SOUTH GEORGIA EMPLOYER COMMITTEE

AWORKERS= COMPENSATION - WHAT THE EMPLOYER MUST KNOW@

Qualified Accidents, Panel of Physicians, Return to Work

April 7, 2005
Valdosta, Georgia

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The Georgia workers= compensation system is governed by a series of statutes found at O.C.G.A. ' 34-9 and by Rules promulgated by the State Board of Workers= Compensation. As such, the circumstances under which an injured employee may successfully bring a claim are governed by statute and by opinions issued by the Georgia Court of Appeals and Supreme Court interpreting the statutes.

O.C.G.A. ' 34-9-1(4) reads in relevant part:

> >Injury= or >personal injury= means only injury by accident **arising out of and in the course of** the employment and shall not, except as hereinafter provided, include a disease in any form except where it results naturally and unavoidably from the accident. Except as otherwise provided in this chapter, >injury= and >personal injury= shall include the aggravation of a preexisting condition by accident **arising out of and in the course of employment**, but only for so long as the aggravation of the preexisting condition continues to be the cause of the disability . . . . >Injury= and >personal injury= shall not include injury

> caused by the willful act of a third person directed against an employee for reasons personal to such employee, nor shall >injury= and >personal injury= include heart disease, heart attack, the failure or occlusion of any of the coronary blood vessels, stroke, or thrombosis unless it is shown by a preponderance of competent and credible evidence, which shall include medical evidence, that any of such conditions were attributable to the performance of the usual work of employment. Alcoholism . . . shall not be deemed to be an >injury= or >personal injury= by accident arising out of and in the course of employment. Drug addiction . . . shall not be deemed to be an >injury= or >personal injury= by accident . . . except when such addiction or disability results from the use of drugs or medicines prescribed for the treatment of the initial injury by an authorized physician . . . .
> (emphasis added)

A. AArising out of@ and Ain the course of@ employment

Thus, for an injury to be found compensable, the accident must both Aarise out of@ as well as Ain the course of@ employment. O.C.G.A. '34-9-1(4). The determination of whether particular injuries arise out of and in the course of employment has been the source of much litigation, and is very fact intensive, i.e. dependent on the facts of each case. There are a number of gray areas where it is not clear whether a particular injury meets both requirements. Therefore, it is necessary for the employer to provide as much factual information to the insurance carrier or workers= compensation administrator as possible regarding whether or not an employee=s injury occurred while the employee was working during work hours, and whether the injury itself was related to the employment.

An accident Aarises out of employment@ when it is apparent to the rational mind upon consideration of all circumstances, that a causal connection exists between the conditions under which the work is required to be performed and the resulting injury. *Davis v. Houston General Insurance Company*, 141 Ga. App. 385 (1977). An injury does not Aarise out of employment@ if it was caused by a hazard to which the worker would have been equally exposed apart from the employment. *Mayor and Alderman of City of Savannah v. Stevens*, 278 Ga. 166 (2004). Furthermore, an injury occurs Ain the course of employment@ when it occurs within the period of employment, at a place where the employee reasonably may be in the performance of his duties, while he is fulfilling those duties or engaged in doing something incidental thereto. *New Amsterdam Casualty Company v. Summer*, 30 Ga. App. 682 (1928).

It can be difficult to understand conceptually the distinctions between Aarising out of@ employment and Ain the course of@ employment. Nevertheless, the courts treat these as two separate and distinct matters that must be shown.

For example, if an employee was injured on the job as a result of an altercation with a co-employee

due to reasons personal to the employee and thus not related to issues of employment, generally that injury would not be held compensable since it did not Aarise out of@ the employee=s employment. And based on the fact that the fight was caused for personal reasons, there would be no causal connection between the employee=s job duties and his injury.

Similarly, as to the Ain the course of employment@ analysis, the employer must determine whether or not the employee=s accident actually occurred while the employee was working during normal work hours. For instance, if an employee suffers an injury while on a regularly scheduled lunch break, then the injury would generally not be compensable. Nevertheless, if an employee suffers an injury while coming into work or suffers an injury after just finishing a shift, many cases in Georgia have held that injury would be in the course of employment.

A complete discussion of the various exceptions and interpretations of the above would be beyond the scope of this presentation, however, a few of the more common situations are:

1) Going to/from work: Generally not compensable because employee is not in the course of his employment. However, there are numerous exceptions, primarily involving employees who are Aon call@ or furnished transportation by the employer to travel from one employment premises to another or going to and from employer provided parking.

2) Reasonable ingress/egress from employment premises: Even if the employee is Aoff the clock@ or not yet Aon the clock@, he is allowed a reasonable period of time for ingress and egress and an injury during this time will be compensable. For example, an employee clocks out and while walking through the building to exit suffers a fall. This is compensable even though the employee was not actively engaged in any work activity at the time.

3) Business trips: Generally, an injury to an employee traveling on business for his employer will arise out of and in the course of employment if the employee is injured as a result of the hazards encountered because of his travel.

4) Idiopathic injury: May not Aarise out of employment@ even though the fall may occur Ain the course of employment@. For example, where an employee was walking across the parking lot to the employment premises and felt popping in her left knee (which was diagnosed as cartilage tear), but did not slip, trip, fall or contact any employment related object, the injury

was not compensable. The medical evidence showed that the injury could have occurred anytime the employee was walking, i.e. there was no particular connection to her employment. (However, to show how complex these issues can become, in the particular example above, the ALJ and State Board Appellate Division found the injury did not arise out of the employment; the Superior Court reversed and found that it did; and the Georgia Court of Appeals reversed the Superior Court and found the injury did not arise out of employment. *See*, *Chaparral Boats v. Heath*, 269 Ga.App. 339 (2004).

5) Lunch breaks: If the employee is on a regularly scheduled lunch break (or rest break) and is not subject to the employer=s demands or control during that time (and is not performing any employment related activity) then an injury occurring during the break is not compensable.

6) The company picnic: What if an employee is injured or even killed while participating in a company picnic or other social activity? This depends on a number of factors, including: whether the event is on work premises, whether employee participation is required expressly or by implication, and whether the employer derives any substantial benefit from the activity. *See*, *Pizza Hut of America v. Hood et.al.*, 198 Ga.App. 112 (1990).

These are some of the issues revolving around the requirement that an injury arise out of and in the course of employment. The total of possible examples is limited only by human behavior and the particulars of each claim.

B. Aggravation of a pre-existing condition

Aggravation of a pre-existing condition is specifically included in the definition of injury in O.C.G.A ' 34-9-1(4). Except as otherwise provided in the Act, the term injury includes Aaggravation of a pre-existing condition by accident arising out of and in the course of employment, but only for so long as the aggravation of pre-existing condition continues to be the cause of the disability; the pre-existing condition shall no longer meet this criteria when the aggravation ceases to be the cause of the disability.@ Note that the definition clearly identifies Aaggravation of a pre-existing condition.@ The aggravation of a pre-existing infirmity, congenital or employment related, is compensable.

Where an employee sustains an on-the-job injury, but thereafter, returns to work and ultimately ceases work due to the aggravation of the pre-existing condition through the performance of the post-injury work activities (and not any specific occurrence), the employee may be deemed to have sustained a Afictional new

accident@ as of the date that performance of the job ceased. The Afictional new accident@ theory of recovery was developed to escape claims being barred by the statute of limitation on a change of condition claim or the initial injury.

In the *Chaparral Boats* case mentioned in the preceding section, the claimant ultimately was able to recover workers= compensation benefits because, although her initial cartilage tear suffered while walking across the parking lot was not compensable, she subsequently suffered an aggravation of that injury while performing her regular job activities, which was compensable as an aggravation of a pre-existing condition.

C. Heart attack and stroke

Heart attack and stroke Ainjury@ cases are very fact intensive and dependent on the particular medical evidence of each case. It is impossible to draw many generalizations about such claims and their compensability.

O.C.G.A. ' 34-9-1(4) provides that heart attack and stroke injuries are not compensable unless it is shown by a preponderance of competent and credible evidence, which **must** include medical evidence, that the condition was attributable to the performance of the usual work of employment. When the medical evidence shows that the exertion or stress of the job is a contributing precipitating factor in the heart attack or stroke event, then the injury may be compensable.

D. Hernia

O.C.G.A. ' 34-9-266 provides that, in all claims for compensation for hernia, it must be Adefinitely@ proved to the satisfaction of the board A(1) that there was an injury resulting in hernia, (2) the hernia appeared suddenly, (3) the hernia was accompanied by pain, (4) the hernia immediately followed an accident, and (5) the hernia did not exist prior to the accident for which compensation is claimed@.

E. Willful misconduct/horseplay

O.G.G.A. ' 34-9-17(a) provides that: ANo compensation shall be allowed for an injury or death due to the employee=s willful misconduct, including intentionally self-inflicted injury, or growing out of his or her attempt to injure another, or for the willful failure or refusal to use a safety appliance or perform a duty required by statute.@

F. Psychic injury

There must be a Adiscernable physical injury@ and a psychological injury is compensable only if it Aarises naturally and unavoidably@ from some discernible physical occurrence. *Abernathy v. City of Albany*,

269 Ga. 88 (1998).

However, if there is a physical injury sustained that causes psychic trauma or even contributes to the continuation of psychic trauma, then the psychic trauma is compensable. *Id*.

G. Intoxication/Under the Influence

O.C.G.A. ' 34-9-17(b) provides:

> (b) No compensation shall be allowed for an injury or death due to intoxication by alcohol or being under the influence of marijuana or a controlled substance, except as may have been lawfully prescribed by a physician for such employee and taken in accordance with such prescription:
>
> (1) If the amount of alcohol in the employee's blood within three hours of the time of the alleged accident, as shown by chemical analysis of the employee's blood, urine, breath, or other bodily substance, is 0.08 grams or greater, there shall be a rebuttable presumption that the accident and injury or death were caused by the consumption of alcohol;
>
> (2) If any amount of marijuana or a controlled substance as defined in paragraph (4) of Code Section 16-13-21, Code Sections 16-13-25 through 16-13-29, Schedule I-V, or 21 C.F.R. Part 1308 is in the employee's blood within eight hours of the time of the alleged accident, as shown by chemical analysis of the employee's blood, urine, breath, or other bodily substance, there shall be a rebuttable presumption that the accident and injury or death were caused by the ingestion of marijuana or the controlled substance; or
>
> (3) If the employee unjustifiably refuses to submit to a reliable, scientific test to be performed in the manner set forth in Code Section 34-9-415 to determine the presence of alcohol, marijuana, or a controlled substance in an employee's blood, urine, breath, or other bodily substance, then there shall be a rebuttable presumption that the accident and injury or death were caused by the consumption of alcohol or the ingestion of marijuana or a controlled substance.
>
> (c) With the exception of the rebuttable presumptions set forth above, the burden of proof shall be generally upon the party who claims an exemption or forfeiture under this Code section.

Note that under the statute, there is a Arebuttable presumption@ that the injury was caused by consumption or ingestion of alcohol, marijuana or a controlled substance if there is a positive test meeting the requirements of sections (b)(1) or (b)(2). The rebuttable presumption also arises if the employee unjustifiably refuses to submit to testing under (b)(3). In legal terms, when the rebuttable presumption arises, the burden of proof shifts to the *employee* to show that the injury was *not* caused by intoxication or ingestion of controlled substances.

However, even when there is a positive test result that meets the requirements of (b)(1) or (b)(2), the employer must conduct a thorough investigation into the circumstances surrounding the injury in order to ensure a successful result. For example, suppose an employee is on a stand on a production line, following all the proper procedures, and the stand collapses due to a mechanical defect, causing injury to the employee. Even if a post-accident test shows the presence of marijuana, the employee will be able to prove that his

injury was not caused by ingestion of marijuana, but was instead caused by the faulty stand. Accordingly, a positive test result does not result in an automatic denial of benefits. The employee can win his claim at a hearing if he can prove that the accident was not caused by his intoxication or ingestion of a controlled substance.

On the other hand, the employer may still prevail even though its testing does not meet the requirements of (b)(1) or (b)(2), or even if no testing was conducted at all. However, when the test is not in compliance with the statute, or where there is no test, the rebuttable presumption does not arise, and the *employer* bears the burden of proving that the injury was caused by intoxication or ingestion of controlled substances.

Practically speaking, there are a number of ways the employer might prove such a case. For example, the employer could introduce scientific evidence to show that the testing conducted, though not in accordance with (b)(1) or (b)(2), nevertheless is valid and demonstrates the employee was under the influence at the time of the accident. The employer might also introduce testimony of eyewitnesses who saw the employee ingest a substance shortly before the accident, observed the employee exhibiting signs of intoxication, etc.

As with any litigated workers= compensation claim, the facts of each case, the testimony of witnesses, and the medical evidence (in this case, drug and/or alcohol test results) will be key to determining whether the injury is one which is compensable under the Act.

Conclusion

The examples cited are just some of the myriad circumstances encountered by employers, insurers, claims adjusters and attorneys when working in the workers= compensation system. While there are some discernible bright line rules, there are more areas of gray or uncertainty. The outcome in any particular case is highly dependent on the exact factual circumstances. Therefore, it is of critical importance that the employer conduct a thorough investigation of each accident. Eyewitness accounts and the recording of as much detail as possible becomes invaluable when a claim is litigated on issues such as those discussed above.

II. Panel of Physicians

C. Selection of Physician - Code Sections 34-9-201., 34-9-208. & State Board Rules 201, 208*

1) **Conformation of Physician Panels**

a) **Traditional Panel of Physicians**

1) A minimum of six (6) non-associated physicians
2) At least one (1) physician must practice the specialty of Orthopedic Surgery
3) A maximum of two (2) industrial clinics
4) At least one (1) minority physician

b) **Conformed Panel of Physicians**

1) A minimum of ten (10) non-associated physicians
2) At least one (1) physician must practice the specialty of Orthopedic Surgery
3) At least one (1) physician must practice the specialty of General Surgery
4) At least one (1) physician must practice the specialty of Chiropractic Medicine
5) At maximum of two (2) industrial clinics
6) At least one (1) minority physician

c) **Panel for Managed Care Organization Procedures**

1) Network of physicians under contract with WC/MCO
2) A case manager (certified as CRRN, CCM, COHN, or COHN-S) must coordinate medical care from time of injury
3) State Board certifies WC/MCO network by county
4) Networks offer medical fee discounts
5) Network must include:

-General medical physicians; and
-Orthopedic surgeons (including hand/upper extremity specialists); and
-Neurologists & Neurosurgeons; and
-General surgeons; and
-Chiropractors; and
-Physical & Occupational therapists; and
-Diagnostic pathology & laboratory services; and

-Radiology services; and
-Hospital, outpatient surgery & emergency care services

6) Minority physicians & practitioners must be included

d) **Posted Panels - General Provisions**

1) Employers must post panel (traditional, conformed and managed care organization) in a prominent location, accessible to all employees

2) Employers must take all reasonable measures to ensure that all employees:
   a) Understand the function of the panel or WC/MCO members when necessary; and
   b) Are given assistance in contacting panel or WC/MCO members when necessary

3) Physicians must be reasonably accessible to employees

4) Employee may select a physician from the posted panel/network directory

5) Emergency situations may preclude panel restrictions until the emergency status resolves

6) Employee may select to make one (1) change of physician to another panel or network physician

7) The State Board may order a change of physician at the request of the Employer, the Employee or upon its own Motion

8) If the Employer controverts the claim they may not restrict the Employee to the posted panel

9) If the Employer fails to provide any of the requirements; the Employee may select any physician to provide treatment and will also be entitled to one change of physician

e) **Authorized Treating Physician/Specialty Referrals**

1) The physician selected by the Employee is the authorized treating physician in control of the Employee=s medical care

2) The authorized treating physician may arrange for any consultation, referral, extraordinary or other specialized medical services

3) A referral physician is not permitted to make additional referrals

III. Return to Work

A) O.C.G.A. ' 34-9-240; Rule 240; Forms WC-240 and WC-240A

B) O.C.G.A. ' 34-9-262, Temporary Partial Disability