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Spring 2011 Update

Dear Friends:

We hope that you enjoy this edition of the Ross & Levy newsletter. This newsletter covers information and current events pertaining to developments in the law and changes in legal precedent with a focus on the impact for employers, insurers, and human resource professionals. *†

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UPCOMING SEMINARS

06/03/11: Americus, EEOC Claims
06/23/11: Dublin, Workers' Compensation
08/19/11: Columbus, Workers' Compensation
11/04/11: Augusta, Workers' Compensation

For more information on upcoming seminars, contact Christie Eades at (866) 995-8663.

WORKERS' COMPENSATION SECTION (GEORGIA)

The following articles are focused on legal precedents and developments of particular interest to employers, human resource professionals, and workers' compensation insurers and adjustors:

INDEPENDENT MEDICAL EVALUATIONS
PROVE INVALUABLE:
Bonus Stores, Inc. v. Hensley

James A. Ivey

Case Background

- ❖ Employee/Claimant, Edward Hensley, sustained a work-related back injury in March 2002 while working as a general manager for Bill's Dollar Store and received

temporary total disability (TTD) benefits through November 2003.

- ❖ At some point, the Claimant began receiving temporary partial disability (TPD) benefits which he received until November 2008.
- ❖ Note that the Claimant, although not discussed in this decision, had exhausted his entitlement to TPD benefits pursuant to O.C.G.A. § 34-9-262 because 350 weeks had passed since his accident date.
- ❖ Once the weekly income checks stopped coming, the Claimant requested that his condition be deemed catastrophic which would technically enable him to receive weekly workers' compensation income benefits for life.
- ❖ A hearing was held before an Administrative Law Judge (ALJ) and the Claimant tendered into evidence a letter dated November 5, 2003 from his personal family physician, Dr. Wesley Ensley that stated that the Claimant was "totally disabled from physical labor in his current condition."
- ❖ Also, a residual functional capacity questionnaire completed by Dr. Ensley for the Social Security Administration dated September 2004 in which the Claimant was diagnosed with neuropathy and chronic persistent pain was tendered. Dr. Ensley indicated on this report that the Claimant could sit and stand or walk for less than two hours each in a work day and that he would need frequent, prolonged, and unscheduled breaks.
- ❖ Finally, a vocational assessment prepared by a vocational specialist, William Thompson,

who interviewed the Claimant in November 2007 was considered by the ALJ. The vocational specialist opined in this report that there were not any jobs available in substantial numbers in the national economy that the Claimant could perform.

- ❖ On the other hand, the Employer/Insurer tendered a report, most likely one based upon an independent medical evaluation, issued by Dr. Lee Kelley, an orthopedist in Atlanta. Dr. Kelley examined the Claimant in December 2003 and opined that the Claimant could return to work without any restrictions.
- ❖ The Employer/Insurer also offered the report of Dr. Thomas Dopson, a spine specialist, who evaluated the Claimant in July 2005 and noted that he did not find any orthopedic, neurologic, radiographic, or other objective clinical basis to support any restrictions on the Claimant's ability to return to work.
- ❖ Finally, the Employer/Insurer also tendered the report of Dr. Ezequiel Cassinelli, also an orthopedist, who examined the Claimant in May 2009 and opined that the Claimant had reached maximum medical improvement with respect to his March 2002 work injury. Furthermore, Dr. Cassinelli indicated that the Claimant suffered from no residual impairment related to his work injury.
- ❖ According to the decision, it appears that only two witnesses testified at the hearing, the Claimant and Mr. Thompson, the vocational specialist who provided a written opinion favorable to the Claimant. However, Mr. Thompson admitted that he reviewed Dr. Cassinelli's opinion after

preparing his vocational assessment. Further, Mr. Thompson admitted that if the ALJ found Dr. Cassinelli's medical opinion to be credible, then there would be jobs available that the Claimant could perform.

- ❖ The ALJ found that the Claimant's back injury was catastrophic thus awarding TTD benefits by specifically finding that the Claimant's injury was "of such a nature and severity that it prevents [the Claimant] from being able to perform his prior work and any work available in substantial numbers within the national economy for which he is otherwise qualified."
- ❖ The ALJ obviously gave more weight to the opinions rendered by Dr. Ensley which were provided before the Claimant was evaluated by Dr. Cassinelli.
- ❖ The Employer/Insurer appealed the adverse decision to the Appellate Division of the State Board of Workers' Compensation.
- ❖ The Appellate Division reversed the decision of the ALJ thus deeming the Claimant's condition not to be catastrophic and denying him additional income benefits. In so doing, the Appellate Division reviewed the entire record of the hearing, including witness testimony and documentary evidence choosing to assign greater weight to the opinions rendered by the three physicians specializing in orthopedic care as opposed to the opinion provided by the Claimant's personal family care physician.
- ❖ Thereafter, the Claimant appealed to the superior court arguing that the Appellate division exceeded its authority, misapplied

the law, and that the evidence did not support its reversal.

- ❖ The superior court reinstated the ALJ's decision by finding that the Appellate Division had committed legal error by applying a de novo standard of review and that the preponderance of the evidence supported a finding that the Claimant's injury was catastrophic.
- ❖ Thus, the Employer/Insurer filed an application for a discretionary appeal with the Court of Appeals of Georgia arguing that the superior court misconstrued the law with regard to the Appellate Division's authority to review a decision rendered by an ALJ. Also, the Employer/Insurer argued that the superior court exceeded its authority in reversing the Appellate Division.

Decision and Rationale

- ❖ The Court of Appeals reversed the superior court thereby reinstating the Appellate Division's decision which denied the Claimant's request for catastrophic designation.
- ❖ The Appellate Division is not allowed to consider additional evidence but must rely on the evidence established at the hearing before the ALJ. Pursuant to O.C.G.A. § 34-9-103(a), when the Appellate Division reviews a decision of an ALJ, the findings of fact made by the ALJ "shall be accepted...where such findings are supported by a preponderance of the competent and credible evidence contained within the records."

- ❖ Nonetheless, “if after assessing the evidence of record, the Appellate Division concludes that the award does not meet the statutes’ evidentiary standards, the Appellate Division may substitute its own alternative findings for those of the ALJ, and enter an award accordingly.” Bankhead Enterprises v. Beavers, 267 Ga. 506, 480 S.E.2d 840 (1997).
- ❖ The Appellate Division is a trier of fact “authorized to assess witness credibility, weigh conflicting evidence, and draw factual conclusions different from those reached by the ALJ who initially heard the dispute.” Home Depot v. McCreary, 306 Ga.App. 805, 703 S.E.2d 392 (2010).
- ❖ Thus, the Appellate Division employed the appropriate standard of review and the superior court exceeded its authority because there was some evidence in the record to support the Appellate Division’s reversal of the ALJ.

Impact for Employers/Insurers

- ❖ While this is one of countless cases in which the Court of Appeals has reversed a superior court for violating the “any evidence” standard of review, it is an important illustration of just how valuable an IME or several IMEs as in this case can be.
- ❖ While the ALJ agreed with the Claimant’s personal physician, the opinions provided by the three orthopedic specialists as well as the timing of those opinions were more persuasive in the minds of the three judges of the Appellate Division.

- ❖ Moreover, the fact that the vocational specialist admitted that his opinion would change if the ALJ found Dr. Cassinelli’s opinion to be credible provided additional evidence that the ALJ’s decision was not supported by a preponderance of the competent and credible evidence in the record.
- ❖ This particular case is important because it illustrates how very important and valuable an IME or several IMEs can be and how they can be strategically used when cross-examining a vocational specialist. They were clearly worth the money spent on them in this case. In addition, not only can IMEs be useful at a hearing but IMEs can also be used to secure a more economical settlement of a claim.

ANY EVIDENCE RULE REVISITED:
Georgia Mountain Excavation, Inc. v. Dobbins

Buck Burriss

The Claimant in this matter¹ sought workers’ compensation benefits for an alleged work-related injury and same were awarded by the ALJ. This award was reversed by the Appellate Division of the State Board of Workers’ Compensation. Thereafter, the Claimant sought review and the superior court set aside the decision of the Appellate Division. Subsequently, the Employer and Insurer filed an application for discretionary review and same was granted by the Court of Appeals.

The issue addressed in this case was whether or not the superior court had authority to set aside

the decision of the Appellate Division, and the Court of Appeals ruled that it did not. As you may know, a party to a workers' compensation proceeding may seek review at the Appellate Division.ⁱⁱ The Appellate Division, if it finds that the factual findings of the ALJ are supported by "a preponderance of competent and credible evidence," must accept the findings of the ALJ.ⁱⁱⁱ However, if the factual findings are not supported by a preponderance of competent and credible evidence, the Appellate Division may substitute its own alternative findings.^{iv} This is precisely what occurred at the Appellate Division.

The decision of the Appellate Division is subject to judicial review in superior court, although the grounds where a decision may be overturned are narrow. In the present case, in order to overturn the ruling of the Appellate Division the superior court must find a lack of competent evidence in the record to support the decision.^v Additionally, in reviewing the a decisions of the Appellate Division the court must view the evidence in the light most favorable to that decision and if there is some evidence support it, the court has no authority to overturn it.^{vi}

In this matter, the Court of Appeals found that the superior court weighed the evidence on its own and disagreed with the factual findings of the Appellate Division. As the superior court did not have authority to weigh the evidence on its own, and was bound by procedures noted above, there was no authority for it to interfere with the Appellate Divisions ruling.

As it relates to Employers and Insurers, careful consideration of facts and evidence should be performed prior to appealing beyond the Appellate Division given the limited authority granted to the superior courts as it relates to overturning a decision.

LITIGATION SECTION

The following articles are focused on legal precedents and developments of particular interest to businesses, property owners, employers, and general liability insurers and adjusters:

GEORGIA GENERAL ASSEMBLY OVERWHELMINGLY APPROVES NEW EVIDENCE CODE

John David Blair

Last month, the Georgia House voted overwhelmingly (162-5) to pass House Bill 24. On the last day of the 2011 legislative session, the Georgia Senate followed suit, approving this bill **50-3**. Now the bill is en route to Governor Nathan Deal, who is expected to sign it without hesitation. What groundbreaking issue has garnered so much support from both liberal and conservative lawmakers, the legislature and the executive branches?

The bill will replace Georgia's existing evidence code (Title 24) with a new, modernized evidence code patterned after the Federal Rules of Evidence used in all federal courts and administrative agencies. If signed by the governor, HB 24 will bring Georgia into the modern age of evidentiary procedure, affecting all its trials, hearings, and administrative proceedings (such as workers' compensation cases).

To date, 43 other states have adopted evidence codes patterned after the Federal Rules of Evidence. If approved by Governor Deal, HB 24 will make the State of Georgia number 44.

What will Change?

The answer is a lot. When we first reported on

HB 24 in our last newsletter, we pointed out that Georgia is surrounded by other states in the southeast that use evidence codes modeled after the Federal Rules of Evidence. The first change is a largely positive one: insurers, employers, and businesses with interests in multiple states will be able to better predict what evidence is and is not admissible for what purposes in the State of Georgia based upon their experiences with litigation in other, neighboring states.

The second major change will be the way the code looks. Presently, Georgia's code does not track with the Federal Rules' numbering system. For instance, in Georgia, the definition of hearsay is found at O.C.G.A. § 24-3-1. In the Federal system, hearsay is defined in Federal Rule 801. As previously reported, in Georgia the concept of "admissions" is dealt with over the course of ten separate statutes (fourteen if "confessions" are included). In the Federal Rules, admissions are governed by Rule 801.

Under the *new* Georgia rules, both the definition of hearsay and the concept of admissions are dealt with in O.C.G.A. § 24-8-801. The last three numbers of this citation mirror the Federal Rule 801, and intentionally so. This is, for the most part, consistent throughout the new rules and will make it far easier for Georgia attorneys to try cases in both State and Federal courts.

The following is a list of other substantial changes that might not "jump off the page" when one is reading the full text of HB24:

- ❖ Though under the old rules there were a few areas where the jury decided questions of admissibility, under the new rules, like with the Federal Rules, all questions concerning the admissibility of evidence are for the trial judge alone to rule upon.
- ❖ Under the old Georgia rules, the admissibility of admissions by agents on behalf of a principal (e.g., a manager on behalf of an employer) was governed by two

overlapping but entirely inconsistent statutes – now all that is required for such statements to be admissible is that they must be made during the existence of the agency relationship and that such statements be about some subject matter within the scope of the agent's duties for the principal.

- ❖ Now, under the new rules business records may be "authenticated" by affidavit where an affidavit is produced timely in advance of trial and the opposing party makes no objection; whereas, under the old rules, a witness was required to appear in court as "records custodians" in order to "lay a foundation" for the records by testimony concerning the document in question in order to overcome hearsay objections – this change in the evidence rules all but eliminates the need for such witnesses unless they have other testimony to offer.
- ❖ Additionally, the new rules will allow "business records" to express opinions (e.g., a mechanic's estimate as to repair cost) where such opinions had been prohibited under the old rules – this will ease the need for having witnesses appear to give testimony on such matters; however, expert opinions must still meet the requirements for expert testimony to be admissible.
- ❖ On the subject of expert testimony, under the new rules both civil and criminal cases will be governed by the Federal procedure for such testimony, which is currently used in only civil cases.
- ❖ The exception permitting jurors to impeach a verdict in criminal cases when exposed to external information or influence now also applies in civil cases under the new rules.
- ❖ The new §803(8) will permit any matters observed and reported pursuant to duty and factual findings resulting from duly authorized investigations to be admitted as

“public records,” though the old rules recognized only certain types of “public records” and required any other records to be admitted as “business records” – this exception to the hearsay rule will not, however, be available to prosecutors in criminal cases.

- ❖ “Res Gestate” was a (perhaps confusing) doctrine used in Georgia to deal with problems arising from the exclusion of hearsay statements – under the new rules both this term and the doctrine it refers to are eliminated.
- ❖ Also, regarding hearsay, Georgia’s rule prohibiting any verdict resting on hearsay testimony to be overturned is now changed – if no objection is made at trial to hearsay, then a verdict based upon that hearsay to which no objection was taken is valid.
- ❖ Also, a party’s own, self-serving statements may now, under the new rules, be used where they have a relevant, non-hearsay use or come within a hearsay exception – under the old rules such statements were simply prohibited from consideration as evidence.
- ❖ Statements of conspirators must now, under the new rules, have been made in furtherance of the conspiracy in order to be admissible against another conspirator – under the old rule, Georgia was the only state that allowed these statements without this requirement.
- ❖ “Statements against penal interest” were previously inadmissible as evidence; however, such statements will now be admissible under the new rules where the person making the statements is unavailable and there are circumstanced corroborating the statement, indicating that it is reliable.
- ❖ A foundation no longer need be laid to impeach a witness through “prior

inconsistent statements” – they may simply be raised as an issue on cross-examination, and the statement is admissible provided that the witness is given the opportunity to explain or deny the prior statement.

- ❖ The rule barring use of subsequent remedial measures to prove negligence applies to products liability cases under the new rules.
- ❖ Plea bargains will not be admissible under the new rules, resolving confusion under present law concerning their admissibility.
- ❖ The Georgia and Federal rules regarding the admissibility of “offers to compromise” or “settlement negotiations” have always been quite similar, though the new rules will simplify the rule and clear up confusion resulting from certain cases – under the new rules, where liability or damages is in dispute, then any statements made directly or even tangentially in the course of settlement negotiations or mediation will be inadmissible as evidence.
- ❖ Under the new rules, opinions are now permissible as “character evidence” in proving general moral character.
- ❖ Evidence of “habit or routine practice” will now be allowed, under the new rules, regardless of whether it is offered by a third party or a direct party.
- ❖ All rules for authenticating and identifying evidence will be located in §§901-903 – previously there were multiple rules and the process could be confusing at times, particularly for different types of documents.
- ❖ The “best evidence rule” now applies, under the new rules, not just to documents, but also to photos, videos, and all other forms of media/recording – the new rule also shifts the burden to the opposing party to show why the original must be produced rather

than a copy, in which case the party offering the evidence must either produce the original or explain why the original is unavailable (under the old rules the offering party *always* had the burden to do this).

- ❖ The judge's authority to exclude evidence that is more prejudicial than probative has been recognized in Georgia, though with much confusion as to how far that authority extends – under the new rules, the trial court judge has the authority to exclude any evidence, even if relevant, where its probative value is substantially outweighed by the danger of confusion, unfair prejudice, or undue delay.

What will Stay the Same?

Georgia's preference for "statutes" versus "rules" is not likely to change anytime soon. As with Georgia's Civil Practice Act, which largely mirrors in substance the Federal Rules of Civil Procedure, Georgia's new evidence code will be just that: a code, meaning the rules are codified into statutory format. The most obvious similarity between the old rules and the new rules is that they are both codified in Title 24 of the Georgia Code. The numbering will change a bit to make the last three digits, as referenced above, mirror the Federal Rule numbers. However, every rule will be cited, as before, by the conventional Georgia numbering system for statutes: Title-Chapter-Section, with article numbers present but omitted from the citation.

Other similarities are less obvious. HB 24 retains Georgia's "sifting," or "wide-open" cross-examination of witnesses, for instance. This means that, when an attorney is cross-examining a witness, he or she will be entitled to question that witness on ALL matters regardless of whether the opposing attorney raised the corresponding issue on direct examination subject, of course, to the other rules of evidence prohibiting questions designed to elicit

testimony that is irrelevant, redundant, overly prejudicial, etc. Under the Federal Rules, an attorney may cross-examine a witness only within the scope of the witness' testimony on direct examination. This difference will continue to exist under the new rules^{vii}.

As Professor Paul S. Milich noted in an article on this subject published through the State Bar's website:

"The proposed new Georgia rules are based predominantly, *but not slavishly*, on the Federal Rules. Some older Georgia statutes have been retained to fill gaps in the Federal Rules and to reflect specific Georgia policies. A few changes have been made to the language of the Federal Rules to customize the rules for Georgia and to clarify some issues that have arisen under the Federal Rules."^{viii}

The above quotation from Professor Milich is apt: Georgia is enacting the Federal Rules to streamline litigation, organize evidentiary procedure, and to simplify the rules governing admissibility for everyone. However, the change does not do away with Georgia-specific doctrines that were working better than the Federal Rules; neither will the new rules do away with Georgia-specific doctrines that address matters that the Federal Rules completely fail to address.

What about the Long-term Effects?

Obviously, there is no way to predict for certain the long-term effects these changes will have on Georgia litigation and legal disputes if this bill is signed by Governor Deal. However, the Federal Rules upon which the new Georgia rules are mirrored have been consistently applied for years now with a net positive effect. Federal trial courts are making more uniform decisions, and the evidence rules are more accessible to

both attorneys and unrepresented parties.

Only time will tell, of course, whether these rules have the same effect in Georgia, but 43 other states have all adopted the Federal Rules with success. That works out to a 100% success rate for 86% of this entire country, and those are pretty good odds.

EMPLOYMENT LAW SECTION

The following articles are focused on legal precedents and developments of particular interest to employers and human resource professionals:

BIG CHANGES IN IMMIGRATION LAW: The Effect of House Bill 87

Casey Bowen

Recently passed in the Georgia House and Senate, House Bill 87 is expected to soon be signed by Governor Nathan Deal. Once enacted, Georgia will become one of the toughest in the nation in dealing with illegal immigrants.

What does this mean for Georgia employers?

All Georgia businesses with more than 10 employees will be required to use the federal E-Verify program. Illegal Immigration Reform and Enforcement Act of 2011, H.B. 87, 2011 Gen. Assem., Reg. Sess. (Ga. 2011). This internet-based, free program compares the employee's I-9 information with records from the U.S. government in order to determine if the employee is eligible for employment.

Opponents believe this requirement may harm the state's agricultural, landscaping, and restaurant industries, which depend upon migrant workers; however, proponents argue illegal immigrants burden the state's public schools, jails, and health care. Buddy Carter, *Pro & Con: Should Gov. Deal sign into law Georgia's immigration bill?*, Atlanta Journal Constitution, May 4, 2011. In response, the legislature added a provision that gives businesses 30 days to correct any "good faith" violations before they face penalties for non-compliance. Under HB 87, employees also face punishment of up to 15 years imprisonment or \$250,000.00 in fines if they use fake identification to secure employment in Georgia.

Other Areas of Impact

Georgia's HB 87 would also:

- ❖ Empower local and state police to arrest illegal immigrants and transport them to state and federal jails in certain situations.
- ❖ Penalize individuals who knowingly transport or harbor illegal immigrants or encourage them to come to Georgia, while committing another crime.
- ❖ Establish a seven-member Immigration Enforcement Review Board to investigate complaints about local and state government officials not enforcing state immigration-related laws.
- ❖ Directs the state Agriculture Department to study the possibility of creating Georgia's own guest worker program.

Uncertain Future

However, HB 87 will face many problems once enacted. Georgia's version is largely modeled after Arizona's law, which saw many of the

more controversial provisions placed on hold by a federal judge after President Obama's administration asserted they were preempted by federal law. Moreover, the constitutionality of Arizona's provision that specifically requires many businesses to use the federal E-Verify program is currently pending before the U.S. Supreme Court. For more information regarding

E-Verify and other compliance procedures see <http://www.uscis.gov>.

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† **DISCLAIMER:** The information provided in this update is for informational purposes only and does not constitute legal advice. For advice and recommendations specific to your case, please consult a licensed, qualified attorney.

ⁱ Georgia Mountain Excavation, Inc. v. Dobbins, 2011 WL 1287902 (Ga. Ct. Appeals 2011).

ⁱⁱ O.C.G.A. § 34-9-103(a).

ⁱⁱⁱ *Id.*

^{iv} Syntec Indus. v. Godfrey, 269 Ga. 170, 496 S.E.2d 905 (1998).

^v OCGA § 34-9-105(c)(4).

^{vi} Home Depot v. McCreary, 306 Ga. App. 805, 703 S.E.2d 392 (2010).

^{vii} This difference is, perhaps, less significant than it initially seems: attorneys and unrepresented parties in the federal system, with proper planning, can typically call opposing parties and witnesses to the stand during a trial as "hostile" witnesses for purposes of asking leading questions outside the scope of the opposition's direct-examination.

^{viii} http://www.gabar.org/public/pdf/news/proposed_new_evidence_rules_milich.pdf.