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LABOR AND INDUSTRIAL RELATIONS Workers' Compensation Reform

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LABOR AND INDUSTRIAL RELATIONS

Workers' Compensation Reform

The 1987 General Assembly made extensive changes in the workers' compensation laws in the state of Georgia, pursuant to recommendations spearheaded by the Governor's Committee on Workers' Compensation, which was initially assembled by the Governor in 1984.[1] Nine separate bills were enacted during the 1987 session. Ten other bills were introduced, but failed to pass both houses. Part of the legislation that passed was recommended by the Governor's Committee.[2]

The new legislation involves changes in issues regarding coverage, evidentiary matters, statutes of limitations, procedural devices, authority of the Workers' Compensation Board, administration of worker benefits, and indemnification. This article discusses each Act individually, indicating changes made by each Act and the purposes behind these changes.

HB 245

HB 245 alters the definition of a municipality to broaden the scope of state authorized organizations which can provide self insurance programs for employees.[3] The previous definition was limited to incorporated municipalities of the state and consolidated city-county governments. The broader definition includes "any local public authority, commission, board, or other similar agency which is created by a general or local act of the General Assembly and which carries out its functions wholly or partly within the corporate boundaries of an incorporated municipality of this state."[4] Also included are bodies "created or activated by an ordinance or resolution of the governing body of a municipal corporation, individually or jointly with other political subdivisions of the state."[5]

The second provision of the Act deals with housekeeping measures regarding the requirement of excess insurance for self-insurer funds.[6] The major change in this Code section is the requirement that the insurance excess loss funding program of a self-insurance fund must be approved by

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1. Telephone interview with Lee Southwell, Chief Administrative Attorney, Georgia State Board of Workers' Compensation (May 21, 1987).
2. *Id.*
3. O.C.G.A. § 34-9-151(11) (Supp. 1987).
4. *Id.*
5. *Id.*
6. O.C.G.A. § 34-9-161(b) (Supp. 1987). "Fund" is defined in O.C.G.A. § 34-9-151(6) (Supp. 1987).

the commissioner as a condition to issuance and maintenance of a certificate of authority.[7] Previously, terms, liability limits, cancellation provisions, and retention amounts related to the excess loss funding program merely had to meet guidelines "acceptable" to the commissioner.[8] This new provision was largely a housekeeping measure designed to increase the control of the commissioner over such programs.[9]

HB 342

HB 342 broadens the definition of an "employee" under O.C.G.A. § 34-9-1(2) to include "elected members of the governing authority" of an individual county, when provided for by a county resolution.[10] Prior to the enactment of this provision, an elected official could not recover workers' compensation benefits from his or her government employer.

This new provision represented a response by the legislature to a recognized gap in the law.[11] The need to address this issue was recognized when the State Superintendent of Public Instruction, Charles McDaniel, died of a heart attack in 1986.[12] McDaniel's family did not recover workers' compensation benefits, based on a state attorney general's opinion, which specifically called for exclusion of benefits for such elected officials.[13]

HB 557

HB 557 was twice amended in conference committee and finally passed on the last day of the 1987 session.[14] The Act contained two separate provisions. The first provision clarifies the definition of an employee to exclude an independent contractor from this definition. Under the new Act, an individual is considered an independent contractor "if such person has a written contract as an independent contractor and if such person buys a product and resells it, receiving no other compensation, or provides an agricultural service or such person otherwise qualifies as an independent contractor."[15]

The practical effect of this provision, due to its narrow scope, is to exclude from coverage two categories of workers: newspaper carriers and those persons who raise chickens on farms owned by a poultry company and receive free room and board and a pay rate based on the number of

7. O.C.G.A. § 34-9-161(b) (Supp. 1987).
8. O.C.G.A. § 34-9-161(b) (1982).
9. Interview with Judge James Oxendine, Chairman of the Georgia State Board of Workers' Compensation, in Atlanta (May 21, 1987) [hereinafter Oxendine Interview].
10. O.C.G.A. § 34-9-1(2) (Supp. 1987).
11. Oxendine Interview, *supra* note 9.
12. *Id.*
13. *Id.*
14. *Id.*; Final Composite Status Sheet, March 12, 1987.
15. O.C.G.A. § 34-9-1(2) (Supp. 1987).

chickens they raise.[16] This provision was controversial, but nevertheless passed on the session's final day.[17]

The second provision of the Act expands the definition of a "member" to include "a trade association or professional association which elects to cover its own employees under a fund established by its members"[18] under O.C.G.A. § 34-9-161(a). This provision allows trade and professional associations to administer self-insurance programs when these associations meet all other requirements of the law. The State Board of Workers' Compensation, a supporter of the bill, received numerous complaints from trade and professional associations who wished to administer such programs and could not under prior law.[19] The Board could see no legitimate reason why such associations should not have this power,[20] and the Legislature agreed.

The key benefit of this provision is "to give the trade associations the opportunity to administer their own destiny."[21] Hence, such associations will now have complete control over the administration and settlement of their own claims. Funds set up through insurance companies allow the insurance carriers absolute control over the administration and settlement of claims.[22] The control that self-insurers derive from the administration and settlement of their claims often leads to substantial cost savings.[23] Accordingly, trade and professional organizations will now be able to realize these benefits.

HB 839

HB 839 expands the definition of a "health care provider" to include "a rehabilitation supplier registered with the State Board of Workers' Compensation."[24] The role of a professional health care provider is to "evaluate the quality and efficiency of services ordered or performed by other professional health care providers" in the form of a peer review organization.[25]

The Act is significant because rehabilitation suppliers registered with the State Board of Workers' Compensation who participate on a peer review organization will have the same immunity granted other participants under O.C.G.A. § 31-7-132.[26] Therefore, registered rehabilitation suppliers

16. Oxendine Interview, *supra* note 9.
17. *Id.*
18. O.C.G.A. § 34-9-151(10) (Supp. 1987).
19. Oxendine Interview, *supra* note 9.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. O.C.G.A. § 31-7-131(2)(L) (Supp. 1987).
25. O.C.G.A. § 31-7-131(1) (Supp. 1987).
26. O.C.G.A. § 31-7-132 was amended by the 1987 General Assembly. As amended, this Code section grants immunity to a "professional health care provider." O.C.G.A. §

cannot be sued individually for any claims arising out of their participation on a peer review organization.

SB 132

SB 132 enacted five separate procedural provisions which were proposed by the State Board of Workers' Compensation.[27] These provisions are largely housekeeping measures designed to correct discrepancies recognized in previous laws under the Code.[28]

The first provision limits the dependency of a partial dependent to the same conditions to which a surviving spouse has been subject under past legislation. Under the new provision, the dependency of both the surviving spouse and the partial dependent "shall terminate at age 65 or after payment of 400 weeks of benefits, whichever is greater."[29] Prior to this Act, a partial dependent had unlimited benefits; whereas, a surviving spouse was limited to payments for 400 weeks. The new Act brings both under the 400 week rule. This provision was designed to correct an inadvertent mistake made in the law several years ago.[30]

The second provision changes the notification deadlines in O.C.G.A. § 34-9-103(a)[31] and appeal deadlines in O.C.G.A. § 34-9-105(b)[32] from thirty days to twenty days. Accordingly, appeals taken to the Board from an administrative law judge award and to the superior court from a board award are now limited to a period of twenty days from the date of the award. This provision puts the appellate procedures in line with the penalty provisions of O.C.G.A. § 34-9-221.[33] The thirty day appeal provision, which is amended by this Act, was originally enacted to be in accord with the appeals procedures of the Georgia Civil Practice Act.[34] However, attorneys were often subjected to the twenty day penalty provision when they filed their appeals between the twentieth and thirtieth day.[35] The Act corrects this discrepancy by providing a twenty day deadline under each provision.

The third provision requires insurers and self-insurers to "designate and maintain an office in the State of Georgia for the handling of [workers' compensation] claims or shall designate an agent located in the State of Georgia who shall be authorized to execute instruments for the pay-

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31-7-132(a) (Supp. 1987).

27. Oxendine Interview, *supra* note 9.

28. *Id.*

29. O.C.G.A. § 34-9-13(e) (Supp. 1987).

30. Oxendine Interview, *supra* note 9.

31. O.C.G.A. § 34-9-103(a) (Supp. 1987) (notice provision).

32. O.C.G.A. § 34-9-105(b) (Supp. 1987) (appeal provision).

33. The penalty deadline under the present statute is 20 days. O.C.G.A. § 34-9-221(f) (Supp. 1987).

34. O.C.G.A. § 5-3-20(a) (1982).

35. Oxendine Interview, *supra* note 9.

ment of compensation."[36] The primary purpose of this provision is to give the board jurisdiction over all insurers.[37] Therefore, the Board is able to assess fines for violations. Previously, insurers located outside the state, who were not subject to the Board's jurisdiction, were difficult to handle effectively.[38]

The fourth provision limits "[t]he pecuniary liability of the employer for medical, surgical, hospital service or other treatment required, when ordered by the board," to those charges for medical treatment prevailing within "the State of Georgia."[39] In 1985, the General Assembly enacted O.C.G.A. § 34-9-205(b) which limited an employer's liability to charges prevailing "in the same community" and required the Board to publish a fee schedule of reasonable charges for geographic regions within the state. The Board encountered difficulties in determining what constituted a geographic region[40] and found inconsistencies among regions which made discrepancies in the board schedule difficult to reconcile.[41] From a legal perspective, the Board was concerned that the practice of publishing such a schedule might be ruled unconstitutional[42] under the Georgia Constitution as a violation of due process.[43] Accordingly, the new Act provides for a uniform schedule which considers the state as one geographic region.

The final provision of SB 132 amends O.C.G.A. § 34-9-221(a) by requiring that claimants with an address of record in Georgia must be paid by legal tender or a negotiable instrument drawn on a Georgia depository.[44] The provision also provides that when "an application for exception is made to the State Board of Workers' Compensation and the applicant demonstrates that reasonable methods of payment exist that will assure the timely receipt of payment of compensation benefits to the claimant," then out of state checks might be accepted.[45]

The primary purpose of this provision is to ensure that the claimants receive their benefits once the claim has been adjudicated.[46] Under prior law, insurance companies often issued drafts drawn on distant banks.[47] Local banks are permitted by law to delay payment on drafts until the

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36. O.C.G.A. § 34-9-131(b) (Supp. 1987).
37. Oxendine Interview, *supra* note 9.
38. *Id.*
39. O.C.G.A. § 34-9-203 (Supp. 1987).
40. Oxendine Interview, *supra* note 9.
41. For example, doctors in Savannah traditionally have charged greater fees than doctors in Atlanta. *Id.*
42. *See* GA. CONST. art. I, § 1, ¶ 1.
43. Oxendine Interview, *supra* note 9.
44. O.C.G.A. § 34-9-221(a) (Supp. 1987).
45. *Id.* This waiver provision has the practical effect of applying only to out of state banks with a correspondent bank within Georgia that will honor their check. Oxendine Interview, *supra* note 9.
46. Oxendine Interview, *supra* note 9.
47. *Id.*

funds are received from the drawer bank.[48] The new Act discourages the use of such drafts and provides for timely payment to claimants.[49]

SB 133

SB 133 represents a complete revision of the occupational disease law in Georgia and is based on recommendations made by the Governor's Study Committee.[50] This bill was a bipartisan effort supported by both management and labor.[51] Lieutenant Governor Zell Miller also was an active supporter of the Act.[52] The Act redefines "occupational disease," abolishes the medical board, and modifies the provision containing the statute of limitations for occupational disease claims. There are sixteen separate provisions in the Act, many of which repeal various laws and parts of laws which conflicted with the major revisions described above.

In O.C.G.A. § 34-9-280, the term "disablement" is redefined to mean "the event of an employee becoming actually disabled to work, as provided in Code §§ 34-9-261, 34-9-262, and 34-9-263, because of occupational disease."[53] Second, the bill eliminates the objective definitions of the terms "asbestosis,"[54] "occupational disease,"[55] "silicosis,"[56] and "byssinosis."[57] The new standard[58] provides a subjective review in each case, which may ease the burden of the employee in proving that he or she has developed an occupational disease that arose out of and in the course of employment.[59]

Prior law attempted to define each individual occupational disease. Previously, lawyers were essentially attempting to do the work of doctors.[60] The Board believed that the former classifications were "not germane to the present day method of evaluation of a person who may or may not have an occupational disease."[61] The Legislature responded to the Board's concerns by eliminating the objective classifications in favor of a subjective review standard.

The subjective formulation adopted by the General Assembly has the effect of treating occupational diseases under the same standards typically applied to other workers' compensation injuries. The repeal of vari-

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. O.C.G.A. § 34-9-280(1) (Supp. 1987).
54. 1982 Ga. Laws 2485, 2491 (formerly found at O.C.G.A. § 34-9-280(1)).
55. 1982 Ga. Laws 2485, 2491-93 (formerly found at O.C.G.A. § 34-9-280(3)).
56. 1982 Ga. Laws 2485, 2489 (formerly found at O.C.G.A. § 34-9-280(4)).
57. 1982 Ga. Laws 2485, 2494 (formerly found at O.C.G.A. § 34-9-280(2)).
58. O.C.G.A. § 34-9-280(2) (Supp. 1987).
59. Oxendine Interview, *supra* note 9.
60. *Id.*
61. *Id.*

ous provisions, which were closely related to the objective classifications previously discussed, reflect this shift in approach. The Act amends O.C.G.A. § 34-9-330 by striking the entire provision containing the definition of disablement due to silicosis and asbestosis. Second, the requirement of medical examinations for newly hired employees, in any business in which employees are subject to the hazard of exposure to silicosis and asbestosis under O.C.G.A. § 34-9-331, also is abolished. Third, fixation of liability for compensation for silicosis and asbestosis under O.C.G.A. § 34-9-332 is abolished in favor of the general standard applied to occupational injuries. Fourth, the presumption of disability or death resulting from silicosis or asbestosis under O.C.G.A. § 34-9-333 is abolished. Fifth, O.C.G.A. § 34-9-334, relating to payment of compensation for silicosis or asbestosis, is abolished. Sixth, O.C.G.A. § 34-9-335, allowing for waiver of compensation for silicosis or asbestosis by an employee wishing to continue employment even though such employee has already been predisposed to the disease, is similarly abolished. Finally, as a housekeeping measure, O.C.G.A. § 34-9-289 was amended to reflect the elimination of the classifications listed under O.C.G.A. § 34-9-280.

The second major series of amended provisions relate to abolishing the medical board.[62] Under the new Act, contested medical questions are no longer reviewed by the medical board. Instead, "the parties may agree to refer the employee to a licensed physician specializing in the diagnosis and treatment of the disease at issue for an independent medical examination and report."[63] Should the parties be unable to "agree on the referral to be made, the State Board of Workers' Compensation shall refer the employee to a licensed physician who specializes in diagnosis and treatment of the disease at issue and who is certified by the appropriate medical board in the field encompassing such disease for an independent medical examination and report."[64]

In the event a claim is filed "for compensation or death from an occupational disease where an autopsy is necessary," the Board may order the autopsy.[65] In cases in which no claim has been filed, the Board is authorized, on its own motion or upon application, to order an autopsy "upon presentation of facts showing that a controversy may arise in regard to the cause of death or existence of any occupational disease."[66]

Members of the State Workers' Compensation Board believed that the medical board was unable to provide the degree of specialization necessary to reach a fair and informed assessment of those unique diseases covered by the law.[67] The medical board was composed of five members,

62. O.C.G.A. § 34-9-310 (Supp. 1987).
63. O.C.G.A. § 34-9-310(a) (Supp. 1987).
64. *Id.*
65. O.C.G.A. § 34-9-310(c) (Supp. 1987).
66. *Id.*
67. Oxendine Interview, *supra* note 9.

and in many cases none of the members had the degree of specialization which would provide them with sufficient expertise to make the necessary medical determinations.[68]

Previously, the findings of the medical board were considered conclusive.[69] Under the new Act, the "findings and conclusions contained in such report or testimony of such physician [agreed upon by the parties or appointed by the Board to examine the employee] shall create a presumption of correctness of such findings and conclusions, which presumption may be rebutted by other competent evidence."[70] These amendments reflect the position of the Workers' Compensation Board to develop a statute which could allow for the "highest and best evidence by having a doctor examine the employee and determine whether the individual has the disease or not."[71]

As a result of the abolishment of the medical board, O.C.G.A. § 34-9-292, providing for payment of expenses, was amended to reflect this change. O.C.G.A. § 34-9-311, relating to the investigation of medical questions and hearings before the medical board and O.C.G.A. § 34-9-312, relating to the conclusiveness of the medical board's findings, were eliminated from the Code.

The third major provision of the Act relates to the statute of limitations period for occupational diseases provided under O.C.G.A. §§ 34-9-281(b)(2), 34-9-281(b)(3), and 34-9-281(d). Under prior law, the limitation period was three years from the date of last exposure for byssinosis, silicosis, or asbestosis and one year for other occupational diseases.[72] The 1987 Act provides for a one year statute of limitation from the time the employee knew or should have known of the disease; however, in no case, may a suit be brought more than seven years after the last exposure.[73] The new limitation period was supported by management, who recognized that the previous law's one year provision would likely be nullified if the issue were ever attacked in state or federal court.[74]

Finally, SB 133 enacts three additional provisions which are important. First, under O.C.G.A. § 34-9-284, the date of injury for the purposes of fixating liability for compensation for occupational diseases is amended. Under the new law, "[t]he date upon which the employee first suffers disablement from the occupational disease or the last date the employee was employed by any employer, whichever date would provide the higher average weekly wage for such employee, shall be deemed the date of the

68. *Id.*

69. 1946 Ga. Laws 103 (formerly found at O.C.G.A. § 34-9-312).

70. O.C.G.A. § 34-9-310(e) (Supp. 1987).

71. Oxendine Interview, *supra* note 9.

72. 1946 Ga. Laws 103 (formerly found at O.C.G.A. § 34-9-281(b)(2)).

73. O.C.G.A. § 34-9-281(b)(2) (Supp. 1987).

74. Oxendine Interview, *supra* note 9. *See* Synalloy v. Newton, 254 Ga. 174, 326 S.E.2d 470 (1985).

injury for the purposes of determining the average weekly wage . . . ."[75]

Second, O.C.G.A. § 34-9-286 which denied benefits to an individual whose relationship to the deceased employee arose subsequent to the beginning of the first compensable disability, even though the relationship was such that it would otherwise give a right to compensation, was abolished. Third, O.C.G.A. § 34-9-287, relating to exposure to substances causing an occupational disease occurring before April 30, 1946, also was abolished.

SB 187 and SB 188

SB 187 and SB 188 are companion bills, which together give the State Workers' Compensation Board the absolute authority to appoint a guardian for an incapacitated adult, eighteen years of age or older, to handle all aspects of the workers' compensation claim of that adult.[76] SB 187 amended O.C.G.A. § 29-5-1, and SB 188 amended O.C.G.A. § 34-9-226.

The new Acts clarify the authority of the Board. Under prior law the board had the authority to appoint a guardian *ad litem* for a child.[77] Although it was generally believed that the Board already had the authority provided in the new provisions,[78] the Acts clarified that authority. The effect of these bills is to ensure that the Board now has the direct authority to appoint a guardian for an incapacitated adult employee seeking compensation, rather than having to seek such an appointment from a probate judge.[79]

SB 312

SB 312 provides limitations on payments of medical expenses from the Subsequent Injury Trust Fund and also provides a method for the resolution by the board of any discrepancies about the payment of these expenses.[80] This provision is the fourth prerequisite to reimbursement from the fund enacted by the General Assembly in the past three sessions,[81] which set guidelines for insurers to follow in seeking indemnification from the Subsequent Injury Trust Fund.

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75. O.C.G.A. § 34-9-284 (Supp. 1987).
76. Oxendine Interview, *supra* note 9.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *See* O.C.G.A. § 34-9-360(c)-(e) (Supp. 1987).