL NEW ACCIDENT

This survey period featured another foray into the distinction between a change in condition and a fictional new accident. The claimant in *ABF Freight System, Inc. v. Presley*[35] sustained a compensable right knee injury in June 2009, underwent surgery, and returned to work, and subsequently sustained a compensable left knee injury in December 2009 that he also underwent surgery for prior to returning to work. After more than a year of performing regular duty work, he underwent total knee replacement surgery on the right knee and sought income benefits during the period he was out of work after the procedure on the grounds that he sustained a fictional new injury.[36]

The ALJ determined that the claimant instead had sustained a change in condition for the worse because there were no new or different circumstances concerning his job duties that caused a new injury since the compensable 2009 injury. The Appellate Division adopted this decision.[37] "The superior court remanded . . . for a determination regarding whether [the claimant's] left knee injuries constitute[d] 'new circumstances' that caused a worsening of the right knee. . . ."[38] However, the court of appeals noted that "the ALJ and the [Appellate Division] did consider whether [the] left knee injuries caused a worsening of [the] right knee condition," and they found that the injuries did not and "the evidence support[ed] the ALJ and [Appellate Division's conclusion] that [the] right knee was never the same after surgery and [progressively worsened] without any additional injuries or job [duties]."[39] Because evidence existed to support the Appellate Division's findings, the Appellate Division's findings must be affirmed.[40]

V. LATE PAYMENT PENALTY/CHANGE IN CONDITION

Revisiting and reversing a case from last year's survey, the Georgia Supreme Court held, in *Metropolitan Atlanta Rapid Transit Authority v. Reid*,[41] that the provision in O.C.G.A. § 34-9-104(b)[42] that contained

34. *Id.* at 407, 762 S.E.2d at 136.
35. 330 Ga. App. 885, 769 S.E.2d 611 (2015).
36. *Id.* at 885, 886, 769 S.E.2d at 613.
37. *Id.* at 887, 769 S.E.2d at 614.
38. *Id.* at 888, 769 S.E.2d at 615.
39. *Id.*
40. *Id.* at 889, 769 S.E.2d at 615.
41. 295 Ga. 863, S.E.2d 695 (2014).

the change in condition statute of limitations is "the proper statute of limitations for a claim of statutory penalties for late benefits payments."[43] Eight years after his last payment of income benefits, the claimant in *Reid* requested a hearing, seeking late payment penalties on twelve benefit checks.[44] The ALJ found that the claim for statutory penalties constituted a change in condition under O.C.G.A. § 34-9-104[45] because additional benefits were requested.[46] The claim was therefore barred under that statute's two-year limitation period.[47] The decision was affirmed by the Appellate Division and the superior court.[48] However, the court of appeals reversed and applied the general statute of limitations, O.C.G.A. § 34-9-82,[49] instead of the change in condition statute of limitations, to the request for late payment penalties.[50]

The Georgia Supreme Court, in a unanimous decision, held that the court of appeals failed to consider a change in "status" when evaluating the definition of a "change in condition" under O.C.G.A. § 34-9-104.[51] The court defined "status" to include "the legal condition of an employee in the context of the employer-employee relationship" and concluded that the claimant's status "was first established when [the] employer [commenced income] benefits voluntarily and [was] last established when the last benefit payment was made."[52] Any further change in the claimant's status was governed by the change in condition statute of limitations under O.C.G.A. § 34-9-104(b), and because the claimant waited more than two years to request additional benefits pursuant to a change in his status, his claim was time-barred.[53]

VI. PAYMENT OF BENEFITS/STATUTE OF LIMITATIONS

The change in condition statute of limitations under O.C.G.A. § 34-9-104(b) was addressed during this survey period by the court of appeals in the context of last payment of benefits. In *Lane v. Williams*,[54] the claimant sustained a compensable claim, and the employer suspended

42. O.C.G.A. § 34-9-104(b) (2008).
43. *Reid*, 295 Ga. at 863-64, 763 S.E.2d at 696.
44. *Id.* at 863, 763 S.E.2d at 696.
45. O.G.C.A. § 34-9-104 (2008).
46. *Reid*, 295 Ga. at 864, 763 S.E.2d at 696.
47. *Id.*
48. *Id.*
49. O.C.G.A. § 34-9-82 (2008).
50. *Reid*, 295 Ga. at 864, 763 S.E.2d at 696.
51. *Id.* at 865, 763 S.E.2d at 697.
52. *Id.* at 866, 866-67, 763 S.E.2d at 697-98.
53. *Id.* at 865, 867, 763 S.E.2d at 697, 698.
54. 330 Ga. App. 416, 766 S.E.2d 482 (2014).

benefits, mailing the last income benefit payment on March 9, 2010 (paying benefits through March 10, 2010). Also on March 9, 2010, the claimant moved for an interlocutory recommencement of income benefits, which the ALJ denied in an order suggesting that an evidentiary hearing would be necessary. However, the claimant did not request a hearing until March 13, 2012, and accordingly, the ALJ found that the two-year statute of limitations under O.C.G.A. § 34-9-104(b) barred the request for reinstatement of income benefits.[55] The court of appeals confirmed that an income benefit payment is "actually made" when it is placed in the mail, not when the claimant received it.[56] Because the claimant's hearing request was not filed until more than two years after the last payment was placed in the mail, the request for additional income benefits was time-barred.[57]

VII. INGRESS/EGRESS RULE

In *Bonner-Hill v. Southland Waste Systems*,[58] the employee was driving on an entrance road across railroad tracks when his vehicle was struck by a train; the injuries resulted in his death, and his wife brought a death and dependency benefits claim.[59] The ALJ found that the claim was compensable because "the short entrance road, which crossed the railroad track, was the only route by which [the employee] could access his workplace;" the employer's lease agreement for the premises included a non-exclusive right to use the access road; "the entrance road was part of the business premises;" and the employer had control over the entrance road.[60] The Board reversed, holding that "the ingress/egress rule did not apply . . . . because [the employer] did not exclusively own, maintain, or control the entrance road [on] which [the employee] was traveling," and that "[the claimant] had not [yet] arrived at work" at the time of the accident.[61]

The court of appeals noted that accidents occurring while employees travel to or from work generally are not compensable; however, the ingress-egress exception renders accidents compensable when the "employee is injured while on the employer's premises in the act of going to or coming from . . . work."[62] The court framed the ingress-egress

55. *Id.* at 417, 766 S.E.2d at 483, 484.
56. *Id.* at 420, 766 S.E.2d at 485.
57. *Id.*
58. 330 Ga. App. 151, 767 S.E.2d 803 (2014).
59. *Id.* at 152, 767 S.E.2d at 805.
60. *Id.*
61. *Id.* at 152-53, 767 S.E.2d at 805.
62. *Id.* at 153, 154, 767 S.E.2d at 806.

exception as applying in situations where the accident occurs in an area that is either "(1) limited (or very nearly so) to the respondent business, even if the business's right to the area is merely a leasehold interest or some other nonexclusive access; or (2) owned, maintained, or controlled by the business . . . ."[63] Under that framework, because the lease provided that the premises included access to the property over the entrance road, the court held that the employee had arrived at the employer's premises at the time of the accident and, thus, the ingress-egress exception applied.[64] In a separate concurring opinion, Judge Dillard expressly concurred in judgment only and noted that the majority opinion thus "may not be cited as binding precedent."[65]

VIII. EXCLUSIVE REMEDY PROVISION

The court of appeals upheld that the application of the exclusive remedy provision precludes tort claims against a general contractor for an out-of-state injury. In *Smith v. Graham Construction Co.*,[66] the claimant–an employee of a subcontractor on a construction project in North Carolina–received workers' compensation benefits under Georgia law. The claimant and his wife sued the general contractor for negligence and loss of consortium, and the trial court granted summary judgment in favor of the general contractor because the suit was barred by the exclusive remedy provision of the Act as set forth in O.C.G.A. § 34-9-11(a). While under North Carolina law only the subcontractor, and not the general contractor, would be considered a "statutory employer"–and thus, the general contractor would not be immune from civil suit–the court of appeals held that the trial court correctly applied Georgia substantive law because application of North Carolina substantive law would contravene Georgia public policy.[67]

IX. DEATH AND DEPENDENCY BENEFITS

In *Barzey v. City of Cuthbert*,[68] the Georgia Supreme Court held that the Act's limitation on the recovery of death benefits by a deceased employee's non-dependent heirs does not violate federal due process or equal protection rights.[69] The deceased employee in *Barzey* was not

63. *Id.* at 155, 767 S.E.2d at 806-07.
64. *Id.* at 155, 767 S.E.2d at 807.
65. *Id.* at 156, 767 S.E.2d at 807 (Dillard, J., concurring in judgment).
66. 327 Ga. App. 823, 761 S.E.2d 370 (2014).
67. *Id.* at 823-24, 824, 761 S.E.2d at 371, 371-72, 372.
68. 295 Ga. 641, 763 S.E.2d 447 (2014).
69. *Id.* at 646, 763 S.E.2d at 453.

married, had no dependents, and his mother was his only heir at law.[70] His mother brought suit against the City of Cuthbert, contending that the Act violated her due process and equal protection rights granted under the Fourteenth Amendment of the United States Constitution[71] because she was precluded as a non-dependent parent from recovering from her son's employer.[72] The Georgia Supreme Court held that because "the Act's differing treatment of dependent and non-dependent heirs is not irrational and serves the legitimate government purpose of workers' compensation, the Act's limitation on recovery by non-dependent heirs does not violate the due process or equal protection rights guaranteed by the United States Constitution."[73]

X. STANDARD OF REVIEW

In *Emory University v. Duval*,[74] the ALJ found that the claimant sustained an aggravation of a preexisting right shoulder injury, but her left shoulder injury was not compensable. The Appellate Division reversed the ruling with respect to the right shoulder, concluding that the right shoulder condition was not work-related based on medical evidence other than that relied upon by the ALJ. On appeal, the superior court reversed and remanded, ordering the Appellate Division to either accept the ALJ's findings or explain why it did not accept the evidence relied upon by the ALJ.[75] In reversing the superior court's judgment, the court of appeals noted the wide latitude afforded to the Appellate Division, specifically its authority to substitute its findings of fact for those of the ALJ.[76] In contrast, neither the superior court nor the court of appeals has authority to substitute itself as a fact-finder.[77] The court of appeals held that because there was ample medical evidence for the Appellate Division to substitute its findings for those of the ALJ, the Appellate Division's decision should have been affirmed by the superior court.[78]

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70. *Id.* at 641, 763 S.E.2d at 449.
71. U.S. CONST. amend. XIV.
72. *Barzey*, 295 Ga. at 643, 763 S.E.2d at 449-50. The plaintiff challenged on appeal the U.S. Constitution, as she did not refer to or cite to the Georgia Constitution. *See id.*
73. *Id.* at 646, 763 S.E.2d at 452.
74. 330 Ga. App. 663, 768 S.E.2d 832 (2015).
75. *Id.* at 665, 768 S.E.2d at 833-34, 834.
76. *Id.* at 665-66, 768 S.E.2d at 834.
77. *Id.* at 666, 768 S.E.2d at 834-35.
78. *Id.* at 667, 768 S.E.2d at 835.

XI. STANDARD OF PROOF–STROKE

The claimant in *Save-A-Lot Food Stores v. Amos*[79] alleged that he sustained a work-related stroke, which the employer contested. In opposition to the opinions of the claimant's family doctor that the claimant had suffered a stroke and job-related stress was a contributing factor leading to the stroke, two neurologists found no evidence of a stroke. The ALJ denied benefits, finding that the claimant had not shown that he suffered a stroke and, even if there was a stroke, there was insufficient evidence that it was caused by work-related stress.[80] The Appellate Division affirmed the decision, but struck the portion of the ALJ's decision stating that the claimant "is required to meet a higher standard of proof to establish that his alleged stroke is compensable . . . ."[81] The superior court reversed the denial of benefits because the employee was held "to an unfairly heightened standard of proof."[82]

The court of appeals observed that O.C.G.A. § 34-9-1(4)[83] provides that under the Act, "injury" does not include several medical conditions, including strokes, unless it is shown by a preponderance of competent and credible evidence—including medical evidence—that the stroke was attributable to the performance of the work.[84] The court of appeals recognized that neither the ALJ nor the Appellate Division imposed a higher burden of proof on the claimant beyond the standard called for in O.C.G.A. § 34-9-1(4), which the ALJ cited multiple times in his award.[85] Accordingly, because the correct standard of proof was applied and evidence in the record existed to support that finding, the superior court's failure to accept the Appellate Division's findings was reversible error.[86]

XII. AVERAGE WEEKLY WAGE

Thomas v. Fulton County Board of Education[87] involved the determination of the claimant's average weekly wage as a school bus driver who only drove the bus for nine months of the year but received her salary spread out over twelve months. During the summer months, she worked

79. 331 Ga. App. 517, 771 S.E.2d 192 (2015).
80. *Id.* at 518-19, 771 S.E.2d at 193, 194.
81. *Id.* at 519, 771 S.E.2d at 194.
82. *Id.* at 517, 771 S.E.2d at 193.
83. O.C.G.A. § 34-9-1(4) (2008 & Supp. 2015).
84. *Amos*, 331 Ga. App. at 520, 771 S.E.2d at 195.
85. *Id.*
86. *Id.*
87. 331 Ga. App. 828, 771 S.E.2d 482 (2015).

a second job driving new school buses to various parts of the country. She sustained a compensable injury on October 19, 2011, and the thirteen-week period for determining her average weekly wage included a small window of time before she returned to her regular school-year job. The ALJ found that the summer work was concurrent (even if not performed contemporaneous to the school-year work) and, thus, her average weekly wage was 1/13th of the total earnings from the thirteen-week period, including both jobs. The Appellate Division found that the two jobs were not performed concurrently and calculated the wages based on her reduced summer monthly pay, and the superior court affirmed.[88]

The court of appeals first concluded that the claimant worked substantially for the entire thirteen-week period because O.C.G.A. § 34-9-260(1)[89] contemplates work for the same or another employer during the period in question.[90] The court then concluded that the average weekly wage should be based on the total wages earned for the thirteen weeks—eleven and a half weeks with the employer and one and a half weeks with the summer job.[91]

XIII. SEARCH FOR WORK

Burns v. State Department of Administrative Services[92] involved a claimant who sustained a compensable injury, received benefits and returned to work, and sought reinstatement of income benefits after she was fired. The ALJ found that the employer's bases for terminating employment were pretextual and that the claimant was fired due to her on-the-job injury. Accordingly, the ALJ awarded benefits and the Appellate Division adopted this award. On appeal, the superior court set aside the award, holding that the claimant was required to show either a diligent job search or that she was working in a restricted capacity when she was fired but failed to do so.[93]

The court of appeals first addressed the omission of the hearing transcript from the record on appeal, noting that the superior court was required to construe the evidence in the light most favorable to the party who prevailed before the Appellate Division, and concluded that in the

88. *Id.* at 829, 830, 771 S.E.2d at 483, 484.
89. O.C.G.A. § 34-9-260(1) (2008).
90. *Thomas*, 331 Ga. App. at 831-32, 771 S.E.2d at 485.
91. *Id.*
92. 331 Ga. App. 11, 769 S.E.2d 733 (2015).
93. *Id.* at 12, 769 S.E.2d at 733.

absence of a hearing transcript, the superior court could not have performed this function.[94]

Further, the court of appeals held that the superior court improperly applied *Maloney v. Gordon Farms*[95] and imposed an additional burden on the claimant, requiring her to show that she had searched for work, or that she was restricted in her work capacity prior to termination.[96] The court stated that a claimant who is fired for reasons directly related to a work injury is not required to show a diligent job search before becoming entitled to income benefits.[97] The court of appeals thus reversed and remanded the case for the superior court to consider the complete record and apply the correct legal standard.[98]

XIV. RETROACTIVE APPLICATION OF MEDICAL BENEFITS

In *Ward v. Pre-Engineer Systems*,[99] the court of appeals retroactively applied workers' compensation benefits–specifically, nurse case management services–to a 1973 accident.[100] The employer controverted nurse case management services on the grounds that such benefits were not available under the Act in 1973.[101] The court of appeals upheld the ALJ's and the Appellate Division's award granting nurse case management services because the result did not cause a non-compensable injury to become compensable but simply affected the scope of the treatment provided.[102]

XV. ATTORNEY FEES

In *Waters v. PCC Airfoils, LLC*,[103] the court of appeals upheld an award of assessed attorney fees where some evidence existed to support a finding of a defense that was at least, in part, unreasonable.[104] The claimant alleged bilateral wrist injuries resulting from repetitive work, and the ATP treated both wrists and eventually recommended surgery on both hands. After eighteen months of treatment, the ATP opined that the left wrist injury was work-related, and the employer contested the

94. *Id.* at 14, 769 S.E.2d at 735.
95. 295 Ga. 825, 462 S.E.2d 606 (1995).
96. *Burns*, 331 Ga. App. at 14-16, 769 S.E.2d at 736.
97. *Burns*, 331 Ga. App. at 15, 769 S.E.2d at 736.
98. *Id.* at 16, 769 S.E.2d at 737.
99. 328 Ga. App. 308, 761 S.E.2d 850 (2014).
100. *Id.* at 309, 761 S.E.2d at 851.
101. *Id.* at 308, 761 S.E.2d at 850.
102. *Id.* at 309, 761 S.E.2d at 851.
103. 328 Ga. App. 557, 762 S.E.2d 617 (2014).
104. *Id.* at 563, 762 S.E.2d at 621.

left wrist injury.[105] The ALJ awarded benefits for the left wrist and assessed attorney fees against the employer for an unreasonable defense, pursuant to O.C.G.A. § 34-9-108(b)(1),[106] and the Appellate Division adopted this decision.[107] The superior court reversed the award of attorney fees.[108]

The issue on appeal was whether the superior court erred in reversing the Appellate Division based on the conflicting or inconsistent medical evidence.[109] The court of appeals reversed the superior court decision, holding that some evidence existed to support the ALJ's determination of unreasonable defense.[110] The court determined that the employer apparently did not controvert the left wrist injury–at least for several months after the date of the accident, if at all–and deferred to the ALJ's weighing of the evidence and determination on the credibility of the doctor's conflicting notes.[111] Because some evidence supported the ALJ's finding that the defense was at least, in part, without reasonable grounds, the award of assessed attorney fees was upheld.[112]

In *Monk v. Parker*,[113] the court of appeals held that the claimant's former counsel failed to perfect his attorney fee lien, as required by Georgia State Board of Workers' Compensation Rule 108(e),[114] because he did not properly serve a copy on all counsel.[115] Subsequent counsel moved to dismiss former counsel's lien, which the ALJ denied because the parties had not been harmed since they had received notice of the lien via the Board's electronic filing system.[116] However, the Appellate Division reversed, holding that notice of electronic filing was not a substitution for the service requirement under Board Rule 108(e) and, thus, the lien was not perfected.[117] The record on appeal was incomplete and lacked many pleadings and filings, including former counsel's attorney fee lien, the motions relating to the fee lien, and the Appellate

105. *Id.* at 558, 559, 762 S.E.2d at 618, 618-19. On a motion for reconsideration, the employer argued that the court ignored two WC-3 controverts of the claim, however, the court's review of the record and the Appellate Division's record index did not reveal any indication of the controverts. *Id.* at 563, 762 S.E.2d at 621.

106. O.C.G.A. § 34-9-108(b)(1) (2008).

107. *Waters*, 328 Ga. App. at 559, 762 S.E.2d at 619.

108. *Id.*

109. *Id.* at 558, 762 S.E.2d at 618.

110. *Id.* at 557, 762 S.E.2d at 617-18.

111. *Id.* at 561-62, 762 S.E.2d at 620.

112. *Id.* at 563, 762 S.E.2d at 621.

113. 331 Ga. App. 736, 771 S.E.2d 424 (2015).

114. Ga. Bd. Workers' Comp. R. 108(e) (2015).

115. *Monk*, 331 Ga. App. at 740-41, 771 S.E.2d at 428.

116. *Id.* at 737-38, 771 S.E.2d at 426.

117. *Id.* at 739, 771 S.E.2d at 427.

Division-approved stipulation and agreement (settlement); consequently, the court was unable to consider those documents.[118] The court of appeals found no error in the superior court's affirmation and was unable to address former counsel's argument that he was divested of a property right established in the stipulation and agreement because those documents were not part of the record on appeal.[119]

118. *Id.* at 736, 771 S.E.2d at 425.
119. *Id.* at 741, 771 S.E.2d at 428.