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The Status of the Workers' Compensation System in Georgia and Proposed Changes: Remedies for the Remedy

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INTRODUCTION

The Workers' Compensation System has two purposes: to provide relief to injured employees without regard to fault; and to protect employers from excessive damage awards.¹ To serve these interests, Georgia Senator Harrill L. Dawkins created a committee of labor leaders, insurance executives, corporate representatives, doctors, and other interested persons who suggested revisions in the Workers' Compensation Act.² The Georgia General Assembly enacted many of these revisions during its 1990 session.³

This article reviews the status of several components of the recently modified Workers' Compensation Act and proposes legislative or administrative changes to assist in achieving the

1. *Samuel v. Baitcher*, 247 Ga. 71, 73, 274 S.E.2d 327 (1981) (citing *Slaten v. Travelers Ins. Co.*, 197 Ga. 1, 2-3 (1943)).

2. Joint Workers Compensation Study Committee, created by HR 810, 1990 Ga. Laws 972.

3. SB 464, 1990 Ga. Gen. Assem., 1990 Ga. Laws 1409 (codified at O.C.G.A. § 34-9-1 to -389 (Supp. 1990)).

dual objectives of the system. The article neither analyzes the entire system, nor highlights all recent developments in the field.⁴

I. OVERVIEW OF THE CURRENT SYSTEM AND PROPOSED CHANGES

In Georgia, a worker who requires compensation for an on-the-job injury must notify his employer within thirty days after the injury occurs.⁵ The employer must then report the injury to the State Board of Workers' Compensation.⁶ Many claims are compensable, and the employer, through workers' compensation insurance or self-insurance,⁷ must pay several forms of benefits: compensation to the injured worker for total or partial reduction of income caused by the injury;⁸ losses from any permanent physical impairment to the worker;⁹ and all appropriate medical care¹⁰ and rehabilitative services.¹¹ In return, the injured worker is barred from suing the employer or fellow employees for on-the-job injuries.¹²

When an employee challenges and litigates a claim, the State Board of Workers' Compensation assigns the dispute to the appropriate administrative law judge.¹³ Appropriate notice is served, and hearings are held.¹⁴ The decision, or "award," of the administrative law judge may be appealed to the Board for de novo review of all findings and conclusions.¹⁵ Subsequent appeals, subject to the "any evidence" standard of review,¹⁶ are heard in

4. For a review of the entire system see J. HIERS & R. POTTER, *GEORGIA WORKERS' COMPENSATION LAW AND PRACTICE* (2d ed. 1988); J. QUILLIAN, *GEORGIA WORKERS' COMPENSATION CLAIMS, WITH FORMS* (1990).

5. O.C.G.A. § 34-9-80 (1988).

6. O.C.G.A. § 34-9-12 (1988); RULES AND REGULATIONS, STATE BOARD OF WORKERS' COMPENSATION R.12 (Supp. 1990).

7. O.C.G.A. § 34-9-150 (1988).

8. O.C.G.A. §§ 34-9-261 to -262 (1988 & Supp. 1990).

9. O.C.G.A. § 34-9-263 (1988).

10. O.C.G.A. § 34-9-200 (Supp. 1990).

11. O.C.G.A. § 34-9-200.1 (1988 & Supp. 1990).

12. O.C.G.A. § 34-9-11 (Supp. 1990).

13. O.C.G.A. § 34-9-100(a), (c) (1988).

14. O.C.G.A. § 34-9-102(a) (1988).

15. O.C.G.A. § 34-9-103 (1988). See *Complete Auto Transit, Inc. v. Davis*, 106 Ga. App. 369, 126 S.E.2d 909 (1962) (holding that the Board's review of an appeal of an Award is a de novo proceeding).

16. See *Cobb Gen. Hosp. v. Burrell*, 174 Ga. App. 631, 331 S.E.2d 23 (1985). "The issue on appeal to the superior court is whether there is 'any evidence' to authorize a finding in accordance with the contentions of the *prevailing party* before the Full Board." *Id.* (emphasis in original).

the superior court of the jurisdiction in which the injury occurred.¹⁷ Thereafter, the parties may appeal to the court of appeals, which assumes jurisdiction on a discretionary basis,¹⁸ and then to the Supreme Court of Georgia. The supreme court hears workers' compensation cases only when three judges of the court of appeals dissent, or when cases conflict on a question of law.¹⁹

The goals of the proposed reforms in the Workers' Compensation System are: to increase weekly benefits to insured workers; to control medical and rehabilitation costs; to improve coordination between workers' compensation benefits and other social programs; to maximize benefits to legitimately qualified workers and remove from the workers' compensation program those properly supported by other programs; and to streamline and reduce administrative costs.

The proposed reforms constitute a large scale quid pro quo: some reforms substantially increase the benefits to injured workers, while other reforms reduce expenses, coordinate various types of benefits, and limit certain benefits. The proposals include: (1) raising maximum weekly benefits to \$300.00 per week, with a supplement of \$15.00 per week for each dependent child (up to four) living in the claimant's home for up to fifty-two weeks; (2) terminating total disability benefits at age sixty-five absent proof that, but for the injury, the claimant would have been employed after sixty-five; and (3) instituting administrative procedures to assist a claimant in obtaining unemployment benefits, social security disability, workers' compensation, and other forms of aid.

II. PROBLEMS WITH THE SYSTEM

Georgia's Workers' Compensation System is plagued by several problems, including low weekly income benefits; high insurance premiums; skyrocketing medical costs; rehabilitation abuses; and unlimited weeks of temporary total disability benefits and non-coordination of benefits programs.

17. O.C.G.A. § 34-9-105(b) (Supp. 1990). If the injury occurred in the state, the appropriate superior court is in the county in which the injury occurred; if the injury occurred out of state, the appropriate superior court is in the county in which the initial hearing was held. *Id.*

18. O.C.G.A. § 34-9-105(e); O.C.G.A. § 5-6-35(a), (f) (Supp. 1990).

19. GA. SUP. CT. R. 30(3) (1984).

A. Low Weekly Income Benefits

As of July 1, 1989, forty-eight states, the Virgin Islands, and the District of Columbia paid higher weekly benefits than Georgia.²⁰ The low weekly benefits the Georgia Workers' Compensation Program provides may actually *encourage* the questionable claim, and *discourage* the legitimate claim. A skilled worker who is injured on the job and candidly classifies the injury as "work related" will learn that the workers' compensation carrier will pay all medical bills without a deductible. Unfortunately, the laborer will then receive only \$225.00 per week during the period of disability.²¹ In addition, the laborer will be ineligible for group health or disability coverage. A laborer who is disabled for weeks or months may be displaced from a lucrative position and rendered unable to subsist independently. Because Georgia is an employment-at-will state, employers can even discharge injured workers, or workers filing workers' compensation claims, with impunity, simply paying out the claims. In this situation, workers may attempt to work surreptitiously, risking fraud claims from both former and new employers.²²

Georgia workers in these circumstances perceive the Workers' Compensation System as a financial insult. Ironically, the \$225.00 per week may be little over one-half of a worker's gross salary. Workers who are paid less per hour would receive a higher percentage of their gross pay.²³ Unscrupulous workers may be tempted to falsely report an injury as having aggravated a pre-existing condition. Faced with the prospect of compensating for a

20. U.S. CHAMBER OF COMMERCE, WORKERS' COMPENSATION LAWS 18 (1989) [hereinafter U.S. CHAMBER OF COMMERCE]. Georgia recently increased the maximum weekly rate to \$225.00. O.C.G.A. § 34-9-261 (Supp. 1990).

21. O.C.G.A. § 34-9-261 (Supp. 1990). The increase in the maximum benefit from \$175 to \$225 per week applies to injuries which occurred on or after July 1, 1990. *Id.* The minimum benefit is \$25 per week, and is two-thirds the average weekly wage, based on the thirteen weeks prior to the injury, up to the maximum. O.C.G.A. § 34-9-260 (1988); O.C.G.A. § 34-9-261 (Supp. 1990). This benefit is not considered gross income under the Internal Revenue Code. I.R.C. § 104(a)(1) (1988).

22. *See, e.g., Georgia Electric Co. v. Rycroft*, 259 Ga. 155, 378 S.E.2d 111 (1989) (claimant's false denial of previous back injury on employment application enabled employer to assert misrepresentation as a defense against employee's benefit claim).

23. *See* O.C.G.A. § 34-9-260 (1988); O.C.G.A. § 34-9-261 (Supp. 1990). Because the maximum benefit is \$225.00 per week, a worker who receives \$10.00 per hour cannot receive the normal benefit to two-thirds of his weekly wage; the \$225.00 would be approximately 56% of his weekly wage. However, an employee earning \$6.00 per hour would receive a benefit of \$160.00 per week which is 66% of his normal weekly income of \$240.00. O.C.G.A. § 34-9-260 (1988).

costly serious injury, the employer's insurer may offer to settle. An employee who accepts such a settlement may soon return to work for a new employer, having learned to handle both the injury and the Workers' Compensation System.

B. High Insurance Premiums

Insurers identify at least three reasons for the disparity between low weekly benefits paid to workers and high premiums charged to employers: skyrocketing and uncontrolled medical costs; rehabilitation abuses; and open-ended temporary total disability.

C. Skyrocketing Medical Costs

After adjusting for inflation, total and per capita personal health care expenditures have risen at annual rates of 5.5 and 4.1 percent since 1950. The proportion of gross national product devoted to personal health care has nearly tripled. Official forecasts project that the United States will be devoting 15 percent of total production to health care by the year 2000.²⁴

Costs of medical care have risen faster than inflation since 1950.²⁵ Because Georgia does not have a cap or time limit on medical care under the Workers' Compensation System, high medical expenditures may continue for an indefinite period.²⁶ Georgia law prohibits medical care providers from billing claimants for treatment.²⁷ Further exacerbating the problem, the Georgia Court of Appeals, in *Murray County Board of Education v. Wilbanks*,²⁸ held that, notwithstanding the statute which prohibits health care providers from sending bills to claimants, an employer and insurer were required to pay a claimant an amount equivalent to the medical bills, to permit the claimant to pay the bills.²⁹ Thus, although the medical care provider could not bill the claimant, the

24. Aaron & Schwartz, *Rationing Health Care: The Choice Before Us*, 247 SCIENCE 418 (1990) (emphasis added).

25. *Id.* at 418-19.

26. O.C.G.A. § 34-9-200 (Supp. 1990).

27. O.C.G.A. § 34-9-205(b) (Supp. 1990).

28. 190 Ga. App. 611, 379 S.E.2d 559 (1989).

29. *Murray County Bd. of Educ. v. Wilbanks*, 190 Ga. App. 611, 379 S.E.2d 559 (1989); *but see* RULES AND REGULATIONS, STATE BOARD OF WORKERS' COMPENSATION R. 200(a) (1990) (providing that medical costs may be paid by the employer or the insurer "directly to the providers of medical, surgical, and hospital care and other treatment, items, or services on behalf of the employee or directly to the employee . . .").

claimant could still receive the money to pay the bills.³⁰ Nothing insured that the claimant would use the money for its intended purpose. The Georgia General Assembly remedied this problem in the 1990 legislative session. Amendments to O.C.G.A. section 34-9-200 (Supp. 1990) require the employer or insurer to furnish medical care, but not necessarily to pay the claimant directly for the costs. In addition, O.C.G.A. section 34-9-206(b) now requires a claimant employee to prove that he has paid a medical bill before the employer or insurer is obligated to reimburse the employee.³¹

Georgia law also requires the State Board of Workers' Compensation to approve medical fees.³² The Board must issue a schedule of acceptable fees. Any fees that fall within that framework are presumed to be reasonable.³³ A medical care provider may, nevertheless, request a hearing to seek reimbursement for higher expenses.³⁴

An employer or insurer who disputes the reasonableness of a charge must pay seventy-five percent of the charge, pending an audit.³⁵ Peer review is available for disputed bills, but the aggrieved party must request a review within sixty days of the employer's or insurer's receipt of any bills.³⁶

Another factor which contributes to sky-rocketing medical costs is the wide variety of medical expenses the Workers' Compensation System permits. Medical care under the Workers' Compensation System may include chiropractic care,³⁷ home care by a licensed practical nurse,³⁸ twenty-four hour attendant home care by a family

30. *See Mayor & Aldermen of Savannah v. George*, 161 Ga. App. 69, 288 S.E.2d 830 (1982). The court upheld the Board's denial of medical reimbursement to the claimant when the claimant received care from the Veteran's Administration Hospital for which he would never have to pay. *Id.*

31. O.C.G.A. § 34-9-206(b) (Supp. 1990).

32. O.C.G.A. § 34-9-205(a) (Supp. 1990). Indeed a medical care provider which "receives any fee, other consideration, or any gratuity on account of services rendered" without approval by the Board is guilty of a misdemeanor and subject to an appropriate fine, imprisonment, or both. O.C.G.A. § 34-9-22 (1988).

33. O.C.G.A. § 34-9-205(b) (Supp. 1990).

34. RULES AND REGULATIONS, STATE BOARD OF WORKERS' COMPENSATION R. 203(a) (Supp. 1990).

35. RULES AND REGULATIONS, STATE BOARD OF WORKERS' COMPENSATION R. 203(b)(1) (Supp. 1990).

36. RULES AND REGULATIONS, STATE BOARD OF WORKERS' COMPENSATION R. 203(b)(2) (Supp. 1990).

37. *See Federated Mut. Implement & Hardware Ins. Co. v. Whiddon*, 88 Ga. App. 12, 75 S.E.2d 830 (1953); *see also* 4 A. LARSON, WORKMEN'S COMPENSATION LAW app. at B-14C-1-3 Table 14C (Mar. 1988) [hereinafter A. LARSON].

38. *See Hopson v. Hickman*, 182 Ga. App. 865, 357 S.E.2d 280 (1987).

member,³⁹ and necessary psychiatric care after physical trauma.⁴⁰

D. Rehabilitation Abuses

The Workers' Compensation System provides rehabilitation assistance to injured workers, to enable them to return to work in their original capacity, or in a limited capacity.⁴¹ Rehabilitation services include: clarifying the claimant's present and future medical status; negotiating with the original employer to permit the claimant to return to work, even on a limited or part-time basis; identifying other prospective employers; identifying skills necessary for the claimant's return to work in some capacity; devising plans for the claimant to acquire such skills; scheduling "work-hardening" programs⁴² to ease the claimant's return to work; and scheduling interviews and follow-up meetings with prospective employers. These services are laudable, although difficult to provide. Rehabilitation may be subject to abuses by claimants as well as by insurers.

Other costs, beyond those compounded by the time and expenses of the rehabilitation supplier, may accrue. Claimants also incur rehabilitation expenses, including mileage to and from job interviews; use of training facilities; tuition for work-hardening programs or other training; and meals and lodging when appropriate. Rehabilitation expenses can rise unreasonably because of the many factors which frustrate and protract the process.

E. Unlimited Weeks of Temporary Total Disability Benefits and Non-Coordination of Benefits

Georgia law provides that a claimant may receive temporary total disability benefits for the duration of his life.⁴³ Insurers resent this open-ended payment to injured workers for temporary total disability because payments may continue long after the workers would normally retire from the workplace. Payment of temporary total disability benefits to a person seventy-six years old seems

39. See *Interchange Village v. Clark*, 185 Ga. App. 97, 363 S.E.2d 350 (1987).

40. See *Williams v. ARA Env'tl. Servs., Inc.*, 175 Ga. App. 661, 344 S.E.2d 192 (1985).

41. O.C.G.A. § 34-9-200.1 (Supp. 1990).

42. An injured worker may be assigned light-duty work to gradually increase the worker's "physical functioning and rebuild to the previous full-duty status." NATIONAL BUS. INST., *WORKER'S COMPENSATION IN GEORGIA* 170 (1988).

43. O.C.G.A. § 34-9-261 (Supp. 1990). A limitation of 400 weeks for such benefits existed before April 1, 1975.

anomalous in most cases, especially when the claimant draws retirement benefits simultaneously. In addition, Georgia law does not provide for coordination of disability and retirement benefits.

III. PROPOSED CHANGES IN THE SYSTEM

A. *Increase in Temporary Total Disability Benefits; Requirement to Rehire Injured Worker*

The Workers' Compensation Act provision which sets maximum weekly benefits for temporary total disability requires further amendment.⁴⁴ While any suggested increase is necessarily arbitrary, a review of weekly benefits paid throughout the country indicates that even a substantial increase, to \$300.00 per week, would not place Georgia's weekly benefits on a par with the weekly benefits of most states.⁴⁵

In addition, the benefits payable under the Act should cease on the claimant's sixty-fifth birthday, unless the claimant can show that, but for the injury, he would have continued to work beyond age sixty-five.⁴⁶ Also, legislators should arrange for claimants to receive, for a limited period, an additional weekly benefit of \$15.00 for each dependent child (up to four children) living in the home of the claimant. Other states permit these additional benefits, which are based upon public policy considerations.⁴⁷ Without these supplemental benefits, the state often absorbs considerable costs by supporting dependent children whose parents are unable to provide sufficient care. Even this small suggested additional benefit would supplement groceries or transportation.

Limiting receipt of the additional benefit to one year might encourage an injured worker to seek work. The limitation would also stimulate the search for other state and private means to aid in the care of dependant children, should the claimant suffer protracted disability. The payment of supplemental benefits for one year would relieve claimants until other sources of additional funds could be identified and pursued. In short, the additional benefit for minor children would further the first major purpose

44. O.C.G.A. § 34-9-261 (Supp. 1990).

45. U.S. CHAMBER OF COMMERCE, *supra* note 20.

46. This proposal is analogous to O.C.G.A. § 34-9-13(e), which limits certain benefits to dependents of deceased workers to a period of 400 weeks or until age sixty-five, whichever is greater. O.C.G.A. § 34-9-13(e) (Supp. 1990).

47. See 4 A. LARSON, *supra* note 37, at app. B-1 to -10 Table 10.

of the Workers' Compensation System: relieving injured employees without regard to fault.⁴⁸

Also in keeping with that purpose, the Workers' Compensation Act should be amended to require that an employer of a workers' compensation claimant who is released to return to work by the authorized treating physician within two years of the first lost time must offer that claimant his same job or an equivalent job unless, for reasons unrelated to the injury or claim, there is no such position. This would bar an employer from discharging an injured worker merely for filing or pursuing a claim. The employer selects the treating physician in most instances, and under proposals regarding controlling medical costs, below, physicians would be required to justify ongoing care after two (2) years. Therefore, if the employee is in fact released to work, it is only proper that the employer should, under most circumstances, be required to provide him a job. This would also reduce rehabilitation costs.

B. Creation of an Uninsured Employers Fund and Remedies Against Uninsured Employers

Under the Workers' Compensation Act, every employer must procure insurance for its employees.⁴⁹ The insurance requirement guarantees each employer's obligation to pay workers' compensation benefits to injured employees. This obligation "arises regardless of fault and is not shared by [any co-defendant tort feasons]."⁵⁰ An employer who fails to carry workers' compensation insurance and becomes insolvent may be liable to an injured employee. If the employer or its agents fail to procure such insurance, and the failure renders the injured employee's compensation award uncollectable, the employee may sue the employer or the individual agents for an amount equal to the award of the workers' compensation board.⁵¹

If the employer files for bankruptcy, however, the injured worker may be left without recovery. Unlike other states, Georgia has no recovery fund from which to pay injured employees of uninsured

48. See *Samuel v. Baitcher*, 247 Ga. 71, 73, 274 S.E.2d 327, 329 (1981).

49. O.C.G.A. § 34-9-120 (1988). If a subcontractor has no insurance, an injured worker may be entitled to recover benefits from the contractor who hired or controlled the subcontractor. O.C.G.A. § 34-9-8(c) (1988).

50. *North Georgia Elec. Membership Corp. v. Thomason & Holsomback Constr. Co. Inc.*, 157 Ga. App. 719, 720, 278 S.E.2d 433, 433 (1984).

51. *Crawford v. Holt*, 172 Ga. App. 326, 327, 323 S.E.2d 245, 246-47 (1984).

and bankrupt employers.⁵² Indeed, in Georgia, the Bankruptcy Court declined to impose a fiduciary relationship in a case in which an injured worker argued that an employer and its officers and directors owed a fiduciary obligation to maintain workers' compensation coverage.⁵³ Such a fiduciary obligation would prevent an employer and its officers and directors from discharging the indebtedness to the injured worker through the bankruptcy proceedings.⁵⁴

An employer which fails to provide workers' compensation insurance loses the protection of workers' compensation. An employee may then bring an action against the employer in the civil courts.⁵⁵ Further, an employer who does not provide workers' compensation insurance coverage cannot require an injured worker to select a physician from a panel. The employer may be held liable for medical care that would not have been authorized by the workers' compensation system.⁵⁶ An uninsured employer is also liable for mandatory attorneys' fees if an injured worker requests a hearing by the Board.⁵⁷

An injured worker may never receive benefits from an uninsured and bankrupt employer. The uninsured employer is subject to civil liability, loses all control of the claimant's medical care, and is required to pay add-on penalties and mandatory attorneys' fees. Thus, the two main purposes of workers' compensation, relief to injured employees and protection of employers from excessive damages awards, are not well served if an employer has no insurance.

A self-insured employer is required to maintain an outstanding bond to pay all or part of the workers' compensation claim.⁵⁸ That bond should be accessible even if the employer becomes insolvent or bankrupt. Thus, the employer's bankruptcy would not relieve the bonding company of its contractual obligation to pay the claim.⁵⁹ To pursue collection from the bond, the claimant should move for relief from the automatic stay of any action involving

52. See 2A A. LARSON, *supra* note 37, at § 67.40 "Uninsured employer funds," at 12-163 to -169.

53. *In re Baitcher*, 36 B.R. 588, 592 (Bankr. N.D. Ga. 1983).

54. *Id.* at 588, 592; see also Christianson, *Workers' Compensation and Bankruptcy: How Do The Parties Fare*, 24 TORT & INS. L.J. 593 (1989).

55. See *Samuel v. Baitcher*, 247 Ga. 71, 274 S.E.2d 327 (1981).

56. See *Kwon v. Fleming*, 184 Ga. App. 861, 363 S.E.2d 28 (1987).

57. O.C.G.A. § 34-9-126(b) (1988).

58. O.C.G.A. § 34-9-121 (Supp. 1990).

59. *In re McLean Trucking Co.*, 74 B.R. 820 (Bankr. W.D. N.C. 1987).

the assets of the debtor, as required by the Bankruptcy Code.⁶⁰ The State Board of Workers' Compensation could then adjudicate the merits of the worker's claim, but only to the extent that the bonding company, and not the employer, is answerable. The Board's action would then be exempt from the stay, as a "valid exercise of the police or regulatory power of a governmental unit."⁶¹

To protect workers when an employer is neither insured nor self-insured, Georgia should institute an uninsured or bankrupt employers fund. Assessments against all employers and insurers could provide the necessary funds, serving as an insolvency pool for entities without workers' compensation insurance. The entities would, in return, be required to assign all defenses to the fund, which would be entitled to assert those defenses against the underlying claims.

The fund would provide subrogation rights against employers who deliberately refuse to obtain coverage. The Georgia General Assembly should amend the Workers' Compensation Act to create a fiduciary duty, running from all employers to their employees, to require employers to maintain workers' compensation coverage. This fiduciary duty should extend to officers and directors. Imposing a fiduciary duty would prevent discharge of an employer's debt to an injured worker because of the employer's bankruptcy. To the extent the fund is subrogated to the debt, the fund could pursue the bankrupt employer, officer, or director for reimbursement.

Once the fund accepts or becomes liable for a claim, the fund should have authority to restrict the employee's medical care to a panel of physicians maintained by the fund. Once the fund begins paying benefits, it should have a duty to disclose to the claimant the names of the doctors on the panel. The claimant would still be free to petition for a change in physicians. As a matter of economics and public policy, the legislature might also limit the benefits available from such a fund. The injured worker could then be statutorily permitted to pursue the uninsured employer or its officers, directors, or both, for any amount over the limit.

C. Reducing or Controlling Costs to Insurers

The following sections provide suggestions to reduce or control the costs insurers or self-insurers incur. Several of these suggestions

60. 11 U.S.C. § 362(a) (1976).

61. See *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108, 1114 (6th Cir. 1981).

also provide intangible advantages to injured workers. For example, improvements in the process for providing notice of claims, in the method of initiating litigation, and in pre-authorization of medical care could streamline and improve the delivery of benefits to injured workers. Suggestions designed to reduce litigation would help injured workers by reducing the chances of delay in receiving benefits.

1. Controlling Medical Costs

Presently, receipt of medical benefits has no time limit. Few practical means exist to challenge the necessity or feasibility of medical care until, in most instances, the medical care has already been provided. An injured worker relies upon a medical professional to assess the necessity for surgery. Under the present system, if an employer or insurer succeeds in convincing the State Board of Workers' Compensation that previously performed surgery is not compensable, then the injured worker must pay the doctor's bill.⁶²

To balance the interests of the injured worker and the interests of the employer and insurer, the Georgia General Assembly should create a system under which no major medical expense, aside from emergency care, is incurred unless and until the medical care provider explains the injury and the suggested treatment. The employer and the insurer should then have an opportunity to object to the expense. Requiring the medical care provider to submit each contemplated treatment separately, in advance, for employer and insurer approval would be both impractical and unreasonable. A scheme similar to the present system for rehabilitation care might be manageable, however.

Additionally, upon the first non-emergency visit of an injured worker, the system should require a medical care provider to submit a form describing the proposed short-run treatment plan. The form should include a concise patient history and should be signed by the patient. The form would be sent to the employer and would constitute irrefutable notice of a claim.

The employer would then have ten days from the receipt of the form to file objections. During this time, the employer could notify its workers' compensation insurer of the provider's proposal, and could verify the injured worker's history by interviewing the patient's supervisors and co-workers. No non-emergency care would

62. O.C.G.A. §§ 34-9-200-205 (1988 & Supp. 1990).

be provided during this ten-day period. The employer or insurer would be required to object in writing to any proposed treatment, and at the same time to submit the first report of injury and the proposed medical plan. Late filing would subject the employer and the insurer to liability for any medical care which had been provided before the filing of the objection, and to potential assessment of attorney's fees, if the objection later proved frivolous.⁶³

This system would motivate employers to post a list of recommended physicians and to acquaint their workers with the system.⁶⁴ Listed physicians familiar with the system could quickly obtain the employer's authorization for any treatment, giving the employer ample opportunity to investigate and accept or deny the claim. Also, once the medical care provider had submitted the form, routine prescriptions and care for minor injuries would be approved quickly, preventing the assessment of attorney's fees.

Once a medical care provider begins approved treatment of a claimant, the provider should be required to submit long-range treatment plans to the insurer or servicing agent, during the thirteenth, twenty-sixth, and fifty-second weeks following the initial treatment. The insurer or servicing agent should then be required to object to a proposed treatment plan within ten days after receiving the plan. The insurer would be free to schedule independent medical examinations, in a timely and diligent manner. The insurer could request the Board to delay ruling on an objection to a medical care proposal, pending receipt of the results of the independent medical examination. This system would effectively monitor medical care and would require medical care providers to explain the course of treatment and long-range anticipated results.

Finally, 102 weeks after the initial treatment by the first provider, medical care would terminate by law, unless the medical care provider, on its own or through the claimant, submitted a long-range medical care plan. This plan would provide reasons for classifying the injury or condition as "long-term intensive," which would indicate that the injury warranted longer-term medical care. The plan could also reveal any sudden or unexpected complications warranting further short-term care. The claimant or medical care provider would bear the burden of showing reasons for extending medical care beyond 102 weeks after the care has begun.

63. See O.C.G.A. § 34-9-108(b)(2) (1988).

64. O.C.G.A. § 34-9-201 (Supp. 1990).

This system should protect employers and insurers from situations in which a claimant incurs significant expenses before the employer and insurer have had an opportunity to document the injury, obtain a referral, or ascertain the necessity of the care provided. This system, while involving the Board on an interlocutory basis, would reduce complex and protracted litigation.

2. *Alternate Medical Care Plans*

Pursuant to O.C.G.A. section 34-9-14, the Board must approve any substitute system of medical care benefits to an injured worker.⁶⁵ This specifically permits corporations with group health plans to avoid payment of premiums for workers' compensation coverage which includes medical coverage.⁶⁶ If the employee contributes to the premiums for the insurance, then the employer is required to pay the employee's share of that premium throughout the period in which the injured worker is receiving medical care for his work-related injury, or is disabled by the injury. Employers should be free to pay the medical care provider directly, with Board approval, for any amounts, such as deductibles, which are not covered by a group health insurer, if the group health insurer will pay the balance of the cost of the medical care.

Increasing numbers of group health carriers are willing to cover medical care for work-related injuries. Using these plans, employers might be able to reduce the premium costs for workers' compensation coverage. Through group health coverage, however, the employer would be responsible for all remaining medical care required to heal a work-related injury if the group health insurer were to stop paying for the medical care. Thus, employers should contract with workers' compensation carriers for contingent medical care coverage, through re-insurance plans.

3. *Rehabilitation Care*

Expenditures for rehabilitation should be discouraged in instances in which the claimant is unlikely to return to work, or is expected to return to work after a short recuperation period. The Georgia General Assembly revised most of the rehabilitation system in 1990.⁶⁷ Now, within ninety days of receiving notice of a work-

65. O.C.G.A. § 34-9-14(a) (1988). The Board will not approve a system in which the employee must pay any portion of the premium cost for equivalent coverage. *Id.*

66. Corporate group health plans must pay for all medical care. Such plans do not require a deductible if the condition is work-related.

67. O.C.G.A. § 34-9-200.1 (Supp. 1990).

related injury, an employer and its insurer must assess the need for rehabilitation, and either appoint a supplier, or explain to the Board in writing the reasons why rehabilitation is unnecessary.⁶⁸ If no supplier is appointed within ninety days, any party may petition the Board to initiate rehabilitation.⁶⁹ In addition, the Board may order an assessment on its own authority.⁷⁰

The system should be modified further to prohibit payment for rehabilitation services unless:

(1) the medical care provider suggests the rehabilitation services in writing, and either the provider or the claimant requests that rehabilitation begin. Either party should have the right to object to the commencement of rehabilitation, and the Board should review the issue through an interlocutory order or through a hearing, if necessary.

(2) either party requests assessment of rehabilitation, within twenty-six weeks of the original injury.⁷¹

(3) a "long-term intensive" injury has been certified, and the medical care provider, either party, or the Board requests that a rehabilitation provider evaluate the injury to determine whether rehabilitation services are appropriate. The parties would then have an opportunity to respond. The Board would make the final decision, however. The rehabilitation care provider would be required to submit a plan, approved by the Board, before incurring any substantial expenses.

The current procedures for filing objections and for plan preview conferences would remain in effect.⁷² The claimant could elect to have an attorney present during the initial assessment of the injury. After the first visit, the rehabilitation provider could choose to see the claimant alone, if all parties had received ample notice of the chosen treatment plans. Treatment plans would include meetings with doctors, prospective employers, and the claimant.

4. Current Law On Employee Misconduct and Violation of Safety Rules

The Workers' Compensation Act denies benefits to employees found guilty of willful misconduct, intoxication, failure or refusal

68. O.C.G.A. § 34-9-200.1(b)(1) (Supp. 1990).

69. O.C.G.A. § 34-9-200.1(b)(2) (Supp. 1990).

70. O.C.G.A. § 34-9-200.1(b)(3) (Supp. 1990).

71. Rehabilitation providers report that rehabilitation is rarely successful unless it begins soon after the original injury.

72. RULES AND REGULATIONS, STATE BOARD OF WORKERS' COMPENSATION R. 200.1 (Supp. 1990).

to use a safety device or to perform a statutory duty, willful breach of published and Board-approved safety rules, or work performance under the influence of marijuana or other non-prescribed drugs.⁷³ The employer has the burden of proving that the willful conduct proximately caused the injury.⁷⁴ The Board decides the factual question of whether the employee was guilty of willful misconduct or other acts of forfeiture.⁷⁵ The findings of the Board are final and are not disturbed on review if supported by the evidence.⁷⁶

a. Crimes

When considering whether to bar recovery, courts generally view criminal behavior as the equivalent of willful misconduct. Willful failure or refusal to perform a statutory duty is more than negligence, or even gross negligence; it involves conduct of a criminal or quasi-criminal nature.⁷⁷ Consequently, such conduct bars compensation. The employer should not be required to pay compensation if violation of a criminal statute proximately causes an injury or death.

Courts require the criminal behavior to constitute a serious violation.⁷⁸ Traffic violations or speeding tickets are generally not considered to be evidence of "criminal behavior."⁷⁹ Thus, an employee who violates traffic laws, even though guilty of willfully failing or refusing to perform a statutory duty, is not usually denied compensation.⁸⁰ Benefits were denied, however, in one case in which the claimant was injured when he overturned his vehicle while traveling at approximately one hundred miles per hour.⁸¹ His willful misconduct was further evidenced by the fact that his

73. O.C.G.A. § 34-9-17 (Supp. 1990).

74. *Shiplett v. Moran*, 58 Ga. App. 854, 856, 200 S.E. 449, 450 (1938). This burden of proof need only be satisfied by a preponderance of the evidence. *See Borden Co. v. Dollar*, 96 Ga. App. 489, 490, 100 S.E.2d 607, 609 (1957).

75. O.C.G.A. § 34-9-105(b) (Supp. 1990).

76. *Herman v. Aetna Cas. & Sur. Co.*, 71 Ga. App. 464, 31 S.E.2d 100 (1944).

77. *Travelers Ins. Co. v. Gaither*, 148 Ga. App. 251, 251 S.E.2d 66 (1978) (negligent attempt to cross railroad track held not to be willful misconduct).

78. *But see Pacific Indem. Ins. Co. v. Eberhardt*, 107 Ga. App. 391, 130 S.E.2d 136 (1963) (holding that jaywalking constituted willful misconduct); *see also* 26 GA. B.J. 111 (1963).

79. *Georgia Dept. of Public Safety v. Collins*, 140 Ga. App. 884, 232 S.E.2d 160 (1977) (excessive auto speed held not to be willful misconduct).

80. *Id.*; *Adams v. United States Fidelity & Guar. Co.*, 125 Ga. App. 232, 186 S.E.2d 784 (1971) (driver's possible intake of alcohol prior to collision held not to be willful misconduct).

81. *Young v. American Ins. Co.*, 110 Ga. App. 269, 138 S.E.2d 325 (1964).

passenger, a fellow employee, had asked the claimant to slow down.⁸²

b. Recklessness

Sometimes, courts allow compensation despite behavior that would frequently be condemned and prohibited by employers. An extreme example of this expansive approach is found in *City of Atlanta v. Madaris*.⁸³ In *Madaris*, a security guard was using the butt of a loaded pistol as a hammer to repair his automobile. He died when the gun fired. The court did not bar compensation, finding instead that the fatal gunshot wound did not result from willful misconduct.⁸⁴

In *Shipllett v. Moran*,⁸⁵ an employee knew of, but ignored, a rule that prohibited employees from wearing their jackets or jumpers loosely or wearing shirt-tails outside of their pants. He was killed when his loose shirt-tail pulled him into a piece of machinery. The court, finding that violation of the special safety rule was negligence, not willful misconduct, did not prohibit recovery of workers' compensation benefits.⁸⁶

c. Self-Inflicted Injuries

An element of intent is required before a self-inflicted injury may bar compensation. Even suicide does not preclude compensation. One court, finding that a suicide attempt resulted from severe pain and despair caused by a prior work-related injury, awarded compensation.⁸⁷ Self-inflicted injuries have been found to be "purposeful," but not "intentional."⁸⁸

d. Alcoholism or Intoxication

Public policy favors sanctions against the abuse of alcohol and drugs. Thus, providing compensation benefits to alcohol and drug abusers who are absent from work should be viewed as a violation of public policy.

82. *Id.* at 270, 138 S.E.2d at 386.

83. 130 Ga. App. 783, 204 S.E.2d 439 (1974).

84. *City of Atlanta v. Madaris*, 130 Ga. App. at 785, 204 S.E.2d at 440.

85. 58 Ga. App. 854, 858, 200 S.E. 449, 451 (1938).

86. *Shipllett v. Moran*, 58 Ga. App. 854, 858, 200 S.E. 449, 451 (1938).

87. *McDonald v. Atlantic Steel Co.*, 133 Ga. App. 157, 210 S.E.2d 344 (1974).

88. *Id.* at 158, 210 S.E.2d at 345.

An injury caused by alcoholism may result in a non-compensable workers' compensation claim, if the alcoholism is found to constitute an intentionally self-inflicted injury.⁸⁹ When the cause of death is related to alcoholism, even if the alcoholism was caused by a work-related injury, an employer may raise self-infliction as a defense.⁹⁰ Injury caused by intoxication is defined as willful misconduct.⁹¹ Thus, once an injury or death is found to be caused by intoxication, whether by alcohol or by drugs, compensation may be denied.⁹² The employer must show that intoxication proximately caused the injury. In addition, to bar compensation, the intoxication must be proved conclusively.⁹³

e. Safety Rules or Devices

Violation of safety rules alone has been held not to constitute willful misconduct.⁹⁴ An employee who merely disregards a rule or instruction is not barred from compensation unless the disobedience is willful or deliberate.⁹⁵ "Inadvertent, unconscious or involuntary violations" are considered negligence, and will not bar recovery.⁹⁶ "[P]remeditation, obstinacy, and intentional wrongdoing" are necessary to bar recovery under workers' compensation.⁹⁷ Courts often refer to this as an "element of intractableness, the headstrong disposition to act by the rule of contradiction."⁹⁸

Notwithstanding the language of O.C.G.A. section 34-9-17,⁹⁹ failing or refusing to use a safety device has not necessarily barred compensation. In deciding whether or not to permit compensation, courts consider several factors, including: the location of the safety device; the employee's knowledge of the safety device and its purpose; the existence of safety rules or specific instructions from the employer mandating that employees use safety devices; and enforcement of rules requiring the use of safety devices.¹⁰⁰ Again,

89. *Dan River, Inc. v. Schinall*, 186 Ga. App. 572, 367 S.E.2d 846 (1988).

90. *Id.*

91. *Reynolds v. Georgia Ins. Co.*, 149 Ga. App. 162, 164, 253 S.E.2d 839, 840 (1979).

92. *Id.*

93. *Bloodworth v. Continental Ins. Co.*, 151 Ga. App. 576, 260 S.E.2d 536 (1979). The Board's findings on intoxication are conclusive. *Id.*

94. *Shiplett v. Moran*, 58 Ga. App. 854, 200 S.E. 449 (1938).

95. *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333, 342, 150 S.E. 208, 212 (1929).

96. *Id.* at 343, 150 S.E. at 212.

97. *Pullman Co. v. Carter*, 61 Ga. App. 543, 545, 6 S.E.2d 351, 352 (1939).

98. *Id.*

99. O.C.G.A. § 34-9-17 (Supp. 1990) ("No compensation shall be allowed for an injury or death due to the employee's . . . willful failure or refusal to use a safety appliance.")

100. A. LARSON, *supra* note 37, at §§ 33.10 to 33.40.

an employer must show that the violation proximately caused the injury. To find willful misconduct, courts require "something more than thoughtlessness, needlessness, or advertence."¹⁰¹

5. *An Expanded Defense Under Rycroft*¹⁰²

In *Ledbetter v. Pine Knoll Nursing Home*,¹⁰³ an employee had intentionally failed to disclose a previous work-related injury on a later application for employment. Georgia's court of appeals held that the employee's nondisclosure did not constitute willful misconduct sufficient to bar workers' compensation benefits under O.C.G.A. section 34-9-17.¹⁰⁴ The Supreme Court of Georgia distinguished this holding in *Georgia Electric Co. v. Rycroft*,¹⁰⁵ and presented a theory under which an employer could attempt to bar benefits by asserting a defense of willful misconduct. The court held that, if an employee knowingly lies about his physical condition on an employment application and the employer relies on the truthfulness of that description, the employment contract is voidable on grounds of fraud.¹⁰⁶ An employer may assert misrepresentation as a defense to an employee's claimed workers' compensation benefits when three requirements are satisfied:¹⁰⁷

- (1) The employee must knowingly and willfully make a false misrepresentation about his physical condition.
- (2) The employer must rely on the false representation as a substantial factor in the hiring.
- (3) There must be a causal connection between the false representation and the injury.¹⁰⁸

Finding O.C.G.A. section 34-9-17 inapposite to the issues presented, despite factual similarities to *Ledbetter*, the *Rycroft* court distinguished the two cases. In *Rycroft*, the employer had

101. *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333, 342, 150 S.E. 208, 212 (1929).

102. *Georgia Elec. Co. v. Rycroft*, 259 Ga. 155, 378 S.E.2d 111 (1989).

103. 180 Ga. App. 654, 350 S.E.2d 299 (1986).

104. *Ledbetter v. Pine Knoll Nursing Home*, 180 Ga. App. at 656, 350 S.E.2d at 301. Georgia law provides that "[n]o compensation shall be allowed for an injury or death due to the employee's wilful misconduct." O.C.G.A. § 34-9-17 (Supp. 1990). The *Ledbetter* court elaborated that "for the 'willful misconduct' of an employee to constitute a bar to workers' compensation, that conduct must have been the proximate cause of the injury." *Ledbetter*, at 655, 350 S.E.2d at 300-01 (emphasis in original).

105. 259 Ga. 155, 378 S.E.2d 111 (1989).

106. *Georgia Elec. Co. v. Rycroft*, 259 Ga. at 159, 378 S.E.2d at 114 (1989).

107. *Id.* at 158, 378 S.E.2d at 113-14. See O.C.G.A. § 13-5-5, which states: "Fraud renders contracts voidable at the election of the injured party."

108. *Rycroft*, 259 Ga. at 158, 378 S.E.2d at 114.

relied upon the employee's misrepresented physical condition in deciding to hire him; in *Ledbetter*, however, no evidence of reliance was presented.¹⁰⁹ The employer in *Ledbetter* had not shown reliance on the employee's misrepresentation in the hiring decision. Thus, applying the fraud test to the facts in *Ledbetter* would not have barred recovery of benefits on the grounds of willful misconduct.¹¹⁰

The *Rycroft* fraud test provides that concealment of a condition which is likely to enhance the chances of an injury, or the chances of greater disability after injury, renders the employment contract voidable because of fraud.¹¹¹ This is a two-edged sword. Voiding the contract bars recovery of workers' compensation benefits, yet it may also entitle the injured party to sue the employer or a fellow employee for civil damages if the injury could be attributed to their negligence. If the employment relationship is voided, then the statutory bar to such suits is removed.¹¹²

Other potential issues arise when the fraud defense is asserted. Georgia courts have yet to determine whether the defense may be asserted retroactively against previously accepted claims, and whether the fraud defense may be used in cases in which drug and alcohol abuse are present. For example, has an employee who was hired after concealing a drug or alcohol abuse problem entered the employment contract fraudulently, thus rendering the contract voidable?

Drug users are approximately four times more likely to be involved in an on-the-job injury.¹¹³ A rule barring from recovery all employees injured while under the influence of alcohol or drugs would implement the public policy against the collection of benefits by on-the-job drug or alcohol users. If broadly construed, this rule might also prohibit recovery by an employee struck by lightning while impaired by drugs, even though the injury would not have resulted from drug use.

The Georgia Court of Appeals has recognized the General Assembly's codification¹¹⁴ of the public policy against compensating claims based upon alcoholism. The court has also limited claims based upon secondary drug addiction.¹¹⁵ In *Fulmer Brothers, Inc.*

109. *Id.* at 160, 378 S.E.2d at 115.

110. *Id.*

111. *Id.* at 159, 378 S.E.2d at 114.

112. O.C.G.A. § 34-9-11 (Supp. 1990).

113. Schwarz, *Using Spies to Win a War*, NEWSWEEK 56, 57, (Nov. 6, 1989) (attributing statistic to U.S. Chamber of Commerce) [hereinafter Schwarz].

114. O.C.G.A. § 34-9-1(4) (Supp. 1990).

115. *See Dan River, Inc. v. Schinall*, 186 Ga. App. 572, 574, 367 S.E.2d 846, 848 (1988).

v. Kersey,¹¹⁶ employee Kersey suffered a back injury in 1985 and required two operations and medical therapy.¹¹⁷ Before the accident, Kersey was taking prescribed muscle relaxants and narcotics to treat various ailments.¹¹⁸ When he had overdosed in 1983, physicians had assumed he was abusing the pain medication.¹¹⁹ Doctors prescribed more pain medication for the 1985 injury. In addition, Kersey then sought additional sources for narcotics.¹²⁰ Kersey re-injured his back in 1987, received more prescribed pain medication, and continued to abuse the medication.¹²¹ The Workers' Compensation Board decided to compensate Kersey for this total disability because the addiction was "attributable to his compensable injury,"¹²² and the superior court affirmed. The court of appeals reversed, however, construing the Workers' Compensation Act to cover addictions which are "caused by the use of drugs or medicine prescribed for the treatment of the *initial* injury by an authorized physician,"¹²³ and not addictions which are merely aggravated by medication prescribed for the second injury.¹²⁴

6. *Suggested Changes Regarding Drug and Alcohol Abuse*

The Workers' Compensation Act should be further amended to deny benefits to any worker who is proven to be under the influence of alcohol or illegal drugs when injured. The Act should also deny benefits to any employee whose system contains a prescription drug at the time of a work-related injury, if the worker is proven to be an abuser of prescription drugs.

Using drugs or alcohol on the job may render an employee more susceptible to injury. In addition, other employees may be endangered.¹²⁵ The proposed amendment would be comparable to

116. 190 Ga. App. 573, 379 S.E.2d 607 (1989).

117. *Fulmer Bros., Inc. v. Kersey*, 190 Ga. App. at 573, 379 S.E.2d at 607.

118. *Id.* at 574, 379 S.E.2d at 608.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 575, 379 S.E.2d at 609 (quoting O.C.G.A. § 34-9-1(4) (1988)).

124. The court stated that "It is not enough that the medication for the first injury 'worsened' an already existing addiction, which was further worsened by medication prescribed for the new injury." *Kersey*, 190 Ga. App. at 576, 379 S.E.2d at 609. *See also* *Waffle House, Inc. v. Bozeman*, 194 Ga. App. 860, 392 S.E.2d 48 (1990), in which the court, relying on *Kersey*, held that an employer was not required to pay to detoxify the claimant, whose prior substance abuse problems were aggravated by his compensable injury.

125. SCHWARZ, *supra* note 113 at 57.

a state-imposed safety rule, the violation of which would bar recovery of workers' compensation benefits. This is a harsh proposal, but it is offered as a means of decreasing drug usage and drug-induced injury. The Act should include a single exception: in cases in which the employer has furnished the alcohol or drugs to the employee, the employee should be awarded benefits; penalties and attorneys' fees should be assessed directly against the offending employer.

7. *Psychological Claims: Illness or Injury?*

A psychological or mental disability is not compensable unless it is linked to a prior physical injury.¹²⁶ In *Hanson Buick, Inc. v. Chatham*,¹²⁷ a claimant who had suffered from psychiatric and nervous disorders since World War II became suicidal after termination from his employment.¹²⁸ He had never suffered a physical injury while employed. The court of appeals ruled that, even though the claimant was suicidal, he had not sustained a compensable injury.¹²⁹ The court warned that "the allowance of compensation for [a] psychological disorder arising out of psychological injury, even if it were easily proved, could make mischief not remotely intended by the beneficent objectives of our Act."¹³⁰

In another case, a claimant argued that her condition had worsened, based on alleged super-added injuries of depression and anxiety, which resulted from the severance of fingers from her left hand.¹³¹ The Court of Appeals held that "there is no evidence that the claimant experienced any further disorder, mental or physical, as a result of her injury. Rather, the evidence shows merely that her injury gave rise to 'mild depression and a great deal of anxiety...'"¹³² The court held that there could be no recovery of benefits for a "super-added injury" because the claimant's depression and anxiety were natural responses to her type of injury.¹³³

126. *Hanson Buick, Inc. v. Chatham*, 163 Ga. App. 127, 292 S.E.2d 428 (1982); *Williams v. ARA Env'tl Servs., Inc.*, 175 Ga. App. 661, 334 S.E.2d 192 (1985).

127. 163 Ga. App. 127, 292 S.E.2d 428 (1982).

128. *Id.* at 127, 292 S.E.2d at 428.

129. *Id.* at 128, 292 S.E.2d at 429.

130. *Id.* at 129, 292 S.E.2d at 430.

131. *ITT Continental Baking Co. v. Comes*, 165 Ga. App. 598, 599, 302 S.E.2d 137, 138 (1983).

132. *Id.* at 599, 302 S.E.2d at 138-39.

133. *Id.* at 599, 302 S.E.2d at 139.

The Georgia Court of Appeals has also held that depression and anxiety caused by alleged stress on the job, and resulting in dizziness and weakness, are not compensable if the disability arises from a "purely psychological injury," rather than "from some discernable physical occurrence."¹³⁴ In addition, the court of appeals recently held that an employee who experienced emotional and psychological problems after being touched on the head by a robber's gun had not sustained a compensable psychological condition.¹³⁵ The court found that the mere contact with the gun was not a discernible physical occurrence.

Courts are hesitant to permit compensation for a psychological condition which does not stem from a physical injury, because of the increased opportunity for malingering, and because of the possibility of an imprecise identification of the antecedent condition. An employee's psychological problems may result from a lifetime of stimuli which may be unrelated to the job. A major difficulty confronts the psychiatrist who attempts to identify the one stimulus which has precipitated a particular psychological condition.

In *Williams v. ARA Environmental Services, Inc.*, two judges of the court of appeals were inclined to favor a more liberal interpretation of the law, and to permit compensation for psychiatric claims without physical injuries.¹³⁶ The judges proposed the following rule:

A nonphysical trauma-triggered psychological injury is compensable. However, the injury must result from an occurrence or occurrences of greater dimensions than the normal stresses and tensions experienced by employees on the job. Upon review, the standard shall be one of 'substantial evidence' to support the finding of any injury rather than 'any evidence.'¹³⁷

This proposal would be feasible if psychological injuries or illnesses also followed the criteria set forth in the portion of the Workers' Compensation Act which defines occupational diseases.¹³⁸

134. *Williams v. ARA Envtl. Servs., Inc.*, 175 Ga. App. 661, 663, 334 S.E.2d 192, 193 (1985).

135. *W.W. Fowler Oil Co. v. Hamby*, 192 Ga. App. 422, 423, 385 S.E.2d 106, 107 (1989).

136. *Williams*, 175 Ga. App. at 663-65, 334 S.E.2d at 194-95. Judge Beasley favored legislative amendment, while Judge Benham favored relaxation of the "physical injury" requirement. *Id.*

137. *Id.* at 667, 334 S.E.2d at 197.

138. O.C.G.A. § 34-9-280(2) (1988). The Code defines occupational disease as:

those diseases which arise out of and in the course of the particular trade, occupation, process, or employment in which the employee is exposed to such

Under such an approach, a psychological illness or injury would be required to meet the following five criteria: (a) a direct link must exist between the illness or injury and the conditions under which the work is performed; (b) the illness or injury must follow naturally from exposure to a work-related hazard; (c) the employee must have had no substantial exposure to the type of illness or injury, outside the conditions of employment; (d) the general public must not be exposed to this type of illness or injury as a matter of course; (e) the illness or injury must appear to have originated from a risk connected with the employment, and to have flowed from the source as a natural consequence.¹³⁹ Such a proposal would benefit both workers and employers. Still, any worker presenting a claim for such an illness or disease which is proven to be caused by drug or alcohol abuse should be barred from recovery.

IV. REDUCING LITIGATION OF CERTAIN ISSUES

To reduce legal expenses, and to predict more accurately the outcome of claims involving recalcitrant issues, the legislature could, by amendment, resolve two recurring questions: whether a worker should be classified as an independent contractor, and whether an injury should be classified as a new accident or as a change in condition.

A. *Independent Contractor Versus Employee*

One recurring problem involves the issue of whether to classify an injured worker as an employee entitled to benefits or as an independent contractor entitled to none. Professor Arthur Larson

disease, provided the employee or the employee's dependents first prove to the satisfaction of the State Board of Workers' Compensation all for the following

- (A) A direct casual connection between the conditions under which the work is performed and the disease;
- (B) That the disease followed as a natural incident of exposure by reason of the employment;
- (C) That the disease is not of a character to which the employee may have had substantial exposure outside of the employment;
- (D) That the disease is not an ordinary disease of life to which the general public is exposed;
- (E) That the disease must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence.

Id. Psychiatric and psychological diseases are specifically excluded by this Code section. *Id.*

139. This proposal tracks the language of O.C.G.A. § 34-9-208(2) (1988) but substitutes "illness or injury" for "disease."

notes that the term "independent contractor" is not a lawyer's artificial distinction.¹⁴⁰ While the employee-independent contractor distinction is a fundamental fact of business life, no test has yet succeeded in delineating that distinction in every case.¹⁴¹ Instead, the distinction is decided on a case-by-case basis, with no consistent rationale among cases.¹⁴²

1. *Georgia's Traditional (and Elusive) Test of An Independent Contractor: Employer Control*

Generally, Georgia law favors finding an employment relationship instead of an independent contract relationship if "the contract gives, or the employer assumes, the right to control the time, manner, and method of executing the work, as distinguished from the right merely to require certain definite results in conforming to the contract."¹⁴³

In *Lyons v. Employers Mutual Liability Insurance Co.*,¹⁴⁴ the Georgia Court of Appeals found that a person who cut wood and delivered it to a paper company created an employer-independent contractor relationship.¹⁴⁵ The contract stated that the woodcutter was to deliver a specified amount of pulpwood to the paper company each week.¹⁴⁶ The Court reasoned that, while the paper company inspected the work to see that it was progressing according to contract specifications, the company did not control the means by which the result was achieved.¹⁴⁷

Other cases, however, hold that similar situations constitute master-servant relationships, rather than employee-independent contractor employment contracts. In *Jordan v. Townsend*,¹⁴⁸ the

140. 1C A. LARSON, *supra* note 37, at § 43.20 at 8-5 (Supp. 1989).

141. *Id.* at 8-7.

142. *Id. Compare Unigard Mut. Ins. Co. v. Hornsby*, 34 Ga. App. 157, 213 S.E.2d 538 (1975) (carpenter, working for a corporation after hours and normally reimbursed for expenses, was held to be an employee of the corporation because of an understanding between the parties whereby the claimant received an hourly wage) *with Rayner v. Aetna Cas. & Sur. Co.*, 145 Ga. App. 779, 245 S.E.2d 1 (1978) (worker held to be a subcontractor, even though the general contractor considered the worker his own employee).

143. *Lyons v. Employers Mut. Liab. Ins. Co.*, 127 Ga. App. 268, 271, 193 S.E.2d 244, 245 (1972). If a workers' compensation insurance policy is issued covering a named worker or class of workers, then an employer/employee relationship is deemed to exist. *Georgia Cas. & Sur. Co. v. Rainwater*, 132 Ga. App. 170, 207 S.E.2d 610 (1974).

144. 127 Ga. App. 268, 193 S.E.2d 244 (1972).

145. *Lyons v. Employers Mut. Liab. Ins. Co.*, 127 Ga. App. at 273, 193 S.E.2d at 247.

146. *Id.* at 269, 193 S.E.2d at 245.

147. *Id.* at 272, 278, 193 S.E.2d at 246, 249.

148. 128 Ga. App. 583, 197 S.E.2d 482 (1973).

court of appeals found that an employer-employee relationship existed between a woodcutter and a logging company, despite a written contract expressly providing that the employer "would have no control over the time, method or manner in which [the employee] performed timber harvesting services."¹⁴⁹ The court reached this conclusion because the same contract stated that workers were to conform to "generally accepted forestry and logging practices," and to reasonable rules that the owner of the timberlands had adopted for the harvesting of timber.¹⁵⁰ The court held that, because the subcontractor's autonomy was qualified, the logging company did retain the *right* "to control the time, method and manner of executing the work."¹⁵¹ These cases appear to turn on the issue of the scope of the employers' control, but, as was pointed out in the dissent in *Jordan*, "control is not the all important thing it is sometimes made out to be and it is not a constant factor."¹⁵²

2. Recent Statutory Clarifications

O.C.G.A. section 34-9-1(2), which defines the term "employee," was recently amended to include this language:

A person shall be an independent contractor and not an employee 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.¹⁵³

Thus, an independent contractor is not an employee, but must have a written contract to that effect. O.C.G.A. section 34-9-7 provides that:

Every contact of service between an employer and an employee covered by this chapter, whether such contract is written, oral,

149. *Jordan v. Townsend*, 128 Ga. App. at 584, 197 S.E.2d at 483.

150. *Id.*

151. *Id.* at 585, 197 S.E.2d at 483.

152. *Id.* at 586, 197 S.E.2d at 484.

The master, of course, always does have the general right of control over his employees in the sense that he can give them orders, train them, hire and fire them. But he very often lacks any effective spot control over the conduct that brings about an accident. There are many independent contractors situations in which the employer has far greater spot control over the details of the work

Id.

153. O.C.G.A. § 34-9-1(2) (Supp. 1990).

or implied, shall be presumed to have been made subject to this chapter except contracts of service between those employers and employees listed in Code Section 34-9-2.¹⁵⁴

This Code section implies that the Workers' Compensation Board has jurisdiction over any contractual relationship between employers and employees, except those expressly listed in O.C.G.A. section 34-9-2. Independent contractors are not specifically exempted.

In addition, O.C.G.A. section 34-9-10 provides that:

No contract or agreement, written, oral, or implied, nor any rule, regulation, or other device shall in any manner operate to relieve any employer in whole or in part from any obligation created by this chapter except as otherwise expressly provided in this chapter.¹⁵⁵

This provision prohibits employers from exculpating themselves from obligations owed to employees. When construed together, these Code sections may mean that even a contractual relationship between an independent contractor and an employer is subject to the jurisdiction of the Workers' Compensation Board. Because the law requires an independent contractor's relationship with an employer to be memorialized in a written contract, such a contract could be interpreted as an illegal exculpatory agreement. Hence, every employer hiring an independent contractor would be exposed to liability for work-related injuries and to claims of contractual overreaching. Confusion in this area would be reduced if the Board were to approve in advance a standard independent contractor written contract, which would be subject to such defenses as fraud, overreaching, or illiteracy.

The courts have recognized the possibility that fraud and subterfuge may be used specifically to avoid workers' compensation law. In *Durham Land Co. v. Kilgore*,¹⁵⁶ a miner was killed while working in a coal mine. Under an employment contract between a supervisor and the mining company, the company relinquished control over the supervisor's hiring or firing of personnel, pay rates and other management of the mine employees.¹⁵⁷ The mining

154. O.C.G.A. § 34-9-7 (1988). Generally, common carriers, employees not employed in the employer's usual course of business, domestic servants, farm laborers, employers with fewer than three employees, and licensed real estate salespersons are exempted. O.C.G.A. § 34-9-2(a) (1988).

155. O.C.G.A. § 34-9-10 (1988).

156. 56 Ga. App. 785, 194 S.E. 49 (1937).

157. *Durham Land Co. v. Kilgore*, 56 Ga. App. at 787, 194 S.E. at 50.

company did, however, exercise the right to fix wages, hours of labor, and working conditions through the miners' union.¹⁵⁸ The court found that the contract with the supervisor was a mere ploy to conceal the true nature of the employment relationship between the miners and the mining company, and was designed to allow the mining company to avoid responsibility for injuries.¹⁵⁹ The court also found an employer-employee relationship between the decedent and the mining company, and approved an assessment of attorneys' fees against the mining company for "willfully failing to carry workmen's compensation insurance"¹⁶⁰

An employer may not avoid paying the price of insuring against liability by deducting the premiums from the wages of its employees. The Georgia Court of Appeals has held that, even if an employer alleges that an employee has agreed to allow the employer to deduct the costs of providing workers' compensation insurance directly from the employee's wages, such an agreement is not enforceable.¹⁶¹

3. Rationales Behind Independent Contractor/Employee Distinctions

Courts are actually embracing two rationales which should be recognized, formalized, and integrated into the arrangements between employers and independent contractors and between employers and employees. Using these rationales in a forthright way would help to reduce costly litigation in this area.

158. *Id.* at 788, 194 S.E. at 50.

159. *Id.* at 787, 194 S.E. at 50.

[W]here, notwithstanding the express provisions of the contract, there is evidence from which it can be inferred that the actual understanding of the parties was that the employer was to have and indirectly assume the right to control the manner of doing the work, and that the contract was a device or subterfuge to avoid the provisions of the workman's compensation law, the court will hold that the deceased employee was a servant and not an independent contractor.

Id.

160. *Id.* at 788, 194 S.E. at 51 (citing 1923 Ga. Laws 92 (currently found at O.C.G.A. § 34-9-126(b) (1988))).

161. *Morgan S. Co., Inc. v. Lee*, 190 Ga. App. 410, 379 S.E.2d 219 (1989) (citing O.C.G.A. § 34-9-121, which requires the employer to provide workers' compensation insurance). The court distinguished a contract that allows a general contractor to allocate to a subcontractor the cost of workers' compensation insurance for the employees of that subcontractor, and held that withholding deductions from the subcontractor's production payments was not the same as an employer's withholding deductions for insurance premiums directly from an employee. *Id.* at 411, 379 S.E.2d at 220-21.

The first rationale is the “*economic reality doctrine*,” advanced by the United States Supreme Court during the 1940s. In *National Labor Relations Board v. Hearst Publications, Inc.*,¹⁶² the Court held that “employee” does not have a definite meaning, but rather “takes color from its surroundings” and “must be read in the light of the mischief to be corrected and the end to be attained.”¹⁶³ The Court weighed heavily such factors as the publisher’s prerogative to fix compensation, to supervise the newsboys with district managers, to designate to the newsboys certain sales areas, to fix work hours, to set minimum standards of conduct, and to furnish sales equipment.¹⁶⁴

Some courts have structured this analysis for determining the existence of an employer-employee relationship by defining and considering four factors: “(1) control of the worker’s duties; (2) payment of wages; (3) right to hire, fire, and discipline; and (4) performance of the duties as an integral part of an employer’s business toward the accomplishment of a common goal.”¹⁶⁵

Courts embraced the “economic realities” rationale over the common law definitions of employee and independent contractor. While the common law definitions were useful in determining the vicarious liability of an employer for tortious injuries to third parties, the definitions did not necessarily aid in the resolution of other issues.¹⁶⁶ Professor Larson uses the example of a motorist injured by the negligence of an independent trucker hauling lumber from a lumber company. To recover from the company under an agency theory, the motorist may be required to show the degree of control the lumber company exerts over the actions of the driver.¹⁶⁷ To recover workers’ compensation from the lumber company, however, the trucker need not show that the company controlled him to a great degree, if the economic reality is that: (a) the lumber company always uses such drivers in its business;

162. 322 U.S. 111 (1944). *Hearst* involved the status of a newspaper publisher’s staff of “newsboys,” men who regularly sold newspapers at specific locations and who, for the most part, supported their families with their wages. *Id.* at 112. The Court held that the intent behind the National Labor Relations Act was to protect “full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” *Id.* at 126.

163. *Id.* at 124.

164. *Id.* at 118–19.

165. *White v. Central Transp., Inc.*, 150 Mich. App. 128, 128, 399 N.W.2d 274, 274 (1986).

166. *Hearst*, 322 U.S. at 120 n.19, 122.

167. 1C A. LARSON, *supra* note 37 at § 43.49 at 8-21 to 8-22 (Supp. 1989).

(b) the driver genuinely bears the risks of the work; and (c) the driver is not free to raise his rates as easily as the lumber company could raise the price of lumber to bear the cost of injury.¹⁶⁸ The "economic reality" rationale actually subsumes the "control test" because the employer exercises control over the allocation of economic resources in any given employment relationship.

A newer rationale, the "nature of the work" theory, focuses on the nature of the work performed by the employee, the business needs of an employer, and the relative interdependence between the two.¹⁶⁹ Generally, if an employer contracts for work that is an integral part of his trade or business, and the employer controls the worker, all persons so employed are considered employees under workers' compensation.¹⁷⁰ If the contractor's work is essential to the employer's business, but the employer controls only the result of the work, an independent contractor relationship exists.¹⁷¹ Although control is still a factor in the determination of employee status, under a current trend, courts inquire as to whether the worker is meeting the employer's basic business needs. Because the answer to this question is almost always "yes," courts consider whether the worker is in a position to independently provide protection for work-related injuries.¹⁷² Because the answer to this inquiry is almost always "no," the rationales behind the employee-independent contractor distinction are largely overridden by the steady judicial expansion of the scope of the term "employee."¹⁷³ If the employer regularly capitalizes upon the labor of a worker, the business which benefits should bear the loss for any injuries the worker sustains while advancing the interests of the business.

4. *Suggested Contract Language*

To protect employers against liability, and to assure the autonomy of workers, parties seeking genuine independent contracts should execute written agreements.¹⁷⁴ These agreements should clearly state that the independent contractor assumes the risk of injury, illness, or death, and that the contractor has accordingly accounted for that risk in his price for services. Negotiations necessary to

168. *Id.*

169. *Id.* at 43.50—43.54.

170. *Id.* at 43.54.

171. *Id.*

172. *Id.*

173. *Id.*

174. *See* O.C.G.A. § 34-9-1(2) (Supp. 1990).

reaching such a written contract would go to the heart of the relationship, and would address the relative bargaining positions of the parties. Indeed, such negotiations would reduce the chances of a worker being surprised by an employer's defense to a later claim.

Thus, whether by statute or by Board rule, Georgia's workers' compensation system could create a rebuttable presumption that a particular provision in a written employment contract creates an independent contract relationship for workers' compensation purposes. Likewise, the *absence* of such written language would create a rebuttable presumption of an employment relationship:

THIS CONTRACT CREATES AN INDEPENDENT CONTRACT RELATIONSHIP AND NOT AN EMPLOYMENT RELATIONSHIP FOR WORKERS' COMPENSATION PURPOSES. The parties agree that [worker] is being hired or retained to do a task other than the type of work regularly carried on by the [employer]. The parties agree that [worker] has bargained freely with [employer] for services, and that part of the fees or remuneration for performing those services is calculated to provide adequate means to assume any risk of death or injury due to any accident or disease arising in and out of the course of performance of those services. The amount so calculated shall either be sufficient for payment of premiums for [worker's] own workers' compensation or health and disability insurance, or for funding some plan of savings devised freely by [worker] who hereby certifies that he or she understands the potential risk of such death or injury and the costs of necessary protection, and that he or she has arrived at the agreed-upon fees or remuneration for services by an arms-length negotiation with [employer]. [Worker] agrees to indemnify and to hold harmless [employer] from any claim for workers' compensation benefits.

This proposed contractual language should alert the worker to the advantage the employer might gain if the worker does not consider individual insurance protection when executing the contract of hire. The language would also serve to warn workers that they themselves will bear the risk of injury, and to permit workers to renegotiate the arrangement. A worker's illiteracy would, of course, estop the employer from asserting the written independent contractor agreement as a defense.

The totality of circumstances surrounding the agreement would still be required to survive the scrutiny of the "control" and

"nature of the work" tests.¹⁷⁵ Thus, the language above would have no bearing on an hourly-paid employee who is subject to direct supervision, control, discipline, and firing by the employer; who supplies no equipment for the job; and who is engaged in the routine work of the employer. Such a case would rebut the "presumption" that the worker was an independent contractor.

Written contracts would create an advance warning system which would minimize disputes over the method of payment and the degree of supervision and control. Contracts could also specify the amount and type of equipment each party intends to supply for a given job. The business and labor community would then receive notice of the expected results of their working relationship. Written contracts might also reduce tax-funded welfare and the medical benefits society normally bears when an independent contractor is injured, and neither the employer nor the worker has assumed the responsibility of insuring against injury.

B. New Accident or Change in Condition?

Courts have wrestled with the issue of whether benefits are recoverable when a worker either returns to work or continues to work after an injury and later becomes disabled.¹⁷⁶ The law distinguishes between a subsequent disability which directly results from an original injury, regardless of an intervening period of work, and an original injury which gradually worsens to the point of disability during the intervening period.¹⁷⁷

An employee's injury may create a procedural quagmire. Should the employee file a claim for a subsequent disability, citing the original accident as the cause? If so, does the statute of limitations bar such a claim? Or, should the worker file a claim from the date he was forced to cease work, arguing that the disability did not manifest itself until then?

To clarify these questions, the Georgia Court of Appeals, in *Central State Hospital v. James*,¹⁷⁸ delineated three typical situations. An employee who sustains an injury but continues to work and is later disabled by a gradual worsening in condition is entitled to claim the subsequent disability as a "new accident."¹⁷⁹ Likewise,

175. See *supra* notes 144–151 and accompanying text.

176. See, e.g., *Central State Hosp. v. James*, 147 Ga. App. 308, 248 S.E.2d 678 (1978).

177. *Id.* at 309, 248 S.E.2d at 679.

178. *Id.* at 308, 248 S.E.2d at 678.

179. *Id.* at 309, 248 S.E.2d at 679.

an employee who suffers one injury on the job which then causes a second injury which aggravates a pre-existing condition, is also entitled to bring a claim for a new accident.¹⁸⁰ If the previous injury contributes to the onset of the subsequent disability, the court will consider the injury a new accident, regardless of whether the claimant is immediately disabled or suffers a gradual decline in his condition.¹⁸¹

In the third situation the *James* court described, a claimant may sustain an injury and receive compensation benefits.¹⁸² After a recovery period, the employee may return to work, but then suffer a steady regression caused by ordinary life and work-related activities.¹⁸³ In this case, the regression would not constitute a new accident, but would be deemed a "change in condition."¹⁸⁴

Underlying the distinction between a change in condition and a new accident are public policies which favor rewarding an injured worker who attempts to stay on the job and avoiding a statute of limitations bar against the claim for the first injury. Problems arise when an employee who is injured while working for one employer begins work for a second employer and becomes disabled by an aggravation of the initial injury. A dispute frequently focuses on the issue of whether the first or the second employer should be responsible.¹⁸⁵ The second employer may argue that the disabled worker sustained a gradual worsening in condition because of the original injury, and that the previous employer should be liable for compensation benefits. The first employer may argue that the former employee sustained a new accident, for which only the second employer would owe compensation. Courts generally analyze

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 309-10, 248 S.E.2d at 679.

184. *Id.*

[T]he term "change in condition" means a change in the wage-earning capacity, physical condition, or status of an employee or other beneficiary [which] must have occurred after the date on which the wage-earning capacity, physical condition, or status of the employee or other beneficiary was last established by award or otherwise.

O.C.G.A. § 34-9-104(a) (Supp. 1990).

185. *See, e.g.,* *Certain v. United States Fid. & Guar. Co.*, 153 Ga. App. 571, 266 S.E.2d 263 (1980) (employee, medically forbidden from doing strenuous work, left a light-duty job and began strenuous work for a second employer, was held to have sustained a new accident when his condition gradually deteriorated); *Slattery Assoc. v. Hufstetler*, 161 Ga. App. 389, 288 S.E.2d 654 (1982) (an employee returning to substantially the same work with less strenuous duties sustained a change in condition, rather than a new accident).

the duties imposed on each employer and assess the impact of these duties on the employee.¹⁸⁶

A case involving multiple employers is difficult because each of the respective employers blames the other. The claimant may be forced to forego medical care and benefits until the Board has issued an interlocutory order. The second employer may learn that a new employee sustained an injury with a previous employer only after the employee has claimed a new injury on the second job. In this situation, the second employer will be reluctant to pay a claim under the "new accident" theory.¹⁸⁷ If the employee attempts to conceal a prior injury and misrepresents a pre-existing condition, the subsequent employer may avoid responsibility for workers' compensation under the *Rycroft* fraud theory.¹⁸⁸

Considering this defense, and the protection available to subsequent employers under the Subsequent Injury Trust Fund,¹⁸⁹ the legislature should amend the Workers' Compensation Act to bar claims for a change in condition in situations in which an employee is injured on one job and later returns to work for a different employer. If the employee has not concealed the disability, and the condition nevertheless deteriorates because of work involved in the new job, liability for the later disability should rest with the subsequent employer only if that employer knew of the pre-existing condition. The employer's access to the Subsequent Injury Trust Fund would permit compensation of the disabled worker, and would advance Georgia's policy of encouraging the employment of disabled and handicapped persons.¹⁹⁰

186. See generally *Mason Inc. v. Gregory*, 161 Ga. App. 125, 291 S.E.2d 30 (1982); *Central State Hosp. v. James*, 147 Ga. App. 308, 248 S.E.2d 678 (1978); *Hartford Ins. Group v. Stewart*, 147 Ga. App. 733, 250 S.E.2d 184 (1978); *House v. Echota Cotton Mills*, 129 Ga. App. 350, 199 S.E.2d 585 (1973).

187. See, e.g., *Ledbetter v. Pine Knoll Nursing Home*, 180 Ga. App. 654, 350 S.E.2d 299 (1986).

188. See *supra* notes 92–97 and accompanying text.

189. "[B]ecause of the policy of encouraging the employment of disabled persons, Georgia ... provides employers access to a subsequent-injury trust fund for compensable claims arising from pre-existing health conditions." *Georgia Elec. Co. v. Rycroft*, 259 Ga. 155, 159, 378 S.E.2d 111, 115 (1989) (citing O.C.G.A. § 34-9-350 (1988)). O.C.G.A. § 34-9-361 (1988 & Supp. 1990) requires that an employer have knowledge of the prior disability, however. *Id.* If a worker fraudulently misrepresents his pre-existing condition, the employer is denied access to that fund. *Id.*

190. A more difficult question concerns the employee who later returns to work for his original employer, after the employer has changed insurance carriers. See, e.g., *Zurich Ins. v. Cheshire*, 178 Ga. App. 539, 540, 343 S.E.2d 753, 754 (1986) (while the employee's injury occurred during the employer's coverage under the first insurer, a "new injury" became manifest during the second insurer's coverage, entitling the employee to compensation from the second carrier).

C. Streamlining the Claims Process and Coordinating Benefits

Georgia's Labor Department administers three separate systems of worker benefits: workers' compensation benefits; Social Security disability benefits; and unemployment benefits.¹⁹¹ Although Social Security is a federal program, claims are initially evaluated through the State Department of Labor.¹⁹² Each of these benefit systems purports to address a separate category of need. Workers' compensation addresses injured workers who cannot work because of job-related illnesses or disabilities. Social Security disability benefits workers who can no longer perform any job, whether because of work-related injuries or because of other disabling illnesses or mishaps. Unemployment benefits aid workers who are capable of working but cannot find work, provided the workers meet certain other criteria.¹⁹³

In some cases, workers' compensation benefits are coordinated with Personal Injury Protection disability benefits (no-fault disability benefits). Coordination is accomplished by means of an intricate formula in which the no-fault disability benefits are reduced by a certain percentage, depending upon the amount of workers' compensation disability benefits received.¹⁹⁴ Likewise, social security disability benefits are reduced if an injured worker also receives workers' compensation payments. Workers' compensation benefits are neither reduced nor coordinated with social security disability benefits, however.

Similarly, no legal impediment prevents a worker from receiving workers' compensation because of a claimed inability to work, while simultaneously receiving unemployment benefits because of a claimed ability to work. This apparent contradiction benefits an injured worker who can perform only light-duty work and is unable to secure suitable employment. Unfortunately, the lack of coordination among benefits may permit unscrupulous workers to abuse both systems.

The claims procedure should be streamlined. Specifically, the function of Labor Department examiners and the system for

191. See O.C.G.A. §§ 34-9-1 to -388 (1988 & Supp. 1990) (administration of Workers' Compensation); and O.C.G.A. §§ 34-8-1 to -177 (1988 & Supp. 1990) (administration of Social Security and unemployment benefits).

192. O.C.G.A. § 34-8-79 (1988).

193. O.C.G.A. § 34-8-2 (1988).

194. Such coordination occurs only in situations in which a no-fault motor vehicle insurance carrier and its workers' compensation carrier each owes disability benefits for the same injury. O.C.G.A. § 33-34-8 (1988).

coordinating benefits could be made more efficient. To reduce bureaucratic overhead and to assess more efficiently the benefits to which a claimant might be entitled, the Labor Department should be restructured to create a centralized system of processing claims for all benefits, whether workers' compensation, social security disability, or unemployment compensation. Under a centralized system, a Labor Department examiner would initially screen claims. The examiner would then advise the claimant as to which type of benefit to seek, or recommend that the claimant seek more than one type of benefit. The employer or insurer would remain free to deny the claim. The employee, however, would be informed of his rights under each system. These examiners could also coordinate claims to prevent the abuses which could potentially arise through contradictory claims.

Ideally, the Workers' Compensation Act itself should be amended to permit the coordination of benefits from unemployment and social security, as part of an overall coordination scheme. Workers' compensation benefits should also be coordinated with retirement benefits. Once a worker retires, he should not be considered "temporarily totally disabled." At retirement, workers' compensation benefits should be converted to permanent partial disability benefits,¹⁹⁵ and should then be coordinated with the employee's retirement benefits.¹⁹⁶

D. Using the Civil Practice Act: Changing the Notice Requirements and Amending the Statute of Limitations

Pursuant to O.C.G.A. section 34-9-80, the Workers' Compensation Act explicitly requires every injured worker to give notice of a claim for injury within thirty days.¹⁹⁷ The notice must be given in writing or in person.¹⁹⁸ Exceptions are permitted if physical or mental incapacity, fraud, or deceit prevent the employee from notifying the employer on time; if an employer's representative

195. See O.C.G.A. § 34-9-263 (1988) (benefit payment schedule governing permanent partial disability).

196. Retirement plans governed by the Employment Retirement Income Security Act (ERISA) are already coordinated. Employee Retirement Income Security Act, 29 U.S.C. 1001 to 1381 (1976), as amended. See, e.g., *Alessi v. Raybestos-Manhattan, Inc.* 451 U.S. 504 (1981) (the court allowed a retirement plan governed by ERISA to deduct from a pension an amount equivalent to that which a worker received from a workers' compensation claim while eligible for retirement benefits, thus preempting the state law, as it eliminated this method of calculating retirement benefits).

197. O.C.G.A. § 34-9-80 (1988).

198. O.C.G.A. § 34-9-81 (1988).

or foreman had prior knowledge of the accident; or if the employee provides a reasonable excuse for lack of notice.¹⁹⁹

Recent case law has weakened the notice requirement. The Supreme Court of Georgia held that, under O.C.G.A. section 34-9-80, the notice need not state that an injury actually occurred on the job.²⁰⁰ A claimant's telephonic notice to his supervisor, following a heart attack and a two-day stay in the hospital, was deemed sufficient to allow the employer to investigate further whether the injury was a work-related event.²⁰¹

The notice requirement is intended to give the employer an opportunity to respond quickly to a claim and to provide an injured employee with needed treatment. The employer has a duty to file a first report of injury with the State Board of Workers' Compensation. The accident is reported and the employer indicates acceptance or nonacceptance of the claim.²⁰² An employer who denies a claim must explain why the claim is being controverted, thus alerting the claimant of the necessity to take steps to seek benefits.²⁰³

Other time restraints exist, including a variety of statutes of limitations.²⁰⁴ Failure to post a list of physicians prevents an employer from using the statute of limitations as a defense to a claim.²⁰⁵ A claimant must still obtain medical care within the statutory period of limitation, however, and that care must continue, if the statute of limitations is to be tolled.²⁰⁶ Medical treatment the Board regards as necessary "to effect a cure, give relief, or restore the employee to suitable employment"²⁰⁷ is not subject to *any* statute of limitations.²⁰⁸ Also, the limitations period is suspended "where there is evidence to support a finding that a claimant was

199. *Id.* As practical matter, claimants may usually avoid the defense of inadequate notice by pursuing the latter two exceptions.

200. *Schwartz v. Greenbaum*, 236 Ga. 476, 477, 224 S.E.2d 38, 39 (1976).

201. *Id.*

202. O.C.G.A. § 34-9-12(a) (1988); RULES AND REGULATIONS, STATE BOARD OF WORKERS' COMPENSATION R. 12, 61 (Supp. 1990).

203. RULES AND REGULATIONS, STATE BOARD OF WORKERS' COMPENSATION R. 61(b)(1), (2), (3) and (4) (Supp. 1990).

204. O.C.G.A. §§ 34-9-82, 104(b) (1988 & Supp. 1990).

205. *Georgia Inst. of Technology v. Gore*, 167 Ga. App. 359, 306 S.E.2d 338 (1983).

206. *Poissonnier v. Better Business Bureau of W. Ga.—E. Ala. Inc.*, 180 Ga. App. 588, 349 S.E.2d 813 (1986).

207. O.C.G.A. § 34-9-200(a) (Supp. 1990).

208. *General Ins. Co. of Am. v. Bradley*, 152 Ga. App. 600, 263 S.E.2d 446 (1979).

potentially due other income benefits at the time of the compensable injury"²⁰⁹

The broad purposes of the O.C.G.A. section 34-9-80 notice provision are to create a system that is beneficial to claimants, by encouraging routine acceptance and payment of claims unless there is a clear doubt as to their validity; to enable a claimant to obtain benefits without retaining counsel; and to assure an employer of adequate notice of a potential claim.²¹⁰

In light of appellate decisions concerning the "notice defense,"²¹¹ and the policy set forth above, lack of notice should be abolished as a defense to a claim for benefits. The law requires an employer and its insurer to pay or deny a claim within the appropriate number of days after receiving notice of the potential claim.²¹² Then, if the claimant brings a later claim for payment, at a hearing concerning the allegation that the claim falls within the statutory time limit, the claimant could demand attorneys' fees and penalties to compensate for the employer's failure to pay the claim, despite

209. *Metropolitan Atlanta Rapid Transit Auth. v. Ledbetter*, 184 Ga. App. 518, 519, 361 S.E.2d 878, 879 (1987) (emphasis added) (citing *Holt's Bakery v. Hutchinson*, 177 Ga. App. 154, 338 S.E.2d 742 (1985)). Moreover, if *some* type of benefits were potentially due at the time of the last payment of weekly or medical benefits, *no* statute of limitations provision would bar claims of a change in condition for the worse. *Holt's Bakery v. Hutchinson*, 177 Ga. App. 154, 338 S.E.2d 742 (1985); *Metropolitan Atlanta*, 184 Ga. App. at 519, 361 S.E.2d at 879. O.C.G.A. § 34-9-104(b) imposes a two-year statute of limitations upon claims for a change in condition, which tolls upon "the final payment of income *benefits due* . . ." *Id.* (emphasis in original). In *Holt's Bakery*, the court held that "due" applied to any benefits the claimant could potentially have claimed since the date of final payment of benefits. *Holt's Bakery*, 177 Ga. App. at 160, 338 S.E.2d at 748. The *Metropolitan Atlanta* court upheld *Holt's Bakery*. *Metropolitan Atlanta*, 184 Ga. App. at 519, 361 S.E.2d at 879. Judge Deen, however, dissented and assailed the majority for construing the statute of limitation period "out of existence." *Metropolitan Atlanta*, 184 Ga. App. at 520, 361 S.E.2d at 880. Judge Deen noted that, under the majority construction of O.C.G.A. § 34-9-104(b), "a worker could wait 10 or 20 or 30 or even 50 years before filing a change in condition claim." *Id.* He posited that "[a]pplying the statute in terms of benefits 'potentially due,' the question arises of why the statute even contains that measuring point, since there obviously will be no date of payment of income benefits, much less 'the date of final payment' from which the limitation period will run." *Id.* See also *Justice v. R.D.C., Inc.*, 187 Ga. App. 198, 369 S.E.2d 493 (1988) (supporting the *Metropolitan Atlanta* majority opinion).

During the 1990 session, Senate Bill 464 addressed this problem. The bill amended O.C.G.A. § 34-9-104(b) to require that claims for most benefits be filed within two years of the last payments, and to require that claims for permanent partial disability benefits be filed within four years of the last payment of prior income or medical benefits. O.C.G.A. § 34-9-104(b) (Supp.1990).

210. O.C.G.A. § 34-9-80 (1988).

211. See, e.g., *Schwartz v. Greenbaum*, *supra* note 200 and accompanying text.

212. O.C.G.A. § 34-9-221(b), (d) (Supp. 1990).

the fact that notice was given. For their part, the employer and insurer could *then* raise the lack-of-notice defense, to defeat the claim for penalties and attorneys' fees. Such a procedure would free the Workers' Compensation Board and the courts to adjudicate more often the merits of claims, rather than assessing attorneys' fees and penalties.

Pleadings requirements under the Workers' Compensation Act could also be amended to provide a statewide uniform pattern of practice. First, the General Assembly should adopt a notice provision requiring treating physicians to complete a patient history form and submit that form to an employer before beginning to treat the claimant. This reporting requirement would permit the employer to receive detailed and informative notice.²¹³ Second, predrafted complaints for benefits should be provided, similar to the forms at most magistrate courts. These complaints could be filed *pro se*, or with the aid of counsel, at all offices of the Labor Department where potential claims are initially examined.

Finally, service of complaints should be permitted, either by mail from the State Board of Workers' Compensation, or by service pursuant to O.C.G.A. section 9-11-4,²¹⁴ at the option of the employee or his attorney. The summons attached to each complaint should state that an employer must answer the allegations of the complaint within twenty days; otherwise, the allegations would be taken as true. Thus, the employer would have another opportunity to accept a claim by consent, avoiding the litigation of some issues. If the Board did not receive an answer within twenty days of the date of service, or if the service was by mail, within twenty-three days of the date of postmark, then the Board would be authorized to enter an award based upon the admitted allegations of the complaint. A default judgment would be entered against the employer on any allegations not denied.

Should the employer deny a claim by filing an answer in a timely manner, or should the Board observe that certain issues require litigation, the Board could issue a scheduling order. A scheduling order would provide a deadline by which a claimant must file a list of all treating physicians consulted within the past five years. The claimant or his attorney would submit this list to the employer, the insurer, or to their attorneys. With the list, the claimant would submit an executed release, permitting the employer

213. See *supra* notes 62 — 65 and accompanying text.

214. O.C.G.A. § 9-11-4 provides rules and procedures for effective service of process within Georgia. O.C.G.A. § 9-11-4 (Supp. 1990).

and insurer to obtain medical records directly from the care providers, including psychiatrists. The employer and insurer should then serve the claimant or his attorney with copies of all records so obtained. The scheduling order would also limit the time in which the employer could take a deposition of the claimant. Any delay would result in the imposition of costs upon the party responsible for the delay.

A deadline within which the parties must prepare respective portions of a prehearing order should also be imposed. The order would be similar to pretrial orders required by the Uniform Superior Court Rules.²¹⁵ These prehearing orders should include a detailed version of each party's contentions, with citations to appropriate law, and a list of exhibits to be presented at the hearing. This would preclude the introduction of newly discovered evidence between the time the order is completed and the time of the hearing. On the same prehearing order, each party would be required to object to the exhibits proposed by the other party. A scheduling order would also provide a date for the hearing.

The current Board rule, requiring all medical depositions to be taken before the date of the hearing unless the party seeking to take the deposition can show excusable delay, would remain intact. The Board would have full discretion to decide whether to permit the hearing to proceed before a medical deposition, or to postpone the hearing until after the medical deposition.²¹⁶

E. Streamlining the Appellate Process

Following the initial decision by an administrative law judge, either party may request a de novo review by appealing to the full board of the State Board of Workers' Compensation.²¹⁷ Currently, the party who is dissatisfied with an award of the full board may appeal to the superior court of the county in which the employer is located, provided that party can cite legal, rather than factual, error.²¹⁸ Appeals to a superior court take time, however, and results may differ from court to court.

215. UNIF. SUPER. CT. R. 7.2 (1990).

216. The lack of limitations on medical care would be alleviated by the proposals regarding medical care; all claims for such cases would *presumptively* expire two years after the injury. *See supra* note 208, notes 62 — 65 and accompanying text.

217. O.C.G.A. § 34-9-103 (1988); RULES & REGULATIONS, STATE BOARD WORKERS' COMPENSATION R. 103 (Supp. 1990).

218. O.C.G.A. § 34-9-105 (Supp. 1990).

The legislature should consider one of the following alternatives to facilitate workers' compensation appeals. One possibility would include the selection of one county to process all superior court appeals, as under the system used to process appeals from decisions of the Public Service Commission.²¹⁹ The General Assembly could possibly fund an additional judgeship for that county. Appearance could be by brief alone, should the requirement of coming to that particular superior court cause either party to suffer a hardship. A second alternative is to eliminate superior court appeals altogether. The aggrieved party could petition the Georgia Court of Appeals for discretionary appeal directly from an award of the full board.²²⁰

F. Rulemaking

The State Board of Workers' Compensation is authorized to issue rules to facilitate its administration, provided the rules are consistent with the Worker's Compensation Act.²²¹

The Board permits itself to amend rules whenever necessary.²²² The Board provides the Chairman of the Board's advisory counsel with a copy of a proposed rule. Comments are then solicited from various groups. Copies of proposed rules are also submitted to the Chairman of the Senate Industry and Labor Committee and to the Chairman of the House Industrial Relations Committee.²²³ Either chairman may request that the Board hold a hearing on proposed changes.²²⁴ After receiving recommendations and comments, the Board may issue the rule.²²⁵

To expedite this process, the Board could follow the rulemaking procedures used in other governmental agencies. Proposed rules are published in various publications for a six-month commentary period. Here, in addition to the submissions above, the Workers' Compensation Board's newsletter, which the Board publishes quarterly, and various state bar newsletters, would suffice.

219. O.C.G.A. § 50-13-19(b) (Supp. 1990).

220. Currently, an aggrieved party may file a petition for discretionary appeals only after the superior court appeal has been pursued. O.C.G.A. §§ 5-6-35, 34-9-105 (Supp. 1990).

221. O.C.G.A. § 34-9-60 (1988).

222. RULES AND REGULATIONS, STATE BOARD OF WORKERS' COMPENSATION R. 60(a) (Supp. 1990).

223. RULES AND REGULATIONS, STATE BOARD OF WORKERS' COMPENSATION R. 60(a)(2)(A)(ii) (Supp. 1990).

224. *Id.*

225. RULES AND REGULATIONS, STATE BOARD OF WORKERS' COMPENSATION R. 60(a)(2)(B) (Supp. 1990).

Publication would permit a broader scope of comment, and would permit greater numbers of suggestions on refinement. In addition, adoption of the six-month commentary period would permit persons affected by the rule to adapt to the changing situation under the proposed rule.

CONCLUSION

If injured workers in Georgia are to be justly compensated, and if society is to avoid paying benefits to injured workers through various social welfare programs, the weekly benefit cap must be raised to at least three hundred dollars. Further, in keeping with the remedial purpose of the Workers' Compensation Act, the legislature should consider adding a benefit of fifteen dollars per week for each dependent child who actually resides with the injured worker. The added benefit should continue for up to fifty-two weeks. An insolvent or uninsured employers' fund should be created. The legislature should consider allowing compensation for psychological illness or injury, even without a physical trauma, provided the illness or injury meets the test for occupational disease, and is subject to a higher burden of proof recommended by the court.

To minimize the drain needless litigation inflicts upon the court system, claims for a change in condition, in which an injured worker has returned to work for a second employer before becoming disabled, should be abolished and such cases deemed "new accidents." In such cases, the Subsequent Injury Trust Fund and the *Rycroft* decision should be available to protect the second employer.²²⁶

Likewise, by a new rule, the Board could approve in advance written contract language which would create the rebuttable presumption of an independent contractor relationship. Such language would place prospective workers on notice as to their legal employment status, and should reduce or narrow the scope of litigation, in an area where dispute too often arises.

Presumptions favoring termination of certain benefits should be created by statute. First, temporary total or partial disability benefits should cease at age sixty-five, absent proof that the claimant would be working but for the compensable injury. Second,

²²⁶ In normal circumstances, an employer takes his employee as he finds him, so this change would not be a departure from much of the risk assumption inherent in workers' compensation law.

medical care should cease after 104 weeks, unless the provider proves, to the satisfaction of the Board, that the claimant's injury requires an ongoing "long-term intensive" plan. Medical care should be subject to advance planning, and non-emergency care should be reviewed at the first, third, twelfth, fifty-second, and one-hundred-fourth weeks, to control medical costs and prevent the claimant from incurring noncompensable expenses. All psychiatric care should be subject to advance approval. Such approval could be done on an interlocutory basis, unless the underlying injury or some other major issue is in dispute and a hearing is needed.

The rehabilitation system should be scrutinized and limited to situations in which rehabilitation is medically indicated, or to "long-term intensive" situations. The system of processing and hearing claims should be streamlined, and social security disability and unemployment benefits should be coordinated. A more efficient claims procedure would result in an even higher weekly benefit rate.

To control the increasing economic costs associated with work-related accidents caused by intoxicated employees, compensation should be denied to anyone who is injured while under the influence of alcohol or illegal drugs (or prescribed drugs, if the claimant is proven to have abused prescribed drugs or to have been impaired to the same extent as for illegal drugs). An exception should be made, and benefits allowed, in cases in which the employer's officers or executive personnel furnished the alcohol or drugs.

Recent legislation and Board rules have refined the system so that more deserving workers are helped, and more employers are protected from huge damage awards. To meet these dual goals more effectively, Georgia's Workers' Compensation Act requires further comprehensive revision.